

RECORD NO. 21-2286

---

**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 TWELVE LEADING NATIONAL DISABILITY RIGHTS  
ORGANIZATIONS AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-  
APPELLEES SUPPORTING AFFIRMANCE**

---

Richard D. Salgado  
*Counsel of Record*  
Kelsey L. Smith  
Abron Hester  
JONES DAY  
2727 N. Harwood Street  
Dallas, TX 75201  
(214) 969-3620  
rsalgado@jonesday.com  
*Counsel for Amici Curiae*

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Local R. 29(4)(A) the following disclosure is made on behalf of:

Advocacy Institute  
Autistic Self Advocacy Network  
Center for Learner Equity  
Center for Public Representation  
Council of Parent Attorneys and Advocates  
Disability Rights Advocates  
Disability Rights Legal Center  
Disability Rights Maryland  
Disability Rights North Carolina  
Disability Rights South Carolina  
National Center for Learning Disabilities  
National Disability Rights Network

1. No amici is a publicly held corporation or other publicly held entity;
2. No amici has parent corporations; and
3. No amici has 10% or more of stock owned by a corporation.

## TABLE OF CONTENTS

	<b>PAGE</b>
CORPORATE DISCLOSURE STATEMENT .....	i
STATEMENT OF INTEREST OF AMICI CURIAE.....	v
SUMMARY OF THE ARGUMENT .....	1
ARGUMENT .....	4
I. The IDEA, ADA, and Section 504 of the Rehabilitation Act Provide Procedures and Requirements to Protect Students with Disabilities.....	5
II. The Systematic Provision of Evidence-based, Appropriate Behavioral Supports Produces Positive Outcomes For Students With Disabilities. ....	9
III. KCS’s Failure To Provide Supports Disrupts Education For Students With Disabilities And Has Proven To Be Systemically Detrimental.....	14
A. Exclusionary Disciplinary Measures Harm Students With Disabilities And Degrade The Educational Environment For Their Peers.....	16
B. The Consequences Of Exclusionary Discipline Extend Beyond The Classroom.....	18
C. The Impacts Are Even More Exacerbated For Black Students With Disabilities.....	22
CONCLUSION .....	23

## TABLE OF AUTHORITIES

<b>CASE</b>	<b>PAGE</b>
<i>Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley</i> , 458 U.S. 176 (1982).....	6, 15
<i>Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1</i> , 137 S. Ct. 988 (2017).....	6, 7, 14
<i>Fry v. Napoleon Cmty. Schs.</i> , 137 S. Ct. 743 (2017) .....	6
<i>G.T. by Michelle T. v. Kanawha Cty. Sch.</i> , No. 2:20-CV-00057, 2020 WL 4018285 (S.D.W. Va. July 16, 2020) .....	15
<i>Halpern v. Wake Forest Univ. Health Scis.</i> , 669 F.3d 454 (4th Cir. 2012) .....	7
<i>In re Conklin</i> , 946 F.2d 306 (4th Cir. 1991) .....	5
<i>Johnson v. Charlotte-Mecklenburg Sch. Bd. of Educ.</i> , 20 F.4th 835 (4th Cir. 2021) .....	6
<i>Olmstead v. L.C.</i> , 527 U.S. 581 (1999).....	8, 16
<i>R.F. by &amp; through E.F. v. Cecil Cty. Pub. Sch.</i> , 919 F.3d 237 (4th Cir. 2019) .....	5
<i>T.B., Jr. by &amp; through T.B., Sr. v. Prince George’s Cty. Bd. of Educ.</i> , 897 F.3d 566 (4th Cir. 2018) .....	5
 <b>STATUTES</b>	
28 C.F.R. § 35.130 .....	8

34 C.F.R. § 104.4 .....8

34 C.F.R. § 300.17 .....6

34 C.F.R. § 300.320 .....6, 7

34 C.F.R. § 300.324 .....6, 7

20 U.S.C. § 1400 .....2, 5

20 U.S.C. § 1412 .....5

20 U.S.C. § 1413 .....5

20 U.S.C. § 1414 .....6, 7, 14

20 U.S.C. § 1415 .....7

29 U.S.C. § 794 .....7

42 U.S.C. § 12131 .....7, 8

42 U.S.C. § 12132 .....7

Exec. Order No. 13217, 66 Fed. Reg. 33155 (2001),  
*reprinted in* 42 U.S.C. § 12131 (2012) .....16

**OTHER SOURCES**

1st Am. Class Action Compl., *G.T. et al. v. Kanawha Cty. Schools et al.*,  
 No. 2:20-cv-00057 (S.D.W. Va. Apr. 10, 2020) .....5

Decl. of Sara Boyd, PH.D. at 41, *G.T. et al. v. Kanawha Cty. Schools et al.*,  
 No. 2:20-cv-00057 (S.D.W. Va. Apr. 27, 2021) .....17

## STATEMENT OF INTEREST OF AMICI CURIAE<sup>1</sup>

**The Advocacy Institute** was established in 2000 as a not-for-profit organization. Its mission is to improve the lives of people with disabilities through policy advocacy, direct training of advocates, and the creation of information and resources with a particular focus on the nation's 7 million students receiving services under the Individuals with Disabilities Education Act.

**Autistic Self Advocacy Network** (“ASAN”) is a national, private, nonprofit organization, run by and for autistic individuals. ASAN provides public education and promotes public policies that benefit autistic individuals and others with developmental or other disabilities. ASAN's advocacy activities include combating stigma, discrimination, and violence against autistic people and others with disabilities; promoting access to health care and long-term supports in integrated community settings; and educating the public about the access needs of autistic people. ASAN takes a strong interest in cases that affect the rights of autistic individuals and others with disabilities to participate fully in community life and enjoy the same rights as others without disabilities.

