FIGHTING EXCLUSIONARY DISCIPLINE IN DISGUISE: SYSTEMIC ADVOCACY STRATEGIES FOR ELIMINATING POLICIES & PRACTICES THAT CIRCUMVENT IDEA DISCIPLINARY PROTECTIONS

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Students with disabilities, especially those of color, are subject to higher rates of suspension, expulsion, and alternative placement than their non-disabled peers, despite heightened disciplinary protections found in federal law. These laws are explicitly aimed at stemming discriminatory exclusion of special education students for conduct related to their disabilities, but enforcing these heightened disciplinary protections can be a daunting task. In addition to the difficulties of challenging formal removals that do not comply with these protections, another significant challenge is that school districts are regularly skirting special education disciplinary protections altogether by failing to document removals as disciplinary in nature or by disguising them as non-disciplinary educational placements, in a set of common practices the authors refer to as "exclusionary discipline in disguise." When such practices become widespread throughout a school district, parents, advocates, and attorneys, including a growing number of law school clinicians, representing students with disabilities are often left searching for effective systemic reform strategies rather than relying on individual advocacy to react to each instance of undocumented exclusion as it occurs. Clinicians and nonprofit attorneys committed to defending the rights of students with disabilities who are low-income, system-involved, or from other marginalized communities may feel this pressure particularly acutely, given the limited capacity to provide direct representation to underserved communities with many individuals in need.

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This Article uses case studies highlighting the systemic reform strategies that the Loyola Law Clinic in partnership with the Southern Poverty Law Center, as well as other organizations inside and outside of Louisiana, have used to combat pervasive exclusionary discipline in disguise through state-level administrative complaints, due process proceedings, and civil rights impact litigation based on disability rights laws and state and federal constitutional protections. An analysis of multiple successful cases and their resulting settlement agreements provides law school clinicians and other attorneys engaged in the same work a blueprint for combating policies and practices that lead to illegal exclusionary discipline in disguise, with particular emphasis on what strategies may be most pedagogically sound for clinicians.

Introduction

Most school administrators and teachers are aware that before a student with a disability can be expelled or issued a long-term suspension, the student must be afforded an extensive process beyond what is required for students without disabilities. Specifically, the Individuals with Disabilities Education Act (IDEA) entitles students with disabilities under its purview to several heightened disciplinary protections aimed at stemming the discriminatory exclusion of special education students for conduct related to their disabilities. Such protections include, most notably, a Manifestation Determination Review (MDR) meeting intended to prevent a child with a disability from being excluded for more than ten days for behaviors related to their disability. The results of an MDR can be appealed through an administrative due process hearing, and, ultimately, to state or federal court.[1] Despite these protections, students with disabilities are subject to suspension, expulsion, and placement in alternative education settings at a significantly higher rate than their peers.[2] Students of color with disabilities face even higher rates of school exclusion, and for longer periods of time.[3]

To evade these complex procedural requirements, and sometimes even out of a purportedly benign desire to "spare" a disciplinary mark on a student's permanent record, teachers and administrators often resort to informal and other undocumented methods of exclusionary

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[1] *See infra* Section I.

[2] Blakely Evanthia Simoneau, *Overrepresented, Underprotected: Discipline and the Constitutional Rights of Students with Disabilities*, 54 Suffolk U. L. Rev. 439, 445 (2021).

[3] U.S. Comm'n on C.R., Beyond Suspensions: Examining School Discipline Policies and Connections to the School-to-Prison Pipeline for Students of Color with Disabilities 11 (2019).

discipline, which this Article collectively describes as "exclusionary discipline in disguise" or "discipline in disguise." These strategies often include relying on parents to remove their children from school during the day or manipulating them into giving "consent" for an alternative placement, waiving their child's due process protections. This is frequently done as a condition to avoid harsher disciplinary consequences for their children. Other strategies involve using the Individualized Education Program (IEP) process to "place" a child on homebound or virtual instruction; in an involuntary alternative placement; or on a shortened-day schedule as the result of behavioral incidents, while characterizing the change as a non-disciplinary educational placement needed to provide a Free and Appropriate Public Education (FAPE).[4] When such strategies are employed widely in a district, it can lead to a disproportionate number of students with emotional and behavioral disabilities languishing in alternative placements or other restrictive settings.

While individual advocacy in such cases can provide relief to a particular student, systemic advocacy seeking district-wide relief is often the most effective method of addressing widespread policies and practices leading to exclusionary discipline in disguise. To address those barriers to effective advocacy, this Article explores advocacy and litigation strategies that the Loyola Law Clinic, the Southern Poverty Law Center (SPLC), and other disability rights organizations have used to successfully combat exclusionary discipline practices of students with disabilities on a district-wide level that are undocumented or disguised as non-disciplinary placements. The types of litigation strategies analyzed in this Article include a wide variety of state complaints, due process hearings, and federal civil rights lawsuits that have challenged illegal exclusionary discipline practices on a systemic level and sought relief on behalf of all affected students with disabilities within a school district. Through these varied techniques and strategies, special education advocates along with law school clinicians have taken critical steps to prevent discriminatory exclusion of students with disabilities by reaching settlement agreements requiring independent monitoring, improved data tracking, amendment of written policies, training

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[4] The IEP is a written statement developed by a team of educators, service providers, and the student's parents that details the student's instructional needs and the accommodations, services, supports, and placement the school system must provide to meet those needs. *See* 20 U.S.C. § 1414(d)(1)(A). FAPE, in turn, encompasses the specialized instruction and related services designed to meet the unique needs of a child with a disability, provided in conformity with the student's IEP. *See id.* § 1401(9), (28)-(29). For further explanation of FAPE, see *infra* note 8.

programs, and the education of stakeholders about the limits of school districts' disciplinary authority.

This Article draws upon case studies to understand the factors and circumstances that make selection of a particular strategy more advantageous than others, with a particular eye toward strategies that are resource-efficient and pedagogically sound in a clinical setting, and suggests future directions for litigation, advocacy, and reform. First, the Article reviews disciplinary protections for students with disabilities under federal law. In Section II, this Article provides an overview of the problem of exclusionary discipline in disguise, which includes both the use of informal suspensions and expulsions of students with disabilities, as well as the use of the IEP process to place special education students in alternative settings for disciplinary reasons. Section III analyzes the strategic considerations used by advocates and law school clinicians in selecting systemic advocacy strategies to challenge the range of exclusionary practices encompassed in exclusionary discipline in disguise. In Section IV, the authors use case studies from their work and the work of other advocates to explore how litigation at the federal, state, and administrative level can be used to combat these harmful and pervasive practices. Finally, the Article concludes by exploring promising directions for future legal advocacy by law school clinicians and other practitioners to prevent the punishment and isolation of students with disabilities in public schools.

I. An Overview of IDEA Disciplinary Protections for Students with Disabilities

In 1975, Congress passed a federal statute to prohibit the exclusion and segregation of students with disabilities in public schools. The foundation of the modern IDEA,[5] the Education for All Handicapped Children Act (EAHCA),[6] emerged from concerns that students with disabilities were receiving little to no education and were being segregated in special classes, "or otherwise neglected . . . until they eventually dropped out."[7] To address these issues, the statute required—and continues to require today—that students receive a FAPE in the

[5] Matthew Schmitz, *20 Years Later: Qualified Immunity as a Model for Improving Manifestation Determination Reviews Under the Individuals with Disabilities Education Act*, 42 Minn. J.L. & Ineq. 155, 161 (2024).

[6] Education for All Handicapped Children Act (EAHCA), Pub. L. No. 94-142, 89 Stat. 773 (1975). Before the EAHCA, the 1970 Education of the Handicapped Act (EHA) provided grants for states to provide special education services. Pub. L. No. 91-230, 84 Stat. 121, 175-88 (1970).

[7] Claire Raj, *Disability, Discipline, and Illusory Student Rights*, 65 UCLA L. Rev. 860, 867-69 (2018) (citing H.R. Rep. No. 94-332 at 2 (1975)); *see* EAHCA, Pub. L. No. 94-142, 89 Stat. 773 (1975); S. Rep. No. 94-168, at 8 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 1425, 1432.

least restrictive environment.[8] The IDEA further granted procedural options to parents to contest a change in their child's educational placement.[9]

After the EAHCA was passed in 1975, it sparked debate and litigation regarding school districts' authority to discipline students with disabilities who were deemed "disruptive" to the educational process.[10] Two decades later, Congress amended the statute to require the modern procedural safeguards in the IDEA for students facing exclusionary school discipline in an attempt to balance the need to avoid exclusion of students with disabilities from the educational environment with the need for educators to discipline students.[11] These 1997 amendments were then reinforced in the most recent reauthorization of IDEA in 2004.[12]

The current procedural protections in the IDEA prevent not only traditional suspensions or expulsions, but also "removal" of children with disabilities for disciplinary reasons more generally. As defined by federal regulations current as of the time of publication, a "removal" for the purpose of IDEA disciplinary protections is any exclusionary discipline in which a student with a disability is removed from the student's current educational placement for a violation of a code of student conduct.[13] According to the U.S. Department of Education Office of Special Education and Rehabilitative Services, this broad definition can encompass many forms of exclusionary discipline, including when a parent is asked to pick up a child early from school, "in-school suspensions, suspensions from riding the school bus, and [even]

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[8] *Compare* 20 U.S.C. § 1400(d) ("ensur[ing] that all children with disabilities have available to them a free appropriate public education"), *with* EAHCA, Pub. L. No. 94-142, 89 Stat. 773, 780 (1975) (requiring states to provide "a free appropriate public education" to receive assistance under the EACHA). The Supreme Court first interpreted the meaning of a "free appropriate public education" (FAPE) in *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). The *Rowley* decision produced a two-part test: first, whether the "State complied with the procedures set forth" in the statute, and second, whether the IEP, under a substantive review, is "reasonably calculated to enable the child to receive educational benefits." *Id.* at 206-07. Approximately thirty years later in *Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 137 S. Ct. 988 (2017), the Supreme Court revisited the substantive prong, holding that "[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* at 999. In other words, the FAPE provisions of the IDEA require school districts to enable a child to make progress towards the academic, functional, and other goals in their IEP.

[9] *See* Doe v. Koger, 480 F. Supp. 225, 228 (N.D. Ind. 1979) (early interpretation of the MDR requirements in the EHA).

[10] Terry Jean Seligmann, *Not as Simple as ABC: Disciplining Children with Disabilities under the 1997 IDEA Amendments*, 42 Ariz. L. Rev. 77, 78 (2000).

[11] Schmitz, *supra* note 5, at 161-62; Seligmann, *supra* note 10, at 78.

[12] Schmitz, *supra* note 5, at 165.

[13] *See* 20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. § 300.530(b)(1).

referrals to law enforcement."[14] Any of these actions are considered removals if the student is not "afforded the opportunity to continue to appropriately participate in the general curriculum, continue to receive the services specified on the child's IEP, and continue to participate with nondisabled children to the extent they would have in their current placement."[15]

A student with a disability who is facing a disciplinary change of placement of ten days or longer is entitled to an MDR to determine if the behavior in question is a manifestation of the student's disability.[16] The requirement to hold an MDR applies to more than just students who have been identified as eligible for special education services and already have IEPs.[17] The IDEA also requires MDRs to be held when the school district has "knowledge" of a student's disability.[18] In this context, a school district is deemed to have "knowledge" of a disability if: (1) "the parent . . . expressed concern in writing" that their child may need "special education and related services;" (2) the parent of the child requested an evaluation of the child; or (3) a teacher or other school official expressed a concern that a child may have a disability to the director of special education or other supervisory personnel in the school district.[19] Generally, this means that, if the school district started, or should have started,[20] the special education evaluation process before the events giving rise to the disciplinary action, then the child has a right to an MDR before exclusion.

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[14] Off. of Special Educ. & Rehab. Servs., U.S. Dep't of Educ., Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions 52 (2022), https://sites.ed.gov/idea/files/qa-addressing-the-needs-of-children-with-disabilities-and-idea-discipline-provisions.pdf [hereinafter Questions and Answers].

[15] 71 Fed. Reg. 46540, 46715 (Aug. 14, 2006) (to be codified at 34 C.F.R. § 300.530(b)).

[16] 20 U.S.C. § 1415(k)(1)(E); 34 C.F.R. § 300.530(e).

[17] To obtain an IEP, a child must prove they have a disability within specifically delineated categories and that, because of that disability, they require special education services. 20 U.S.C. § 1401(3)(A). Eligible categories of disability include: "intellectual disability, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as 'emotional disturbance'), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities." 34 C.F.R. § 300.8(a)(1); *see also* 20 U.S.C. § 1401(3)(A)(i) (describing disability categories under the IDEA).

[18] 20 U.S.C. § 1415(k)(5); *see* 34 C.F.R. § 300.530(d).

[19] 20 U.S.C. § 1415(k)(5)(B). Exceptions to this rule exist where the parent refuses an evaluation or IEP services, and where the child has been evaluated but previously determined ineligible. *Id*. § 1415(k)(5)(C).

[20] The "child find" obligation of the IDEA requires school districts to "identif[y], locate[], and evaluate[]" all children with disabilities "who are in need of special education and related services." *Id.* § 1412(a)(3)(A).

The right to an MDR also applies to students with disabilities outside of the special education system who instead receive accomodations under Section 504 of the Rehabilitation Act of 1973 through what are commonly referred to as "504 Plans."[21] For 504 students, federal regulations require an "evaluation" before a significant change in placement.[22] The U.S. Department of Education interprets this regulation as mandating MDRs prior to the exclusion of students with 504 Plans, even if different regulatory requirements apply.[23] Several courts have supported this interpretation of Section 504, even without reliance upon the federal regulations.[24]

When the IDEA's heightened disciplinary protections apply to a student, a school district must hold an MDR for any removal longer than ten consecutive school days.[25] The implementing regulations of the IDEA further provide that a disciplinary change in placement occurs when a series of short-term disciplinary removals cumulatively add up to more than ten school days in a school year and the removals constitute a pattern, which also entitles children with disabilities to an MDR and related disciplinary protections in the IDEA.[26] Federal regulations provide several factors to consider when determining whether a series of removals constitutes a pattern: (1) the similarity of the student's behavior in each incident; (2) the length of each removal; (3) the total amount of time the child is removed; and (4) the proximity of the removals to one another.[27] Thus, a single long-term removal or a series of short-term removals that form a pattern totaling more than ten

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21 In contrast to the IDEA, *see supra* note 17, Section 504 and the ADA encompass a broader definition of "disability," defined as an "impairment which substantially limits one or more . . . major life activities." 29 U.S.C. § 705(20)(B); 42 U.S.C. § 12102.

22 34 C.F.R. § 104.35(a).

23 *See* Off. for C.R., U.S. Dep't of Educ., Supporting Students with Disabilities and Avoiding the Discriminatory Use of Student Discipline Under Section 504 of the Rehabilitation Act of 1973, 14 (2022), https://www.ed.gov/sites/ed/files/about/offices/list/ocr/docs/504-discipline-guidance.pdf; Questions and Answers, *supra* note 14. Even without such guidance, students with 504 Plans often qualify for MDRs under 20 U.S.C. § 1415(k)(5)(B). If a child with a 504 Plan is suspended for longer than ten days, especially where previous behavioral concerns have been addressed, there may be an argument that the school district had "knowledge" of the disability as required under 20 U.S.C. § 1415(k)(5)(B).

24 *See, e.g.*, Ron J *ex rel.* R.J. v. McKinney Indep. Sch. Dist., Case No. 4:05-CV-257, 2006 WL 2927446 (E.D. Tex. Dec. 29, 2005) (MDR procedures required); Centennial Sch. Dist. v. Phil L. *ex rel.* Matthew L., 799 F. Supp. 2d 473, 479 (E.D. Pa. 2011) (Section 504 requires process "similar" to MDRs.). Notably, neither of these opinions cites *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) to support an agency interpretation of federal law, and therefore arguably such decisions are unaffected by the Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024).

25 34 C.F.R. § 300.536(a).

26 *Id*. § 300.536(a)(2).

27 *Id*.

school days result in a disciplinary change of placement that triggers the IDEA's heightened disciplinary protections.

Once a school district identifies the need for an MDR before disciplinary exclusion, the school district must conduct the MDR within ten days of the decision to change the student's placement.[28] The purpose of an MDR is to determine whether the student's behavior was directly and substantially related to the student's disability or whether it was a result of the school's failure to implement the student's IEP.[29] Prior to making a determination, the MDR participants must consider "all relevant information in the student's file, including the [student]'s IEP, . . . teacher observations, and any relevant information provided by the parent[]."[30] If the MDR's conclusion is that the behavior was related to the disability or caused by the "failure to implement the IEP," and is therefore a "manifestation," then in most cases the student must be immediately returned to the student's original placement.[31]

There are several notable exceptions to the general rule that a student must be immediately returned to their previous placement upon a finding that the conduct was a manifestation. First, regardless of whether the behavior is a manifestation, school districts can place a child in an interim alternative educational setting like an alternative school or program for up to forty-five school days when the conduct involves possession of a weapon; knowing possession or use of illegal drugs or sale or soliciting the sale of controlled dangerous substances; or the infliction of serious bodily injury as defined under federal law.[32] Students placed in an interim alternative educational setting under these exceptions must continue to receive FAPE.[33] Also, a student does not have to be returned to their previous placement, even if the behavior was determined to be a manifestation, if the parents and the school district agree to a change of placement.[34] Finally, a school district may request a due process hearing to seek an order for a change in placement from a hearing officer if it believes that maintaining the current placement of a child whose behavior is a manifestation of their disability is substantially likely to result in injury to the child or to others.[35] If the hearing officer agrees that there is a substantial likelihood of injury to the child or others, the hearing officer may order the child

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28 20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(e)(1).

