RIGHTS TO NOWHERE: THE *IDEA*'S INADEQUACY IN HIGH-POVERTY SCHOOLS

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ABSTRACT

The Individuals with Disabilities Education Act ("IDEA") successfully opened the schoolhouse doors to millions of students with disabilities. But more than forty years after its enactment, the law has proven largely inept at confronting the educational inequities faced by the many students with disabilities attending underfunded, high-poverty public schools. This shortcoming is inconsistent with common conceptions of the IDEA: Advocates and policymakers alike treat the IDEA's rights and privately enforceable remedies as strong, meaningful tools. This Article theorizes that the IDEA's under-appreciated failures are overlooked because they are the products of the law's internal structure, undue judicial deference to schools, and litigation that targets procedural injuries rather than substantive educational practices.

The IDEA's core procedural rights are meant to guarantee students with disabilities an appropriate education in the most integrated setting possible. Yet, in high-poverty schools, virtually none of the law's promises are realized. The IDEA's rights are tethered to an assumption that schools are operating with an adequate level of capacity and proficiency, but under-resourced schools lack the ability to ensure either. As a result, the law's three core principles—procedural rights, appropriate education, and integrated settings—are badly diminished for students with disabilities in

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high-poverty schools. Essentially, individual students are unable to leverage the IDEA's rights for meaningful remedies, and they are thwarted by courts when they attempt broader programmatic change. Meanwhile, advocates' emphasis on enforcing procedural rights merely strengthens the law's structural weaknesses. Fulfilling the IDEA's purpose requires a shift in how courts and advocates understand the law's limitations in under-resourced schools. It also requires a growth in political will to incentivize and fund local solutions aimed at improved student outcomes. This Article proposes a framework for such a shift.

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INTRODUCTION

When President Gerald Ford signed the Education for All Handicapped Children Act ("EAHCA") into law, he did so with trepidation, stating "Unfortunately, this bill promises more than the Federal Government can deliver, and its good intentions could be thwarted by the many unwise provisions it contains."[1] More than forty years, two reauthorizations, and billions of dollars later, President Ford's fears seem prescient. Certainly, momentous gains have been made in the education of children with disabilities and without a doubt, the legislation forced open schoolhouse doors and the promise of education for a multitude of students who had previously been barred.[2] But the EAHCA—now known as the Individuals with Disabilities Education Act ("IDEA")[3]—fails a majority of students who currently attend poorly functioning and under-resourced public schools.

America's public school students have suffered from decades of disinvestment.[4] But the country's dereliction of public education is inequitably shouldered by low-income students and students of color.[5]

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1. Education for All Handicapped Children Act, Pub. L. No. 94-142 (1975); *President Gerald R. Ford's Statement on Signing the Education for All Handicapped Children Act of 1975*, FORD LIBR. & MUSEUM (Dec. 2, 1975) [hereinafter *Ford 1975 Statement*], https://www.fordlibrarymuseum.gov/library/speeches/750707.htm [https://perma.cc/VDW7-96MN].

2. The United States has progressed from excluding nearly 1.8 million children with disabilities from public schools prior to the EHA's implementation to providing more than 7.5 million children with disabilities with special education and related services designed to meet their individual needs in the 2018–19 school year. *A History of the Individuals with Disabilities Education Act*, U.S. DEP'T OF EDUC., https://sites.ed.gov/idea/IDEA-History/ [https://perma.cc/C8YW-W2MF]; *see also* Jay P. Heubert, *Six Law-Driven School Reforms: Developments, Lessons, and Prospects*, *in* LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY 1–2 (Jay P. Heubert ed., 1999) (describing the inhumane conditions students with disabilities faced prior to the enactment of the EHA); RUTH COLKER, DISABLED EDUCATION: A CRITICAL ANALYSIS OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT 17–22 (2013) (discussing the shortcomings of the IDEA as it relates to poor and minority children and suggesting ways in which resources might be allocated more evenly along class lines).

3. 20 U.S.C. § 1400 (2004).

4. *TCF Study Finds U.S. Schools Underfunded by Nearly $150 Billion Annually*, CENTURY FOUND. (July 22, 2020) [hereinafter *TCF Study*], https://tcf.org/content/about-tcf/tcf-study-finds-u-s-schools-underfunded-nearly-150-billion-annually/ [https://perma.cc/FN2Z-5ZHG] ("The majority of school districts in the country—7,224 in total, serving almost two-thirds of all public school students—face a 'funding gap,' meaning that lifting students up to average outcomes requires greater public investment.").

5. *TCF Study*, *supra* note 4. The inequalities impacting the intersections of race and poverty have been explored by many scholars. Important work has also shed light on how racial bias impacts the identification of students with disabilities. This Article does not aim

School districts that serve predominantly low-income, Black, and Latinx students receive the fewest state and local dollars.[6] Those same districts also tend to enroll high proportions of students with disabilities, who require higher levels of funding per pupil.[7] The net result is that schools in these districts operate with significantly less funding than what is needed to meet their students' educational needs.

Unsurprisingly, disinvestment in public schools leads to poor academic outcomes, particularly for students with disabilities.[8] Students

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to disentangle race, poverty, and disability. Rather, its aim is to identify the false assumptions embedded in the IDEA that prevent it from responding to and remedying some of these racial-, income-, and disability-based disadvantages. The term "students of color," while imperfect, is used in this Article as a shorthand that is broad enough to capture the different racial and ethnic groups who are impacted by the cross section of poverty and disability.

6. Low-income school districts are more than twice as likely to have a funding gap as higher income districts. *Id.* ("Districts with funding gaps are disproportionately made up of low-income and Black and Latinx students."). *See generally* ERICA FRANKENBERG ET AL., C.R. PROJECT & CTR. FOR EDUC. & C.R., HARMING OUR COMMON FUTURE: AMERICA'S SEGREGATED SCHOOLS 65 YEARS AFTER *BROWN* (2019), https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/harming-our-common-future-americas-segregated-schools-65-years-after-brown/Brown-65-050919v4-final.pdf [https://perma.cc/N6AU-8PEG] (discussing how racial and economic segregation still persist 65 years after *Brown v. Board* and remain unchecked, placing the goal of the decision at risk); LINDA DARLING-HAMMOND, LEARNING POL'Y INST., EDUCATION AND THE PATH TO ONE NATION, INDIVISIBLE (2018), https://learningpolicyinstitute.org/sites/default/files/productfiles/Education_Path_To_One_Nation_BRIEF.pdf [https://perma.cc/SK5L-U9N9] (discussing how trends of poverty and segregation perpetuate education inequality).

7. Laura A. Schifter et al., *Students from Low-Income Families and Special Education*, CENTURY FOUND. (Jan. 17, 2019), https://tcf.org/content/report/students-low-income-families-special-education/ [https://perma.cc/3GT9-B5V3]; JAY G. CHAMBERS ET AL., CTR. FOR SPECIAL EDUC. FIN., CHARACTERISTICS OF HIGH-EXPENDITURE STUDENTS WITH DISABILITIES, 1999-2000, at 6 (May 2004), https://files.eric.ed.gov/fulltext/ED522071.pdf [https://perma.cc/SV8N-U8K9] (reviewing the 1999-2000 special education expenditure data and finding that average expenditures for a general education student was $6,556 compared to $12,474 for students with disabilities—a difference of $5,918 (90.3%)).

8. Lex Frieden, NAT'L COUNCIL ON DISABILITY, *Improving Educational Outcomes for Students with Disabilities* (May 17, 2004), https://ncd.gov/publications/2004/mar172004 [https://perma.cc/ZK5M-YWUC] ("More than 40 percent of secondary-aged students with disabilities do not attain a high school diploma, and dropout rates for youth with disabilities are three to four times higher than dropout rates for youth without disabilities."); *see also* C. Kirabo Jackson et al., *The Effects of School Spending on Educational and Economic Outcomes: Evidence from School Finance Reforms* (Nat'l Bureau of Econ. Rsch., Working Paper No. 20847, 2015) (finding that a 10% increase in per-pupil spending led to more completed years of education, higher wages, and a reduction in the annual incidence of adult poverty and that spending increases were associated with sizeable improvements in school quality, including reductions in student-to-teacher ratios, increases in teacher salaries, and longer school years).

attending high-poverty[9] school districts sit in overcrowded classrooms in antiquated, sometimes hazardous, school buildings.[10] Their teachers rarely have advanced degrees and often lack basic certifications.[11] Students in these schools are less likely to have access to advanced curricular offerings, laboratories, or even latest-edition textbooks.[12] Students with disabilities face even greater challenges, since compared to their non-disabled peers they are more likely to be segregated into lower-achieving classrooms, subjected to punitive discipline, or pushed out of schools entirely.[13]

These dismal outcomes are inconsistent with the rich legal rights afforded to students with disabilities. The IDEA was lauded as a civil rights victory for students with disabilities because it is steeped in privately enforceable procedural and substantive rights.[14] It ended the days of school exclusion and promised access to meaningful educational opportunities.[15] More specifically, it called for comprehensive individualized evaluations to help understand how a child's disability impacts their learning and the creation of a detailed plan of special education and related supports to assist the child in meeting annual academic goals.[16] Embedded in those plans is a substantive right to an appropriate education, defined as "free appropriate

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9. High-poverty, as used here, is meant to mean a majority of students in the school are from low-income families. The National Center for Education Statistics collects national level data on public schools and groups public schools into sub-categories based on the concentration of students receiving free or reduced-price lunch (a proxy measure for low-income students). The categories are as follows: low-poverty schools (25% or less of the students eligible for FRPL); mid-low poverty schools (25.1% to 50%); mid-high-poverty (50.1% to 75%) and high poverty (more than 75%). *Concentration of Public School Students Eligible for Free or Reduced Price Lunch*, NAT'L CTR. FOR EDUC. STATS. (May 2021), https://nces.ed.gov/programs/coe/indicator/clb?tid=4 [https://perma.cc/H7V7-2AVS].

10. DARLING-HAMMOND, *supra* note 6, at 4–5 (discussing how poverty and segregation trends perpetuate education inequality); *Fast Facts: Condition of Public School Facilities*, NAT'L CTR. FOR EDUC. STATS., (2012–13 school year), https://nces.ed.gov/fastfacts/display.asp?id=94 [https://perma.cc/8HFP-49AH] ("53 percent of public schools needed to spend money on repairs, renovations, and modernizations to put the school's onsite buildings in good overall condition."); *see also* Complaint ¶ 1, Gary B. v. Snyder, No. 16-CV-13292, 2016 WL 4775474, (E.D. Mich. Sept. 13, 2016) (describing Detroit public schools as having unsafe building conditions, vermin infestations, and a lack of textbooks and basic classroom materials like paper, pens, and toilet paper).

11. DARLING-HAMMOND, *supra* note 6, at 7–8.

12. Linda Darling-Hammond, *New Standards and Old Inequalities: School Reform and the Education of African American Students*, 69 J. NEGRO EDUC. 263, 266–68 (2000).

13. Daniel J. Losen & Kevin G. Welner, *Disabling Discrimination in Our Public Schools: Comprehensive Legal Challenges to Inadequate Special Education Services for Minority Children*, 36 HARV. C.R.-C.L. L. REV. 407, 447 (2001).

14. 20 U.S.C. § 1412 (2016).

15. COLKER, *supra* note 2, at 42.

16. 20 U.S.C. § 1414(a)–(d).

public education" ("FAPE"), and a mandate to educate students with disabilities in the "least restrictive environment" ("LRE"), meaning with their non-disabled peers whenever appropriate.[17] These rights are miles ahead of educational rights given to students without disabilities.[18] Why, then, has the IDEA done so little to advance the education of students with disabilities in high-poverty schools?

Several scholars have highlighted the inequities that come with accessing the law's complicated procedural rights. The high cost of attorneys and experts, unequal bargaining power between parents and schools, and a hesitancy to disrupt a child's school-based relationships all undermine low-income families' ability to leverage the IDEA.[19] This Article theorizes that the law's failures cannot be fully explained by these external forces. Rather, they are a product of the law's internal structure, courts' undue deference to schools, and advocates' failure to target impact litigation at meaningful substantive reforms. In other words, the IDEA's weaknesses do not stem from secondary circumstances that could be corrected with modest interventions. The IDEA's inefficacy is baked into its structure, which is then reaffirmed by courts' inability to discern how the law's utility is limited in under-resourced schools.

At its core, the IDEA delivers students with disabilities procedural rights meant to guarantee an appropriate education in the most integrated

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17. *Id.* § 1412(a)(1), (5).

18. Goss v. Lopez, 419 U.S. 565, 579 (1975) ("[S]tudents facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing . . . [T]he timing and content of the notice and the nature of hearing will depend on appropriate accommodation of competing interests involved."); *see also* Joshua E. Weishart, *Reconstituting the Right to Education*, 67 ALA. L. REV. 915, 917 (2016) ("Whittled by a 5-4 Supreme Court majority in *San Antonio Independent School District v. Rodriguez*—as nonfundamental, ostensibly without rank in the U.S. Constitution—the right [to education] persists explicitly in state constitutions . . . but has failed to usher in the lasting reforms sought by advocates.") (internal citations omitted).

19. COLIN ONG-DEAN, DISTINGUISHING DISABILITY: PARENTS, PRIVILEGE, AND SPECIAL EDUCATION 5 (2009); Daniela Caruso, *Bargaining and Distribution in Special Education*, 14 CORNELL J.L. & PUB. POL'Y 171, 172–73 (2005) (emphasizing the uneven distribution of special education services); Erin Phillips, Note, *When Parents Aren't Enough: External Advocacy in Special Education*, 117 YALE L.J. 1802 (2008) (discussing why many parents are unable to access IDEA remedies); Elisa Hyman et al., *How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 20 AM. U. J. GENDER SOC. POL'Y & L. 107, 132–36 (2011) (discussing how students from low-income families are unable to access IDEA's due process remedies); Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1424–30 (2011) (explaining how low-income families struggle to utilize the IDEA's remedies).

setting possible. Yet, in high-poverty schools, virtually none of the law's promises are realized. The IDEA's rights are rooted in an assumption that schools are operating with an adequate level of capacity and proficiency, but under-resourced schools generally lack both.[20] So, all three core principles—procedural rights, appropriate education, and integrated settings—are badly diminished for students with disabilities in high-poverty schools. Essentially, individual students are unable to leverage the IDEA's rights to secure meaningful remedies and are thwarted by courts when they attempt broader programmatic change.

