RECORD NO. 21-2286

In The
United States Court of Appeals
For The Fourth Circuit

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

Plaintiffs – Appellees,

v.

THE BOARD OF EDUCATION OF THE COUNTY OF KANAWHA,

Defendant – Appellant,

and

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

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA AT CHARLESTON

BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

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

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

Pursuant to FRAP 26.1 and Local Rule 26.1,

The Board of Education of the County of Kanawha
(name of party/amicus)

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

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

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

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

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

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

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

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

Signature: /s/ Richard S. Boothby Date: November 29, 2021

Counsel for: Petitioner

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Jurisdictional Statement

The District Court concluded that it had jurisdiction under 28 U.S.C. § 1331.[1] Following the District Court's August 24, 2021 grant of class certification, Appellant filed a timely Petition for Permissive Appeal pursuant to Federal Rule of Civil Procedure 23(f) on September 7, 2021. This Court granted the Petition on November 15, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1292(e).

Statement of the Issues

A. Did the District Court err in concluding that Plaintiffs established "commonality" under Fed. R. Civ. P. Rule 23(a)(2) despite Plaintiffs' failure to identify a uniformly-applied common policy or practice of the Defendant that harmed all class members?

B. Did the District Court clearly err by basing its commonality analysis in significant part on a misreading of Plaintiffs' statistical evidence?

C. Did the District Court err in finding that Plaintiffs' requested relief of unspecified systemic change and ongoing monitoring was appropriate under Fed. R. Civ. P. 23(b)(2)?

D. Did the District Court err in concluding that Plaintiffs' proposed class was ascertainable, where the class definition included members that have yet to be identified?

E. Did the District Court err in concluding that the claims of the class representatives, G.T., and K.M., typify those of the class, where G.T. and K.M. require different services?

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[1] KCS does not concede that the District Court had subject matter jurisdiction because Plaintiffs did not exhaust their administrative remedies pursuant to 20 U.S.C. § 1415(i). KCS focuses its appeal on the Rule 23 issues given this Court's grant of KCS's Rule 23(f) Petition.

Statement of the Case

Plaintiffs brought this class action against the Board of Education of the County of Kanawha ("KCS"), alleging that KCS's policies and practices addressing the behavioral needs of students with disabilities are inadequate. Plaintiffs G.T. and K.M. are KCS students who have been identified as having different disabilities, needing different services, and have been subjected to disciplinary removals for different kinds of disruptive behavior. Both G.T. and K.M., through their parents, initiated separate due process complaints against KCS for alleged failures in the provision of special education services. These administrative hearings yielded different results—G.T. was determined not to have met his burden of proof and K.M. was awarded only partial relief. *See* J.A 1261-1361.

Rather than focusing their appeals to the District Court on any alleged error of the hearing officer below, G.T. and K.M. joined to bring this class action complaint challenging KCS's entire system of identifying, classifying, and serving all students with disabilities. In this class action, G.T. and K.M. are the class representatives for "All Kanawha County Schools students with disabilities who need behavior supports and have experienced disciplinary removals from any classroom." J.A. 1580.

I. The Individuals with Disabilities Education Act provides the legal framework for this action.

In the Individuals with Disabilities Education Act ("IDEA"), Congress promises students with disabilities who need special education a free appropriate public education ("FAPE").[2] 20 U.S.C. § 1400. FAPE means that a student with a disability "is entitled to 'meaningful' access to education based on her individual needs." *Fry v. Napoleon Cmty Sch.*, 137 S. Ct. 743, 753-54 (2017) (quoting *Westchester Cty. v. Rowley*, 458 U.S. 176, 192 (1982)).[3] FAPE is individually determined for each student. *Id.*

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[2] Each state which accepts IDEA funding is required to develop its own IDEA policy. *See* 20 U.S.C. § 1412. State Board of Education Policy 2419, W. Va. Code of State Rules § 126-16-1, is West Virginia's IDEA policy ("Policy 2419"). *See* J.A. 939-1094.

[3] *See* J.A. 949, Policy 2419, Chapter 1, p. 9:

The definition of FAPE under the IDEA 2004 means special education and related services that:

1. Are provided without charge at public expense (free);
2. Are provided in conformity with an appropriate individualized education program (IEP) developed in adequate compliance with the procedures outlined in this manual and reasonably calculated to enable the student to receive educational benefit (appropriate);
3. Are provided under public supervision and direction; and
4. Include an appropriate preschool, elementary or secondary education that meets the education standards, regulations, and administrative policies and procedures issued by the WVDE, including the requirements of IDEA 2004.

To effectuate the promise of FAPE, the IDEA establishes a procedural framework for assessing and meeting the individual needs of each qualifying student. Each student found eligible for special education under the IDEA is assigned a team of professional educators and others familiar with their strengths and needs, including the student's parents. Each team must prepare an individualized education plan ("IEP"). That process includes reviewing the student's present levels of performance, deciding if additional evaluations are necessary, and creating reasonably ambitious annual goals for the student to achieve. *See* 20 U.S.C. § 1414. This "IEP Team," at least once per school year, must review the student's IEP and provide the student's parents a meaningful opportunity to participate in its preparation. *See* 34 C.F.R. § 300.322(e). Ultimately, "[a] school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. ex rel. Joseph F. v. Douglas County Sch.*, 137 S. Ct. 988, 999 (2017).

The IDEA also addresses the behavioral needs of students with disabilities. After determining that a student's "behavior impedes the child's learning or that of others," an IEP Team must "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." 20 U.S.C. § 1414(d)(3)(B)(i). However, no specific behavioral interventions are mandated after making that determination.

The IDEA describes several behavior-related tools and processes for addressing the behavioral needs of students with disabilities on a case-by-case basis. These include creating behavior goals within IEPs, conducting manifestation determinations ("MDRs") to determine whether a specific instance of student misbehavior was a manifestation of the student's disability, assessing the function of a student's behavior ("FBAs") and drafting behavior intervention plans ("BIPs") to help students replace disruptive and unhelpful behaviors with behaviors that meet their needs and allow them to benefit from their educational program. *See* 20 U.S.C. §§ 1415(k)(1)(D)-(E).

However, the IDEA does not mandate the use of FBAs, BIPS, or MDRs unless a disciplinary "change in placement" has been proposed for the student as a consequence of the student's alleged misbehavior. *See* 20 U.S.C. § 1415(k). If an out-of-school suspension will cause a student to have missed more than ten school days in the same school year, that loss of school time is considered a "change in placement." *Id.* The West Virginia Safe Schools act ***mandates*** ten-day out-of-school suspensions (and even expulsions) when a student engages in dangerous behaviors like selling narcotics, possessing illegal drugs, battering a school employee, or possessing a deadly weapon—so long as those actions are not a manifestation of a student's disability. *See* W. Va. Code §§ 18A-5-1a(a), (k) ("For purposes of this

section, nothing herein may be construed to be in conflict with the federal provisions of the Individuals with Disabilities Education Act, 20 U. S. C. §1400, et seq.").

Before a change of placement occurs, the IEP Team must hold an MDR and determine whether the student's misbehavior was caused by or had a direct and substantial relationship to the student's disability, or if the misbehavior was the direct result of the school not implementing relevant portions of the student's IEP. 20 U.S.C. § 1415(k)(1)(E)(i)(I). Depending on the outcome of that process, the IEP Team may also need to seek parental consent to conduct an FBA, and then develop a BIP to address the student's behavioral needs. *Id.*

These processes and decisions are necessarily focused on the personal circumstances of ***individual*** students—not ***groups*** of students.[4] *See, e.g., A.W. ex rel. Wilson v. Fairfax Cnty. Sch. Bd.*, 372 F.3d 674, 683 (4th Cir 2004) ("[If] the MDR committee concludes that the child's disability did not factor into the student's conduct, then the school may discipline that student as it would any other."). IEP Teams regularly conduct these student-centered reviews and processes with critical input from the student's parents. Proposing any form of uniform response to the

[4] KCS's IDEA compliance is monitored by the WVDE and the United States Department of Education (USDE). *See* 20 U.S.C. § 1416(a)(1)(A). KCS reports its disciplinary statistics to the WVDE on an annual basis, and the WVDE in turn reports that data to the USDE regularly. The USDE's Office of Civil Rights (OCR) publishes disciplinary statistics for individual school districts, including KCS, every two years.

universe of unique behavioral situations and student needs would be incompatible with the IDEA's focus on the individual student and the practical realities of addressing and modifying human behavior. *See e.g.*, 20 U.S.C. § 1415(k)(1)(A) ("School personnel may consider any unique circumstances on a case-by-case basis when determining whether to order a change in placement [such as suspension] for a child with a disability who violates a code of student conduct.")[5]

II. The IDEA provides several dispute resolution procedures that focus on students' individual needs and circumstances.

Under the IDEA, a student or parent may challenge a school district's decisions regarding the content of an IEP, including but not limited to any related services and placement of the student. An IDEA plaintiff must first exhaust his or her administrative remedies in a "due process hearing" before seeking review in the federal courts. *See* 20 U.S.C. § 1415(f); *Fry*, 137 S. Ct. at 753. The impartial due process hearing officer ("IHO") is tasked with determining whether the student was afforded a FAPE in light of the student's circumstances and the school district's actions to address them. *See, e.g., id.*; J.A. 1261-1361.