29 *Id*.

30 *Id*.

31 20 U.S.C. § 1415(k)(1)(F); 34 C.F.R. § 300.530(e)-(f).

32 20 U.S.C. § 1415(k)(1)(G); 34 C.F.R. § 300.530(g).

33 20 U.S.C. § 1415(k)(1)(D); 34 C.F.R. § 300.530(d)(i).

34 20 U.S.C. § 1415(k)(1)(F)(iii); 34 C.F.R. § 300.530(f)(2).

35 20 U.S.C. § 1415(k)(3)(A); 34 C.F.R. § 300.532(a). It is important to note that this provision does not give the school district unilateral authority to use alleged safety concerns to keep the child out of school while the hearing is pending if the behavior was determined to

placed in an interim alternative educational setting for up to forty-five school days.[36]

Notwithstanding any of these exceptions, if the behavior is determined to be a manifestation, then the school district must conduct a Functional Behavioral Assessment (FBA) or review the student's FBA if one already exists.[37] An FBA is a scientific, data-driven process used by schools "to understand the function and purpose of a child's specific, interfering behavior and factors that contribute to the behavior's occurrence and non-occurrence for the purpose of developing effective positive behavioral interventions, supports, and other strategies to mitigate or eliminate the interfering behavior."[38] At the same time, the school district must conduct or review a Behavior Intervention Plan (BIP) if the behavior is determined to be a manifestation.[39] A BIP is a part of a student's IEP and is "designed to address behaviors that interfere with the child's learning or that of others and behaviors that are inconsistent with school expectations."[40] The BIP focuses on strategies for eliminating target behaviors and teaching the student appropriate replacement behaviors. A student's BIP "generally describes the behavior that inhibits the child from accessing learning and the positive behavioral interventions and other strategies that are to be implemented to reinforce positive behaviors and prevent behavior that interferes with the child's learning and that of others."[41] As the name implies, the primary purpose of a BIP is to identify interventions, not punishments, to help the student. Finally, if the behavior was a manifestation by virtue of being a direct result of the school's failure to implement the IEP, then the school must take steps to ensure that the identified deficiencies are remedied immediately.[42]

Parents who disagree with an MDR determination have appeal rights.[43] After an initial MDR determination by the school, parents can appeal by filing an expedited special education due process hearing request. The special education due process hearing requires formal adjudication before an independent hearing officer, typically appointed by the state educational authority.[44] If the parents are dissatisfied with

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be a manifestation and the special circumstances involving weapons, drugs, or serious bodily injury are not present.

36 20 U.S.C. § 1415(k)(3); 34 C.F.R. § 300.532(b)(2)(ii).

37 20 U.S.C. § 1415(k)(1)(F)(i); 34 C.F.R. § 300.530(f)(1)(i).

38 Questions and Answers, *supra* note 14, at 52.

39 20 U.S.C. § 1415(k)(1)(F)(ii); 34 C.F.R. § 300.530(f)(1)(ii).

40 Questions and Answers, *supra* note 14, at 51.

41 *Id.*

42 34 C.F.R. § 300.530(e)(3).

43 20 U.S.C. § 1415(k)(3).

44 *Id.* § 1415(f); 34 C.F.R. § 300.511(b). For cases involving MDRs, the case should be granted expedited status, which means that the hearing must occur within twenty school days

the hearing officer's decision, they may then appeal to state or federal court.[45]

MDR procedures are meant to prevent school districts from imposing a disciplinary change of placement for behavior that is a manifestation of the student's disability. In fact, failure to adhere to the necessary procedures is the most common basis for overturning the disciplinary exclusion of a student with disability.[46] However, a lawyer is often necessary to vindicate the rights of students facing disciplinary changes in placement, as identifying and remedying procedural failures in the MDR process is challenging. This poses access to justice issues for parents unable to afford or retain counsel. Further, empirical data shows that parents attempting to appeal the substance of an MDR determination—for example, a parent who files a due process hearing to contest the school's determination that a child's outburst at school was unrelated to a mental health disorder—face a number of significant barriers. Scholars have routinely critiqued MDR determinations as inherently subjective, as they lack measurable or objective metrics to determine the relationship between behavior and disability.[47] In most cases, parents who appeal the decision of an MDR team have only data and information collected by the school district to show the relationship between the child's disability and the behavior.[48] The school district may fail to collect information to show this connection or may manipulate the data collected; as a result, independent expert testimony in MDRs is critical for parents—but also can be expensive.[49] Even with experts, parents face impediments to overturning the substance of an MDR determination, where the standard for review on substance is highly deferential.[50]

In sum, the IDEA contains substantial procedural mechanisms to address and prevent the exclusion of students with disabilities from school. However, beyond individual legal representation for parents who can afford to retain counsel,[51] the limited efficacy of these procedures in the IDEA informs the need for advocates to go beyond individual

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of the filing of the due process complaint, and the decision must be issued within ten school days after the hearing. 20 U.S.C. § 1415(j)(4)(B).

45 *Id.* § 1415(g)-(i).

46 Raj, *supra* note 7, at 860, 884-85.

47 Justin P. Allen & Matthew T. Roberts, *Practices and Perceptions in Manifestation Determination Reviews*, 53 Sch. Psych. Rev. 31, 36-38 (2021); Raj, *supra* note 7, at 890; *see also* Schmitz, *supra* note 5, at 164 (citing the same).

48 Raj, *supra* note 7, at 890; *see also* Schmitz, *supra* note 5, at 164 (citing the same).

49 Raj, *supra* note 7, at 890-98.

50 Maria M. Lewis, *Navigating the Gray Area: A School District's Documentation of the Relationship Between Disability and Misconduct*, 120 Tchrs. Coll. Rec. 1, 6, 24 (2018); *see also* Schmitz, *supra* note 5, at 164 (citing the same).

51 For further examples of how to combat exclusion through the MDR procedures, see, e.g., Michele Scavongelli & Marlies Spanjaard, *Succeeding in Manifestation Determination*

due process hearings to contest, more broadly, the exclusion of students with disabilities. In the next sections, we will explore the possibility of seeking such systemic relief through litigation.

II. The Scope and Harm of Exclusionary Discipline in Disguise

Disproportionate exclusionary discipline is one of many barriers that students with disabilities—and especially students of color with disabilities—face in accessing a public education. In its most recent data release, the Civil Rights Data Collection (CRDC) reported that students with disabilities were significantly more likely to be suspended, expelled, or referred to law enforcement than their non-disabled peers. While only approximately 17% of public school students have identified disabilities, students with disabilities represented almost a third—29%—of K-12 students who received out-of-school suspensions in the 2020-2021 school year.[52] Students with disabilities also accounted for 21% of expulsions.[53]

Students of color likewise account for disproportionate numbers of suspended and expelled students,[54] with Black students in particular routinely disciplined for normal childhood behavior and pushed out of school.[55] Approximately one in five Black children with a disability, for example, was suspended from school in the 2013-2014 school year, according to the U.S. Department of Education.[56] And once excluded, children of color with disabilities missed more instructional time. According to the U.S. Commission on Civil Rights, Black students with disabilities who are suspended or expelled lose approximately seventy-seven more days of instruction compared to White students with disabilities.[57]

Research further shows that students with disabilities face other disturbing forms of exclusionary and unsafe situations at school, including bullying, harassment, seclusion, and restraint. Of the 42,500

Reviews: A Step-by-Step Approach for Obtaining the Best Result for Your Client, 10 U. Mass. L. Rev. 278 (2015).

52 *Civil Rights Data Collection (CRDC) for the 2020-2021 School Year*, U.S. Dep't of Educ., Office for C.R., https://www.ed.gov/laws-and-policy/civil-rights-laws/crdc/crdc-2021-school-year (last visited Aug. 6, 2025) [hereinafter CRDC 2020-2021 School Year].

53 *Id*.

54 *See generally* U.S. Comm'n on C.R., *supra* note 3, at 10 ("Students of color as a whole, as well as by individual racial group, do not commit more disciplinable offenses than their White peers – but black students, Latino students, and Native American students in the aggregate receive substantially more school discipline than their White peers and receive harsher and longer punishments than their White peers receive for like offenses.").

55 *Id*. at 35-36.

56 *Id*. at 7-8.

57 *Id*. at 11.

allegations of harassment or bullying reported by students in the 2020-2021 school year, the CRDC reported that 9% were based on disability.[58] Meanwhile, students with disabilities account for 81% of students physically restrained beyond a temporary touching or holding of a child's wrist, arm, shoulder, or back for the purpose of escorting a child to a safer location; 32% of students handcuffed, or otherwise mechanically restrained; and 75% of kids who are secluded in an unmonitored—and potentially even locked—room.[59]

Over time, these disparities have persisted, even as overall rates of suspensions and expulsions have decreased. In the 2017-2018 school year, suspension rates fell to 5%—a significant decrease from prior years, even if still higher than rates of suspension in the 1970s and early 1980s.[60] Nevertheless, advocates, including the authors of this Article, remain concerned about exclusionary and discriminatory discipline, especially with the potential increased behavioral needs of students returning to in-person instruction in the 2020-2021 school year after the COVID-19 pandemic. Preliminary data following students' return to school has shown exclusionary discipline approaching or exceeding pre-pandemic levels in some places.[61] Furthermore, while school districts should be applauded for responding to criticism of "zero tolerance" policies by developing programs in restorative justice, Positive Behavior Interventions and Supports (PBIS), conflict resolution, and other non-punitive disciplinary approaches, some school districts emphasize these policies to the exclusion of accurately reporting the number of students they actually remove from the educational environment.[62] In other words, incoming suspension and expulsion data fails to account for the prevalence of informal removals and punitive alternative placements often made through the IEP process that are often framed as alternatives to traditional exclusionary discipline.

This trend is highly concerning, as the undocumented nature of the exclusionary discipline leaves advocates and policymakers without a reliable data set upon which to base advocacy. Nonetheless, advocates and clinicians repeatedly facing exclusionary discipline in disguise have started to sound the alarm and collect data and information about this phenomenon.[63] This section details an emerging picture of these

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58 CRDC 2020-2021 School Year, *supra* note 52.

59 *Id.*

60 Peggy Nicholson, *Too Young to Suspend: Ending Early Grade School Exclusion by Applying Lessons from the Fight to Increase the Minimum Age of Juvenile Court Jurisdiction*, 11 Belmont L. Rev. 334, 349-50 (2024).

61 *Id*. at 350.

62 *See infra* Section II(A) (discussing prevalence of informal and other undocumented disciplinary removals).

63 *See* Nat'l Disability Rts. Network, Out from the Shadows: Informal Removal of Children with Disabilities from Public Schools 12 (2022), https://www.ndrn.org/

removals gleaned from advocates, including categories of removals and their harms.

A. Types of Exclusionary Discipline in Disguise

Discipline in disguise comes in many shapes and sizes. As described below, strategies can include informal removals, as well as the stealth use of the IEP process to place special education students in alternative settings that are actually disciplinary in nature. This section will review each of these forms of undocumented disciplinary action.

Informal removals are perhaps the most well-known variety of discipline in disguise. As defined by the U.S. Department of Education, an informal removal is an "action taken by school personnel in response to a child's behavior that excludes the child for part or all of the school day, or even an indefinite period of time" without invoking federal and state law disciplinary procedures.[64] Informal removals can include extended "cool downs" or "time-outs," certain types of in-school suspensions, and short formal removals that turn into longer removals marked as absences because the return of the student is conditioned on the holding of a parent conference or obtaining a mental health evaluation. A common form of informal removal is when a school calls a parent to pick up their child during the school day to avoid having to suspend the child or so that the child can "cool down." In other instances, a school district may issue a one-day suspension but not allow the student to return until the parent attends a conference with the principal or school disciplinarian. If the parent has transportation issues or an inflexible work schedule that prevents them from attending the conference immediately, what is documented as only a one-day suspension may result in a removal that lasts for several days. Another type of informal removal is the use of "time out" rooms for extended periods of the day, or in-school suspensions in which students are isolated from their peers and denied the opportunity to access services and instruction. If a school district relies heavily on the use of informal removals, then many students could experience a pattern of removals that exceed ten cumulative days of removal in a school year without ever receiving the benefit of having an MDR.

In addition to these informal removals, another form of undocumented disciplinary exclusion involves disguising removals to alternative schools or programs as IEP placements when, in reality, the placement is a disciplinary consequence for alleged behavior that

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wp-content/uploads/2022/01/Out-from-The-Shadows-1.pdf [hereinafter Nat'l Disability Rts. Network].

64 Questions and Answers, *supra* note 14, at 52.

violates a code of student conduct. These alternative settings might take the form of a remote learning program, a homebound placement, a shortened-day schedule, a traditional alternative school, a public day program, or some other type of special school or program for students with behavioral needs.[65] In most states, school districts can use the power of the district representative on the IEP team to change a special education student's placement to a more restrictive setting even if the parent does not agree with the rest of the IEP team.[66] In such jurisdictions, school district members of the IEP can remove a student for behavior without a formal suspension or expulsion by describing the alternative setting as an appropriate IEP placement constituting the student's least restrictive environment. While such placements may discuss the student's need for behavioral support, they typically avoid any reference to the change as a disciplinary consequence in the IEP. Although a parent can file a request for due process to invoke the student's "stay-put" rights to prevent the involuntary placement, many parents are unaware of this right; do not have the wherewithal to file and litigate a due process proceeding on their own; or are unable to procure assistance from advocates or legal representatives to do so.[67]

In other states, parents must consent for an IEP change in placement to take effect if it is purportedly non-disciplinary in nature.[68] In these jurisdictions, school districts must request and win a due process hearing to implement a non-disciplinary change of placement if the parent does not agree to it. While a school district initiating due process proceedings for these purposes is rare in most places, there are many subtle (and not-so-subtle) ways that school districts can coerce or manipulate parents into indicating agreement to a change in placement and waiving due process protections, despite a lack of meaningful

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65 Although not reviewed as case studies in this essay, advocates have also brought class action litigation targeting public day programs for special education students in recent years. *See, e.g.*, S.S. *ex rel.* S.Y. v. City of Springfield, 332 F. Supp. 3d 367 (D. Mass. 2018); E.F. v. City of New York, No. 2021-cv-00419, 2022 WL 4644633 (E.D.N.Y. Sept. 30, 2022). These cases raise disability claims exclusively, without the due process claims discussed herein.

66 *See* Letter from Off. of Special Educ. Programs & Rehab. Servs. to Dorothy M. Richards 1 (Jan. 7, 2010), *in* 55 IDELR 107 (2010) ("If the [IEP] team cannot reach agreement, the public agency must determine the appropriate services and provide the parents with prior written notice of the agency's determinations regarding the child's educational program and of the parents' right to seek resolution of any disagreements by initiating an impartial due process hearing or filing a State complaint.").

67 *See* 20 U.S.C. § 1415(j); 34 C.F.R. § 300.518.

68 For example, California requires informed consent from the parent for IEPs and prohibits school districts from unilaterally implementing components of an IEP for which a parent has not provided informed consent. *See* Cal. Educ. Code § 56346. Other states, such as Massachusetts, require a parent signature on the IEP prior to implementation, with an option on the signature block giving parents the opportunity to accept or reject, in whole or in part, proposed changes. *See* 603 Mass. Code Regs. § 28.00 (2025).

consent. Some districts may describe the proposed alternative setting as a therapeutic placement to the parent even though the student would have less access to specialized instruction and services than in their current placement.[69] Additionally, a school district might directly or indirectly threaten harsher consequences by describing voluntary placement in an alternative setting as the only way to avoid a longer involuntary alternative placement or other disciplinary action.[70] Similarly, some districts describe agreeing to a change in placement as the only way to avoid marring the student's record with a formal expulsion that could jeopardize a student's future employment or higher education prospects.[71] In some instances, school districts might even imply or state explicitly that agreement to a change in placement is the only way to prevent referral to law enforcement.[72] Used separately or in combination with one another, these kinds of tactics can vitiate consent when parents are made to feel that they have no choice but to indicate their agreement to the change in placement.[73]

Unfortunately, where informal and IEP-based disciplinary removal practices are undocumented as disciplinary action, research on the number of children excluded from school through these convert mechanisms is sparse. Partners at national Protection and Advocacy (P&A) agencies, which provide legal representation and investigate abuse and neglect of persons with disabilities, report that hundreds if not thousands of students with disabilities are illegally informally removed from school each year.[74] The P&A agencies further describe that, among the discipline cases they receive, these informal forms of school removal are among the most common school discipline issues they encounter—perhaps even more common than routine suspensions and expulsions.[75] These informal removals evade data reporting requirements to state education departments and the CRDC, and, as a result, more accurate estimates of the broad impact of informal and other undocumented removals present significant challenges.

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69 *See, e.g.*, Second Amended Complaint, P.A. *ex rel.* A.A. v. Voitier, No. 2:23-cv-02228 (E.D. La. May 20, 2024). For further information about this litigation see *infra* Section IV(B).

70 *Id*.

