IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

Charleston Division

G.T., *by his parents Michelle and Jamie T. on behalf of themselves and all similarly situated individuals*, et al.,

Plaintiffs,

v.

CIV. ACT. NO. 2:20-CV-00057
JUDGE BERGER

THE BOARD OF EDUCATION OF
THE COUNTY OF KANAWHA,

Defendant.

PLAINTIFFS' RESPONSE TO DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

The Kanawha County Schools' Board of Education ("Defendant") fails to provide students with disabilities necessary behavioral supports—specifically, therapies to build social skills and self-regulation—so they can make appropriate academic progress. Defendant's failure to provide these therapies to students with disabilities is a well-defined practice that limits their educational opportunities and violates their rights under the Individuals with Disabilities Education Act ("IDEA"), Section 504 of the Rehabilitation Act ("Section 504"), the Americans with Disabilities Act ("ADA"), and the West Virginia Human Rights Act.[1] This ongoing violation has been and remains the crux of this case. *See* ECF No. 22, Plaintiffs' First Amended Complaint ("Compl."); *see also* ECF No. 46, Order Denying Mot. Dismiss ("Order Denying MTD"), at 6 (Plaintiffs allege consistent failure to provide needed behavior supports).

In its Motion for Summary Judgment, Defendant repeatedly argues that the Kanawha County Schools ("KCS" or the "District") has made improvements, in the form of new written procedures and forms. They have also hired additional special education staff. Yet, Plaintiffs have compelling evidence that KCS is still failing to provide students with disabilities needed therapies to build social skills and self-regulation to enable them to make appropriate academic progress. All of the KCS students in the proposed class have been identified by KCS as having behaviors that interfere with their learning. All have been identified as needing behavior supports. Yet, they do not receive needed therapies to build social skills and self-regulation. Accordingly, they continue to engage in problematic behaviors and are failing to make appropriate academic progress. This is reflected in West Virginia Department of Education ("WVDE") and KCS

[1] The requirements of the ADA and Section 504 are the same in this context, as recognized by courts. *See Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 498 (4th Cir. 2005). The West Virginia Human Rights Act is interpreted consistently with the ADA, as well. Accordingly, the discussion of the ADA in this response brief also applies to Plaintiffs' Section 504 and West Virginia Human Rights Act claims.

documents, student records, KCS deposition testimony, and the findings of Plaintiffs' experts. KCS' motion ignores this record evidence and the accordant material disputes of fact and relies on flawed interpretations of the applicable law.

First, Defendant misstates applicable law, failing even to reference a controlling Supreme Court decision describing the obligations imposed on school districts by the IDEA. In *Endrew F. ex. rel. Joseph F. v. Douglas Cnty. Sch. Dist.RE-1*, the Supreme Court held that school districts' services for students with disabilities must be reasonably calculated to enable them to make appropriate progress, including to meet challenging objectives.[2] 580 U.S. 386, 402-03 (2017). Defendant also ignores Plaintiffs' equal opportunity claim under the ADA, which requires school districts to provide students with disabilities an equal opportunity to learn and benefit from the districts' programs and services.[3] *See Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 758 (2017).

Second, Defendant mistakenly argues that, as a local education agency, it need only meet the standards set out in the State's special education policies. But even if KCS were fully compliant with the State's policies—which it is not—KCS has independent obligations under the IDEA, the contours of which are described in *Endrew F.* It also must comply with the ADA. *See* 42 U.S.C. § 12132; *Fry*, 137 S. Ct. at 758.

Third, Defendant argues that the Plaintiffs must exhaust their claims once again. Under Fourth Circuit law, however, re-exhaustion is unnecessary when the underlying complaint remains the same. This Court previously found that G.T. and K.M. properly exhausted both individual and systemic claims under IDEA, ADA, and Section 504, *see* Order Denying MTD at 12-14, and

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[2] *Endrew F.* sets forth the substantive standard for providing a free and appropriate public education ("FAPE") under the IDEA. *Endrew F.*, 580 U.S. at 399.

[3] The Supreme Court recently affirmed that "ADA and Rehabilitation Act claims based on educational services should be subject to the same standards that apply in other disability discrimination contexts." *A. J. T. by & through A. T. v. Osseo Area Sch., Indep. Sch. Dist. No. 279*, 605 U.S. 335, 345 (2025).

Plaintiffs' underlying complaint has not changed. While Plaintiffs' renewed Motion for Class Certification is narrower and more focused than Plaintiffs' previous motion, Plaintiffs' underlying complaint remains KCS' failure to provide needed behavioral supports, a claim exhausted at G.T.'s and K.M.'s respective due process hearings. *Compare* Order Denying MTD at 2, 6 (2020), *with* ECF No. 224, Pls. Memo in Supp. Class Cert. ("Class Cert. Mot."), at 7 (2025).