The IDEA's individual remedies are inherently incapable of providing students the means to achieve the law's core principles for at least three reasons. First, courts fail to recognize that the IDEA's procedural protections are impaired in high-poverty schools. Instead, they assume that procedural protections ensure substantive quality and carelessly defer to schools' ill-conceived educational programs. [21] In overwhelmed and under-resourced schools, following procedure does not guarantee adequate educational programming because the procedures cannot correct programmatic failures. Requiring that certain people attend meetings cannot ensure qualified and knowledgeable teachers are present. [22] Requiring decisions based on a variety of data does not prevent that data from being flawed. [23] Requiring schools to secure parental consent does not ensure parental understanding and engagement.[24] In short, guaranteeing process does not have any real bearing on the quality of a child's educational program. Rather, when schools lack the resources needed to assess and implement specialized instructions and supports, focusing on process is the equivalent of rearranging deck chairs on the Titanic—utterly futile. Yet, courts follow a precedent steeped in the false narrative that adequate procedures will help guarantee some substantive level of quality when, in fact, they just ensure a better view of the sinking ship.

Second, the IDEA's primary qualitative standard—FAPE—requires a healthy underlying system to function as intended. In high-poverty schools,

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20. BRUCE D. BAKER, LEARNING POL'Y INST., HOW MONEY MATTERS FOR SCHOOLS, at vi (2017) ("These inequities in funding create dramatically different educational opportunities for children and contribute to differences in access to key educational resources—expert teachers, personalized attention, high-quality curriculum, good educational materials, and plentiful information resources—that support learning at home and at school.").

21. *See infra* Part II.A.1.

22. 20 U.S.C. § 1414(d)(1)(B) ("Individualized education program team").

23. *Id.* § 1414(a), (b) ("Evaluations, parental consent, and reevaluations" and "Evaluation procedures").

24. *Id.* § 1414(a)(1)(D) ("Parental consent").

such systems generally do not exist, and schools strain to provide adequate educational programming generally, let alone the highly specialized instruction required by the IDEA. FAPE is primarily measured by a student's progress towards individualized academic goals.[25] These goals are derived in large part from a student's current academic performance.[26] When schools are unable to deliver quality instruction, both a student's current performance and their expectations for future progress are routinely low, not because the individual student lacks capacity, but because their school does. Moreover, courts' ferocious deference to schools' chosen methodologies for delivering instruction, regardless of their actual efficacy, leave students with limited ability to leverage the IDEA for improved educational programs.[27] Given this precedent, students in high-poverty schools are stuck with special education programming that has no plausible prospect of succeeding in the under-resourced environments in which they operate.

Third, the IDEA's proscription against segregation, conceptualized as the LRE requirement, simply does not have the strength to compel meaningful integration in high-poverty schools.[28] The LRE obligation requires schools to integrate students with disabilities with their non-disabled peers whenever appropriate.[29] However, underfunded school

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25. *Id.* § 1401(9) ("Free appropriate public education"); *see also* Endrew F. *ex rel.* Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988, 999 (2017) ("To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.").

26. 20 U.S.C. § 1414(d)(3) ("Development of IEP").

27. Shakopee Indep. Sch. Dist., 52 IDELR 210 (Minn. SEA 2009) (finding that neither the IDEA nor its implementing regulations require an IEP to include a specific methodology or one that would maximize the student's abilities); A.S. *ex. rel.* S. v. N.Y.C. Dep't of Educ., 573 F. App'x 63, 66 (2d Cir. 2014) (ruling that while the parents preferred for their child to attend an ABA-based program, the student could also receive an educational benefit from the district's use of the TEACCH methodology); Carlson v. San Diego Unified Sch. Dist., 380 F. App'x 595, 597 (9th Cir. 2010) (noting that a parent's disagreement with the district's educational methodology was insufficient to establish an IDEA violation); Lachman v. Ill. State Bd. of Educ., 852 F.2d 290, 297 (7th Cir. 1988) (holding that parents do not have a right to compel a school district to provide a specific program or employ a specific methodology in providing for the education of a student with a disability); M.M. *ex rel.* C.M., 437 F.3d 1085, 1096 (11th Cir. 2006) (ruling that although the parents argued that auditory-verbal therapy was the best methodology for the student, the district is only required to provide an appropriate methodology); Matthews v. Douglas Cnty. Sch. Dist. RE-1, 73 IDELR 42 (D. Colo. 2018) (holding that a district did not violate the IDEA when it used the Wilson Reading System to provide instruction to a high schooler with dyslexia and other disabilities since some educational methodologies share the same core instructional approach).

28. 20 U.S.C. § 1412(a)(5).

29. *Id.*; 34 C.F.R. § 300.115.

districts lack the resources to set up a variety of programs that could support different types of integration needs.[30] As a result, students in high-poverty schools are more likely to learn in segregated classrooms, rather than through integrated services that take place in inclusive regular educational settings.[31] Similarly, poorly funded school districts are more likely to set up centralized services in one school and transfer students in need of those services to that setting. [32] Thus, a student's right to be free from segregation—which the IDEA purports to protect—is constrained by schools' and districts' capacity to fund a variety of options on the continuum of alternative placements.[33]

Further, when students with disabilities in high-poverty schools attempt to achieve programmatic, rather than individual, remedies, they are thwarted by courts' heavy-handed use of the IDEA's exhaustion clause.[34] Although this clause requires that students with disabilities exhaust administrative remedies before bringing actions in court, Congress and the Supreme Court have both stated that exhaustion should not be required where it would be "futile as either a legal or practical matter."[35] Students requesting programmatic remedies squarely fall within this exemption because they seek systemic relief that cannot be awarded through the administrative process. [36] Yet many lower courts dismiss their cases, reasoning that because students *could* have sought individual remedies, the exhaustion process is not futile.[37] Consequently, these courts force plaintiffs to seek individual remedies through administrative agencies that are inherently incapable of ordering broad-based programmatic relief.[38]

Finally, while class action lawsuits hold real promise for substantive change, too often, well-meaning advocates target systemic claims at

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30. NAT'L COUNCIL ON DISABILITY, BROKEN PROMISES: THE UNDERFUNDING OF THE IDEA 36 (Feb. 7, 2018) [hereinafter BROKEN PROMISES], https://ncd.gov/sites/default/files/NCD_BrokenPromises_508.pdf [https://perma.cc/7NPN-98LF].

31. Schifter et al., *supra* note 7.

32. NAT'L COUNCIL ON DISABILITY, THE SEGREGATION OF STUDENTS WITH DISABILITIES, 23–26 (Feb. 7, 2018) [hereinafter SEGREGATION OF STUDENTS], https://ncd.gov/sites/default/files/NCD_Segregation-SWD_508.pdf [https://perma.cc/27F9-EQ9W].

33. 34 C.F.R. § 300.115.

34. 20 U.S.C. § 1415(*l*).

35. Honig v. Doe, 484 U.S. 305, 327 (1988) ("[Exhaustion] . . . should not be required . . . in cases where such exhaustion would be futile either as a legal or practical matter." (quoting 121 CONG. REC. 37,416 (1975) (statements of Sen. Harrison A. Williams)).

36. Fry v. Napoleon Cmty. Sch., 137 S. Ct. 743, 752 (2017) (holding that the IDEA's exhaustion clause only applies when plaintiffs pursue remedies involving a denial of the IDEA's FAPE guarantee).

37. *See infra* Part II.B.1.

38. *See infra* Part II.B.1.

procedural issues, leaving the substance up to chance.[39] This Article offers an original analysis of certified and putative class actions in federal courts during the last fifteen years, revealing an almost singular focus on issues of process in IDEA class actions.[40] Plaintiffs' allegations involved screening and evaluation procedures, meaningful access to interpreters, and timely implementation of related services, among others.[41] While such claims are both necessary and helpful, they do not strike at the heart of the problem for students in high-poverty schools—improving the educational program itself. Stated differently, class actions must be directed not just at improved access to special education services, but at the quality of those services and by extension, the educational programs in which they operate.

In essence, too many students are trapped in under-resourced, failing school systems.[42] When these students are also identified as having disabilities, the IDEA is supposed to help shore them up by offering specialized instruction tailored to meet their unique needs.[43] But when the larger educational program is broken, the IDEA alone cannot fix it. Fundamentally, the issues outlined in this Article are interwoven with the decades-old problem of educational inequity. Solutions are within reach, but they cannot be accomplished without a willingness to sufficiently fund public schools. The IDEA has never been fully funded.[44] When signing the bill into law, President Ford questioned whether the federal government could ever deliver on its promised funding.[45] In 2019, the federal government covered less than 15% of its funding obligations towards the IDEA.[46] Yet, the law both assumes and demands a significant level of resources to be effective.[47] Further, evidence demonstrates that school funding matters—particularly for students of color from low-income families.[48]

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39. *See infra* Part II.B.2.

40. *Id.*

41. *Id.*

42. CENTURY FOUND., CLOSING AMERICA'S EDUCATION FUNDING GAPS (July 22, 2020), https://tcf.org/content/report/closing-americas-education-funding/ [https://perma.cc/X4HA-Q5H4].

43. 20 U.S.C. § 1400(d).

44. BROKEN PROMISES, *supra* note 30, at 18.

45. "Despite my strong support for full educational opportunities for our handicapped children, the funding levels proposed in this bill will simply not be possible if Federal expenditures are to be brought under control and a balanced budget achieved over the next few years." *Ford 1975 Statement*, *supra* note 1.

46. CONG. RSCH. SERV., R44624, THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA) FUNDING: A PRIMER 8 (Aug. 29, 2019) [hereinafter IDEA FUNDING PRIMER], https://fas.org/sgp/crs/misc/R44624.pdf [https://perma.cc/ZYX8-TDQ5].

47. BROKEN PROMISES, *supra* note 30 (discussing how a lack of funding denies critical resources to students with disabilities).

48. Jackson et al., *supra* note 8.

This Article suggests three potential solutions to begin to tackle these inequities. As a first step, fully funding the IDEA would go a long way to resolving the burdens unjustly placed on the shoulders of low-income students of color. But since full funding has yet to materialize in the more than forty years since the law's enactment, this Article suggests a more modest and achievable proposal in the form of competitive grants targeting school districts that serve majority low-income populations.[49] Designing a competitive grant program could target funding towards those districts that have the highest level of need and incentivize their participation in finding solutions that work for their particularized challenges. Second, Congress should amend the IDEA to give the Department of Justice ("DOJ") the authority to investigate and litigate systemic violations of the law. Federal enforcement is necessary to address the inequities embedded in a private enforcement scheme. But rather than punishing bad actors by withholding federal dollars, consequences should involve collaborative planning and oversight towards improved educational outcomes with objectively quantifiable goals. Finally, advocates must orient class actions towards substantive educational practices rather than focusing only on process. Such suits may face a series of obstacles, including, as a starting point, the federal rules governing class certification.[50] Still, class-based litigation has the ability to force changes directed at substantive educational practices—the surest way to improve educational outcomes for students with disabilities.[51]

This Article proceeds in four parts. Part I presents the IDEA's core principles of FAPE and LRE, describing how the IDEA's rights and remedies are tied to the individual, but delivery of those rights exists in a larger programmatic structure. It then briefly describes the state of public schools, paying particular attention to high-poverty schools serving a majority Black and/or Latinx student population. Part II illustrates how each of the IDEA's core principles—procedural rights, substantively appropriate education, and the promise of integration—are gravely weakened when applied to students with disabilities in high-poverty schools. It then details how courts' flawed application of the exhaustion clause unjustly prevents students from accessing crucial systemic remedies. Finally, it analyzes the past fifteen years of IDEA class actions, uncovering advocates' focus on procedural claims. Part III explores three compelling and practical solutions: (1) targeted funding

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49. U.S. DEP'T OF EDUC., RACE TO THE TOP PROGRAM EXECUTIVE SUMMARY 2 (Nov. 2009) [hereinafter RACE TO THE TOP EXECUTIVE SUMMARY], https://files.eric.ed.gov/fulltext/ED557422.pdf [https://perma.cc/9APL-4V97].

50. Pasachoff, *supra* note 19, at 1456.

51. Thomas Hehir, *Looking Forward: Toward a New Role in Promoting Educational Equity for Students with Disabilities from Low-Income Backgrounds*, *in* HANDBOOK OF EDUCATION POLICY RESEARCH 831, 836 (Gary Sykes et al. eds., 2009).

through a competitive grant-based program, (2) federal, rather than private, enforcement of the IDEA, and (3) focused class action lawsuits aimed at substantive educational practices. Part IV concludes.

I. The IDEA in High-Poverty Schools

The IDEA has been lauded as a successful example of civil rights legislation, in part, because it provides a clear right of action for eligible children with disabilities and their parents to demand accountability from their school systems.[52] By design, the IDEA's rights and remedies are rooted in the individual child.[53] Congress was particularly concerned with ensuring that disability categories did not drive educational programming, but rather that each individual child's need would determine the types of services and supports they would receive.[54] However, an individual child's educational program exists as a part of a broader curriculum. When the overall educational program is healthy, an individual child can leverage the IDEA to ensure their needs are being appropriately addressed by that program. But, when the overall system is broken, the IDEA's remedies are relatively powerless.

Students with disabilities attending under-resourced, high-poverty schools face programmatic challenges that strike at the heart of the IDEA's structure. The following section first describes the core principles that make up that structure. It then portrays the challenges faced by students with disabilities in under-resourced schools to situate the later conversation regarding the IDEA's depleted efficacy for those students.

A. The Tension Between Individuals and the Collective

The IDEA was born out of the Civil Rights Movement and is essentially a civil rights bill for children who have disabilities that adversely impact their education.[55] Like advocates for racial equality, advocates for

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52. COLKER, *supra* note 2. For instance, Winkelman noted (1) that Congress's choice to allow parents these rights "was consistent with the purpose of IDEA and fully in accord with our social and legal traditions," (2) that the parent-child relationship "is sufficient to support a[n] . . . interest in the education of one's child," and, finally, (3) "Congress has found that 'the education of children with disabilities can be made more effective by . . . strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home.'" Winkelman *ex rel.* Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 535 (2007) (citation omitted).

53. 20 U.S.C. § 1400(d)(1)(A).

54. COLKER, *supra* note 2, at 33–35.

55. *Id.* at 20–26.

disability rights battled against segregation and fought for the promise of equal educational opportunity.[56]

But the IDEA is different from other civil rights legislation in a few critical ways. The law was enacted under the Spending Clause, promising states federal funding in return for their agreement to educate students with disabilities according to the law's terms and setting up a system in which states are reliant, in part, on federal funds to ensure compliance with these terms.[57] In addition, the Department of Education ("DOE") does not have the authority to investigate individual students' complaints under the IDEA. Rather, students with disabilities and their parents are tasked with ensuring schools live up to the IDEA's obligations by making use of the statute's due process protections.[58] In short, the law is privately, not publicly enforced.

The IDEA is entirely focused on the individual student and does not promise equal educational outcomes. Instead, it offers students with disabilities a substantive right to free appropriate public education ("FAPE"), measured using the individual child's current ability and their expected capacity for progress.[59] However, students highly individualized procedural and substantive rights[60] exist within a broader educational program. The IDEA prefers integration of students with disabilities in regular education classrooms, known as education in the least restrictive environment ("LRE"). Consequently, tension exists between what is best for the individual student and what can be provided by the general program.

