

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION**

G.T. by his Parents Michelle and Jamie T.,
K.M. by his Parents Danielle and Steven M.,
*on behalf of themselves and all similarly
situated individuals*, and THE ARC OF
WEST VIRGINIA,

Civil Action No. 2:20-cv-00057

Plaintiffs,

Judge Irene C. Berger

v.

THE BOARD OF EDUCATION OF THE
COUNTY OF KANAWHA,

Defendant.

**MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. BACKGROUND FACTS.....	4
A. The BOE Suspends Students With Disabilities At Unacceptably High Rates, Both In Absolute Terms And In Comparison To Their Peers.	5
B. The Named Plaintiffs And Other KCS Students With Disabilities Are Harmed By The BOE’s Exclusionary Discipline Practices.....	11
C. The BOE Does Not Have Adequate Systems or Procedures to Ensure Students with Disabilities Receive Necessary Behavioral Supports.	13
III. STANDARD OF REVIEW	15
IV. ARGUMENT	17
A. The Plaintiff Class Is Adequately Identifiable.....	17
B. The Class Is So Numerous That Joinder Of All Members Is Impractical.	19
C. The Class Members Share Common Questions Of Law Or Fact.	20
D. The Named Plaintiffs’ Claims Are Typical of the Class.	26
E. The Named Plaintiffs And Their Counsel Will Fairly And Adequately Protect The Interests Of The Class.	29
1. Proposed Class Representatives.....	29
2. Plaintiffs’ Counsel Meet The Requirements Of Rule 23(g) And Should Be Appointed Class Counsel	31
F. Injunctive And Declaratory Relief Are Appropriate Because The BOE Has Acted Or Refused To Act On Grounds Generally Applicable To The Plaintiff Class.....	32
V. CONCLUSION.....	35

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>A.R. v. Conn. State Bd. of Educ.</i> , No. 3:16-cv-01197 (CSH), 2020 WL 2092650 (D. Conn. May 1, 2020).....	33
<i>Amchem Prods., Inc. v. Windsor</i> , 521 U.S. 591 (1997).....	16
<i>Baxley v. Jividen</i> , No. 3:18-1526, 2020 WL 7489759 (S.D.W. Va. Dec 21, 2020)	17, 19, 21
<i>Black v. Rhone-Poulenc, Inc.</i> , 173 F.R.D. 156 (S.D.W. Va. 1996).....	26, 29, 30, 31
<i>Brown v. Nucor Corp.</i> , 576 F.3d 149 (4th Cir. 2009)	26
<i>C.G. v. Pa. Dep’t of Educ.</i> , No. CIV.A 1:06-CV-1523, 2009 WL 3182599 (M.D. Pa. Sept. 29, 2009)	33
<i>Chester Upland Sch. Dist. v. Pa.</i> , No. 12-132, 2012 WL 1473969 (E.D. Pa. Apr. 25, 2012).....	20
<i>Chisholm v. United States Postal Service</i> , 665 F.2d 482 (4th Cir. 1981)	16
<i>D.L. v. D.C.</i> , 860 F.3d 713 (D.C. Cir. 2017).....	18, 20
<i>Dunn v. Dunn</i> , 318 F.R.D. 652 (M.D. Ala. 2016).....	20
<i>Andrew F. v. Douglas Cty. Sch. Dist. RE-1</i> , 137 S. Ct. 988 (2017).....	1, 2
<i>EQT Prod. Co. v. Adair</i> , 764 F.3d 347 (4th Cir. 2014)	15, 16
<i>Fisher v. Va. Elec. & Power Co.</i> , 217 F.R.D. 201 (E.D. Va. 2003).....	26
<i>G.F. v. Contra Costa Cty.</i> , No. 13-cv-03667-MEJ, 2015 WL 4606078 (N.D. Cal. July 30, 2015)	20

Good v. Am. Water Works Co., Inc.,
310 F.R.D. 274 (S.D. W. Va. 2015).....29

Gunnells v. Healthplan Servs., Inc.,
348 F.3d 417 (4th Cir. 2003)16

Harris v. Rainey,
299 F.R.D. 486 (W.D. Va. 2014).....16, 32

Holsey v. Armour & Co.,
743 F.2d 199 (4th Cir. 1984)19

J.N. v. Or. Dep’t of Educ.,
No. 6:19-cv-00096-AA, 2021 WL 408093.....20

J.R. v. Oxnard Sch. Dist.,
No. LA CV17-04304, 2019 WL 4438243 (C.D. Cal. July 30, 2019).....20, 21

Kingery v. Quicken Loans, Inc.,
300 F.R.D. 258 (S.D.W. Va. 2014).....20

Lester v. Pay Car Mininc, Inc.,
No. 5:17-cv-00740, 2018 WL 2728033 (S.D.W. Va. June 6, 2018)26, 30

Cyrus ex rel. McSweeney v. Walker,
233 F.R.D. 467 (S.D. W. Va. 2005).....20

MG v. N.Y.C. Dep’t of Educ.,
162 F. Supp. 3d 216 (S.D.N.Y. 2016).....3

Mills v. D.C.,
348 F. Supp. 866 (D.D.C. 1972)31

Olmstead v. L.C.,
527 U.S. 581 (1999).....3, 31

Parsons v. Ryan,
754 F.3d (9th Cir. 2014)21, 25

Pashby v. Cansler,
279 F.R.D. 347 (E.D.N.C. 2011)16

R.P.K. v. Dep’t of Educ.,
272 F.R.D. 541 (D. Haw. 2011).....33

Scott v. Clarke,
61 F. Supp. 3d 569 (W.D. Va. 2014)16, 21

In re Serzone,
 231 F.R.D. 221 (S.D. W. Va. 2005).....32

Smith v. Res-Care, Inc.,
 No. 3:13–5211, 2015 WL 461529 (S.D.W. Va. Feb. 3, 2015)26

Soutter v. Equifax Info. Servs., LLC.,
 307 F.R.D. 183 (E.D. Va. 2015)17

Thorn v. Jefferson-Pilot Life Ins. Co.,
 445 F.3d 311 (4th Cir. 2006)16

Tinsley v. Snyder,
 922 F.3d 957 (9th Cir. 2019)21

V.W. v. Conway,
 236 F. Supp. 3d 554 (N.D.N.Y. 2017)20, 21

Wal-Mart v. Dukes,
 564 U.S. 338 (2011).....18, 25

Ward v. Dixie Nat’l Life Ins. Co.,
 595 F.3d 164 (4th Cir. 2010)29, 30

STATUTES

20 U.S.C.
 § 1400(c)(5)2, 17
 § 1400 *et seq.*1
 § 1414(d)(3)(B)(i)5

29 U.S.C. § 794.....1

42 U.S.C. § 12131 *et seq.*.....1

W. Va. Code
 § 5-11-9 *et seq.*.....3
 § 18-20-11

RULES

FED. R. CIV. P.

23(a)	15
23(a)(1)	19
23(a)(2)	20, 22, 26
23(a)(3)	26
23(a)(4)	29, 30
23(a) and 23(b)(2)	34
23(b)(2)	<i>passim</i>
23(g)(1)(A).....	31

TREATISES

William B. Rubenstein, <i>Newberg on Class Actions</i> § 3:12 (5th ed. 2020)	19
--	----

REGULATIONS

34 C.F.R.

§ 300.324(a)(2)(i).....	5
§ 300.646.....	14

OTHER AUTHORITIES

Susan Beck, “Memorandum: Changes in the Regulation of Significant Disproportionality Calculations” West Virginia Department of Education Office of Special Education and Student Support (Oct. 23, 2019), available at https://wvde.us/wp-content/uploads/2019/11/MemorandumofCEISChanges.pdf	14
U.S. Dep’t of Educ., Dear Colleague Letter on the Inclusion of Behavioral Supports in Individualized Education Programs 4 (IEPs), (Aug. 1, 2016), at https://sites.ed.gov/idea/files/dcl-on-pbis-in-ieps-08-01-2016.pdf	5
West Virginia Policy 2419	1, 3, 5

This action challenges the ongoing failure by Defendant, the Board of Education of the County of Kanawha (the “BOE”), to effectively address the Kanawha County Schools’ (“KCS”) systemic failures to provide needed behavior supports for students with disabilities, leading to unjustified disciplinary removals from the classroom. (*See* Plaintiffs’ First Amended Complaint, ECF No. 22). Plaintiffs ask the Court to certify a class of: All Kanawha County Schools students with disabilities who need behavior supports and have experienced disciplinary removals from any classroom. Certification of this class is appropriate and needed to achieve relief from Defendant’s policies, practices, and procedures, which deny the students a free and appropriate public education in the least restrictive environment, without discrimination, in violation of federal and West Virginia law.

I. INTRODUCTION

Under the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400 *et seq.*, public schools must provide a free and appropriate public education (“FAPE”) in the least restrictive environment (“LRE”) to all eligible children with disabilities. Under Title II of the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12131 *et seq.*, and Section 504 of the Rehabilitation Act (“Section 504”), 29 U.S.C. § 794, public schools may not discriminate against children on the basis of disability when administering their services, programs, or activities. These standards must be met by West Virginia’s public schools, including the Kanawha County Schools. *See* W. Va. § 18-20-1; West Virginia Policy 2419 (“W. Va. Policy 2419”).

The standard for providing FAPE is a “demanding” one: schools must provide “appropriately ambitious” special education that gives students with disabilities “the chance to meet challenging objectives.” *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1000 (2017). To meet its substantive obligation under the IDEA, a public school must offer an

Individualized Education Program (“IEP”) “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” 137 S. Ct. at 1001.

For students with disabilities whose behavior impedes learning, public education must include effective behavior supports. 20 U.S.C. § 1400(c)(5). Such students may have, among other conditions, an emotional or behavioral disturbance, autism, an intellectual disability, attention deficit hyperactivity disorder (“ADHD”) or attention deficit disorder (“ADD”), or specific learning disabilities, including those associated with traumatic brain injury (“TBI”). Their conditions are severe enough that school-based counseling or therapy alone is not sufficient to produce needed behavioral changes. These students must receive more intensive behavior supports as needed to enable each child to attain goals in the child’s IEP and in the school’s general education curriculum, and to participate in extracurricular and other nonacademic activities.