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[5] Section 504 of the Rehabilitation Act is a civil rights law that prohibits all recipients of federal funds from discriminating on the basis of disability, *see* 29 U.S.C. § 794, and it encompasses a broader range of disabilities than does the IDEA. *See* 34 C.F.R. § 104.3(j)(2)(i). Section 504 students do not necessarily need an IEP, but an IEP is one way to provide FAPE to a Section 504 student. *See* 34 C.F.R. § 104.33(b)(2). Other Section 504 students are provided a 504 Plan, which identifies specific accommodations, supports, and/or other services for the child. The procedural and substantive requirements for 504 Plans are far less rigorous than the corresponding requirements for IEPs under the IDEA.

Whether a school district has provided a student with a FAPE is a substantive case-by-case, student-by-student determination. Procedural violations of the IDEA do not necessarily result in a substantive denial of FAPE. *See R.F. v. Cecil Cty. Pub. Sch.*, 919 F.3d 237, 246 (4th Cir. 2019). Instead, the provision of FAPE depends on the individual circumstances of the child—like when a student engages in certain misbehavior, and if, when and how the school district identified and addressed that student's related needs. *See, e.g., id.* at 250 ("[T]he behavior strategies in the [student's] May 2016 IEP were reasonably calculated in light of [the student's] circumstances at the time that the IEP was created."). After exhausting his or her administrative remedies, the student can appeal the IHO's decision to the district court or a state court. *See* 20 U.S.C. § 1415(f).

This Court and the Supreme Court have recognized important limitations on the courts in IDEA litigation:

> [T]he provision that a reviewing court base its [FAPE] decision on the preponderance of the evidence is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review. The very importance which Congress has attached to compliance with certain procedures in the preparation of an IEP would be frustrated if a court were permitted to set state decisions at naught.
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> . . . .
>
> And we find nothing in the [IDEA] to suggest that . . . it intended that reviewing courts should have a free hand to impose substantive standards of review which cannot be derived from the Act itself . . . . In assuring that the requirements of the Act have been met, courts must be

> careful to avoid imposing their view of preferable educational methods upon the states. The primary responsibility for formulating the education to be accorded to a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to the state and local educational agencies in cooperation with the parents or guardian of the child . . . . In the face of such a clear statutory directive, it seems unlikely that Congress intended courts to overturn a State's choice of appropriate educational theories.

Rowley, 458 U.S. at 207-08. Both the Supreme Court and this Court have consistently held true to this sound approach for decades. *See, e.g., Endrew F.*, 137 S. Ct. at 1001 (same); *A.B. ex rel. D.B. Lawson*, 354 F.3d 315, 325 (4th Cir. 2004) (same); *see also Smith v. Robinson*, 468 U.S. 992, 1012 (1984) ("No federal district court . . . can duplicate [the efforts of parents and local education agencies]."); *T.B. v. Prince George's Cty. Bd. of Educ.*, 897 F.3d 566, 572 (4th Cir. 2018) ("The IDEA rightly 'recogniz[es] that federal courts cannot run local schools.'"); *Hartmann v. Loudoun Cty. Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997) ("Absent some statutory infraction, the task of education belongs to the educators who have been charged by society with that critical task.").

III. Plaintiffs' lawsuit broadly attacks all KCS's special education practices as "inadequate" rather than identifying specific legal failures.

Plaintiffs allege that KCS has inadequate behavioral policies, practices and procedures for providing a FAPE to its students with disabilities, and that these students sustain "unjustified disciplinary removals" from the classroom as a result. There is no evidence—or even an allegation—that any of KCS's policies or practices

violate black-letter law. There is no claim or showing that KCS does anything that the IDEA prohibits or fails to do anything that the IDEA requires. Instead, Plaintiffs allege that KCS's "system" for addressing the behavioral needs of students with disabilities is "inadequate" and "not working" in nearly all respects. *See, e.g.,* J.A. 60 (Amended Complaint); J.A. 187-88 (Dr. Elliott's report); J.A. 1589 (Class Certification Order acknowledging Plaintiffs cannot point to a single policy that violates the law). Plaintiffs styled their theory of the case in an attempt to avoid the individual questions inherent in meeting the behavioral needs of students with disabilities—instead focusing on the adequacy of KCS's "system-wide policies and practices." *Id.* at 861.

To support these allegations, Plaintiffs' expert witness Dr. Judy Elliott prepared a sweeping fifty-five (55) page report in which she concluded that KCS was "inadequate" with respect to (1) identifying students who need behavior supports, (2) identifying the causes of disruptive behavior when developing behavior supports, (3) developing IEPs, 504 plans, and BIPs, (4) implementing IEPs, 504 plans, and BIPs, (5) monitoring whether students with disabilities who receive behavior supports make appropriate progress in their educational programs, (6) monitoring whether its disciplinary policies are implemented in compliance with the IDEA and Section 504 of the Rehabilitation Act, and (7) training and professional development. *See* J.A. 188-90.

Dr. Elliott testified that her opinion is not based on what the law requires—but instead her notions of best practices, literature and custom. *See* J.A. 1134 ("Q: What law requires them to do that? A: You keep referring to a law, versus what is best practices and what the literature and research says about the impact of suspension . . . ."); J.A. 1111.

To support Plaintiffs' allegation that KCS's "inadequate" policies and practices harm students, Dr. Elliott reviewed a sampling[6] of student files and opined that most of them "appeared" to fail to meet the student's needs. J.A. 219. Dr. Elliott testified that she "looked at the students' files for evidence of supports, behavioral implementation plans, FBAs, and the documents that were there . . . to make that assumption or that projection." *Id.* at 1135.

Plaintiffs' statistical expert, Dr. Raphael, admitted that Dr. Elliott made a "qualitative judgment" about the adequacy of "behavior supports" for this sampling of students. J.A. 1105. Dr. Elliott admitted that she did not consider other causes and factors that may have been relevant to students' disruptive behaviors like the parent's highest level of education, parent's employment status, the number of siblings in the home, family history of behavior issues, family history of mental health, or family history of criminal conduct. *See id.* at 1135-36.

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[6] This sampling was comprised solely of students who had experienced two or more in-school or out-of-school suspensions over an approximately 24-month period immediately preceding the filing of Plaintiffs' complaint, beginning on January 24, 2018. *See* J.A. 1565; J.A. 193; J.A. 164.

Dr. Elliott also observed a "trend" of disciplinary removals that, in her opinion, could have been "avoid[ed]" had KCS provided those students adequate "behavior supports." J.A. 194. Dr. Elliott opines KCS students sustain "high rates of suspension" "as a result" of KCS's "[in]adequate systems of policies and procedures." *Id.* at 190. Plaintiffs characterize these disciplinary removals as "unjustified." *Id.* at 858. Dr. Raphael admitted that Dr. Elliott made a "causal inference" by inferring that KCS's policies are to blame for these disciplinary removals. *Id.* at 1102. Dr. Elliott's causal inference is the sole "evidence" in this case that KCS's existing policies and practices harm students.