Fourth, Defendant asserts that it is entitled to summary judgment pursuant to "equitable legal standards," namely mootness and prohibitions on "obey-the-law" injunctions. But KCS' mootness argument rests on the flawed assertion that KCS has remedied its failure to provide the class the therapies Plaintiffs are entitled to under the law. As shown below, the record is replete with evidence showing that KCS fails to provide the therapies necessary to enable the class to make appropriate educational progress and to afford them an equal opportunity to learn. Accordingly, Plaintiffs' claims are not moot. In addition, Plaintiffs have not asked for an injunction limited to "obey the law," and there are no equitable standards preventing the Court from entering an injunction to remedy the ongoing systemic violations in this case.

Last, KCS argues that summary judgment is warranted if the Court denies Plaintiffs' renewed Motion for Class Certification. In so arguing, KCS relies on a case in which class certification was not sought and relief was issued for nonparties. But here, Plaintiffs have sought class certification and shown that class certification is warranted. *See generally*, Class Cert. Mot.; ECF No. 260, Pls. Rep. In Supp. Mot. for Class Cert. Additionally, there is an organizational plaintiff, The Arc of West Virginia, with members who have standing that can seek systemic relief here. Order Denying MTD at 14-16 (noting that The Arc has standing to seek systemic relief in this case). Moreover, even if the class is not certified, the claims of the individual plaintiffs remain,

and Defendant's arguments that such individual claims have been waived is without merit.[4] For all of these reasons, summary judgment on any grounds is inappropriate.

II. FACTS SUPPORTING PLAINTIFFS' CLAIMS AND RAISING MATERIAL ISSUES OF FACT

Defendant's Motion for Summary Judgment insists that it "cured" any legal violations that may have existed. *See* ECF No. 301, Def. Mem. in Supp. Mot. for Summ. J. ("Def. Mem."), at 3-6. This argument is at odds with the record. Evidence shows that KCS students ***still*** do not receive needed behavior supports and thus fail to make appropriate academic progress. The material factual dispute concerning whether KCS has a consistent practice of failing to provide the class with needed therapies to build social skills and self-regulation makes summary judgment wholly inappropriate here.

Defendant touts changes it has made on paper. But KCS' evidence of on-the-ground changes in its provision of services to the class is weak. Deposition testimony, KCS internal documents, student records, Plaintiffs' experts, and findings from the WVDE underscore KCS' failure to make such on-the-ground changes. As a result, failures identified in 2020 and 2021 persist today, and changes that Defendant has made on paper have not remedied the District's ongoing failures to provide students with therapies to build social skills and self-regulation, which they need to make appropriate educational progress and have an opportunity to learn that is equal to their peers.

Tellingly, KCS' special education leadership testified that, although there have been changes in guidelines and forms since 2021, they have not seen changes in the *types or amoun*t of behavior supports being provided, ECF No. 252-6, Deposition Transcript of Holly Samples (Apr.

[4] Compl. ¶¶ 30, 37 (G.T. and K.M. appealing the Hearing Officer's denials of individual relief); Order Denying MTD at 3 (noting that G.T. and K.M. were denied individual relief by the Hearing Officer)

2025) ("Samples Dep.") at 62:9-23, or in how behavior supports are being implemented compared to four years ago, ECF No. 252-7, Deposition Transcript of Vicky Brown ("Brown Dep.") at 20:13-16. Indeed, a review of student files clearly shows this this lack of change and that, in practice, KCS still does not provide the therapies needed to build social skills and self-regulation.

Plaintiffs' expert Dr. Judy Elliott, an expert in the field of educational psychology and the education of students with disabilities,[5] previously reviewed a random sample of 332 files of KCS students with disabilities who received two or more suspensions between January 2016 and January 2018. *See* ECF No. 120-3 ("Dr. Elliott 2021 Rep." or "2021 Rep."). Recently, Dr. Elliott reviewed updated files from 52 of the students in the original random sample, as well as an additional random sample of 26 files of students with disabilities enrolled in KCS in the 2024-2025 school year identified by KCS as having behavior needs. According to KCS, the files included the students' Individualized Education Programs ("IEPs"), Behavior Intervention Plans ("BIPs"), Behavior Support Plans ("BSPs"), Functional Behavior Analysis ("FBAs"), Manifestation Determinations ("MDRs"), and discipline records contained in KCS' centralized electronic database ("MFiles") covering the most recent four school years (2021-2022, 2022-2023, 2023-2024, and 2024-2025). Dr. Elliott also reviewed additional IEPs, BIPs, BSPs, FBAs, MDRs, and discipline records outside of MFiles for 43 of these students from the 2023-2024 and 2024-

[5] Dr. Elliott has a Ph.D. in Educational Psychology and has authored dozens of articles, books, book chapter, and reports on special education. She is an education consultant to both large and small school districts across the country from South Carolina to California, working with Superintendents, school boards, school district administration, and program staff to support student social and emotional well-being and improve school systems so that all students receive an equitable education in the most-integrated setting. She was the Chief Academic Officer for the Los Angeles Unified School District, including overseeing curriculum, instruction, and intensive intervention programs in academics and behavior for students with disabilities. She has also served as the Chief of Teaching and Learning in the Portland (OR) public schools, as Assistant Superintendent of Student Support Services in a large public school district, and as a special education teacher for students with emotional and behavioral disabilities. Her credentials are set forth in her 2021 and 2025 reports in this case. *See* Dr. Elliott 2021 Rep. at 6, 61-78; ECF No. 260-3 ("Dr. Elliott 2025 Rep.") at 3, 16-29.