Appropriate behavior supports may be identified through individualized Functional Behavior Assessments (“FBAs”) and Behavior Intervention Plans (“BIPs”) and may include positive behavior interventions and supports (“PBIS”). These supports may include curriculum modifications or other academic supports for students whose behavior stems from frustration with challenging classroom assignments, or even boredom with work that is too easy. They may also include providing a visual schedule or a break from class when upset, for children who may be overwhelmed by changes in routine or sensory input.¹

¹ See also Ex. 2, Declaration of Judy Elliott, Ph.D. (“Elliott Decl.”), pp. 33-34 (normal and customary evidence-based supports include “social skills training, self-control training, self-monitoring training, anger control training, Check and Connect (in which the student checks in with a trusted adult at the school), Check-in/Check-out (CICO, another model for student-adult check-ins, reintegration practices following suspensions, counseling, home-school collaborative practices, cognitive behavior supports, and de-escalation supports . . .”).

The mandate to provide FAPE under the IDEA is separate and distinct from the prohibition of discrimination under the ADA and Section 504. The Supreme Court has held that Title II of the ADA prohibits the needless isolation or segregation of persons with disabilities. *Olmstead v. L.C.*, 527 U.S. 581, 600 (1999) (holding that “unjustified institutional isolation of persons with disabilities is a form of discrimination”). The unjustified disciplinary removal of students with disabilities from classrooms where they are educated alongside peers without disabilities is systemic discriminatory segregation. Separating individuals with disabilities from their peers without disabilities “perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life,” and “severely diminishes life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.” *Id.* at 600-601. Public schools must modify their policies, practices, and procedures as needed to avoid these harms.

Named Plaintiffs G.T. and K.M. (“Named Plaintiffs”), on behalf of themselves and others similarly situated (the “Plaintiff Class”), and The Arc of West Virginia (collectively, “Plaintiffs”) bring this class action complaint for declaratory and injunctive relief to challenge the BOE’s systemic policies, practices, and procedures that violate federal and state law. Rather than providing needed behavior supports, the BOE routinely punishes students with disabilities for their behaviors and removes them from the classroom. As discussed below, the BOE’s failure to provide behavior supports as needed to ensure FAPE in the LRE and to prevent discrimination has led to alarmingly high rates of suspensions and other disciplinary removals for KCS students with disabilities. The BOE’s actions violate the IDEA, Section 504, the ADA, West Virginia Human Rights Act (“HRA”), W. Va. Code § 5-11-9 et seq., and W. Va. Policy 2419.

Class certification is necessary to obtain systemic remedies for these violations, which have harmed scores of KCS students with disabilities.² Plaintiffs readily meet the standard for class certification under Rule 23. The proposed class is far too numerous for individual joinder because it includes hundreds of students with disabilities. Plaintiffs challenge the legality of the BOE's system-wide policies and practices, which raise common questions capable of common, "yes or no" answers that will efficiently resolve Plaintiffs' class claims of systemic liability. Typicality is met because the Named Plaintiffs are subject to the same deficient policies, procedures, and practices as the putative class members. The Named Plaintiffs and class counsel will also fairly and adequately protect the interests of the proposed class and have done so diligently to date. Additionally, the BOE has acted, and refused to act, on grounds that apply generally to the class, such that the systemic changes Plaintiffs seek are appropriate for the class as a whole.

This case is not about the behavior supports provided to any specific child with disabilities, and Plaintiffs do not seek relief for individual children. Rather, this case is about the BOE's system-wide policies and practices. Specifically, this case examines whether the BOE fails to ensure that KCS students with disabilities receive the behavior supports they need to receive FAPE in the LRE, without discrimination. The injunctive and declaratory relief requested would resolve these issues on behalf of all the children in the class.

II. BACKGROUND FACTS

Plaintiffs' legal claims center on the BOE's limited and ineffectual responses to a systemic problem with KCS policies and procedures, which has persisted for years.

² *Cf. MG v. N.Y.C. Dep't of Educ.*, 162 F. Supp. 3d 216, 242 (S.D.N.Y. 2016) (highlighting "necessity" of certifying class of students with disabilities, explaining, "[a]bsent class certification, thousands of individual students would be required to file for administrative and/or judicial review to assert these concerns. Such review processes are inefficient, burdensome, and available only to those families with the resources to pursue them.").

A. The BOE Suspends Students With Disabilities At Unacceptably High Rates, Both In Absolute Terms And In Comparison To Their Peers.

Hundreds of students with disabilities experience repeated, unnecessary suspensions and other disciplinary actions during their enrollment at KCS. According to the BOE’s own data, KCS enrolled 25,373 students in the 2019-2020 school year, including 4,049 students with IEPs and 1,324 students with disabilities receiving services under Section 504.³ Students with disabilities made up approximately 21 percent of the KCS population that year, but they received 36.9 percent of all suspensions—2,906 suspensions in total.⁴ Students with IEPs were 66 percent more likely to be suspended than students without disabilities.⁵ Federal and state law requires districts to provide students with disabilities the behavior supports they need to succeed. *See* 20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); W. Va. Policy 2419 at 50, 73.⁶ As Plaintiffs’ expert Dr. Judy Elliott notes, however, the ineffectiveness of supports provided to KCS students “is demonstrated by the disciplinary actions—including in-school or out-of-school suspension, lunch detention, Saturday detention, exclusion from class, loss of bus privileges, transfer to an

³ Data provided by the BOE regarding the enrollment of students with disabilities receiving Section 504 service plans was not disaggregated by school year. This figure represents the total number of student enrolled at KCS from January 24, 2018 – May 30, 2020 (the “Relevant Period”) receiving Section 504 service plans. *See* Ex. 12, “504 Student Spreadsheet,” (Sep. 30, 2020); *see also*, Ex. 13, ZoomWV: Kanawha District Profile, West Virginia Department of Education (WVDOE), available at <https://zoomwv.k12.wv.us/Dashboard/dashboard/2056>.

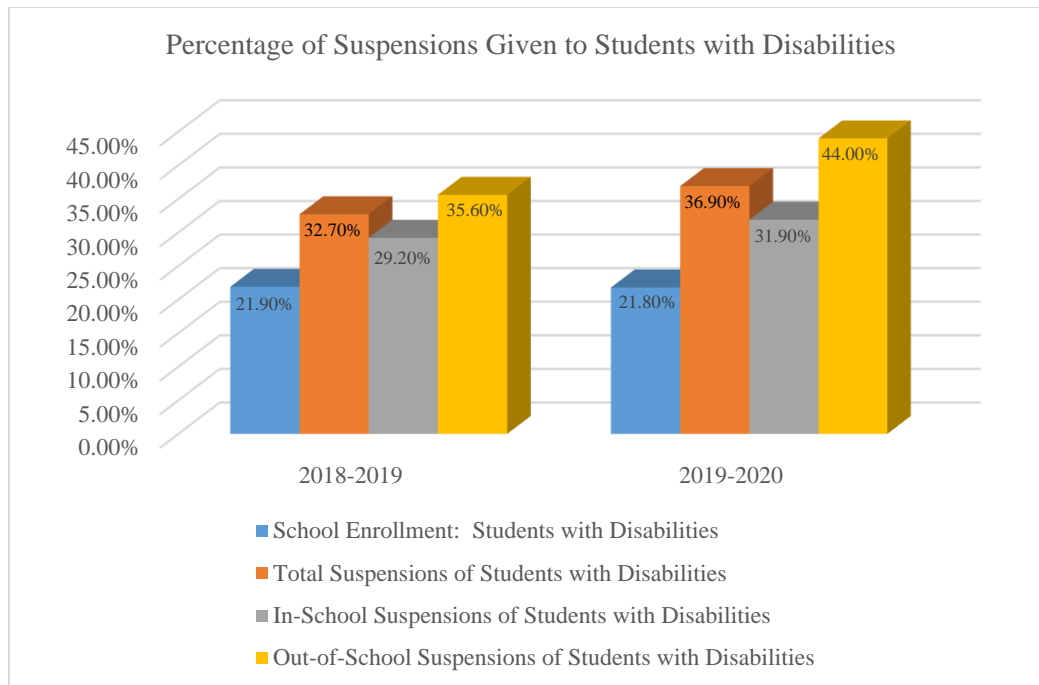
⁴ *See* Ex. 14, KCBOE 000001, “Pt 1 & Pt 2 KCBOE #000001 SPREADSHEET 3-29-2021-2 with highlights” (Mar. 29, 2021); Ex. 12, “504 Student Spreadsheet;” Ex. 13, ZoomWV: Kanawha District Profile.

⁵ *See* Ex. 2, Elliott Decl. at p. 10 (review of KCS suspension data from 2018-2019 school year).