---

<sup>1</sup> Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, *Amici* state that: (A) there is no party, or counsel for a party in the pending appeal who authored the amicus brief in whole or in part; (B) there is no party or counsel for a party in the pending appeal who contributed money that was intended to fund preparing or submitting the brief; and (C) no person or entity contributed money that was intended to fund preparing or submitting the brief, other than *Amici* and their members.

**The Center for Learner Equity** (“CLE”), formerly known as the National Center for Special Education in Charter Schools, is a national nonprofit that was formed in 2013. Our mission is to ensure that students with disabilities, particularly those in under-resourced communities, have the quality educational opportunities and choices they need to thrive and learn. We accomplish this through research, advocacy, coalition formation, and capacity building with national, state, and local partners.

**The Center for Public Representation** (“CPR”) is a public interest law firm that has assisted people with disabilities for more than 40 years. CPR uses legal strategies, systemic reform initiatives, and policy advocacy to enforce civil rights, expand opportunities for inclusion and full community participation, and empower people with disabilities to exercise choice in all aspects of their lives. CPR is both a statewide and a national legal backup center that provides assistance and support to public and private attorneys representing people with disabilities in Massachusetts and to the federally funded protection and advocacy programs in each of the States. CPR has litigated systemic cases on behalf of persons with disabilities in more than 20 states and submitted amici briefs to the United States Supreme Court and many courts of appeals in order to enforce the constitutional and statutory rights of persons with disabilities, including the right to be free from discrimination under the

Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and other laws.

**Council of Parent Attorneys and Advocates** (“COPAA”) is a not-for-profit organization for parents of children with disabilities, their attorneys, and advocates. COPAA provides resources, training, and information for parents, advocates, and attorneys to assist in obtaining the free appropriate public education (FAPE) such children are entitled to under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* Our attorney members represent children in civil rights matters. COPAA also supports individuals with disabilities, their parents, and advocates, in attempts to safeguard the civil rights guaranteed to those individuals under federal laws, including the Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. §1983 (Section 1983, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Section 504) and the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*

**Disability Rights Advocates** (“DRA”) is a non-profit public interest center that specializes in high-impact civil rights litigation and other advocacy on behalf of persons with disabilities throughout the United States. DRA’s educational cases include *Enyart v. National Conference of Bar Examiners, Inc.*, 630 F.3d 1153 (9<sup>th</sup> Cir. 2011), which required the National Conference to permit a blind law school graduate to use assistive technology to take the Multistate Bar Exam and the



Multistate Professional Responsibility Exam, and *Breimhorst v. Educational Testing Services* (N.D. Cal.), which ended the practice of “flagging” scores when students received disability-related accommodations when taking several nationally administered standardized tests.

The **Disability Rights Legal Center** (“DRLC”) is a national non-profit legal organization founded in 1975 to champion the rights of people with disabilities through education, advocacy, and litigation. Individuals with disabilities continue to struggle against ignorance, prejudice, insensitivity, and lack of legal protection in their endeavors to achieve fundamental dignity and respect. DRLC assists people with disabilities in attaining the benefits, protections, and equal opportunities guaranteed to them under the Rehabilitation Act of 1973, the Americans with Disabilities Act, the Individuals with Disabilities Education Act, and other state and federal laws. DRLC considers the “free appropriate public education” guaranteed by the IDEA to be a foundational right for people with disabilities to achieve independence, productivity, and dignity.

**Disability Rights South Carolina** (“DRSC”) and **Disability Rights North Carolina** (“DRNC”) are the federally designated legal protection and advocacy agencies for people with disabilities in South Carolina and North Carolina, respectively. Their mission is to help people with disabilities understand and exercise their rights under the law and to ensure that people with disabilities are

afforded opportunities for full and equal participation in society. DRSC and DRNC accomplish this by providing direct legal assistance to people with disabilities, protecting the rights of people with disabilities through the courts and justice system, and educating and informing policymakers about issues that impact the rights and services for people with disabilities.

DRSC and DRNC are dedicated to protecting the rights of students with disabilities in this Circuit and beyond. A significant portion of DRSC's and DRNC's work assists students with disabilities and their families throughout the Carolinas in securing appropriate educational services in public schools, including systemic behavioral supports for students whose disabilities require them. DRSC's and DRNC's experience in advocating for the educational and civil rights of students with disabilities forms the basis of their interest in this case.

**Disability Rights Maryland** (“DRM”), a nonprofit legal advocacy organization, is the federally-mandated Protection and Advocacy agency for the State of Maryland, charged with defending and advancing the rights of persons with disabilities within the state. A leader in Maryland's educational advocacy community, DRM provides legal advocacy on issues including school discipline, juvenile justice, and enforcement of the rights of students with disabilities to a free appropriate public education (FAPE) as mandated by federal law. DRM has

significant experience representing students with disabilities statewide who have been suspended from school or who are involved in the juvenile justice system.

**The National Center for Learning Disabilities** (“NCLD”) is a national not-for-profit organization founded in 1977. The mission of NCLD is to improve the lives of the 1 in 5 children and adults nationwide with learning and attention issues—by empowering parents and young adults, transforming schools and advocating for equal rights and opportunities. NCLD works to create a society in which every individual possesses the academic, social, and emotional skills needed to succeed in school, at work, and in life.