2025 school years. These records revealed that KCS does not provide needed therapies to build social skills and self-regulation for students in the class. Ex. 1, Dr. Elliott Suppl. Decl. ¶ 9.

After reviewing these 78 recent files, Dr. Elliott concluded that "the students in the class continue to not receive needed therapies to build social skills and self-regulation, which was also shown by the student files [she] reviewed back in 2020-2021." *Id.* She explained: "Because they are not receiving such therapies, they are not making educational progress that is commensurate with their abilities or being given the opportunity to meet challenging objectives." *Id.* Specifically, Dr. Elliott found that virtually none of the students' IEPs contained goals that addressed social skills or self-regulation. *Id.* at ¶ 10. No student received counseling or other related services to improve social skills or self-regulation. *Id.* at ¶ 23. While a few students got a group "social skills" lesson for special education students, those classes typically do not , provide the type of social skills training that students in the class need. *Id.* at ¶¶ 18-20.

Dr. Elliott's findings are consistent with data and reporting from the WVDE and KCS itself. Following onsite visits, staff interviews, and a review of student files, a May 2025 WVDE report found that it was "crucial" for teachers to understand and use "positive behavior interventions" that teach new skills but found widespread failure by KCS in doing so. *See* Ex. 2, WVDE Compliance Monitoring Report, KCBOE70479 at -486, -490. In addition, despite the changes Defendant touts, the May 2025 report found ongoing problems with FBAs, BIPs, and KCS' continuum of behavior services. *Id.* at -486-87, -490-92. KCS' own data confirms the WVDE finding that the school district fails to provide needed behavior supports. According to KCS, of the 345 students KCS identified as needing behavior supports in the 2024-2025 school

year,[6] at least 124 of those students had no behavior plan (no BIP or BSP) at all.[7] *See* ECF 223-1, KCBOE070410-426. And, troublingly, academic proficiency rates of students with disabilities in the District remain extremely low, ECF 274-1, KCBOE 071044 at -046, while suspension rates for students with disabilities remain too high, reflecting a lack of needed behavior services. *See* Class Cert. Mot., at 12-13; ECF No. 260-3 ("Dr. Elliott 2025 Rep.") at 7, 9. In short, the situation for students with disabilities at KCS remains dire, despite Defendant's representations.

Plaintiff G.T.'s experience is illustrative of KCS' failings. G.T. has Autism Spectrum Disorder. *See* ECF No. 260-4, Supplemental Report of Sara Boyd, PhD ("Dr. Boyd. Suppl. Rep.") at 3. Despite his involvement in the instant litigation, KCS has failed to provide him the interventions he needs to build his social skills and self-regulation. *Id*. G.T.'s teachers continue to handle his challenging behaviors with classroom removals and calls to his parents, rather than providing him with therapies to build social skills and self-regulation. ECF No. 260-6, Deposition Transcript of Alexa Beane ("Beane Dep.") at 72:16-72:22; Dr. Boyd Suppl. Rep. at 3, 13. As with other students in the proposed class, the District has noted his social skills and self-regulation deficits, but has treated them as his fault and a disciplinary issue, rather than providing needed services to address these skill deficits. Dr. Boyd Suppl. Rep. at 16-17; *see also* Dr. Elliott 2021 Rep. at 39; Dr. Elliott Suppl. Rep. at 9. There is substantial evidence showing that the District is failing to provide the therapies to build social skills and self-regulation that students need. KCS has not changed its practice in this regard. By doing so, and as shown below, KCS is impeding

[6] The 345 number likely understates the number of students with disabilities identified by KCS as needing behavior supports. That number includes only students with IEPs, not 504 Plans. *See* Brown Dep. 58:13-15. Yet, Plaintiffs previously identified 240 students with disabilities whose need for behavior supports was identified in a Section 504 plan. "Section 504 Student Spreadsheet," ECF No. 120-13.

[7] At least 124 students are listed as not having a BIP/BSP in Mfiles, KCS' record storage system. *See* ECF 223-1, KCBOE070410-26. An additional 22 students are listed as having a BIP or BSP that was not updated for the 2024-2025 school year. *Id.*

students from making appropriate educational progress and enjoying equal educational opportunity. Moreover, KCS' weak evidence to the contrary at best raises factual disputes for trial. Accordingly, the Defendant's motion for summary judgment should be denied.