1. FAPE Is Grounded in the Individual

One of the IDEA's core principles is that all children with disabilities are capable and should be held to appropriately high standards.[61] This principle is captured through the concept of FAPE. Every child who qualifies for services under the IDEA is guaranteed a FAPE delivered through special education and related services designed to meet the "unique needs of a child with a disability."[62] While the FAPE standard does not require schools to maximize a child's potential, it does require more than trivial progress

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56. *Id.*

57. 20 U.S.C. § 1412; Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 295 (2006).

58. 20 U.S.C. § 1415.

59. *Id.* § 1401(9); Winkelman *ex rel.* Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 523 (2007).

60. *See* Endrew F. *ex rel.* Joseph F. v. Douglas Cnty. Sch. Dist. 137 S. Ct. 988, 1001 (2017) (describing the rights conferred by the FAPE provision of the IDEA).

61. 20 U.S.C. § 1400(c)(5).

62. *Id.* § 1401(9), (29); *Endrew F.*, 137 S. Ct. at 992.

towards academic goals.[63] Moreover, the right to FAPE is conferred through a federal statute and thus, exists separately from any state constitutional or statutory duties surrounding public education.[64] Thus, the right to FAPE can confer a more meaningful substantive education than what is guaranteed for students without disabilities.[65]

FAPE is conferred through an Individualized Education Program ("IEP"). [66] The IEP is a document developed by a designated group of teachers, school officials, parents, and, where appropriate, the child in question, that describes a child's current academic and annual goals and the special education and supported services the child will receive to reach those goals.[67] It is "the centerpiece of the statute's education delivery system for disabled children . . . ." [68] Specificity and individualized data are key components of the IEP.[69] IEPs are governed by a detailed set of procedures which emphasize the need for data that both gauges a child's current level of performance and estimates achievable growth for the upcoming academic year.[70] The IEP team is then tasked with using this data as a baseline from which to write appropriately ambitious annual goals.[71]

For most children with disabilities, academic goals must be tied to the regular educational curriculum to ensure that students with disabilities have the special education and related supports needed to meet state

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63. *Endrew F.*, 137 S. Ct. at 1001 (citing Bd. of Educ. v. Rowley, 458 U.S. 176, 191 (1982)) ("[A] student offered an educational program providing merely more than *de minimis* progress . . . can hardly be said to have been offered an education at all . . . . [R]eceiving instruction that aims so low would be tantamount to sitting idly . . . awaiting the time when they were old enough to drop out." (quotations omitted)).

64. *Id.*; Fry v. Napoleon Cmty. Sch., 137 S. Ct. 743, 752 (2017) ("The IDEA offers federal funds to States in exchange for a commitment: to furnish a 'free appropriate public education'—more concisely known as a FAPE—to all children with certain physical or intellectual disabilities.").

65. For example, South Carolina's state constitution only provides the right to a "minimally adequate education." Abbeville Cnty. Sch. Dist. v. State, 515 S.E.2d 535, 540 (1999).

66. 20 U.S.C. §§ 1412(a)(4), 1414(d).

67. *Id.* § 1414(d)(1)(B).

68. Honig v. Doe, 484 U.S. 305, 311 (1988).

69. 20 U.S.C. § 1414(d).

70. For instance, every IEP must include "a statement of the child's present levels of academic achievement and functional performance," describe "how the child's disability affects the child's involvement and progress in the general education curriculum," and set out "measurable annual goals, including academic and functional goals," along with a "description of how the child's progress toward meeting" those goals will be gauged. *Id.* § 1414(d)(1)(A)(i)(I)–(III).

71. *Id.* § 1414(d)(1)(B).

educational standards for competence in basic subject areas.[72] For a minority of children for whom their disability greatly impacts cognitive functioning, grade level standards may not be appropriate.[73] In these circumstances, IEP teams must ensure "appropriately ambitious" goals.[74] Once goals are identified, the IEP team determines the nature and amount of special education and related services necessary to ensure advancement towards those goals and then determines placement.[75] Placement does not refer to a particular school, but rather the type of setting where a child will receive the special educational supports and services.[76] This leads directly into a discussion of the IDEA's second core principle, education in the "least restrictive environment."[77]

2. LRE Emphasizes the Collective

While FAPE is often thought of as the centerpiece of the IDEA's rights, equally important is the right to an education in the LRE. The IDEA was enacted in response to the exclusion of children with disabilities from regular educational settings.[78] From its inception, the law contained a mandate that students with disabilities be educated in the LRE, meaning that the law favors the integration of students with disabilities with their non-disabled peers.[79] Inclusion, or "mainstreaming," is an educational term that refers to the practice of placing students with disabilities in regular education classes with appropriate instructional support.[80] The LRE regulation specifically outlines that "special classes, separate schooling, or other removal of children with disabilities from the regular educational

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72. Endrew F. *ex rel.* Joseph F. v. Douglas Cnty. Sch. Dist. 137 S. Ct. 988, 999 (2017) ("Accordingly, for a child fully integrated in the regular classroom, an IEP typically should, as *Rowley* put it, be 'reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.'" (citing Bd. of Educ. v. Rowley, 458 U.S. 176, 191 (1982))).

73. Students with intellectual disabilities accounted for about 6% of the students who received special education services under the IDEA during the 2019–20 school year. *Students with Disabilities in Condition of Education*, NAT'L CTR. FOR EDUC. STATS. 1 (May 2021) [hereinafter *Students with Disabilities*], https://nces.ed.gov/programs/coe/indicator/cgg [https://perma.cc/T8XK-5P3E].

74. *Endrew F.*, 137 S. Ct. at 1000.

75. 20 U.S.C. § 1414(d)(1)(A)(i)(IV).

76. 34 C.F.R. § 300.116 ("Placements").

77. 20 U.S.C. § 1412.

78. The Education for All Handicapped Children Act is the precursor to what is now the IDEA, and it set forth the principle of inclusion. COLKER, *supra* note 2, at 6 ("In 1975, more than 1 million children with disabilities were excluded from public school; today, virtually no child with a disability is excluded from public school.").

79. *Id.* at 26.

80. Oberti *ex rel.* Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist., 995 F.2d 1204, 1207 (3d Cir. 1993).

environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."[81] In this way, the IDEA quite purposefully ties the fates of students with disabilities to the larger school program.

While inclusion is undoubtedly preferred, it is by no means mandatory. Instead, the IDEA allows for segregated settings when the regular education setting, with supplementary supports, is not beneficial.[82] As an extension of LRE, IDEA's regulations require states to commit to establishing a "continuum of alternative placements."[83] Essentially, school districts must offer a variety of placements to ensure every child the opportunity to be educated in the LRE, or in an environment similar to the regular education setting. Placement options range from instruction in the regular classroom with supportive services, pullout instruction to occur outside of the regular education classroom, separate classrooms within the same school, separate specialized schools, to residential treatment programs or hospitals.[84]

A tension exists between FAPE and LRE. FAPE must be determined within the context of LRE, meaning that what might be best for the child's educational progress must be balanced with what can be achieved in an inclusive setting. Emotional and social benefits must be considered along with academic progress.[85] These decisions can be particularly difficult when parents and school officials value academic and social benefits differently.[86] Take the example of an elementary school child with severe cognitive deficits who clearly cannot achieve on grade level with their peers. School-based members of the IEP team may want to remove the child to a more segregated environment for all core academic classes and only integrate the child during extracurricular activities. Parents, on the other hand, may value peer relationships and acceptance much more than

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81. 20 U.S.C. § 1412(a)(5).

82. *Id.*

83. 34 C.F.R. § 300.115(a). LRE requires states to ensure that each child with a disability is educated with children without disabilities "to the maximum extent appropriate." 20 U.S.C. § 1412(5). When a school district wants to place a child outside of the general education setting, it must ensure that the general education setting, with supports and services, is inappropriate, and be able to justify the need for removal from this setting with individualized data points. *Id.* § 1412(5)(A)–(B); *id.* § 1412; *id.* § 1414(a)(1)–(2).

84. *Id.* § 1414(e); 34 C.F.R. § 300.115(b).

85. Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048 (5th Cir. 1989) (involving a dispute over the segregated placement of a child with Down syndrome who received minimal academic benefits in the general education setting).

86. *Id.*

academic achievement and may prefer as much time as possible in the integrated settings.

Because the LRE mandate requires inclusion "to the maximum extent appropriate," the decision about what educational setting is most appropriate is ultimately a subjective judgement, and courts have vacillated on the strength of the inclusion presumption, with some scholars illustrating a slight weakening of the presumption over time.[87] When the strength of the LRE requirement was first being litigated, courts generally favored inclusive settings, if plaintiffs could demonstrate social benefits and were willing to sacrifice academic achievement for the value of socialization.[88] Recently, however, the pendulum has swung slightly in the other direction. Several circuits have upheld schools' recommendations of segregated settings, particularly when schools determine that inclusion is detrimental to the education of other students, or when there is conclusive evidence that an inclusionary placement will not be successful.[89]

Decisions regarding placement, where a child is to receive specialized instruction and other related services, are supposed to be made by the IEP team, which includes parents.[90] But placement is largely a function of what options are available along the continuum of alternative placements in any given school district.[91] School districts, and in some cases state legislatures, are in control of designing and structuring these placements.[92]

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87. Allan G. Osborne, Jr., *Is the Era of Judicially-Ordered Inclusion Over?*, 114 ED. L. REP. 1011, 1011 (1997).

88. *Id*. at 1014 ("In striking the balance between the benefits of placement in the mainstream and the need for specialized educational services, these courts approved a trade-off in favor of mainstreaming only when it was shown conclusively that the student would benefit from the social facets of mainstreaming.").

89. Hartmann *ex rel.* Hartmann v. Loudon, 118 F.3d 996, 999 (4th Cir. 1997); T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 575 (3d Cir. 2000) (holding that a school's placement of a child in a hybrid preschool program, involving a half-day preschool class composed of half disabled children and half non-disabled children, with afternoon placement in the school's resource room, satisfied FAPE); P. *ex rel*. Mr. & Mrs. P. v. Newington Bd. of Educ., 546 F.3d 111, 121 (2d Cir. 2008) (finding that a school satisfied LRE when it ensured a student would be in a regular classroom 74% of the time, where evidence produced during an administrative proceeding demonstrated that education in a regular classroom, with use of supplemental aids and services, could not be achieved satisfactorily).

90. 20 U.S.C. § 1414(e).

91. *T.R.*, 205 F.3d at 579 ("A district that does not operate a regular preschool program is not required to initiate one simply . . . to create a least restrictive environment (LRE) opportunity for a disabled child . . . . However, the school district is required to account [for] a continuum of possible alternative placement options when formulating an IEP.").

92. *See infra* Part II.A.3.

Overall education budgets, staffing, and at times, state laws, all impact what is offered along this continuum.[93] School districts determine whether to offer specialized instruction in the regular setting or pull the child out of the classroom for those services due to staffing constraints.[94] School districts also determine how many teachers, school psychologists, behavioral support staff, and other related service providers are full time at each school, and how many are itinerant, which impacts caseloads and availability of services.[95] School districts often pool resources and expertise to create programs that specialize in educating students with particular types of disabilities which allows districts to save money and build on expertise in certain programs.[96]

When school districts are well-funded and well-managed, they can structure this continuum of alternative placements to adequately meet the needs of a range of students with disabilities. But, when school districts are poorly funded or poorly managed, students with disabilities are less likely to have the same opportunities for integration.[97] Higher rates of segregation lead to poorer academic outcomes.[98] Consequently, a school's wealth will impact the particular placements it offers, which impacts its ability to ensure FAPE. Thus, no matter how much the law may value integration, the practical reality is that district resources limit opportunities for integration. Even more troubling, as this Article will demonstrate, is that the IDEA fails to offer meaningful remedies to assist those students who find themselves trapped in poorly functioning segregated educational programs.

B. The Intersections of Poverty, Disability, and Public Schools

Students with disabilities who attend high-poverty schools confront educational environments that are particularly poorly suited to meet their needs. First, schools serving predominantly low-income students operate on fewer dollars per pupil than other schools. As the Education Trust, a national nonprofit, finds, these schools on average receive $1,000 less per pupil than

93. SEGREGATION OF STUDENTS, *supra* note 32, at 24–25.
94. *Id.* at 25.
95. *Id.* at 34–36.
96. Letter to Trigg, 50 IDELR 48 (Nov. 30, 2007) ("Although IDEA does not require that each school building . . . be able to provide all the special education . . . for all types and severities of disabilities, the LEA has an obligation to make available . . . alternative placement options that maximize opportunities for its children with disabilities to be educated with nondisabled peers . . . .").
97. BROKEN PROMISES, *supra* note 30, at 41.
98. SEGREGATION OF STUDENTS, *supra* note 32, at 37–38.

schools serving relatively few low-income students.[99] Second, schools enrolling predominantly low-income students have greater needs than other students.[100] Poverty brings with it a host of external difficulties, including housing instability, health issues, and food shortages which can negatively impact education.[101] Students living in poverty also often have fewer resources at home to help support their learning. They may lack access to computers, internet, study aids, or simply quiet space in which to complete homework.[102] Studies and federal standards estimate that low-income students need at least 40% more school resources than their peers to receive an adequate education—and those estimates are even higher for students attending schools in concentrated poverty.[103]

This mismatch between school resources and student need translates into a funding gap in excess of $10,000 per pupil in many districts containing high-poverty schools.[104] The tangible effects of this funding gap are clear. Their classrooms tend to be more crowded, their facilities more dilapidated, and their offerings lower in quality. Staffing, however, may be their most serious challenge.

High-poverty school districts feel the effects of national teacher shortages more keenly and struggle to maintain qualified special education teachers.[105] One recent study indicates that 90% of high-poverty school districts struggle to staff qualified special education teachers.[106] High-poverty schools are also lacking in other professional staff like school psychologists, social workers, behavioral interventionists, and speech

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99. IVY MORGAN & ARY AMERIKANER, FUNDING GAPS: AN ANALYSIS OF SCHOOL FUNDING EQUITY ACROSS THE U.S. AND WITHIN EACH STATE 6 (Feb. 27, 2018), https://edtrust.org/resource/funding-gaps-2018/ [https://perma.cc/CR3S-6RDE].

100. *See id.* at 7 (estimating that it costs districts at least 40% more to educate student in poverty than those not in poverty).

101. James E. Ryan, *Poverty as Disability and the Future of Special Education Law*, 101 GEO. L.J 1455, 1459 (2013).

102. *Id.* at 1486.

103. THE EDUCATION TRUST, FUNDING GAPS 2006, at 6 (2006), https://edtrust.org/wp-content/uploads/2013/10/FundingGap2006.pdf [https://perma.cc/J6XD-C7AG].

