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

REPLY BRIEF OF APPELLANT

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Table of Contents

Page

Table of Authorities

Page(s)

Cases

Constitutional Provisions

Statutes

Rules

Regulations

Introduction

Rule 23 does not transform the IDEA into a court-sanctioned opportunity for expert witnesses to enforce special education policies not required by Congress. The IDEA requires the adoption of *specific* special education policies. WVBOE Policy 2419 contains those policies. KCS is not required to adopt any policies other than Policy 2419.

In their Response, Plaintiffs largely abandon the adequacy-based "common questions of law or fact" they posed below (J.A. 879) in favor of a new theory of commonality: KCS violated specific policy-related provisions of the IDEA. Plaintiffs egregiously misunderstand which educational agency is responsible for creating special education policies, procedures, and programs under the IDEA. In any case, Plaintiffs bear the burden of proving that their newly-posed common questions exist. The statutes Plaintiffs cite demonstrate conclusively that they do not. Plaintiffs' new commonality theory rests on an invalid legal premise. The IDEA does not require KCS to draft and adopt policies in the manner Plaintiffs claim.

To cast KCS's position as "novel" and "far reaching," the Response relies heavily on class action decisions having nothing to do with special education under the IDEA. A review of IDEA class action decisions disproves those characterizations. Plaintiffs' proposed class is without precedent—and it should not be authorized for the first time here.

The Response also continues to misconstrue discipline statistics regarding KCS's students with disabilities. The misinterpretation is not simply a matter of imprecise word choice, as Plaintiffs insist. *Material* misrepresentations of this data are made in the Response. The UCLA Study does not establish that KCS has more disproportionate rates of disabled student suspension than most other school districts. KCS has less disproportionate rates of such discipline than the nation's schools do collectively.

Plaintiffs have modified their previously-requested relief and now seek an injunction requiring KCS to adopt policies which Plaintiffs claim the IDEA requires. An injunction requiring the enactment of specific statutorily-required policies would satisfy Rule 23(b)(2), but the IDEA does not require KCS to enact policies as Plaintiffs claim. And to be sure, the relief requested below—a yet-to-be explained injunction remedying "inadequate" policies, procedures, and practices—does not satisfy the Rule.

Finally, that Plaintiffs have merely pled discrimination claims does not warrant affirming the Class Certification Order. Education-based discrimination requires the additional showing that a plaintiff was excluded from education services "solely by reason" of their disability. There has been no such evidence in this case. And Plaintiffs failed to cite authority for class treatment of such claims.

The Response succeeds only in demonstrating another way in which IDEA claims are ill-suited for class treatment. Plaintiffs are not entitled to an injunction ordering KCS to enact policies that Congress has not required—including but not limited to policies that Plaintiffs' expert believes constitute best practice. The Response is without merit and this Court should reverse the Class Certification Order.

Argument

I. The "common questions" Plaintiffs raise for the first time on appeal are based on a false legal premise.

IDEA[1] plaintiffs can satisfy commonality upon a showing of "significant proof" of "policies that violate the IDEA." *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 498 (7th Cir. 2012); *D.L. v. District of Columbia*, 713 F.3d 120, 131 (D.C. Cir. 2013). This established legal principle may have inspired Plaintiffs' new theory on commonality.

Plaintiffs now argue that KCS has "illegal" policies and failed to adopt policies specifically required by the IDEA. This is a significant change from the common questions raised below (J.A. 879) which turned instead largely on the absence or adequacy of KCS-created policies and practices, rather than KCS's

[1] The Individuals with Disabilities Education Improvement Act of 2004 (IDEA).

alleged failure to meet specific enumerated IDEA obligations.[2] The Class Certification Order likewise makes no mention of illegal policies or the absence of policies required by law.[3] On appeal, the Response largely abandons the Rule 23 dispute below and invents a new one.

Plaintiffs now argue that the IDEA places "affirmative legal requirements on [KCS] to adopt 'policies, procedures, and programs' for the provision of special education," Resp. at 1 (quoting 20 U.S.C. § 1413(a)(1)), and claim that they have "identified multiple areas where the Board's policies—or the total absence of policies required by law—violated the [IDEA.]" *Id.* The Response then identifies four (4) categories of policies that local education agencies (LEAs) "must establish" (*id.* at 4-9) and argues that an LEA's "failure to" enact these specific policies "constitutes a statutory violation." *Id.* at 26; *see id.* at 25 ("[KCS] is *affirmatively* obligated to establish certain policies—and its failure to adequately do so is an element of each class member's claims."). The Response offers twelve pages of commonality argument resting on this demonstrably false premise. *See id.* at 24-36.