⁶ *See* W. Va. Policy 2419 at 73, “If a student’s behavior, regardless of the student’s disability, impedes his/her learning or the learning of others, the IEP Team *must* consider the use of strategies, including positive behavioral interventions and supports, to address the behavior. If the IEP Team determines that such services or supports are needed, they must be included in the IEP and be implemented.” (emphasis added); *see also* Ex. 26, U.S. Dep’t of Educ., Dear Colleague Letter on the Inclusion of Behavioral Supports in Individualized Education Programs 4 (IEPs), (Aug. 1, 2016) (same), at <https://sites.ed.gov/idea/files/dcl-on-pbis-in-ieps-08-01-2016.pdf>.

alternative program, or in some cases expulsion—that continued to take place [even] after supports were provided”—in those cases where they were provided at all.⁷

As the graph below indicates, KCS students with disabilities have been far more likely to experience in-school, and especially out-of-school, suspensions than their presence in the student population would indicate.⁸

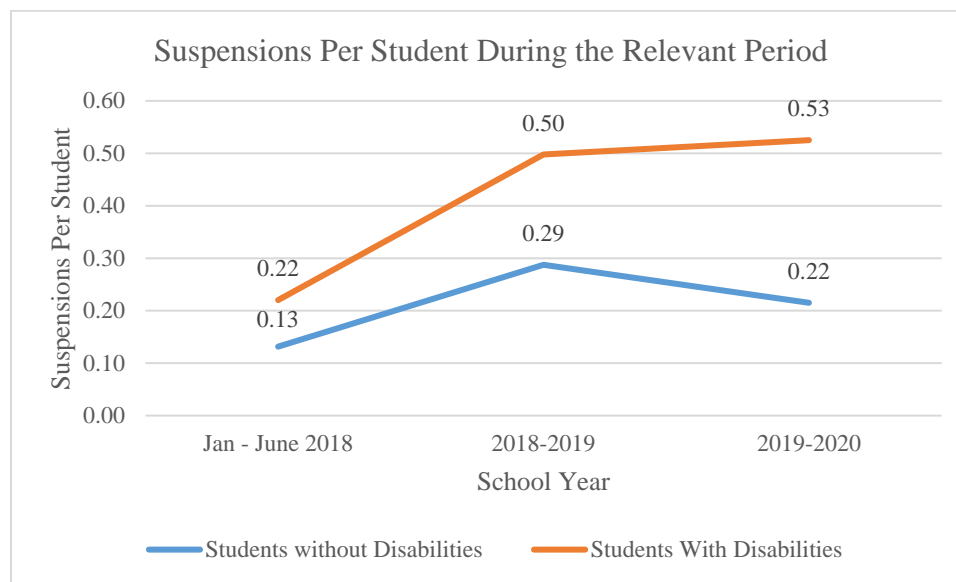


These discipline disparities have persisted and even increased over the years. According to the U.S. Department of Education, KCS students with disabilities, with either IEPs or Section 504 plans, making up 22.5 percent of the student population, received 38.4 percent of out-of-school

⁷ Ex. 2, Elliott Decl., p. 38. Dr. Elliott bases her findings on her review of a random, representative sample of 332 KCS students with disabilities who received two or more suspensions during the Relevant Period. *See also* Ex. 1, Declaration of Steven Raphael, Ph.D., *passim*.

⁸ *See* Ex. 14, KCBOE 000001; Ex. 15, KCBOE 001644-2205; Ex. 12, “504 Student Spreadsheet;” Ex. 13, “ZoomWV: Kanawha District Profile;” Ex. 16, “West Virginia Child Count Data by District and School Year” (Feb. 23, 2021). *Cf.* Ex. 2, Elliott Decl., p. 10 (in 2018-2019 school year, KCS students with disabilities were 66% more likely to receive suspensions as KCS students without disabilities).

suspensions in the 2017-18 school year—nearly double the suspension rate of their non-disabled peers.⁹ A recent study based on this data found that KCS secondary students (grades 6-12) with IEPs lost 242.42 days of instruction during the 2017-2018 school year, compared to 96.50 days lost for KCS students without disabilities, as measured in days lost per 100 secondary students – a gap of 115.92 lost instructional days, the highest in West Virginia and one of the highest among larger school districts in the country.¹⁰ Since then, as the following graph shows, the disproportionate rate at which the BOE suspends its students with disabilities has only grown wider, and more troubling:¹¹



⁹ See Ex. 17, Civil Rights Data Collection, “Kanawha County Schools: Instances of Corporal Punishment and Suspensions,” and “Kanawha County Schools: LEA Summary of Selected Facts,” U.S. Department of Education Office of Civil Rights, available at <https://ocrdata.ed.gov/profile/9/district/31409/summary>.

¹⁰ See Ex. 18, D.J. Losen, et al., *Disabling Inequity: The Urgent Need for Race-Conscious Resource Remedies* (2021), p. 28 & Table 2, at <https://www.civilrightsproject.ucla.edu/research/k-12-education/special-education/disabling-inequity-the-urgent-need-for-race-conscious-resource-remedies/final-Report-03-22-21-v5-corrected.pdf>.

¹¹ See Ex. 14, KCBOE 000001; Ex. 15, KCBOE 001644-2205; Ex. 12, “504 Student Spreadsheet;” Ex. 13, “ZoomWV: Kanawha District Profile;” Ex. 16, “West Virginia Child Count Data by District and School Year.”

Many school districts, including West Virginia districts otherwise similar to KCS, achieve rough parity in suspension outcomes between students with and without disabilities. For example, while KCS secondary students with disabilities endured a gap of nearly 116 lost instructional days due to suspensions during the 2017-2018 school year (as measured in days lost per 100 secondary students), the Berkeley County Schools, the second largest district in the state, had a gap of only 16 lost instructional days due to suspensions that year between its secondary students with and without disabilities.¹² Other districts, like Harrison County and Monongalia County, had gaps of 31 and 36 lost instructional days, respectively—below the state average of 52 days, and far below KCS.¹³

The BOE also suspends students of color, including those with disabilities, at alarming rates. In the 2017-2018 school year, the BOE suspended Black students at Capital High School, the largest high school by enrollment in KCS, 2.3 times more than white students.¹⁴ That same year, the BOE suspended Black students at Elk Elementary Center, KCS’s largest elementary school by enrollment, at a rate 20 times higher than white students.¹⁵ Across the district, KCS students of color with disabilities experience the most significant disparities: in the same school year, students of color made up only 17.7 percent of KCS special education students, but received 34.8 percent of in-school suspensions and 28.4 percent of out-of-school suspensions.¹⁶ The BOE

¹² See Ex. 18, D.J. Losen, *supra* note 10. As the Losen report indicates, the risk that a KCS student receiving IDEA services would be suspended in the 2017-2018 school year was 35.29 percent, far higher than the national average, 13.31 percent, or the West Virginia average, 19.33 percent. *Id.*

¹³ *Id.*

¹⁴ See Ex. 19, Lena V. Groeger et al., “Miseducation: All Schools in Kanawha County School District,” ProPublica, (Oct. 16, 2018).

¹⁵ *Id.*

¹⁶ See Ex. 17, Civil Rights Data Collection, *supra* note 9 at “Kanawha County Schools: Discipline Report.”

has known about these disparities since at least 2015,¹⁷ but still has not taken meaningful steps to remediate.¹⁸

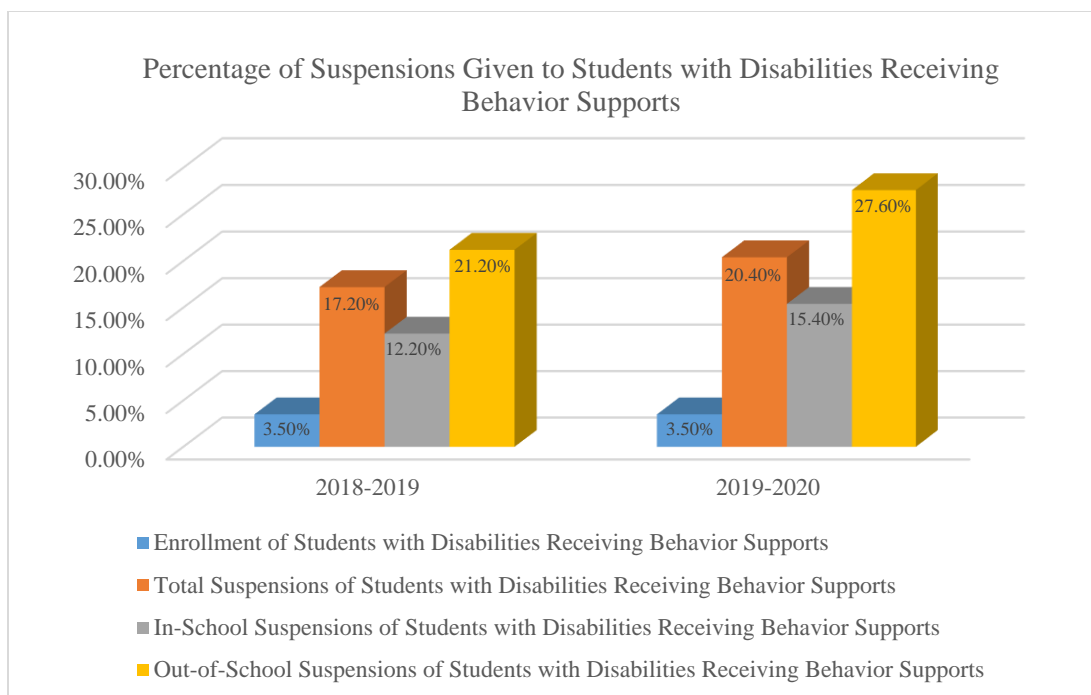
The purpose of a behavior support is to provide a positive, corrective intervention as an alternative to a disciplinary removal for students whose behavioral conditions arising from their disabilities impede their learning or that of other students. Schools must provide supports that “address the ‘root cause’ of student behavior challenges.” Elliott Decl., Ex. 2, p. 34. According to data it compiled for this litigation, however, the BOE continues to subject its students with disabilities who receive behavior supports to a staggering number of suspensions, which indicates that root causes of behavior have not been addressed. During the Relevant Period, KCS administered 3,641 suspensions to the approximately 840 students with disabilities the BOE identified in discovery as receiving behavior supports.¹⁹ The graph below shows the percentage of suspensions received by students receiving behavior supports during the 2018-2019 and 2019-2020 school year, disaggregated by suspension type:²⁰

¹⁷ See Ex. 24, Ryan Quinn, “Study: Black students disproportionately punished in WV schools,” Charleston Gazette-Mail (Aug. 25, 2015), available at https://www.wvgazettemail.com/news/education/study-black-students-disproportionately-punished-in-wv-schools/article_8162bf11-7b0a-52d0-b817-3b222908488c.html. In response to a 2015 study revealing that the BOE suspended Black students at a rate 1.8 times greater than their representation in the student population, the BOE’s own Assistant Superintendent of Curriculum and Instruction commented, “the county knows suspensions don’t help kids.” *Id.*

¹⁸ See Ex. 25, Ryan Quinn, “State education officials pledge to reduce discipline disparity between Black, white students,” Herald-Dispatch, (Feb. 22, 2021), available at https://www.herald-dispatch.com/news/state-education-officials-pledge-to-reduce-discipline-disparity-between-black-white-students/article_2cfd7d52-b55f-5d3f-b7fc-40c4b8a48072.html.