71 *Id*.

72 *Id*.

73 Nat'l Disability Rts. Network, *supra* note 63, at 12 ("Among other concerns, parents and LEAs are frequently not in a place of equal bargaining power, with both parties equally aware of the child's rights and the legal options available.").

74 *Id*. at 7.

75 *Id*. at 17.

B. Harms from Exclusionary Discipline in Disguise

The harm that results from these exclusionary removals is well-documented, even if the suspension or expulsion is not. Students suspended or expelled are more at risk of school avoidance, academic failure, grade repetition, behavior problems, substance use, dropout, and court involvement.[76] Further, the research suggests that even one suspension can trigger these negative outcomes. For example, the Council of State Governments Justice Center has found a single suspension makes a student three times more likely to enter the juvenile justice system the following school year.[77] The harms, moreover, are not confined to the students excluded. Indeed, there is little justification for exclusionary discipline practices where research shows suspensions produce little to no benefits for educational achievement at the school level.[78] A significant body of research also shows that exclusionary disciplinary practices are potentially counterproductive, with a harmful impact on school culture. In fact, some studies suggest that, paradoxically, schools that discipline students more frequently are also more dangerous.[79]

For students with undocumented suspensions or expulsions, the "informality" of the exclusion can cause further harm. As previously noted, informal removals are by definition not recorded or reported as such to the school district, state, and federal government. Without this data, policymakers lack key information to develop evidence-based approaches to improve student behavior and climate. At the individual level, the informal exclusion can still come at severe cost not only to the children who are missing out on key instructional time, but also to their parents and caregivers, even if framed by the school as a less punitive alternative to a suspension or expulsion. Take, for example, the informal removals effectuated by schools calling a parent to pick up their child due to disruptive behaviors. These calls typically occur in the middle of the day—at times, according to advocates, under threat of a child being arrested, or of a report of child abuse and neglect being made to

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[76] U.S. Comm'n on C.R., *supra* note 3; *see also* Rusell J. Skiba et al., *Parsing Disciplinary Disproportionality: Contributions of Infraction, Student, and School Characteristics to Out-of-School Suspension and Expulsion*, 51 Am. Educ. Rsch. J. 640 (2014) (summarizing social science research on the impact of suspensions and expulsions).

[77] U.S. Comm'n on C.R., *supra* note 3, at 77 (citing Tony Fabelo et al., Breaking Schools' Rules: A Statewide Study of How School Discipline Relates to Students' Success and Juvenile Justice Involvement, Justice Center The Council of State Governments & Public Policy Research Institute xii (2011), https://csgjusticecenter.org/wp-content/uploads/2020/01/Breaking_Schools_Rules_Report_Final.pdf).

[78] Daniel J. Losen, Nat'l Educ. Pol'y Center, Discipline Policies, Successful Schools, and Racial Justice 10 (2011).

[79] *Id*. at 10-11.

the state child welfare agency, if the parent refuses to pick up the child immediately; meanwhile parents who respond to such threats by leaving work midday may risk losing their jobs and plunging their families into financial destitution, which of course can further harm their children.[80] More generally, advocates report that children sent home from school in this way can get caught in a cycle of "rejection and removal" that can "silently kill" educational opportunity.[81] And these feelings can be compounded when schools send the message that they are singling out students because of race, ethnicity, national origin, and/or disability, according to the U.S. Commission on Civil Rights.[82]

Even if the informal removal results in placement at an alternative school or homebound instruction, rather than total exclusion from the school environment, severe educational deprivation can persist. Research suggests that even well-intentioned efforts to provide educational services in a school building—such as an alternative, therapeutic, or public day school, as opposed to virtual, online, or home instruction—can severely damage children's educational opportunities. At alternative schools serving children who are expelled or suspended from school, or are at risk of educational failure, educational options are often severely limited, and most schools fail to graduate one-third or more of their students.[83] Nearly two-thirds of alternative schools offer one or no science classes, and nearly one-third of alternative schools offer only one or no math classes.[84] At disciplinary alternative schools, the academic options can be even more limited.[85] In some states, these alternative schools may be framed as "therapeutic" programs;[86] in this way, disciplinary alternative schools can parallel the harms of some traditional public day school programs, discussed further below. These harms are not abated just because the school may frame the setting as a therapeutic placement, rather than as a consequence of a suspension or expulsion.

While day school programs may in some circumstances be necessary to provide FAPE to students with disabilities,[87] a number of purportedly

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[80] *See infra* note 116 (describing litigation in Boston challenging such practices).

[81] Nat'l Disability Rts. Network, *supra* note 63, at 7.

[82] U.S. Comm'n on C.R., *supra* note 3.

[83] Gov't Accountability Off., GAO-20-310, K-12 Education: Information on How States Assess Alternative School Performance 12-17, https://www.gao.gov/assets/gao-20-310.pdf.

[84] *Id*. at 12.

[85] *Id*.

[86] *See* Second Amended Complaint, P.A. *ex rel.* A.A. v. Voitier, No. 2:23-cv-02228 (E.D. La. May 20, 2024). For further information about this litigation, see *infra* Section IV(B).

[87] *See, e.g.*, Groton-Dunstable Regional Sch. Dist., 107 LRP 31892 (May 31, 2007) (ordering school district to reimburse parent for private day school tuition after school district failed to provide FAPE); Saddleback Unified School District, 23 IDELR 477 (Nov. 20, 1995) (holding that private day school placement for students with learning disabilities

"therapeutic" programs exacerbate children's mental health condition rather than improve it. In these schools, typically public day schools for students with identified disabilities, schools routinely inform students with behavioral disabilities and their caregivers that services, if they desire them, are only available at a single school: the purportedly "therapeutic" school. At some of these programs, advocates have reported the provision of few academics and the use of dangerous physical restraints, inappropriate forced isolation, threatened and repeated arrests, and suspensions for minor offenses.[88]

Students on homebound, shortened-day, or remote instruction due to their behavior can, in some circumstances, face similar deprivations. Certainly, homebound or remote placements may be required as accommodations to "aid" or "prevent medical harm to" immunocompromised students, or to address other health and disability-related issues.[89] Homebound, shortened-day, and remote placements for behavior reasons, however, can produce severe inequities. P&A agencies report the education provided to students with disabilities on homebound instruction for behavioral reasons typically is, at best, anemic, and, at worst, non-existent. For example, advocates report that children with disabilities receive remote or homebound instruction with less than ten hours of tutoring *per week*, and often even these minimal services are not provided or made available.[90] The educational deprivation that results can be even more extreme than for a general education student, where students with disabilities placed on homebound instruction tend to have highly specialized academic needs and, therefore, without intensive supports and services, may have even less capacity than other students to learn independently. Further, as is abundantly clear after the COVID-19 pandemic, homebound or remote instruction places burdens on parents and caregivers by requiring them to fill in as educators and paraeducators. Even if the child can access education remotely or from home, and has the necessary support to do so, children in remote or homebound programs may be deprived of other important school

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was required to provide FAPE where district had previously denied FAPE in a public school setting).

88 Class Action Complaint, Doe v. Pasadena, No. 2:16-CV-00984 (Feb. 11, 2016) (alleging that, at a public day school in California, "[r]ather than fostering learning, the emphasis at [the public day school] is on behavior control using drastic methods including dangerous physical restraints, inappropriate forced isolation, threatened and repeated arrests, and suspensions for minor offenses"); Class Action Complaint, Parent/Professional Advocacy League v. Springfield, No. 3:14-cv-30116 (June 27, 2014) (same in Springfield, Massachusetts); Class Action Complaint, E.F. v. N.Y. City Dep't of Educ., No: 1:21-cv-00419 (Jan. 26, 2021) (same in New York City); *see also* Second Amended Complaint, P.A. *ex rel.* A.A. v. Voitier, No. 2:23-cv-02228 (E.D. La. May 20, 2024) (disciplinary alternative school claiming to be therapeutic in Louisiana).

89 34 C.F.R. § 300.114(a); 34 C.F.R. § 300.115.

90 Nat'l Disability Rts. Network, *supra* note 63, at 15.

experiences and services, including access to free and reduced-priced lunch, school-based health clinics, libraries, playgrounds, extracurricular sports and arts activities, and, more generally, a sense of belonging.[91]

The continued persistence of practices excluding students with disabilities from school is disheartening, as they represent precisely the variety of educational exclusion the IDEA was designed to address.[92] Further, it can be challenging for legislative reforms to target discipline in disguise, where the behavior is often designed precisely to evade existing statutory protections against unlawful student exclusion. In this area of school discipline reform, then, litigation, including under the IDEA, is of particular importance. The disciplinary protections of the IDEA, and their potential pitfalls as purely individual advocacy tools, will be explored further in the next section.

III. Barriers to Challenging Discipline in Disguise Systemically

It is not uncommon for school district officials to view the procedures described above as overly burdensome and unduly restrictive of the district's ability to maintain order in its schools. Faced with the possibility of having to keep a perceived "problem student" in a regular school setting, some school districts will go to great lengths to avoid having to implement the IDEA's disciplinary safeguards.

Individual advocacy for students and families subjected to these kinds of practices is resource- and fact-intensive. For example, the greatest challenge to advocacy around informal removals is often proving a sufficient number of undocumented removals. If a parent has not kept a detailed log of undocumented removals, the parent can establish a pattern of undocumented removals through phone records, text messages, and emails. Similarly, establishing that IEP placements are disguised exclusionary discipline—or that there was no valid consent to a change in placement—is a highly fact-specific inquiry generally established through testimony and documentary evidence submitted as part of a state administrative complaint or at a due process hearing. Such fact-intensive advocacy is not only resource-intensive, as previously noted, but also may not dissuade school districts from engaging in the same illegal practices against other students—or perhaps even the client in future incidents. In other words, school districts may find it acceptable to lose or settle individual cases where the vast majority of parents and students affected by these disciplinary practices will not have the means to challenge the district's actions.

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91 *Id*.

92 *See generally A History of the Individuals with Disabilities Education Act*, U.S. Dep't of Educ., https://sites.ed.gov/idea/IDEA-History#1975 (last visited Aug. 6, 2025).

Thus, advocates have turned to systemic litigation, despite increasingly frustrating results. Some of the common barriers to such litigation, including limitations on class action relief and extensive exhaustion requirements, will be explored further below, such that these barriers may be avoided in future litigation strategies.

A. The Short-Lived Promise of Federal IDEA Class Actions

The promise of systemic reform litigation has been a central component of the IDEA since its inception.[93] Indeed, the drafters of the IDEA[94] relied heavily on two class action cases, *Pennsylvania Association for Retarded Children (P.A.R.C.) v. Commonwealth of Pennsylvania*[95] and *Mills v. Board of Education of the District of Columbia*,[96] in drafting the law.[97] In the legislative history, Congress anticipated similar litigation to enforce the rights of children with disabilities after the law's enactment.[98] This expectation was fulfilled by numerous class actions seeking to challenge schoolwide policies discriminating against students with disabilities in the 1980s and onwards, including, for example, lawsuits challenging the number of instructional days per year students with disabilities could receive;[99] denial of education to students with disabilities in juvenile detention centers;[100] and automatic, non-individualized placement of students with disabilities in particular placements.[101]

Then, in 2011, the Supreme Court decided *Wal-Mart v. Dukes*,[102] which upended systemic reform class action litigation of all kinds, including special education class-action litigation.[103] In *Wal-Mart*, a class of a million and a half female employees challenged sex discrimination in salary and promotion decisions under Federal Rule of Civil Procedure 23(a). The requirements to certify a class under Rule 23(a) are fairly

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93 Joshua M. Anderson, *Idea Class Action Lawsuits and Other Means of Challenging Systemic Violations of Federal Special Education Law*, 15 Tenn. J.L. & Pol'y 224, 229 (2021) (discussing class action background of IDEA); Mark C. Weber, *Idea Class Actions After* Wal-Mart v. Dukes, 45 U. Tol. L. Rev. 471, 476 (2014) (discussing class action litigation relevant to the IDEA).

94 Originally, the IDEA was called the Education for All Handicapped Children Act of 1975. *See* EAHCA, Pub. L. No. 94-142, 89 Stat. 773 (1975).

95 334 F. Supp. 1257 (E.D. Pa. 1971); 343 F. Supp. 279 (E.D. Pa. 1972).

96 348 F. Supp. 866 (D.D.C. 1972).

97 Anderson, *supra* note 93, at 229 (citing Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773, (1975)).

98 *Id.* (reviewing IDEA legislative history on class actions).

99 Weber, *supra* note 93, at 475-77 (citing Battle v. Pennsylvania, 629 F.2d 269, 280 (3d Cir. 1980)).

100 *Id*. (citing Andre H. *ex rel.* Lula H. v. Ambach, 104 F.R.D. 606, 613 (S.D.N.Y. 1985)).

101 *Id*. (citing Roncker *ex rel.* Roncker v. Walter, 700 F.2d 1058, 1064 (6th Cir. 1983)).

102 131 S. Ct. 2541, 2551 (2011).

103 Weber, *supra* note 93, at 481-85.

straightforward: (1) that the class is so numerous that individual joinder is not practicable; (2) that there are questions of law or fact common to the class; (3) that the claims or defenses of the representative parties are typical of those of the class; and (4) that the representative parties will fairly and adequately protect the class's interest. The Supreme Court held, in *Wal-Mart*, that the second requirement, commonality, requires that the harm must "be of such a nature that it is capable of classwide [sic] resolution—which means that determination of its truth or falsity will resolve an issue that is central to . . . the claims in one stroke."[104]

Shortly after *Wal-Mart*, courts began applying the new Rule 23(a) commonality standards to systemic reform litigation on behalf of students with disabilities.[105] Since then, IDEA class action litigation has faced significant barriers.[106] The IDEA is a statute that exists to combat a single, discriminatory approach to all students with disabilities, without regard for the needs of the individual child. Accordingly, substantive relief under the statute is usually individually tailored—take, for example, the most basic requirement of an "individualized" education program or IEP. Several scholars have noted that, while the IDEA requires individual remedies, common policies that disregard the unique, individual characteristics and needs of students with disabilities may nonetheless be ripe for post-*Wal Mart* class certification: especially where the remedy requested is not to afford individual consideration but to implement a single policy.[107] In other words, class action litigation that challenges failure to adhere to IDEA procedures, rather than failure to substantively provide education, remains more viable. However, separating procedure from substance can be challenging in this context.

Take, for example, the issue of MDRs. The requirement that an MDR take place is a procedural requirement under the IDEA; however, certain questions must be appropriately asked and answered: Is the behavior related to the child's disability? Did the school district implement the IEP? These requirements are substantive, and the result can be overturned in an individual special education due process hearing. This not only presents a commonality issue but also raises a separate issue: whether the lawsuit has been properly exhausted through the

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104 *Wal-Mart*, 131 S. Ct. at 2545.

105 Weber, *supra* note 93, at 481-91.

106 *Id*. (identifying post-*Wal-Mart* decisions where classes were decertified or not certified); *see also, e.g.*, Jamie S. v. Milwaukee Pub. Sch., 668 F.3d 481, 499 (7th Cir. 2012) (vacating a class certification order in an IDEA class action after *Wal-Mart*).

107 Claire S. Raj, *Rights to Nowhere: The Idea's Inadequacy in High-Poverty Schools*, 53 Colum. Hum. Rts. L. Rev. 409, 458 (2022) (describing several IDEA "class action lawsuits . . . able to leverage procedural claims to bring about significant substantive changes to school systems" since *Wal-Mart*).

special education due process procedures required by the IDEA.[108] The increasingly substantial procedural barriers posed by exhaustion, even for litigants who can satisfy the post-*Wal Mart* class action certification standard, are explored in the next section.

But first, a final note on the promise of class actions in this context in light of recent case law developments. Federal disability statutes such as the IDEA, Section 504, and the Americans with Disabilities Act (ADA) are not the only protections against discipline in disguise. Students also have procedural due process rights under the Fourteenth Amendment to the U.S. Constitution[109] and parallel state constitutional provisions.[110] Many state constitutions recognize a right to procedural due process before suspension or expulsion, based upon the U.S. Supreme Court decision in *Goss v. Lopez*. In *Goss*, the Supreme Court held that students have a property interest in education protected by the Due Process Clause, which cannot be removed without adherence to minimum procedures.[111] Some federal courts and circuits have interpreted this decision as applying only to "traditional" removals from the brick-and-mortar school building, permitting removals without due process of students to alternative schools, for example.[112] However, not

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108 T.R. v. Sch. Dist. of Phila., 458 F. Supp. 3d 274, 286 (E.D. Pa. 2020) ("Repeatedly, courts facing putative class actions claiming a systemic deficiency under IDEA have found that the commonality requirement of Fed. Rule Civ. P. 23(a) and the systemic exception to the exhaustion requirement often go hand in hand." (quoting T.R. *ex rel.* Galaraza v. Sch. Dist. of Phila., 458 F. Supp. 3d 274, 286 (E.D. Pa. 2020)).

109 Goss v. Lopez, 419 U.S. 565 (1975).

110 The scope and content of these constitutional due process protections varies by state and circuit. *See generally* E. J. Schopler, *Right of Student to Hearing on Charges Before Suspension or Expulsion from Educational Institution*, 58 A.L.R. 2d 903 (discussing cases which "discuss . . . whether a student is entitled to a hearing, or a formal hearing, before his suspension").