The IDEA requires ***State Educational Agencies*** (SEAs) to enact these policies—not LEAs. *See* 20 U.S.C. § 1412(a) ("A State is eligible for assistance

[2] This was notable enough at the time that KCS emphasized it in class certification briefing. *See* J.A. 920 ("There is no evidence or allegation that KCS fails to perform any enumerated IDEA obligations.").

[3] *See* J.A. 1589 ("While the Plaintiffs cannot point to a single policy . . . .").

under this subchapter . . . if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets each of the following conditions."). The Response wholly misunderstands the IDEA's allocation of substantive policy authorship responsibilities and, in some cases, even the meaning of those responsibilities.

Policy	**Policy Author**	**IDEA Cite**
"Identifying students with disabilities who need 'behavior support' to receive FAPE." Resp. at 5, 26.[4]	State	20 U.S.C. § 1412(a)(7)
"Ensur[ing] that behavior supports are provided to students with disabilities who need them to receive FAPE." Resp. at 7, 26.	State	20 U.S.C. § 1412(a)(4)
"[M]onitoring the progress of students with disabilities . . . towards the goals set in their IEPs." Resp. at 8, 26.	State	20 U.S.C. § 1412(a)(4)
"Ensur[ing] that personnel necessary to carry out the IDEA are appropriately and adequately trained." Resp. at 9, 26.	State	20 U.S.C. § 1412(a)(14)(A)[5]

[4] At Resp. at 5 and 26, Plaintiffs claim that 20 U.S.C. § 1414(d)(3)(B)(i) requires LEAs, like KCS, to adopt a policy on identifying students who need behavior supports. It does not. This passage explains that, for students whose behavior impedes their learning or that of others, the student's IEP Team must consider the use of positive behavioral interventions and supports, and other strategies, to address the student's behavior. 20 U.S.C. § 1414(d) does not require LEAs to adopt policies at all. Rather, it describes the contents of IEPs and the procedures that IEP Teams follow in crafting each student's IEP. 20 U.S.C. § 1412(a)(4), on the other hand, requires SEAs to create policies and procedures which require IEPs that conform to § 1414(d).

[5] 20 U.S.C. § 1412(a)(14) concerns the licensure and certification of teachers by SEAs—credentialing events that occur before a teacher is ever hired by an LEA. Plaintiffs' claim that § 1412(a)(14) obligates KCS to adopt local policies on training its teachers about behavior supports—or any other topic—is not only obviously wrong, but nearly impossible to explain.

The Response manufactures an "affirmative obligation" on LEAs to enact their own policies by citing the first half of 20 U.S.C. § 1413(a)(1).[6] *See* Resp. at 1. The second half of the statute though explains that LEAs are required to have "in effect policies, procedures and programs ***that are consistent with the State policies and procedures established under section 1412***." 20 U.S.C. § 1413(a)(1) (emphasis added).

20 U.S.C. §§ 1412 and 1413 mean that LEAs are "charged with fulfilling the state's obligations under the IDEA for students within [its] jurisdiction." *Johnson v. Charlotte-Mecklenburg Sch. Bd. of Educ.*, 20 F.4th 835, 839 at n.2 (4th Cir. 2021); *see Osseo Area Sch. v. M.N.B.*, 970 F.3d 917, 922 (8th Cir. 2020) ("A school district's obligations under the IDEA are . . . measured by the State's obligations, which the [LEA] is charged with implementing at the local level."); *Ellenberg v. New Mexico Military Inst.*, 487 F.3d 1262, 1269 ("State Education Agenc[ies] must enact policies and procedures to implement the IDEA . . . . [LEAs] are given primary responsibility for overseeing the actual provision of special education services to disabled children."). Plaintiffs' confusion on this fundamental point after two years of systemic litigation is hard to believe.

[6] Section 1413 is the IDEA's federal funding eligibility statute. The West Virginia Department of Education (WVDE), tasked with monitoring LEAs' IDEA compliance, has concluded that KCS complies with it. To KCS's knowledge, this statute has never been construed as a basis for a private cause of action.

The West Virginia Board of Education (WVBOE) ***has*** enacted the policies required by 20 U.S.C. § 1412. WVBOE Policy 2419 contains the WVBOE's "approved [IDEA] policies and procedures." J.A. 948. Policy 2419's manual "outlines the policies and procedures districts must follow in meeting the requirements of the [IDEA]." *Id.* Policy 2419 establishes that the WVBOE has "primary responsibility" for establishing policies and procedures to comply with the IDEA. *Id.* at 1026. The West Virginia Department of Education (WVDE) has the "primary leadership role in developing quality educational services . . . [and] implement[ing] State Board of Education policies and regulations governing the education of [special education] students . . . ." *Id.* at 1026. The LEA, on the other hand, is responsible for implementing the policies and procedures contained in Policy 2419. *Id.* at 1029.

