No. 21-2286

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

G.T., by his parents MICHELLE and JAMIE T., on behalf of himself and all similarly situated individuals; K.M., by his parents DANIELLE and STEVEN M., on behalf of themselves and all similarly situated individuals; THE ARC OF WEST VIRGINIA,

Plaintiffs-Appellees,

v.

BOARD OF EDUCATION OF THE COUNTY OF KANAWHA,

Defendant-Appellant,

and

KANAWHA COUNTY SCHOOLS; RON DUERRING, Superintendent, Kanawha County Schools, in his official capacity,

Defendants.

On Appeal from the United States District Court
for the Southern District of West Virginia
No. 2:20-cv-00057

BRIEF FOR APPELLEES

Lydia C. Milnes
Blaire L. Malkin
Mountain State Justice, Inc.
1217 Quarrier Street
Charleston, West Virginia 25301
(304) 344-3144

Samir Deger-Sen
Peter Trombly
LATHAM & WATKINS LLP
1271 Avenue of the Americas
New York, NY 10020
(212) 906-1200

February 28, 2022

Counsel for Appellees

(*additional counsel listed on inside cover*)

Lori Waller
Disability Rights West Virginia
1207 Quarrier Street, Suite 400
Charleston, West Virginia 25301

Shira Wakschlag
The Arc of the United States
1825 K Street NW, Suite 1200
Washington, D.C. 20006

Ira A. Burnim
Lewis Bossing
Judge David L. Bazelon Center for
Mental Health Law
1090 Vermont Avenue NW, Suite 220
Washington, D.C. 20005

Robin Hulshizer
Kirstin Scheffler Do
Karen Klass
Jaime Zucker
Renatta Gorski
LATHAM & WATKINS LLP
330 North Wabash Avenue, Suite 2800
Chicago, Illinois 60611
(312) 876-7700

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 21-2286 Caption: G.T. et al. v. The Board of Education of the County of Kanawha

Pursuant to FRAP 26.1 and Local Rule 26.1,

G.T. by his parents, Michelle T. and Jamie T.
(name of party/amicus)

who is Plaintiff-Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity?
__ YES X NO

2. Does party/amicus have any parent corporations? __ YES X NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? __ YES X NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ___ YES _X_ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question)
___ YES _X_ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ___ YES _X_ NO
If yes, identify any trustee and the members of any creditors' committee:

7. Is this a criminal case in which there was an organizational victim?
___ YES _X_ NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: *s/ Samir Deger-Sen* Date: February 28, 2022
Counsel for: G.T. by his parents, Michelle T. and Jamie T.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 21-2286 Caption: G.T. et al. v. The Board of Education of the County of Kanawha

Pursuant to FRAP 26.1 and Local Rule 26.1,

K.M., by his parents Danielle and Steven M.
(name of party/amicus)

who is Plaintiff-Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity?
__ YES X NO

2. Does party/amicus have any parent corporations? __ YES X NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? __ YES X NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ___ YES _X_ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question)
___ YES _X_ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ___ YES _X_ NO
If yes, identify any trustee and the members of any creditors' committee:

7. Is this a criminal case in which there was an organizational victim?
___ YES _X_ NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: *s/ Samir Deger-Sen* Date: February 28, 2022
Counsel for: K.M., by his parents Danielle and Steven M.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 21-2286 Caption: G.T. et al. v. The Board of Education of the County of Kanawha

Pursuant to FRAP 26.1 and Local Rule 26.1,

The Arc of West Virginia
(name of party/amicus)

who is Plaintiff-Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity?
__ YES X NO

2. Does party/amicus have any parent corporations? __ YES X NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? __ YES X NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ___ YES _X_ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question)
___ YES _X_ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ___ YES _X_ NO
If yes, identify any trustee and the members of any creditors' committee:

7. Is this a criminal case in which there was an organizational victim?
___ YES _X_ NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: *s/ Samir Deger-Sen* Date: February 28, 2022
Counsel for: The Arc of West Virginia

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

Page(s)

Page(s)

Page(s)

Page(s)

STATUTES AND REGULATIONS

Page(s)

Page(s)

OTHER AUTHORITIES

INTRODUCTION

This class action seeks systemic relief for children with disabilities who have been harmed by the unlawful policies and practices of Defendant, the Board of Education of the County of Kanawha (the "Board"). Federal law imposes affirmative legal requirements upon the Board to adopt "policies, procedures, and programs" for the provision of special education, including necessary behavioral supports, to children with disabilities. 20 U.S.C. §§ 1413(a)(1), 1414(d)(3)(B)(i). In the District Court, Plaintiffs identified multiple areas where the Board's policies—or the total absence of policies required by law—violated the Individuals with Disabilities Education Act (IDEA), as well as the Americans with Disabilities Act (ADA), and the Rehabilitation Act. Proof of the illegality of each policy is a separate "common contention" that advances the claims of every class member. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Accordingly, the District Court correctly certified the class.

On appeal, the Board tries to avoid this straightforward conclusion by recasting this case as an effort to alter Individualized Education Programs ("IEPs") for individual students, or provide relief for disparate, individualized violations. That is simply wrong. This suit is necessary because the Board's inadequate policies *at the systems level* have harmful and adverse effects on students with disabilities throughout the district, regardless of individual circumstances. Congress recognized

the critical importance of systems-level policies and practices by imposing specific, affirmative requirements on entities like the Board to create appropriate structures in school districts, rather than simply leaving those decisions to the discretion of school-level officials.

The Board's contrary position ultimately amounts to the extraordinary claim that its system-wide deficiencies are beyond legal challenge. The Board contends that no class-wide challenge to the Board's failure to adhere to its statutory obligations is available unless the Board adopts (1) an affirmative, illegal policy that (2) results in an "across-the-board" denial of a free appropriate public education ("FAPE") to all class members. Those extra-textual requirements stretch the commonality standard beyond all recognition. There is no sensible distinction between a policy that affirmatively violates the law and an absence of policy in an area where the law *requires* one. A school board's abdication of its statutorily imposed duties cannot be immune from challenge just because it did not undertake to create and implement any policy at all. And, likewise, there is no requirement at the class-certification stage to show an "across-the-board" injury. That argument engrafts onto the commonality requirement an additional requirement that a class cannot be certified if it contains any uninjured class members. But no court has imposed such a requirement under Federal Rule of Civil Procedure 23(a)(2), and to do so would make class treatment impossible in all but a vanishingly small number

of cases. The District Court did not abuse its discretion in rejecting the Board's novel and atextual theories.

The District Court also correctly found that the named Plaintiffs are typical of the class, that the class is ascertainable, and that injunctive relief is appropriate as to the class. Those findings, based on nine months of discovery and a voluminous record, do not reflect any abuse of discretion. The Board's arguments to the contrary are again just spins on the same theme. In each instance, the Board asserts that certification here was improper because class members are "unique individuals with unique needs." Appellant's Opening Brief ("AOB") 47. But this case is about the unlawful *policies* to which *all* class members are subject. The District Court understood that critical distinction, and its sound decision certifying the class should be affirmed.

STATEMENT OF THE CASE

A. Legal Background

Congress enacted the IDEA, 20 U.S.C. § 1400 *et seq.*, to address "the educational needs of millions of children with disabilities." *Id.* § 1400(c)(2).[1] Congress found that "a majority of handicapped children in the United States 'were either totally excluded from schools or [were] sitting idly in regular classrooms

[1] The statute was formerly known as the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975).

awaiting the time when they were old enough to "drop out."'" *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 179 (1982) (alteration in original); 20 U.S.C. § 1400(c)(2)(A)-(B). The IDEA's express purpose was to reverse this "pervasive and tragic academic stagnation," *Endrew F. v. Douglas Cnty Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017), by ensuring "that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs," 20 U.S.C. § 1400(d)(1)(A).

In exchange for federal funds, States and Local Educational Agencies ("LEAs") take on affirmative obligations to establish "policies, procedures, and programs" for providing "free appropriate public education" ("FAPE") to students with disabilities. *Id.* §§ 1412(a)(1)(A), 1413(a)(1). Under the IDEA, the Board is an LEA responsible for educating all students with disabilities in the school district. *Id.* §§ 1401(19)(A), 1413(a)(1); JA949, 1061.

LEAs must establish policies to ensure that every student with a disability receives an Individualized Education Program ("IEP") that is "reasonably calculated to enable [the] child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. at 1001; 20 U.S.C. § 1412(a) (a state must put in place "policies and procedures" to ensure FAPE); *id.* § 1413(a)(1) ("The [LEA], in providing for the education of children with disabilities within its

jurisdiction, [must have in] effect policies, procedures, and programs that are consistent with the State policies and procedures . . . .").

The standard for providing FAPE is a "demanding" one: students with disabilities must receive an "appropriately ambitious" educational program that gives them "the chance to meet challenging objectives." *Endrew F.*, 137 S. Ct. at 1000. To effectuate this goal, the IDEA imposes a number of procedural and substantive requirements on LEAs.

First, LEAs must establish policies for identifying students with disabilities who need "behavior supports" to receive FAPE. LEAs first need to establish policies for the identification of all students with disabilities in a district who are eligible for special education. 20 U.S.C. § 1414(a)(1)(A), (b)(4). LEAs then have a further obligation to ensure that those students eligible for special education receive the behavior supports they need to receive FAPE. *See id.* §§ 1414(d)(3)(B)(i), 1412(a), 1413(a)(1); 34 C.F.R. §§ 300.320(a)(4), 300.324(a)(2)(i). Behavior supports are "school-based interventions and supports that are provided as part of a child's educational program as necessary to enable the child to advance appropriately toward attaining the annual goals specified in the IEP, to be involved in and make progress in the general education curriculum, and to participate in extracurricular and other nonacademic activities." JA193 n.3.