¹⁹ See Ex. 14, KCBOE 000001; Ex. 15, KCBOE 001644-2205; Ex. 12, “504 Student Spreadsheet;” Ex. 13, “ZoomWV: Kanawha District Profile;” Ex. 16, “West Virginia Child Count Data by District and School Year.”

²⁰ *Id.*



Moreover, because it only accounts for documented suspensions, the data described above does not fully capture all the times KCS students with disabilities are segregated from their peers. KCS school staff frequently call students' parents and direct them to pick up the student from school before the end of the school day, or to keep the student at home. *See, e.g.*, Ex. 6, Declaration of Kristina E. ("K.E. Decl.") at ¶ 24; Ex. 3, Exhibit A to Declaration of Dr. Sara Boyd, Ph.D. ("Boyd Decl."), p. 26. For example, during the 2017-2018 school year, staff at Alum Creek called K.M.'s parents to pick him up early from school for alleged misbehavior over 20 times. *See* Ex. 28, K.M. Due Process Hearing Tr., at 116:6-11 (Oct. 28, 2019). The BOE does not record these informal removals as disciplinary incidents in the West Virginia Education Information System ("WVEIS"). *See* Ex. 32, Holly Samples, April 1, 2021 30(b)(6) Dep. Tr. ("Samples Dep. Tr.") 74:16 – 84:21. As a result, the BOE consistently undercounts the occasions when students with disabilities are removed from their classrooms in its reports to the federal and West Virginia education departments. *See id.* at 250:15-24. The reported numbers alone are deeply concerning, but the rate is likely much higher than what the BOE reports due to these informal removals.

B. The Named Plaintiffs And Other KCS Students With Disabilities Are Harmed By The BOE's Exclusionary Discipline Practices.

The Named Plaintiffs exemplify how these trends affect individual KCS students. G.T., a third grader with Autism, has experienced approximately six suspensions as well as other informal removals from his classrooms as a KCS student, including five out-of-school suspensions in the 2018-2019 school year alone. *See* Ex. 27, G.T. Due Process Hearing Tr. 164:18-23; 178:14-15 (Aug. 19, 2019). Similarly, K.M., a fifth grader with Down syndrome, has experienced at least 14 suspensions. His parents were called to take him home at least 20 times during the second half of the 2017-18 school year. *See* Ex. 28, K.M. Due Process Hearing Tr. 116:6-24 (Oct. 28, 2019). These repeated disciplinary removals have harmed both Named Plaintiffs by denying them opportunities for academic skill-building and social engagement with their peers. *See* Ex. 3, Boyd Decl., pp. 27-28. They are both at risk of further removals from the school, and the related harms of disengagement and alienation from school. *See id.*

Other KCS families also report that their children with disabilities have received multiple, harmful suspensions in response to disability-related behaviors. *See* Ex. 7, Declaration of Rajahnea P. ("R.P. Decl."); Ex. 6, K.E. Decl.; Ex. 8, Declaration of Jennifer M. ("J.M. Decl."); *see also*, Ex. 10, Declaration of Christina Smith ("C.S. Decl."). For example, one student's mother reported that despite receiving reports of behavior incidents from her son's school, Shoals Elementary, the school did not attempt to provide any behavior supports and instead only threatened to suspend him. *See* Ex. 7, R.P. Decl., at ¶ 3. The child's behaviors were manifestations of his disabilities of ADHD and oppositional defiance disorder, including failing to stand still in line, not respecting other children's personal space, and "bulling up" (crossing his arms and refusing to cooperate). *Id.* at ¶¶ 1, 3. Another student's mother reported that instead of formally suspending her son, her son's school would regularly remove him to a segregated classroom

whenever he exhibited challenging behaviors, or they would call to have the parent pick him up before the school day ended. *See* Ex. 6, K.E. Decl., at ¶ 24.²¹ Another student’s mother reported that, despite an Autism diagnosis and repeated requests for an IEP and behavior plan since 2013, BOE has never provided these supports to her son. Ex. 10, C.S. Decl. at ¶¶ 10-14. In January 2020, St. Albans High School suspended the student for being “threatening” after engaging in behaviors related to his disability, including flapping his hands and reciting lines in a robotic voice he heard on video games. The school failed to communicate with the student’s mother for a week following the incident; she sent him to school but he sat outside the school campus every day that week. *Id.*

As discussed above, this problem is pervasive and widespread. Christina Smith, an advocate with nearly two decades of experience advocating for students with disabilities in West Virginia, including with KCS, explains:

Generally, KCS does not hold teachers and administrators accountable for providing the behavior supports students with disabilities need to make progress in school and advance from grade to grade. The KCS staff drafts behavior plans for students that are not based on accurate, individualized information about what may trigger a student’s behavior, or what the student is trying to achieve through their behavior. KCS staff are also not trained to implement these plans effectively. KCS staff do not work with IEP teams to develop IEPs that have appropriate behavior

²¹ In addition to removals, the BOE subjects students with disabilities to unnecessarily restrictive placements, or physical restraints. *See e.g.*, Ex. 21, KCSKP0022143, email dated January 6, 2020 from Donna Chambers, Elk Elementary Center Principal, describing ongoing issues with a student. Ms. Chambers wrote, “He’s been suspended from school, had an FBA, 504, and now has an IEP. He has had the most physical restrictive placement in general ed. possible being that he was confined to a screened area last school year so he could not visibly see other children.” *See also* Ex. 22, KCSKP0034456, email dated January 27, 2020, about a third-grade student who was “tearing the place apart” and staff was “not physically able to deal with him.” Dr. Porter, KCS’s then-Assistant Superintendent with responsibility for special education, emailed the principal, Mr. Somerville, asking, “Why aren’t they restraining him?” to which Mr. Somerville responded, “Yes, he was restrained, for most of the day.” Excessive use of discipline and restraints harm members of the Plaintiff Class by impeding their progress in school and restricting their ability to foster the “social skills needed to succeed in educational and community environments.” Ex. 3, Boyd Report, p. 53.

goals for these students, or identify behavioral services and supports to help students with behavior. As a result, students who need behavior supports do not get the supports they need. I have seen KCS students with disabilities fall behind in school or get in trouble within the school or with law enforcement because they didn't get the supports they needed.

Ex. 10, C.S. Decl. at ¶ 31; *see also* Ex. 2, Elliott Decl., pp. 15-16 (“vast majority” of KCS students reviewed had “history of behavior problems, suspensions, office referrals, and other removals from school or the classroom[, and] with few exceptions . . . need appropriate behavior supports.”).

C. The BOE Does Not Have Adequate Systems or Procedures to Ensure Students with Disabilities Receive Necessary Behavioral Supports.

KCS students with disabilities, including the Named Plaintiffs, will be harmed by KCS's discriminatory disciplinary removals as long as KCS fails to implement adequate systems and procedures to ensure that these students receive needed supports. Specifically, KCS currently lacks adequate systems and procedures to ensure that (1) KCS students with disabilities who need behavior supports are properly identified; (2) the cause of the disruptive behaviors is properly identified; (3) appropriate supports are implemented through IEPs, Section 504 service plans, and BIPs; (4) these plans are properly implemented, such that students actually receive prescribed supports; and (5) the implementation of the plans, and whether students actually make appropriate progress, are meaningfully monitored. Ex. 2, Elliott Decl., *passim*. KCS's failures to ensure the provision of adequate supports, and to monitor their implementation, has resulted in the BOE having “abdicated its responsibilities” to ensure students with disabilities receive the legally-required supports they need. *Id.*, p. 54.

As an example, the BOE has failed to identify and remediate discriminatory discipline trends because it lacks meaningful systems to track this data at the district level. *See* Ex. 38, Declaration of Jaime Zucker at ¶¶ 4-5, 21, 24. Dr. Katherine Porter, former KCS Assistant Superintendent and Director of Special Education, testified that her office does not, in the normal

course of business, collect and aggregate *any* data on the following: (1) disciplinary incidents by school; (2) records on discipline throughout KCS schools; (3) disciplinary incidents for students generally (as compared to students with disabilities); (4) the number of times students are sent to the principal's office; or (5) suspensions of students with disabilities for less than ten days. *See* Ex. 30, Dr. Kate Porter December 4, 2020 30(b)(6) Dep. Tr. ("Porter Dep. Tr.") 128:8 – 130:24.²² The BOE does not normally track even the most basic data, such as how many students are receiving behavior supports each school year, or how many students have been referred to law enforcement.²³ Without such data, KCS "cannot effectively monitor whether students who need behavior supports receive them, and whether with those supports they are receiving FAPE in the LRE without discrimination." Elliott Decl., Ex. 2, p. 54.

The BOE's failure to track this important data prevents it from reacting meaningfully to district-wide trends that may violate federal law, such as the fact that students with disabilities, including those of color, face a significantly disproportionate number of suspensions.²⁴ The BOE

²² Dr. Porter explained that she would be notified only of suspension concerns or high suspension rates if one of her staff chose to raise the issue, as opposed to someone in the office monitoring suspension data. Porter Dep. Tr. 122:4-18. Moreover, KCS has disclosed no district-wide guidelines for staff indicating when staff should raise suspension concerns. The IDEA regulation states that when a student with disability experiences more than 10 days of suspension for substantially similar behaviors during a school year, the school must convene a manifestation determination review, to determine whether the behavior for which the student has been suspended is related to the student's disability. *See* 34 C.F.R. § 300.530(e).

²³ *See* Ex. 23, Email from Rick Boothby, "Re: Special Education student headcount for KCS" (March 1, 2021); *see also* Ex. 32, Samples Dep. Tr. 89:8 – 93:13; Ex. 31, Zachary Hanshaw March 31, 2021 30(b)(6) Dep. Tr. ("Hanshaw Dep. Tr.") 37:11 – 38:17.