Moreover, West Virginia LEAs are not authorized to create their own IDEA policies without the approval of the WVDE:

> To receive funds available under IDEA 2004, districts must adopt and implement appropriate special education policies and procedures. **These procedures . . . must be approved by the [WVDE]. This manual [Policy 2419] is provided to each school district as [WVDE's] approved policies and procedures to be approved by the district's Board of Education. Any changes to procedures outlined in the manual must have WVDE approval.**

Id. at 948 (emphasis added). In any event, the record evidence demonstrates that KCS complies with Policy 2419:

"Policy Gap"	Policy 2419	LEA Responsibility
"The Board lacks any district-wide policy for identifying which students . . . need behavior supports." Resp. at 27.	"**The IEP Team** will consider the use of positive behavioral interventions and supports" if "behavior impedes [the student's] learning or that of others." J.A. 990. "For an initial evaluation, the student must be evaluated in all areas related to the suspected exceptionality including … behavior performance . . . ." J.A. 962.	Neither Policy 2419 nor the IDEA requires the LEA to enact its own policy to identify students who need behavior supports. Dr. Porter testified that KCS's IEP Teams do this as Policy 2419 dictates. J.A. 677-89.
"The Board offers no guidance on how to perform FBAs or implement BIPs." Resp. at 27.	"**The IEP Team** must . . . [d]evelop and implement a BIP or review the existing BIP and modify, as needed, to address the current behaviors." J.A. 1015. A BIP is a "[w]ritten, purposeful and individualized plan based upon a student's FBA." *Id.* at 1058. An FBA, also performed by the IEP Team, *see id* at 1058, is a "sequential, multi-step, team evaluation process that helps determine the purpose and effect of the problem behavior(s)." *Id.* at 1063	Neither Policy 2419 nor the IDEA requires the LEA to offer its own policy guidance to behavior professionals conducting FBAs or overseeing the FBA process.[7] Dr. Porter's testimony establishes that IEP Teams do this as required by Policy 2419.
"The Board pays no attention to progress that students with disabilities make—or the discipline they experience—after	**The IEP Team** (in tandem with SAT, and MDET teams and Eligibility Committees) provide multiple layers of review for monitoring student progress. *See* J.A. 955, 962, 975-77.	Neither Policy 2419 nor the IDEA requires the LEA to create a policy on monitoring student progress directly. IEP Teams,

[7] The Class Certification Order recognized that "[n]either the IDEA nor West Virginia policy specifies the content of FBAs or BIPs. J.A. 1582.

they are identified as needing behavior supports." Resp. at 27.		Student Assistance Teams and MDET teams perform these functions as required. KCS reports its aggregated student discipline data to the WVDE as Policy 2419 requires. J.A. 1032.
"The Board does not adequately train staff members responsible for providing behavior supports to students with disabilities."	"The **WVDE** is responsible for ensuring that . . . [the WVDE] participates in the development and provision of programs for the training of educational personnel related to special education issues and services." J.A. 1027-28. State law likewise indicates that general classroom teachers are entitled to additional training upon request. *See* W. Va. Code § 18-2-1c.	Neither Policy 2419 nor the IDEA requires LEAs to implement their own training policies.

Plaintiffs make no effort to frame their new "common questions" in terms of what the IDEA requires of KCS: to comply with Policy 2419.[8] *Compare* Resp. at 26-28 *with* 20 U.S.C. § 1413(a)(1). Instead, the Response claims that LEAs have an "affirmative obligation" to implement *their own* policies to *fill in gaps* in state and federal policy, as perceived by their expert, Dr. Elliott. *See* Resp. at 4-9, 26-27.

Plaintiffs' proposition would substitute Dr. Elliott's policy preferences for those of Congress, the WVBOE and the WVDE under the guise of statutory

[8] The Class Certification order noted KCS's argument that it complies with Policy 2419 but made no findings on the subject. *See* J.A. 1581.

interpretation. *Compare* Resp. at 1, 4-9, 26-27 *with* 20 U.S.C. § 1413(a)(1) (substituting Plaintiffs' preferred policies for "the State policies and procedures established under section 1412"). This is precisely what the Supreme Court (and this Court) have warned against for forty years. *See, e.g., Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206 (1982) ("[The IDEA] 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 . . . would be frustrated if a court were permitted simply to set state decisions at naught.").