In order to ensure that students receive the supports they need, the IDEA requires an LEA to establish a policy to ensure that IEPs are developed by an "IEP Team" including an LEA representative, a special education teacher, a regular education teacher, and the student's parents. 20 U.S.C. § 1414(d)(1)(B). And the statute then specifically requires that this team "consider the use of positive behavioral interventions and supports, and other strategies" when a child with disabilities engages in "behavior [that] impedes the child's learning or that of others." *Id.* § 1414(d)(3)(B)(i).

There are a variety of commonly used tools that LEAs employ to comply with this obligation. For some students with significant needs, LEAs use Functional Behavioral Assessments ("FBAs") to evaluate why a student with disabilities engages in a particular challenging behavior. An effective FBA follows a standard procedure: documenting the events that occur prior to a child's behavior of concern (the antecedents) and the events that follow (the consequences). JA283. With this information, school staff can identify the "function" of the unwanted behavior—what the child is trying to achieve with the behavior—and create strategies for preventing the behavior. *Id.* FBAs also can identify replacement behaviors that will allow a student with disabilities to achieve the same desired outcome without the unwanted behavior. *Id.* An FBA that examines the underlying cause of a challenging behavior facilitates the development of interventions addressing that

behavior, JA214, such as behavior supports that LEAs must provide for all students with disabilities who need them to receive FAPE, 20 U.S.C. § 1414(d)(3)(B)(i).

Educators also typically document necessary behavior supports in "Behavior Intervention Plans" or "BIPs." JA193 n.3, 222, 283-84. An effective BIP clearly articulates the inappropriate behavior in which a student engages, the alternative positive behavior the student should learn or exhibit, the means by which school personnel plan to implement the behavior support, and criteria for monitoring its effectiveness. JA222-23.

Second, LEAs must establish policies to ensure that behavior supports are provided to students with disabilities who need them to receive FAPE. 20 U.S.C. §§ 1412(a)(4), 1413(a)(1). When behavior supports are necessary, they must be incorporated into the student's IEP. *Id.* § 1414(d)(1)(A)(i)(IV); JA1013 (explaining that if positive behavioral interventions and supports "are needed, they must be included in the IEP and be implemented"); *see also* JA565; 34 C.F.R. § 300.324(a)(2)(i), (b)(2); *id.* § 300.320(a)(4). A failure to provide necessary behavior supports constitutes a denial of FAPE, and a violation of the IDEA. *Sumter Cnty. Sch. Dist. 17 v. Heffernan*, 642 F.3d 478, 484-86 (4th Cir. 2011) ("[T]he failure to implement a material or significant portion of the IEP can amount to a denial of FAPE.").

Third, LEAs must establish policies for monitoring the progress of students with disabilities, including those who need behavior supports, toward the goals set in their IEPs. "The [LEA] shall ensure that" the IEP Team reviews each IEP at least once a year "to determine whether the annual goals for the [student with disabilities] are being achieved." 20 U.S.C. § 1414(d)(4)(A)(i). The LEA also "shall ensure" that the IEP Team "revises the IEP as appropriate to address . . . any lack of expected progress." *Id.* § 1414(d)(4)(A)(ii). The IDEA thus expects LEAs to ensure that IEPs—and behavior supports they incorporate—are effective.

The obligation to monitor progress requires LEAs to monitor discipline, too. *See* 34 C.F.R. § 300.530(b), (d), (e) (requiring certain services and evaluative measures for students with disabilities who are removed from classrooms for more than 10 days in the same school year). LEAs must collect suspension data and ensure its accuracy to allow for review of whether "significant discrepancies are occurring between the long-term suspension and expulsion rates for students with and without disabilities." JA1032; *see also* 20 U.S.C. § 1412(a)(22)(A). When significant discrepancies exist, LEAs must "review and revise policies, procedures, and practices" related to the "development and implementation of IEPs" and the "use of positive behavioral interventions and supports" as necessary to comply with the IDEA. JA1032; 20 U.S.C. § 1412(a)(22)(B).

Fourth, an LEA has an obligation to "ensure that personnel necessary to carry out [the IDEA] are appropriately and adequately prepared and trained, including that those personnel have the content knowledge and skills to serve children with disabilities." 20 U.S.C. § 1412(a)(14)(A); *see also id.* §§ 1412(a)(14)(D), 1413(a)(3); JA1006. Thus, an LEA's personnel must be adequately trained to recognize, address, and monitor the behavior support needs of students with disabilities.

The IDEA also regulates the settings in which LEAs must provide FAPE. LEAs must establish policies to ensure that "children with disabilities" receive FAPE in the "[l]east [r]estrictive [e]nvironment" ("LRE"). 20 U.S.C. § 1412(a)(5)(A). Students with disabilities must be taught in the same classes as "children who are not disabled," "[t]o the maximum extent appropriate." *Id.*; *see also* 34 C.F.R. § 300.114(a)(2)(ii). An LEA is therefore prohibited from maintaining any policy under which "special classes, separate schooling, or other removal of children with disabilities from the regular educational environment" is the norm. 20 U.S.C. § 1412(a)(5)(A).

Separate from the IDEA's requirements, LEAs are public entities that must comply with the ADA. 42 U.S.C. § 12132; 28 C.F.R. § 35.130. Congress determined "that there was a 'compelling need' for a 'clear and comprehensive national mandate' to both eliminate discrimination *and* to integrate disabled

individuals into the social mainstream of American life." *Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 505-06 (4th Cir. 2016). To comply with the ADA's integration mandate, a public entity such as the Board is forbidden from engaging in "unjustified 'segregation' of persons with disabilities." *Olmstead v. L.C.*, 527 U.S. 581, 600 (1999) (quoting 42 U.S.C. § 12101(a)(5)). LEAs must therefore provide educational services in integrated settings when such placements are appropriate, the affected persons with disabilities do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the LEA's resources and the needs of other students with disabilities. *See id.* at 607 (plurality opinion). Policies that unnecessarily remove, or seriously risk removing, students with disabilities from general education classrooms constitute systemic discriminatory segregation in violation of the ADA. *See J.S., III v. Houston Cnty. Bd. of Educ.*, 877 F.3d 979, 986-87 (11th Cir. 2017) (per curiam) (applying *Olmstead*'s framework to removal from school classrooms); *Brown v. District of Columbia*, 928 F.3d 1070, 1079-83 (D.C. Cir. 2019) (holding that *Olmstead* claims could properly proceed as a class action).

Finally, LEAs must also comply with Section 504 of the Rehabilitation Act. 29 U.S.C. § 794(b)(2)(B). Section 504 "requires that public schools provide reasonable accommodations to students with disabilities," and it employs a definition of "disability" that is "broader than that used in the IDEA. *Johnson v.*

Charlotte-Mecklenburg Schs. Bd. of Educ., 20 F.4th 835, 841 n.6 (4th Cir. 2021) (citing 29 U.S.C. § 705(9)). Section 504 guarantees that students with disabilities are provided with "regular or special education and related aids and services that . . . are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met." 34 C.F.R. § 104.33(b)(1). To satisfy this requirement, students with disabilities may receive a "504 Plan" or, alternatively, an IEP that complies with the IDEA. *Id.* § 104.33(b)(1)-(2). Section 504's integration requirements mirror the ADA's, *Pashby v. Delia*, 709 F.3d 307, 321 (4th Cir. 2013), and require that services are provided in the most integrated setting appropriate, 34 C.F.R. § 104.4(b)(2).

Taken together, these statutes impose upon LEAs a series of affirmative legal requirements to create policies ensuring the adequate provision of education to students with disabilities. It is well-settled that failures to create and implement such policies constitute statutory violations for which an LEA can be held liable. *See, e.g.*, *DL v. District of Columbia* ("*DL II*"), 860 F.3d 713, 719-20 (D.C. Cir. 2017) (finding LEA liable for failing to meet its affirmative obligations under the IDEA by, among other things, "failing to identify children with disabilities").

B. The Board's Policies

Kanawha County Schools ("KCS") is West Virginia's largest school system. During the 2019-2020 school year, approximately one in five students enrolled in

KCS had disabilities and received special education services pursuant to an IEP or Section 504 plan. JA409; JA1598-617. But, for years, KCS has removed students with disabilities from classrooms at disproportionate rates. During the 2017-2018 school year, for example, students with disabilities made up 22.5% of the student population, JA415, yet received 38.4% of out-of-school suspensions, JA421. A similar trend emerges from the data for the two school years that followed. *See* JA196 (noting that KCS's suspension rate for students with disabilities was 66% higher than the suspension rate for general education students); JA409, 1618-987, 1598-617 (students with disabilities under IDEA or Section 504 constituted 21% of population, but received 36.9% of suspensions). Students with disabilities who received behavior supports likewise experienced disproportionate rates of removal, with those students constituting 3.5% of KCS's 2019-2020 student population, but receiving 20.4% of suspensions. JA413, 1598-617, 1618-987. And this suspension data does not include instances when KCS sent students home informally and did not record a suspension. JA733-36.

KCS's students with disabilities experience a more disproportionate rate of disciplinary removal than do their peers in school districts across the country. One recent study indicates that in the 2017-2018 school year, KCS secondary students with disabilities lost 212.42 days of instruction per 100 secondary students, whereas KCS students without disabilities lost 96.5 days of instruction per 100 secondary

students. JA451. Among school districts with over 10,000 secondary students, that disparity was the highest in West Virginia and 15th highest in the nation. JA450-51.