²⁴ *See* 34 C.F.R. § 300.646; *see also* Ex. 20, Susan Beck, "Memorandum: Changes in the Regulation of Significant Disproportionality Calculations" West Virginia Department of Education Office of Special Education and Student Support (Oct. 23, 2019), available at <https://wvde.us/wp-content/uploads/2019/11/MemorandumofCEISChanges.pdf> ("To determine if significant disproportionality is evident, the WVDE annually collects and examines 1) special education identification rates; 2) special education identification rates by disability category; 3) placement rates in least restrictive environments; and 4) suspension and expulsion rates by incidence, duration and type of disciplinary action. Each data element is analyzed by district level

also fails to use this data to identify individual students who are experiencing a high number of classroom removals and to determine who might benefit from additional or different behavior supports. *See* Ex. 30, Porter Dep. Tr. at 131:9–21; *cf.* Ex. 2, Elliott Decl., p. 16. If the BOE collected this data, it would be evident that all too often its disciplinary removals of these students take place because the BOE fails to provide them with effective behavior supports. Ex. 2, Elliott Decl., at pp. 18-19, 24-25.

Rates of disciplinary removals of students with disabilities are remarkably high—and increasing—across KCS. Without judicial intervention, KCS will continue to remove its students with disabilities at alarming rates. By operating as a district that suspends rather than supports its students, the BOE denies KCS students with disabilities their right to a FAPE in the LRE, and an education free of discrimination.

III. STANDARD OF REVIEW

Class certification is appropriate if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. *See* FED. R. CIV. P. 23(a). Named Plaintiffs also must demonstrate that the Plaintiff Class satisfies one of the three sub-provisions of Rule 23(b), including that “the party opposing the class has acted or refused to act on grounds that apply generally to the class,” such that final injunctive or declaratory relief is appropriate. *See* FED. R. CIV. P. 23(b)(2). In addition to this two-step framework, the Fourth Circuit has “repeatedly recognized that Rule 23 [also] contains an implicit threshold

risk for students with disabilities and by race and ethnicity subgroups in the form of relative risk ratios, and alternate risk ratio to account for low populations.”).

requirement that the members of a proposed class be ‘readily identifiable.’” *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014).

The Named Plaintiffs seek to certify the proposed class pursuant to Rule 23(b)(2). Suits brought to obtain injunctive relief for civil rights violations, such as those alleged by Plaintiffs, are precisely the type of cases for which Rule 23(b)(2) certification was intended. *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997) (“Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples [of when class certification is proper under Rule 23(b)(2)]”) (citations omitted); *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 330 n.24 (4th Cir. 2006) (observing that “Rule 23(b)(2) was created to facilitate civil rights class actions”) (citations omitted); *Chisholm v. United States Postal Service*, 665 F.2d 482, 492 (4th Cir. 1981) (affirming certification of a Rule 23(b)(2) class of black employees of the postal service alleging racial discrimination in the promotion system); *Scott v. Clarke*, 61 F. Supp. 3d 569, 590-91 (W.D. Va. 2014) (“Rule 23(b)(2) was drafted specifically to facilitate relief in civil rights suits.”) (citations omitted); *Harris v. Rainey*, 299 F.R.D. 486, 494 (W.D. Va. 2014) (observing that plaintiffs “allege . . . a class-wide violation of civil rights.”); *cf. Pashby v. Canstler*, 279 F.R.D. 347, 354 (E.D.N.C. 2011), *aff’d on other grounds, Pashby v. Delia*, 709 F.3d 307 (4th Cir. 2013).

In analyzing class certification claims, the Fourth Circuit encourages district courts to give Rule 23 “a liberal rather than a restrictive construction” to “best serve the ends of justice for the affected parties and . . . promote judicial efficiency.” *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 424 (4th Cir. 2003) (citation omitted). While courts may take a “close look” at the facts of the case at the class certification stage, even at the risk of some overlap into the merits, “[t]he likelihood of plaintiff’s success on the merits . . . is not relevant to the issue of whether certification is proper.” *Thorn*, 445 F.3d at 319.

IV. ARGUMENT

A. The Plaintiff Class Is Adequately Identifiable.

As a threshold matter, the Plaintiff Class satisfies the implicit requirement of being “readily identifiable.” *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014). To satisfy this requirement, Plaintiffs need only show “that the Court and the parties could determine who is and is not a class member.” *Baxley v. Jividen*, No. 3:18-1526, 2020 WL 7489759, at *3 (S.D.W. Va. Dec 21, 2020) (Chambers, J.). Such is clearly the case here.

Plaintiffs propose defining the class in the precise, objective manner required: All KCS students with disabilities who need behavior supports and have experienced disciplinary removals from any classroom. *See* Am. Compl. ¶ 39. The terms “Student with a Disability” or “Students with Disabilities” refer to students who have been found eligible for educational aids and services under the IDEA, Section 504, the ADA, or West Virginia law. For students whose behavior impedes learning, public education must include effective behavior supports, which should be identified in their IEP plans, 20 U.S.C. § 1400(c)(5), or “Section 504” service plans. Whether such students have experienced disciplinary removals from the classroom also is an objective question that should be readily answered from educational records.

If there were a need to identify individual class members, doing so would be a straightforward and objective task²⁵—and, in fact, the BOE has done just that. From data produced

²⁵ In *Soutter v. Equifax Info. Servs., LLC.*, 307 F.R.D. 183, 197 (E.D. Va. 2015), the court held that a class is readily identifiable on the basis of objective criteria even when the steps to ascertain membership in a class are time-consuming, such as a manual review of individual consumer files. Likewise, membership in the Plaintiffs’ proposed class can readily be determined by reviewing KCS students’ IEPs and disciplinary records, which the BOE did when it produced student data responsive to Plaintiffs’ discovery requests. *See, e.g.*, Ex. 14, KCBOE 000001; Ex. 12, “504 Student Spreadsheet.” The BOE’s ability to create such spreadsheets in response to Plaintiffs’ discovery requests proves that membership in the class can be determined by reference to the objective criteria in the BOE’s business records. *See Soutter*, 307 F.R.D. at 198 (“Equifax has already proven its ability to determine whether and when a consumer has notified it of an

by the BOE in discovery, and other business records associated with individual student files, Plaintiffs can demonstrate that hundreds of KCS students with disabilities who received behavior supports have experienced a disproportionate share of disciplinary removals.²⁶ Although as discussed herein, among other things the BOE does not record informal “send-homes” as classroom removals,²⁷ and does not adequately identify all students who need behavior supports,²⁸ for purposes of certifying a class and deciding class-wide claims and injunctive remedies, the Court and the parties can sufficiently determine who is and who is not a class member.

Given the nature of this case, however, there is no need for such individualized scrutiny. Plaintiffs seek only unitary injunctive and declaratory relief for the benefit of the entire class under Rule 23(b)(2), not any form of individualized relief. *See, e.g., Wal-Mart v. Dukes*, 564 U.S. 338, 360 (2011) (“Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class.”). In 2017, the District of Columbia Circuit Court of Appeals examined whether classes of students who needed—but were not properly evaluated for—special education services were adequately identifiable. *See D.L. v. D.C.*, 860 F.3d 713 (D.C. Cir. 2017). The court held that because the class was defined by reference to objective criteria, and all claims could be remedied by a single injunctive order, there would never be a need to individually

inaccurate Virginia judgment pursuant to this Court's September 17, 2010 Order requiring Equifax provide Soutter with a list of the names and addresses of each consumer who made a dispute concerning a Virginia judgment on their file at any time since February 17, 2008 under [certain] dispute codes.”).

²⁶ *See* Ex. 14, KCBOE 000001; Ex. 12, “504 Student Spreadsheet,” *see also* Part IV.B, *infra* (BOE identified at least 390 students from the 2019-2020 school year alone who meet the class definition).

²⁷ *See, e.g., id.*; *see also* Ex. 32, Samples Dep. Tr., 89:8-93:12.

²⁸ *See, e.g.,* Ex. 2, Elliott Decl., pp. 17-25.

identify class members. *See id.* at 725; *see also id.* at 726 (suits seeking unitary injunctive relief are precisely what Rule 23(b)(2) was designed to accommodate).

For all of these reasons, the Plaintiff Class is adequately identifiable.

B. The Class Is So Numerous That Joinder Of All Members Is Impractical.

The numerosity requirement of Rule 23 is met if “the class is so numerous that joinder of all members is impracticable.” FED. R. CIV. P. 23(a)(1). When deciding numerosity, there is no “mechanical test” or minimum class member requirement. *Holsey v. Armour & Co.*, 743 F.2d 199, 217 (4th Cir. 1984). Yet the “rule of thumb” is that the class includes 40 or more class members. *See, e.g.*, William B. Rubenstein, *Newberg on Class Actions* § 3:12 (5th ed. 2020); *Baxley v. Jividen*, 2020 WL 7489759, at *4 (S.D. W. Va. Dec. 21, 2020) (Chambers, J.) (numerosity satisfied where the proposed class contained over 40 members).

The number of putative class members here far exceeds that “rule of thumb,” because the estimated class size consists of hundreds of students with disabilities. The BOE provided data through discovery that identifies at least 390 students from the 2019-2020 school year alone who meet the class definition.²⁹ This includes students with disabilities who (1) received needed behavior supports, as identified in their IEPs and Section 504 plans, and (2) faced at least one in-school or out-of-school suspension during the 2019-2020 school year. Over 300 of the 390 students experienced more than one suspension during the 2019-2020 school year.³⁰ This is only a segment of those KCS students in the class as defined by Plaintiffs, which by the BOE’s count

²⁹ *See* Ex. 14, KCBOE 000001; Ex. 15, KCBOE 001644-2205; Ex. 12, “504 Student Spreadsheet;” Ex. 13, “ZoomWV: Kanawha District Profile;” Ex. 16, “West Virginia Child Count Data by District and School Year.” Calculation of this estimate was based on the reported number of students receiving behavior supports in the 2019-2020 school year who received at least one suspension.

³⁰ *See id.*

also includes 1,008 students with disabilities who received at least one suspension during the latter half of the 2017-2018 school year and the 2018-2019 school year.³¹ Thus, the numerosity requirement is clearly satisfied here. *See Cyrus ex rel. McSweeney v. Walker*, 233 F.R.D. 467, 470 (S.D. W. Va. 2005) (finding numerosity satisfied for a class of 359 members); *G.F. v. Contra Costa Cty.*, No. 13-cv-03667-MEJ, 2015 WL 4606078, at *9 (N.D. Cal. July 30, 2015) (finding numerosity satisfied in a class action alleging violations of IDEA, ADA, and Section 504 where “the class contains at least 40 youth with disabilities currently.”).