104. BRUCE D. BAKER ET AL., THE REAL SHAME OF THE NATION: THE CAUSES AND CONSEQUENCES OF INTERSTATE INEQUITY IN PUBLIC SCHOOL INVESTMENTS, app. at 45–50, https://www.shankerinstitute.org/sites/default/files/The%20Real%20Shame%20of%20the%20Nation.pdf [https://perma.cc/L465-KDRB].

105. *See Why Is There a Special Education Teacher Shortage*, SCH. EDUC. BLOG (Jan. 12, 2021) [hereinafter *Special Education Teacher Shortage*], https://soeonline.american.edu/blog/special-education-teacher-shortage [https://perma.cc/2TZC-5D3G] ("While the special education teacher shortage affects schools across the spectrum, it tends to impact high-poverty schools most acutely.").

106. *Id.*

pathologists,[107] all of whom play crucial roles in the success of students with disabilities.[108] When schools are unable to retain qualified teachers and employ crucial professional staff, students suffer.[109]

Third, low-income students with disabilities face serious challenges in education regardless of where they attend school, but those challenges are dramatically amplified in high-poverty schools.[110] A National Longitudinal Study on high school students with disabilities found that while there has been overall improvement in educational outcomes for students with disabilities, most of the gains are due to improvements in outcomes of children from middle- and upper-income homes.[111] Gains for students with disabilities from low-income homes remained largely flat.[112] Professor Thomas Hehir, former director of the DOE's Office of Special Education Programs, theorized a compelling reason for the stagnation: factors that resulted in improvement for middle- and upper-income students were simply happening to a lesser degree for low-income students.[113] These factors include integration, access to challenging academic subjects, early intervention services, and improved training for general education teachers.[114] In fact, other data suggests that low-income students with disabilities are more likely to be placed in substantially separate classrooms and have less access to high quality teachers and challenging course work than middle-income students with disabilities, which supports Hehir's segregation thesis.[115]

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107. BROKEN PROMISES, *supra* note 30, at 36.

108. *Id.* at 13.

109. *See* Matthew Ronfeldt et al., *How Teacher Turnover Harms Student Achievement*, 50 AM. EDUC. RSCH. J. 4, 30–32 (2013); Gary T. Henry & Christopher Redding, *The Consequences of Leaving School Early: The Effects of Within-Year and End-of-Year Teacher Turnover*, 15 EDUC. FIN. & POL'Y 332, 343 (2020) (finding that losing a teacher during the school year is linked with losing between 32 to 72 instructional days).

110. *See* Hyman et al., *supra* note 19, at 110; *see also* Jennifer Rosen Valverde, *A Poor IDEA: Statute of Limitations Decisions Cement Second-Class Remedial Scheme for Low-Income Children with Disabilities in the Third Circuit*, 41 FORDHAM URB. L.J. 599, 612–15 (2013) (finding that poverty and disability double the challenges that students face).

111. LYNN NEWMAN ET AL., U.S. DEP'T OF EDUC., SECONDARY SCHOOL PROGRAMS AND PERFORMANCE OF STUDENTS WITH DISABILITIES 16 (2011), https://ies.ed.gov/ncser/pubs/20123000/pdf/20123000.pdf [https://perma.cc/6TBS-34L5].

112. *Id.*

113. Hehir, *supra* note 51, at 7.

114. *Id.* at 8.

115. Schifter et al., *supra* note 7, at 1 ("[A]cross all states, descriptively, students from low-income families had about twice or more than twice the identification rate with emotional disability or intellectual disability as compared to non-low-income children." With the exception of a few, "in nearly every case . . . of intellectual disability, students from low-income families had twice (or more) the rate of placement in substantially separate classrooms than non-low-income students.").

These challenges only increase in high-poverty schools. The specific programmatic changes that students with disabilities need—access to high-quality teachers, evidence-based reading programs, early intervention services, and the opportunity to learn in an inclusive setting with peers—are a heavier lift, in part, because they speak to deficiencies in the overall education program in these schools, not just the special education program. Thus, students with disabilities face two major educational challenges: those related to their individual disability and those related to their school's structural disadvantage. The IDEA becomes powerless because it cannot fix the first set of challenges without also fixing the second. But the statute itself, and courts' interpretation of it, whittle away its usefulness by stripping the law of its power to challenge the second.[116] While other scholars have illustrated the inequity inherent in the IDEA's private enforcement scheme,[117] this Article theorizes that the problem lies with the statute itself and the limits courts have read into it which, in turn, weaken the law's ability to beget meaningful programmatic change.

II. The IDEA's Weaknesses Exposed

The IDEA is often praised for its robust private enforcement scheme, but when analyzing the statute's ability to bring about meaningful change for students in high-poverty schools, these seemingly robust rights prove hollow. Both in the context of individuals and groups, the IDEA is rarely leveraged to produce meaningful remedies for students attending high-poverty schools.[118] Individual students in under-resourced and failing schools are unable to leverage the IDEA's core rights meant to guarantee meaningful process, substantive educational programs, and integrated learning environments. Each of these principles assumes a functioning educational system and are unable to remedy a broken one. Further, students are often blocked when they band together to access class-based programmatic relief in two ways. First, courts' misuse of the IDEA's exhaustion clause prevents systemic claims from moving forward. Second, advocates too often focus class-based litigation on procedural fixes and assume that guaranteeing meaningful process will translate to substantive quality—a false equivalency.

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116. *See infra* Part II.A.

117. *See supra* note 19.

118. Hyman et al., *supra* note 19, at 114 ("[R]elative to the number of due process filings, there is little IDEA litigation in federal courts . . . .").

A. The Ineffectiveness of Individual Remedies

The IDEA's core components—procedural rights, FAPE, and LRE—are all badly diminished when applied to resource-starved school systems. To function as intended, all three rights require sufficiently staffed, funded, and capable schools. The law makes assumptions about the collaborative nature of the IEP process, reliable baseline data, and the availability of sufficient resources to implement a variety of learning environments. But, as illustrated in this section, none of these assumptions hold true in high-poverty schools. Parents are often not seen as equal team members in a collaborative process and do not have the resources to effectively challenge schools' conclusions about their child. Further, the inability of underfunded schools to ensure competent teachers, professional staff, and a variety of effective learning environments impacts students' access to the IDEA's core components of FAPE and LRE. Courts, however, too often fail to scrutinize these inequities and instead automatically defer to schools' decisions no matter how flawed.

1. The Futility of Procedural Rights

The IDEA's procedural rights can be broken down into two categories: design rights (relevant to the IEP development phase) and demand rights (parents' rights to invoke a variety of actions to challenge schools' obligations under the law).[119] Design rights, related to the start of the special education process, include parents' right to notice and right to meaningful participation at meetings that involve their child's eligibility for special education services and the resulting IEP meant to convey those services.[120] Procedural rights at this stage also specify the "who" and "what" of IEP design—who must participate on the IEP team, what information that team must consider, and what information must be included in an IEP.[121] Later stages include demand rights that give parents the ability to request access to records, seek an independent evaluation of their child, or invoke a

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119. Jon Romberg, *The Means Justify the Ends: Structural Due Process in Special Education Law*, 48 HARV. J. ON LEGIS. 415, 446, 451 (2011) (outlining that procedural protections at the IEP formation stage include specific directives about the individuals who must be part of the IEP team (including parents), the types of data that must be considered and form the basis of the IEP, and the substance of the IEP itself).

120. 20 U.S.C. § 1415(b)(1); Deal v. Hamilton Cnty. Bd. of Educ., 392 F.3d 840, 857 (6th Cir. 2004) (finding a school's predetermination not to offer autistic student intensive applied behavioral analysis was a procedural violation of the IDEA and because predetermination of placement did not allow the student's parents to meaningfully participate in the IEP, causing substantive harm.); *see also* Romberg, *supra* note 119, at 449 (describing the goals of structural due process protections).

121. 20 U.S.C. § 1414(d)(1)–(3).

variety of procedural mechanisms to demand review of the school's compliance with the IDEA as it relates to their child.[122] Parents can request formal mediation, file a complaint to be investigated by the state's department of education, or request a due process hearing before an independent hearing officer appointed by the state's department of education.[123] They can also appeal unfavorable due process decisions to federal courts.[124] Due process complaints are the predominant choice for dispute resolution, but are more often invoked by wealthy parents than those with limited resources.[125]

Several researchers have highlighted the inequities low-income families face when attempting to invoke demand rights.[126] These include a lack of resources to hire lawyers and experts (both of which greatly increase the chance of success in a due process case), information asymmetries unique to low-income families, and limitations on the usefulness of prospective relief.[127] Less scrutinized, however, is the emptiness of design rights when applied to students in high-poverty schools.[128]

Design stage procedural protections are meant to ensure meaningful parent participation and the quality of the IEP itself, but they are dependent on a functioning and appropriately staffed educational system. Without that, simply ensuring who must participate in the IEP drafting process and what information must be considered, does nothing to ensure a collaborative decision-making process or an effective IEP.[129] Mandating parents' presence

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122. *Id.* § 1415(a)–(b).

123. *Id.* § 1415(e)–(f); 34 C.F.R. § 300.151 ("State Complaint Procedures").

124. *Id.* § 1415(i)(2).

125. CTR. APPROPRIATE DISP. RESOL. SPECIAL EDUC., IDEA DISPUTE RESOLUTION DATA SUMMARY FOR: U.S. AND OUTLYING AREAS 2008–09 TO 2018–19, at 5 (2021), https://www.cadreworks.org/sites/default/files/resources/National%20IDEA%20Dispute%20Resolution%20Data%20Summary%20201920%20%20Accessible%20FINAL_1.pdf [https://perma.cc/ST56-SPWJ] (containing chart of relative use of dispute resolution options).

126. Pasachoff, *supra* note 19; Hyman et al., *supra* note 19.

127. Hyman et al., *supra* note 19, at 121. The IDEA allows for equitable remedies including reimbursement for out-of-pocket expenses such as the cost of private tuition. It allows a court to order placement into a private school program if the public school has denied FAPE. The authors point out that this relief, while theoretically allowed, is rarely practically invoked because it would require a private school to hold a place open for the student while the student litigated the tuition payment. *Id.*

128. Romberg, *supra* note 119, at 420 (addressing the theoretical and functional role of due process in special education law, but without specific attention paid to low-income students).

129. 20 U.S.C. § 1414(d)(1)(A)(i)(I)–(III). The IDEA requires that every IEP include "a statement of the child's present levels of academic achievement and functional

at IEP meetings cannot guarantee that schools will take time to fully understand the complicated evaluation data about the child. Nor can it ensure that schools will sincerely consider parents' requests. Rather, research demonstrates that low-income parents have limited bargaining power throughout the IEP process. Without access to advocates, they are less able to serve as a check on schools' decisions.[130] In fact, several schools with large populations of non-native English speakers do not even ensure that translation or interpretation services are routinely available to families who need them. [131] Further, when parents attempt to invoke due process procedures to complain about being shut out of decision-making, they rarely win. [132] Parents who present evidence of short meeting times, [133] their incomplete understanding of evaluation data,[134] or their complete exclusion

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performance," describe "how the child's disability affects the child's involvement and progress in the general education curriculum," and set out "measurable annual goals, including academic and functional goals," along with a "description of how the child's progress toward meeting" those goals will be gauged. *Id.* § 1414(d)(1)(A)(i)(IV). The IEP must also describe the "special education and related services . . . that will be provided" so that the child may "advance appropriately toward attaining the annual goals" and, when possible, "be involved in and make progress in the general education curriculum." Endrew F. *ex rel.* Joseph F. v. Douglas Cnty. Sch. Dist. 137 S. Ct. 988, 994 (2017).

130. Pasachoff, *supra* note 19 (discussing information asymmetries that prevent low-income parents from effectively participating in the IEP process); David M. Engel, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 DUKE L.J. 166, 169 (arguing that the goal of the collaboration may have been thwarted, at least in part, because parents are unwilling to jeopardize relationships with their child's school by asserting their children's rights).

131. T.R. v. Sch. Dist. of Phila., 458 F. Supp. 3d 274, 282 (E.D. Pa. 2020); H.P. v. Bd. of Educ. of City of Chi., 385 F. Supp. 3d 623, 637 (N.D. Ill. 2019).

132. R.F. *ex rel.* E.F. v. Cecil Cnty. Pub. Sch., 919 F.3d 237, 249 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 156 (2019) (holding that school did not significantly impede parents' procedural rights to participate in decision making regarding their child's education when their child's placement was changed for four months without involving them). The court determined that participation in decision making regarding R.F.'s education was not "significantly impeded" when Cecil County Public Schools ("CCPS") changed R.F.'s placement without conferring with her parents. *Id.* at 249 (quoting 20 U.S.C. § 1415(f)(3)(E)(ii)(II)). In changing R.F.'s placement, CCPS provided her more special education services, not fewer, in the ICSC, consistent with her parents' objection that her IEP contained too many hours in the general education classroom. *Id.* at 248. Yet, the court held that CCPS did not significantly impede R.F.'s parents' participation rights when it failed to inform them that it was gradually changing R.F.'s placement in line with their expressed wishes. *Id.* at 249.

133. *R.F.*, 919 F.3d. at 242.

134. Colonial Sch. Dist. v. G.K. *ex rel.* A.K., 763 F. App'x 192, 192 (3d Cir. 2019) (finding parents of an elementary school student with autism and specific learning disabilities could not show that a Pennsylvania district excluded them from the IEP process by failing to ensure that they fully understood their son's IEP goals).

from meetings have not persuaded courts to find that schools violated their obligations to confer FAPE.[135]

Requiring the right people to be present at the meeting and specifying the type of data to be considered does not ensure sufficient quality of the people or the data. High-poverty schools struggle to attract and retain qualified teachers.[136] When teachers lack training and experience it is less likely they are delivering effective instruction.[137] For the vast majority of students with disabilities, most of their learning takes place in the regular education classrooms.[138] Data that the IEP team considers when assessing a child's current academic performance and when making predictions about their potential relies in large part on the quality of instruction delivered in that setting.[139] When instruction in regular education is ineffective, the picture about a child's current performance and future potential is tainted. In short, a child's lack of progress may be a reflection of poor educational instruction rather than the impact of a disability, but school-based members of the IEP team are not likely to admit or even consider such a perspective. Further, the limited resources of high-poverty schools result in fewer professional staff, like school psychologists. As a result, higher caseloads decrease the likelihood of providing quality assessments and evaluations from which to base decisions.[140]

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135. D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 565 (3d Cir. 2010) (holding that a school district did not violate the IDEA when it ignored parents' letters for months but included the parents in their child's IEP meeting because they eventually could participate in their child's IEP).

136. *Special Education Teacher Shortage*, *supra* note 105 ("While the special education teacher shortage affects schools across the spectrum, it tends to impact high-poverty schools most acutely.").

137. BROKEN PROMISES, *supra* note 30; *see also* Linda Darling-Hammond, *Teacher Quality and Student Achievement: A Review of State Policy Evidence*, 8 EDUC. POL'Y ANALYSIS ARCHIVES 1 (Jan. 1, 2000) (finding that policy investments in the quality of teachers may be related to improvements in student performance).