**National Disability Rights Network** (“NDRN”) is the non-profit membership organization for the federally mandated Protection and Advocacy (P&A) and Client Assistance Program (CAP) agencies for individuals with disabilities. The P&A and CAP agencies were established by the United States Congress to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education. There are P&As and CAPs in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Territories (American Samoa, Guam, Northern Mariana Islands, and the US Virgin Islands), and there is a P&A and CAP affiliated with the Native American Consortium which includes the Hopi, Navajo and San Juan Southern Paiute Nations in the Four Corners region of

the Southwest. Collectively, the P&A and CAP agencies are the largest provider of legally based advocacy services to people with disabilities in the United States.

## SUMMARY OF THE ARGUMENT

Systemic problems require systemic solutions. That is critical here because Kanawha County Schools (“KCS”) systemically fails to provide students with disabilities the behavioral, social, and emotional supports they need to succeed in the classroom. The only way to adequately remedy this failure is for KCS to implement district-wide changes. Saying that the focus of a “free appropriate public education” (“FAPE”) is ultimately “case-by-case, student-by-student,” and “one child at a time”—something KCS emphasizes throughout its brief—misses the point. From snowbanks to impressionist paintings, everything of course ultimately breaks down to its unique individual parts. But just as focusing on a single snowflake or brushstroke misses the bigger picture, a narrow focus on individual student services or placements under the Individuals with Disabilities Education Act (“IDEA”), the Americans with Disabilities Act (“ADA”), and Section 504 of the Rehabilitation Act (“Section 504”) fails to adequately address KCS’s serious systemic failures.

Every student needs individualized supports, but this case is not about the adequacy of the supports that KCS should provide to each *individual* student in the proposed class. Rather, this case is about the system-level procedures that KCS uses, or fails to use, to develop and implement behavioral, social, and emotional supports for students system-wide. Plaintiffs raise deficiencies that transcend case-by-case determinations and instead reveal broader patterns, practices, and procedures that

affect all students with disabilities. Those systemic deficiencies include inadequate policies and procedures for:

- Identifying those students with disabilities who require behavior supports or similar support to successfully attend school and learn in the least restrictive environment;
- Identifying the cause of disruptive behaviors;
- Implementing appropriate supports through Individual Education Plans (“IEPs”), Section 504 service plans, and Behavioral Intervention Plans (“BIPs”);
- Properly implementing plans so that students actually receive prescribed supports; and
- Meaningfully monitoring whether students actually make appropriate progress.

Taken together, the IDEA, the ADA, and Section 504 ensure students with disabilities receive the supports and services they need to receive a FAPE in the least restrictive environment and receive equal educational opportunities in the most integrated, least restrictive setting appropriate. Compliance with those laws results in positive systemic outcomes and helps fulfill the Department of Education’s “mission [] to promote student achievement and preparation” by “ensuring equal access.”<sup>2</sup> Noncompliance with those laws, meanwhile, causes serious systemic consequences.

---

<sup>2</sup> *Mission*, U.S. Dep’t of Educ. (Oct. 20, 2011), <https://bit.ly/3CgQss4>. See also 20 U.S.C. § 1400(c)(1) (“Improving educational results for children with

Such consequences are harmful. As the district court found, students with disabilities in KCS are subject to disciplinary removals at a disproportionate rate compared to their non-disabled classmates, and at a higher and more-disproportionate rate than students with disabilities in most other school districts in the state and most other large school districts nationally. But that is just the start.

Research shows that suspension, expulsion, and other disciplinary measures are band-aid solutions that do not generally help to reduce or eliminate reoccurrence of school-inappropriate behavior for students with disabilities. And repeated or prolonged suspensions and other disciplinary removals from the classroom, and the corresponding loss of instructional time can change the life trajectory of the most at-risk students. That includes derailing children from potential success to a cycle of poverty and recidivism. *See infra*, at pp. 18–21. KCS’s failure to provide students with disabilities a FAPE, free from discrimination, thus violates the IDEA, the ADA, and Section 504. That failure is not merely about whether any individual student received supports, but rather, concerns KCS’s district-wide failure to provide effective supports to a class of students with disabilities who need supports and have

---

disabilities is an essential element of . . . ensuring equality of opportunity, full participation, [and] independent living . . . for individuals with disabilities.”); *Restraint and Seclusion: Resource Document*, Dep’t of Educ., iii (May 2012), available at <https://bit.ly/3vDd3ho> (explaining a school’s “first responsibility” is “foster[ing] learning in a safe and healthy environment for all [] children, teachers, and staff”).

experienced unjustified disciplinary removals from the classroom. The district court correctly certified the class and did not abuse its discretion in doing so.

### ARGUMENT

The U.S. Department of Education has charged that “[s]chools must do everything possible to ensure all children can learn, develop, and participate in instructional programs that promote high levels of academic achievement.”<sup>3</sup> This means school districts must “make every effort to structure safe environments and provide a . . . framework, such as the use of positive behavior interventions and supports (“PBIS”), that applies to all children, all staff, and all places in the school . . . .”<sup>4</sup> When districts do not make those efforts, they shirk their legal responsibility to provide a FAPE to students with disabilities. Their inadequate attention or deliberate inaction places those students on a path toward severe systemic consequences.

This brief first describes the IDEA, the ADA, and Section 504 framework that governs what KCS is required to do. Second, it explains the positive outcomes that schools can achieve for students with disabilities by complying with that framework. And finally, it explains the systemic consequences that noncompliance causes.

---

<sup>3</sup> *Restraint and Seclusion, supra*, at iii.

<sup>4</sup> *Id.*



**I. The IDEA, ADA, and Section 504 of the Rehabilitation Act Provide Procedures and Requirements to Protect Students with Disabilities.**

Collectively, the IDEA, the ADA, and Section 504 of the Rehabilitation Act establish a framework to protect the rights of students with disabilities. In turn, the Supreme Court and this Court have further refined and clarified those requirements.