111 419 U.S. at 579.

112 *See, e.g.*, Swindle v. Livingston Par. Sch. Bd., 655 F.3d 386, 394 (5th Cir. 2011); Nevares *ex rel.* Nevares v. San Marcos Consol. Indep. Sch. Dist., 111 F.3d 25, 26 (5th Cir. 1997); *see also* S.J.W. *ex rel.* Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771, 779 (8th Cir. 2012) (finding no irreparable harm on a preliminary injunction motion where plaintiff attended an alternative school and "earned academic credit and stayed on track for graduation"). Note, even in the Fifth and Eighth Circuits, procedural due process claims may proceed based upon nontraditional, informal removals in some circumstances involving severe deprivations at an alternative or homebound setting, according to several district courts. Cole *ex rel.* Cole v. Newton Special Mun. Separate Sch. Dist., 676 F. Supp. 749, 752 (S.D. Miss. 1987), *aff'd*, 853 F.2d 924 (5th Cir. 1988) ("A student could be excluded from the educational process as much by being placed in isolation as by being barred from the school grounds."); Riggan v. Midland Indep. Sch. Dist., 86 F. Supp. 2d 647, 655 (W.D. Tex. 2000) (finding plaintiff raised a genuine fact issue as to whether alternative placement amounted to an effective deprivation of access to education "because [the student] was prohibited from participating in or benefitting from comments of his teacher and peers"); *see also* Gentry v. Mountain Home Sch. Dist., No. 3:17-CV-3008, 2018 WL 2145011, at *10 (W.D. Ark. May 9, 2018) ("The Court believes [plaintiff] has raised a genuine, material question of fact as to whether completing the last few months of his senior year at the [alternative educational setting] . . . would have been significantly different from or inferior to the education he would have received at Mountain Home

all federal courts and circuits adhere to this interpretation of *Goss*,[113] and advocates have put forth arguments to distinguish those precedents.[114] Moreover, state constitutions contain their own procedural due process provisions that may protect against such removals,[115] and states may also have statutes with even more robust protections against removals of any

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High School. There is evidence in the record that the [alternative placement] did not offer many, if any, of the courses [plaintiff] was taking during his last semester at Mountain Home High School, and that it did not offer certain classes [plaintiff] needed to take, not simply to graduate, but to graduate and attend the colleges to which he had been provisionally accepted."); Engele v. Indep. Sch. Dist. No. 91, 846 F. Supp. 760, 765 (D. Minn. 1994) (rejecting defendants' argument that "because homebound instruction was offered and schoolwork was sent home to [plaintiff], any deprivation of [plaintiff's] right to public education was *de minimis*").

[113] Betts *ex rel.* Betts v. Bd. of Educ. of City of Chi., 466 F.2d 629, 633 (7th Cir. 1972) (requiring procedural due process protections where an alternative school placement was "tantamount to expulsion"); Everett v. Marcase, 426 F. Supp. 397, 400 (E.D. Pa. 1977) ("In the present cases, the School District has argued that a lateral transfer, even if for disciplinary reasons, unlike a suspension, deprives a pupil of no property right. The evidence presented at the hearings, as well as common knowledge of urban school systems, refutes such argument."). Other circuits have left open the possibility for due process claims less explicitly. *See* Laney v. Farley, 501 F.3d 577, 584 (6th Cir. 2007) (holding that an in-school suspension, even where students are provided with educational instruction, can violate due process when it "so isolates a student from educational opportunities that it infringes her property interest in an education"); Buchanan v. City of Bolivar, 99 F.3d 1352, 1359 (6th Cir. 1996) (noting possible availability of a procedural due process claim with "some showing that the education received at the alternative school is significantly different from or inferior to that received at [the] regular public school"); Zamora *ex rel.* Zamora v. Pomeroy, 639 F.2d 662, 670 (10th Cir. 1981) (suggesting a viable due process claim where education at an alternative program is so "inferior [as] to amount to an expulsion from the educational system"); *see also* C.B. *ex rel.* Breeding v. Driscoll, 82 F.3d 383, 389 (11th Cir. 1996) (citing *Zamora*, 539 F.2d at 670, with approval). Beyond these circuit court opinions, several district courts have applied the same approach. *See, e.g.*, *Gentry*, 2018 WL 2145011, at *10 ("The Court believes [plaintiff] has raised a genuine, material question of fact as to whether completing the last few months of his senior year at the [alternative educational setting] . . . would have been significantly different from or inferior to the education he would have received at Mountain Home High School. There is evidence in the record that the [alternative placement] did not offer many, if any, of the courses [plaintiff] was taking during his last semester at Mountain Home High School, and that it did not offer certain classes [plaintiff] needed to take, not simply to graduate, but to graduate and attend the colleges to which he had been provisionally accepted."); E.S. *ex rel.* D.K v. Brookings Sch. Dist., No. 4:16-CV-04154, 2018 WL 2338796, at *4-5 (D.S.D. May 23, 2018) (finding that the plaintiff was deprived of a property interest where "she was not assigned work in her regular classes and did not receive any instruction from a certified teacher"); Edwards v. MiraCosta Coll., No. 3:16-CV-1024, 2017 WL 2670845, at *5 (S.D. Cal. June 20, 2017) (finding plaintiff adequately pled a deprivation of a liberty interest where he "alleged that the suspension ha[d] negatively affected his grade point average, resulted in him being placed on academic probation, and caused him to be ineligible for academic scholarships").

[114] *See, e.g.*, Memorandum in Opposition to 12(c) Motion for Judgment on the Pleadings at 13-16, P.A. *ex rel.* v. Voitier, No. 23-cv-2228 (E.D. La. Mar. 26, 2024), Dkt. No. 25.

[115] Danielle Weatherby, *Student Discipline and the Active Avoidance Doctrine*, 54 U.C. Davis L. Rev. 491, 518 (2020) ("[S]tate constitutions' guarantees of free, public education are recognized property interests protected under the procedural prong of the Due Process Clause.") (citation omitted); *see also* Karen Swenson, *School Finance Reform Litigation: Why Are Some State Supreme Courts Activist and Others Restrained?*, 63 Alb. L. Rev. 1147, 1148

kind.[116] These federal and/or state procedural due process claims can be pursued independently or in conjunction with disability discrimination claims.

Before or around the time *Wal-Mart v. Dukes* was decided, cases challenging informal removals on procedural due process grounds typically sought class certification.[117] The class certification issues plaguing systemic reform IDEA litigation, however, also impact class claims for pure procedural due process violations, especially for discipline in disguise. This is because school districts do not typically pursue only one method to evade procedural requirements for exclusion of students with disabilities, but rather employ multiple methods to evade MDR and other hearing requirements[118]—for example, by coercing a "voluntary placement" of a child at an alternative school after a disciplinary incident, and then using disciplinary incidents at the alternative school to justify the child's indefinite placement in an alternative setting.[119] Where students may be sent home from school or placed at an inferior or segregated school in multiple different ways within a single school district, commonality issues can prevent successful class certification. And if the proposed class includes a disability subclass with disability discrimination claims, IDEA exhaustion issues may persist. We thus address next the exhaustion barriers to systemic reform litigation in this context.

B. Adding Exhaustion to Injury: Non-Class Procedural Barriers to IDEA Systemic Reform Litigation

Similarly, in the early years of IDEA systemic reform litigation,[120] the exhaustion requirement was not unduly restrictive, with courts

(2000) ("All fifty state constitutions contain provisions guaranteeing a right to free public education."); *id*. at 1148 n.9 (collecting state constitution provisions).

116 *See generally* U.S. Dep't of Educ., Compendium of School Discipline Laws and Regulations for the 50 States, District of Columbia and the U.S. Territories (2024), https://safesupportivelearning.ed.gov/sites/default/files/discipline-compendium/School%20Discipline%20Laws%20and%20Regulations%20Compendium.pdf. For an effective example of due process claims challenging informal removals under state statutes that offer strong protections, see Greater Bos. Legal Servs., Greater Boston Legal Services Clients and Boston Public Schools Reach Settlement to End Unlawful Suspensions of Kindergartners, First, and Second Graders (Nov. 16, 2018), https://dev-gbls.pantheonsite.io/sites/default/files/2018-11/gbls-press-release-bps-school-discipline-settlement-11-16-2018.pdf (last visited Aug. 15, 2025).

117 *See, e.g.*, Verified Second Amended Complaint – Class Action, Harris v. Atlanta Indep. Sch. Sys., No. 08-cv-1435 (Mar. 31, 2009), ECF No. 147; *see also infra* Section IV(A)(1)(b) (discussing *P.B. v. White*, No. 2010-cv-04049 (E.D. La. Mar. 20, 2012)).

118 *See* Section II(A) (discussing informal and other undocumented removal methods used within and between different school districts).

119 *See, e.g.*, Second Amended Complaint, P.A. *ex rel.* A.A. v. Voitier, No. 2:23-cv-02228 (E.D. La. May 20, 2024).

120 Weber, *supra* note 93, at 485 (describing the pre-*Wal Mart* "period in which class action challenges to special education systems in school districts around the United States were relatively frequent" (citation omitted)).

recognizing extensive exceptions to the statute's exhaustion requirement. Although the text of the IDEA does not include exhaustion exceptions,[121] the legislative history of the statute allows for such lenience.[122] Initially, these exhaustion exceptions were widely recognized by courts, and included: (1) futility; (2) systemic violations; (3) inadequacy; and (4) severe or irreparable harm.[123] These exceptions are judicially created and may be categorized differently in some cases.[124] Nevertheless, in 1988, the Supreme Court in *Honig v. Doe* recognized the futility and inadequacy exceptions, when it noted that "parents may bypass the administrative process where exhaustion would be futile or inadequate."[125]

Until 2017, these exceptions meant exhaustion did not pose a major barrier to systemic relief for students with disabilities,[126] even

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121 For an explanation of exhaustion exceptions included in the IDEA legislative history, see Bari Britvan, Comment, *Idea's Futility Exception: On the Verge of Futility?*, 172 U. Pa. L. Rev. 1361, 1371 (2024).

122 *See id*. at 1400; *see also* J.S. *ex rel.* N.S. v. Attica Cent. Schs., 386 F.3d 107, 114 (2d Cir. 2004) ("[T]he futility exception has been applied in cases of alleged systemic violations, and . . . such cases are often class actions."); J.G. *ex rel.* Mrs. G. v. Bd. of Educ. of Rochester City Sch. Dist., 830 F.2d 444, 447 (2d Cir. 1987) ("[C]laims of generalized violations . . . lend themselves well to class action treatment."); T.R. *ex rel.* Galarza v. Sch. Dist. of Phila., 458 F. Supp. 3d 274, 286 (E.D. Pa. 2020) ("Repeatedly, courts facing putative class actions claiming a systemic deficiency under IDEA have found that the commonality requirement of Fed. Rule Civ. P. 23(a) and the systemic exception to the exhaustion requirement often go hand in hand." (quoting T.R. *ex rel.* Galarza v. Sch. Dist. of Phila., 458 F. Supp. 3d 274, 286 (E.D. Pa. 2020)).

123 *See generally* Richard P. Shafer, *Exhaustion of State Remedies Under § 615 of the Education for All Handicapped Children Act (20 U.S.C.A. § 1415),* 62 A.L.R. Fed. 376 (1983) (describing cases that "discuss[] whether a party must exhaust the available state administrative remedies before commencing an action" under section 615 of the EACHA).

124 *See, e.g.*, Richard Marsico, *A New Hope:* Perez v. Sturgis Public Schools *Opens the Courthouse Doors to Children with Disabilities*, 11 Belmont L. Rev. 210, 216 (2024) (describing five common exceptions to IDEA exhaustion, including that (1) "the plaintiff is challenging a statute, practice, or procedure that the plaintiff alleges is contrary to law"; (2) "the relief plaintiff seeks is not available through the IDEA's administrative process"; (3) "the administrative process is inadequate to provide a forum to adjudicate the plaintiff's claims"; (4) "resort to the administrative process would cause the child severe or irreparable harm"; and (5) "the school district did not give notice of the availability of the IDEA's administrative process.").

125 484 U.S. 305, 327 (1988).

126 Most courts considering the issue have consistently held that exhaustion is not jurisdictional under the IDEA. Ellen Saideman & Michele Scavongelli, IDEA/ADA/Section 504 & Recent Supreme Court Decisions—Perez, Cummings & Loper Bright at the Conference of Council of Parent Attorneys and Advocates (Mar. 8, 2025). Four circuits have explicitly reached this conclusion. *See* K.I. v. Durham Pub. Sch. Bd. of Educ., 54 F.4th 779, 792 (4th Cir. 2022); Payne v. Peninsula Sch. Dist., 653 F.3d 863, 867 (9th Cir. 2011) (noting that the "IDEA's exhaustion requirement is a claims processing provision that IDEA defendants may offer as an affirmative defense"), *overruled on other grounds by* Albino v. Baca, 747 F.3d 1162 (9th Cir. 2014); Mosely v. Bd. of Educ. of the City of Chi., 434 F.3d 527, 533 (7th Cir. 2006)("A failure to exhaust is normally considered to be an affirmative defense . . . and we so see no reason to treat it differently here [under the IDEA]."); N.B. *ex rel.* D.G. v. Alachua Cnty. Sch. Bd., 84 F.3d 1376, 1379 (11th Cir. 1996) ("The exhaustion requirement . . . is not jurisdictional . . . .").

if class certification did.[127] However, following the Supreme Court's decision in *Fry v. Napoleon*,[128] the exhaustion requirement began to pose more formidable barriers in systemic reform cases.[129] The *Fry* decision requires exhaustion of administrative remedies whenever the "gravamen" of the complaint constitutes a denial of FAPE under the IDEA.[130] To assist courts and advocates in making an assessment of the complaint's "gravamen", the Supreme Court proposes the following questions: "First, could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was *not* a school—say, a public theater or library? And second, could an *adult* at the school—say, an employee or visitor—have pressed essentially the same grievance?"[131] In other words, if the claim arguably relates to the provision of education, then exhaustion is required—and courts, after *Fry*, have interpreted this ruling strictly to require exhaustion even where relief at the administrative level was, in fact or effectively, unavailable.[132]

In 2023, the Supreme Court dispelled the most restrictive of those interpretations in *Perez v. Sturgis Public Schools*.[133] This lawsuit was brought by Miguel Luna Perez, who is deaf, and attended public school in the Sturgis School District from age nine to twenty.[134] When

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127 *See, e.g.*, Jose P. v. Ambach, 669 F.2d 865 (2d Cir. 1982) (upholding class certification despite argument that plaintiffs failed to exhaust administrative remedies in case challenging New York State and city education authorities' failure to provide FAPE); Ass'n for Retarded Citizens in Colo. v. Frazier, 517 F. Supp. 105 (D. Colo. 1981) (pursuing a class action on behalf of all children with disabilities aged five to twenty-one living at state home and training school).

128 580 U.S. 154 (2017).

129 The *Fry* decision has, however, opened the door to federal lawsuits, without exhaustion barriers, for issues such as harassment, abuse, unreasonable force, and other kinds of discrimination that do not concern schooling. *See, e.g.*, McIntyre v. Eugene Sch. Dist., 976 F.3d 902 (9th Cir. 2020) (disability-based harassment and discrimination); K.G. v. Sergeant Bluff- Luton Cnty. Sch. Dist., 244 F. Supp. 3d 904, 923 (N.D. Iowa 2017) (use of force against student); K.L. v. Scranton Sch. Dist., No. 3:19-cv-0670, 2020 WL 42723 (M.D. Pa. Jan. 3, 2020) (discrimination unrelated to schooling); K.D. *ex rel.* K.J. v. St. Joseph Sch. Dist., 18-6113-CV, 2019 WL 267743 (W.D. Mo. Jan. 18, 2019) (abuse).

130 580 U.S. at 154.

131 T. B. *ex rel.* Bell v. Nw. Indep. Sch. Dist., 980 F.3d 1047, 1052 (5th Cir. 2020) (citing *Fry*, 137 S. Ct. at 756).

132 *See* Raj, *supra* note 107, at 418 (noting, before *Perez* and after *Fry*, that courts frequently dismissed cases seeking systemic or programmatic remedies, on the basis that "because students could have sought individual remedies, the exhaustion process is not futile" (emphasis omitted)).

133 143 S. Ct. 859 (2023).

134 *Id*. at 862.

the district announced that it would not permit Mr. Perez to graduate, he and his family filed an administrative complaint with the Michigan Department of Education alleging violations of the IDEA, Title II of the ADA, and Section 504.[135] The state Administrative Law Judge dismissed the ADA and Section 504 claims for lack of jurisdiction.[136] The parties then reached a settlement agreement as to the IDEA claims.[137] Thereafter, Perez pursued his dismissed ADA and Section 504 claims for money damages in federal court.[138] In its opinion, the Supreme Court unanimously held that the IDEA exhaustion requirement does not preclude an ADA lawsuit in such circumstances, *i.e.*, where the relief sought (money) is unavailable under the IDEA.