138. *Students with Disabilities in Condition of Education*, *supra* note 73, at 4 ("Ninety-five percent of students ages 6–21 served under IDEA in fall 2019 were enrolled in regular schools . . . the percentage who spent most of the school day . . . in general classes in regular schools increased from 59 percent in fall 2009 to 65 percent in fall 2019.").

139. LINDA P. BLANTON ET AL., NAT'L CTR. FOR LEARNING DISABILITIES, PREPARING GENERAL EDUCATION TEACHERS TO IMPROVE OUTCOMES FOR STUDENTS WITH DISABILITIES 16 (2011), https://www.ncld.org/wp-content/uploads/2014/11/aacte_ncld_recommendation.pdf [https://perma.cc/EMC6-5695].

140. NAT'L ASS'N OF SCH. PSYCHS., SHORTAGES IN SCHOOL PSYCHOLOGY: CHALLENGES TO MEETING THE GROWING NEEDS OF U.S. STUDENTS AND SCHOOLS 1 (2021) (recommending "a ratio of no more than 500 students per school psychologist when more comprehensive and preventive services are being provided . . . . The ratio of students per school psychologist was estimated to be 1,211 to 1 in the United States in the 2019–2020 school year").

Consequently, for most parents, design stage procedural protections only guarantee certain people will be present at an IEP meeting. They do not ensure unbiased or objective views on any of the data presented. Parents, without some level of independent expertise about educational assessments, are unable to effectively challenge schools' decisions about their child's performance, projected progress, the effectiveness of educational instruction, or recommendations about the specialized instruction needed. Meaningful leverage at the design stage would require the ability to challenge the school's conclusions with an expert who could argue that their child was capable of more or needed something different than what the school proposes. However, because few low-income parents have the resources to hire outside experts, they often must wait until the IEP is implemented and their child fails to have the evidence needed to challenge the school's program.[141]

Critics may argue that parents can still challenge an ineffective IEP by demonstrating a child's inability to meet the goals contained therein. While true, there are at least two problems with this remedy. First, it puts parents in the position of having to wait for their child to fail before gaining enough leverage to compel change in their child's services.[142] Second, because of the Supreme Court's exaltation of procedure, many lower courts defer to schools' decision-making regarding substance when schools demonstrate their adherence to process. Stated differently, courts fail to adequately scrutinize the substantive educational program. This second point is explored in the following section by analyzing how the IDEA's substantive promise of FAPE is significantly diminished for students with disabilities in high-poverty schools.

2. A Diminished Right to FAPE

Students with disabilities' right to a substantively adequate educational program is encased in the IDEA's concept of FAPE. The Supreme Court first had occasion to scrutinize the FAPE standard in its seminal case, *Board of Hendrick Hudson v. Rowley*.[143] There, the Court contrasted the IDEA's "elaborate and highly specific procedural safeguards" with its "general and somewhat imprecise" substantive requirement concluding that, "the importance Congress attached to these procedural safeguards cannot be

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141. Hyman et al., *supra* note 19, at 113 (describing the shortage of special education lawyers).

142. Pasachoff, *supra* note 19, at 1436 (describing how informational asymmetries and a lack of lawyers lead to less bargaining power for low-income parents).

143. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 180–85 (1982).

gainsaid."[144] With this framing in mind, the Supreme Court instructed lower courts to apply a two-part test when reviewing the sufficiency of an IEP asking: First, has the school complied with the procedures of the IDEA? Second, was the IEP reasonably calculated to confer educational benefits?[145] Ultimately, the Court emphasized procedure and concluded that "adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." [146] In short, *Rowley* stood for the proposition that scrupulous attention to procedures would help guarantee the IDEA's more opaque promise to confer a substantively appropriate education.

Then, in 2004 Congress amended the IDEA to both clarify and limit when procedural violations could rise to the level of remediable harms.[147] It instructed hearing officers to base their determinations on substantive rather than procedural grounds, unless the procedural violation resulted in a denial of FAPE.[148] Lower courts began diminishing the effects of procedural violations, holding that even where a school had violated a procedural right, parents were not entitled to remedies unless they could link that violation to substantive harm.[149]

More than thirty years after *Rowley*, the Supreme Court revisited the FAPE standard in *Endrew F. v. Douglas County School District*, focusing on the second part of the test and looking at the substantive requirement of FAPE.[150] The Court held that schools meet their obligation to confer FAPE when they reasonably calculate an IEP to "enable a child to make progress appropriate in light of the child's circumstances."[151] For a child fully integrated in the regular classroom, an appropriate IEP should enable them to "achieve passing marks and advance from grade to grade." [152] When a child is not capable of grade level achievement, the IEP must be "appropriately ambitious in light of [their] circumstances."[153] Notably, *Endrew F.* did not

144. *Id*. at 205.
145. *Id.* at 206–07.
146. *Id.* at 205–06.
147. 20 U.S.C. § 1415(f)(3)(E)(ii).
148. *Id.*
149. *See, e.g.*, Urban *ex rel.* Urban v. Jefferson Cnty. Sch. Dist. R-1, 89 F.3d 720, 727 (10th Cir. 1996) ("Because the District's procedural violation did not amount to a substantive deprivation . . . there was no violation of [the student's] right to an appropriate education. In the absence of a violation of his right to an appropriate education, [he] is not entitled to compensatory education.").
150. Endrew F. *ex rel.* Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988, 999 (2017).
151. *Id.* at 998–99.
152. *Id.* at 999–1000 (citation omitted).
153. *Id.* at 1000.

overrule *Rowley* and thus, the Court's steadfast faith in the value of the IDEA's procedural protections remains.[154]

For students in broken school systems, the foundational principle of FAPE is compromised in three ways. First, courts fail to recognize the futility of process (as described above) and continue to adhere to precedent which commands uncompromising deference to schools' decision-making. Stated differently, some courts continue to place more value on the first part of the *Rowley* standard—whether the IEP was reasonably calculated. When schools can demonstrate compliance with process, courts fail to adequately scrutinize the second question—whether the IEP delivered substantively appropriate education.[155] Second, the metric used to measure "appropriate" education, grade level performance, is itself flawed because high-poverty schools struggle to ensure basic grade level competency overall. Thus, courts turn to *Endrew F.'s* more amorphous instruction to look for "appropriately ambitious" goals. [156] Once an objective standard is lost, students with disabilities struggle to convince courts that they are capable of something more than what a school has ordained as "appropriate." Third, courts consistently find that instructional programs are entirely within the control of schools. Consequently, there is little parents can do to improve the quality of instruction in a high-poverty school, even when that instruction is clearly inadequate.

a. Courts' Misplaced Reliance on Process

The Supreme Court's exaltation of process has caused many lower courts to narrow their inquiry when reviewing FAPE challenges.[157] Several circuits refuse to examine educational outcomes after an IEP is in place, instead indicating that the only relevant evidence is the information that was before the IEP team at the time it developed the IEP.[158] Stated differently, in certain circuits, evidence relating to whether the child succeeded or failed

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154. Distinguishing *Rowley* on the basis that it "had no need to provide concrete guidance with respect to a child who is not fully integrated in the regular classroom and not able to achieve on grade level." *Id.*

155. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206–07 (1982).

156. *Id.*

157. *See, e.g.*, L.H. v. Hamilton Cnty. Dep't of Educ., 900 F.3d 779, 790–91 (6th Cir. 2018) ("If the procedural requirements are satisfied, the court grants greater deference to the State ALJ's determinations on the second step, the substantive analysis.").

158. Dennis Fan, Note, *No Idea What the Future Holds: The Retrospective Evidence Dilemma*, 114 COLUM. L. REV. 1503, 1505 (2014) ("Courts in many jurisdictions refuse to consider evidence of any later educational benefit the student *actually* received when determining whether the school district provided a FAPE via the IEP.").

under the IEP is irrelevant to determining the sufficiency of an IEP. Courts that restrict evidence to the time the IEP was written reason that actual progress or regression following the IEP is not "legally relevant" to the question of whether an IEP "was calculated to confer some educational benefit."[159] Thus, for parents in these particular circuits, challenging the effectiveness of an IEP without access to experts who can challenge school psychologists' conclusions about their child's potential is an all but impossible task. Further, because courts only look to whether the IEP was "reasonable" and not ideal, schools are often unaccountable for poor decisions made at the design stage.[160]

The problem with fixating on process as a measure of adequacy becomes even more evident when the substantive program itself is deficient. An IEP can be both procedurally adequate and reasonably calculated, but entirely ineffective. For instance, if a school lacks quality teachers or simply does not have access to the training or other specialized supports children with disabilities require, a perfectly written IEP is meaningless because it cannot be successfully implemented. A well-written IEP will not address the fact that untrained or poorly trained teachers will be limited in their ability to effectively advance the knowledge of their pupils. Likewise, chaotic and understaffed classrooms and ineffective methodology will inhibit learning. All of these represent programmatic challenges that contribute to a denial of FAPE but have nothing to do with whether or not an IEP was reasonably designed according to procedure.

Even where parents have resources to secure experts, they struggle to overcome courts' deference to schools' judgements. Essentially, plaintiffs must prove that a child's failure to meet annual academic goals is the fault of the school's instructional program and not due to the child or their disability. For example, in a case before the Third Circuit, parents of a child with ADHD and undiagnosed dyslexia alleged the school district denied FAPE when their daughter demonstrated minimal reading progress after four years of special

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159. Carlisle Area Sch. v. Scott P. *ex rel.* Bess P., 62 F.3d 520, 534 (3d Cir. 1995) ("In any event, appropriateness is judged prospectively so that any lack of progress under a particular IEP, assuming arguendo that there was no progress, does not render that IEP inappropriate."); *see also* Fuhrmann *ex rel.* Fuhrmann v. E. Hanover Bd. of Educ., 993 F.2d 1031, 1039–40 (3d Cir. 1993) ("*Rowley* requires, at the time the initial evaluation is undertaken, an IEP need only be '*reasonably calculated* to enable the child to receive educational benefits.'").

160. Endrew F. *ex rel.* Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988, 999 (2017). "The 'reasonably calculated' qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials . . . any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal." *Id.* at 991–92.

education services.[161] This case involved parents who, over a three-year period, consistently advocated with the school in an effort to obtain better outcomes for their daughter before invoking due process rights.[162] The Third Circuit upheld the district court's ruling on behalf of the school, finding no denial of FAPE despite the child's admittedly slow progress.[163] The court sided with the school in large part because of evidence indicating frequent meetings with the parents and updates to the IEP. The parents' expert, a neuropsychologist, testified that their child's poor achievement demonstrated that she was not benefiting from the school's instruction and evidenced the school's "global disregard for this level of impairment."[164] However, the court declined to credit this testimony, and instead deferred to the school, stating "we may not rely on hindsight to second-guess an educational program that was reasonable at the time."[165]

Setting aside the question of whether the evidence actually demonstrated that the school's program was adequate, what is striking here is the court's dogged determination to credit the school for its continued willingness to engage with the parents, and the court's unwillingness to question the root of the parents' concerns—the quality of the school's educational program. Whether the school meets its obligation to confer FAPE turns on what is reasonable progress for this particular child given the effects of her disability (here dyslexia and ADHD).[166] The parents found at least one expert who determined that their daughter was capable of making more progress—of learning to read past a first grade level with the right instruction and support.[167] But one expert was not enough to overcome the deference afforded to schools who met the procedural requirements of the IDEA—even where it was the parents and not the school who were pushing for improvements to their child's IEP, as was the case here.[168] This distinction matters because the obligation to confer FAPE rests with the school, not with parents. Thus, it was arguably parent pressure, not the FAPE obligation, that

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161. K.D. *ex rel.* Dunn v. Downingtown Area Sch. Dist., 904 F.3d 248, 253 (3d Cir. 2018) (noting that when entering her third-grade year, the student was reading on a first-grade level).

162. *Id.* at 252.

163. *Id.* at 253 ("He found that Downingtown remained aware of K.D.'s slow progress and kept trying to improve her programming in response to K.D.'s performance and Dr. Kelly's report . . . Downingtown 'did not simply hand out the same IEP year after year,' but repeated foundational skills where needed . . . .").

164. *Id.* at 252.

165. *Id.* at 255.

166. *Id.* at 251.

167. *Id.* at 252.

168. *Id.* at 252–53.

caused the school to revise the IEP.[169] But the Third Circuit did not review the case with that in mind. This is not to suggest that schools can never be held accountable for their failures to ensure progress, but it does illustrate the steep hill parents must climb to overcome the deference afforded to schools who meet procedural requirements of the IDEA.[170]

This general problem is even worse for students in high-poverty schools. Where a school can demonstrate that they are meeting procedural requirements of the IDEA, courts will all too quickly lay the blame for slow progress on children themselves, rather than attribute it to the instructional program.[171] Even when schools have terrible instructional programs, it can be difficult for students to attribute these failings to the school rather than their disability, particularly without the aid of an expert and where courts are unwilling to scrutinize the outcomes of an IEP.[172] As long as schools continue to offer special education services, engage in timely reviews and updates of a child's IEP, and can demonstrate the child made some sort of progress, a reviewing court will likely find that they have met the IDEA's FAPE requirement. Thus, for the students whose families do not have the resources to hire experts, or front the cost of private tuition and sue for reimbursement, the IDEA holds little promise to remedy failing educational programs.

Even when courts move past procedural deference to examine whether a program was substantively sufficient to confer FAPE, students in high-poverty schools are at a disadvantage. As discussed below, the FAPE standard itself depends on a healthy educational program, and without it, the standard is fatally flawed.

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169. *Id.* at 256 ("After K.D.'s parents notified Downingtown of Dr. Kelly's evaluation and recommendations, Downingtown responded within a week. It scheduled a meeting, sought more assessments, and offered a one-on-one aide. And it developed a fourth IEP, which incorporated many of Dr. Kelly's recommendations, including adopting a new reading program.").

170. *See, e.g.*, D.C. v. Klein Indep. Sch. Dist., No. 20-20339, 2021 WL 2492842, at *3 (5th Cir. June 17, 2021) (upholding a hearing officer's decision ordering the school district to modify their reading instruction program and provide compensatory education).

171. Johnson v. Bos. Pub. Schs., 906 F.3d 182, 195–96 (1st Cir. 2018) ("To the extent that Johnson implies that 'slow' progress is, in and of itself, insufficient to constitute a 'meaningful educational benefit,' we cannot agree. Instead, the relationship between speed of advancement and the educational benefit must be viewed in light of a child's individual circumstances.").