Extensive discovery in the District Court has revealed that these disproportionate removals are the result of the Board's shocking lack of adequate policies and procedures for the provision of necessary behavior supports to students with disabilities. Indeed, at every step of the process, the Board's conduct reflects an almost complete abdication of the affirmative requirements placed on an LEA by the IDEA, ADA, and Section 504.[2]

1. Identifying Which Students With Disabilities Need Behavior Supports

- The Board does not provide schools with *any* guidance on how to identify students with disabilities who need behavior supports. 20 U.S.C. §§ 1414(d)(3)(B)(i), 1412(a), 1413(a)(1). The Board instead leaves it entirely to school principals—who may or may not have formal training in special education—to advise whether a student with disabilities needs a behavior plan. *See* JA677-78 (Porter Dep. 81:19-82:9).

- Lacking guidance from the Board and proper training, school staff preparing FBAs consistently fail to identify the reasons why students with disabilities engage in challenging behaviors. JA215. And,

[2] These findings—which the Board does not seriously dispute on appeal—are based on documents produced by the Board in discovery, testimony from the Board's former Assistant Superintendent and director of Special Education, Dr. Katherine Porter, JA1572-73, and a "detailed, credible, and well-grounded" report by Plaintiffs' expert based on "quantitative data analysis and qualitative review of individual records" for hundreds of KCS students with disabilities who have experienced disciplinary removals, JA1565; *see also* JA183-267.

historically, school staff frequently used truncated "Expedited FBA" forms that did not prompt staff to conduct needed observations or document important information for assessing behavior support needs. JA215-16.

2. Implementing Behavior Supports For Students With Disabilities

- The Board has *no* district-wide standards or expectations that staff members drafting BIPs must follow. JA675-76 (Porter Dep. 70:25-71:10). The Board thus has no policy in place to govern the implementation of a necessary component of FAPE for students with disabilities whose behavior impedes their learning or that of others. 20 U.S.C. § 1414(d)(1)(A)(i)(IV).

- Operating under this hands-off policy, school staff prepared BIPs and Section 504 Plans that presumed that students with behavior problems had the skills necessary to behave in an appropriate manner, but *chose* not to do so. JA220-21. Thus, the Board sets students with disabilities up for failure by not providing specialized skill development, and instead treating those students as if they already possess those needed skills.

3. Monitoring Outcomes For Students With Disabilities Who Need Behavior Supports

- The Board has *no* system in place to monitor whether students with disabilities who do receive behavior supports are achieving their goals or progressing academically. JA 679 (Porter Dep. 102:4-13); JA708 (Porter Dep. 217:15-20); JA232-34. The Board therefore has no mechanism for tracking whether students with disabilities are making appropriate, meaningful progress toward FAPE—despite the unequivocal requirement of the IDEA that an LEA implement such monitoring. 20 U.S.C. § 1414(d)(4)(A).

- As a result, school staff do not monitor the progress of students with disabilities. The BIPs that Dr. Judy Elliott, Plaintiffs' expert, reviewed lacked information about who would implement behavior supports, when supports would be provided, where supports would be provided, or when BIPs would be reviewed to determine whether the supports were working—all of which is data essential to determining the efficacy of a behavior support. JA223-25.

- The Board likewise does not aggregate or monitor data regarding discipline for students with disabilities, including those receiving behavior supports. JA696-698 (Porter Dep. 128:8-130:24); JA684 (Porter Dep. 116:7-11); JA 234-37. The Board thus leaves it to school staff to raise suspension concerns, despite the Board's obligation to ensure that when students with disabilities are suspended for more than 10 days for similar conduct in a given school year, a manifestation determination review is convened to determine whether the conduct is related to the student's disability or the "direct result of the LEA's failure to implement the IEP." 34 C.F.R. § 300.530(e).

4. Training Staff Responsible For Providing Special Education And Implementing Behavior Supports

- The Board provides little to no training to school staff on how to perform FBAs, to write IEPs and BIPs, or to implement and monitor the effectiveness of behavior supports, JA225, 227, 238-39; JA680-83 (Porter Dep. 103:14-104:5;105:6-106:11), despite the IDEA's affirmative obligation that LEAs ensure staff "are appropriately and adequately prepared and trained . . . to serve children with disabilities." 20 U.S.C. § 1412(a)(14)(A); *see also id.* § 1413(a)(3).

5. Integration Of Students With Disabilities Who Need Behavior Supports

- Due to the Board's failures to maintain adequate policies in the foregoing areas, KCS personnel use discipline when behavior supports would be appropriate to help students with disabilities remain in the classroom and participate in instruction. JA323. That system-wide practice results in the disproportionate removal of students with disabilities from the classroom, which constitutes unjustified segregation of students with disabilities from their peers without disabilities in violation of the ADA and Section 504.

In short, for years, the Board has maintained inadequate policies and procedures for developing, implementing, and monitoring behavior supports for KCS students with disabilities, and it does not provide the adequate training and preparation necessary to provide statutorily mandated supports to students. And year

after year, regardless of the individual makeup of the student body, students with disabilities, including those who need behavior supports, have been excluded from the classroom and from settings with their peers without disabilities at disproportionate rates relative to their presence in KCS's student population. These disciplinary removals threaten to leave students with disabilities who need behavior supports "totally excluded from schools," denying those students FAPE in the LRE and the discrimination-free public education to which they are entitled under federal and state law. *Endrew F.*, 137 S. Ct. at 999.

C. Procedural History

1. Plaintiffs

Named Plaintiffs are two of the many KCS students subjected to the Board's deficient policies and procedures. Plaintiff G.T. is a "pleasant" and "curious" eleven-year-old child, JA285, who enjoys talking about "history, World War I, and World War II," JA296. G.T. has been diagnosed with Autism and Attention Deficit Hyperactivity Disorder. JA26 (¶ 2); JA285. G.T. struggles with changes to his routine and "becomes anxious when he is overwhelmed or when placed in unfamiliar situations." JA285. G.T.'s FBA contains virtually no information that could be used to determine the reasons why G.T. engages in disruptive behavior, and G.T.'s BIP in turn fails to identify behaviors of concern or corresponding supports tailored to addressing G.T.'s inappropriate behavior. JA292. Instead, G.T. has been suspended

frequently, missing more than 13 days of school due to suspension in less than three months, from October 1, 2018, to December 11, 2018. JA291-92; JA590.

Plaintiff K.M. is a "creative and motivated" twelve-year-old child, and he enjoys activities such as playing the drums. JA302. K.M. has been diagnosed with Down syndrome and Attention Deficit Hyperactivity Disorder. JA27 (¶ 3); JA302. K.M. "has difficulty focusing on tasks" when "he does not have some intrinsic interest in the activity" and "has some challenges with verbal expressive language." JA302. K.M. has received an FBA and a BIP, but those documents rely on limited observations of K.M. and provide "no examination of why" K.M. displays more difficult behaviors on some days rather than others. JA312-14. And, although K.M.'s BIP contains some behavioral goals, such as following a staff directive with 75% accuracy, it gives no guidance on the types of instructions that K.M. is expected to follow successfully. JA314-15. In the absence of an effective assessment of K.M.'s needs and the development of realistic, measurable goals, K.M. has routinely been suspended—missing at least 19 days of school due to suspension between January 2018 and April 2019. JA309-311. That number of days lost to suspensions does not include numerous occasions when school staff called K.M.'s family to have him picked up from school early due to his behavior. JA612.

On April 10, 2020, Plaintiffs filed their First Amended Complaint seeking declaratory and injunctive relief on behalf of G.T., K.M., The Arc of West Virginia,

and a proposed class of all KCS students with disabilities who need behavior supports and have experienced disciplinary removals from the classroom.[3] JA67. The Complaint alleges that the Board's policies, procedures, and practices violate the IDEA, and that they segregate students with disabilities in violation of Section 504, the ADA, and West Virginia law. JA62-67.

Following nine months of discovery, Plaintiffs moved for class certification. Plaintiffs challenged the adequacy of, or the Board's failure to adopt, district-level policies for identifying students with disabilities needing behavior supports, developing behavior supports, implementing behavior supports, monitoring the effectiveness of behavior supports, and training staff to carry out these policies.

2. The Decision Below

The District Court granted Plaintiffs' motion, certifying a class of "[a]ll [KCS] students with disabilities who need behavior supports and have experienced disciplinary removals from any classroom." JA1595. As relevant here, the District Court held that Plaintiffs satisfied the requirements of commonality and typicality,

[3] Both Named Plaintiffs presented class claims during the administrative process. JA33-44 (¶¶ 24-25, 31-32). Both Hearing Officers held that they lacked jurisdiction over Named Plaintiffs' class claims. JA33-34 (¶¶ 27, 34). The Board has expressly abandoned any argument that failure to exhaust administrative remedies provides a basis for reversing the class-certification order. AOB1 n.1; *see Edwards v. City of Goldsboro*, 178 F.3d 231, 241 n.6 (4th Cir. 1999).

that the class was ascertainable, and that Plaintiffs sought injunctive and declaratory relief properly available under Rule 23(b)(2).

The District Court began by noting that commonality requires that class members' "claims . . . depend upon a common contention" that "is capable of class wide resolution." JA1585 (quoting *Wal-Mart*, 564 U.S. at 350). The District Court identified several common contentions that supported its finding of commonality, including "a lack of oversight and training at the district level," "a failure to consistently implement BIPs," and "a lack of evaluation and adjustment to plans over time to reflect the responses and changing needs of students." JA1588. Whether the policies underlying these alleged district-wide failures satisfied the Board's obligations under the IDEA, ADA, and Section 504 would turn not on "behavioral supports that should be provided to the individual students," but rather on "the procedures that KCS uses, or does not use, to develop and implement those supports." JA1589. Accordingly, the commonality requirement was satisfied.