Following *Perez*, whether a disability discrimination claim must be exhausted through the administrative procedures available under the IDEA is subject to a two-part inquiry: (1) Is the gravamen of the complaint a denial of a FAPE under the IDEA?; and (2) Is the "relief sought" through the claim available under the IDEA? If the answer to the first question is no, then, under *Fry*, the ADA claims may proceed without administrative exhaustion. If the answer to the second question is no, exhaustion is not required. However, what relief is "unavailable" under the IDEA beyond money damages remains to be defined. *Perez* only involved money damages. While claims for money damages such as those in *Perez* now clearly may bypass special education due process hearings, requests for systemic injunctive or declaratory relief are less clear, even though statewide or district-wide injunctive relief is not a remedy "available" under the text of the IDEA.[139] The consensus of lawyers and scholars is that *Perez* should open the courthouse doors again to IDEA class action litigation; nonetheless, such promise has so far failed to realize.[140]

The reasons *Perez* has not opened the door to special education class action litigation are manifold. First, the Supreme Court noted in *Perez* that claims seeking money damages in combination with other relief available under the IDEA "may find [the] request for equitable relief barred or deferred if [the plaintiff] has yet to exhaust [due process proceedings]."[141] This language creates some ambiguity about whether exhaustion is required for systemic, as opposed to individual, equitable

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135 Perez *ex rel.* Perez v. Sturgis Pub. Schs., No. 1:18-CV-1134, 2019 WL 8105854, at *2 (W.D. Mich. June 20, 2019), *report and recommendation adopted*, No. 1:18-CV-1134, 2019 WL 6907138 (W.D. Mich. Dec. 19, 2019).

136 *Id*.

137 *Id*.

138 *Id*.

139 Britvan, *supra* note 121, at 1386-1400.

140 *See* Marsico, *supra* note 124, at 235-37.

141 *Perez*, 143 S. Ct. at 865.

and declaratory relief. Further, money damages in the special education context can involve highly individualized inquiries, which creates a commonality problem.[142] Besides those evidentiary problems,[143] the Supreme Court recently decided in *Cummings v. Premier Rehab Keller, P.L.L.C.* that emotional distress damages are no longer available under Section 504 of the Rehabilitation Act.[144]

Because Section 504 and the ADA are often interpreted similarly by courts,[145] emotional damages under the ADA—a typical form of damages for educational violations—are now uncertain.[146] Accordingly, unless state or federal law provide otherwise, the sole reliable damages options that remain are generally limited to lost economic opportunity; lost vocational damages/earning capacity; medical expenses; and nominal damages.[147]

Further, although a special education due process hearing officer does not have jurisdiction to issue systemic injunctive and declaratory relief for an entire school district or state,[148] school districts may have an argument that the administrative forum is still required, even if it is time-consuming, inefficient, and ineffective to resolve the issue at hand.[149] For example, systemic failures to provide MDR meetings prior

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142 T.R. *ex rel.* Galarza v. Sch. Dist. of Phila., 4 F.4th 179, 190 (3d Cir. 2021) (noting that "the commonality requirement of Fed. Rule Civ. P. 23(a) and the systemic exception to the exhaustion requirement often go hand in hand" (quoting T.R. *ex rel.* Galarza v. Sch. Dist. of Phila., 458 F. Supp. 3d 274, 286 (E.D. Pa. 2020)).

143 In some good news, the question of whether plaintiffs must prove intentional discrimination in these kinds of cases was recently settled in favor of parents and students when the Supreme Court unanimously held that the ADA and Rehabilitation Act do not require children with disabilities "to satisfy a more stringent standard of proof than other plaintiffs to establish discrimination under the acts." A.J.T. *ex rel* A.T. v. Osseo Area Schs., Indep. Sch. Dist. No. 279, 145 S.Ct. 1647, 1658-59 (2025).

144 142 S. Ct. 1562, 1576 (2022).

145 Because they share a similar framework, Title II of the ADA and Section 504 generally "are interpreted *in pari materia*." Frame v. City of Arlington, 657 F.3d 215, 223 (5th Cir. 2011); *see also* Pace v. Bogalusa City Sch. Bd., 403 F.3d 272, 287-88 (5th Cir. 2005) (collecting cases).

146 Britvan, *supra* note 121, at 1379 ("[F]ollowing *Cummings v. Premier Rehab Keller PLLC*, in which the Supreme Court held that emotional distress damages are no longer available under Section 504 of the Rehabilitation Act, the availability of such damages under the ADA is uncertain."); *see also* Saideman & Scavongelli, *supra* note 126 (citing Doherty v. Bice, 101 F.4th 169, 174 (2d Cir. 2024), *cert. denied*, 220 L. Ed. 2d 144, 174 (Oct. 15, 2024)) (noting that the Second and Eleventh Circuits have already explicitly held, since *Cummings*, that emotional distress damages are unavailable under Title II of the ADA); A.W. v. Cowenta Cnty. Sch. Dist., 110 F. 4th 1309 (11th Cir. 2024), *petition for cert. filed*, No. 24-523 (Nov. 5, 2024)). Compensatory and punitive damages are not available under the IDEA, *see Perez*, 143 S. Ct. at 863-64, and punitive damages are not recoverable in suits under Section 504 at Title II of the ADA. *See* Barnes v. Gorman, 536 U.S. 181, 189 (2002).

147 Saideman & Scavongelli, *supra* note 126.

148 Erin B. Stein, Comment, *The Individuals with Disabilities Education Act (Idea): Judicial Remedies for Systemic Noncompliance*, 2009 Wis. L. Rev. 801, 814 (2009).

149 *See, e.g.*, Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1308-09 (noting "the mere fact the complaint is structured as a class action seeking injunctive relief, without more, does not excuse exhaustion" and holding that "even though injunctive relief is unavailable, the

to disciplinary alternative school placement could be resolved, at the due process hearing level, with an individual award to a child providing return to their original school placement and compensatory services; this ruling, however, does nothing to prevent the child from being immediately transferred back to the disciplinary alternative school again after the due process hearing officer's decision.

In theory, the futility exception to IDEA exhaustion would account in such circumstances for the unsuitability—even if not unavailability—of relief at the due process hearing level.[150] However, the Court declined, in *Perez*, to address "whether IDEA's exhaustion requirement is susceptible to a judge-made futility exception."[151] Although the Supreme Court has recently affirmed the existence of a futility exception in other statutory contexts, this statement in *Perez* renders the future of IDEA reform litigation uncertain in cases not involving monetary relief.[152] Unless a class action complaint involves a request for money damages,[153] exhaustion of administrative remedies may still be required, including resource-intensive investigations and months of attorney and client time, burden, and cost.[154]

Some courts have even held that exhaustion of individual named plaintiffs is insufficient to remove exhaustion barriers to special education class action litigation—instead, exhaustion of the *entire class* is required. In *S.S. ex rel. S.Y. v. City of Springfield*, for example, lawyers filed a special education due process hearing request and fully exhausted administrative remedies of the lead plaintiff prior to filing

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administrative process has the potential for producing the very result plaintiffs seek, namely, statutory compliance").

150 Britvan, *supra* note 121, at 1386-1400; *see also id*. at 1373 (discussing the futility exception, which has been utilized as an umbrella exception "for a variety of situations in which administrative relief is more or less unlikely") (internal citations omitted).

151 *Perez*, 143 S. Ct. at 859; Kayla Bridgham & Janet R. Decker, *An Analysis of Idea Administrative Exhaustion One Year Post*-Perez, 425 Ed. Law Rep. (West) 1, 17-18 (Aug. 29, 2024) ("[T]he *Perez* Court also declined to rule on whether the exhaustion requirement under 20 U.S.C. § 1415 includes a futility exception, allowing plaintiffs to forgo exhaustion when it would be futile.").

152 *Compare* A.G. *ex rel.* Gibson v. Bd. of Educ. of the Winton Woods City Sch. Dist., 632 F. Supp. 3d 771, 779 (S.D. Ohio 2022) ("Sixth Circuit law does not apply a futility exception to the IDEA exhaustion requirement."), *with* R.Z. *ex rel.* B.Z. v. Cincinnati Pub. Schs., 1:21-cv-140, 2021 WL 3510312, at *4 (S.D. Ohio Aug. 10, 2021) (analyzing whether plaintiff could show that exhaustion was futile because the Sixth Circuit *Perez* majority, despite holding that there is no futility exception, also noted that even if the exception existed, it would not apply).

153 *See, e.g.*, Powell *ex rel.* J.T.A. v. Sch. Bd. of Volusia Cnty., 86 F.4th 881, 883 (11th Cir. 2023) (seeking damages for learning loss from COVID-19 related school closures).

154 *See* Raj, *supra* note 107, at 415 ("The high cost of attorneys and experts, unequal bargaining power between parents and schools, and a hesitancy to disrupt a child's school-based relationships all undermine low-income families' ability to leverage the IDEA.").

a federal class action complaint.[155] The class action complaint was traditional systemic reform litigation, targeted to combat the "informal removal" of students with disabilities to a public day school program that was segregated and educationally inferior, in violation of the ADA.[156] Students at the public day school had mental health disabilities, and, while the school claimed to be therapeutic, plaintiffs documented use of dangerous physical restraints, forced isolation in padded rooms, suspensions for minor offenses, and repeated arrests and law enforcement involvement.[157] The remedy sought was purely injunctive relief.[158] After filing the lawsuit in 2014, more plaintiffs—who had not exhausted administrative remedies—were added to the suit.[159] With these new plaintiffs, counsel moved for class certification well after the lawsuit began, and after significant motion practice and discovery had been conducted.[160]

Following this significant investment of resources, the district court denied Plaintiffs' motion for class certification, despite the exhaustion of the original plaintiff to the litigation. The Court held that because "the members of the proposed class may achieve a remedy through an IDEA administrative hearing related to the claims raised[,] . . . the IDEA exhaustion requirement applies to individual members of the proposed class."[161] The fact that one named plaintiff had exhausted was inadequate to resolve this issue, and, in fact, created typicality and adequacy barriers to class certification, in the Court's view.[162] Further, the Court found the futility exception to be inapplicable.[163]

In light of this ruling, some have concluded that, going forward, courts may require classes to be limited only to parties who have previously exhausted.[164] Where resources to bring individual due process complaints are extremely limited, particularly for low-income families, the limitation of class certification to exhausted parties would be almost

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155 318 F.R.D. 210, 222 (D. Mass. 2016), *aff'd*, Parent/Pro. Advoc. League v. City of Springfield, 934 F.3d 13 (1st Cir. 2019).

156 Complaint, S.S. *ex rel.* S.Y. v. City of Springfield, 24-cv-30116 (June 27, 2014).

157 *Id*.

158 *Id*.

159 S.S. v. City of Springfield, 318 F.R.D. 210, 216-19 (D. Mass. 2016).

160 *See* Memorandum in Support of Motion to Certify Class, S.S. *ex rel.* S.Y. v. City of Springfield, 24-cv-30116 (July 15, 2014), Dkt. No. 157; *see also* Order, S.S. *ex rel.* S.Y. v. City of Springfield, 24-cv-30116 (May 16, 2016), Dkt. No. 140 (expert report on class certification related scheduling order).

161 S.S. *ex rel.* S.Y. v. City of Springfield, 318 F.R.D. 210, 224 (D. Mass. 2016).

162 *Id.*

163 *Id*.

164 Trevor Matthews, Note, *The Most Integrated Setting: Olmstead, Fry, and Segregated Public Schools for Students with Disabilities*, 102 Minn. L. Rev. 1413, 1439 (2018) (reviewing prospects for future systemic reform IDEA litigation).

preclusive to special education systemic reform litigation.[165] To combat this risk, several scholars have made persuasive arguments that such rulings should be revisited for systemic reform litigation after *Perez*,[166] or otherwise overruled on the basis of other administrative law precedent concerning exhaustion and exhaustion exceptions.[167] Such litigation, however, may be risky, time-consuming, and resource-intensive.

The resource constraint issues are, unfortunately, heightened for some advocates, rather than mitigated, following *Perez*. Interlocutory appeals of class certification decisions in systemic reform cases challenging systemic policies, rather than money damages, may raise novel, non-frivolous questions that require time-intensive analysis on appeal.[168] Where most lawyers bringing systemic reform cases on behalf of students with disabilities in school are non-profit or legal aid lawyers with limited resources, the risk of bringing such lengthy and perilous litigation may outweigh the benefits. The same is true for clinicians.

Further, even if class certification succeeds and class-wide relief is granted, the limited legal resources of the legal aid organization will go towards monitoring enforcement of a class-wide consent decree for years.[169] The resources required to monitor such consent decrees weaken these organizations' abilities to bring new suits—which is a particular issue when advocates seek to combat compliance evasion methods that may, and do, change over time. This type of long-term monitoring work is particularly unsuitable for law clinics, where it can span years of clinic students and may detract from the focus on individual special education representation by student practitioners.

IV. Emerging Systemic Advocacy Strategies to Combat Discipline in Disguise

Faced with these procedural and practical barriers, the prospects for traditional, class action reform litigation targeting informal removals—whether brought under the IDEA, Section 504, or the ADA—appear limited. As a result, many advocates and parents of children with disabilities find themselves at a loss to address the issue of discipline in disguise. Therefore, there is a growing and urgent need for alternative

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165 *See* Raj, *supra* note 107, at 415.

166 Marsico, *supra* note 124, at 237.

167 Matthews, *supra* note 164, at 1439 (reviewing arguments to revisit *S.S.* based on IDEA legislative history, employment law, and Social Security exhaustion rules); *see also* Abbe Petuchowski, Note, *Beyond the Point of Exhaustion: Reforming the Exhaustion Requirement to Protect Access to Idea Rights in Juvenile Facilities*, 56 Colum. J.L. & Soc. Probs. 41, 87 (2022) (discussing habeas-based potential basis to affirm the exhaustion exceptions).

168 Fed. R. Civ. P. 23(f) (standard for interlocutory class action certification appeals).

169 *See, e.g.*, *infra* Section IV(A)(1)(b) (discussing New Orleans special education class action litigation).

litigation strategies to address these forms of exclusionary discipline systemically.

Thankfully, in some parts of the country, advocates have already begun to devise alternatives, which may be highly successful models for clinical education and representation. The case studies below provide other methods to combat exclusionary discipline in disguise that creatively address the procedural barriers previously analyzed, including exhaustion and class certification, and render systemic litigation more accessible to law students. These case studies include illustrations of the use of formal dispute resolution mechanisms under the IDEA to obtain relief on behalf of multiple students, as well as multi-plaintiff, non-class systemic litigation. While the post-*Perez* possibilities for class action IDEA systemic reform litigation are promising, these advocacy strategies ultimately may be less risky and more resource-efficient, for advocates both inside and outside the law school setting. While it is the authors' hope that the previous section provides a blueprint for clinicians and litigators who, by necessity or design, litigate the limits of *Perez* in systemic relief cases, the alternative, often more accessible, advocacy strategies described in the case studies below must also be considered, especially for law clinics, legal aid organizations, non-profits, and the law firms that support them with *pro bono* legal counsel. Even without testing the limits of the exhaustion doctrine of the IDEA, the case studies have obtained effective relief for students in school districts where informal removals and other forms of exclusionary discipline in disguise are a persistent and pervasive issue.

A. Using IDEA Formal Dispute Resolution Mechanisms to Obtain Systemic Relief

For a child with a disability not receiving appropriate education in school, the administrative procedures of the IDEA usually represent the first line of defense. There are two administrative procedures that states accepting funds under the IDEA are required to maintain: impartial due process hearings[170] and state administrative complaints.[171] Typically, these processes are pursued by individual parents or their advocates, seeking relief on behalf of individual children. However, nothing in the IDEA or its implementing regulations limits these dispute resolution processes to a single plaintiff at a time. As explored in the case studies below, advocates have pursued options to bring multi-student administrative

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[170] *See generally* 20 U.S.C. 1415(f) (impartial due process hearings).

[171] *See generally* Perry A. Zirkel, *State Laws for Due Process Hearings Under the Individuals with Disabilities Education Act*, 38 J. Nat'l Ass'n Admin. L. Judiciary 3 (2018) (providing an overview of state law incorporation of the IDEA's requirements).

state complaints and due process complaints with remarkably positive results.

1. Multi-Plaintiff Due Process Hearing Requests

The impartial due process hearing is an adjudicative process to determine whether a child received FAPE, including the opportunity for parents and the school district to put on evidence, present witnesses and expert witnesses, obtain a record of the proceedings, and retain counsel.[172] It includes an extensive prehearing phase, including a complaint, a response, a resolution session, prehearing disclosure, and the opportunity for mediation. The process is overseen by impartial hearing officers who are not employees of the State Education Agency or school district employees.[173] In some states, hearing officers are appointed from lists maintained by the state education agency and are not necessarily attorneys.[174] In others, the hearing officer is an Administrative Law Judge from the state office or agency in charge of administrative proceedings.[175] Following the hearing, the hearing officer issues a decision about whether FAPE was provided.[176] Thereafter, a party may appeal, first to a review officer in the select states that choose to have a second administrative tier, and then to state or federal court.[177] These administrative procedures must be exhausted before filing any suit in state or federal court under the IDEA,[178] if, as discussed in the previous section, so required under *Perez* and *Fry*.[179]

Testing the limits of such administrative procedures to adjudicate systemic policy issues, the case studies below brought multi-student due process complaints. While neither case was resolved in Plaintiffs' favor by a due process hearing officer, both presented the opportunity to obtain a written decision denying any available policy relief; opened the possibility for mediation and settlement discussions prior to filing federal litigation; and laid the groundwork for future federal litigation by attempting to exhaust the claims at issue. While each case study was filed before or around the time of *Wal-Mart,* which may have increased

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172 20 U.S.C. § 1415(f), (h); *see also* Zirkel, *supra* note 171, at 3 (describing features of special education due process hearings).