For relief, Plaintiffs seek an injunction to "remedy [KCS's] systemic deficiencies." J.A. 891. Plaintiffs do not request that KCS do (or refrain from doing) anything in particular. Instead, Plaintiffs incorporate the entirety of Dr. Elliott's 55-page expert report, which calls for an eventual, unspecified and systemic change.[7] *See id.* Dr. Elliott's report is vague and often silent on solutions to the systemic "inadequacies" she identifies. The most concrete reforms Dr. Elliott's report identifies are a special education handbook, *see id.* at 226, utilization of aggregated disciplinary data, *see id.* at 232, and an "effective professional development

[7] Dr. Elliott testified that that KCS might see "reasonable movement" on whatever changes she ultimately proposes in "three to five years," and that her reforms are a "continual improvement process" subject to "peaks and valleys" because "things don't always stick." *See* J.A. 1113-14.

program," *id.* at 239. Importantly, Plaintiffs also request the imposition of a court-appointed monitor to (1) enforce the yet-to-be-specified injunctive relief, and (2) maintain indefinite lines of communications between Plaintiffs' counsel and the District Court on KCS's compliance with that relief. *See id.* at 67-68.

IV. Class discovery revealed that KCS's practices comply with the law.

During the class discovery stage, KCS established that it complies with the IDEA's procedural requirements. KCS's IEP teams (1) prepare IEPs for eligible students with disabilities, (2) conduct FBAs, MDRs and BIPs for those students whose circumstances require them, and (3) facilitate parental involvement in those processes. *See generally* J.A. 909-10.

At KCS, a child's IEP team plays the most integral and direct role in meeting student behavioral needs. The IEP team always includes the student's parents, one general educator, one special educator, a representative of the school district, an individual who can interpret the instructional implications of evaluation results, the student when appropriate, and others with knowledge or special expertise regarding the child (for example, a board-certified behavior analyst ("BCBA")). *See* J.A. 1164-65. In addition to IEP teams, student assistance teams ("SATs") and multi-disciplinary evaluation teams ("MDETs") play important roles in identifying students who need academic and behavioral interventions as well as recommending formal evaluations and making referrals for services. *See id.* These multiple layers

of school teams provide numerous opportunities to identify and meet the needs of students whose behaviors interfere with their learning. KCS employs positive behavior support interventions ("PBIS") which encourages positive reinforcement and focuses on understanding the function of student behavior.[8] *See id.*

Dr. James Ball, one of KCS's expert witnesses, is an autism consultant who works hands-on at KCS as a BCBA. Dr. Ball confirmed KCS's practices and procedures and testified that he has personally witnessed PBIS "in all the [KCS] schools that [he has] come in contact with," rebutting Dr. Elliot's opinion that KCS has not implemented PBIS. *Compare* J.A. 199 *with* J.A. 1222.

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[8] "Positive Behavioral Interventions, and Supports:

A broad term that describes a comprehensive, research-based, proactive approach to behavioral support aimed at producing comprehensive change for students with challenging behavior. PBS encompasses multiple approaches: changing systems, altering environments, teaching skills and appreciating positive behavior. The goal of PBS is not to eliminate the behavior but to understand the behavior's purpose (based upon information from the student's functional behavioral assessment) so that the student can replace it with new, pro-social behaviors that achieve the same purpose. PBS strategies may include, but are not limited to:

1. Altering the classroom environment;
2. Increasing predictability and scheduling;
3. Increasing choice making;
4. Making curricular adaptations;
5. Appreciating positive behaviors; and/or
6. Teaching replacement skills."

J.A. 1070.

KCS's other expert witness, Dr. Shelby Haines, a BCBA-Doctoral, School Psychologist, former Special Education Director and the current Superintendent of Marshall County Schools (WV), summarized her findings as follows:

> KCS has built a system with multiple layers of support, including multiple school psychologists, autism itinerants, education specialists, BCBAs, IEP specialists, and a parent education resource center. These staff are assigned to various schools throughout the county to train personnel, assist in many facets of IEP implementation, and program monitoring. This hands-on, personalized assistance is much more effective than large group professional development sessions with limited follow-up or data analysis with no personalization.

J.A. 1238.

Dr. Haines emphasized that "[a]ll decisions for students should be highly individualized":

> There are many variables for student success that can change at any time. It is not uncommon for a child to be doing well behaviorally, and then, one day, simply change. These behaviors may not be able to be predicted but need to be immediately addressed. At times, these behaviors can be addressed swiftly and changed quickly. Other times, behaviors take significant time with the manipulation of many variables to make a change. It is the job of the IEP or SAT team to monitor these changes.

J.A. 1239.

V. The District Court certified Plaintiffs' proposed class.

On August 24, 2021, the District Court issued its Order certifying the Plaintiffs' class. J.A. 1559-1596. The Court reviewed and summarized statistical

studies attached to Plaintiffs' motion to certify, as well as Plaintiffs' experts' reports opining on KCS's suspension rates of students with disabilities. *Id*. at 1564-66.

The Court noted a "common theme" in Dr. Elliott's conclusions that it appeared that KCS "went through the motions . . . without adequately identifying and addressing issues." J.A. 1567. The Court found, based on Dr. Elliot's opinions, that "KCS rarely provides behavior supports that are customarily offered in other school districts[.]" *Id*. at 1569.

The District Court also reviewed KCS's experts' opinions and noted their conclusions that KCS has a number of trained staff dedicated to providing services to students with disabilities. J.A. 1570-71. The Court also acknowledged that KCS's witnesses emphasized the "highly individualized process for developing IEPs and BIPs for students who need behavior supports." *Id*. at 1572. The Court reviewed the history and characteristics of both G.T. and K.M. and concluded that although the two students have different disabilities and needs, they were both denied adequate BIPs and FBAs, and that there was a need for more meaningful collaboration with both students' parents. *Id*. at 1577.

The Court addressed each requirement for certifying a class under Rule 23. It concluded that Plaintiffs' proposed class is ascertainable because class members could be identified based on the data KCS produced during discovery, and that more thorough data collection is part of the remedy Plaintiffs seek. J.A. 1583-

84. Next, in concluding that Plaintiffs satisfied the "commonality" requirement, the Court explained that Plaintiffs identified "patterns" of deficiencies among the individual records reviewed by their expert witness. *Id.* at 1589. Although the Court recognized that Plaintiffs cannot point to any single policy that affects all class members, it concluded that these "patterns," when combined with Plaintiffs' statistical evidence of disproportionate disciplinary rates among disabled students suggests that KCS's system for developing and implementing behavioral supports is not "effective." *Id.* at 1588-89. Importantly, the statistic that the District Court relied upon in reaching this finding—that KCS has one of the highest suspension rate disparities in the country—was not asserted by either party below and is nowhere to be found in the record.

With respect to typicality, the District Court concluded that G.T. and K.M. "fit squarely into the proposed class definition" and that their claims are typical of those of the class. The Court found that both G.T. and K.M. have "continued to struggle to access services they need." J.A. 1591. The Court's final conclusion relevant to this appeal was that an "injunction addressing multiple inadequacies in KCS's special education program" would be a suitable remedy to all class members. *Id.* at 1594. In concluding that Plaintiffs' proposed remedy was appropriate under Rule 23, the Court did not address the specific policies that would be changed or the indefinite appointment of a "monitor" who would oversee the gradual, as-yet-

undefined systemic change and report back to the District Court any perceived "inadequacies."

KCS petitioned this Court to immediately appeal the Class Certification Order pursuant to Rule 23(f). On November 16, 2021, this Court granted the Petition. J.A. 1597.

Summary of the Argument

The IDEA promises students with disabilities a FAPE and contains the procedures that educational professionals, parents, related service providers, and other members of IEP teams must follow. Each IEP team is tasked with meeting the educational needs of just one student. IDEA litigation is not an appropriate vehicle for federal courts—or expert witnesses—to impose their policy preferences on local education agencies and professional educators who serve school children, one child at a time. *See, e.g., Rowley*, 458 U.S. at 207-08; *Hartmann*, 118 F.3d at 1000 ("Absent some statutory infraction, the task of education belongs with the educators who have been charged by society with that critical task.").