“The IDEA was enacted ‘to throw open the doors of public education and heed the needs’ of students with disabilities who had for too long been ‘either completely ignored or improperly serviced by American public schools.’” *T.B., Jr. by & through T.B., Sr. v. Prince George’s Cty. Bd. of Educ.*, 897 F.3d 566, 571 (4th Cir. 2018) (citing *In re Conklin*, 946 F.2d 306, 307 (4th Cir. 1991)). The IDEA does this by providing states with the funding to educate students with disabilities and conditioning it on state and local school districts meeting substantive education requirements. 20 U.S.C. §§ 1412, 1413. This is to “ensure that students with disabilities have access to an education that meets their unique needs, to protect the rights of these children and their parents, and to prevent the unnecessary exclusion of these children ‘from the public school system and from being educated with their peers.’” *R.F. by & through E.F. v. Cecil Cty. Pub. Sch.*, 919 F.3d 237, 241 (4th Cir. 2019) (quoting 20 U.S.C. § 1400).

The cornerstone of this is the right to a FAPE, which the IDEA guarantees to *all* eligible students. It assures “‘meaningful access to education based on [the student’s] individual needs,’ and includes ‘both instruction tailored to meet a child’s

unique needs and sufficient supportive services to permit the child to benefit from that instruction.”” *Johnson v. Charlotte-Mecklenburg Sch. Bd. of Educ.*, 20 F.4th 835, 839 (4th Cir. 2021) (alteration in original) (quoting *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 748–49, 753–54 (2017)).

Schools provide a FAPE through an appropriately developed IEP that is based on the student’s individual needs and is “reasonably calculated” to enable the student “to make progress appropriate” to their circumstances. *See Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017); 34 C.F.R. §§ 300.17; 300.320–300.324. Merely more than “de minimis” progress is not enough. Instead, the IEP must include goals that challenge the student. *See Andrew*, 137 S. Ct. at 1001 (“[P]roviding ‘merely more than de minimis’ progress from year to year can hardly be said to have been . . . an education at all.”). The Supreme Court has repeatedly stated the IDEA “demands more” than “receiving instruction that aims so low [that it] would be tantamount to ‘sitting idly . . . awaiting the time when they were old enough to ‘drop out.’” *Id.* (quoting *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 179 (1982)).

In the case of a student whose behavior impedes his learning or that of others, the IEP Team must consider—and, when necessary to provide a FAPE, expressly include in the IEP—the use of positive behavioral interventions and supports, and other strategies, to address that behavior. 20 U.S.C. § 1414(d)(3)(b)(i); 34 C.F.R. at

§§ 300.324(a)(2)(i), (b)(2); 300.320(a)(4). The IEP must describe the “‘special education and related services . . . that will be provided’ so that the child may ‘advance appropriately toward attaining the annual goals’ and, when possible, ‘be involved in and make progress in the general education curriculum.’” *Andrew*, 137 S. Ct. at 994 (quoting § 1414(d)(1)(A)(i)(IV)). The IDEA also gives parents procedural rights when a school fails to meet the requirements, such as obtaining an independent educational evaluation of their child. 20 U.S.C. § 1415(b).

The ADA and Section 504 of the Rehabilitation Act also protect students with disabilities. Title II of the ADA forbids any “public entity” from discriminating based on disability, 42 U.S.C. § 12131, while Section 504 applies the same prohibition to any federally funded “program or activity,” 29 U.S.C. § 794. More specifically, the ADA provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. Section 504 uses slightly different language but essentially provides the same, and this Court typically “construe[s] the ADA and Rehabilitation Act to impose similar requirements.” *Halpern v. Wake Forest Univ. Health Scis.*, 669 F.3d 454, 461 (4th Cir. 2012).

These statutes prohibit disability-based discrimination such as unjustified isolation or segregation. Indeed, under the ADA, isolation of qualified students

fundamentally undermines those students' rights and the purpose of the ADA. 42 U.S.C. § 12131. The ADA prohibits the needless isolation of students with disabilities because it "perpetuates unwarranted assumptions that [these children] are incapable or unworthy of participating in community life." *See Olmstead v. L.C.*, 527 U.S. 581, 600–01 (1999). So, to comply with the ADA, schools must provide students with disabilities equal opportunities to participate in school services and activities. Structuring education services in a way that results in, aids, or perpetuates discrimination against students with disabilities is strictly prohibited. 28 C.F.R. § 35.130; 34 C.F.R. § 104.4(b)(1)(v), (b)(4).

Rather than comply with these procedural and substantive safeguards, KCS fails to meet its burden of providing supports and services to students with disabilities to which they are entitled and which would allow these students to remain in the classroom and progress in their education among their peers without disabilities. As explained *infra*, at pp. 12–14, implementing behavioral, social, and mental health support programs that follow the legal requirements produces positive outcomes for students with disabilities. But instead of fostering a learning environment for students with disabilities, KCS repeatedly fails to provide behavioral support to students with disabilities via its frequent use of suspensions, expulsions, separate classrooms, and other disciplinary measures, thus denying them

a FAPE and subjecting them to unnecessary segregation. Given these systemic failures and harms, the district court did not err in granting class certification.