C. The Class Members Share Common Questions Of Law Or Fact.

To meet the commonality requirement of Rule 23, there must be “questions of law or fact common to the class.” FED. R. CIV. P. 23(a)(2). “[C]ommonality requires a showing that there is ‘some glue’ holding the claims together.” *Dunn v. Dunn*, 318 F.R.D. 652, 662-63 (M.D. Ala. 2016). This “does not require all questions of law or fact to be common” — “even a single common question will suffice.” *V.W. v. Conway*, 236 F. Supp. 3d 554, 574-75 (N.D.N.Y. 2017); *see also Kingery v. Quicken Loans, Inc.*, 300 F.R.D. 258, 265 (S.D. W.Va. 2014).

In analogous cases involving students’ educational rights under the IDEA, Section 504, or the ADA, other courts have found Rule 23(a)(2) readily satisfied. *See, e.g., D.L.*, 860 F.3d at 724-25 (finding common questions, including whether students were denied FAPE because of deficient and poorly implemented policies and practices); *J.N. v. Or. Dep’t of Educ.*, No. 6:19-cv-00096-AA, 2021 WL 408093, at *13 (D. Or. Feb. 5, 2021) (finding common question whether defendant’s failure to identify, correct, and prevent the systemic misuse of shortened school days exposed the class members to significant risk that they will be subject to denials of FAPE in the LRE and disability-based discrimination); *J.R. v. Oxnard Sch. Dist.*, No. LA CV17-04304 JAK (FFMx),

³¹ *Id.*

2019 WL 4438243, at *25 (C.D. Cal. July 30, 2019) (same); *V.W.*, 236 F. Supp. 3d at 574-76 (finding common question whether school district’s policy to not provide instruction to incarcerated youth was systematic deprivation of special education services); *G.F.*, 2015 WL 4606078, at *9-10 (same); *Chester Upland Sch. Dist. v. Pa.*, No. 12-132, 2012 WL 1473969, at *3-4 (E.D. Pa. Apr. 25, 2012) (finding common questions of whether school closures or reduction of funding will cause students with disabilities to be denied FAPE under the IDEA or services required by Section 504).

Importantly, “the commonality element is more easily established in proposed class actions seeking injunctive or declaratory relief Indeed, suits for injunctive relief by their very nature present common questions of law and fact.” *Scott v. Clarke*, 61 F. Supp. 3d 569, 585 (W.D. Va. 2014) (quotations omitted). In such cases, “the commonality requirement can be satisfied by proof of the existence of systemic policies and practices that allegedly expose [class members] to a substantial risk of harm.” *Parsons v. Ryan*, 754 F.3d at 681 (9th Cir. 2014); *see also J.R.*, 2019 WL 4438243, at *25 (common questions may be resolved “through the class-wide injunctive relief sought, *i.e.*, a reshaping of the Districts’ Child Find policies and procedures to facilitate prompt and thorough identification and evaluation of students with suspected disabilities.”).³² Such exposure to the risk of harm due to “systemic and centralized policies or practices” will suffice—

³² Although the Fourth Circuit has not yet weighed in, other courts have recognized that demonstrating the risk of harm to class members from defendants’ systemic policies and practices supports commonality in civil rights cases such as this one. *See, e.g., B.K. by next friend Tinsley v. Snyder*, 922 F.3d 957, 967-69 (9th Cir. 2019) (finding common questions where systemic policies and practices exposed class of minors in custody of Arizona foster care system to physical and emotional harm and unreasonable risk of harm); *V.W.*, 236 F. Supp. 3d at 574 (commonality was met where plaintiffs alleged that defendants “acted with deliberate indifference to the substantial risk of serious harm posed by” defendants’ policies and practices); *Baxley v. Jividen*, 2020 WL 7489759, at *3 (S.D. W. Va. Dec 21, 2020) (“Plaintiffs need not show that every class member will use the healthcare system at the regional jail. Instead, they simply need to show that the entire class is subject to the same policies.”).

even if some members experience different injuries or none at all—because “these policies and practices are the ‘glue’ that holds together the putative class” *Parsons*, 754 F.3d at 678, 684.

In this case, Plaintiffs raise several common questions of law or fact, including:

1. Whether the BOE has an adequate system and procedures for identifying students with disabilities who need behavior supports to receive FAPE in the LRE.
2. Whether the BOE has adopted appropriate systems and procedures, for:
 - a. identifying the causes of disruptive behavior, including through FBAs, when developing behavior supports for students who need them to receive FAPE in the LRE;
 - b. developing and revising IEPs, Section 504 plans, and BIPs for students with disabilities who need behavior supports to receive FAPE in the LRE; and
 - c. implementing IEPs, Section 504 plans, and BIPs for students with disabilities who need behavior supports to receive FAPE in the LRE.
3. Whether the BOE has an adequate system and procedures for monitoring whether students with disabilities who receive behavior supports are making appropriate progress in their educational programs.
4. Whether the BOE adequately monitors its disciplinary policies to ensure they are implemented in compliance with the IDEA, Section 504, the ADA, and West Virginia law.
5. Whether the BOE provides adequate training and professional development to staff so that they can provide behavior supports to students who need them to receive FAPE in the LRE.
6. Whether the BOE’s failure to implement systems and procedures to ensure that students receive needed behavior supports discriminates against these students on the basis of disability under the ADA, Section 504, and the West Virginia Human Rights Act.

Consistent with the above case law, these common questions satisfy Rule 23(a)(2).

In support of this motion, Plaintiffs have submitted an expert declaration from Dr. Judy Elliott. Based on her decades of experience, as well as her review of a random sample of 332 KCS students with disabilities who experienced at least two suspensions during the Relevant Period,

Dr. Elliott determined that the BOE “does not have a systemic infrastructure to identify, implement, monitor, and evaluate the impact of behavior supports for students with disabilities.” Ex. 2, Elliott Decl., p. 2. Among other things, KCS staff regularly determine that students do not need behavior supports, when there is “ample evidence” in the student’s school records, such as a history of suspensions and office referrals, or mental health diagnoses from outside providers, that indicate otherwise. *Id.*, p. 15. When they recognize a student’s need for behavior supports, KCS staff do not use a comprehensive, problem-solving process to determine the root causes of such behavior. *Id.*, pp. 21-22. Instead, staff perform and rely on cursory, poor quality FBAs, “Expedited FBAs,”³³ or psychological evaluations—assessments not based on functional observations of a student’s behavior in the classroom, and which do not help them develop accurate hypotheses for why the student engages in problem behavior, or support the student in behavior more conducive to learning. *Id.*, pp. 25-26.

These failures infect student IEPs, Section 504 plans, and BIPs, which in the majority of the over 300 sets of student records Dr. Elliott reviewed were “inadequate to meet the severity of the student’s behavior problems.” *Id.*, p. 28. There was little evidence in these records that KCS staff and students have access to customary behavior supports for students with disabilities who need them to address the root cause of their challenging behaviors, *id.*, including because KCS lacks sufficient personnel qualified to provide them a “full continuum” of such supports. *Id.*, p.3.

³³ The BOE improperly uses an “Expedited FBA” to avoid standard practice for conducting FBAs in many circumstances. Dr. Porter explained that her staff only performs an “in-depth” or “comprehensive” FBA when the team determines it needs to do so. Ex. 30, Porter Dep. Tr. at 64:8-17. According to Dr. Elliott, KCS’ “use of the ‘Expedited FBA’ is not a standard practice, and treats some students who need behavior supports differently than others.” Ex. 2, Elliott Decl., pp. 31-32.

Dr. Elliott also found little evidence that principals and other school staff adequately monitored whether IEPs, Section 504 plans, and BIPs were appropriately implemented, *id.*, pp. 34-35, or that students with these plans were making appropriate progress. *Id.*, pp. 38-40. Many students had “on-going behavior problems and classroom exclusions over a number of years, yet little evidence existed that the IEP team met regularly to revise the IEP.” *Id.*, p. 19. Unsurprisingly, Dr. Elliott found that staff did not receive “cohesive” training that focused on complex student behaviors and on the development, implementation, and monitoring of the IEPs, BIPs, Section 504 plans, and other supports provided to students with disabilities. *Id.*, pp. 43-45.

Dr. Elliott’s findings are supported by former KCS assistant superintendent Kate Porter’s testimony, which confirmed the BOE’s deficient systemic policies (or lack thereof) and practices that place the class members at significant risk of harm for denials of FAPE in the LRE and disability-based discrimination. For example, Dr. Porter testified that the BOE does not monitor schools’ policies and practices for providing behavior supports to students with disabilities, or how each school administers discipline to these students. Ex. 30, Porter Dep. Tr. 116:7-11. She explained that there are no district-wide standards to guide schools and teachers as to when a student needs behavior supports. *Id.* at 70:25-71:10. Rather, it is left to individual teachers to know whether a student needs a behavior plan on a case-by-case basis, with limited, *ad hoc* guidance from the principal at the school level. *Id.* at 81:19-82:9.

Dr. Porter’s testimony also revealed a lack of systematic policies and practices for developing behavior supports for students with disabilities. When asked what guidelines the BOE relies on to develop a BIP, Dr. Porter testified, “I’m not sure what you mean by ‘guidelines.’” When then asked whether there are “any sort of standards or expectations set across the board for the district that either psychologists, teachers or people are supposed to look to when developing

a BIP,” Dr. Porter responded, “No.” Ex. 30, Porter Dep. Tr. 69:21-71:10. She further admitted that the BOE provides no formal training to staff on how to develop BIPs, *id.* at 105:6-106:11, or implement IEPs that include BIPs. *Id.* at 103:9-104:5; *cf.* Ex. 3, Boyd Decl., p. 52 (concluding that staff at both G.T.’s and K.M.’s school “either did not know who was responsible for teaching critical skills or would not know what methods would be used to teach those skills.”).