For these reasons, the IDEA is uniquely "ill-suited to class-wide relief." *Blackman v. District of Columbia*, 633 F.3d 1088, 1094-96 (D.C. Cir. 2011) (Brown, J., concurring). That is not to say IDEA classes are blanketly uncertifiable. Although this Court has not yet addressed an IDEA class certification, three Courts of Appeals have. Those Courts of Appeals hold that IDEA class plaintiffs must identify a

"uniformly applied" policy or "well-defined practice" resulting in an "across-the-board denial of the individual assessments and services that the IDEA requires." *Parent/Professional Advocacy League v. City of Springfield, Mass.*, 934 F.3d 12, 29 (1st Cir. 2019) (collecting cases).

This test is a faithful application of *Wal-Mart Stores Inc. v. Dukes*, 564 U.S. 338 (2011) to IDEA class actions. It permits class treatment when a school district does (or fails to do) something that results in an across-the-board denial of services to students. Simultaneously, it provides a necessary guard against class actions that collectivize individual decision-making or place federal courts in the impossible position of presiding over a battle of experts opining about how better to reach broad, system-wide goals. The IDEA uniquely requires this kind of safeguard. The IDEA's student-by-student processes are fueled by the efforts of caring parents, classroom teachers, behavior specialists and other educational professionals—not lawyers or expert witnesses. The Courts of Appeals' thoughtful application of *Wal-Mart* to IDEA class actions is good for our special education system, good for the federal courts, and good for students. In addition to three Courts of Appeals, dozens of District Court decisions across the country have faithfully applied this standard.

Plaintiffs' class action claims do not satisfy this or any other recognized standard for certifying a Rule 23(b)(2) class action. Plaintiffs do not challenge a common policy or well-defined practice—nor is there any across-the-board denial

of services to students with disabilities. Instead, in dispute is whether KCS's entire approach to addressing the behavioral needs of students with disabilities is "working" or "adequate" in the view of competing experts. Plaintiffs request a yet-to-be-specified injunction addressing KCS's alleged systemic deficiencies and a court-appointed monitor to oversee its implementation. Meanwhile, the Class Certification Order explicitly rejects the need to determine whether individual student needs are actually met by KCS.

The Class Certification Order turns the IDEA's student-centered approach on its head. By certifying this class, the District Court eschewed a wide body of IDEA class action authority, deviated from the plain terms of Rule 23(b)(2) and endorsed a commonality analysis that three Courts of Appeals have expressly rejected. Moreover, the Class Certification Order reaches the alarming factual conclusion that KCS has one of the highest suspension rate disparities in the country and gives great weight to that finding despite neither party claiming this to be true, the absence of record evidence supporting it, and the fact that it is objectively untrue. KCS's disciplinary disparities are no different than the disparities that exist nationwide and in nearly every school district in the country that uses out of school suspensions.

For these reasons, KCS respectfully submits that the Class Certification constitutes an abuse of discretion, and requests that it be reversed.

Standard of Review

This Court reviews a class certification order for abuse of discretion. *See Brown v. Nucor Corp.*, 785 F.3d 895, 901 (4th Cir. 2015). "A district court abuses its discretion when it materially misapplies the requirements of Rule 23." *Id.* at 902 (citing *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 424 (4th Cir. 2006). "A district court per se abuses its discretion when it makes an error of law or clearly errs in its factual findings." *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 317-18 (4th Cir. 2006). Thus, "[t]he decisive question here is whether the district court materially misapplied Rule 23[] to the facts at hand in light of *Wal-Mart*" or made erroneous factual findings. *Brown*, 785 F.3d at 902.

Argument

I. Plaintiffs fail to demonstrate commonality.

The Supreme Court's seminal decision in *Wal-Mart* established the commonality test for claims of systemic wrongdoing. *See* 564 U.S. 338. The Supreme Court held that class claims "must depend on a common contention . . . [that] must be of such a nature that is capable of classwide resolution—which means that a determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 350. To that end, class plaintiffs must "demonstrate that the class members have

suffered the same injury." *Id.* at 349-50. Allegations of a "violation of the same provision of law" do not suffice. *Id.* at 349.

Decisions from the three Courts of Appeals that have applied *Wal-Mart* to an IDEA class action support KCS's position. *See Parent/Professional*, 934 F.3d 13; *DL v. District of Columbia*, 713 F.3d 120 (D.C. Cir. 2013); *Jamie S. v. Milwaukee Public Schools*, 668 F.3d 481 (7th Cir. 2012). Drawing from a collection of authority, the First Circuit most recently set forth the commonality test for IDEA cases:

> **Plaintiffs can satisfy Rule 23(a)'s commonality requirement by identifying a uniformly applied, official policy of the school district, or an unofficial yet well-defined practice, that drives the litigation** . . . . So, for example, classes have been certified under the IDEA to challenge (1) a school district's policy, called 'upper level transfer,' of automatically moving students who had aged out of autism support classrooms at one school to another school . . . and (2) a district's policy of delaying the start of services offered in IEPs, like speech therapy, until two weeks into the school year. In these examples, it is easy to see how the policies anchor common questions – does 'upper leveling' or delaying the start of services violate the IDEA? – the answers to which could resolve an issue that is central to the validity of each one of the claims in one stroke.

Parent-Professional, 934 F.3d at 29.

Correspondingly, IDEA class plaintiffs must establish that "the harm to the class members is (in part) that **the policy precludes, across-the-board, the individual assessments and services that the IDEA requires** and that harm is likely to have similar causes (the policy) and effects (denial of services appropriate

to that individual student)." *Parent-Professional*, 934 F.3d at 29. Decisions from the Seventh Circuit and D.C. Circuit are consistent with this approach—as are the vast majority of decisions from United States District Courts. *See* J.A. 921-22 at n.14-15 (collecting cases).

The "across-the-board" denial of services requirement preserves *Wal-Mart*'s mandate that the plaintiffs "suffer[] the same injury." FAPE is the "yardstick for measuring the adequacy of the education that a school offers to a child with a disability," and it undeniably (and necessarily) turns on "individual student needs." *Fry*, 137 S. Ct. at 753-54. With a uniformly applied policy or practice and an "across-the-board" denial of services, however, a factfinder could determine—in one stroke—whether the class members were deprived of a FAPE. Upon making those two showings, a class of student plaintiffs may be able to prove that the class-wide injury (an across-the-board denial of services) is attributable to the common wrong (a uniformly applied policy or practice) and may seek injunctive relief. Not only have Plaintiffs failed to make these showings, but they also deny that they must do so to proceed. *See* J.A. 878 at n.32.[9]

[9] Notably, Plaintiffs' commonality argument below bears little resemblance to the Class Certification Order's reasoning. Plaintiffs argued that the class members face a "substantial risk of harm" attributable to KCS's policies. *See* J.A. 878 at n.32. But "substantial risk of harm" is not a commonality test or an IDEA standard. Rather, it is an Eighth Amendment standard applied to challenges to the treatment of individuals in state custody. *See, e.g., Orr v. Shicker*, 953 F.3d 490 (7th Cir. 2020); *Parsons v. Ryan*, 754 F.3d 657 (9th Cir. 2014). Plaintiffs' commonality argument below was based on an irrelevant standard.

However, in the absence of a class-wide injury traced to a common wrong, reviewing whether the FAPE standard has been met requires an examination of each class member's circumstances and his or her school's provision of special education and related services. Accordingly, a reviewing court is able to make a classwide FAPE determination, in one stroke, only if there is a common policy or well-defined practice that results in an across the board denial of services." The IDEA's emphasis on the individual student is its "principal command." *Fry*, 137 S. Ct. at 753; *see also Endrew F.*, 137 S. Ct. at 999 (stating that an IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"). The focus on the individual student is a feature, not a bug, of special education under the IDEA.

The IDEA therefore stands in stark contrast to other causes of action that are more amenable to Rule 23(b)(2) class treatment. For example, this Court has sustained Title VII and the FCRA class certifications under Rule 23(b)(2) because the merits questions under those statutes turn on uniform, class-wide circumstances—not the circumstances of individual plaintiffs. *See, e.g., Berry v. Schulman*, 807 F.3d 600, 609 (4th Cir. 2015) ("[W]hat matters [under FCRA] is the conduct of the *defendant* . . . [which] was uniform with respect to each of the class members."); *Brown v. Nucor Corp.*, 785 F.3d 895, 916 (4th Cir. 2015) (certifying

class alleging a disparate impact theory of liability). The student-centric IDEA is just the opposite.