173 20 U.S.C. § 1415(f)(3)(A). The hearing officer, with some limited exceptions, is not directly involved in these enumerated prehearing steps. Zirkel, *supra* note 171, at 8 (citing 20 U.S.C. § 1415(c)(2)(D)).

174 Joy Markowitz, Eileen Ahearn, & Judy Schrag, Nat'l Ass'n State Dirs. Special Educ., Inc., Dispute Resolution: A Review of Systems in Selected States 14 (2003).

175 *See* La. Admin. Code tit. 28, pt. XLIII, § 151(C).

176 20 U.S.C. § 1415(f)(3)(d).

177 20 U.S.C. § 1415(g), (i)(2)(A); *see also* Zirkel, *supra* note 171, at 3.

178 20 U.S.C. § 1415(*l*).

179 For further discussion of the IDEA exhaustion requirements, see *supra* Section III(B).

the odds of settlement, this unconventional practice remains worth considering today as a method to either exhaust, or, at a minimum, gain evidence relevant to combatting an exhaustion defense.

a. Jefferson Parish Public Schools

In 2005, the SPLC and the Southern Disability Law Center filed a single due process hearing request on behalf of three students with mental health disabilities and a class of all similarly situated students enrolled in the Jefferson Parish Public School System.[180] The complainants filed this novel due process proceeding not against the school district in which the students were enrolled but against the State Education Agency (SEA) for Louisiana. Since class certification is not available at the administrative level, the complainants filed as a multi-plaintiff due process proceeding. Such a multi-plaintiff approach to administrative remedies, however framed, can go far in obtaining systemic relief, even without systemic federal litigation as part of a class action, as explained below.

The *James T. v. LDOE* "class" due process complaint in Jefferson Parish alleged that the Louisiana Department of Education (LDOE) had failed to fulfill its supervisory and enforcement responsibilities under the IDEA by failing to appropriately monitor and impose corrective action on the local school district for its years of systemic violations of the rights of students with mental health disorders, described under the IDEA as an exceptionality of "Emotional Disturbance."[181] Specifically, the complaint alleged that students with mental health disorders were being suspended and expelled to alternative schools at significantly higher rates than their non-disabled peers; were not being provided with MDRs prior to disciplinary changes in placement; and were not receiving FBAs, BIPs, and related services like social work or counseling to address their behavioral needs.[182] Addressing the issue of IEP placements as discipline in disguise, the complaint also alleged that the district was violating the right to education in the least restrictive environment by using completely segregated self-contained classes to warehouse

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[180] For a copy of the due process complaint, ensuing settlement agreement, and Corrective Action Plan for *James T. et al v. LDOE* (*James T.* case), see *Jefferson Parish Special Education*, SPLC, https://www.splcenter.org/seeking-justice/case-docket/jefferson-parish-special-education (last visited Aug. 6, 2025).

[181] *See* Request for an Administrative Due Process Hearing Involving James T., Glenn D., Keneisha S. and a Class of All Similarly Situated and Treated Students with Emotional Disturbance in the Jefferson Parish Public School System at 2-7, James T. v. LDOE, 45-H-41 (Feb. 1, 2005), https://www.splcenter.org/wp-content/uploads/2009/07/Jefferson_Parish_Complaint.pdf. For regulatory and statutory definitions of "Emotional Disturbance" under the IDEA, see 34 C.F.R. § 300.8(a)(1); *see also* 20 U.S.C. § 1401(3)(A)(i) (describing disability categories under the IDEA).

[182] *Id*.

students identified with the exceptionality of Emotional Disturbance. The segregated classrooms, operating as special schools within a regular school, were effectively impossible for students with behavioral needs to "earn their way" out of, as the program required, due to a lack of supports and discriminatory exit criteria.[183] The central theory of the complaint in *James T.* was that the LDOE had violated its duty of general supervision as the SEA to ensure that all education programs for children with disabilities in the state administered by local education agencies meet the educational standards of the SEA, including those related to disciplinary procedures, as required by 42 U.S.C. § 1412 (a) (11) and 34 C.F.R. §§ 300.149 and 300.600.[184] The LDOE had long been aware of the district's non-compliance around issues like education in the least restrictive environment and disproportionate school discipline rates through its compliance monitoring, but had never imposed corrective action on the school district.[185]

Counsel for the complainants were prepared to litigate the due process proceeding and, if necessary, appeal to federal district court after exhausting administrative remedies. LDOE, however, was willing to negotiate, and the *James T.* case ultimately resulted in a settlement agreement requiring appointment of a special master by LDOE over the local school district to oversee the implementation of the corrective action plan required by the settlement.[186] The settlement agreement required elimination of the district's policy or practice of using informal removals known as "Until Parent Conference" (UPC) or "Cool Off" suspensions with students classified as Emotionally Disturbed.[187] The special master was tasked with developing and implementing a central administrative tracking system for accurately recording the number of disciplinary referrals and removals to prevent informal or undocumented removals from being used.[188] It also required closure of the segregated self-contained classrooms, which students classified as having the exceptionality of Emotional Disturbance could rarely "earn their way" out of due to the structure of the points-based behavioral program used in the classrooms.[189] Corrective action also included development of a written policy requiring an MDR to be held prior to the commencement of any suspension resulting in a student with an exceptionality of Emotional Disturbance being removed for more than ten cumulative school days in a school year. The

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183 *Id.* at 4.

184 *Id*. at 7-8.

185 *Id.* at 6-7.

186 *See* Mediated Settlement Agreement ⁋⁋ 11-13, James T. v. LDOE, 45-H-41 (Aug. 2005), https://www.splcenter.org/wp-content/uploads/2009/07/Jefferson_Parish_Agreement.pdf.

187 *Id.* ⁋ 15.

188 *Id*.

189 *Id.* ⁋ 16.

special master was also responsible for developing a training protocol and program for conducting FBAs and drafting and implementing effective BIPs. Data supports that the changes implemented as the result of the settlement agreement benefitted all students, not just special education students with an exceptionality of Emotional Disturbance, as the out-of-school suspension rate for the district fell by nearly half from 29.26% during the 2002-2004 school year to 16.6% in 2007.[190]

b. New Orleans Public Schools

In the wake of Hurricane Katrina, New Orleans became the first all-charter school district in the nation. The transition to an all-charter system created difficulties for all but led to particularly challenging problems for special education students and their families. Each charter organization functioned as its own Local Education Agency (LEA) for special education purposes, with no centralized system for enrollment or provision of related services, and no real oversight of special education from the Orleans Parish School Board. Unsurprisingly to many advocates, this decentralized system led to special education students being denied admission to charter schools and being subjected to both formal and informal disciplinary exclusion without any due process protections or procedural safeguards.

To address exhaustion issues, in July of 2010, SPLC and the Loyola Law Clinic filed a class action due process complaint on behalf of thirteen Orleans Parish students with disabilities against LDOE and the Board of Elementary and Secondary Education (BESE).[191] The complaint alleged, among other things, that students with disabilities were being denied admission to the public charter schools in the district on the basis of their disabilities and that students with disabilities were being excluded for manifestations of their disabilities because of a failure to follow the procedural safeguards required by law.[192] The complaint relied not just on violations of the IDEA and its regulations, but also alleged as separate counts violations of the anti-discrimination provisions of Section 504 and the ADA.[193]

This multi-plaintiff complaint was filed before a federal class action lawsuit against LDOE and BESE in October 2010, and the Orleans

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190 *See* LDOE, *Suspensions and Expulsions*, https://louisianabelieves.com/docs/default-source/data-management/2007-2012-discipline-counts-and-rates-site-(district-state---public).xlsx?sfvrsn=e4b2831f_6 (last visited Aug. 6, 2025).

191 For the Due Process Complaint, the Federal Court Class Action Complaint, Class Action Settlement, and other documents associated with *P.B. v. Brumley*, see *P.B., et al. v. Brumley*, SPLC, https://www.splcenter.org/seeking-justice/case-docket/pb-et-al-v-brumley (last visited Aug. 6, 2025).

192 Due Process Complaint, E.A. v. La. Dep't of Educ. (July 28, 2010) https://www.splcenter.org/wp-content/uploads/2010/07/NOLAschools072810.pdf.

193 *Id*. at 56-58.

Parish School Board (OPSB) later intervened as a defendant.[194] Although the administrative hearings never concluded, the issues that arose from filing of the multi-plaintiff due process complaint allowed advocates to gather extensive evidence about the unavailability of the administrative proceedings to address their systemic concerns.

The later federal class action suit resulted in a consent judgment focused on independent monitoring in the areas of discipline, enrollment, identifying students with disabilities, and the provision of special education services.[195] The independent monitor was tasked with issuing compliance reports in each of those areas every 180 days.[196] The consent judgment and independent monitoring also spurred the development of a centralized process for handling enrollment, expulsion, and long-term suspension housed within the offices of NOLA Public Schools rather than the individual charter organizations; now, the NOLA Public Schools Student Hearing Office conducts all student disciplinary conferences and expulsion hearings for students with and without disabilities.[197] If a student with disabilities is recommended for expulsion, the Student Hearing Office reviews the record to ensure an MDR has been held in compliance with state and federal special education laws and regulations.[198] If a timely MDR has not been held, then the Student Hearing Office will not proceed with the expulsion hearing and will send the student back to their placement at the referring school.[199]

Although suspensions remain a problem, the implementation of this centralized disciplinary process led to a significant reduction in the number of expulsions, from a high of 440 expulsions in a school year to a low of sixty-seven expulsions several years after the entry of the consent judgment and creation of the Student Hearing Office.[200] The litigation also led to the creation of NOLA Public Schools guidance regarding informal suspensions, which requires charter schools within the district to accurately document all school removals for disciplinary purposes,

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194 *See* Complaint, P.B. v. Pastorek, No. 2:10-cv-04049 (Oct. 26, 2010), https://www.splcenter.org/wp-content/uploads/2010/11/pb_v_pastorek.pdf; *see also* Order, P.B. v. White, No. 2:10-cv-04049 (E.D. La. Mar. 20, 2012), Rec. Doc. 140.

195 *See* Consent Judgment, P.B. *ex rel.* Berry v. White, No. 2:10-cv-04049 (Mar. 25, 2015), https://www.splcenter.org/wp-content/uploads/2015/03/pb_order.pdf.

196 Jaclyn Zubrzycki, *New Orleans Schools Unite on Expulsions*, Educ.Week (Feb. 19, 2013), https://www.edweek.org/leadership/new-orleans-schools-unite-on-expulsions/2013/02.

197 *See* NOLA Pub. Schs., Student Hearing Off.: Manual for Disciplinary Procedures 22 (2024), https://nolapublicschools.com/documents/2024-2025-student-hearing-office-manual/download?p=1.

198 *Id.* at 28.

199 *Id.* at 26-27.

200 Wilborn P. Nobles III, *New Orleans Schools Seek Better Discipline Process as Expulsions Drop But Suspensions Rise*, NOLA.com (June 27, 2019), https://www.nola.com/news/education/new-orleans-schools-seek-better-discipline-process-as-expulsions-drop-but-suspensions-rise/article_b777475f-4267-5bff-8a97-8b6847af2692.html.

including students sent home for a portion of a school day, in order to properly facilitate the administration of procedural safeguards like MDRs.[201] The consent judgment remains in force nearly ten years since.[202]

2. Multi-Plaintiff Administrative Complaints

Another avenue of relief is federal and state administrative complaints. While these administrative complaints cannot independently satisfy IDEA exhaustion requirements,[203] they are resource-efficient options to seek systemic relief before costly and time-intensive litigation. At the federal level, complaints of disability discrimination can be filed with the U.S. Department of Education Office for Civil Rights (OCR)[204] and the U.S. Department of Justice (DOJ) Educational Opportunities section. OCR enforces civil rights laws prohibiting discrimination based on race, color, national origin, sex, disability, and age in schools that receive federal funding.[205] DOJ investigates similar discrimination complaints in schools.[206] While neither agency enforces the IDEA, both agencies have authority to investigate disability discrimination under the ADA and Section 504.

At the state level, the IDEA requires a parallel but distinct administrative complaint process. Amendments to the IDEA in 1992 require all state educational agencies to provide complaint procedures concerning IDEA violations to parents, community members, and others.[207] The precise content of these procedures is delegated to each state educational agency.[208] Generally, however, the process for

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201 *See* NOLA Pub. Schs., PB v. White – Undocumented Suspension Guidance (n.d.), https://noscihigh.org/files/galleries/Undocumented_Suspension_Guidance.pdf (last visited Aug. 4, 2025). The policy delineates that "[r]emovals that result in a student's absence for less than half of an academic day should be recorded as a half-day of removal; removals for more than half of a school day should be recorded as whole-day removals."

202 On February 12, 2025, the Defendants filed a motion to terminate the Consent Judgment. *See* Motion to Dismiss, P.B. v. White, No. 2010-cv-04049 (E.D. La. Feb. 12, 2025), Dkt. No. 466.

203 *See generally* Porter v. Bd. of Trs. of Manhattan Beach Unified Sch. Dist., 307 F.3d 1064, 1074 (9th Cir. 2002) ("Only § 1415 procedures are required to be exhausted prior to suit.").

204 This Article does not address the potential diminishment or closure of OCR under the Trump Administration. For more information on this topic, *see* Collin Binkley & Bianca Vázquez Toness, *In Trump's Quest to Close the Education Department, Congress and His Own Agency May Get in the Way*, Associated Press (Feb. 4, 2025), https://apnews.com/article/trump-education-department-executive-order-8519eaa465385cc13f4ddcae90228dd3.

205 *Your Rights*, Dep't of Educ. (Jan. 15, 2025), https://www.ed.gov/about/ed-offices/ocr/know-your-rights.

206 *Educational Opportunities Section*, DOJ: C.R. Div., https://www.justice.gov/crt/educational-opportunities-section (last visited Aug. 4, 2025).

207 Perry A. Zirkel, *State Laws and Guidance for Complaint Procedures Under the Individuals with Disabilities Education Act*, 368 West's Educ. Law Rep. 24, 25 (2019).

208 *Id*.

state investigations parallels the administrative procedures followed by federal agencies. States must provide an optional on-site school investigation; an opportunity for the complainant to provide additional information, including orally; an opportunity for the school district to resolve the complaint; a mutual opportunity for mediation; review of all relevant submitted information; and a written decision with an independent determination as to whether a school district violated a requirement of the IDEA.[209] These determinations address FAPE violations, and state educational agencies are permitted to award compensatory services and other prospective corrective action necessary to ensure compliance.[210]

While advocates often look to DOJ and OCR to combat a wide range of disability discrimination issues,[211] these state procedures should not be overlooked, especially with shifting priorities in discrimination enforcement between presidential administrations.[212] Even in Louisiana, multi-student administrative state complaints have been used to combat informal removals.[213]

For example, in 2006 and 2007, the SPLC and the Southern Disability Law Center sought to combat informal exclusions in three other large school districts in Louisiana besides Jefferson and Orleans Parish, with similar problematic disciplinary practices and elevated rates of exclusionary discipline against students with disabilities. As a result of the willingness shown by LDOE to impose systemic corrective action, the advocates opted to switch strategies and file systemic state administrative complaints, with multiple complainants, directly against the school districts for East Baton Rouge Parish, Caddo Parish, and Calcasieu Parish. The earliest multi-student administrative complaint was filed against the East Baton Rouge Parish Public School System and named two middle

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209 *Id*. (citing 30 C.F.R. § 300.151, 153).

210 30 C.F.R. § 300.151(b) (stating that the SEA remedies "must address (1) The failure to provide appropriate services, including corrective action appropriate to address the needs of the child (such as compensatory services or monetary reimbursement); and (2) Appropriate future provision of services for all children with disabilities"); *see also id.* § 300.152(b)(2) (describing "procedures for effective implementation . . . , if needed, including (i) Technical assistance activities; (ii) Negotiations; and (iii) Corrective actions to achieve compliance").

211 Anderson, *supra* note 93, at 248 ("OCR complaints remain an avenue for relief that has traditionally been a favored method by aggrieved parents or advocacy organizations.").

212 *See, e.g.*, Brooke Shultz, *Trump Shakeup Stops Most Work at Education Department's Civil Rights Office*, Educ.Week (Feb. 14, 2025), https://www.edweek.org/policy-politics/trump-shakeup-stops-most-work-at-education-departments-civil-rights-office/2025/02.