The Response's so-called "affirmative obligation" to fill in perceived policy gaps—repeated throughout the Response as a statutory duty—is nowhere to be found in the IDEA or federal regulations. *See* 20 U.S.C. § 1413(a)(1), 34 C.F.R. § 300.201. Nor can it be found in a single case interpreting the IDEA. *See, e.g., Johnson*, 20 F.4th at 839, n.2. Plaintiffs' "affirmative obligation" directly contradicts the IDEA's assignment of policy and procedure authorship to the SEA and the plain language of Policy 2419. *See* J.A. 948 ("Any changes to procedures outlined in the manual must have WVDE approval."). Worse still, it invites federal courts to "create out of whole cloth substantive provisions" where "neither Congress nor the agency charged with devising the implementing regulations . . . had created any." *Alex R. v. Forrestville Valley Cmty Unit Sch. Dist. 221*, 375 F.3d 603, 615 (7th Cir. 2004). This

"affirmative obligation" invention demonstrates a profound misunderstanding of IDEA compliance.

More surprising is that the Response construes this nowhere-to-be-found "affirmative obligation" to fill in policy gaps as a ***contingency of federal funding***. *See* 20 U.S.C. § 1413(a)(1). The notion that LEAs—as a condition for federal funding—must develop their own policies, above and beyond state and federal standards, is an outrageous half-reading of the IDEA supported by virtually no authority. *Compare* Resp. at 4-9, 26-28 *with Johnson*, 20 F.4th at 839 at n.2; *Osseo*, 970 F.3d at 922; *Ellenberg*, 487 F.3d at 1269. Lest there be any doubt how the U.S. Department of Education construes 20 U.S.C. § 1413(a)(1), the regulation implementing it is titled "Consistency with State policies." *See* 34 C.F.R. § 300.201.

KCS appreciates that Rule 23 is "no license to engage in free-ranging merits inquiries." *Amgen Inc. v. Conn. Retirement Plans & Trust Funds*, 568 U.S. 455, 466 (2013). But courts must undertake a "rigorous analysis" at the Rule 23 stage—which "entail[s] some overlap with the merits of the plaintiff's underlying claim." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011). Courts look to the merits to the extent "necessary to verify that Rule 23 has been satisfied." *Brown v. Nucor Corp.*, 785 F.3d 895, 903 (4th Cir. 2015). Just reading the IDEA provisions cited in the Response demonstrates that Plaintiffs' new common questions do not exist. They are built on an outlandish and incomprehensible reading of the IDEA.

Almost the entire Response rests on this faulty premise. *See* Resp. at 1, 2, 4-9, 11, 13, 21, 26, 27, 33, 34, 36, 39. Plaintiffs' failure to demonstrate commonality resolves this appeal. But there are several other issues warranting reply.

II. Plaintiffs' reliance on non-IDEA class actions is without merit.

The Response relies on Rule 23(b)(2) class certification decisions unrelated to the provision of FAPE under the IDEA to establish that Plaintiffs need only challenge class-wide policies and practices to sustain class certification. This approach finds no support in IDEA class action decisions because to do so would materially "enlarge or modify" substantive rights in violation of the Rules Enabling Act. *Wal-Mart*, 564 U.S. at 367 (quoting 28 U.S.C. § 2072(b)).

A. Plaintiffs' view of IDEA class certification would alter substantive rights in violation of the Rules Enabling Act.

The "absence of . . . bright-line rule[s]" in the IDEA "should not be mistaken for an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." *Endrew F.*, 137 S. Ct. at 1001. Instead, a school district's IDEA compliance is monitored by state and federal departments of education. *See* 20 U.S.C. § 1416. These regulatory bodies are tasked with "improving educational results and functional outcomes for all students with disabilities." *Id.* To that end, among other things, LEAs report disciplinary statistics and other performance metrics to state departments of education on a regular basis. *See* 20 U.S.C. § 1416(b)(2)(B); J.A. 1030.

The IDEA's sole private cause of action in a court of law is (what amounts to) the appeal of due process hearing officer decisions "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a [FAPE] to such child." 20 U.S.C. §§ 1415(i), (b)(6). The governing standard for IDEA litigation—and its "principal command"—is the provision of FAPE to students with disabilities. *Fry v. Napoleon Cmty Schs.*, 137 S. Ct. 743, 753-54 (2017). FAPE, as a matter of law, turns on the unique circumstances of each student. *See, e.g., id.* The IDEA's sole private cause of action stands in stark contrast to other causes of action that might be more amenable to broader class-wide relief.

With these principles in mind, "[a]bsent a statutory infraction," *Hartmann v. Loudoun Cnty Bd. of Educ.*, 118 F.3d 996, 1000 (4th Cir. 1997), an "across-the-board denial of services that the IDEA requires" is necessary to adjudicate IDEA claims on a class-wide basis. *Parent/Professional v. City of Springfield, Mass.*, 934 F.3d 13, 29 (1st Cir. 2019).