The District Court next found that Plaintiffs G.T. and K.M. were typical of the class. "Typicality," the District Court explained, "does not require that the Named Plaintiffs have experiences identical to those of the class." JA1591. Rather, the Named Plaintiffs must "have *claims* sufficiently typical to adequately represent the interests of the class." *Id.* Here, the Named Plaintiffs and the absent class members all assert that they were subject to the same policies. *Id.* Proof of the

individual claims regarding these inadequate policies and procedures would necessarily advance the class claims. *Id.* G.T. and K.M. thus "fit squarely into the proposed class definition." *Id.*

With respect to ascertainability, the District Court explained that the class members were readily identifiable based on data produced by the Board in discovery using IEPs, Section 504 Plans, and discipline records. JA1584; JA1598-617, 1618-749, 1750-987. Though the Board's current records only identified every student with a disability actually receiving behavior supports, rather than every student who needs them, that distinction did not alter the District Court's ascertainability finding because Plaintiffs were seeking enhanced data collection as a remedy in this action. JA1584. Moreover, the District Court noted, any difficulties in identifying students who need behavior supports could be easily addressed by aligning the criteria for class membership with information already present in the Board's student records. *Id.*

Finally, the District Court held that the class satisfied Rule 23(b)(2). The Court noted that Plaintiffs requested a single injunction to address systemic "inadequacies in KCS's special education program," not to obtain individualized relief. JA1593-95. Plaintiffs thus properly sought relief to address "systemic problems with the way KCS addresses disability-related behavioral problems to ensure that students receive a free and appropriate public education." JA1594-95.

And the Court made clear that it would not award relief that "requires or provides ongoing oversight of individual IEPs or Section 504 Plans." JA1594.

SUMMARY OF ARGUMENT

1. Commonality requires just one "common contention" that is "capable of classwide resolution" and will "'drive the resolution of the litigation.'" *Wal-Mart*, 564 U.S. at 350. Plaintiffs claim that the Board's policies, or lack thereof, in several discrete areas violate affirmative requirements imposed by the IDEA and the integration mandates of the ADA and Section 504. The Board's policy in each area—identification, implementation, monitoring, and training—constitutes conduct common to the entire class, all of whom are subject to each policy. And, in each instance, resolving the consistency of the Board's policy with the statutes' affirmative requirements is a common question, the resolution of which will advance the claims of every class member.

The Board's contrary argument rests on mischaracterizing Plaintiffs' claims as ones for individualized relief based on individualized violations. But Plaintiffs' claims here are trained on specific statutory requirements that are violated at the *systemic* level by the Board's inadequate policies. The Board's assertion that such policies are immune from class-wide challenge unless there is an affirmative "illegal policy" that causes an "across-the-board" denial of FAPE is baseless. Those requirements find no support in Rule 23(a)(2)'s text or the Supreme Court's

precedent, and would create virtually insurmountable barriers for classes challenging systemic statutory violations of the federal education laws.

2. The Board next seeks reversal based on a claimed over-statement in the District Court's opinion. The Board asserts that the District Court was wrong to state that KCS's suspension disparity between students with and without disabilities was the highest in West Virginia and one of the highest in the country for large school districts, when this statement was only true as to secondary students. But the Board entirely fails to explain how this imprecision affected the District Court's certification analysis. The comparison between KCS and other districts has nothing to do with whether there are common questions of fact or law, and the challenged statement does not even appear in the District Court's commonality analysis. The Board's quibble with a single sentence of background information in the District Court's opinion plainly does not warrant reversal of the entire certification decision.

3. G.T. and K.M. are typical of the class because proof of their individual challenges to the adequacy of the Board's policies will advance every class member's challenge to those policies. Instead of identifying any specific inadequacies in G.T. or K.M.'s representation of the class, the Board argues that *no* class member can be typical, because of the inherently individualized nature of IDEA claims. That argument is simply a retread of the Board's commonality argument, and is likewise without merit.

4. The Board also claims that the class is not ascertainable. That requirement is not warranted for Rule 23(b)(2) classes seeking exclusively injunctive and declaratory relief. But even if it were, it is easily satisfied here. Class members are readily identifiable because the class is defined in reference to objective criteria that the Board is required by law to evaluate and track—students' behavior support needs and disciplinary removals. The class is thus ascertainable even under the most stringent conception of that requirement.

5. Finally, Rule 23(b)(2) is satisfied. This claim is a classic request for injunctive and declaratory relief to address a systemic violation of civil rights. The Board does not seriously dispute that the class here satisfies the plain language of Rule 23(b)(2), but instead launches a scattershot series of attacks on the scope of the potential injunction the District Court *may* order. Those challenges are premature and without merit. The only question at this stage is whether the Board "has acted or refused to act on grounds that apply generally to the class." That requirement is clearly satisfied. The District Court's sound decision should be affirmed.

STANDARD OF REVIEW

This Court reviews for abuse of discretion an order granting class certification. *Doe v. Chao*, 306 F.3d 170, 183 (4th Cir. 2002). Review of class-certification rulings is highly deferential because district courts possess considerable advantages "in managing complex litigation" and are entitled to "some latitude in

bringing that expertise to bear." *Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 654 (4th Cir. 2019).

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING RULE 23(A)'S REQUIREMENTS TO BE SATISFIED

A. Plaintiffs Identified Common Questions Capable Of Class-Wide Resolution

To satisfy Rule 23(a)(2)'s commonality requirement, the claims of each class member must "depend upon a common contention." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Evaluation of that common contention must "resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* Thus, a "common question[] of law or fact" for purposes of Rule 23(a)(2) is one that will "'generate common *answers* apt to drive the resolution of the litigation.'" *Id.*

A single common question meeting these criteria will suffice. *Id.* at 359. Whether a particular question drives resolution of the litigation depends on "the elements of the class member's case-in-chief." *B.K. v. Snyder*, 922 F.3d 957, 968 (9th Cir. 2019). A common question need not be one that *resolves liability* for each member of the class. Rather, commonality may be satisfied by a contention that addresses a single element of a cause of action. *See, e.g.*, *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 86 (2d Cir. 2015) ("While the resolution of this question will not address each element of each of these claims, that is not required for there

to be a common question under Rule 23." (citing *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 468 (2013))); 1 William B. Rubenstein, *Newberg on Class Actions* § 3:20 (5th ed. Dec. 2021 update) ("When the party opposing the class has engaged in some course of conduct that affects a group of persons and gives rise to a cause of action, one or more of the elements of that cause of action will be common to all of the persons affected."). Thus, if an element of a cause of action can be resolved on a class-wide basis, Rule 23(a)(2) is satisfied, regardless of whether there remain additional elements that would need to be proven to establish liability. *Bell v. PNC Bank, Nat'l Ass'n*, 800 F.3d 360, 374, 380-81 (7th Cir. 2015) ("commonality as to every issue is not required," and not "every class action" must "resolve all liability issues for every class member"); *In re Cmty. Bank of N. Va. Mort. Lending Pracs. Litig.*, 795 F.3d 380, 399 (3d Cir. 2015) (similar).

Finally, at the class-certification stage, Plaintiffs need not "*answer* the common question of fact or law, . . . just prove it exists." *See DG v. Devaughn*, 594 F.3d 1188, 1198 (10th Cir. 2010); *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 505 (6th Cir. 2015).

Here, Plaintiffs point to several common questions concerning whether the Board's policies and procedures for providing necessary behavior supports comply with specific statutory requirements. Unlike in a case like *Wal-Mart*, where the relevant cause of action did not impose any systemic requirements on the defendant,

here the Board is *affirmatively* obligated to establish certain policies—and its failure to adequately do so is an element of each class member's claim. Addressing this element on a class-wide basis will "drive the resolution" of each class member's claims, and thus satisfies the commonality requirement. *Wal-Mart*, 564 U.S. at 350. The District Court thus did not abuse its discretion in finding commonality satisfied.

1. Plaintiffs' Common Contentions Are Susceptible To Common Proof

a. The IDEA affirmatively requires an LEA, like the Board, to establish "policies, procedures, and programs" to meet the substantive obligation to provide FAPE to all students with disabilities in a school district. 20 U.S.C. § 1413(a)(1); *id.* § 1401(9).

The IDEA requires the Board to establish policies for (1) identifying students with disabilities who need behavior supports, *id.* § 1414(d)(3)(B)(i); (2) implementing necessary behavior supports, *id.* § 1414(d)(1)(A)(i)(IV); (3) monitoring their efficacy, *id.* § 1414(d)(4)(A); and (4) training personnel responsible for carrying out these policies, *id.* § 1412(a)(14)(A); *see also id.* § 1413(a)(3). To be clear, these are all *affirmative* requirements to establish adequate policies that the IDEA places on *the Board* specifically, and failure to satisfy any one of them constitutes a statutory violation. *Id.* §§ 1412(a), 1413(a)(1).

Plaintiffs allege that the Board has deficient "policies, procedures, and programs" in all four areas:

- The Board lacks *any* district-wide policy for identifying which students with disabilities need behavior supports to receive FAPE in the LRE. JA677-78 (Porter Dep. 81:19-82:9).

- The Board offers *no guidance* on how to perform FBAs or create and implement BIPs that meet the Board's obligation to provide the behavior supports essential to delivering FAPE. JA670-72, 675-76 (Porter Dep. 65:7-67:6, 70:25-71:10).