213 For examples of successful "class" administrative complaints in other contexts, see, for example, Allison Zimmer, La. Ctr. for Child.'s Rts., Learning Interrupted 31-32 (n.d.), https://lakidsrights.org/wp-content/uploads/2022/09/LEARNING-INTERRUPTED-email.pdf (last visited Aug. 6, 2025) (detailing two successful multi-student administrative complaints seeking to obtain compensatory education services and policy change for children in juvenile detention in Louisiana).

schoolers with Emotional Disturbance as complainants.[214] It alleged class-wide violations and sought systemic relief for the district's failure to follow IDEA disciplinary provisions related to holding MDRs, conducting FBAs, and developing and reviewing BIPs.[215] The complaint also detailed the frequent use of informal "cool-down" suspensions to evade required IDEA disciplinary procedures.[216] The parties agreed to mediation and entered into a mediation agreement that required the district to hire a behavioral consultant from a list provided by the complainants.[217] The main role of the behavioral consultant was to develop and implement a Positive Behavioral Support (PBS) training program and protocol for the district that included specific "strategies, objectives, and timelines" for reducing the long-term suspensions and expulsions of students with Emotional Disturbance and increasing their access to regular education classes.[218] The agreement also called for the development of a tracking system for accurately recording the number of disciplinary referrals and removals for the class of students.[219] The agreement further required a revision of the district's Discipline Handbook to include provisions expressly prohibiting informal removals including "cooling off" periods and requests for parent pickup of students.[220]

In December of 2006, advocates filed a similar "class" administrative complaint against the Caddo Parish Public School System on behalf of six middle and high school special education students with exceptionalities of Emotional Disturbance.[221] The complaint alleged system-wide failure to provide sufficient related services to address behavioral needs; educate students with Emotional Disturbance in the least restrictive environment; and follow IDEA disciplinary procedures related to MDRs, FBAs, and BIPs.[222] When negotiations with the school district stalled, parents' counsel began negotiating with LDOE to avoid filing a class due process complaint against the SEA similar to the one used in Jefferson Parish. As a result, the LDOE conducted a site visit and issued a monitoring report

214 James Comstock-Galagan, *et al.*, Administrative Complaint at 1 (May 10, 2006), https://www.splcenter.org/wp-content/uploads/2009/07/East_Baton_Rouge_Complaint.pdf. To access the East Baton Rouge Parish Class Administrative Complaint and ensuing Mediation Agreement, see *East Baton Rouge Special Education*, SPLC, https://www.splcenter.org/seeking-justice/case-docket/east-baton-rouge-special-education (last visited Aug. 6, 2025).

215 *See* Comstock-Galagan, *supra* note 214.

216 *Id.* at 6-7.

217 *See* Mediation Agreement ¶¶ 1-2 (Sept. 18, 2006), https://www.splcenter.org/wp-content/uploads/2009/07/East_Baton_Rouge_Agreement.pdf.

218 *Id.*

219 *Id.* ¶ 7.

220 *Id.*

221 H. Clay Walker, *et al.*, Class Administrative Complaint at 2 (Dec. 13, 2006), https://www.splcenter.org/wp-content/uploads/2009/07/Caddo_Parish_Complaint.pdf. To access both the Caddo Parish Class Administrative Complaint and Negotiated Settlement Agreement, see *Caddo Parish Special Education*, SPLC, https://www.splcenter.org/seeking-justice/case-docket/caddo-parish-special-education (last visited Aug. 6, 2025).

222 *Id*. at 3-8.

for the district in February 2008, which substantiated many of the violations alleged in the class administrative complaint.[223] The named complainants and LDOE then entered into a negotiated settlement agreement requiring the hiring of an independent consultant or independent management team to oversee the implementation of an Intensive Corrective Action Plan (ICAP) for the Caddo Parish school district.[224] The ICAP required similar measures to the agreements in Jefferson and East Baton Rouge Parish related to training programs, protocols, and policies for positive behavioral supports, FBAs, BIPs, and MDRs.[225]

The advocates then filed a third and final "class" administrative complaint against the Calcasieu Parish Public School System in September 2007.[226] The parties entered into a negotiated settlement agreement just over a month later. Like the other settlements, the agreement called for the hiring of a consultant to oversee the development and implementation of training programs, protocols, policies, and tracking systems designed to ensure compliance with the disciplinary procedures required by the IDEA.[227] The Calcasieu settlement also devoted a section of the agreement to ensuring the provision of a commensurate school day for students with Emotional Disturbance. The purpose of this section was to eliminate the school district's practice of shortening the school day of students with Emotional Disturbance by delaying their start time or requiring them to leave early, and thereby providing them with less education than their non-disabled peers.[228]

Thus, while each complaint and resulting settlement agreement varied in their details to account for the particular context of each school district, the same general strategy resulted in systemic reform that addressed pervasive practices of evading the IDEA's disciplinary safeguards. It should be noted, however, that each of these complaints took place during a time in which the state department of education was a relatively willing and reform-minded participant; such strategies could be less effective under a different administration with different priorities.[229]

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223 *See* Negotiated Settlement Agreement at 1 (Mar. 2008), https://www.splcenter.org/wp-content/uploads/2009/07/Caddo_Parish_Settlement.pdf.

224 *Id*.

225 *Id.* at 2-3.

226 James Comstock-Galagan, *et al.*, SPLC, Class Administrative Complaint at 1 (Sept. 21, 2007), https://www.splcenter.org/wp-content/uploads/2009/07/Calcasieu_Parish_Complaint.pdf. To access the Calcasieu Parish Class Administrative Complaint, Negotiated Settlement Agreement, and Corrective Action Plan, see *Calcasieu Parish Public School System*, SPLC, https://www.splcenter.org/seeking-justice/case-docket/calcasieu-parish-public-school-system (last visited Aug. 6, 2025).

227 *See* Negotiated Settlement Agreement ⁋⁋ 1-3 (Oct. 11, 2007), https://www.splcenter.org/wp-content/uploads/2009/07/Calcasieu_Parish_Agreement.pdf.

228 *See id.* ⁋ 15.

229 At the time of the complaints discussed from 2006 to 2007, the Louisiana Department of Education was controlled by appointees of Governor Kathleen Blanco, including

B. Targeted Multi-Plaintiff Systemic Litigation Grounded in Federal and State Civil Rights Law

After the initial decision of whether to exhaust, or attempt to exhaust, state-level administrative processes, or otherwise pursue settlement prior to state or federal litigation, advocates then face the issue of whether to seek class certification in their state and federal court filings. This is a step advocates sometimes overlook or miss, as class action litigation is the most typical variety of systemic reform litigation. Class certification, however, is by no means a requirement for systemic reform impact litigation, as the case study below demonstrates.[230]

In further pursuit of combatting informal and other undocumented removals in Louisiana, the SPLC and the Loyola Law Clinic recently brought a lawsuit in federal court on behalf of five students in St. Bernard Parish.[231] The lawsuit alleged multiple violations of federal law on behalf of the plaintiff-students, without class-wide claims for relief.[232] Located in the Greater New Orleans area near the lower Ninth Ward, St. Bernard Parish has experienced demographic shifts in recent years, especially since Hurricane Katrina, leading to more students of color in the public school system.[233] The district has only two high schools: the traditional high school and C.F. Rowley Alternative (Rowley), an alternative school for suspended and expelled students.[234] While the school district is predominantly White, the student population at Rowley is majority-Black and includes a disproportionate number of students with disabilities.[235]

This case began in the law school clinic, with law student practitioners at the Loyola Law Clinic representing several students with disabilities in St. Bernard Parish in school discipline hearings and special education due process proceedings after they had been referred to the district's

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Cecil Picard and Paul Pastorek. *See Paul Pastorek Named Interim State Superintendent of Education*, WAFB (Mar. 4, 2007, at 22:26 CST), https://www.wafb.com/story/6162443/paul-pastorek-named-interim-state-superintendent-of-education/.

230 *See generally* Maureen Carroll, *Aggregation for Me, But Not for Thee: The Rise of Common Claims in Non-Class Litigation*, 36 Cardozo L. Rev. 2017, 2017 (2015) ("When a plaintiff seeks an injunction or declaration based on a defendant's generally applicable policy or practice, the case has an inherently aggregate dimension, regardless of whether the plaintiff brings it as a class action or as an individual suit.").

231 Second Amended Complaint, P.A. *ex rel.* A.A. v. Voitier, No. 2:23-cv-02228 (E.D. La. May 20, 2024).

232 *Id*.

233 Chad Calder & Jeff Adelson, *Built for White Residents Fleeing the City, Inner Suburbs Like St. Bernard are Increasingly Diverse,* NOLA.com (Dec. 31, 2021), https://www.nola.com/news/built-for-white-residents-fleeing-the-city-inner-suburbs-like-st-bernard-are-increasingly-diverse/article_de34b954-57c1-11ec-8b84-d7f44244c257.html.

234 Second Amended Complaint ⁋ 37, P.A. *ex rel.* A.A. v. Voitier, No. 2:23-cv-02228 (E.D. La. May 20, 2024).

235 *Id*. ⁋ 45; *see also Enrollment Data*, La. Dep't of Educ., https://www.louisianabelieves.com/resources/library/student-attributes (last visited Aug. 6, 2025).

alternative school. The students, clinicians, and authors of this Article eventually noticed a pattern of violations. Students with disabilities and students of color were routinely sent to the district alternative school for long periods of time, without due process or special education protections, purportedly for different reasons, but with the same result: indefinite school exclusion typically lasting for well over the equivalent of a full semester, which, if for disciplinary reasons constitutes an expulsion as defined under state law.[236] The clinic students provided the initial legal representation in special education proceedings and any disciplinary hearings or meetings, under clinician supervision. In addition to providing a unique pedagogical experience for the students with opportunities to prepare witnesses, compile exhibits, and practice other trial advocacy skills in two full due process hearings, this process successfully exhausted the claims of future plaintiffs in the federal litigation.

The subsequent federal complaint did not include class allegations, but rather specific factual allegations for multiple plaintiffs.[237] A record review conducted by the clinical students, and subsequent cite checking and drafting, significantly sped up the complaint drafting process. Based on these individual allegations and publicly available information and data, the complaint alleged that the school district had a policy and practice of involuntarily and discriminatorily placing students at Rowley for months or even years without following state and federal law.[238] According to the complaint, the school district forced parents to sign a waiver of their child's right to a due process hearing to avoid arrest or an expulsion on their permanent record, or otherwise suspended the students and then prohibited their return.[239] Once placed at Rowley, students were denied education and special education services and supports; were subjected to excessive contact with law enforcement; were segregated from non-disabled peers; and were effectively barred from exit based on an unfair point system.[240] As in Jefferson Parish, the complaint alleges that it was effectively impossible for students with behavioral needs to "earn their way out" of the alternative school due to a lack of supports and discriminatory exit criteria, including the point system.[241] The suit included claims on behalf of the individual students under the U.S. Constitution, the Louisiana Constitution, the ADA, Section 504 of the Rehabilitation Act, the Louisiana Human Rights Act, and other Louisiana state laws.[242] The relief sought included not only

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236 Second Amended Complaint at 2, P.A. *ex rel.* A.A. v. Voitier, No. 2:23-cv-02228 (E.D. La. May 20, 2024).

237 *Id.*

238 *Id.* ¶ 60.

239 *Id.* ¶¶ 59-61.

240 *Id.*

241 *Id.* ¶¶ 59-71.

242 *Id.* ¶¶ 156-204.

injunctive relief to prevent future placements at the alternative school, but also district-wide disciplinary policy change and damages.[243]

Once the federal litigation was underway, the SPLC took a more central role in navigating complex issues of federal civil procedure, with students participating in discrete processes including discovery review, responses, and legal research. Students also had the opportunity to attend hearings in federal court and to participate in settlement conferences with the Magistrate Judge. Following the settlement negotiations, the parties reached a settlement agreement that demonstrates that class claims are not necessary to gain meaningful systemic relief against discipline in disguise.[244] The agreement alters the school district's official policies, student handbooks, and other public-facing documents to require, prior to an alternative school placement, the school district to provide due process and an MDR meeting. The district-wide policy changes include a requirement that students receive due process before disciplinary transfer to an alternative school; that students receive a definite exit date if referred to the alternative school; and that students again receive due process if, for any reason, they are held at the alternative school past their exit date. The agreement further requires public data reporting on alternative school placements longer than a school semester, as well as training for school staff. While the agreement does not impose independent monitoring, the data transparency, public notification, and alteration of school board policies provide a key mechanism for parents to hold the school district accountable.

C. Limitations and Direction

The above case studies show that traditional IDEA class action litigation is far from the only method to combat discipline in disguise. A variety of other advocacy and litigation strategies, which may be more accessible to law clinicians than typical special education class action litigation, exist to avoid this costly and—given recent developments in case law—often risky strategy. Given the unfavorable case law on exhaustion and class certification for IDEA class actions in the past decade, many of these more traditional class action lawsuits can be litigated for years before ultimately being dismissed on threshold, procedural issues.[245] In some cases, these risks may be worth taking; however, most law school clinicians, civil rights lawyers, special education practitioners, and nonprofit organizations lack the resources

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[243] *Id.* ¶¶ 48-50.

[244] Settlement Agreement, P.A. *ex rel.* A.A. v. Voitier, No. 2:23-cv-02228 (E.D. La. Feb. 26, 2025), Dkt. No. 102-3 [hereinafter St. Bernard Parish Settlement Agreement].

[245] *See, e.g.*, Section III(B) (discussing *S.S. ex rel. S.Y. v. City of Springfield*).

to undertake substantial, multi-year risks. This section will explore the benefits and drawbacks of alternative litigation strategies.

Figure 1: Benefits and Drawbacks of Case Studies' Approach to Discipline in Disguise

	Benefits	Drawbacks
Multi-plaintiff due process hearings	+ Shorter and less expensive + Provides basis for exhaustion defense for later state/federal court litigation + May result in settlement or mediation before costly state/federal court litigation + Student exposure to trial advocacy skills	- Length of administrative proceedings may depend on defendants' litigation strategy (*i.e.*, whether or not defendants file a motion to dismiss) - Could result in resource-intensive parallel administrative proceedings - Federal or state claimants may be required to preserve claims before administrative hearings conclude - If proceeding does not progress beyond due process, limitation to remedies available under the IDEA
Multi-student state administrative complaints	+ Minimal resource investment apart from complaint drafting + Well established process for systemic relief, including through settlement or mediation + Not preclusive + Possible intensive and independent drafting experience for students and negotiation experience in mediation or settlement	- No appeal available - Not sufficient to satisfy exhaustion requirements - Generally, one-year statute of limitations, without any tolling effect on other claims - Availability of non-settlement relief subject to the state department of education's discretion - Not typically fee-generating
Multi-plaintiff systemic litigation	+ Urgent claims on behalf of individual plaintiffs may be pursued in due process proceedings + Parallel due process claims can challenge policy and practice + Monetary, injunctive, and declaratory relief can be sought for individual students + Lengthy consent decree or independent monitoring process will not impede litigation if school district strategy shifts to alternative methods of exclusion + Student exposure to systemic federal and state litigation	- Exhaustion of individual plaintiffs still may be required unless monetary relief sought - Injunctive relief usually limited to individual plaintiffs, except as to modification of formal policies - Independent monitoring unlikely, and, therefore, subsequent litigation to enforce policy change may be required

First, advocates and clinicians bringing due process complaints on behalf of students, or advocates and clinicians who seek to bring federal civil rights litigation, should not overlook state-level administrative processes, including due process hearings and state administrative complaints, as a preliminary defense against informal and undocumented disciplinary practices. Multi-plaintiff due process hearings, such as the New Orleans and Jefferson Parish Public Schools case studies explored above, can open mediation discussions about systemic relief, especially where such preliminary administrative proceedings demonstrate that any exhaustion defenses in state or federal court will face substantial barriers. At the very minimum, multi-plaintiff due process requests can help to establish that the lawsuit is appropriately litigated in federal court, notwithstanding exhaustion defenses, if, at the administrative level, the hearing officer rules that systemic ADA and 504 claims must be dismissed due to a lack of jurisdiction. Such a ruling could be used to conclusively show not only administrative exhaustion[246] but also, in the alternative, the unavailability of relief in the administrative forum in later state or federal court litigation, *i.e.*, futility.[247]

Of course, this strategy relies on some factors not necessarily within litigants' control: namely, defendants typically would have to file a motion to dismiss to obtain such a ruling. It also carries some risks—for example, if the motion is granted and jurisdiction is denied, the parents and students may face a difficult decision between accepting an IDEA settlement with a universal waiver, including of 504/ADA claims.[248] If such a motion is not filed early in the litigation, or if the motion is denied,[249] advocates may face the daunting prospect of litigating several parallel due process hearings simultaneously. For an independent practitioner, a small nonprofit organization, or a law clinic

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[246] *See, e.g.*, S.P. *ex rel.* M.P. v. Knox Cnty. Bd. of Educ., 329 F. Supp. 3d 584, 593 (E.D. Tenn. 2018) (denying motion to dismiss for failure to exhaust where the ADA claim for lack of jurisdiction "was heard on the substance and granted" at the administrative hearing level); Saideman & Scavongelli, *supra* note 126.

[247] *See, e.g.*, Cayla R. v. Morgan Hill Unified Sch. Dist., 5:10-cv-04312, 2012 WL 1038664, at *4 (N.D. Cal. Mar. 27, 2012) (Section 504 claim exhaustion was futile where the hearing officer "routinely dismisses claims brought under [Section] 504 for lack of jurisdiction"); *see* Scavongelli & Saideman, *supra* note 126.

[248] One approach to this issue would be to obtain a carve-out in the settlement agreement waiver for 504/ADA claims. If the school district refuses to accept this carve-out, advocates also may want to consider whether their client, at some point in the negotiations, wants to make a written counter-offer conditioning settlement upon no waiver for ADA/504 claims and obtain a rejection in writing. *See* Saideman & Scavongelli, *supra* note 126.