## **II. The Systematic Provision of Evidence-based, Appropriate Behavioral Supports Produces Positive Outcomes For Students With Disabilities.**

According to the U.S. Department of Education, “providing appropriate behavioral supports helps to ensure that students with disabilities are best able to access and benefit from instruction.”<sup>5</sup> Schools should not cast a student with a disability away—or assume that a student cannot learn—when he or she disrupts the classroom environment because of the *school’s* failure to provide appropriate supports. Instead, “the goal should be to ensure that . . . students progress through school successfully, with access to the same content as their typical peers to be ready for college or a career.”<sup>6</sup> While it is of course true that many FAPE decisions must be individualized and tailored to the child’s needs, implementing “evidence-based behavioral supports in IEPs”—through a systemic approach— “when done with fidelity, often serve as effective alternatives to unnecessary disciplinary removals,

---

<sup>5</sup> Sue Swenson & Ruther E. Ryder, *Dear Colleague Letter*, U.S. Dep’t of Educ., 2 (Aug. 1, 2016), available at <https://bit.ly/358fAoV>. The Department of Education wrote the Dear Colleague Letter “to clarify that the failure to consider and provide for needed behavioral supports through the IEP process is likely to result in a child not receiving a meaningful educational benefit or FAPE.” *Id.*

<sup>6</sup> Martha Thurlow, et al., *Meeting the Needs of Special Education Students: Recommendations for the Race to the Top Consortia and States*, Inst. on Cmty. Integration, 6 (2011), available at <https://ici.umn.edu/products/385>.

increase participation in instruction, and may prevent the need for more restrictive placements.”<sup>7</sup>

Research agrees. The vast majority of students with disabilities are capable of meeting the same educational standards as students without disabilities when given the right type of instruction, access, and supports required by IDEA.<sup>8</sup> “[S]chool-wide, small group, and individual behavioral supports that use proactive and preventative approaches, address the underlying cause of behavior, and reinforce positive behaviors are associated with increases in academic engagement, academic achievement, and fewer suspensions and dropouts.”<sup>9</sup> In high-performing schools, “effective academic instruction is combined with effective behavior supports to maximize academic engagement and, thus, student achievement.”<sup>10</sup> Indeed, students with significant cognitive disabilities—when provided with needed behavioral, social, emotional, and academic supports—can also be successful in the classroom and progress from year to year.<sup>11</sup>

---

<sup>7</sup> *Dear Colleague Letter*, *supra*, at 3.

<sup>8</sup> *Meeting the Needs of Special Education Students*, *supra*, at 4–5.

<sup>9</sup> *Dear Colleague Letter*, *supra*, at 5 (collecting scholarly articles).

<sup>10</sup> *Restraint and Seclusion*, *supra*, at 2–3.

<sup>11</sup> See, e.g., *Communicative Supports Overview*, TIES Center (last visited Mar. 6, 2022), <https://bit.ly/3HGNVbS> (while “all children develop communicative competence,” some “require specific communication supports . . . to advance their

Research shows that students with disabilities are more likely to achieve when they are:

- (1) directly taught school and classroom routines and social expectations that are predictable and contextually relevant;
- (2) acknowledged clearly and consistently for positive academic, social, and social, and emotional learning and skills; and
- (3) treated by others with respect.<sup>12</sup>

Ultimately, “children are more likely to achieve when they are directly taught predictable and contextually relevant school and classroom routines and expectations,” are “acknowledged clearly and consistently for displaying positive academic, social, and emotional learning and skills, as well as school-appropriate behavior,” and are “consistently prompted and given advice when their behavior is not school-appropriate or is disruptive, and treated by others with respect.”<sup>13</sup> Indeed, “implementing evidence based, multi-tiered . . . frameworks can help improve overall school climate, school safety, and academic achievement for all children, including students with disabilities.”<sup>14</sup>

---

communication abilities”—the use of which “provides a wonderful opportunity to develop relationships [and] increase the communicative competence among peers”).

<sup>12</sup> *Restraint and Seclusion, supra*, at 2–3.

<sup>13</sup> *Dear Colleague Letter, supra*, at 5–6.

<sup>14</sup> *Id.* at 8.

These are not novel concepts. Multi-tiered support frameworks are already implemented in many districts across the country. PBIS is a multi-tiered school-wide approach to establishing the social culture that is helpful for schools to improve “social, emotional and academic outcomes for all students, including students with disabilities and students from underrepresented groups” while supporting and reducing disruptive behavior in all children.<sup>15</sup> PBIS is an important preventive framework that can increase the capacity of school staff to support all children, including children with the most complex behavioral needs, thus reducing the need for more support or intervention from the school.<sup>16</sup>

When PBIS is implemented school-wide or district-wide, schools experience reductions in disruptive behaviors, including those that historically would result in suspensions.<sup>17</sup> District-wide PBIS implementation enhances the impact of effective instruction on academic outcomes and improves school safety and organizational health.<sup>18</sup> According to the Center on PBIS, district-wide PBIS results in:

---

<sup>15</sup> *Restraint and Seclusion, supra*, at 3; see also *Positive Behavioral Interventions and Supports*, Office of Elementary & Secondary Educ. (Dec. 8, 2020), <https://bit.ly/3InomxP>.

<sup>16</sup> *Restraint and Seclusion, supra*, at 3; see also *School-Wide*, Center on PBIS (last visited Feb. 21, 2022), <https://www.pbis.org/topics/school-wide> (District-wide PBIS “establishes a social culture and the behavior supports needed to improve social, emotional, behavioral, and academic outcomes for all students”).

<sup>17</sup> *Restraint and Seclusion, supra*, at 26.

<sup>18</sup> *Id.* at 27.