- The Board pays no attention to progress that students with disabilities make—or discipline they experience—after they are identified as needing behavior supports. JA 679 (Porter Dep. 102:4-13); JA708 (Porter Dep. 217:15-20); JA696-98 (Porter Dep. 128:8-130:24).

- The Board does not adequately train staff members responsible for providing behavior supports to students with disabilities. JA225, 227, 238-39.

Thus, Plaintiffs contend that with respect to each of these four distinct statutory requirements, the Board's policies—or the absence of a policy *required* by law—constitutes a violation of the IDEA. And the question of whether the Board has violated the IDEA in these discrete ways is "central to the validity of" each class member's claims. *Wal-Mart*, 564 U.S. at 350.

As the Supreme Court has explained, a court's "[f]irst" "inquiry in suits brought under [the IDEA's judicial review provision] is . . . has the State complied with the procedures set forth in the Act." *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206 (1982); *see also* 20 U.S.C. § 1415(f)(3)(E) ("a local educational agency" may be "order[ed]" "to comply with procedural requirements under this section").

Thus, if each class member had pursued an individual claim against the Board alleging inadequate policies in these areas, the "first" element of their claim would be establishing that a challenged policy does not comply with the IDEA's requirements. For example, if an individual student filed an action against the Board asserting that he was not receiving FAPE because the Board's inadequate (or nonexistent) policy for monitoring behavior support efficacy violated Section 1414(d)(4)(A), an element of that claim would be that the policy did, in fact, fail to comply with Section 1414(d)(4)(A). The element is common to all class members challenging that policy, and, as noted above, a *single element* of a claim is sufficient to satisfy the commonality requirement. *Sykes*, 780 F.3d at 86.

A common question only has to "drive the resolution of the litigation," not wholly resolve it. *Wal-Mart*, 564 U.S. at 350.[4] That criteria is satisfied here. If the Board is able to establish that the IDEA does *not* require a policy for monitoring behavior supports or that the Board satisfies the requirement, then every class member would fail to prove that element of their claim. And, if, by contrast, the Board is violating Section 1414(d)(4)(A), then that conclusion will satisfy that element as to every student who is exposed to the unlawful policy. No matter who

[4] Once a common question is resolved, there may still be individual issues that class members must establish in order to prove liability. Those individualized issues might or might not pose a predominance problem in a case under Rule 23(b)(3). But that does not mean there is no common question.

is right, the answer will "resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.*

The same is true of Plaintiffs' ADA and Section 504 claims. Plaintiffs challenge the Board's failure to identify students who need behavior supports, implement behavior supports, monitor their effectiveness, and train staff as a systemic failure to comply with these statutes' integration mandates. The inadequacy of the Board's policies in these areas cause students with disabilities to receive exclusionary discipline instead of behavior supports when they engage in challenging behavior. *See Olmstead v. L.C.*, 527 U.S. 581, 600-01 (1999); *Lane v. Kitzhaber*, 283 F.R.D. 587, 597-98 (D. Or. 2012) (finding commonality satisfied where individuals with disabilities challenged systemic segregation in employment services). Students with disabilities are subjected to exclusionary discipline at disproportionate rates, denying them the opportunity to learn alongside their peers without disabilities. Every class member's ADA and Section 504 claims will thus likewise be advanced by the evaluation of their contentions that the Board's systemic failure to provide behavior supports, and to instead engage in a widespread practice of disciplinary removal of students with disabilities, constitutes unjustified segregation.

Importantly, Plaintiffs need not show that the Board's deficient policies have resulted in a deprivation of FAPE for every class member who needs behavior

supports. *See, e.g.*, *DL II*, 860 F.3d at 724-25 (finding commonality requirement satisfied where deficient policies affected "30 percent of toddlers" transitioning to preschool); *Rikos*, 799 F.3d at 505 ("The Supreme Court in *Dukes* did not hold that named class plaintiffs must prove at the class-certification stage that all or most class members were in fact injured to meet [the commonality] requirement."). The fact that some students may have received FAPE despite the Board's systemic IDEA violations does not mean that Plaintiffs' class claims do not rest upon common contentions. *See Holsey v. Armour & Co.*, 743 F.2d 199, 217 (4th Cir. 1984) ("Despite the presence of individual factual questions, the commonality criterion of rule 23(a) is satisfied by the common questions of law presented.").

"[D]ifferences between class members" only affect the Rule 23(a)(2) analysis if they "impede the discovery of common answers." *Brown v. Nucor Corp.*, 785 F.3d 895, 909 (4th Cir. 2015). Here, the extent of class members' injuries does not affect commonality, because the common question relates to "the conduct of the *defendant*," and when that conduct is "uniform with respect to each of the class members," individual circumstances will not preclude class-wide resolution of claims challenging that common conduct. *Berry v. Schulman*, 807 F.3d 600, 609 (4th Cir. 2015); *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1121 n.3 (9th Cir. 2017) (finding that issues related to satisfaction of elements of a RICO claim were "appropriate for classwide litigation because they focus on Leasing Defendants'

conduct"); *Barrows v. Becerra*, 24 F.4th 116, 131 (2d Cir. 2022) (holding that challenge to "centralized actions" satisfied commonality).[5]

Put another way, Plaintiffs do not need to show that the entirety of the class has been *injured* by the Board's misconduct in order to establish commonality. It is well-settled that, "as long as all putative class members were subjected to the same harmful conduct by the defendant, Rule 23(a) will endure many legal and factual differences among the putative class members." *In re Cmty. Bank*, 795 F.3d at 397. And those differences may include that "not all members of the plaintiff class suffered an actual injury." *Id.*; *see also Buono*, 847 F.3d at 1121-22 (finding commonality despite "individualized issues related to [class member's] injury"). The presence of individualized issues like individual injury may present a

[5] The same is true for Plaintiffs' claims under the ADA and Section 504. Evaluation of whether the Board's policies and procedures for providing behavior supports cause, or create a serious risk of, systemic segregation will generate an answer common to every class member. To satisfy commonality on their ADA and Section 504 claims, Plaintiffs do not "need to prove" that the Board's policies "are *per se* violations of federal law or that the identified state policies and practices directly violate federal law." *See J.N. v. Oregon Dep't of Educ.*, 338 F.R.D. 256, 270-71 (D. Or. 2021) (certifying class of students with disabilities challenging policy of shortened school days as violation of IDEA, ADA, and Section 504). And whether these practices violate the ADA and Section 504 in causing systemic segregation and failing to educate students in the most integrated setting appropriate will not turn on the particular circumstances of any student with disabilities. *See, e.g.*, *Steward v. Janek*, 315 F.R.D. 472, 482 (W.D. Tex. 2016) (certifying a class of individuals with distinct intellectual and developmental disabilities challenging "inadequate" process for diverting class members from institutionalization).

predominance question in cases seeking monetary relief under Rule 23(b)(3). *See Krakauer*, 925 F.3d at 657-58 (collecting cases). But that requirement does not apply to cases seeking indivisible unitary injunctive relief under Rule 23(b)(2). *See DG*, 594 F.3d at 1198. Because damages will never have to be apportioned in a (b)(2) class, there is no need to establish individual injury; the sole issue is whether a systemic violation warrants a systemic remedy.[6] Here, Plaintiffs point to several common contentions regarding the Board's injurious conduct. These contentions can be productively litigated on a class-wide basis, even if Plaintiffs' class may contain some uninjured individuals.

Finally, the common answers to Plaintiffs' questions would come from common proof, and are thus provable on a class-wide basis. To prove violations of the IDEA, ADA, and Section 504 at trial, Plaintiffs will present evidence including testimony from the school officials about each of these policies; forms and other documents that the Board instructs staff to use when assessing the need for, implementing, and monitoring behavior supports; evidence regarding the training

[6] Plaintiffs' (b)(2) claim is akin to pattern-or-practice employment discrimination claims brought by the government, where sufficient evidence of a discriminatory policy "justifies an award of prospective relief," and evidence that any employee "was a victim of" the policy is unnecessary. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 360-61 (1977); *see also Nucor*, 785 F.3d at 914 (describing bifurcated proceedings for pattern-and-practice claims).

opportunities provided to KCS staff; and expert testimony regarding the Board's policies and procedures. This evidence will go to whether the *Board's conduct* violates its statutory obligations. And, tellingly, the Board's evidence is equally class-wide. In opposing certification before the District Court, the Board presented expert testimony that the Board's policies and procedures were "consistent with best practices" and provided in accordance with the IDEA. JA1179; JA1243-44. On appeal, the Board once again argues (at AOB13-15, and 29) that its policies comply with the IDEA. Those arguments only underscore that the claims and defenses in this case ultimately apply on a class-wide basis and are subject to common proof—making class treatment appropriate. *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 457 (2016) (explaining that a "fatal similarity" in class members' claims is properly addressed through a motion for summary judgment, not a motion for class certification (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 107 (2009))).

b. The affirmative requirements placed on the Board by the statutes at issue here differentiate this case from *Wal-Mart*. As noted above, whether a particular question is common to class members depends on the elements of their cause of action. In *Wal-Mart*, the cause of action at issue, Title VII, did *not* impose affirmative obligations on the corporation itself. *See DL II*, 860 F.3d at 725 ("IDEA," in contrast to Title VII, "requires the [LEA] to find and serve all children

with disabilities as a condition of its funding."). Thus, whether the statute was violated turned on inquiries into the specific reason for discrimination against individual class members. *Wal-Mart*, 564 U.S. at 350, 352; *see DL II*, 860 F.3d at 725 ("Unlike Title VII liability, IDEA liability does not depend on the reason for a defendant's failure and plaintiffs need not show why their rights were denied to establish that they were.").