A. Plaintiffs cannot identify a uniformly applied official policy or well-defined practice.

Plaintiffs cannot identify a "uniformly applied official policy" or "well-defined practice" to move this litigation forward—and the Class Certification Order does not find any either. Instead, the District Court construed the *Parent/Professional*, *D.L.*, and *Jamie S.* decisions as follows:

> A review of out-of-circuit cases . . . confirms that the commonality analysis rests largely on the quality of the evidence supporting common policies or **common patterns** and practices.

J.A. 1587 (emphasis added). The District Court then identified a "cohesive pattern" that "KCS does not have an effective system for developing and implementing behavioral supports for students with disabilities." *Id.* at 1589.[10]

This reading of *Parent/Professional*, *D.L.*, and *Jamie S.* does not withstand scrutiny. None of those decisions held that "common patterns" satisfy commonality. In fact, **each of them considered and expressly rejected that argument**. *See Parent/Professional*, 934 F.3d at 30 ("The problem with plaintiffs'

[10] Notably, the principal evidence cited by the District Court in support of this "pattern"—that KCS has one of the highest suspension rate disparities in the country—was not asserted by either party below, is nowhere to be found in the record, and is contradicted by readily available data. *See infra* at Section II.

[position is that they claim] to find a pattern of legal harm common to the class without identifying a particular driver—a uniform policy or practice that affects all class members—of that alleged harm."); *D.L.*, 713 F.3d at 126-27 ("After *Wal-Mart* it is clear that defining the class by reference to the District's pattern and practice of failing to provide FAPE speaks too broadly."); *Jamie S.*, 668 F.3d at 488 ("After identifying 'certain patterns' and 'trends' in the student files, [plaintiffs' expert] simply 'projected' the patterns and trends over the entire [school] district . . . . That all class members have 'suffered' as a result of disparate individual IDEA . . . violations is not enough.").

Instead, these Courts of Appeals require a "uniformly applied policy" or "well-defined practice" to satisfy commonality. *Parent/Professional*, 934 F.3d at 29; *see D.L.*, 713 F.3d at 127 ("[T]he harms alleged to have been suffered by the plaintiffs here involve different policies and practices . . . the district court identified no single or uniform policy or practice that bridges all their claims."); *Jamie S.*, 668 F.3d at 498 ("As the Supreme Court noted in *Wal-Mart*, an illegal *policy* might provide the glue necessary to litigate otherwise highly individualized claims as a class. But again, as in *Wal-Mart*, proof of an illegal policy is entirely absent here.") (emphasis in original) (internal citations omitted).

The rejection of a commonality-by-pattern test by three Courts of Appeals is well-founded: commonality-by-pattern erases *Wal-Mart* entirely.

Patterns can be defined broadly or narrowly. If a pattern "speaks too broadly," *D.L*, 713 F.3d at 127, it fails to "generate common answers apt to drive the resolution of the litigation." 564 U.S. at 351. This is uniquely important in IDEA cases. Broadly defined patterns leave the merits untethered to a policy or practice to be remedied by injunctive relief—and federal courts are instead invited to "impos[e] their view of preferable educational methods" on local school districts without an eye towards any specific problem or solution. *Rowley*, 458 U.S. at 207. Broader is not better.

The Class Certification Order's reliance on a "pattern" of "not hav[ing] an effective system for developing and implementing behavioral supports for students with disabilities" speaks far too broadly. Dr. Elliott's 55-page report criticizes nearly everything KCS does to address the behavioral needs of students with disabilities. Importantly, record evidence demonstrates that KCS actually does perform the services that Dr. Elliott asserts are inadequate.[11] Dr. Elliott opines though that KCS is not performing these services well enough.

Regardless, the many component parts of KCS's "system" of providing FAPE to students with disabilities are not all commonly applied, legally required, or even applicable to every class member. The class is comprised of "students with

[11] For example, one of Plaintiffs' critiques is that KCS does not utilize district-wide suspension data. KCS instead analyzes suspension data on an individual level and reports its aggregated district-wide data to the WVDE.

disabilities who need behavior supports"[12]—which includes both IDEA students and Section 504 students. Section 504 students receive 504 plans rather than IEPs. 504 plans are governed by a different legal framework than IEPs.[13] Even among IDEA students only, BIPs, MDRs, FBAs and IEPs with behavior-related goals are not required across the board. *See supra* at 5. Some of those services and processes may apply to some IDEA students depending on their individual needs and circumstances.

Among the litany of systemic issues raised in Plaintiffs' Amended Complaint and Dr. Elliott's report is the "adequacy" of BIPs, MDRs, FBAs, and IEPs at KCS. J.A. 60 at ¶¶ 150, 151. The adequacy of such services, as a matter of law, can only be judged with respect to each student's unique needs, strengths, and circumstances. *See, e.g., Endrew F.*, 137 S. Ct. at 1001. Plaintiffs also question

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[12] The term "behavior supports" is not defined by the IDEA. Rather it is an umbrella term that can include a wide variety of behavioral strategies. **All students,** to varying degrees, need some form of "behavior support" in the classroom—from a teacher's posted class rules, to visual/picture schedules, which help certain students better understand and anticipate the order of activities for the day, to far more involved supports like the full-time assistance of a paraprofessional who helps implement a BIP. The class definition is not helpful in identifying the class members or what services they need to receive a FAPE. *See* Section IV.

[13] IDEA eligibility is limited to thirteen specific categories of disability. Even if a student's condition falls within one of those categories, IDEA services would be provided only if the student's education performance is adversely impacted thereby, and the student requires special education and related services because of their disability. Section 504 has at least some application for all students with disabilities. For many, that will only be the right to be free of discrimination on the basis of disability—as opposed to specific services. These are legally—and factually—distinct groups of students.

whether parents have meaningful input in their child's IEPs and BIPs, J.A. 1588—but this question, too, has been deemed too individualized to proceed in class action. *See T.R. v. Sch. Dist. of Philadelphia*, Civil Action No. 15-4782, 2019 WL 1745737 (E.D. Pa. April 18, 2019), *aff'd*, 4 F.4th 179 (3d Cir. 2021). Yet another issue Plaintiffs raise is whether KCS adequately identifies students who "need behavior supports"—but the Seventh Circuit has analogously concluded that systemic "child find" violations are not cognizable class claims. *See Jamie S.*, 668 F.3d at 498 ("There is no such thing as a "systemic" failure to find and refer individual disabled children for IEP evaluation—except perhaps if there was significant proof that [the school district] operated under child-find *policies* that violated the IDEA.") (emphasis in original).

Other criticisms (for example, how KCS utilizes disciplinary data, and how KCS trains its staff) are not tethered to any IDEA requirements at all. KCS in fact does those things—just not in a manner that satisfies Dr. Elliott. KCS's expert Dr. Ball testified that in his experience consulting with thousands of school districts, he has never seen the use of aggregated disciplinary data as Dr. Elliott proposes. *See* J.A. 1229. Proceeding to the merits of these wide-ranging, adequacy-based critiques is emphatically at odds with *Rowley*'s mandate that "reviewing courts should [not] have a free hand to impose substantive standards of review which cannot be derived from the [IDEA] itself." 458 U.S. at 207.

The Class Certification Order bundles Dr. Elliott's critiques together as a broadly-phrased "pattern." But grouping different criticisms together "gives no cause to believe that all [Plaintiffs'] claims can be productively litigated at once." *Wal-Mart*, 564 U.S. at 350. The remaining merits question in this case is whether everything KCS does to address student behavioral needs is working—and if not, what should replace or enhance KCS's current practices. The merits of this case will involve a battle of the experts disputing how best to achieve broad, system-wide goals of providing a FAPE to thousands of individual special education students. As a public body committed to meeting the needs of all students with disabilities, KCS is open to recommendations for improvement. But KCS opposes Plaintiffs' relief requested in this case, *see* Section III *infra*, and there is no way to adjudicate the parties' disagreements in court without running afoul of established law.