172. Endrew F. *ex rel.* Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 290 F. Supp. 3d 1175, 1179 (D. Colo. 2018) ("[A]t the end of his fourth grade year, Petitioner's parents . . . enroll[ed] Petitioner at . . . a private school that specializes in the education of children with autism. It is undisputed that Petitioner has been able to access education [there] where he is making academic, social and behavioral progress.").

b. The Limits of FAPE's Substantive Standard

In *Endrew F.*, the Supreme Court confirmed that FAPE was meant to provide a substantive standard of education to students with disabilities.[173] The Court declined to create a bright-line rule, and instead tied the standard to an individual student's capacity. When a child is capable of learning on grade level and fully integrated into the regular classroom, the Court concluded said that a legally sufficient IEP would enable the child to progress through the regular curriculum.[174] When a child is not capable of grade level progress, their goals must be "appropriately ambitious" in light of their individual circumstances.[175] But, in some high-poverty schools, virtually no children are meeting grade level standards.[176] Thus, in these schools the more amorphous guideline requiring "appropriately ambitious goals" takes hold and opens the door to lower academic standards.

The DOE's guidance instructs schools to ensure IEPs have annual goals that are "sufficiently ambitious to help close the gap" between the child's current progress and grade level achievements.[177] Yet, in some public high schools, less than half of students are passing state standardized reading and math tests.[178] Essentially, the FAPE standard assumes high-functioning,

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173. Endrew F. *ex rel.* Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988, 995 (2017) ("[T]he Court nonetheless made clear that the Act guarantees a substantively adequate program of education to all eligible children.").

174. *Id*. at 999 (citing *Rowley*, 485 U.S. at 203–04 ("[R]easonably calculated to enable the child to achieve passing marks and advance from grade to grade")).

175. *Id.* at 1000.

176. *The Conditions of Education: Reading Performance*, NAT'L CTR. FOR EDUC. STATS. (2019), https://nces.ed.gov/programs/coe/pdf/coe_cnb.pdf [https://perma.cc/A4DX-XQUW] (reporting that the average reading score for 8th-grade students in high-poverty schools was lower than the scores for 8th grade students in low- and mid-low poverty schools); *see also* Class Action Complaint ¶¶ 7–8, Gary B. v. Snyder, No. 16-CV-13292, 2016 WL 4775474 (E.D. Mich. Sept. 13, 2016) (identifying that the plaintiffs, Detroit schoolchildren, regularly show little to no proficiency across all subject areas).

177. *Dear Colleague Letter: FAPE Guidance, Director Office of Special Education and Rehabilitative Services* 1, U.S. DEP'T OF EDUC. (Nov. 16, 2015), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/guidance-on-fape-11-17-2015.pdf [https://perma.cc/PMQ8-DPQ4] (clarifying that in order to ensure that children with disabilities have meaningful access to a State's academic content standards and are held to high expectations, an IEP must align with the state's academic standard depending on the child's grade).

178. SC School Report Card, Allendale County Schools, 2020-2021, https://screportcards.ed.sc.gov/overview/?q=eT0yMDIxJnQ9RCZzaWQ9MDMwMTAwNA [https://perma.cc/Q3J8-PFFZ] (reporting a 29.9% pass rate for English One end of year course assessment and 17.2% pass rate on Algebra One end of year course assessment); *see also* Class Action Complaint ¶¶ 6, 91–92, Gary B. v. Snyder, No. 16-CV-13292, 2016 WL 4775474 (E.D. Mich. Sept. 13, 2016) (finding that among certain high-poverty Detroit

well-funded schools, where inclusion is offered and most regular education students are meeting grade level standards. In that setting, a student with a disability struggling to keep up with grade level achievement may be able to hold a school accountable for more, different, or better special education services.[179] But, in high-poverty schools with diminished levels of grade level achievement, students with disabilities are unable to leverage grade level standards for improved outcomes. In short, rather than raising the bar, the FAPE standard aligns with a lowered standard reflecting the depressed level of achievement in these schools.

When a child is not learning at grade level or not fully integrated into the regular classroom, determining the appropriate academic achievement becomes more muddled.[180] In this scenario, a school meets its FAPE obligation when it designs an IEP that is "appropriately ambitious" in light of the child's circumstances.[181] Yet, determining what is "appropriately ambitious" for a child is subjective. While schools should certainly rely on data gathered from the child's performance on tests, teacher observations, and other cognitive and achievement testing, there are limits to what that data can accurately reveal.[182] And when a child is trapped in a low-functioning school system, none of that data can accurately show whether a child's poor performance is due solely to their disability or rather to a low-quality instructional program.[183] In short, when schools can demonstrate procedural compliance, a child's poor performance is more likely to be attributed to their internal failings (disability and lack of motivation) rather than external factors (unqualified teachers and ineffective instruction). Moreover, as described below, if parents attempt to challenge the instructional program itself, their efforts are largely stymied by courts' ferocious deference to schools' judgements regarding educational methodology.

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school districts, "only 4.2% of third grade students scored proficient or above on the State of Michigan's 2015-2016 English assessment test").

179. BROKEN PROMISES, *supra* note 30.

180. *Endrew F.*, 137 S. Ct. at 992.

181. *Id.*

182. Ryan, *supra* note 101, at 1484; *see also* Torin D. Togut & Jennifer E. Nix, *The Helter Skelter World of IDEA Eligibility for Specific Learning Disability: The Clash of Response-to-Intervention and Child Find Requirements*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 568, 572 (2012) (critiquing the severe discrepancy model for identifying learning disabilities for producing inconsistencies across states and suggesting a different model is necessary to introduce more stability and consistency).

183. Ryan, *supra* note 101, at 1484.

c. Schools' Supremacy over Instructional Programs

The final reason why students in high-poverty schools are unable to ensure substantively appropriate education is rooted in courts' unyielding deference to schools' decisions about educational instruction. An individual student's access to FAPE often rests in large part on the effectiveness of a school's chosen methodology, yet the individual student has little ability to demand that a certain program or approach be a part of the school's academic offerings. Courts are exceedingly deferential to schools as experts in determining matters of educational policy.[184] Thus, parents' preference for a specific methodology does not obligate a school district to employ it.[185] Moreover, schools are not required to choose programs that maximize a child's chance of success or even guarantee progress.[186] Practically speaking, parents are at the mercy of a school's chosen educational program and have little leverage within the IDEA to demand something different, even when experience demonstrates that certain methods work well for their child.[187] At best, once a child has failed under the school's chosen program, parents may be able to leverage the IDEA to get compensatory education or tuition

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184. The absence of a bright-line rule "should not be mistaken for an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review. At the same time, deference is based on the application of expertise and the exercise of judgment by school authorities. *Endrew F.*, 137 S. Ct. at 1001.

185. A.S. *ex rel.* S. v. N.Y.C. Dep't of Educ., 573 F. App'x 63, 66 (2d Cir. 2014) (ruling that while the parents preferred for their child to attend an ABA-based program, the student could also receive an educational benefit from the district's use of the TEACCH methodology); Carlson v. San Diego Unified Sch. Dist., 54 IDELR 213 (9th Cir. 2010) (noting that a parent's disagreement with the district's educational methodology was insufficient to establish an IDEA violation); Lachman v. Ill. State Bd. of Educ., 852 F.2d 290, 297 (7th Cir. 1988), *cert. denied*, 488 U.S. 925 (1988) (holding that parents do not have a right to compel a school district to provide a specific program or employ a specific methodology in providing for the education of a student with a disability); Matthews v. Douglas Cnty. Sch. Dist. RE 1, 73 IDELR 42 (D. Colo. 2018) (holding that a district did not violate the IDEA when it used the Wilson Reading System to provide instruction to a high schooler with dyslexia and other disabilities since some educational methodologies share the same core instructional approach).

186. Shakopee Indep. Sch. Dist., 52 IDELR 210 (Minn. SEA 2009) (finding that neither the IDEA nor its implementing regulations require an IEP to include a specific methodology or one that would maximize the student's abilities).

187. M.M. ex rel. C.M. v. Sch. Bd. of Miami-Dade Cty., Fla., 437 F.3d 1085, 1102 (11th Cir. 2006) (ruling that although the parents argued that auditory-verbal therapy was the best methodology for the student, the district is only required to provide an appropriate methodology).

reimbursement should they leave the public school setting for a private setting with more effective instruction.[188]

A brief hypothetical helps illustrate the programmatic constraints parents bump up against with methodology. "Specific Learning Disability" is by far the largest category within the IDEA, representing about 30% (almost 2.2 million) of students who receive services under the law.[189] Children with certain learning disabilities, including dyslexia, may struggle to grasp foundational building blocks of matching sounds to letters, known as phonemic awareness—an essential step in learning how to read.[190] A child with an identified deficit in this area will need specialized instruction to help them acquire basic reading skills and there is no shortage of reading programs to choose from. [191] The Orton Gillingham ("OG") method, a multi-sensory approach to teaching reading and spelling, is a well-known and highly effective program for students with dyslexia, in part because of its focus on phonemic awareness.[192] Yet, even where a parent has evidence that OG has worked for their child, a school district is under no obligation to implement it, or even find something similar. Rather, the school district can choose to implement whatever reading program or specialized instruction they prefer.

Critics may argue that schools should absolutely have the right to determine educational instruction and that giving parents the ability to demand different methodology is costly, unworkable, and inefficient. As a starting premise, the choice of instructional program, training provided to teachers, and delivery of that instruction are decisions rightfully left up to school officials. But that deference should not be a license to violate the IDEA's FAPE requirement. Yet, when courts afford schools unwavering

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188. 20 U.S.C. § 1412(a)(10)(C); Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 247 (2009) ("IDEA authorizes reimbursement for the cost of private special-education services when a school district fails to provide a FAPE and the private-school placement is appropriate, regardless of whether the child previously received special education or related services through the public school."); *see also* Endrew F. *ex rel.* Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 290 F. Supp. 3d 1175, 1179 (D. Colo. 2018) ("In May of 2010 . . . Petitioner's parents decided to withdraw him from Summit View and enroll Petitioner at the Firefly Autism House, a private school that specializes in the education of children with autism [where Petitioner] is making academic, social and behavioral progress.").

189. *Students with Disabilities*, *supra* note 73.

190. *What Is Dyslexia?*, UNDERSTOOD.ORG, https://www.understood.org/articles/en/whatisdyslexia?_sp=b08b2a4316a140f08976ad40364e56a0.1627989366681#Snapshot:_What_dyslexia_is [https://perma.cc/SUY2-5CA3].

191. *Id.*

192. NAT'L READING PANEL, TEACHING CHILDREN TO READ: AN EVIDENCE-BASED ASSESSMENT OF THE SCIENTIFIC RESEARCH LITERATURE ON READING AND ITS IMPLICATIONS FOR READING INSTRUCTION 2–119, app. F (2000).

deference in their choice of methodology, they do just that. Parents are left to fight for individualized fixes in an overall methodology that is not well suited to deliver FAPE for their child.

Returning to the hypothetical, to secure OG services, parents would either need to convince the school-based members of the IEP team that the OG method was necessary at the design stage of their child's IEP, or if that failed, invoke due process. In either scenario, parents likely need to enlist an expert willing to attest to the need for OG to counter the school's perceived expertise.[193] Further, should parents attempt to invoke due process, courts' unwillingness to engage in "Monday morning quarterbacking" of schools' IEP design leaves parents with little ammunition to challenge a school's chosen methodology.[194] Accordingly, parents' only recourse is to wait for the child to fail under the school's methodology and then allege a denial of FAPE. Even in this latter scenario, the likely remedy is reimbursement for an individualized OG tutoring program rather than implementation of OG for the entire school system.[195]

By force of circumstance, children who attend underfunded and under-resourced schools are likely to encounter low-quality instructional programs and the IDEA offers little hope to remedy their fate. By placing methodology entirely within a school's control, parents are unable to leverage the IDEA's FAPE requirement to advocate for better instructional programs, even when the school's existing program has failed.

3. Shortcomings of LRE

While the LRE mandate clearly directs schools to preference education in the regular education setting, it also allows for a continuum of alternative placements in anticipation of the fact that this setting will not be appropriate for all children.[196] School districts, and sometimes states, control these points along the continuum, and the IDEA allows for consolidation of

193. Endrew F. *ex rel.* Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988, 1001 (2017) ("This absence of a bright-line rule, however, should not be mistaken for an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.") (citing Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley, 458 U.S. 176 (1982)).

194. Fuhrmann *ex rel.* Fuhrmann v. E. Hanover Bd. of Educ., 993 F.2d 1031, 1040 (3d Cir. 1993) ("Neither the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement.").

195. *See infra* Part II.B.1.

196. 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.115.

services.[197] It should come as no surprise that schools with limited resources have diminished ability to design and implement a variety of options on the continuum.[198] Schools with limited resources instead look for efficiencies, which often leads to centralizing programs. Thus, students attending high-poverty schools have fewer options along the continuum for quality placements and are more likely to wind up in segregated programs.[199] Once in these segregated settings, students have little ability to leverage the IDEA to get themselves out of ill-suited programs.

An example of the LRE trap is Georgia's statewide system of segregated specialized schools, known as the Georgia Network for Education and Therapeutic Support ("GNETS") Program.[200] The program was originally limited to students in the IDEA category of Emotional Disturbance, but it has since been extended to include any student with a disability unable to succeed in the traditional classroom because of their behavior.[201] Despite founded accusations of mismanagement, poor educational outcomes, and

197. Osborne, *supra* note 87, at 1012 ("In the overwhelming majority of lawsuits in which a parent contests a placement in a school other than the neighborhood school, the courts have found that the student's IEP required the centralized placement."); *see also* Barnett *ex rel.* Barnett v. Fairfax Cnty. Sch. Bd., 927 F.2d 146, 152 (4th Cir. 1991) (upholding the placement of a hearing-impaired high school student at a centralized program, even though the placement was not at his neighborhood school).

198. SEGREGATION OF STUDENTS, *supra* note 32, at 35–36.

199. Schifter, *supra* note 7, at 4 (finding that low-income students with disabilities were more likely to be placed in substantially separate classrooms than their non-low-income peers).

200. GA. COMP. R. & REGS. § 160-4-7-.15; Letter from Vanita Gupta, U.S. Dep't of Justice, C.R. Div., to The Honorable Nathan Deal, Governor (July 15, 2015) [hereinafter DOJ Findings Letter], https://www.ada.gov/olmstead/documents/gnets_lof.pdf [https://perma.cc/E5TY-LGML] ("Today, the GNETS Program consists of a network of 24 regions operated by the State, which serve approximately 5,000 students at any given time, all of whom have behavior-related disabilities.").