Accordingly, in *Wal-Mart*, a plaintiff in an individual action could not establish corporate liability based on the policy of delegating decision-making to store managers. By contrast, an individual IDEA claimant *could* establish liability here by pointing to the inadequacy of the Board's system-wide policies and procedures for providing behavior supports. In such an individual action, an LEA would not be able to avoid IDEA liability by blaming a denial of FAPE on a school principal, because the statute makes clear that LEAs are accountable for providing FAPE. 20 U.S.C. §§ 1412(a)(1)(A), 1413(a)(1). And permitting the Board here to evade liability through the use of a defense that would not be available in an individual proceeding would contravene the Rules Enabling Act's instruction that the use of the class device cannot "abridge, enlarge, or modify" the parties' substantive rights. 28 U.S.C. § 2072(b). In individual and class claims, the IDEA demands more of the Board than merely avoiding the promulgation of affirmatively unlawful policies.

c. This focus on the Board's policies and their consistency with *specific* statutory requirements also distinguishes this case from *Parent/Professional Advocacy League v. City of Springfield*, 934 F.3d 13 (1st Cir. 2019), and *Jamie S. v. Milwaukee County Public Schools*, 668 F.3d 481 (7th Cir. 2012). In *Parent/Professional*, the panel found the suit to be "one challenging hundreds of individualized decisions made in a decentralized environment" connected only by "a pattern of legal harm common to the class." 934 F.3d at 29-30. And in *Jamie S.*, the plaintiffs simply asserted that "all the class members have 'suffered' as a result of disparate individual IDEA child-find violations." 668 F.3d at 497. Here, by contrast, the class members are not solely tied together by a "pattern of common harm," but by the fact that they have been subject to a set of common inadequate *policies* (or, in some instances, the absence of policies required by law).

That makes this case more like *DL II*. There, the D.C. Circuit found that commonality was satisfied because each subclass's claim rested on the contention that a deficient or poorly implemented "'uniform policy or practice'" caused the alleged IDEA violation. 860 F.3d at 724 (quoting *DL v. District of Columbia*, 713 F.3d 120, 127 (D.C. Cir. 2013)). The court explained that because "IDEA requires the District to find and serve all children with disabilities as a condition of its funding," IDEA liability, "[u]nlike Title VII liability, does not depend on the reason for a defendant's failure." *Id.* at 725. Instead, the commonality requirement was

satisfied by the District's failure to fulfill the IDEA's affirmative obligations to create policies applicable to the entire subclass. *Id.* The policies underlying Plaintiffs' common contentions here are similarly susceptible to evaluation in a single stroke.

The District Court's decision certifying this similar system-wide challenge to an improper set of policies and practices was absolutely correct and should be affirmed.

2. The Board's Argument Drastically Departs From Settled Principles Of Commonality

According to the Board, IDEA plaintiffs seeking to satisfy commonality must challenge (1) a "uniformly applied official policy" or a "well-defined practice," AOB25, that causes (2) an "across-the-board" denial of behavior supports or other services, AOB30. In other words, the Board's proposed rule would permit IDEA claims to proceed as class actions only when an LEA has denied FAPE to *every* member of a proposed class through some form of *affirmative* unlawful conduct. Both requirements are conceptually incoherent, find no support in the case law, and, in practice, would make the commonality requirement an insurmountable barrier to IDEA class actions. Indeed, as the D.C. Circuit explained, to accept the Board's position that "IDEA claims ought to be handled one-by-one, not as class actions," would "eviscerate the very purpose of the IDEA." *DL II*, 860 F.3d at 730-31. The IDEA obligates LEAs to establish "policies, procedures, and programs," 20 U.S.C.

§ 1413(a)(1), for carrying out its requirements precisely because "structural remedies" are necessary to cure LEAs' "'pervasive and tragic' failure to serve all children with disabilities." *DL II*, 860 F.3d at 731 (quoting *Endrew F.*, 137 S. Ct. at 999). The Board's extraordinary position should be firmly rejected.

Start with the purported requirement that services must be denied "across-the-board." AOB30. The Board contends that because "[w]hether a student in fact received adequate 'behavior supports' depends on the student's individual circumstances," Plaintiffs cannot show a violation of the IDEA on a class-wide basis. AOB31. In the Board's telling, because certain class members may end up receiving FAPE notwithstanding the Board's inadequate policies—perhaps through their own initiative, an exceptional teacher, or a tireless parent—the commonality requirement cannot be satisfied. That is flatly wrong. The commonality requirement does not demand that there be an identical *effect* on each class member from a common policy they are subject to. Nor does it demand that every class member actually establish liability, or prove that they have suffered an injury. As discussed above, so long as each class member is exposed to the allegedly unlawful policy such that it resolves an element of their claim, resolution of the legality of that policy is a common

contention that advances an issue "central" to each class member's case.[7] *Wal-Mart*, 564 U.S. at 350.

In any event, even if the Board's contention that there must be an "across-the-board" injury were correct, the Board's policies *do* cause such an injury. That is because every class member has a statutory entitlement to policies that timely identify, implement, and monitor the behavior supports they need. By violating the IDEA's requirements, the Board subjects all class members to harm by depriving them of the policies Congress has deemed they require. Without effective policies for assessing necessary behavior supports, decision-makers will not be able to determine whether a challenging behavior is a sign that a student needs support or a reason to impose discipline. Being educated in a system that does not properly assess students' behavior support needs will unnecessarily segregate and deny FAPE to

---

[7] Although the Supreme Court has spoken of class members having "suffered the same injury," the Court's opinions make clear that this does not mean each class member must be affected identically. *Wal-Mart*, 564 U.S. at 350 (quoting *General Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). Rather, the Court explained that while it was not enough for class members to have "suffered a violation of the same provision of law," because a provision can be violated in different ways, commonality *is* satisfied when each class member's "claims . . . depend upon a common contention . . . capable of classwide resolution." *Id.* at 350; *Falcon*, 457 U.S. at 157 (explaining that "same injury" means "that the individual's claim and the class claims will share common questions of law or fact"). *Wal-Mart*'s and *Falcon*'s "same injury" language therefore refers to the need for class members' alleged harm to flow from a common act or practice that violates a statute, *not*, as the Board claims (at AOB33-35), any requirement that each class member be affected in exactly the same way by that common act or practice.

many students with disabilities and put every student with disabilities at significant risk of being unnecessarily segregated or denied FAPE. *See B.K.*, 922 F.3d at 977 (recognizing that "significant risk" of statutory violation to which all class members are subjected may provide basis for commonality); *see also Parent/Professional*, 934 F.3d at 29 (only requiring that "harm is *likely* to have similar causes (the policy) and effects (denial of services appropriate to that individual student)" (emphasis added)); *cf. Pashby v. Delia*, 709 F.3d 307, 322 (4th Cir. 2013) ("[T]he ADA and the *Olmstead* decision extend to persons at serious risk of institutionalization or segregation . . . .").

Just as misguided is the Board's position that plaintiffs bringing IDEA claims must point to an affirmative "official policy" or "well-defined practice." AOB9-10, 25-26. No such requirement is warranted in the context of a statute that itself imposes affirmative requirements—and thus is violated by failure to create policies that meet those requirements. Indeed, there is no serious dispute that if the Board were to adopt a policy of simply ignoring the IDEA altogether, it would be a plain violation of the statute's requirements. An LEA's failure to satisfy the IDEA's affirmative requirements is subject to challenge on a class-wide basis, no matter whether that failure is the result of an "affirmative" policy, an "inadequate" policy, or the absence of any policy at all.

Indeed, ultimately, accepting the Board's view of commonality would work a radical change in the law. The Board's purported prerequisites, applied in conjunction, would all but foreclose class claims challenging systemic conditions. All kinds of systemic failures in school, prison, and foster care systems would become immune from class-wide challenges because institutions rarely *affirmatively* flout their obligations, and uniform courses of unlawful conduct rarely have uniform *effects*. It would be "preposterous" to require people in broken school, prison, and foster care systems to litigate claims one-by-one, even though the same conduct by the same defendant gives rise to each claim. *DL II*, 860 F.3d at 730-31; *Parsons v. Ryan*, 754 F.3d 657, 680 (9th Cir. 2014); *B.K.*, 922 F.3d at 969.

In short, the District Court was correct to reject the Board's novel and far-reaching theory that only affirmative, "across-the-board" denials are proper subjects of class treatment. The District Court's sound decision should be affirmed.

B. The District Court's Factual Findings Do Not Contain Any Clear Error, And The Challenged Comparison Was Immaterial To Class Certification

A district court considering a motion for class certification must "tak[e] a 'close look' at relevant matters" and "mak[e] 'findings' that the requirements of Rule 23 have been satisfied." *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 365 (4th Cir. 2004) (citations omitted). A district court abuses its discretion if it "*relies on* . . . clearly erroneous findings of fact." *Huskey v. Ethicon, Inc.*, 848 F.3d 151,

158 (4th Cir. 2017) (emphasis added). In other words, to affect this appeal, a challenged factual finding must be both material to Rule 23's requirements and clearly wrong.