B. Plaintiffs have not demonstrated any across-the-board denial of behavior supports or other services.

Both the District Court and Plaintiffs insist that this case is not about the behavior supports provided to individual students. *See, e.g.,* J.A. 1589. That is, in fact, the foundation of Plaintiffs' case.

The Amended Complaint alleges that KCS "fails to adequately analyze the root causes of students' concerning behaviors, and therefore fails to create effective IEPs or BIPs for them." J.A. 60, ¶ 150. To support this allegation, Dr. Elliott reviewed a sampling of student files and opined that the

"majority . . . appeared to be inadequate to meet the severity of the student's behavior problems." *Id.* 219. Plaintiffs then extrapolated that opinion across the class. *See id.* 884 ("Each Named Plaintiff and unnamed class member . . . has been denied the necessary behavioral supports they needed to receive FAPE.").

Whether a student in fact received adequate "behavior supports" depends on the student's individual circumstances—and it is the ultimate issue in due process hearings and federal court litigation across the country. *See, e.g., R.F. v. Cecil Cnty. Pub. Sch.*, 919 F.3d 237, 250 (4th Cir. 2019) ("[T]he behavior strategies in the [student's] May 2016 IEP were reasonably calculated in light of [the student's] circumstances at the time that the IEP was created."). These individual proceedings are complete with witnesses, cross examination, expert testimony, findings of fact and conclusions of law, and deference to the expertise of administrative hearing officers. *See, e.g., id.* The resulting written decisions—like those of G.T. and K.M.—often exceed 40 or 50 pages and turn on critical details like when the student engaged in certain behavior and the school's substantive responses to address it. *See, e.g.,* J.A. 1261-1361.

In this case, Dr. Elliott reviewed a few hundred student files, reached her own conclusion about the quality of "behavior supports" for the "majority" of those students, J.A. 219—and Plaintiffs then presumed that conclusion applies to a class of an unknown number of students, *id.* at 884. Dr. Elliott has not met these

students, did not interview KCS employees who actually provided them behavioral services, and did not reach written conclusions on these students that KCS can assess on the merits. This methodology is an affront to the governing standard of FAPE, the administrative hearing process, and the careful and individual attention necessary to assess the behavioral needs of students with disabilities. Notably, the class plaintiffs in *Parent/Professional* and *Jamie S.* tried this same analysis—and both Courts of Appeals concluded that it does not satisfy commonality.

The Class Certification Order credits Dr. Elliott's methodology (and a misunderstood statistic, *see* Section II) and concludes that "KCS's approach is not working." J.A. 1594. The Class Certification Order ultimately concludes that "there is no need for [KCS] to formulate defenses as to the denial of FAPE for individual class members." *See id.* at 1589, n.11. But this is precisely the defense called for by Plaintiffs' theory that "[e]ach Named Plaintiff and unnamed class member . . . has been denied the necessary behavior supports they need to receive FAPE in the LRE." *Id.* at 884.[14]

This case is—without question—about the adequacy of behavior supports provided to individual students. It is a core allegation in the Amended Complaint, a critical component of Plaintiffs' "evidence," and the ultimate issue under

[14] Notably, an administrative hearing officer concluded that KCS provided G.T. (one of the class representatives) a FAPE. *See* J.A. 1308-09.

the governing standard of FAPE. Yet Plaintiffs ask this Court to erase these individual questions in favor of the generalized and qualitative judgments of their expert.

C. Class members do not suffer from same alleged injury.

Plaintiffs allege that class members sustain "unjustified disciplinary removals" from the classroom as a result of KCS's "system." That is, KCS's policies fail to meet student behavioral needs on the front end, and KCS instead "unjustifi[ably]" disciplines students on the back end. J.A. 858. In response, KCS argued that there is no way to determine the existence or the cause of this alleged injury on a class-wide basis, *see* J.A. 929-30—but the Class Certification Order makes no mention of it.

Disciplinary removals from the classroom for a whole class of students cannot logically or legally be deemed "justified" or "unjustified" on a class-wide basis. First, the IDEA authorizes school personnel to "consider any unique circumstances on a case-by-case basis when determining whether to order a change in placement [including suspension] for a child with a disability who violates a code of student conduct." 20 U.S.C. § 1415(k)(1)(A). Second, for certain behaviors, state law ***requires*** KCS to suspend or expel a student so long as the behavior was not a manifestation of the student's disability.[15] *See e.g.,* W. Va. Code § 18A-5-1a(a).

[15] Each of those zero tolerance behaviors were found in Dr. Elliott's sampling of student files. Many of these students were suspended for drug-related infractions, others for unprovoked physical violence, and one student set off fireworks in a school gymnasium. J.A. 1133-34, 1139.

Without individualized examination of the facts and circumstances of each student suspension and expulsion, it is not possible to conclude that one student, let alone a class of students, sustained "unjustified disciplinary removals" across the board. That judgment could only be made on a case-by-case, student-by-student basis as it is dependent on the student's behavior and a great many other factors, as detailed in the IDEA.

The *cause* of student disciplinary removals cannot be determined on a class-wide basis either. The root cause of behaviors that result in suspensions is necessarily unique to each individual. Students engage in different behaviors for different reasons. A high school student with ADHD and dyslexia who smokes marijuana in a school bathroom engages in that behavior for different reasons than an elementary school student with autism and generalized anxiety who throws a textbook at a classmate. While it is conceivable that KCS's provision of (or failure to provide) appropriate behavioral supports played some role in one or both of these incidents, there is no way to answer that question without examining the unique circumstances of each student and KCS's efforts to consider the use and provision of appropriate behavior services.[16] That is likely why Congress requires parents and students to exhaust their administrative remedies before proceeding to court.

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[16] And even this presumes that both students' IEP Teams previously concluded that their behavior impedes their learning or that of others and, after due consideration, required the use of behavior supports. After all, these could be isolated and highly unusual behaviors for both students.

Plaintiffs cannot establish whether they suffered a class-wide injury—and if so, what caused it. This is exactly why *Parent/Professional*'s "**across-the-board**" denial of services requirement is so important. Without it, the governing standard of FAPE is stripped away, causation is simply inferred, and federal courts are tasked with presiding over a battle of the experts disputing educational policy. That is what happened below.

II. The District Court reached clearly erroneous factual conclusions in assessing the record below.

In their class certification briefing, Plaintiffs identified a number of statistical conditions regarding the use of discipline at KCS. These statistics generally establish that KCS students with disabilities incur higher rates of suspension than their peers without disabilities. *See* J.A. 863. However, that is also true for "nearly every school district in America that uses out-of-school suspensions." *Id.* at 451; *Id.* at 1136 (Dr. Elliott admitting that it is "generally true" that "students with [disabilities] are more likely to be suspended than . . . their nondisabled peers"). The statistics also establish that KCS has higher-than-average rates of suspension across its entire student body—meaning both regular education and special education students from grades pre-K through 12. *See id.* at 1136 ("KCS's suspension rate for ***general education and special education*** were higher, just higher, in comparison to other school districts.") (emphasis added).

After the discovery deadline had passed, Plaintiffs belatedly disclosed a study from a March 23, 2021 study from the UCLA Civil Rights Project (the "UCLA Study") as an exhibit to their Motion for Class Certification. *See* J.A. 424-544. KCS moved to strike this untimely submission that it had no opportunity to examine or question. *Id.* at 1387. Denying KCS's motion to strike, the District Court found that the UCLA Study "may be helpful in analyzing the class certification factors." *Id.* at 1562. The Class Certification Order then construes and relies upon the UCLA Study as follows:

> Plaintiffs cited [the UCLA Study] for disciplinary data, including comparisons between suspension rates for students with and without disabilities in Kanawha County, and between suspension rates for students with disabilities in Kanawha County and in other school districts across the state and country.
>
> . . . .
>
> The Plaintiffs presented data indicating that KCS students with disabilities are suspended at a disproportionate rate compared to their peers without disabilities, and **that the disparity in suspension rates at KCS is the highest in West Virginia and among the highest among large school districts nationally**.