201. GNETS includes "students [with disabilities] who exhibit intense social, emotional and/or behavioral challenges with a severity, frequency or duration such that the provision of education and related services in the general education environment has not enabled him or her to benefit educationally based on the IEP. GA. COMP. R. & REGS. § 160-4-7-15(2)(a); *see also* Rachel Aviv, *Georgia's Separate and Unequal Education System*, NEW YORKER (Sept. 24, 2018), https://www.newyorker.com/magazine/2018/10/01/georgias-separate-and-unequal-special-education-system [https://perma.cc/DCB3-YCM4] ("GNETS was created as a single educational center . . . to provide therapeutic and educational support for students with emotional or behavioral health needs . . . Georgia expanded the program to create a network of "psycho-educational centers" throughout the state.").

even abuse, the program continues to exist and serve as a placement for children with emotional or behavioral challenges.[202]

By consolidating behavioral health supports into specialized schools, Georgia has created a program that is easy to enter and difficult to leave. Teachers refer children to the GNETS program if they determine a student's behavioral needs cannot be met in the regular school setting.[203] Of course, one reason the child's needs cannot be addressed in the regular education setting is because Georgia consolidated behavioral supports into the GNETS program. Thus, the child is not receiving supportive services that would allow them to be successful in a regular education classroom.[204] Once an individual child becomes part of the GNETS, they must meet exit criteria based on the behaviors that necessitated their placement to leave the program. [205] A DOJ investigation found "not only that the exit criteria developed for most students were vague or boilerplate, but also that exit criteria often contained higher standards of behavior than would be expected of students in general education schools, effectively rendering students with behavior-related disabilities 'stuck' in segregated GNETS programs."[206]

As is true for many segregated settings for students with disabilities, GNETS's academic programming is woefully inadequate. A 2015 DOJ investigation found that students generally do not receive grade level instruction and, in fact, that in some facilities, students are exclusively taught by computer based credit-recovery programs. [207] Further, many GNETS

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202. Timothy Pratt, *The Separate, Unequal Education of Students with Special Needs: Georgia's System to Teach Children with Disabilities Falls Vastly Short of Its Promise*, THE ATLANTIC (Mar. 21, 2017), https://www.theatlantic.com/education/archive/2017/03/the-separate-unequal-education-of-students-with-special-needs/520140/ [https://perma.cc/XN7Q-EAL9].

203. DOJ Findings Letter, *supra* note 200 ("A number of parents reported, and our review of records indicated, that their children were often immediately referred to the GNETS Program after one incident or several interrelated incidents associated with a single event or problem, such as using inappropriate language with a teacher on more than one occasion.").

204. *Id.* ("The State's support and development of GNETS has effectively created one placement option for many students with behavior-related disabilities to the exclusion of all others. This structure limits the State-funded resources available to meet the needs of children with disabilities for mental health and behavior-related educational services.").

205. *Id.* at 10.

206. *Id.*

207. *Id.* at 17 ("According to our experts, many of the computer-based instructional programs used in GNETS programs are 'credit recovery programs,' designed to . . . allow[] students to make up course credits after missing classes . . . . We visited two GNETS Centers where the students received all . . . academic instruction by computer using credit recovery programs.").

students are denied access to electives and extracurricular activities and attend school in inferior facilities lacking core features of other schools, such as gymnasiums, cafeterias, libraries, science labs, and playgrounds.[208] And yet, the IDEA has not been successfully leveraged to close it down.

GNETS' flaws did not go unnoticed or unchallenged by parents,[209] disability rights activists, and even the federal government.[210] But the legal tool used to challenge the program was not the IDEA, but rather the Americans with Disabilities Act ("ADA") and its companion, Section 504 of the Rehabilitation Act of 1973 ("Section 504").[211] The choice to forgo the IDEA's remedies illustrates the shortcomings of the IDEA's ability to remedy programmatic concerns. The very existence of a statewide program like GNETS that not only segregates students with disabilities, but also relegates them to inferior educational opportunities, illustrates the IDEA's ineffectiveness at remedying programmatic concerns. The IDEA does not sanction unnecessary segregation, nor does it allow for unequal educational opportunities, yet the law could not be leveraged to put an end to such practices.

Because the IDEA's rights are built almost entirely around the individual student, it is difficult to expand on these remedies for broader change. Moreover, the IDEA incentivizes individual and incremental remedies, which can be meaningless in a largely broken educational system. As described in the following section, there are several obstacles to engaging

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208. *Id.* at 3 ("Students in the GNETS Program also often lack access to electives and extracurricular[s] . . . . Moreover, many . . . [use] inferior facilities . . . lack[ing] many of the features and amenities of general education schools . . . . Some GNETS Centers are . . . in poor-quality buildings that . . . served as schools for black students during *de jure* segregation . . . .").

209. In 2017, parents of children with disabilities in—or at risk of entering—GNETS filed a class action lawsuit against the State of Georgia claiming discrimination under Title II of the ADA, Section 504, and the Equal Protection Clause of the Fourteenth Amendment. On March 19, 2020, the district court denied Georgia's motion to dismiss, allowing the case to proceed to discovery. Ga. Advoc. Off. v. Georgia, 447 F. Supp. 3d 1311, 1315 (N.D. Ga. 2020).

210. In July 2015, DOJ found GNETS violates Title II of the ADA by (1) unnecessarily segregating students with disabilities and (2) failing to offer grade level instruction that meets state education standards. DOJ Findings Letter, *supra* note 200, at 2. Despite the shocking conclusions in DOJ's letter of finding, Georgia continued to defend the GNETS program and refused to enter into settlement talks with DOJ or make significant changes to the program. As a result, in 2016, DOJ filed a lawsuit against the State, alleging that the State's administration of the GNETS system violates the ADA by "unnecessarily segregating students with disabilities from their peers" and providing "unequal" education opportunity to GNETS students. Complaint ¶ 62, United States v. Georgia, 461 F. Supp. 3d 1315 (N.D. Ga. 2016).

211. 42 U.S.C. § 12101 et seq. (1990); 29 U.S.C. § 794 (1973).

systemic relief, and both courts and advocates can be obstacles to effective programmatic remedies.

B. Thwarted Systemic Remedies

When students with disabilities in high-poverty schools attempt to achieve programmatic, rather than individual remedies, they encounter two obstacles. First, systemic claims are thwarted by courts' heavy-handed use of the IDEA's exhaustion clause. Second, advocates too often target systemic claims at procedural issues, leaving the substance up to chance. The following Section explores courts' application of the exhaustion clause, concluding that systemic claims are unjustly dismissed. It then offers an original analysis of certified and putative class actions in federal courts during the last fifteen years, revealing an almost singular focus on issues of process in IDEA class actions.[212] While such claims are of value, they do not strike at the heart of the problem for students in high-poverty schools—improving the educational program itself.

1. Courts' Rigid Application of the Exhaustion Requirement

Congress clearly intended to confer IDEA-eligible students and their parents the right to hold schools accountable for their obligations under the law.[213] The statute includes an exhaustion requirement compelling plaintiffs "seeking relief that is also available under [the IDEA]" to first exhaust the IDEA's administrative procedures prior to invoking other federal laws protecting the rights of students with disabilities.[214] By 2017, the exhaustion requirement had caused enough confusion in federal courts that the Supreme Court sought to clarify it.[215] Unfortunately, it did not reach any conclusions on the scope or validity of exceptions to exhaustion,[216] and lower courts' subsequent varied—and arguably narrow—interpretations of those exceptions too often restrict plaintiffs from bringing systemic claims to remedy programmatic deficiencies.

The purpose of exhaustion has been described as placing "those with specialized knowledge—education professionals—at the center of the

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212. *See infra* Part II.B.2.
213. 20 U.S.C. § 1415(*l*).
214. *Id.*
215. Fry v. Napoleon Cmty. Schs., 137 S. Ct. 743, 752 (2017) ("We granted certiorari to address confusion in the courts of appeals as to the scope of § 1415(*l*)'s exhaustion requirement.").
216. *Id.*

decision-making process" before allowing complainants to seek recourse through fora whose members possess less expertise.[217] Courts have long been leery of substituting their judgement in place of that of educators.[218] By requiring parents to first exhaust claims before an administrative body, courts ensure "agencies, not the courts . . . have primary responsibility for the programs that Congress has charged them to administer"[219] and that exhaustion allows the agency to "compile a record which is adequate for judicial review."[220] Requiring exhaustion also advances Congress's view, "that the needs of [children with disabilities] are best accommodated by having the parents and the local education agency work together to formulate an individualized plan for each . . . child's education."[221] Lower courts all agree that certain exceptions are warranted, but circuits vary on the categories and scope of exceptions.

From the IDEA's inception, however, Congress recognized exceptions to the exhaustion requirement. Senator Harrison Williams (D-NJ), the author and floor manager of the Senate bill, stated that "exhaustion of the administrative procedures established under this part should not be required for any individual complainant filing a judicial action in cases where such exhaustion would be futile either as a legal or practical matter."[222] In the decades since, courts have recognized several exceptions, which broadly fit into three categories: futility, issues of a purely legal nature,[223] and

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217. Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 60–61 (1st Cir. 2002).

218. *See, e.g.*, E.S. v. Indep. Sch. Dist., No. 196 Rosemount-Apple Valley, 135 F.3d 566, 569 (8th Cir. 1998) ("[T]he district court must . . . resist[] any impulse to 'substitute [its] own notions of sound educational policy for those of the school authorities.'") (last alteration in original) (quoting Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 206 (1982)).

219. Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 (9th Cir. 1992) (quoting McCarthy v. Madigan, 503 U.S. 140, 145 (1992)).

220. Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist., 288 F.3d 478, 487 (2d Cir. 2002) (quoting Weinberger v. Salfi, 422 U.S. 749, 765 (1975)).

221. Rosemary Queenan, *Delay & Irreparable Harm: A Study of Exhaustion Through the Lens of the IDEA*, 99 N.C.L. REV. 985, 1005 (2021) (quoting Smith v. Robinson, 468 U.S. 992, 1012 (1984)) (discussing additional goals of exhaustion including giving administrative agencies the chance to correct their own errors).

222. 121 CONG. REC. 37,416 (1975) (statements of Sen. Harrison A. Williams).

223. *See* McQueen *ex rel.* McQueen v. Colo. Springs Sch. Dist. No. 11, 488 F.3d 868, 875 (10th Cir. 2007) (quoting Ass'n for Cmty. Living in Colo. v. Romer, 992 F.2d 1040, 1044 (10th Cir. 1993) for an exception to exhaustion when "a plaintiff's challenge to a policy of general applicability 'raise[s] only questions of law, thereby rendering agency expertise and the factual development of an administrative record less important'"); Lester H. *ex rel.* Octavia P. v. Gilhool, 916 F.2d 865, 869–70 (3d Cir. 1990) (applying the exception where the factual record was fully developed and parties agreed that the school had failed (or chosen not) to implement plaintiff's requested relief).

emergency situations where exhaustion would cause "severe or irreparable harm."[224]

Class action suits invoking the IDEA are often thwarted by the exhaustion clause when courts refuse to permit applicable exceptions, specifically, the futility exception. The futility exception applies when the administrative process cannot provide adequate remedies for plaintiffs' alleged harms, rendering the administrative process futile.[225] While some circuits apply the futility exception when plaintiffs seek programmatic relief that a hearing officer is powerless to order, many take a narrower view. In these circuits, courts reason that since each individual plaintiff *could* have received a remedy under the administrative process, exhaustion would not have been futile. Courts seem most comfortable applying the futility exception to claims involving the integrity of the administrative process itself.[226]

Circuits with a narrow view of the futility exception only apply it when plaintiffs' allegations invoke the entirety of the special education system, calling for a complete overhaul of the program.[227] The Ninth Circuit suggests that only "truly systemic" claims that threaten the IDEA's goals on a "system-wide basis" warrant exceptions to the exhaustion clause.[228] In order to be "truly systemic" the remedy must require a "restructuring of the education system itself in order to comply with the dictates of the Act."[229]

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224. Lewis M. Wasserman, *Delineating Administrative Exhaustion Requirements and Establishing Federal Courts' Jurisdiction Under the Individuals with Disabilities Education Act: Lessons from the Case Law and Proposals for Congressional Action*, 29 J. NAT'L ASS'N ADMIN. L. JUDICIARY 349, 395–96 (2009) (categorizing courts' varied exceptions to the IDEA's exhaustion rule).

225. Honig v. Doe, 484 U.S. 305, 327 (1988); *see also* Wasserman, *supra* note 224, at 386 (categorizing judicial applications of the futility exception).

226. *See* Heldman *ex rel.* T.H. v. Sobol, 962 F.2d 148, 158–59 (2d Cir. 1992) (excusing exhaustion to systemic challenge of New York state's method of appointing hearing officers); Beth V. *ex rel.* Yvonne V. v. Carroll, 87 F.3d 80, 88–89 (3d Cir. 1996) (recognizing the futility exception when plaintiffs alleged that Pennsylvania's Department of Education failed to maintain an adequate system for resolving complaints).

227. *See* J.G. *ex rel.* Mrs. G. v. Bd. of Educ., 830 F.2d 444, 446–47 (2d Cir. 1987) (excusing exhaustion where a class of plaintiffs raised systemic violations including failure to evaluate, failure to give parents notices of procedural rights, and failure to obtain parental consent for special education services); N.M. Ass'n for Retarded Citizens v. New Mexico, 678 F.2d 847, 851 (10th Cir. 1982) (rejecting exhaustion requirement where plaintiffs' allegations involved the entire special education program and the remedy required the complete restructuring of the system to comply with the IDEA).

228. Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1305 (9th Cir. 1992) (cited by T.R. v. Sch. Dist. of Phila., 458 F. Supp. 3d 274, 285 (E.D. Pa. 2020) and Parent/Pro. Advoc. League v. City of Springfield, 934 F.3d 13, 27–28 (1st Cir. 2019)).

229. Doe *ex rel.* Brockhuis v. Ariz. Dep't of Educ., 111 F.3d 678, 682 (9th Cir. 1997).

Thus, claims that only seek to address a limited component of the system are not "truly systemic."[230]

Using this same logic, the Tenth Circuit dismissed a challenge to a school system's policy of assigning "arbitrarily predetermine[d]" hours of specialized instruction, instead of individualizing services based on need.[231] The court found that the claim did not meet the futility exception because it did not "target structural or due process concerns, but rather the effect of a single component of [the school district's] educational program on individual children's IEPs."[232] Likewise, the Third Circuit dismissed a putative class action challenging a school district's policy of centralizing "inclusion classrooms" in certain elementary schools.[233] There, because the claim was limited to kindergarten students, which the court called a "small subset," it did not sufficiently call into question the entirety of the educational system.[234]

Courts reluctant to apply the futility exception opine that the administrative process holds some value in either its ability to help develop facts as to each individual child's case[235] or its ability to provide relief to individual plaintiffs.[236] Arguably, even where the administrative process could add some value, a purpose of the futility exception is to acknowledge when exhaustion would simply be impractical. Recall that Congress intended exceptions in cases where exhaustion would be futile either as a "legal or practical matter."[237] Arguably, it is impractical to make every kindergarten student in a school system exhaust their claim when they are all attempting to challenge a common placement policy. Thus, some courts take a slightly

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230. *Id.* at 682 (citing *Hoeft*, 967 F.2d at 1305).

231. Ass'n for Cmty. Living in Colo. v. Romer, 992 F.2d 1040, 1043 (10th Cir. 1993).

232. *Id.* at 1044.