The Board asserts that the District Court imprecisely stated that a UCLA study found that "the disparity in suspension rates in KCS is the highest in West Virginia and among the highest among large school districts nationally," JA1580, when the study in fact only reached that conclusion as to secondary students. And the Board claims that reversal of the entire decision is required because that distinction was at "the heart of [the Court's] commonality analysis." AOB36. That is patently wrong. The quoted excerpt does not even appear in the commonality section of the District Court's opinion, but rather in a section simply *describing* the evidence that Plaintiffs set forth. JA1580. There is no indication that the District Court relied on the statement anywhere in its opinion, let alone that it is the "heart of the commonality analysis." To the contrary, in rejecting the Board's motion to strike, the District Court expressly stated that the UCLA study provided only "background and context" for its analysis of Plaintiffs' class-certification motion. JA1562.

That is for good reason. KCS's rate of removals relative to other districts has no bearing at all on commonality. Instead, in the commonality section of the opinion, the District Court properly focused its analysis on the evidence developed during class discovery, which concerned the Board's *policies* for providing behavior

supports to KCS students with disabilities. It was the legality of "the procedures that KCS uses, or does not use, to develop and implement [behavior] supports," the Court explained, that provided the common thread binding the class member's claims together. JA1589. That common thread has nothing whatsoever to do with where KCS may or may not have ranked relative to other school districts.

In fact, the only sentence referencing the UCLA study's "[r]ates" of "lost [i]nstruction," JA451, in the commonality section of the opinion simply states: "Students with disabilities in Kanawha County are subject to disciplinary removals at a rate disproportionate to their non-disabled peers, and at a higher and more-disproportionate rate than students with disabilities in most other school districts in the state and most other large school districts nationally." JA1588. The Board tellingly does not challenge that statement, because it is entirely correct. Indeed, the Board's own brief asserts that KCS's disparity in lost instructional days due to suspension per 100 students with and without disabilities is the 7th highest in West Virginia and 101st out of 843 "large school districts" nationwide. AOB37-38. Thus, the only reference to the UCLA study in the commonality section of the opinion is something the Board itself cannot reasonably dispute. That is not clear error, let alone clear error so prejudicial as to warrant reversal.

C. Plaintiffs Are Typical Of The Class

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." The typicality requirement exists to ensure that the class representatives share the interests of the class as a whole. *Deiter v. Microsoft Corp.*, 436 F.3d 461, 466 (4th Cir. 2006) ("[T]he named plaintiff's claim and the class claims [must be] so interrelated that the interests of the class members will be fairly and adequately protected in their absence." (second alteration in original)). But typicality does not "require[] that the plaintiff's claim and the claims of the class members be perfectly identical or perfectly aligned." *Id.* at 467. Rather, typicality is satisfied where a plaintiff's proof of an individual claim advances the claims of the absent class members. *Id.* at 466-67; *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 340 (4th Cir. 1998) ("[A]s goes the claim of the named plaintiff, so go the claims of the class.").

Here, because plaintiffs challenge the Board's district-wide policies, practices, and procedures for providing behavior supports, the Named Plaintiffs' individual proof will advance the entire class's claims. G.T. and K.M. are members of the class of KCS students with disabilities who need behavior supports and have experienced disciplinary removals from the classroom, and they have been affected by the Board's failure to maintain any adequate policies and procedures for the provision of necessary behavior supports.

- Both G.T. and K.M. have received deficient FBAs that fail to identify the antecedents and consequences of challenging behavior, and thus fail to identify the function of the behavior, leaving staff to guess at how to address that behavior. JA292-93, 312-13. Dr. Elliott found this to be a common problem among KCS's FBAs. JA214-17.

- Both G.T. and K.M. have BIPs that lack individualized interventions that staff members can evaluate and implement in a consistent fashion. JA293, 315-16, 323. According to Dr. Elliott, this is a recurring problem in KCS's BIPs. JA223 ("The challenging behavior identified was 'threat of injury.' The identified replacement behavior was 'no threat of injury.'").

- Both G.T. and K.M. contend that their behavior supports were inadequately monitored. JA324. Dr. Elliott found KCS's BIP monitoring to be an "area of significant weakness." JA227.

- Both G.T. and K.M. claim that KCS staff members lack adequate training for performing FBAs, writing BIPs, and ensuring implementation and monitoring of behavior supports. Dr. Elliott found that KCS did not consistently provide training and professional development opportunities to staff on these essential activities. JA237-40.

Resolving the legality of the Board's procedures thus advances G.T. and K.M.'s claims just as it advances the claims of every class member subject to those same policies. That satisfies the typicality requirement. *Deiter*, 436 F.3d at 466.

The Board's contrary argument is meritless. AOB46-47. The Board argues that G.T. and K.M. received certain services and behavior supports, distinguishing them from the "unnamed and unidentified students who purportedly did not receive these services." AOB46. But there is no functional difference between a poorly designed, inadequate, or unmonitored behavior support and no behavior support at

all. Both are the products of the Board's systemic failures to provide behavior supports to students with disabilities who need them.

The Board also insists that Plaintiffs cannot show typicality because the provision of FAPE "necessarily turns on KCS's responses to [students with disabilities'] differing individual needs and unique circumstances." AOB47. But this argument is the Board's "commonality challenge in a new guise." *DL II*, 860 F.3d at 725. As discussed above, the challenge here is to the adequacy of Board's policies and procedures, which apply to all class members, including G.T. and K.M., not to the effects of those policies on any particular class member. Indeed, under the Board's logic, *no* student could be "typical" of the class, because each student is a "unique individual[] with unique needs." That reasoning stretches the typicality requirement beyond all recognition.

D. To The Extent Ascertainability Is Required, Ascertainability Is No Obstacle To Class Certification

The Board argues that Plaintiffs' proposed class must be "ascertainable" at the time of certification, and that the class fails to meet this requirement. AOB44-46. The Board is wrong on both scores.

Ascertainability requires that class members be "readily identifiable" by the time of judgment. *Hammond v. Powell*, 462 F.2d 1053, 1055 (4th Cir. 1972); *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014). Traditionally, a class is ascertainable when it is defined based on objective criteria. *See, e.g.*, *Matamoros v.*

Starbucks Corp., 699 F.3d 129, 139 (1st Cir. 2012). A class definition raises ascertainability concerns when it is vague, based on a member's state of mind, or tied to success on the merits. *See Mullins v. Direct Digital, LLC*, 795 F.3d 654, 659-60 (7th Cir. 2015). But where objective criteria define the class, the need for some fact-finding to apply those criteria does not affect ascertainability. *See, e.g.*, *In re Agent Orange Prod. Liab. Litig. MDL No. 381*, 818 F.2d 145, 154, 167 (2d Cir. 1987) (affirming certification of class of persons in multiple countries' armed forces "at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange"); *see also Cherry v. Dometic Corp.*, 986 F.3d 1296, 1303 (11th Cir. 2021).

The Third Circuit heightened the traditional test for ascertainability by making a "reliable, administratively feasible" method for identifying class members a prerequisite to certification. *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 594 (3d Cir. 2012). This much-criticized "administrative feasibility"—or "paper trail"—requirement, *Byrd v. Aaron's Inc.*, 784 F.3d 154, 172-73 (3d Cir. 2015) (Rendell, J., concurring), has never been applied by this Court in a case seeking *only* declaratory and injunctive relief, and there is no reason to do so here.

As other circuits have recognized, the reasons for requiring ascertainability, let alone heightened ascertainability, have no force when a class seeks only declaratory and injunctive relief pursuant to Rule 23(b)(2). *Shelton v. Bledsoe*, 775

F.3d 554, 560-63 (3d Cir. 2015); *Cole v. City of Memphis*, 839 F.3d 530, 542 (6th Cir. 2016); *Yaffe v. Powers*, 454 F.2d 1362, 1366 (1st Cir. 1972). Indeed, Rule 23(b)(2)'s framers stated that certification would be appropriate when class members are "*incapable* of specific enumeration." Fed. R. Civ. P. 23(b)(2) advisory committee's note (1966) (emphasis added). Because Plaintiffs seek relief in the form of changes to policies and procedures that the Board must apply to all its eligible students, there will never be any need to identify class members for purposes of providing notice or apportioning individualized relief. There is thus no basis to apply an ascertainability requirement in the context of a class like this one.

In any event, ascertainability is readily satisfied here. The District Court certified a class of "[a]ll Kanawha County Schools students with disabilities who need behavior supports and have experienced disciplinary removals from any classroom." JA1595. In doing so, the District Court correctly recognized that the class was defined in reference to objective criteria capable of application. JA 1583-84.

Moreover, even if heightened ascertainability is required, the class definition's criteria can be easily applied to education records the Board is obligated to maintain. IEPs, 504 Plans, and student disciplinary records provide the information necessary to determine whether a student with disabilities needs behavior supports and has experienced disciplinary removals from any classroom.

Indeed, during discovery, the Board used those student records to produce a list of students with disabilities who had been suspended at least twice and who IEP teams had identified as needing behavior supports. Thus, class members were readily identifiable based on the Board's own data. *See Peters v. Aetna*, 2 F.4th 199, 242-43 (4th Cir. 2021).

To be sure, the Board's list of students with disabilities receiving behavior supports did not include all those who need behavior supports. But responsibility for that gap lies with the Board. The IDEA requires the Board to identify students with disabilities who need behavior supports. *See* 20 U.S.C. § 1414(d)(3)(B)(i). To the extent such students have not been identified, it is not because they are unascertainable—it is because they have not been ascertained due to the Board's systemic failings. As the District Court recognized, "more thorough collection of data is part of the remedy sought in this litigation." JA1584. The Board's shortcomings in this regard cannot be a shield against class certification. *See Hargrove v. Sleepy's LLC*, 974 F.3d 467, 482-83 (3d Cir. 2020); *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 540 (6th Cir. 2012).