Additionally, Dr. Porter confirmed that the BOE does not have district-wide policies and practices for monitoring whether students who receive behavior supports make progress in their educational programs. Ex. 30, Porter Dep. Tr. 217:15-20. The BOE does not systematically track how many of its special education students are meeting IEP goals, or how many students with disabilities are advancing from grade to grade. *Id.* at 102:4-13. As Dr. Elliott noted, “[i]t is highly unusual for a school district not to have a data system that permits it to aggregate and compare its behavior support and discipline data and monitor continually the service and supports it provides to its . . . students with disabilities.” Ex. 2, Elliott Decl, p. 50.

Every member of the Plaintiff Class “suffers exactly the same [statutory] injury” when exposed to the BOE’s district-wide policies or practices that “create [] a substantial risk of serious harm,” *Parsons*, 754 F.3d at 678—here, the denial of FAPE in the LRE and disability-based discrimination. Because of these pervasive systemic issues, the Plaintiff Class continues to be at significant risk of facing disciplinary removals from school. These students are also at significant risk of being denied the educational services to which they are entitled, and facing future disability-based discrimination. *See* Ex. 2, Elliott Decl., p. 54. *See also* Mem. Op. and Order at 13, ECF No. 46 (“The discipline and segregation in turn result in stigmatization and isolation from peers, making integration into general education classrooms more challenging.”); Ex. 11, Declaration of L. Ford, p. 4 at ¶ 16.

Plaintiffs have submitted ample evidence to show the “capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.” *Wal-Mart v. Dukes*, 564 U.S. at 350 (emphasis in original). Plaintiffs’ evidence reveals “specific and overarching systemic deficiencies [that] place children at risk of harm,” including the allegations that “agency-wide monitoring policies and practices, or lack thereof, create a risk of harm shared by the entire class.” *Parsons*, 754 F.3d at 682. If this Court finds a deficiency in these or any other component of the BOE’s systems for educating students with disabilities, such a finding would establish, as Plaintiffs have alleged, that all class members are commonly harmed or at a substantial risk of harm “as a matter of formal policy and systemic practice.” *Id.* at 680. The Court can resolve Plaintiffs’ “yes or no” questions in one fell stroke during merits proceedings, because either each of the policies and practices is unlawful as to every class member, or it is not. As such, Rule 23(a)(2) is satisfied.

D. The Named Plaintiffs’ Claims Are Typical of the Class.

Rule 23’s typicality requirement ensures that the interests of the named representatives aligns with the interests of the class. *See* FED. R. CIV. P. 23(a)(3). “The proposed class satisfies the typicality requirement if the class representatives assert claims that fairly encompass those of the entire class, even if not identical.” *Smith v. Res-Care, Inc.*, No. 3:13–5211, 2015 WL 461529, at *5 (S.D.W. Va. Feb. 3, 2015) (internal citation omitted). The typicality requirement mandates that the Named Plaintiffs show that (1) their interests are squarely aligned with the interests of class members, and (2) their claims arise from the same events and are premised on the same legal theories as the claims of the class members. *See id.*; *see also Fisher v. Va. Elec. & Power Co.*, 217 F.R.D. 201, 212 (E.D. Va. 2003). The test for typicality involves a “comparison of the plaintiffs’ claims or defenses with those of the absent class members.” *Lester v. Pay Car Mininc, Inc.*, No. 5:17-cv-00740, 2018 WL 2728033, at *6 (S.D.W. Va. June 6, 2018).

The threshold to meet the typicality requirement is “not high.” *Brown v. Nucor Corp.*, 576 F.3d 149, 153 (4th Cir. 2009). In addition, “commonality and typicality tend to merge.” *Id.* at 159 (typicality requirement met where class representatives satisfied commonality threshold); *see also Black v. Rhone-Poulenc, Inc.*, 173 F.R.D. 156, 161 (S.D.W. Va. 1996) (same).

Typicality is satisfied here because the individual Named Plaintiffs are both KCS students with disabilities who need behavior supports and have experienced disciplinary removals from any classroom, and they share the same interests as the absent class members. Ex. 3, Boyd Decl., p. 53. Each Named Plaintiff and unnamed member of the Plaintiff Class is subject to the same deficient KCS systems and procedures, and each has been denied the necessary behavioral supports needed to receive FAPE in the LRE. As a result, KCS has failed to meet its obligations under state and federal law, and has engaged in discrimination based on disability against both individual Named Plaintiffs and the members of the Plaintiff Class.

The claims raised by the Named Plaintiffs arise out of KCS’s systemic failures, and are essentially identical to the claims of the absent class. Dr. Sara Boyd, who has evaluated and observed the Named Plaintiffs, found significant similarities in the educational programs of the two Named Plaintiffs. For example, Dr. Boyd found that both students have documented behavior support needs, but in both cases, KCS staff performed FBAs that were not based on “the behavior data needed to develop individualized and effective behavior supports.” Ex. 3, Boyd Decl., pp. 20, 40-41; *cf.* Ex. 2, Elliott Decl., p. 30 (KCS’s FBAs are “generally poorly performed”). The BIPs based on these FBAs “did not contain appropriate individualized interventions that targeted specific student behaviors,” and were not reviewed to assess whether they were working. Ex. 3, Boyd Decl., p. 51; *cf.* Ex. 2, Elliott Decl., p. 41 (KCS’s failure to monitor effectiveness of plans is an “area of significant weakness”). KCS staff did not consult with the children’s parents to learn

what behavior supports worked at home and might work at school. Ex. 3, Boyd Decl., pp. 52-53; *cf.* Ex. 2, Elliott Decl., p. 27 (“limited or no evidence” of parental involvement in identifying behavior supports).

Both students’ BIPs and IEPs lacked clear, measurable goals. For example, “the behavioral goals in G.T.’s IEPs and BIPs are not adequate and reflect a lack of understanding about how to identify and achieve behavioral goals for students like G.T.” Ex. 3, Boyd Decl., p. 22. And, “[b]ehavior goals in a student’s IEP or BIP must be clear, measurable, and realistic in order to be able to assess progress in any meaningful way, but the goals developed for K.M. do not meet these criteria.” *Id.* at 42; *cf.* Ex. 2, Elliott Decl., pp. 33, 37 (where students in the sample reviewed had behavior goals that were inappropriate and “not realistic”).

Dr. Boyd further concluded that both of the Named Plaintiffs’ schools engaged in disciplinary removals for behaviors related to the Named Plaintiffs’ disabilities, which “impeded their acquisition of academic skills, led to their placements in inappropriately restrictive learning environments, and caused both G.T. and K.M. to miss out on educational and social development opportunities. . . .” *Id.* at 51. “Rather than taking a proactive and preventative approach, KCS has responded with discipline to challenges that could be effectively addressed through the provision of behavior supports. KCS places the onus on the students to improve their behavior rather than taking a step back to evaluate what changes staff can make to support them.” *Id.*

The Named Plaintiffs’ interests are squarely aligned with the interests of class members. They have been harmed in similar ways as the absent class members. For example, the BOE suspended G.T. five times in 2018 before ultimately removing him from the general education environment and placing him in a segregated classroom with other students with disabilities. *See* Ex. 3, Boyd Decl., pp. 19-20. Similarly, after subjecting K.M. to at least 20 informal disciplinary

actions and one lengthy suspension, the BOE attempted to remove K.M. from his general education classroom and place him in a segregated classroom for children with behavior disorders—less than a week after beginning to implement a new BIP. *See id.* pp. 35-39; *see also* Ex. 29, Decision, Due Process No. 19-020, p. 44 (finding there was “insufficient time after the May 2019 BIP to assess whether it was assisting [K.M.] to meet his goals”). As demonstrated above, these injuries—specifically, these frequent suspensions and other disciplinary removals—are typical of the class. *See, e.g.*, Ex. 2, Elliott Decl., pp. 8-10 (finding the conclusion that G.T. and K.M. meet class definition “reasonable and credible,” and noting that KCS elementary school students with IEPs are twice as likely to be suspended as other KCS students).

Because Named Plaintiffs have been and continue to be injured by the same BOE policies and procedures that they allege also harm the Plaintiff Class, and, like the Plaintiff Class, remain at significant risk of further harm, they have established that their claims are typical of the class.

E. The Named Plaintiffs And Their Counsel Will Fairly And Adequately Protect The Interests Of The Class.

1. Proposed Class Representatives Are Adequate.

The adequacy-of-representation requirement of Rule 23 is met if “the representative parties will fairly and adequately protect the interests of the class.” FED. R. CIV. P. 23(a)(4). When assessing this, “the Court must consider the abilities of both the attorneys who represent the class representatives, and the class representatives themselves.” *Black*, 173 F.R.D. at 162. The factors “predominantly recognized as the basic guidelines for the Rule 23(a)(4) prerequisite . . . are (1) absence of conflict and (2) assurance of vigorous prosecution.” *Id.*

For a conflict to defeat adequacy, that conflict “must be fundamental.” *Ward v. Dixie Nat'l Life Ins. Co.*, 595 F.3d 164, 180 (4th Cir. 2010). A conflict is not fundamental when all class members “share common objectives and the same factual and legal positions [and] have the same

interest in establishing the liability of [defendants].” *Id.* Similarly, a conflict that is “merely speculative or hypothetical” will not defeat adequacy. *Id.*

The Named Plaintiffs are adequate class representatives. First, there is no conflict—fundamental or otherwise—between the Named Plaintiffs’ interests and those of other class members. *See Ward*, 595 F.3d at 180 (claims posed no potential for conflicting interests); *see also Good v. Am. Water Works Co., Inc.*, 310 F.R.D. 274, 295 (S.D. W. Va. 2015) (same); Ex. 5, Declaration of Danielle M. (“D.M. Decl.”), at ¶ 4; Ex. 4, Declaration of Michelle T. (“M.T. Decl.”), at ¶ 4. As established above, the Named Plaintiffs suffered similar harms as those experienced by the unnamed class members; the BOE’s systemic failures to ensure that KCS students receive FAPE in the LRE, free from discrimination, affect the Named Plaintiffs in the same way as the unnamed class members. *See* Ex. 5, D.M. Decl., at ¶ 12; Ex. 4, M.T. Decl., at ¶ 10. Thus, the Named Plaintiffs and the Plaintiff Class “share common objectives and the same factual and legal positions.” *Ward*, 595 F.2d at 180.