- Improved academic performance;
- Reduced bullying behaviors;
- Improved social-emotional competence;
- Improved social and academic outcomes for students with disabilities;
- Decreased rates of student-reported drug and alcohol abuse;
- Reduced office discipline referrals, suspensions, and incidents of restraint and seclusion; and
- Improved teacher outcomes, including perception of teacher efficacy, school organizational health and school climate, and perception of school safety.<sup>19</sup>

The benefits of proper behavioral and social support for students cannot be overstated—especially since research has shown that “a failure to make behavioral supports available throughout a continuum of placements, including in a regular education setting, could result in an inappropriately restrictive placement and constitute a denial of placement in the LRE.”<sup>20</sup> Here, KCS has systematically opted for “disciplinary measures such as short term removals from the current placement . . . or other exclusionary disciplinary measures that significantly impede

---

<sup>19</sup> *School-Wide, supra*.

<sup>20</sup> *Dear Colleague Letter, supra*, at 3.

the implementation of the IEP” which “generally do not help to reduce or eliminate reoccurrence of the misbehavior.”<sup>21</sup>

By using evidence-based, multi-tiered frameworks such as PBIS, districts will encourage positive outcomes for their students with disabilities and will faithfully accomplish the goal of the federal statutes: enabling all children to “advance appropriately toward attaining the annual goals’ and, when possible, ‘be involved in and make progress in the general education curriculum.’” *Endrew*, 137 S. Ct. at 994 (quoting § 1414(d)(1)(A)(i)(IV)). As Plaintiffs have shown, KCS has failed to provide appropriate supports for students who need them, thus preventing these students from achieving positive outcomes or fulfilling the goal of the federal statutes.

### **III. KCS’s Failure To Provide Supports Disrupts Education For Students With Disabilities And Has Proven To Be Systemically Detrimental.**

Discipline is not a support. Just as complying with IDEA, ADA, and Section 504 requirements produces positive results, the inverse is true when schools flout them. Here, KCS’s systemic reliance on exclusionary disciplinary measures—which removes students from their classrooms for days, weeks, or months—sacrifices the future of students with disabilities without improving the general educational environment. Each year, KCS’s failure deprives students of their chance

---

<sup>21</sup> *See id.* at 10–11.

to succeed. This problem starts with disproportionate suspension rates among students with disabilities, but it metastasizes from there to affect the students' entire educational experience and often their future prospects.

Even if it is an unintentional and incidental consequence of a school system that believes students with disabilities “do[] not belong,” KCS’s reliance on exclusionary disciplinary measures results in the routine deprivation of class time from students with disabilities who *should* be in the classroom. *See* 1st Am. Class Action Compl. at ¶ 5, *G.T. et al. v. Kanawha Cty. Schools et al.*, No. 2:20-cv-00057 (S.D.W. Va. Apr. 10, 2020), ECF No. 22; *see also G.T. by Michelle T. v. Kanawha Cty. Sch.*, No. 2:20-CV-00057, 2020 WL 4018285, at \*1 (S.D.W. Va. July 16, 2020) (“Students with disabilities in Kanawha Schools are subject to frequent suspensions, with at least 1,486 in the 2015-2016 school year and 1,611 in the 2018-2019 school year.”). That fundamentally undermines KCS’s obligation to include students with disabilities in the learning environment. *See Rowley*, 458 U.S. at 179 (“The [IDEA] . . . was passed in response to Congress’ perception that a majority of handicapped children in the United States were either totally excluded from schools or [were] sitting idly . . . [until] they were old enough to drop out.” (internal quotations omitted)).

Federal law requires that KCS’s policies and practices applicable to students with disabilities ensure that such students are integrated with—not isolated from—

their non-disabled peers. *See Olmstead*, 527 U.S. at 600 (“[I]n the ADA . . . Congress not only required all public entities to refrain from discrimination . . . Congress explicitly identified unjustified ‘segregation’ of persons with disabilities as a ‘for[m] of discrimination.’” (alteration in original)); Exec. Order No. 13217, 66 Fed. Reg. 33155 (2001), *reprinted in* 42 U.S.C. § 12131 (2012) (“States must avoid disability-based discrimination unless doing so would fundamentally alter the nature of the service, program, or activity provided by the State.”).

Understanding and preventing the harms of excessive exclusionary discipline on a student with a disability is one of a school district’s fundamental obligations.<sup>22</sup> Therefore, this Court should consider the negative systemic effects of the exclusionary discipline KCS uses in assessing whether the requirements for class certification have been met.

**A. Exclusionary Disciplinary Measures Harm Students With Disabilities And Degrade The Educational Environment For Their Peers.**

The point of discipline is to discourage behavior that is perceived as inappropriate. Exclusionary discipline, then, is flawed at its core because class time

---

<sup>22</sup> *Dear Colleague Letter, supra*, at 2 (“[T]his letter serves to remind school personnel that the authority to implement disciplinary removals does not negate their obligation to consider the implications of the child’s behavioral needs, and the effects of the use of suspensions (and other short-term removals) when ensuring the provision of FAPE.”).

is paramount for students with disabilities, and suspensions tend to *encourage* this kind of behavior.<sup>23</sup> Sometimes exclusionary discipline encourages the behavior that triggered the discipline in the first place—for example, when the student’s goal is to get out of the classroom.<sup>24</sup> But it also often exacerbates the underlying causes of disruptive conduct in students with disabilities by disconnecting them from their classmates, reinforcing antisocial actions, and eroding a child’s institutional trust.<sup>25</sup> This loss of trust is justified—missing as little as “[ten] or more days of school was associated with a 40.9% drop in the probability of being on track to graduate.”<sup>26</sup>

---

<sup>23</sup> *Beyond Suspensions: Examining School Discipline Policies and Connections to the School-to-Prison Pipeline for Students of Color with Disabilities*, U.S. Comm’n on Civil Rights, 11 (July 2019), available at <https://bit.ly/3K1Lihp> (“[E]xcessive exclusionary discipline negatively impacts classroom engagement and cohesion and increases the likelihood excluded students will be retained in grade, drop out of school, or be placed in the juvenile justice system.”).