And, even if the Board continued to flout its duties of identification, the District Court would have little difficulty applying objective criteria to the Board's education records to identify any remaining class members. *See Peters*, 2 F.4th at 242-43. A review of disciplinary records for students with disabilities who have

been suspended multiple times would yield a list of students disciplined due to challenging behavior. That information would indicate a need for behavior supports and make inclusion in the class appropriate. *See* JA201; JA574; *see also Soutter v. Equifax Info. Servs., LLC*, 307 F.R.D. 183, 197 (E.D. Va. 2015) ("[R]ecourse to manual, member-by-member review" would not "render the inquiry 'subjective.'").

In any event, if this Court were to conclude that ascertainability poses a barrier to certification here, the proper course would be to remand for the District Court to revise the class definition. *See Nucor*, 785 F.3d at 901 ("Rule 23(c)(1)(C) provides a district court with broad discretion to alter or amend a prior class certification decision at any time before final judgment"). As the District Court recognized, "tweaking the class definition to reference specific criteria found in student records," rather than a need for behavior supports, "would be possible." JA1584. Here, removing the condition that class members "need behavior supports" would "avoid or mitigate [any] administrative challenges" without altering the nature of the class's claims. *EQT Prod.*, 764 F.3d at 360.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN CERTIFYING THE CLASS PURSUANT TO RULE 23(B)(2)

A. Plaintiffs' Claims Are Ideally Suited For Rule 23(b)(2) Certification

Rule 23(b)(2) certification is appropriate where "the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to

none of them." *Wal-Mart*, 564 U.S. at 360 (quoting Nagareda, 84 N.Y.U. L. Rev. at 132). Rule 23(b)(2) was designed to enable plaintiffs to pursue class-wide challenges to systemic civil rights violations. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997); *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 330 (4th Cir. 2006); *see also* Fed. R. Civ. P. 23(b)(2) advisory committee's note (1966).

This action seeking to vindicate the civil rights of students with disabilities uses Rule 23(b)(2) for its clearly intended purpose. *DL II*, 860 F.3d at 726. As Plaintiffs have made clear from the outset, this case seeks systemic changes to district-wide policies, not modifications to individual students' IEPs. Here, the Board "has acted or refused to act on grounds that apply generally to the class." Fed R. Civ. P. 23(b)(2). The Board did so by establishing inadequate (or functionally nonexistent) policies that "apply generally to the class" because they dictate the terms under which necessary behavior supports are—or are not—provided to KCS students with disabilities. *Id.* Because the Board's conduct applies to every class member, a single order could provide "final injunctive relief or corresponding declaratory relief" that "is appropriate respecting the class as a whole." *Id.*

Importantly, Rule 23(b)(2) does not require plaintiffs to seek "perfect" injunctions. *Brown*, 928 F.3d at 1082. Rather, "[i]f a certain outcome is legally mandated and an injunction provides each member of the class an increased opportunity to achieve that outcome, Rule 23(b)(2) is satisfied." *Id.* Here, the

legally mandated outcome under the IDEA is the provision of FAPE in the LRE. And under the integration mandates of the ADA and Section 504, the Board must avoid the unjustified segregation of students with disabilities from their peers without disabilities. An injunction requiring changes to the Board's deficient policies and procedures to satisfy these statutory requirements is "appropriate relief respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

B. The Board's Arguments To The Contrary Are Meritless

The Board's Opening Brief does not actually dispute any of the foregoing principles, or that it has "acted or refused to act on grounds that apply generally to the class." Fed. R. Civ. P. 23(b)(2). Instead, the Board launches a series of scattershot challenges and policy arguments untethered from Rule 23(b)(2) itself.

The Board first attempts to cast Plaintiffs' requested relief as incompatible with Rule 23(b)(2) by arguing that any eventual injunction would be insufficiently clear. AOB40-41. This argument is misguided and speculative. The District Court is perfectly capable of crafting injunctive relief that is both comprehensive and comprehensible. Indeed, Plaintiffs have already provided specific recommendations as to potential class-wide relief, such as the development of systems for collecting student data and providing training and professional development to staff. JA891. The Board's speculation about the inadequacy of some future class-wide remedy is plainly no basis to deny class certification.

The Board next argues that Plaintiffs seek class-wide injunctive relief that would not be "final." AOB41 (citing *Jamie S.*, 668 F.3d at 499). In an effort to bolster this argument, the Board cites Dr. Elliott's testimony about how quickly systemic reforms yield discernible results in schools. *See id.* (citing JA1114-15). The Board's argument that a delay in discernible results means that relief is not "final" mischaracterizes the systemic reform sought by Plaintiffs as a request for individualized relief. Plaintiffs seek a permanent injunction that will require the Board to fix its flawed *policies*. JA67. The Board's obligation to comply with the terms of a prospective injunction will be immediate, even if the *effects* of that compliance may not materialize immediately.

The Board also argues that relief in the form of a court-appointed monitor violates Rule 23(b)(2). AOB41-42. That too is incorrect. Court-ordered monitoring is a common form of relief in the context of cases seeking the implementation of new policies. *See Chicago Teachers Union, Local No. 1 v. Board Educ. of the City of Chicago*, 797 F.3d 426, 441-42 (7th Cir. 2015) (noting that plaintiffs sought monitor to oversee creation of new policy); *United States v. City of New York*, 258 F.R.D. 47, 66 (E.D.N.Y. 2009) (noting that ordering "steps to monitor the City's compliance with Title VII" could be "appropriate" form of injunctive relief). And the District Court has already made clear that it "would not award" relief "that

requires or provides ongoing oversight of individual IEPs or Section 504 Plans." JA1594.

Even more strained is the Board's argument that the appointment of a monitor is not proper relief under Rule 23(b)(2) because the Board has not agreed to it. AOB42-43. The Board's consent is irrelevant to the District Court's authority to order relief pursuant to a judgment of liability. Indeed, the only case the Board relies on, *Cobell v. Norton*, 334 F.3d 1128 (D.C. Cir. 2003), actually undermines the Board's position. There, the D.C. Circuit recognized that a court-appointed monitor may inform a district court about a defendant's "compliance with the district court's decree, and . . . help implement that decree." *Id.* at 1143; Fed. R. Civ. P. 53. That is the only monitoring this Complaint seeks. JA67-68. And, in any event, the Board's objections to a monitor are not at issue in this appeal. No monitor has yet been appointed, and if such an appointment is made as part of a future injunction, the Board may appeal that judgment at the appropriate time.

Next, the Board broadly claims that IDEA class actions on behalf of students with disabilities are just efforts to "adjust[] the spigot directing the flow of public funds to lawyers." AOB43 (quoting *Blackman v. District of Columbia*, 633 F.3d 1088, 1097 (D.C. Cir. 2011) (Brown, J., concurring)). The Board's ad hominem attack against attorneys who litigate IDEA claims has nothing to do with Rule 23(b)(2), or the relief that Plaintiffs seek here.

Finally, the Board asserts that the class lacks cohesion required by Rule 23(b)(2). AOB44. This argument is also without merit. The Board again attempts to frame Plaintiffs' case as seeking individualized relief based on individualized circumstances. But this argument fares no better when repackaged as a challenge to cohesiveness, rather than commonality or typicality. Classes pursuing relief under Rule 23(b)(2) are afforded a "presumption of cohesiveness" because the "group nature of the harm alleged and the broad character of the relief sought" is unlikely to give rise to "conflicting interests among its members." *Berry*, 807 F.3d at 609-10 (citations omitted). Here, no conflicts exist between class members, all of whom seek the same declaratory and injunctive relief addressing deficiencies in the Board's policies and procedures.

In short, this case is in the heartland of those for which certification under Rule 23(b)(2) is proper. The District Court's sound decision certifying this class should be affirmed.

CONCLUSION

For the foregoing reasons, this Court should affirm.

Dated: February 28, 2022

Respectfully submitted,

s/ Samir Deger-Sen

Samir Deger-Sen
Peter Trombly
LATHAM & WATKINS LLP
1271 Avenue of the Americas
New York, NY 10020
(212) 906-1200

Lydia C. Milnes
Blaire L. Malkin
Mountain State Justice, Inc.
1217 Quarrier Street
Charleston, West Virginia 25301
(304) 344-3144

Lori Waller
Disability Rights West Virginia 1207
Quarrier Street, Suite 400
Charleston, West Virginia 25301

Shira Wakschlag
The Arc of the United States
1825 K Street NW, Suite 1200
Washington, D.C. 20006

Ira A. Burnim
Lewis Bossing
Judge David L. Bazelon Center for Mental Health Law
1090 Vermont Avenue NW, Suite 220
Washington, D.C. 20005

Counsel for Appellees

Robin Hulshizer
Kirstin Scheffler Do
Karen Klass
Jaime Zucker
Renatta Gorski
LATHAM & WATKINS LLP
330 North Wabash Avenue, Suite 2800
Chicago, Illinois 60611
(312) 876-7700

CERTIFICATE OF COMPLIANCE WITH RULE 32(g)

Counsel for Appellees hereby certifies that:

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Local Rule 32(b). The brief contains 12,969 (as calculated by the word processing system used to prepare this brief), excluding the parts exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the type-face requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6). The Brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman style font.

Dated: February 28, 2022

s/ Samir Deger-Sen
Samir Deger-Sen

Counsel for Appellees

CERTIFICATE OF SERVICE

I, Samir Deger-Sen, hereby certify that on February 28, 2022, the foregoing Brief for Appellees was filed with the clerk's office for the United States Court of appeals for the Fourth Circuit and served on counsel of record via the Court's CM/ECF system.

s/ Samir Deger-Sen
Samir Deger-Sen

Counsel for Appellees