Moreover, the Named Plaintiffs will vigorously prosecute this matter. Through their parents, both Named Plaintiffs participate actively in this litigation. *See* Ex. 5, D.M. Decl., at ¶ 3; Ex. 4, M.T. Decl., at ¶ 3. Because they still do not receive needed behavior supports, G.T. and K.M. remain at serious risk of being denied FAPE in the LRE, and of suffering from disability-based discrimination. *See* Ex. 3, Boyd Decl., p. 53; *cf. Lester*, 2018 WL 2728033, at *7 (class representative adequately represents proposed class where his claim would stand or fall on the same issue as the rest of the class). Rule 23(a)(4) has been met here.³⁴

³⁴ Indeed, Courts have found Rule 23(a)(4) satisfied where class representatives had less knowledge and involvement than the Named Plaintiffs here. *See Black*, 173 F.R.D. at 162 (certifying class where representative plaintiffs “demonstrated less than a complete understanding of their responsibilities and of the technical legal issues”).

2. Plaintiffs' Counsel Meet The Requirements Of Rule 23(g) And Should Be Appointed Class Counsel.

Counsel for the Named Plaintiffs request to be appointed counsel for the Plaintiff Class, pursuant to Rule 23(g). In appointing class counsel, the Court should consider: “(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel’s experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel’s knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class.” FED. R. CIV. P. 23(g)(1)(A). Each factor establishes that appointment of Named Plaintiffs’ counsel as class counsel is warranted. In assessing the competence of class counsel, “[t]he analysis begins with the rule that counsel’s competence and experience are presumed in the absence of contrary proof.” *Black*, 173 F.R.D at 162.

The Named Plaintiffs are represented by:

a. Lydia C. Milnes and Blaire Malkin of the law firm of Mountain State Justice, Inc., a nonprofit, public-interest legal services firm with an institutional mission to advocate for the interests of vulnerable West Virginians, regardless of their ability to pay. The organization has a long history of and substantial expertise in class litigation on behalf of low-income West Virginians.

b. Lori Waller of Disability Rights West Virginia, the designated protection and advocacy agency for the state of West Virginia pursuant to the Developmental Disabilities Assistance and Bill of Rights Act. The organization has extensive experience and expertise representing individuals with disabilities to cause substantial, systemic changes that improve access and services for West Virginians with disabilities.

c. Ira A. Burnim and Lewis Bossing of Judge David L. Bazelon Center for Mental Health Law, a leader in the field of mental disability law since its founding in 1972. The Center has played a major role in litigating complex cases seeking to reform public services for children and adults with mental disabilities, including *Mills v. D.C.*, 348 F. Supp. 866 (D.D.C. 1972), which established a constitutional right to education for children with disabilities and was a precedent for the IDEA, and *Olmstead v. L.C.*, 527 U.S. 581 (1999), in which the Supreme Court held that unnecessary segregation is discrimination prohibited by the ADA.

d. Shira Wakschlag of The Arc of the United States, the largest national community-based organization advocating for and with people with

intellectual and developmental disabilities. The organization engages in complex federal court litigation nationwide to support the rights of individuals with intellectual and developmental disabilities in all aspects of life.

e. Robin Hulshizer, Kirstin Scheffler Do, Karen Klass, Jaime Zucker, and Renatta Gorski of Latham & Watkins LLP, a global law firm, with substantial experience in federal court litigation and skill in the vigorous prosecution and management of class action litigation.

The Named Plaintiffs' counsel have done significant work to identify and investigate the relevant claims, including participating in interviews of parents, bringing due process proceedings, engaging expert witnesses, conducting depositions, and analyzing discovery. *See* Ex. 33, Decl. of Lydia C. Milnes at ¶ 7; Ex. 34, Decl. of Lori Waller at ¶ 6; Ex. 35, Decl. of Ira A. Burnim at ¶ 16; Ex. 36, Decl. of Shira Wakschlag at ¶ 14; Ex. 37, Decl. of Robin Hulshizer at ¶ 5. Furthermore, Named Plaintiffs' counsel has a wide breadth of experience in class action litigation, in addition to subject-matter knowledge and expertise litigating on behalf of students with disabilities under the IDEA, ADA, and Section 504. *See generally id.* Named Plaintiffs' counsel has committed substantial staff and resources to this matter and will continue to commit the resources needed to zealously pursue relief on behalf of the class.

Counsel have demonstrated they are “qualified, experienced and generally able to conduct the litigation.” *In re Serzone*, 231 F.R.D. 221 at 238 (S.D. W. Va. 2005). For the reasons above, the Named Plaintiffs' counsel satisfies the Rule 23(g) criteria for appointment as class counsel.

F. Injunctive And Declaratory Relief Are Appropriate Because The BOE Has Acted Or Refused To Act On Grounds Generally Applicable To The Plaintiff Class.

Named Plaintiffs seek to certify this proposed class under Rule 23(b)(2), which applies when the defendant “has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” FED. R. CIV. P. 23(b)(2). Compliance with this rule “generally” signifies “that the party

opposing the class does not have to act directly against each member of the class . . . [t]he key is whether the party's actions would affect all persons similarly situated so that those acts apply generally to the whole class." *Harris v. Rainey*, 299 F.R.D 486, 494 (W.D. Va. 2014) (granting Rule 23(b)(2) certification for a class challenging Virginia's refusal to allow same-sex marriages on the basis that state authorities' grounds for the action or inaction applied to the putative class as a whole); *see also* FED. R. CIV. P. 23(b)(2) advisory committee's note to 1966 amendment ("Action or inaction is directed to a class within the meaning of [Rule 23(b)(2)] even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.").

In this case, the Plaintiff Class is certifiable under Rule 23(b)(2) because Named Plaintiffs have alleged systemic, civil rights violations in the context of education for children with disabilities. *See, e.g., D.L.*, 860 F.3d at 433 (certifying class action where plaintiffs alleged systemic failure of defendant to provide special education services to them in violation of IDEA and the ADA and finding "Rule 23(b)(2) class action . . . was designed for exactly this sort of suit"); *J.N.*, 2021 WL 408093, at *15 (certifying class action where plaintiffs alleged harm from defendant's statewide policies which exposed the class members to significant risk of denial of FAPE in the LRE and disability-based discrimination); *A.R. v. Conn. State Bd. of Educ.*, No. 3:16-cv-01197 (CSH), 2020 WL 2092650, at *9 (D. Conn. May 1, 2020) (certifying class action challenging enforcement of age limit for special education in violation of IDEA and observing "[i]ndeed, these claims are exactly the types of claims for which Rule 23(b)(2) certification was designed.").

Named Plaintiffs seek declaratory and injunctive relief from district-wide policies and practices that place class members at a substantial risk of harm. *See* Mem. Op. and Order at 13,

ECF No. 46 (“These allegations are structural in nature, and the experiences of K.M. and G.T. demonstrate the inadequacy of the relief available through due process complaints. Absent procedures to appropriately address disability-related behavioral problems at every stage—from identifying students who require behavioral support, to analyzing the behavioral triggers and crafting a BIP, to implementing the BIP—tinkering with individual students’ IEPs or BIPs will not provide effective relief. The Plaintiffs seek structural relief in the form of declaratory judgment, injunctive relief, and appointment of an independent monitor.”). The BOE has acted on grounds generally applicable to the Plaintiff Class as a whole; its systemic deficiencies in failing to ensure FAPE in the LRE without discrimination have subjected Named Plaintiffs and the Plaintiff Class to past and current harms, and place them at a substantial risk of future harm.

If this Court finds that, due to its actions and failures to act, the BOE has violated its legal duty, it can order the BOE to remedy its systemic deficiencies through declaratory and injunctive relief. For instance, this Court may require the BOE to engage outside assistance to help develop and monitor policies, practices, and procedures for the provision of behavior supports to students who need them to receive FAPE and avoid discrimination, including systems for collecting student data and providing training and professional development to staff. *See* Ex. 2, Elliott Report, pp. 53-54 and *passim* (suggesting systemic improvements); Ex. 3, Boyd Report, pp. 51-53 (same).

Thus, certification of the Plaintiff Class is appropriate under Rule 23(b)(2).

V. CONCLUSION

As set forth herein, Plaintiffs respectfully request that this Court certify this case as a class action pursuant to FED. R. CIV. P. 23(a) and 23(b)(2), and appoint the undersigned as class counsel pursuant to FED. R. CIV. P. 23(g).

Respectfully submitted,

**Plaintiffs G.T. and K.M., on behalf of themselves
and all other similarly situated individuals, and
The Arc Of West Virginia,**

By Counsel.

/s/ Lydia C. Milnes

Lydia C. Milnes (WVSB No. 10598)
Blair L. Malkin (WVSB No. 10671)
Mountain State Justice, Inc.
1217 Quarrier Street
Charleston, West Virginia 25301
Telephone: (304) 344-3144

Lori Waller (WVSB No. 11303)
Disability Rights West Virginia
1207 Quarrier Street, Suite 400
Charleston, West Virginia 25301-1845

Robin Hulshizer (IL Bar No. 6230994)
Kirstin Scheffler Do (IL Bar No. 6315311)
Karen Klass (IL Bar No. 6327168)
Jaime Zucker (IL Bar No. 6333596)
Renatta Gorski (IL Bar No. 6332737)
Latham & Watkins LLP
330 North Wabash Avenue, Suite 2800
Chicago, Illinois 60611
Telephone: (312) 876-7700

Ira A. Burnim (DC Bar No. 406154)
Lewis Bossing (DC Bar No. 984609)
Judge David L. Bazelon Center for Mental Health Law
1090 Vermont Avenue NW, Suite 220
Washington, D.C. 20005

Shira Wakschlag (DC Bar No. 1025737)
The Arc of the United States
1825 K Street NW, Suite 1200
Washington, D.C. 20006

Counsel for Plaintiff