The Response characterizes this position as "novel" and "far reaching," as if KCS invented it. Resp. at 40. This position comes directly from the most recent Court of Appeals decision addressing the application of Rule 23(b)(2) to the IDEA. *See Parent/Professional*, 934 F.3d at 29. This is the same position taken by nearly every court which has considered the issue. *See* J.A. 921-22 at n.14-15 (collecting cases). In the dozens of IDEA class certification decisions KCS has cited in its briefing, *see id.*, KCS is able to discern ***just one*** United States District Court decision

that is inconsistent with *Parent/Professional*. *See J.N. v. Oregon Dep't of Educ.*, 338 F.R.D. 256 (D. Or. 2021). That decision is wholly unpersuasive and was contradicted by a decision from its own Court of Appeals just a few months later.[9]

Parent/Professional's test is both legally sound (*see* Opening Br. at 22-25) and provides ample class recourse in event that proven LEA or SEA policy failures have collective impact. For example, had KCS delayed the start of IDEA-required services at the beginning of the school year,[10] misappropriated IDEA funds,[11] had a practice transferring students to different facilities for lack of resources,[12] unlawfully ceased providing IDEA services to students over a certain age,[13] or had any number of uniform policy failures that cut off services to eligible students, a trial on the

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[9] *J.N.* relied on the "risk of harm" test that Plaintiffs raised below (Opening Br. at 23, n.9) but seemingly abandon on appeal. Thereafter, the Ninth Circuit materially contradicted the *J.N.* Court's reasoning by affirming the dismissal of an IDEA class action for failure to exhaust. *See Student A v. San Fran. Unified Sch. Dist.*, 9 F.4th 1079 (9th Cir. 2021). As of the date of this Reply, the *J.N.* case has been stayed for nearly a year. There appears to be no prospect for adjudicating a case like this on the merits.

[10] *See R.A.G. ex rel. R.B. v. Buffalo City Sch. Dist. Bd. of Educ.*, No. 12-CV-960, 2013 WL 3354424, *11 (W.D.N.Y. July 3, 2013) ("[B]ecause Plaintiffs are challenging a single, definable policy of Defendants, they have sufficiently satisfied Rule 23(a)(2).").

[11] *See Chester Upland School Dist. v. Pa.*, No. 12-132, 2012 WL 1473969 (E.D. Pa. 2012) (certifying class of students challenging state appropriations and funding)

[12] *See P.V. ex rel. Valentin v. School District of Philadelphia*, 289 F.R.D. 227 (E.D. Pa. 2013).

[13] *See K.L. v. Rhode Island Bd. of Educ.*, 907 F.3d 639 (1st Cir. 2018).

merits could objectively determine whether those practices resulted in a class-wide denial of FAPE. Likewise, had Plaintiffs presented "significant proof" that any of KCS's policies or procedures violated the IDEA, an adjudication on the merits could answer that question. *See Jamie S*, 668 F.3d at 498; *D.L.*, 713 F.3d at 131. These two categories of IDEA class actions provide recourse for policy failures with collective impact while preserving the IDEA's regulatory relationship between LEAs and SEAs.

This case falls into neither category. Instead, the Response declares that litigants can rewrite the IDEA to suit their policy preferences and beliefs about best practice simply by invoking Rule 23. But Congress did not grant litigants or courts with such license. Rather, the opposite is true. *See, e.g., Endrew F.*, 137 S. Ct. at 1001; *Rowley*, 458 U.S. at 206; *Hartmann*, 118 F.3d at 1000. Alleging that an LEA has system-wide policy deficiencies in a number of different categories, without more, does not make a viable class claim under the IDEA. *See* Resp. at 35 (distinguishing this case from topical authority on the grounds that this case challenges class-wide policies rather than patterns of harm to students).[14] At the very

[14] The Response's contrary statements notwithstanding, Plaintiffs' case is premised on an alleged "pattern" of harm to students caused by KCS's allegedly inadequate policies—or at least that used to be their premise. That is the nature of the injury alleged (J.A. 61), the trend claimed in Dr. Elliott's report (*id.* at 194) and the harm argued in class certification briefing below (*id.* at 858). *See* Opening Br. at 30-35.

least, Plaintiffs must identify an IDEA provision which requires KCS to adopt a policy which KCS has failed to adopt; or identify a KCS policy which violates the IDEA.

As the Response demonstrates, Plaintiffs' view of IDEA class certification materially alters the statutory conditions for IDEA funding. To receive IDEA funds, SEAs develop policies and procedures that comply with the IDEA, and LEAs follow those policies and procedures in their provision of FAPE to eligible students. LEAs falling short of those commitments are subject to individual due process complaints, state department complaints, Office of Civil rights complaints and improvement plans enforced by the SEA. *See* J.A. 1031. Complying with expert witnesses' notions of best practice—in litigation where there are no violations of black letter law, no involvement of the SEA which has "primary responsibility" for creating IDEA policies, and "no need" to determine if individual student needs are being met by the LEA—is not among the IDEA funding conditions set by Congress.