<sup>24</sup> *See, e.g.*, Decl. of Sara Boyd, PH.D. at 41, *G.T. et al. v. Kanawha Cty. Schools et al.*, No. 2:20-cv-00057 (S.D.W. Va. Apr. 27, 2021), ECF No. 120-4 (“For example, one function of his [mis]behaviors may be to escape from activities he does not like. If KCS responds by [excluding K.M.], this may reinforce for K.M. that behaving in certain ways will help him escape from things he does not want to do.”).

<sup>25</sup> Christina LiCalsi, et al., *An Empirical Examination of the Effects of Suspension and Suspension Severity on Behavioral and Academic Outcomes*, Am. Inst. for Rsch., 8 (Aug. 2021), available at <https://bit.ly/3Hm6D8B> (“[R]emoving students from the school environment does nothing to deal with students’ and schools’ deeper issues and may lead to further disengagement from school, anger, and erosion of trust” as well as “exacerb[at]ion of] recidivism . . . [and] disconnect[ion] from the school,” thus “reinforcing one another’s antisocial behavior”).

<sup>26</sup> *Id.*

To put it simply, there is little justification a school district can offer for excluding students with disabilities *thousands of times* from the classroom. If the goal is to prevent reoccurrence, suspensions fail. If the goal is to prevent disruptive behavior in the long-term, suspensions fail. And if the goal is to prevent antisocial actions from a disciplined child to peers, suspensions fail. Ultimately, the only thing that exclusionary discipline accomplishes is altering the life trajectory of students with disabilities, by disrupting their education and increasing the chances of leaving school entirely, and becoming entangled with the juvenile and adult justice systems.

**B. The Consequences Of Exclusionary Discipline Extend Beyond The Classroom.**

Exclusionary discipline increases the odds that a student with disabilities will drop out of school before graduating and will interact with the juvenile justice system.<sup>27</sup> Indeed, it puts “students at risk for experiencing a wide range of correlated educational, economic, and social problems including school avoidance, increased

---

<sup>27</sup> See Robert Balfanz, et al., *Sent Home and Put Off-Track: The Antecedents, Disproportionalities, and Consequences of Being Suspended in the Ninth Grade*, 5 J. of Applied Rsch. on Child. 1, 16 (2014), available at <https://files.eric.ed.gov/fulltext/EJ1188519.pdf> (“[G]iven that being suspended . . . greatly diminishes a student’s odds of graduating and enrolling in post-secondary schooling, and that clear evidence exists . . . that minority and special education students are suspended disproportionately . . . real urgency needs to be applied to ending this disproportionality.”).

likelihood of dropping out, and involvement with the juvenile justice system.”<sup>28</sup> A student subjected to exclusionary discipline is “three times more likely to come into contact with the juvenile justice system within the next year.”<sup>29</sup> Both dropping out and involvement with the juvenile justice system dramatically increase the odds that a child with disabilities will end up incarcerated—often quickly, with 73 percent of students with disabilities who dropped out finding themselves “arrested within five years of leaving school.”<sup>30</sup>

This problem is far from theoretical—“[e]mpirical studies over the past decade have shown clear connections between school discipline policies . . . and the school-to-prison pipeline; and these connections have been especially apparent for students of color.”<sup>31</sup> Therefore, the reality of suspension goes beyond the “quick and dirty” disciplinary removal that educational institutions rely on it to be.<sup>32</sup> Reality

---

<sup>28</sup> *Beyond Suspensions, supra*, at 4.

<sup>29</sup> *Id.* at 38 (citing Tony Fabolo, et al., *Breaking Schools’ Rules: A Statewide Study of How School Discipline Relates to Students’ Success and Juvenile Justice Involvement*, Just. Ctr. The Council of State Gov’ts & Pub. Pol’y Rsch. Inst., xii (July 2011), available at <https://bit.ly/3JTCNKj>).

<sup>30</sup> *Id.* at 37 (citing Martha Thurlow, et al., *Students with Disabilities who Drop Out of School—Implications for Policy and Practice*, Nat’l Ctr. on Secondary Educ. and Transition, 3 (July 2002), available at <https://files.eric.ed.gov/fulltext/ED468582.pdf>).

<sup>31</sup> *Id.*

<sup>32</sup> See Brenda Alvarez, *School Suspensions Do More Harm than Good*, Nat’l Educ. Assoc. (Sep. 10, 2021), <https://bit.ly/3Hh2jHv> (discussing the benefits of

proves that suspension is the first of a series of escalating punishments that all too often lead to the placement of a student in an overcrowded juvenile detention facility.<sup>33</sup> And, because roughly 20 percent of juvenile detention facilities are overcapacity, “thousands of youth, including students of color with disabilities” will find themselves transferred to adult prisons every year, where they lose access to age appropriate education and psychological services.<sup>34</sup>

Reality for youth with disabilities in adult prisons is harrowing. As the National Prison Rape Elimination Commission explained in 2009, “more than any other group of incarcerated persons, youth incarcerated with adults are probably at the highest risk of sexual abuse.”<sup>35</sup> Coupled with the fact that “individuals with severe developmental disabilities are at especially high risk” of sexual victimization in prisons, and that victims of sexual violence in prisons are the most likely to be re-victimized, this consequence of exclusionary discipline becomes quite clear.<sup>36</sup>

---

facilitating “a positive school culture” instead of “focusing on punishment and removals”).

<sup>33</sup> *Beyond Suspensions*, *supra*, at 38.

<sup>34</sup> *Id.* at 41–42.