Id. at 1562, 1580 (emphasis added). The UCLA Study says no such thing—and neither party ever claimed that it did. *See id.* at 864 (Plaintiffs' explanation of the UCLA Study). Nonetheless, the Class Certification Order repeats its alarming interpretation of the UCLA Study in the heart of its commonality analysis, and later concludes that KCS's approach is just "not working." *Id.* at 1594.

The UCLA Study provides that the "lost instructional day gap" **among secondary students only** at KCS ranks 15th amongst large school districts across the country. *See* J.A. 451. This statistic establishes the simple difference, or gap, between the rates of lost instructional time due to suspensions for secondary students with disabilities and their secondary student peers without disabilities. The UCLA Study's lost instructional day gap calculation is limited to a subset of older, and thus relatively more discipline-prone students—students older than both representative plaintiffs. This statistic does not speak to conditions across the entire school district.

Importantly, the UCLA Study's underlying data[17] establishes a vastly different conclusion if *all* KCS students are taken into account:

	Lost Instructional Days per 100 students without disabilities	*Lost Instructional days per 100 students with disabilities*	*Lost Instructional Day Gap per 100 students*	*Ranking Amongst Large School Districts*
Secondary Students Only at KCS	96	212	116	15
All KCS Students	58	107	49	101

The district-wide lost instructional day gap at KCS (49 days) is significantly lower than the gap among secondary students only (116 days). KCS's lost instructional day

[17] The UCLA Study's underlying data is available at https://www.civilrightsproject.ucla.edu/research/k-12-education/special-education/disabling-inequity-the-urgent-need-for-race-conscious-resource-remedies, at Spreadsheet 3.

gap is in fact ***not*** "the highest in West Virginia" or "one of the highest" among large school districts nationally as the Class Certification Order held. The UCLA Study's underlying data identifies six (6) West Virginia school districts and one hundred (100) "large school districts" nationally with greater lost instructional day gaps than KCS.[18] To illustrate the magnitude of this error, the UCLA Study's underlying data identifies thirteen (13) large school districts that have ***more than double*** KCS's lost instructional day gap. *See supra* at n.17.

Moreover, the UCLA Study's "lost instructional day gap"—even properly drawn across the entire school district—is not a suspension rate disparity. These are different metrics with different methodologies. Students with disabilities incur out-of-school suspensions at about double the rate of their peers without disabilities: **both at KCS, and nationwide**.[19] KCS's "suspension rate disparity" is

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[18] The UCLA Study defines "large school districts" by reference to their **secondary student population,** making it difficult to determine which school districts are "large" when reviewing the district-wide data. Assuming "large school district" means 10,000 total students and 1,000 students with disabilities, KCS's lost instructional day gap ranks 101 of 843. But regardless of the parameters used, KCS does not have "one of the highest" lost instructional day gaps in the country according to the UCLA Study's underlying data.

[19] The Office of Civil Rights' Data Collection Tool allows for a direct comparison of suspension rates. *See* OCR Data Collection Tool, available at https://ocrdata.ed.gov/dataanalysistools/comparisongraphsanddatareport. The OCR data establishes that in the 2017-18 school year, KCS students with disabilities incurred one or more out of school suspensions at approximately 2.35 times the rate of their peers without disabilities. *See id.* Nationwide, that same disparity is 2.50—marginally higher than KCS's disparity. *See id.*

in fact roughly equal to the national rate—a far cry from being amongst the most disparate in the nation. The District Court's conclusion that KCS has the highest suspension disparity rate in West Virginia and is among the highest of large school districts nationally not only lacks record support, it is not true.

This factual error is a supporting pillar of the Class Certification Order's commonality analysis. *See* J.A. 1587-88. The District Court held that "the commonality analysis rests largely on the **quality of the evidence** supporting allegations of common policies or common patterns and practices." *Id.* at 1587 (emphasis added). The District Court then turned to the evidence in this case and asserted, first thing, that KCS has one of the highest suspension rate disparities in the country. *See id.* at 1588. Given that this is just not true, the Class Certification Order constitutes an abuse of discretion.[20] *See Thorn*, 445 F.3d at 317-18 ("A district

[20] The Class Certification Order commits two other factual errors, and KCS finds it important to correct the record. First, the District Court stated that "[Dr. Elliott] found an overall probability" of "0.55" that KCS students with disabilities will incur a suspension. J.A. 1565. After KCS disputed Dr. Elliott's methodology, Dr. Elliott conceded that this number is not a probability. *See id.* at 1435. It is a risk ratio reached by dividing the total number of suspensions—including in-school suspensions, which do not necessarily effect a change of placement under the IDEA—by the student population. This ratio is primarily driven by students who incur multiple suspensions. This is misleading because the vast majority of students with disabilities at KCS are never suspended. The likelihood of an IDEA student incurring an out of school suspension at KCS—at least, in the 2017-2018 school year—is more accurately stated as roughly 0.19 (or 19%). This is the percentage of IDEA students who were suspended one or more times at KCS in that school year. *See supra* at n.15.

court abuses its discretion when it makes an error of law or clearly errs in its factual findings.").

III. Plaintiffs do not seek appropriate injunctive relief under Rule 23(b)(2).

A plaintiff seeking class certification under Rule 23(b)(2) must establish that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief . . . is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

An injunction "must be clear enough to inform the [defendant] of what it may and may not do." *Pashby v. Delia*, 709 F.3d 307, 331 (4th Cir. 2013). "At the class certification stage, the injunctive relief sought must be described in reasonably particular detail such that the court can at least conceive of an injunction that would satisfy Rule 65(d)'s requirements." *Shook v. Bd. of Cnty. Comm. of Cnty. of El Paso*, 543 F.3d 597, 605 (10th Cir. 2008); *see M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 847 (5th Cir. 2012). In turn, Rule 65 requires that an injunction "state its terms specifically." Fed. R. Civ. P. 65(d)(B). This rule is "designed to prevent uncertainty and confusion . . . and to avoid the possible founding of a contempt citation on a decree too vague to be understood." *Schmidt v. Lessard*, 414 U.S. 473, 477 (1974).

Second, the District Court stated that KCS's "total student population [is] approximately 4,200." J.A. 1564. KCS's student population is instead approximately 25,000. *Id.* at 862. KCS believes this may have been a typographical mistake.

Plaintiffs seek an order "to remedy [KCS's] systemic deficiencies," incorporating-by-reference Dr. Elliott's 55-page report. J.A. 891. The report itself is so lengthy that it cannot be summarized in this briefing. In short though, the report criticizes the whole of KCS's special education program in broad and general terms—while often remaining silent on solutions. Ultimately, Plaintiffs do not request that KCS do anything in particular—or refrain from doing anything in particular. Instead, per Dr. Elliott, Plaintiffs request a "continuous improvement process" overseen by a court-appointed monitor for, at least, several years. *Id.* at 1114-15.

The relief requested also violates Rule 23(b)(2)'s requirement that class-wide injunctive relief be "final." *See Jamie S.*, 668 F.3d at 498 ("The final clause is important."). Dr. Elliott testified in no uncertain terms that her eventual systemic reforms to KCS are not "final." Dr. Elliott testified that KCS might see "reasonable movement" on her proposed reforms "within three to five years," that it is a "huge domain" and a "continuous improvement process" subject to "peaks and valleys" because "things don't always stick." J.A. 1114-15. KCS raised this dispositive testimony in its briefing below, *id.* at 932—but the Class Certification Order makes no mention of it.

In addition, Plaintiffs seek a court-appointed monitor to carry out the "relief" and to maintain lines of communication with Plaintiffs' counsel and the

District Court indefinitely. This is not "final," either—particularly given the indefiniteness and breadth of the injunction requested. *See Jamie S.*, 668 F.3d at 499 (concluding that a court-appointed monitor in an IDEA case violates Rule 23(b)(2)).

Beyond the Rule 23(b)(2) conflict with court-appointed monitoring, the District Court lacks authority to order monitoring absent KCS's consent. *See Cobell v. Norton*, 334 F.3d 1128, 1141 (D.C. Cir. 2003) (vacating court appointed monitor after a governmental defendant revoked its consent). In *Cobell*, the D.C. Court of Appeals held as follows:

> [T]he district court does not have inherent power to appoint a monitor – at least not a monitor with the extensive duties the court assigned to [this one] – over a party's substantial objection . . . . When a party has for a nonfrivolous reason denied its consent [to monitoring] . . . the district court must confine itself (and its agents) to its accustomed judicial role.