III. STANDARD OF REVIEW

Summary judgment is appropriate only when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (citation omitted). At summary judgment, "a district court is required to view the evidence in light most favorable to the nonmovant" and "to draw all reasonable inferences in his favor." *Harris v. Pittman*, 927 F.3d 266, 272 (4th Cir. 2019). Viewing the evidence through that lens, if "a rational trier of fact could reasonably find for the nonmoving party," summary judgment must be denied. *GMC Real Estate, LLC v. AmGUARD Ins. Co.*, 683 F. Supp. 3d 541, 545 (S.D. W. Va. 2023).

IV. ARGUMENT

A. KCS' Violations of the IDEA and the ADA Are Ongoing

Despite changes that the District claims it has undertaken since 2021, KCS is not providing students in the proposed class with the services they need to make appropriate educational progress or to receive equal educational opportunity.

1. KCS has substantive legal obligations under the IDEA and ADA

As the Supreme Court has made clear, the IDEA requires school districts to provide special education—that is, specialized instruction and related services—that is appropriately ambitious and reasonably calculated to enable a child to make appropriate progress in school. *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 403 (2017); *see also Johnson v. Charlotte-Mecklenburg Sch. Bd. of Educ.*, 20 F.4th 835, 839 n.2 (4th Cir. 2021) (local school district "is charged with fulfilling the State's obligations under the IDEA for students in [its]

jurisdiction," including the provision of a FAPE); *G ex rel. RG v. Fort Bragg Dependent Sch.*, 343 F.3d 295, 306 (4th Cir. 2003) (holding that "the federal standard embodied in the IDEA," rather than the State's standard governed whether a student was provided a FAPE); *R.S. v. Morgan Cnty. Bd. of Educ.*, No. 3:18-CV-80, 2019 WL 2518136, at *9 (N.D. W. Va. June 18, 2019) (applying *Endrew F.* standard, not WV Policy 2419, in determining whether FAPE was provided). In doing so, the Supreme Court explained that "this standard is markedly more demanding than" the test previously applied by courts in IDEA cases. *Id.*at 402.

As another Supreme Court case explains, school districts and schools must comply with the ADA as well as the IDEA. *See Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 758 (2017). Equal opportunity is a core element of the ADA, and that statute requires that schools and school districts provide students equal educational opportunity: that is, an opportunity to benefit from school programs and services that is commensurate with their peers without disabilities. 42 U.S.C. § 12132; 28 C.F.R. § 35.130(b)(1)(ii)-(iii) (requiring schools and schools districts to afford students with disabilities equal opportunity to participate in or benefit from school, and an equal opportunity "to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others").[8] While we focus here on Plaintiffs' IDEA claim—the focus of Defendant's motion—it bears noting that the same evidence that shows ongoing violations of the IDEA also shows that Defendant is violating the ADA by failing to provide students with disabilities the services (accommodations) they need to enjoy equal educational opportunity. Notably, Defendant does not seek summary judgment on the basis that it is complying with—or

[8] *See also* 42 U.S.C. §. 12101(a)(7)-(8) ("assure equality of opportunity" for people with disabilities and "the opportunity to compete on an equal basis"); 28 C.F.R. § 35.130(b)(7) (requiring reasonable modifications when necessary to avoid discrimination).

even assert that it is complying with—the ADA.[9] KCS is wrong in asserting that guidelines and forms are sufficient to comply with its legal obligations. Both the IDEA and the ADA require more than "paper" compliance. They require *actual* compliance. Indeed, the *Endrew F.* Court squarely rejected the notion that the IDEA "impose[s] only procedural requirements—a checklist of items the IEP must address—not a substantive standard enforceable in court." 580 U.S. at 401-402. As the Court observed, IDEA's "procedures are there for a reason," to facilitate the school district and school providing the special education services, including specialized instruction and related services, that the student needs to make appropriate educational progress. *Id.* at 402. These procedures do not supplant the "substantive" requirements of the IDEA with which KCS must comply, and which include actually providing the services students need to advance and make progress in the educational program. *Id.* at 390-91.

2. KCS fails to comply with its substantive legal obligations

On this record, KCS cannot demonstrate that there is no genuine dispute of material fact as to whether it is meeting its legal obligations. To the contrary, the evidence shows that KCS is not meeting the substantive standards the IDEA requires. Despite having updated policies and forms, KCS has not made changes in the provision of behavior supports, including therapies to build social skills and self-regulation. The District's own administrators testified in 2025 that they have not seen changes in the *types or amoun*t of behavior supports provided, Samples Dep. 62:9-23, or in how they are being implemented compared to four years ago, Brown Dep. 20:13-16.