B. This case does not lie in the "heartland" of Rule 23(b)(2) and reversing the Class Certification Order would in no way obstruct other kinds of civil rights class actions.

The Response concludes that "this case is in the heartland of those for which certification under Rule 23(b)(2) is proper." Resp. at 54. The Response cites just two examples of this "heartland" of successful IDEA class actions: the unpersuasive *J.N.* decision, *see supra* at n.9, and the D.C. Court of Appeals decision in *D.L. II*. *See*,

860 F.3d 713, 724 (D.C. Cir. 2017). *D.L. II* involved significant proof that the District of Columbia violated black-letter IDEA provisions. *Id.* at 719, 725.[15] The *D.L. II* subclasses suffered across-the-board denials of specific IDEA-required services.[16]

IDEA litigation generally—and adequacy-based IDEA litigation specifically—do *not* lie in the "heartland" of Rule 23(b)(2). The IDEA is uniquely "ill-suited to class-wide relief." *Blackman*, 633 F.3d at 1094-96 (Brown, J., concurring). Courts of Appeals and District Court decisions across the country ***nearly universally*** reject the reasoning that led to the certification of this class. *See Student A*, 9 F.4th 1079 (affirming dismissal of a systemic IDEA class action for failure to exhaust); *T.R.*, 4 F.4th 179 (same); *Parent/Professional*, 934 F.3d 13 (affirming the denial of an IDEA class certification); *Jamie S.*, 668 F.3d 481 (reversing the grant of an IDEA class certification); *D.L.*, 713 F.3d 120 (same); *see*

[15] The *D.L.* plaintiffs presented significant proof that the school district failed (1) to identify 98 to 515 children a month who may be eligible for special education (resulting in Child Find violations); (2) to complete evaluations within 120 days of being referred for evaluation (as required by D.C. law); (3) to make eligibility determinations within 120 days of evaluation completion (as required by D.C. law); and (4) interrupted special education services for nearly a third of all toddlers transitioning from Birth to Three programs to preschool programs (again denying legally-required services; *see* 34 C.F.R. §§ 303.209(d)(2), (d)(3)).

[16] While KCS takes no issue with the *D.L. II* decision, it should be noted that IDEA litigation takes on a decidedly different character in the District of Columbia where all legislative power lies with the author of the IDEA, Congress. *See* U.S. Const. art 1, § 8, cl. 17.

also J.A. 921-22 at n.14-15 (collecting cases). The Response's suggestion that KCS's position is "novel" and "far-reaching" rings hollow in light of these federal court decisions applying Rule 23(b)(2) to IDEA litigation.

KCS is not asking this Court to "all but foreclose class claims challenging systemic conditions." Resp. at 40. Like all class litigation, this case turns on the substance of the underlying cause of action and related statutory rights. Rule 23 cannot be construed to "enlarge or modify any substantive right." *Wal-Mart*, 564 U.S. at 367 (quoting 28 U.S.C. § 2072(b)). Yet that is what the Responses asks of this Court by reading requirements into the IDEA that are not there.

The IDEA is not interchangeable with the "prophylactic" Title VII redressing of discriminatory practices in the workplace, *Brown v. Nucor Corp.*, 785 F.3d 895, 915 (4th Cir. 2015); or Eighth Amendment and Due Process prohibitions against deliberate indifference to inmate harm, *Parsons v. Ryan*, 754 F.3d 657, 680 (9th Cir. 2014); or Fair Credit Reporting Act violations, *Berry v. Schulman*, 807 F.3d 600 (4th Cir. 2015); or any number of other statutes Congress has enacted to redress a various societal ills and misconduct. KCS does not ask this Court to construe those statutes or reach any ruling that constrains Rule 23(b)(2) class actions generally; it asks the Court to recognize that the IDEA "is simply not an anti-discrimination statute." *Ellenberg*, 478 F.3d at 1281.

This case is about a system of special education where the parties share a mutual goal but disagree how to achieve it. While the Response freely disregards Policy 2419's procedural mandates, KCS does not have that option. In any case, there is no precedent for debating best practice policy disagreements in federal court where no one is authorized to create new special education laws.

III. The Response downplays the material, significant, and erroneous conclusions made below about KCS student suspension statistics.