[249] An adjudication on the merits, if the systemic claim proceeds, can be appealed to complete the exhaustion process. 20 U.S.C. § 1415(*l*). Advocates seeking this conclusive adjudication at the administrative level should note that at least one district court has held that § 1415(*l*) may require a state administrative hearing officer to exercise jurisdiction over some non-IDEA claims. *See In re* P.G. v. Genesis Learning Ctrs., No. 3:19-cv-00288, 2019 WL 3323163 (M.D. Tenn. July 18, 2019).

professor supervising multiple students, this burden may be substantial. To combat this risk, advocates can frame the relief requested in systemic terms only, *i.e.*, policy change and/or damages, rather than individual remedies such as compensatory education or a new school placement for an individual child. Of course, such requested remedies must align with the clients' goals. And in some cases, it can be challenging to find multiple clients at once with the same systemic objective, particularly within the typical one to two-year statute of limitations for IDEA claims.[250] Nonetheless, where practitioners receive multiple similar cases from a single school district within a short period of time, such multi-plaintiff due process hearing requests should be considered as less resource-intensive options to obtain maximum impact before state or federal court litigation.

Even less resource-intensive, state administrative complaints remain a second option, particularly in states where the state department of education is politically interested in and motivated to hold school districts accountable. Although such procedures do not satisfy the requirements of exhaustion under the IDEA,[251] they avoid the risk of litigating multiple adversarial due process hearings simultaneously; indeed, advocates have minimal involvement after the complaint is filed.[252] In a clinical setting, this offers a discrete and time-limited opportunity for students to practice making systemic claims before full-blown federal or state court litigation. And state complaint procedures are more well-established than due process hearings as an avenue for systemic relief. However, state administrative complaints generally have a one-year statute of limitations,[253] and so multiple plaintiffs with parallel interests must be located and aggregated quickly; often, this is a barrier, especially where the advocate wants to pursue a due process hearing or direct state/federal court litigation simultaneously. Advocates and clinicians may not want to expend resources to pursue this additional remedy before other litigation, especially where it is not

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250 20 U.S.C. § 1415(f) ("A parent or agency shall request an impartial due process hearing within 2 [sic] years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this subchapter, in such time as the State law allows."). For a state-by-state analysis of shorter and longer IDEA statutes of limitation specified by state law, see Perry A. Zirkel, *The Statute of Limitations for an Impartial Hearing Under the IDEA: A Guiding Checklist*, 363 West's Educ. Law Rep. 483 (May 2, 2019).

251 *See* Porter v. Bd. of Trustees of Manhattan Beach Unified Sch. Dist., 307 F.3d 1064, 1074 (9th Cir. 2002).

252 *See* Section III(A)(2) (discussing state administrative complaint procedures).

253 34 C.F.R. § 300.153(c). At least one state, however, has expanded the statute of limitations to two years. La. Admin. Code tit. 28, pt. XLIII, § 152 (2024).

fee-generating;[254] however, from the standpoint of pursuing systemic relief, the juice can be well worth the squeeze. Even in states with less progressive state departments of education, multi-student state administrative complaints signal potential future state or federal court litigation—and, critically, offer school districts an off-ramp through mediation and settlement.

Systemic settlement, of course, is not the only possible outcome of such complaints, although for many advocates and school districts, it is a desirable and efficient one. The agency may also issue a ruling in the complainants' favor, which can buttress later litigation even if it does not satisfy exhaustion requirements. In *Fry v. Napoleon Community Schools*, for example, the parents filed a complaint with OCR before filing the federal lawsuit that eventually reached the Supreme Court.[255] OCR decided in the parents' favor that the school district had discriminated against the student and required the school to provide a new IEP that included a provision allowing her service dog in school.[256] Nonetheless, out of fear of ill will from school officials, the parents enrolled their child in another school and sued the school district in federal court seeking declaratory and monetary relief.[257] Importantly, such subsequent litigation is not precluded by the federal or state administrative complaint process.[258] Furthermore, while advocates run the risk of a negative administrative outcome from the administrative agency without any opportunity to appeal,[259] those administrative decisions do not have preclusive effect on independent lawsuits.[260] Advocates still must take care, however, to file any lawsuit within the

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254 *See* Vultaggio *ex rel.* Vultaggio v. Bd. of Educ., 343 F.3d 598, 599 (2d Cir. 2003) (affirming that state complaint procedures "[are] not an 'action or proceeding' within the meaning of IDEA's attorneys' fees provision").

255 580 U.S. 154, 163 (2017).

256 *Id.*

257 *Id.*

258 Importantly, the federal and state administrative processes are not mutually exclusive. *See* Peter J. Maher, Note, *Caution on Exhaustion: The Courts' Misinterpretation of the Idea's Exhaustion Requirement for Claims Brought by Students Covered by Section 504 of the Rehabilitation Act and the ADA but Not by the Idea*, 44 Conn. L. Rev. 259, 271 (2011) (noting the OCR "regulations do not require parties to exhaust [the state] grievance procedure before filing a complaint with OCR for a violation of Section 504, although [they] encourage[] parties to use the grievance procedure and resolve disputes at the local level" (citing Analysis of Final Regulations, 34 C.F.R. § 104 App. A ¶ 12 (2011))).

259 34 C.F.R. § 300.153(c).

260 Caldwell v. Knox Cnty. Bd. of Educ., No. 3:13-CV-552, 2014 WL 3735840, at *6 (E.D. Tenn. July 29, 2014) ("[A]s a number of courts have found, [where] plaintiffs . . . have an adequate remedy in a court, [it] precludes judicial review of the OCR proceedings: they can sue the alleged wrongdoer directly." (citing, *inter alia*, Wash. Legal Found. v. Alexander, 984 F.2d 483, 486 (D.C. Cir. 1993) ("[A]n adequate remedy is available to appellants, and we therefore conclude that appellants have no cause of action under the APA for the discrimination alleged."))); Jersey Heights Neighborhood Ass'n v. Glendening, 174 F.3d 180, 191-92 (4th Cir. 1999) ("[W]e think that [the] direct remedy against funding recipients is not

relevant limitations period, as the state administrative complaint does not toll an otherwise applicable statute of limitations.[261]

The final alternative explored in this Article is multi-plaintiff systemic litigation. Without class claims, this form of litigation avoids a post-*Wal Mart* class certification dispute, while maximizing plaintiffs' ability to pursue IDEA, 504, and ADA claims for relief, including money damages. From the perspective of effective clinical pedagogy, the time-limited nature of this approach is attractive as well; where IDEA class action litigation may sometimes go on for a decade or more at a time, multi-plaintiff litigation is more likely to last for approximately one to three years, allowing clinic students to be involved in a significant portion of the duration of the case. Exhaustion issues may remain for claims seeking injunctive or declaratory relief, and multiple clients may have to be exhausted—along with their ADA/504 claims[262]—in administrative due process hearings to support multi-plaintiff litigation.[263] However, those administrative due process hearings can occur on individual timelines, which is particularly useful if a plaintiff is facing exigent circumstances.[264] Following the conclusion of administrative proceedings, a motion to add new plaintiffs can be filed after exhaustion is complete,[265] and these administrative hearings provide a fertile environment for dedicated clinical students to practice putting on witnesses and evidence, as well as conducting direct and cross-examinations. If initial administrative proceedings fail to produce the systemic relief requested, advocates may be able to support arguments that new plaintiffs raising similar claims should join the litigation without due process proceedings, on the basis that relief is effectively unavailable in the administrative forum.[266]

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only 'adequate,' but, as the Supreme Court recognized, is preferable to a direct suit against the agency itself.").

261 With multi-plaintiff due process hearings, plaintiffs should be careful not to allow the statute of limitations to impede future litigation in state or federal court. In contrast to traditional IDEA claims that can be appealed, *see* 20 U.S.C. § 1415(i), administrative proceedings seeking systemic relief may not follow the same procedure, especially if the administrative process results in a ruling that advocates do not want to appeal, *i.e.*, that the administrative process is unavailable.

262 Some courts have held that the non-IDEA claim, like the IDEA claim, must be exhausted in the administrative forum. *See, e.g.*, C.W. v. Denver Cnty. Sch. Dist. No. 1, 17-cv-02462, 2019 WL 4674331, at *23 (D. Colo. Sept. 25, 2019), *appeal dismissed*, 994 F.3d 1215 (10th Cir. 2021); Durbrow v. Cobb Cnty. Sch. Dist., 887 F.3d 1182, 1192 (11th Cir. 2018); *see also* Saideman & Scavongelli, *supra* note 126.

263 *See* Section III(B) (discussing *Perez* and limitations on money damages since *Cummings*).

264 *See* 20 U.S.C. § 1415(j)(4)(B) (providing expedited treatment for due process hearings during a period of school exclusion).

265 *See* Fed. R. Civ. P. 15(a)(2) (directing federal courts to "freely give leave [to amend] when justice so requires").

266 *See* Section III(B) (discussing futility exception, including the "unsuitability" as well as "unavailability" of the administrative forum).

In multi-plaintiff systemic limitation, due process claims under the federal constitution, state constitution, and state laws also expand opportunities for relief. In the context of combatting discipline in disguise, due process claims in particular have distinct benefits, because they are not subject to the same potential limitations on money damages as 504 and ADA claims, and they do not require exhaustion of special education due process proceedings. Due process claims further allow advocates to seek relief on behalf of not only students with disabilities, but also other students, especially students of color, disproportionately subjected to informal removals along with students with disabilities.[267] Such claims, however, may be more straightforward to pursue with certain kinds of informal removals more obviously akin to suspension and expulsion—such as calling parents to pick up children from school[268]—than other forms of undocumented discipline purporting to provide therapeutic interventions and education, such as alternative school, public day school, or homebound placement.[269]

Of course, pursuit of multi-plaintiff litigation, as opposed to traditional class litigation, has trade-offs, regardless of the claims pursued. Most importantly, individual plaintiffs who seek injunctive or declaratory relief against a generally applicable policy or practice are typically entitled to receive only individual injunctive relief, even if that individual relief is predicated on substantive proof of a policy, practice, or systemic violation.[270] It can be challenging to obtain evidence of widespread practices without class certification, especially in cases involving sensitive information about minors that may be subject to additional protections beyond traditional discovery rules.[271] That said, if multiple plaintiffs are bringing the litigation, full school records will be available for each individual student, and evidence of systemic practices in the school district also can be drawn across the multiple student-litigants' records in combination with aggregate data about discipline in the school district,[272]

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267 *See* Section II (discussing disproportionate informal removals of Black students).

268 *See supra* note 116 (discussing class action litigation in Massachusetts challenging this practice).

269 *But see supra* notes 112-113 (discussing successful lawsuits bringing due process claims on behalf of students sent to alternative schools and, in one instance, placed on homebound instruction).

270 Carroll, *supra* note 230, at 2063 (discussing difference between private agreements in "quasi-individual" actions and consent decrees in class action cases).

271 *Compare* P.A. *ex rel.* A.A. v. Voitier, No. CV 23-2228, 2024 WL 3967474, at *8-9 (E.D. La. Aug. 28, 2024) (permitting discovery on some but not all information requested about students in comparable circumstances in multi-plaintiff systemic litigation), *with id.* at *7 (requiring production of information about relevant nonparty students in school district, but allowing redaction of identifying information).

272 This data can typically be obtained through publicly available sources such as the CRDC. *See* U.S. Dep't of Educ., CRDC, https://civilrightsdata.ed.gov/ (last visited Aug. 6, 2025). Alternatively, data can be collected through public records requests, or, in the absence

especially through expert testimony. And even if a motion to compel is required to ensure access to non-plaintiff records, such discovery litigation can be more efficient than resolution of a class certification dispute.

The problem, therefore, is not necessarily in proving systemic practices, but in obtaining systemic relief. Where consent decrees and independent monitoring are not available, advocates may have to bring subsequent litigation to ensure that systemic practices identified as unlawful are, in fact, reformed—which, without a consent decree or independent monitoring, can be challenging to do. However, lawyer and court oversight is not the only check on public education. Alternatives such as those featured in the St. Bernard Parish settlement agreement can include changes to district policies, plus data transparency to ensure that discipline in disguise is brought to light.[273] To the extent plaintiffs can obtain monetary relief, the damage to school districts' pocketbooks further may have a deterrent effect. Individual damages can also make a substantial difference in the lives of individual student-litigants and their parents, who have not only suffered due to the school districts' unlawful actions but also have devoted substantial time and resources to litigation. Finally, where multiple plaintiffs pursue common claims, there is a greater chance that press coverage may highlight the issue beyond individual circumstances. It is often this public pressure, as much as or more than legal action, that deters future rights violations, and multi-plaintiff litigation can help garner such attention, similar to class action suits.[274]

There is, of course, a risk that school districts will attempt to mitigate the collective action effects of multi-plaintiff claim aggregation by "picking off" individual plaintiffs, *i.e.*, offering to settle with individuals for money damages without systemic relief or delaying litigation such that individual claims for injunctive relief become moot. But, especially before the class is certified, this is a risk even of class action litigation.[275]

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of an appropriate response from the public agency to these requests, through discovery. *See, e.g.*, Minutes Entry, P.A. *ex rel.* A.A. v. Voitier, No. CV 23-2228 (E.D. La. Apr. 25, 2024), Dkt. No. 36 (requiring native format production of public record request responses on discipline and alternative school placement).

273 *See* St. Bernard Parish Settlement Agreement, *supra* note 244.

274 Carroll, *supra* note 230, at 2050 (discussing media coverage advantages of class litigation versus an individual case).

275 *See* Fed. R. Civ. P. 23(e) (requiring fairness hearing for "certified" class); *cf.* Carroll, *supra* note 230, at 2045 n.161 (discussing protection against mootness for certified classes). Of note, defendants cannot attempt to "pick off" plaintiffs by taking action to moot claims before class is certified; after the motion for class certification is filed, the Supreme Court has held that litigation may proceed on behalf of the class even after a named plaintiff's case becomes moot. *See* U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 405 (1980). However, mootness protections against "pick off" of named plaintiffs are not guaranteed in all circumstances, particularly if an appeal follows the class certification decision. *See generally* Michele C. Nielsen, Comment, *Mute and Moot: How Class Action Mootness Procedure Silences Inmates*, 63 UCLA L. Rev. 760, 782 (2016) (discussing limitations of Supreme Court doctrine preventing "pick off" of named class action plaintiffs in public interest cases).

In other words, there are risks common to obtaining systemic relief in both multi-plaintiff and class action litigation, which are not necessarily relieved by the time-consuming, expensive, and potentially risky pursuit of class status.

Finally, even if class status is pursued, the long-term costs of managing and defending a consent decree must also be considered, especially in a clinical setting where students will be in law school, typically, only for a fraction of the life of the court proceedings. Many systemic reform class actions go on for years in the remedial phase.[276] In that lengthy process, it can be challenging to ensure students gain appropriate skills. And, from an advocacy prospective, the clinicians and students will typically be bound by a consent decree or judicial order issued years ago, without the benefit of discovery to investigate how the school district may, in the case of informal removals, have shifted to alternative methods of discipline in disguise, such as placing more special education students in homebound or virtual classrooms rather than in alternative schools. In other words, where undocumented removals are ever-shifting responses to avoid legal requirements protecting the rights of students with disabilities, the longevity of a traditional consent decree may be a drawback not only from a pedagogical perspective for law school clinicians but also from a broader sustainability and efficacy perspective, as multi-plaintiff litigation allows lawyers to respond rapidly to changing conditions. Although some may classify this dynamic as a "whack-a-mole" approach, it is important to remember that defendants are just as disincentivized to avoid serial litigation as plaintiffs, if not more so. Indeed, in other contexts such as mass torts, defendants have moved for class certification in individual cases to avoid the resource drain of serial litigation.[277] The risk of such expensive, serial litigation therefore can have a deterrent effect on school districts, without the necessity of a years-long consent decree often bound to outdated conditions.

Conclusion

In conclusion, combatting discipline in disguise, due to its elusive and shifting nature, is undeniably daunting. Despite the heightened protections of federal law aimed at stemming discriminatory exclusion of students with disabilities, students with disabilities, especially those of color, continue to face high rates of school exclusion. When school districts obscure these exclusions by failing to document removals as disciplinary in nature or by disguising them as non-disciplinary educational placements, the challenge of both individual and systemic advocacy is multiplied. Case law

276 *See, e.g.*, M.D. *ex rel.* Stukenberg v. Abbott, Docket No. 11-cv-00084 (S.D. Tex. July 4, 2025) (ongoing monitoring since 2017).

277 Carroll, *supra* note 230, at 2049-50.

developments that impede advocates' ability to pursue traditional special education class action litigation further complicate advocacy by lawyers dedicated to defending the rights of students with disabilities who are low-income, system-involved, or from other marginalized communities.

Despite the challenges of the current political and jurisprudential environment, the case studies in this Article demonstrate that multiple strategies remain to seek systemic change in districts that hide or disguise exclusionary discipline. The advocates and law school clinicians in the case studies explored in this Article chose the particular strategy used in each case study based on the facts and circumstances that existed at the time, including under different state and federal administrations with varying levels of commitment to combating educational inequity for students of color and students with disabilities. All of the strategies discussed have the potential to improve resource efficiency, achieve efficient relief, and provide valuable educational experiences for clinical students. They also avoid some of the drawbacks typically associated with special education class action litigation. While the success of any systemic reform approach is dependent on the context of the situation to which it is being applied, the same strategies or a combination of them could also be used against school districts in other jurisdictions that are engaging in similar practices of evading IDEA procedural safeguards by hiding or disguising exclusionary discipline.