This evidence is consistent with the findings of recent reviews by Plaintiffs' expert witness, Dr. Judy Elliott. Dr. Elliott reviewed documents relating to KCS' current practices. She reviewed

[9] Nor does Defendant's Motion address Plaintiffs' claim under the West Virginia Human Rights Act in its Motion, which has similar requirements to the ADA and Section 504. *See Hosaflook v. Consolidation Coal Co.*, 201 W. Va. 325, 497 S.E.2d 174, 181 n.10 (1997).

updated special education forms and procedures, all documents and data relied on by Defendant's experts Drs. Haines and Rodet, and additional documents listed in her 2025 Rebuttal and Supplemental Report. Dr. Elliott 2025 Rep. at 1; Ex. 1, Dr. Elliott Suppl. Decl. ¶¶ 6-8. Two categories of evidence alone—student files and WVDE findings—illustrate the shortcomings in KCS' provision of behavior supports, including therapies to build social skills and self-regulation, that preclude summary judgment here.

Student Files. Since writing her report, Dr. Elliott also updated her review of student files. She reviewed updated files from 52 of the students included in her prior review of a random sample of 332 KCS students with disabilities who received two or more suspensions between January 2016 and January 2018, as well as 26 additional randomly selected files of students with disabilities who have behavior needs. *See supra* at 5-6; Ex. 1, Dr. Elliott Suppl. Decl. ¶ 8.

Her analysis revealed that KCS does not provide appropriate therapies to build social skills and self-regulation for students in the class. *See* Dr. Elliott 2025 Rep. at 6-10; Dr. Elliott 2021 Rep. at 34, 38-42 ; Ex. 1, Dr. Elliott Suppl. Decl. ¶ 9. Such therapies, she explained, should be incorporated into both "specialized instruction" and the "related services" that make up "special education" under the IDEA. *Id.* ¶¶ 11, 22. Dr. Elliott concludes that KCS is not "providing these supports to its students with disabilities." Dr. Elliott 2021 Rep. at 40; Dr. Elliott 2025 Rep. at 3-4.

In reviewing the 78 files from the past four school years, Dr. Elliott did not find a single example of a student who received counseling or had other related services identified to strengthen social skills or self-regulation.[10] While a few students participated in a group "social skills" lesson,

[10] Even when a student's IEP indicated that "lack of social skills and frequent inappropriate behavior impedes his ability," the student's IEP did not include any therapies to support the development of social skills or self-regulation. *See* Ex. 1, Dr. Elliott Suppl. Decl. ¶ 17; *see also* Ex 3, IEPs from March 2024 and March 2025 (KCBOE 082540-082578). Aside from generalized group social skills lessons listed in some IEPs, approximately 9 of 78 files had any

the lesson was not designed to and did not include the type of social skills instruction that students with serious behavior issues need.[11] Of the 78 recent files reviewed, almost none included IEP goals to address social skills and self-regulation. Ex. 1, Dr. Elliott Suppl. Decl. ¶ 10. In a recent deposition of KCS, the Director of Special Education, Megan McCorkle, testified that the way that teachers and staff know what social skills to teach and how to teach them is based on the stated IEP goals. ECF No. 300-2, Deposition Transcript of Megan McCorkle 108:9-110:17. Absent clear goals about social skills or self-regulation, staff do not know what or how to teach the student these critical skills.[12] Ex. 1, Dr. Elliott Suppl. Decl. ¶ 10.

A review of behavior plans further evidences the problems. Of the 345 students KCS identified as needing behavior supports in the 2024-2025 school year,[13] at least 124 students appear to not have any behavior plan at all, neither a BIP nor BSP.[14] *See* ECF No. 223-1, KCBOE070410-070426. As Dr. Elliott explained, without a behavior plan, "students do not receive appropriate

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form of behavior or social-emotional supports listed in the IEP, and those were vague and nondescript, such as 15 minutes per month of "behavior support," or 90 minutes per month of "Autism social skills," without any explanation or correlated goal in the IEP. *See* Ex. 1, Dr. Elliott Suppl. Decl. at ¶ 18 & n.2.

[11] She explained that "these types of social skills classes typically meet the needs of students with only the mildest behavior issues." Ex. 1, Dr. Elliott Suppl. Decl. ¶ 18. Moreover, none of the students in the sample, including the students with "social skills" listed on their IEP, had a directly related goal for social skills or self-regulation. *Id.*

[12] For example, one student's IEPs from March 2024 and March 2025 illustrate the deficiencies and gaps in data collection and IEP goals, as well as the absence of related services or other therapies to build social skills and self-regulation, found in the majority of the updated student files produced by KCS. Ex 3, IEPs from March 2024 and March 2025 (KCBOE 082540-082578). Notably, despite the IEP identifying "social skills" and "frequent inappropriate behavior" as "imped[ing]" the student's "ability to participate successfully in a general education environment" and noting the need for a behavior plan, there was no behavior plan of any kind in the student's file from the past four years.

[13] The 345 number likely understates the number of students with disabilities identified by KCS as needing behavior supports. That number includes only students with IEPs, not 504 Plans. Brown Dep. 58:13-15. Yet, Plaintiffs previously identified 240 students with disabilities whose need for behavior supports was identified in a Section 504 plan. *See* "Section 504 Student Spreadsheet," ECF No. 120-13.