Plaintiffs concede that the UCLA Study (Study) does not establish that KCS has one of the most disproportionate rates of student suspension in the country. *See* Resp. Br. at 41. But the Response downplays the magnitude of this error while demonstrating a misunderstanding of the Study's findings. *See id.* at 42 (indicating KCS "cannot reasonably dispute" that it has more disproportionate rates of discipline than most other school districts in the country).

The Class Certification Order (and now the Response) conflate two different kinds of statistics to arrive at erroneous conclusions. *See* Opening Br. at 38. The Study ranks the "gap" in rates of lost instructional time per 100 secondary students only (the simple difference between suspension days for students with disabilities and students without). The Study does not establish the *disproportionate* rates of suspension between students with and without disabilities.

By only calculating the gap between lost instructional days, the Study misses the critical point that when all suspensions are higher in a district, the gap, though

proportionally inflated, does not necessarily indicate a malfunctioning system. For instance, if a school district has 5 lost instructional days per 100 students without disabilities and 20 lost instructional days per 100 students with disabilities, the gap between the two numbers is 15 days. While 15 looks like a small number, the more meaningful calculation, relative rates of suspension, reveals that students with disabilities lose instructional days due to suspension at a *rate four times higher* than students without disabilities. The gap in instructional days lost tells us nothing about the *disproportionate* rate at which students with disabilities are suspended.

The Study's "gap" calculation sounds sensational, but it reveals nothing about the *proportion* of lost instructional days due to suspension or the *rates* of suspension relative to other school districts—the comparison at issue. The relative rates of discipline between students with and without disabilities at KCS are <u>below</u> the national average. Students with disabilities at KCS incur one or more out-of-school suspensions at approximately 2.35 times the rate of students without disabilities. The average rate for all U.S. schools is 2.50. *See* Opening Br. at 38 at n.18. Even the Study's lost instructional day gap—were it calculated as a relative difference—puts KCS below the national average for lost instructional days for students with disabilities as compared to students without:

Unit	*LID / 100 SWD*	*LID / 100 SWOD*	*Gap Δ*	*Relative Δ*
KCS (K-12)	107	58	49	1.8
National (K-12)	41	19	22	2.2

KCS's "gaps" are high because KCS has relatively high rates of suspension across its entire student population—i.e., all students, general education and special education students. *See* Opening Br. at 35. This is easily attributable to differences in state legislation concerning the use of suspension in public schools.[17]

Despite the high rates of suspension across KCS's entire student population, KCS maintains below average relative rates of suspension between students with and without disabilities. This strongly suggests that the Study's "lost instructional day gap" has nothing to do with KCS's special education practices. It certainly does not establish that KCS has more "disproportionate rates" of discipline than most other school districts in the country. This issue then is not just a matter of "imprecise[]" word choice, Resp. at 41—the finding below is inaccurate in the most material sense possible.

[17] West Virginia LEAs (like KCS) are required to suspend or expel students who engage in certain behaviors. *See* W. Va. Code § 18A-5-1a. Other states have enacted legislation limiting the usage of out-of-school suspensions. Predictably, suspension rates vary significantly across state lines due to different state policies on student discipline.

As should be apparent by now, these disparities can be couched in a number of different ways. Ultimately, underlying all behavioral statistics are countless inputs that have little or nothing to do with the policies and procedures at issue in this case. In other words, KCS agrees with Plaintiffs that commonality does not turn on "where KCS may or may not have ranked relative to other school districts." Resp. at 42.

As such, the parties seem to agree that commonality does not turn on the "quality of evidence" establishing a "cohesive pattern" of inadequacy. J.A. 1588-89. The Class Certification Order's finding that "KCS's approach is not working" cannot be an appropriate Rule 23 finding, either. *See id.* at 1594. The Response essentially concedes this error in the Class Certification Order, but now recasts the Order as hinging on the "common thread" of KCS's allegedly "illegal" policies and procedures. Resp. at 41-42. Plaintiffs did not frame their common questions below in these stark terms. *See* J.A. 879. Any claim otherwise finds no support in the Order. *See id.* 1588-89.

Ultimately, it was Plaintiffs—not KCS—who dedicated five pages of class certification briefing below to offer a (notably selective) statistical critique without explaining how it was pertinent to Rule 23.[18] *See* J.A. 682-87. The Class

[18] KCS moved to strike the undisclosed Study and warned that "it is unclear where and how the authors of this study calculated their comparative rates . . . KCS has not had opportunity to review, confirm, or rebut the calculations and conclusions of this organization." J.A. 1387. Its motion was denied.

Certification Order emphasizes Plaintiffs' statistical case repeatedly: relying on Plaintiffs' "statistical analysis of the disproportionate rates of suspension," how KCS ranks with other school districts across the country and citing this "fact" first in support of commonality. *See id.* at 1580, 1587, 1588. Plainly these statistics were misunderstood in a material fashion below and continue to be misconstrued here on appeal. KCS must correct the record and will continue to ask that these statistics not be mischaracterized to say something they do not.