<sup>35</sup> *National Prison Rape Elimination Commission Report*, Nat’l Prison Rape Elimination Comm’n, 18 (June 2009), available at <https://www.ojp.gov/pdffiles1/226680.pdf>.

<sup>36</sup> *Id.* at 72; see also Tess M.S. Neal & Carl B. Clements, *Prison Rape and Psychological Sequelae: A Call for Research*, 16 *Psychol. Pub. Pol’y & L.* 284, 18 (Aug. 2010), available at <https://bit.ly/35vDgDI> (“Once an inmate is raped, he



Leaving children and youth with disabilities in overcrowded juvenile detention facilities to avoid exposing them to the violence of adult prison is also not a solution. This is because even the *milder* incarceration in overcrowded juvenile facilities subjects them to horrific consequences, such as “increased suicidal behavior, stress-related illnesses, and psychiatric problems.”<sup>37</sup> Even if overcrowding were resolved, the simple confinement of youth with disabilities still leads to “trouble developing proper social-emotional skills, such as self-control and conflict resolution” which leads to increased “likelihood of recidivism.”<sup>38</sup> Ultimately, it is hard to understand how exclusionary disciplinary measures, which have no benefit to the student, can be justified in the face of such severe

---

becomes an immediate target for other potential aggressors because he is perceived as weak and vulnerable.”); Kate Walsh et al., *National Prevalence of PTSD Among Sexually Revictimized Adolescent, College, and Adult Household-Residing Women*, 69 Archives Gen. Psychiatry 935, 8 (Sept. 2012), available at <https://bit.ly/35be7OD> (“Revictimized [study] participants were 4.3 to 8.2 times more likely than non-victims to develop lifetime PTSD whereas single victims were only 2.4 to 3.5 times more likely.”).

<sup>37</sup> *Beyond Suspensions, supra*, at 42; see also Madhur Kulkarni et al., *Witnessing versus Experiencing Direct Violence in Childhood as Correlates of Adulthood PTSD*, 26 J. Interpers Violence 1264, 1 (Apr. 2011), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4314106/pdf/nihms658844.pdf> (describing the impact childhood violence plays in the development of “deleterious outcomes in childhood and adulthood”).

<sup>38</sup> *Beyond Suspensions, supra*, at 42.

consequences. And this failure falls hardest upon the most vulnerable: students of color with disabilities.

**C. The Impacts Are Even More Exacerbated For Black Students With Disabilities.**

Students of color with disabilities are more likely to feel the harm of unjustified isolation and segregation.<sup>39</sup> Students of color are disproportionately more likely to be identified as having a disability and are disproportionately more likely to suffer the effects of isolation, suspension, and institutional disregard.<sup>40</sup> Increases in strict punishment, such as suspension, correlate with increased drop-out and incarceration rates—with each standard deviation increase in strictness adding a 20 percent increased incarceration risk.<sup>41</sup> And as described above, the impact of incarceration is never discrete. The United States Department of Justice reported in 2021 that 82% of persons released from prison “were arrested at least once during the 10 years following release.”<sup>42</sup> Therefore, every avoidable suspension is another

---

<sup>39</sup> *Id.* at 118–21 (analyzing the racial discipline gap between white and black students with disabilities).

<sup>40</sup> See Daniel J. Losen, *Disabling Punishment*, Ct’r for Civil Rights Remedies & Charles Hamilton Houston Inst. For Race & Just., 2 (Apr. 2018), available at <https://bit.ly/3viHwB7> (“Black students with disabilities in grades K-12 lost 77 more days of instruction on average than White students with disabilities.”).

<sup>41</sup> Andrew Bacher-Hicks et al., *Proving the School-to-Prison Pipeline*, Education Next (July 2021), <https://bit.ly/3BPSbVe>.

<sup>42</sup> *Recidivism of Prisoners Released in 24 States in 2008: A 10-Year Follow-Up Period*, U.S. Dep’t of Just., 1 (Sep. 2021), available at <https://bit.ly/3slxTzD>.

potential tether to a cycle of incarceration. And “avoidable” is key; just as behavioral, social, and academic supports seek to close the performance and inclusion gaps between students with and without disabilities, such supports present viable means to narrow the racial equity gap in education.

### **CONCLUSION**

Because class certification is necessary to remedy the systemic violations of the IDEA, the ADA, Section 504, and West Virginia law, and to avoid the litany of harms to students with disabilities in Kanawha County Schools, this Court should find that the district court did not abuse its discretion.

Dated: March 7, 2022

Respectfully Submitted,

/s/ Richard D. Salgado

Richard D. Salgado

*Counsel of Record*

Kelsey L. Smith

Abron Hester

JONES DAY

2727 N. Harwood Street

Dallas, TX 75201

(214) 969-3620

rsalgado@jonesday.com

*Counsel for Amici Curiae*

No. 21-2286

**Caption:** *G.T., et al. vs. The Bd. of Education of the Cty. of Kanawha, et al.*

**CERTIFICATE OF COMPLIANCE WITH RULE 28.1(E) OR 32(A)  
TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND  
TYPE STYLE REQUIREMENTS**

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a), Fed. R. App. 29(a)(5), and the word count limitation of Local R. 32(b). This brief is written in Georgia Pro, a proportionally spaced font, has a typeface of 14 points, and contains 6,498 words (as counted by Microsoft Word 2016), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Date: March 7, 2022

/s/ Richard D. Salgado

Richard D. Salgado

**CERTIFICATE OF SERVICE**

I hereby certify that on this 7th day of March, 2022, I electronically filed the foregoing with the Court's CM/ECF system. All participants in this case are registered CM/ECF users and will be served via the CM/ECF system.

March 7, 2022

/s/ Richard D. Salgado

Richard D. Salgado