[14] At least 124 students are listed as not having a BIP/BSP in Mfiles, KCS' record storage system. *See* KCBOE 070410–70426, ECF No. 223-1. An additional 22 students are listed as having a BIP or BSP that was not updated for the 2024-2025 school year. *Id.* (That data is marked in red in the BIP/BSP column of the spreadsheet).

therapies to build social skills and self-regulation." Dr. Elliott 2025 Rep. at 11. For those students with a behavior plan (BIP or BSP) in the files reviewed, Dr. Elliott found that the BIPs and FBAs have not improved since her prior review of student files. Ex. 1, Dr. Elliott Suppl. Decl. ¶ 6. And BIPs continue to focus on stopping behavior rather than teaching students skills they need to change their behavior.[15] *Id.* ¶¶ 6, 12. This punitive approach to challenging student behavior was discussed in Dr. Elliott's 2025 Report and was further confirmed by the updated student files. Dr. Elliott 2025 Rep. at 9. Dr. Elliott found that "the 78 files show[] that the students in the class continue to be suspended, often repeatedly and for the same or a similar offense," and that "[n]o additional behavior support was provided to these students" and as a result of these repeated exclusions from the classroom, their "grades plummeted." Ex. 1, Dr. Elliott Suppl. Decl. ¶ 13.

It is not even clear that the school staff are aware of or use the new documents Defendant has described regarding the provision of behavior supports. *See, e.g.*, Ex. 5, Deposition Transcript of Kiley Reed ("Reed Dep.") at 37:3-9; 61:15-63:5 (admitting to never having seen the Behavior Documentation Log form and not knowing whether the Behavior Support Continuum is used); Beane Dep. at 32:1-3 (admitting to being unaware of "a KCS-wide or districtwide process that guides the provision of behavior supports"); ECF No. 300-3, Deposition Transcript of Larry Bailey ("Bailey Dep.") at 33:8-12 (admitting to being unaware "of any specific policy changes"). When deposed, neither teachers at schools within the district nor the principal of the largest high school in the district were aware of the policy and form changes that Defendant describes in its Motion. *See* Beane Dep. at 32:1-3, 34:20-35:6 (admitting she was not aware of any districtwide process

[15] For example, one student's behavior plan indicated "target behaviors" of verbal aggression, verbal disruption, and off-task behaviors. The "replacement behaviors" identified were simply to stop doing the problem behaviors and act "appropriately." The "consequence strategies" or "reactive procedures" for when these behaviors occur are threefold: reminders, "appropriate discipline for offense of defiance," and "[r]emoval from classroom." Ex 4, Behavior Support Plan (KCBOE 074979-074980).

guiding the provision of behavior supports or written guidance on developing behavior supports); Bailey Dep. at 33:8-12 ("I'm not aware of any specific policy changes[].").

WVDE. Echoing Dr. Elliott's findings, the WVDE in May 2025 found KCS failed to provide "crucial" positive behavior interventions that build skills and teach new behavior and documented numerous violations of WV Policy 2419 with regard to the provision of behavior supports. Ex. 2, WVDE Compliance Monitoring Report, KCBOE70479 at -486-90. KCS claims in its Motion for Summary Judgment that WVDE has assessed it to be in compliance with West Virginia special education requirements. Def. Mem. at 5. The reports on which Defendants rely—the Annual Desk Audits—are not persuasive because they are not based on a close examination of the District. To pass a desk audit, the District need only upload data from a small number of students to satisfy pre-determined indicators. ECF No. 300-8, Deposition Transcript of Judy Elliott ("Elliott Dep.") 49:22-23; 50:6-11 (explaining desk audits based on her professional experience). More in depth assessments from WVDE reveal KCS' shortcomings. For example, in connection with its May 2025 report, the WVDE conducted a more fulsome evaluation of the District which included onsite reviews. Elliott Dep. 49:22-23; 50:13-19. On closer examination by the State of what is happening in practice on the ground, rather than on paper, the outcome was different: WVDE determined that the District was *not* in compliance with West Virginia special education requirements with respect to its provision of behavior supports. *See* Ex. 2, WVDE Compliance Monitoring Report, KCBOE70479 at -486-90; Dr. Elliott 2025 Rep. at 7-8; Elliott Dep. 50:23-51:2 (explaining onsite review shows that positive behavior interventions and supports are "not happening" and "that students are still being mishandled in a punitive way in schools").

Even if WVDE had given KCS a clean bill of health, Def. Mem. at 5—and it has not—it is the IDEA and ADA, not WVDE's expectations, that establishes the obligations that KCS has to

the class, and Plaintiffs have presented substantial evidence that those obligations are not being met. And the underlying data in the WVDE desk audit shows shockingly low academic proficiency scores for students with disabilities, which are indicative of KCS' ongoing failure to provide students with needed services to make appropriate academic progress as required by the IDEA. ECF No. 274-1, KCBOE 071046.