IV. An injunction requiring the enactment of statutorily-required policies would be appropriate relief under Rule 23(b)(2), but an injunction ordering the unspecified improvement of "inadequate" policies is not.

Plaintiffs' new appellate position alters KCS's position on the relief requested. Were it not based on a non-existent legal mandate, an injunction requiring the enactment of identifiable, statutorily-required policies would indeed be "final" injunctive relief comporting with Rule 23(b)(2). That was not the relief Plaintiffs requested below. J.A. 891. It was not the class relief certified in the Class Certification Order, either. *See id.* at 1594-95.

With respect to remedying "inadequate" practices, though, "the injunctive relief 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). 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). Class litigation to remedy perceived "inadequacies" without ready solutions does not just run afoul of the constraints on IDEA litigation and the text of Rule 23(b)(2)—it's wasteful.

Dr. Elliott's testimony provided the only explanation of Plaintiffs' adequacy-based relief—a "continual improvement process" to be worked out over several years overseen by a court-appointed monitor with direct lines of communication to Plaintiffs' counsel. J.A. 67-68, 1114-15. The Response misconstrues KCS's position to be a challenge to the timing of this "relief." *See* Resp. at 52. KCS understands that some prospective injunctions take time to fulfill. But unspecified "continual improvement"—presumably according to Dr. Elliott—is not "final" in any sense. Fed. R. Civ. P. 23(b)(2). That would not be an injunction at all. *See generally Jaime S.*, 668 F.3d at 499-500 (finding that a court-appointed monitor "does not even come close to satisfying Rule 23(b)(2)'s standard," describing it as "a system for eventually providing individualized relief" which "does not, on its own, provide 'final' relief to any class member.").

The Response has little to say to support Plaintiffs' claim for court-appointed monitoring beyond the fact it is premature. Perhaps so, but Plaintiffs' request for this unavailable remedy is noteworthy nonetheless because, among other reasons, the

defendant is already monitored by state and federal subject matter experts as Congress requires. *Compare* Resp. at 53-54 *with* 20 U.S.C. § 1416.[19]

V. Plaintiffs' Section 504 and Title II claims are subsumed by their IDEA claims and are not susceptible to class treatment.

Plaintiffs also allege discrimination under Section 504 and Title II. These claims were not addressed by the Class Certification Order, and there has been absolutely no evidence of discrimination in this case. The Class Certification Order characterizes the merits of this case as "about the procedures that KCS uses, or does not use, to develop and implement [behavior] supports." J.A. 1589.

When IDEA, Title II, and/or Section 504 claims may coexist, federal courts assess "whether the gravamen of a complaint against a school concerns a denial of FAPE, or instead addresses disability-based discrimination." *Fry*, 137 S. Ct. at 756. To be sure, "[t]he same conduct might violate all three statutes." *Id.* But "a discrimination claim under the Rehabilitation Act or the ADA involving a denial of FAPE is not coextensive with an IDEA claim." *D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26, 40 (1st Cir. 2012). Education discrimination plaintiffs "must prove they have [been] excluded from a program or benefits 'solely by reason' of their disability." *Sellers by Sellers v. Sch. Bd. of City of Manassas, Va.*, 141 F.3d 524, 529

[19] KCS emphasized that it will not consent to years of court-appointed monitoring only because virtually every example of IDEA court-appointed monitoring cited by Plaintiffs were the result of consent decrees.

(4th Cir. 1998) (quoting *Doe v. University of Md. Med. Sys. Corp.*, 50 F.3d 1261, 126 (4th Cir. 1995)). "To prevail on a discrimination claim under the Rehabilitation Act or the ADA involving a denial of FAPE, a plaintiff must make an additional showing that the denial resulted from a disability-based animus." *D.B.*, 675 F.3d at 40; *see Sellers*, 141 F.3d at 529 ("[E]ither bad faith or gross misjudgment should be shown before a § 504 violation can be made out.").

To KCS's knowledge, no comparable claim has ever been the basis for class treatment. Given that the gravamen of the Amended Complaint is a denial of FAPE and that disability-based animus is needed to prove a claim under section 504 and Title II, these claims cannot sustain class certification, either.

Conclusion

For the reasons stated above and in its Opening Brief, KCS respectfully requests that the Class Certification Order be reversed and for a remand to determine what remains to be adjudicated for the class representative plaintiffs only.

THE BOARD OF EDUCATION OF THE COUNTY OF KANAWHA,

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Dated: March 21, 2022

/s/ J. Mark Adkins
Counsel for Appellant

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