Id. at 1141-42.

To be sure, *Cobell* confined its holding to the facts at issue: in that case, court-appointed monitoring the Department of the Interior invoked separation of powers concerns. But Plaintiffs' demand for monitoring here does the exact same thing. KCS's IDEA compliance is already monitored by the WVDE and the USDE. *See* 20 U.S.C. § 1416(a)(1)(A). This Court has correctly recognized that "federal courts cannot run local schools.'" *T.B.*, 897 F.3d at 572. Monitoring KCS invites the District Court to do just that—particularly given that there is no particular action to be enjoined or compelled. *See Cobell*, 334 F.3d at 1143 (emphasizing the importance

of "specific and detailed" injunctions and decrying "court decrees that are as thick as phone books").

There is also reason to conclude that what Plaintiffs are requesting—direct but unspecified court involvement in KCS's special education system for years on end—will have negative consequences. Although the case did not involve court-appointed monitoring, Judge Brown of the D.C. Court of Appeals put it plainly in her concurring opinion in *Blackman*:

> That this class action failed to provide the specialized relief plaintiffs desired only further supports the notion that the class action is an inappropriate vehicle for these claims . . . . IDEA has morphed from a system intended to benefit children to a system that provides full employment to a specialized cadre of lawyers . . . . If there is any answer to this problem, it will likely come from concerned parents, committed teachers, and conscientious volunteers. One thing is clear. It will not come from adjusting the spigot directing the flow of public funds to lawyers.

633 F.3d at 1095, 1097 (Brown, J., concurring).

For these reasons, KCS cannot, and will not, consent to a "continuous improvement process" overseen by a court-appointed monitor. KCS is committed to meeting the needs of its students and has always been willing to take concrete steps to offer additional safeguards for students with disabilities. But Plaintiffs' demands in this case are not appropriate claims for relief under Rule 23(b)(2)—and they are fatally in conflict with the structure and purpose of the IDEA.

IV. Plaintiffs' class is unascertainable.

To be ascertainable, the class members must be readily identifiable by objective criteria. *See EQT Prod. Co. v. Adair*, 764 F.3d 347 (4th Cir. 2014). Below, the parties disputed whether the ascertainability requirement applies to Rule 23(b)(2) class actions. Citing out-of-circuit authority, Plaintiffs argued that classes seeking injunctive relief do not need to establish that the class members are ascertainable. *See, e.g., Shelton v. Bledsoe*, 775 F.3d 554, 562 (3d Cir. 2015). This Court has not addressed that question, and the District Court did not reach it either.

However, courts that have *not* found ascertainability to be required for Rule 23(b)(2) class actions still require that the class be "cohesive"—a requirement that is "more stringent than the predominance and superiority requirements for maintaining a class action under Rule 23(b)(3)." *Ebert v. Gen. Mills, Inc.*, 823 F.3d 472, 480 (8th Cir. 2016); *see Shelton*, 775 F.3d at 562. "The existence of a significant number of individualized factual and legal issues defeats cohesiveness and is a proper reason to deny class certification under Rule 23(b)(2)." *Donelson v. Ameriprise Fin. Servs., Inc.*, 999 F.3d 1080, 1093 (8th Cir. 2021). Plaintiffs' class is not cohesive for the reasons set forth above—nor is it ascertainable, as established below.

The District Court concluded that the class is ascertainable because KCS assembled "data identifying all students with disabilities who **receive** behavior

supports" in discovery. J.A. 1584 (emphasis added). This misconstrues the class definition. The class definition is not students who **receive** behavior supports—but students who **need** them. The class definition is infinitely less ascertainable than the identifiable subset of students who already receive documented "behavior supports." *See Jamie S.*, 668 F.3d at 495 ("One immediately obvious defect in this class is its indefiniteness. A significant segment of the class . . . comprises [of] disabled students who may have been eligible for special education but were not identified and remain unidentified.").

There is no statutory standard or test for determining whether a student needs behavioral intervention—let alone an objective one. The IDEA requires that an IEP team "**consider the use** of positive behavioral interventions and supports, and other strategies, to address that behavior" if the IEP team determines that a student's behavior interferes with his or her learning or that of others. 20 U.S.C. § 1414(d)(3)(B)(i) (emphasis added). Even if the provision of "behavior supports" for such students was mandated—plainly it is not—section 1414(d)(3)(B)(i) is not a standard by which class members can be readily identified by objective criteria. *See Enterprise City Bd. of Educ. v. S.S.*, 2020 WL 3129575, *6 (M.D. Al. June 12, 2020) ("Under the IDEA, the IEP team is required to consider behavior interventions and strategies to address behavior that impedes the child's learning or that of others. Specific programs or strategies, however, are not mandated as long as the

educational organization takes appropriate steps to address a student's behavior.") (internal citations omitted). There is no way to objectively identify a class of "all KCS students with disabilities who need behavior supports."

V. The class representatives are not typical of the class.

Rule 23(a)(3) requires that the class representative's claims or defenses be typical of the class. "[A]s goes the claim of the named plaintiff, so go the claims of the class." *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 340 (4th Cir. 1998). The Class Certification Order finds typicality because the class representatives "both have continued to struggle to access services they need" and "they remain exposed to the inadequate procedures in KCS." J.A. 1591.

But indisputably, neither of the class representatives typify the policy and practice critiques made by Dr. Elliott. *See* J.A. 930-31. KCS identified G.T. and K.M. as needing "behavior support," provided them with "behavior supports," conducted IEP meetings, accurately determined their eligibility category, performed FBAs, and developed BIPs to address and modify their behaviors which impede learning. *See id.* The class representatives cannot typify unnamed and unidentified students who purportedly did not receive these services. By way of example, Plaintiffs' allegation that KCS systemically fails to identify students who "need behavior supports" is obviously inapplicable to the two class representatives. KCS identified these students as needing behavior supports, involved professional

behaviorists, and created BIPs to address their severe behavioral issues which impeded their learning.

Of course, the class representatives are entitled to file due process complaints alleging that their IEPs, BIPs and/or other special education services were inadequate to meet their needs, resulting in a denial of FAPE. And they did that. The due process hearing officers reached different conclusions in each case. K.M. was denied a FAPE on one limited issue (insofar as his BIP was not implemented in a timely manner after his FBA was completed). G.T. was provided a FAPE in all respects. These different decisions are not surprising. G.T. and K.M. are unique individuals with unique needs. They have different educational goals, different disabilities, different behavioral issues, different behavior plans, and different responses to their behavior plans. Whether KCS provided each student with a FAPE necessarily turns on KCS's responses to their differing individual needs and unique circumstances. These class representatives do not typify each other, let alone the unnamed, unnumbered and unidentifiable class members.

Conclusion

KCS is committed to working with concerned parents and other stakeholders to address the sensitive and difficult questions inherent in meeting the behavioral needs of students with disabilities. In this endeavor, there are struggling children, success stories, and many students who fall somewhere in between. The

heartbeat of meeting student needs comes from educators, behavior professionals and parents who typically work together to make difficult (but never perfect) student-by-student decisions.

KCS's district-wide policies and procedures are also important—and KCS is committed to improvement on all fronts. But it will stand in opposition to litigation that diverts the school district's resources to attorneys and litigation consultants in the name of compelling it to indefinite commitments overseen by a court-appointed monitor.

For these reasons, KCS respectfully requests that this Court reverse the Class Certification Order and remand for a status conference to determine what remains to be decided on behalf of the named Plaintiffs only.

Request for Oral Argument

KCS respectfully requests oral argument.

THE BOARD OF EDUCATION OF THE COUNTY OF KANAWHA,

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Dated: January 31, 2022 /s/ J. Mark Adkins
Counsel for Appellant

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I hereby certify that on this 31st day of January, 2022, I caused this Brief of Appellant and Joint Appendix to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 31st day of January, 2022, I caused a copy of the Sealed Volume of the Joint Appendix to be served, via UPS Ground Transportation, upon counsel for the Appellees, at the above addresses.

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