KCS also argues that a special education need only be "available" and not actually provided under the IDEA. Def. Mem. at 16 n.5. This is incorrect. Under the IDEA, a school district "must *provide* a disabled child with such special education." *Endrew F.*, 580 U.S. at 390–91 (quoting the definition of a FAPE at 20 U.S.C. § 1401(9)(D)) (emphasis added). And, as the Supreme Court observed, an eligible student who is not actually provided special education can "hardly be said to have been offered an education at all." *Id.* at 402-03. The IDEA "demands more." *Id.* at 403.

B. Plaintiffs Have Satisfied the IDEA's Exhaustion Requirement.

KCS is not entitled to summary judgment for failure to exhaust. In denying KCS' motion to dismiss, this Court found that G.T. and K.M. exhausted their claims under the IDEA, ADA, and Section 504. Order Denying MTD at 12. Plaintiffs are not required to re-exhaust their claims, despite the passage of time and Defendant's assertion that "things have changed." The Fourth Circuit has held that "exhaustion is inconsistent with the statutory scheme when the complaint remains the same," which is the circumstance here. *Devries by DeBlaay v. Spillane*, 853 F.2d 264, 267 (4th Cir. 1988); *see also Cnty. Sch. Bd. of Henrico Cnty. v. R.T.*, 433 F. Supp. 2d 657, 691 (E.D. Va. 2006) (when "for subsequent years … the complaint remains the same … no exhaustion is required); *M.S. v. Fairfax Cnty. Sch. Bd.*, No. 1:05CV1476 JCC, 2006 WL 2376202, at *4 (E.D. Va. Aug. 11, 2006).

The underlying complaint in this case has remained the same since the filing of the First Amended Complaint. *Compare* ECF No. 22 *with* ECF No. 224. This case has always been about KCS' failure to provide behavior supports to students with disabilities, which includes therapies to build social skills and self-regulation. *See, e.g.*, ECF No. 22 at ¶¶ 60, 79, 90, 136. Plaintiffs' renewed Motion for Class Certification is more focused and narrower than its previous motion, resting on KCS' consistent failure to provide students in the class appropriate therapies to build social skills and self-regulation. But that narrower focus does not expand Plaintiffs' obligation to exhaust. The Hearing Officer dismissed all of G.T.'s claims, including those related to behavior supports; the Hearing Officer's decision on K.M.'s claims found that KCS had failed to provide him with appropriate behavior supports, including social skills therapies, in violation of the IDEA.[16] Hearing Officer Decision, No. 19-018, ECF No. 260-7; Ex. 6, Hearing Officer Decision, No. 19-020. Both individual plaintiffs have thus properly exhausted their claims.

C. Because There Are Ongoing Violations of Federal Law, This Case Is Not Moot and Class-wide Relief Is Warranted

KCS' arguments that various "equitable standards" warrant summary judgment are without merit. KCS first argues that this case is moot, and that this Court should deny relief because KCS has made (and will continue to make) changes to its special education guidelines and staffing. This argument is based on the faulty premise that KCS has or is remedying the legal violations of which Plaintiffs have complained. However, as discussed above, there is much evidence to the contrary showing that KCS continues to fail to provide needed therapies to build social skills and self-regulation. This consistent practice violates students' rights under the IDEA and ADA and thus warrants injunctive relief.

[16] Contrary to Defendant's assertions, Def. Mem. at 13-14, K.M. is and has always been a named plaintiff in this case on behalf of whom Plaintiffs' seek relief. Compl. ¶¶ 102-146; Pls. First Suppl. Responses to Interrogatory No. 4, ECF No. 300-9.

Second, Plaintiffs do not, as Defendants contend, seek an "obey-the-law" injunction. Def. Mem. at 23-25. It is well established that federal district courts have the authority and the responsibility to remedy violations of federal law, and they enter and oversee injunctions as necessary to protect the interests of class members. Here, Plaintiffs seek an injunction that requires KCS to take affirmative steps to provide the children in the proposed class with the services they need to make appropriate educational progress and have an opportunity to benefit from their schooling that is commensurate with their non-disabled peers. Because the evidence shows that there are ongoing failures to provide the necessary behavioral interventions, violations of the IDEA, ADA, Section 504, and the West Virginia Civil Rights Act continue and both injunctive and declaratory relief are appropriate.[17]

Third, Defendant's assertion that Plaintiffs' requested injunction fails to satisfy the requirements of Fed. R. Civ. P. 65 governing injunctive orders of the court is misplaced. Def Mem. at 24-25. That rule sets forth the required contents and scope of court orders granting injunctions. Given that there is not yet a finding on liability in this case, Defendant's argument about the scope and particularity of the injunctive relief is premature and should be rejected. Defendant relies on an appellate court decision involving the scope of an injunction issued by the district court following a trial on the merits and following remedial briefing by the parties—neither of which has happened yet in this case. Def. Mem. at 23-24 (citing *EEOC v. Autozone, Inc.*, 707

[17] Defendant mischaracterizes Plaintiffs' request for declaratory relief in calling it "a declaration about the quality of support services." Def. Mem. at 23. The declaratory judgment request does not reference or seek a statement about the quality of services provided. Instead, it explicitly addresses the Defendant's *failure to provide* therapies to build social skills and self-regulation to members of the proposed class. ECF No. 300-7, Pls. Responses to Interrogatory No. 6. *See Volvo Constr. Equip. N. Am., Inc. v. CLM Equip. Co.*, 386 F.3d 581, 594 (4th Cir. 2004) (stating that a district court must rule on the merits of a declaratory judgment when it will "serve a useful purpose in clarifying and settling the legal relations in issue and will terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding").

F.3d 824, 841-44 (7th Cir. 2013)). Accordingly, it is irrelevant here, and Defendant's argument fails.

Indeed, the scope of relief is best determined after trial and based on the evidence. *See, e.g.*, *U.S. v. Florida*, 682 F. Supp. 3d 1172, 1243-44 (S.D. Fla. 2023) (entering injunction in systemic ADA case, following trial and remedial briefing, tailored to the court's findings, that requires state to take steps to ensure children with disabilities in its Medicaid program receive all required services); *Rosie D. v. Patrick*, 497 F. Supp. 2d 76, 78 (D. Mass. 2007) (following liability decision in favor of a class of Medicaid-eligible children with serious emotional disturbance, Court issued the proposed judgment offered by defendants, with certain modifications requested by plaintiffs). Appropriately, the particulars of such relief are not determined based solely on the complaint's prayer for relief, but rather are determined by the court, after a review of all the evidence and after findings of liability are made, with input from both parties, to address the particular violations found. These long-standing practices, and the weight of legal precedent in this area, demonstrate that federal district courts have the ability, authority, and responsibility to remedy violations of federal law and to enter and oversee systemic injunctive relief when necessary to resolve the claims and protect the interests of class members with disabilities.

D. *Trump v. CASA* Does Not Support Summary Judgment Here

KCS relies on the Supreme Court's recent decision in *Trump v. CASA* in support of its Motion. That case, however, did not involve a class action or a request for class certification. Instead, it addressed whether individual parties in one case in one district court could obtain an injunction enjoining an Executive Order as to nonparties nationwide. *CASA* restricted a district court's power to grant nationwide injunctive relief on behalf of nonparties; it did not reject the class action device as a means of securing relief for non-parties, quite the opposite. On the

contrary: the Supreme Court specifically cited class actions as a proper means for binding defendants as to nonparties. *Trump v. CASA*, 145 S. Ct. 2540, 2555 (2025); *see also id.* at 2587 (Kavanaugh, J., concurring) (recognizing the availability of a class action in lieu of a nationwide injunction).

Here, Plaintiffs have properly filed a motion for class certification, *see* ECF No. 224, and KCS appears to concede that certification would permit this Court to grant systemic relief, even after *CASA*. Def. Mem. at 15.[18]

Moreover, KCS' argument ignores that there is an associational plaintiff in this case. As an organizational plaintiff with members who have standing, The Arc of West Virginia has authority to seek systemic relief on behalf of its member students. Order Denying MTD at 14-16 (citing *S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 182 (4th Cir. 2013)).

Here, all the requirements for associational standing are met. As the Supreme Court has ruled, "an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). In denying Defendant's Motion to Dismiss, this Court found that The Arc passes this test, finding:

> The Arc of West Virginia is a membership organization focused on disability rights, and it serves families with children receiving special education services at public schools in West Virginia. G.T. and K.M. are constituents, and their parents are members. There is no dispute that students and their families, including G.T. and

[18] And if class certification were not granted, G.T. and K.M.'s individual claims would be properly before this Court. This Court would have the power to issue injunctive relief on their behalf. *See CASA*, 145 S. Ct. at 2557; Compl. at ¶¶ 30, 37. *CASA* also did not limit the ability of organizational or associational plaintiffs to seek systemic relief. *CASA*, 145 S. Ct. at 2549 n.2.

> K.M., have standing to sue for IDEA and other violations. Likewise, there is no dispute that the issues involved in this suit are germane to The Arc of West Virginia's purpose.

Ord. Denying MTD at 15. The claims and relevant facts have not changed since.

V. CONCLUSION

In consideration of the weight of the evidence in Plaintiffs' favor, especially when viewed in the light most favorable to Plaintiffs, and the genuine issues of material fact, Defendant's Motion for Summary Judgment should be denied in full.

Respectfully submitted by:

Plaintiffs G.T., *by his parents Michelle and Jamie T. on behalf of themselves and all similarly situated individuals, et al.,*

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