233. J.T. v. Dumont Pub. Schs., 533 F. App'x 44, 54–55 (3d Cir. 2013) (finding that a putative class of kindergartners challenging the school district's policy of centralizing inclusion classrooms in certain elementary schools had to exhaust their individual claims under the IDEA's administrative remedies).

234. *Id.*; *see also* Parent/Pro. Advoc. League v. City of Springfield, 934 F.3d 13, 27–28 (1st Cir. 2019) (dismissing a putative class action brought on behalf of all students with a mental health disability enrolled in a segregated school setting as not truly systemic because plaintiffs failed to challenge a policy enforced at the highest administrative level (quoting *Hoeft*, 967 F.2d at 1305)); Waters v. S. Bend Cmty. Sch. Corp., 191 F.3d 457, 1999 WL 528173, at *4 (7th Cir. 1999) (refusing to excuse exhaustion for plaintiff's claim of systemic failure to identify students with learning disabilities because the relief sought, individual remedy to make plaintiff whole, did not require restructuring of the special education program).

235. *J.T.*, 533 F. App'x at 54–55.

236. *Hoeft*, 967 F.2d at 1305.

237. 121 CONG. REC. 37,416 (1975) (statements of Sen. Harrison A. Williams).

more expansive view of the futility exception, acknowledging the impracticality of forcing a large class of students to meet exhaustion.

For example, the Second Circuit applied the futility exception to a group of six students who claimed their school district neglected its obligations to confer FAPE by failing to evaluate students, develop IEPs, provide notice to parents, or provide adequate training to teachers and staff.[238] While their allegations certainly threatened IDEA's goals on a "system-wide" basis,[239] the court also recognized that the futility exception was necessary because either "the framework and procedures for assessing and placing students in appropriate educational programs were at issue, or because the nature and volume of complaints were incapable of correction by the administrative hearing process."[240] In short, the court acknowledged the impracticality of forcing hundreds of students to exhaust administrative claims. Notably, the court opined that forcing each plaintiff to exhaust before a hearing officer would likely create inconsistent results, and that a hearing officer had no power to order systemic relief.[241] Thus, even where students could get an individual remedy, the court affirmed the value of the programmatic relief sought by plaintiffs.

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238. The Second Circuit found examples of allegations related to systemic problems, such as the "failure to notify parents of meetings; its alleged failure to provide parents with legally required progress reports; and its alleged failure to provide appropriate training to school staff . . . [and] additional allegations of . . . failure to perform timely evaluations." *See* J.S. *ex rel.* N.S. v. Attica Cent. Schs., 386 F.3d 107, 115 (2d Cir. 2004); *see also* Mrs. W. v. Tirozzi, 832 F.2d 748, 750 (2d Cir. 1987) (excusing putative class members from exhaustion for allegations of a system-wide failure to provide adequate psychological staff or conduct mandatory periodic evaluations of students).

239. *See J.S.*, 386 F.3d at 110 (upholding a district court's decision to excuse exhaustion because claims centered on issues with the program itself rather than any individual child).

240. *See id.* at 111 (citing to previous cases from the Second Circuit where the futility exception was applied); Heldman v. Sobol, 962 F.2d 148, 159 (2d Cir. 1992) (concluding exhaustion futile regarding a regulation implementing a state statute that neither the hearing officer nor the Commissioner of Education had the authority to alter); *Tirozzi*, 832 F.2d at 752–53 (finding exhaustion not required where issue involved the state complaint resolution procedures); J.G. v. Bd. of Educ. of the Rochester City Sch. Dist., 830 F.2d 444, 447 (2d Cir. 1987) (finding exhaustion not required where issue involved settlement enforcement of class action claim); Jose P. v. Ambach, 669 F.2d 865, 867 (2d Cir. 1982) (finding exhaustion not required in class action seeking structural reform of the New York state and city educational systems to allow more timely evaluation and placement of handicapped children in appropriate program).

241. *J.S.*, 386 F.3d at 114.

Remarkably, the Seventh and Third Circuits heard similar putative class claims, but only one was barred (Seventh Circuit)[242] and the other was not (Third Circuit).[243] Both cases involved systemic claims alleging school districts' failure to provide adequate translation and interpretation services for parents with limited English proficiency ("LEP").[244] Despite the plaintiffs' credible allegations of systemic claims and the inability to obtain class-wide relief at the administrative level, the Seventh Circuit found that plaintiffs' allegations were not truly systemic because they involved "fact-intensive inquir[ies] into the individual circumstances."[245] In essence, because some LEP parents may have enough English language knowledge to understand and participate in the IEP process without translation or interpretation services, class-wide relief was not warranted. Taking the opposite approach, the Third Circuit found that the plaintiffs sufficiently alleged a "system-wide policy of inaction"—the insufficient and untimely provision of interpretation and translation services. [246] The court acknowledged that the plaintiffs sought programmatic relief and thus, the merits of individual remedies were irrelevant.[247]

Following the Third Circuit's application of the futility exception is consistent with Congressional intent and the purpose of the exhaustion clause. Congress intended for claims to bypass administrative exhaustion when futile "either as a legal or practical matter." [248] The Supreme Court directed courts to allow for exceptions when exhaustion would be "futile" or "inadequate."[249] Programmatic remedies, even when they do not implicate

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242. H.P. v. Bd. of Educ. of Chi., 385 F. Supp. 3d 623, 628 (N.D. Ill. 2019) (barring the futility exception when a school did not provide written translations of IEPs and other educational documents despite 42% of students having parents with limited English proficiency ("LEP")).

243. T.R. v. Sch. Dist. of Phila., 223 F. Supp. 3d 321 (E.D. Pa. 2013) (including a putative class of students in a Philadelphia school district who alleged that the school provided inadequate translation and interpretation services to LEP students with disabilities and their parents).

244. *H.P.*, 385 F. Supp. at 627; *T.R.*, 223 F. Supp. at 321.

245. *H.P.*, 385 F. Supp. at 633–35 (acknowledging that some plaintiffs, who had exhausted other available remedies, presented evidence that hearing officers dismissed their claims for broad relief because they did not have the authority to order programmatic changes).

246. *T.R.*, 223 F. Supp. at 330 n.7 (noting that the hearing officer concluded that he had no authority to find that the school district's alleged practices resulted in per se violations for similarly situated students or parents).

247. *Id.* at 330.

248. 121 CONG. REC. 37,416 (1975) (statements of Sen. Harrison A. Williams).

249. Honig v. Doe, 484 U.S. 305, 326–27 (1988) ("It is true that judicial review is normally not available under [the IDEA] until all administrative proceedings are completed, but as we have previously noted, parents may bypass the administrative process where exhaustion would be futile or inadequate.").

the entire special education system, should still be viable claims. Forcing individual plaintiffs to exhaust remedies prior to asking for programmatic relief serves no purpose because the administrative remedy cannot provide the relief requested—the very definition of futility. Rather than narrow the entryway to potential programmatic relief, courts should acknowledge—and some have—that forcing a class of plaintiffs to exhaust administrative remedies could individualize remedies, but would do nothing to address the systemic policies or practices challenged.[250]

When courts take a narrow view of the futility exception, they needlessly restrict plaintiffs' access to programmatic remedies. The restriction disproportionately affects students with disabilities trapped in high-poverty schools. Students in these underfunded and poorly performing schools need the promise of system-wide relief in order to have a chance at meaningful improvements in their educational outcomes. Plaintiffs who can substantiate claims which require a wholesale restructuring of the educational program may be able to skate by exhaustion. But those who cannot are needlessly turned away from the potential for systemic relief. Narrowing the exception could unjustly exclude claims targeting access to appropriately trained staff, quality of special education programming, or availability of inclusive settings. Each claim has the potential to meaningfully improve educational programs in high-poverty schools.

2. Miscalculated Class Actions

Class actions have certainly had a role in promoting positive results for students in certain school districts.[251] But several scholars have noted that, as a whole, class actions rarely result in improved substantive educational programs for students in high-poverty schools.[252] University of

250. J.S. *ex rel.* N.S. v. Attica Cent. Schs., 386 F.3d 107, 114–15 (2d Cir. 2004).

251. Smith *ex rel.* Thompson v. Los Angeles Unified Sch. Dist., No. CV 93-7044 RSWL GHKX, 2014 WL 176677, at *1 (C.D. Cal. Jan. 16, 2014), *rev'd sub nom.* Smith v. L.A. Unified Sch. Dist., 822 F.3d 1065 (9th Cir. 2016), *withdrawn from bound volume, opinion amended and superseded on denial of reh'g*, 830 F.3d 843 (9th Cir. 2016), and *rev'd sub nom.* Smith v. L.A. Unified Sch. Dist., 830 F.3d 843 (9th Cir. 2016) (discussing class action litigation filed in 1993, which challenged racial disparities in special education, including disproportionate suspensions and expulsions and violations of LRE resulting in several consent decrees and court appointed monitors); Corey H. v. Bd. of Educ. of Chi., 534 F.3d 683, 684–85 (7th Cir. 2008) (discussing a class action filed against Illinois State Board, which raised LRE violations that resulted in a consent decree with court monitors).

252. Hyman et al., *supra* note 19; SAMUEL BAGENSTOS, FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY'S ROLE IN AMERICAN EDUCATION 130 (Joshua M. Dunn & Martin R. West eds., 2009) (concluding that although class action litigation has resulted in positive remedies for some of the nation's largest school districts, those results are not

Michigan Law School Professor Samuel Bagenstos categorizes class actions into two broad types: "totality cases" and "focused cases."[253] Totality cases seek to challenge systemic deficiencies in the broader special education program, touching on nearly all of its operations. Focused lawsuits target narrower conduct, seeking to resolve only a certain aspect of the broader program. Professor Bagenstos concludes that focused cases are much more effective in producing meaningful results.[254] He finds wide-ranging the classes, result in process-oriented remedies, ultimately, resulting in a smaller chance of meaningful improvement for the students in the class.[255] The remainder of this Article builds on the work of other scholars and explores the effectiveness of class action lawsuits and putative class actions filed in district courts over the last fifteen years.[256]

Between 2005 and 2020, federal courts reviewed about sixty-five cases involving plaintiffs' attempts to file class actions invoking the IDEA.[257] The majority were filed in the Second (fifteen cases) and Third Circuits (thirteen cases).[258] Given that there are over 13,000 school districts in the United States, it is reasonable to assume that many have not faced the pressure of systemic advocacy in the last fifteen years.[259] The total number seems miniscule when compared to the more than seven million students

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representative of the outcomes of most other class actions on this issue); Hehir, *supra* note 51 (concluding that class actions have had mixed results, largely helping to improve procedural compliance, but limited in their use to reform educational practices).

253. BAGENSTOS, *supra* note 252, at 130.

254. *Id.* at 131–36 (contrasting two New York class actions, *Jose P.* and *Ray M. v. Board of Education*. *Jose P.*, a 1979 class action challenging New York City's entire special education program and resulting in a broad consent decree, lasted over 20 years and failed to substantially improve outcomes for students with disabilities. *Ray M.* focused on the single issue of integration of preschool students, resulting in a narrower consent decree which lasted about four years and resulted in a 30% improvement rate of preschool students educated in integrated settings.).

255. *Id.* at 136–37.

256. *Id.* at 6–10; Hehir, *supra* note 51, at 19–25.

257. This dataset does not purport to represent every IDEA class action filed since 2005, but rather seeks to understand those cases that courts reviewed in some capacity. Cases in this set were pulled from Westlaw searches for "IDEA" and "class action" and "putative class." Because this Article seeks to build on the work of other scholars and acknowledges the Supreme Court's decision in *Walmart v. Dukes*, which changed the landscape of class certification, the data set is limited to cases heard after 2005. *See generally*, Mark C. Weber, *IDEA Class Actions After* Wal-Mart v. Dukes, 45 U. TOL. L. REV. 471 (2014) (analyzing *Walmart*'s application to special education law).

258. *See* class action data set tracking IDEA class actions filed in federal courts between 2005 and 2020 (on file with the *Columbia Human Rights Law Review*).

259. *Digest of Education Statistics: Table 214.10*, NAT'L CTR. FOR EDUC. STATS. https://nces.ed.gov/programs/digest/d19/tables/dt19_214.10.asp [https://perma.cc/Q7Q6-9W9J].

who receive services under the IDEA.[260] Limited resources of individuals and the legal system's paucity of poverty lawyers may account for the weak showing.[261] Another reason may be the availability of the IDEA's state complaint process, which allows parents to request that their state department of education investigate alleged violations of the IDEA.[262]

Of the class actions and putative class actions filed over the past fifteen years, an overwhelming number focus on procedural issues. That is, they seek remedies to fix issues of access to educational programs, rather than target the substance of those programs. For example, several lawsuits have been filed on behalf of students held in juvenile detention facilities claiming a lack of special education services.[263] Others were filed on behalf of parents with limited English skills seeking improved interpretation and translation services.[264] There have also been systemic challenges to school closures[265] and to block state policies that restrict services to students who reach the age of majority.[266] A few other categories of cases challenge the

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260. *Preprimary, Elementary, and Secondary Education: Students with Disabilities,* NAT'L CTR. FOR EDUC. STATS., https://nces.ed.gov/programs/coe/indicator/cgg [https://perma.cc/42LN-EW5A] (noting that between 2019–20, 7.3 million, or 14% of all public school students, received special education services under the IDEA).

261. Hyman et al., *supra* note 19, at 112–13.

262. 34 C.F.R. § 300.151–.153 (2021).

263. *See* V.W. *ex rel.* Williams v. Conway, 236 F. Supp. 3d 554, 565 (N.D.N.Y. 2017) (alleging violation of FAPE when children are in solitary confinement without access to education); Wilburn v. Nelson, No. 3:17 cv-331-PPS-MGG, 2018 WL 5961724, at *194 (N.D. Ind. Nov. 13, 2018) (alleging violation of FAPE when children are in solitary confinement); Derrick *ex rel.* Tina v. Glen Mills Sch., No. 19-1541, 2019 WL 7019633, at *1 (E.D. Pa. Dec. 19, 2019) (challenging evaluation and provision of special education for students with disabilities in detention facility); H.C. *ex rel.* Jenny C. v. Bradshaw, No. 18-cv-80810, 2019 WL 1051146, at *1 (S.D. Fla. Mar. 6, 2019) (alleging FAPE denial for detained juveniles).

264. *See* N.N. *ex rel.* A.N. v. Rochester City Sch. Dist., 505 F. Supp. 3d 211, 211 (W.D.N.Y. 2020) (parents of students with disabilities alleged school district failed to translate critical education-related documents into parents' native language); T.R. v. Sch. Dist. of Phila., 458 F. Supp. 3d 274, 279 (2020) (alleging school district's provision of translation and interpretation services is deficient); H.P. v. Bd. of Educ. of Chi., 385 F. Supp. 3d 623, 623 (2019) (alleging district failed to provide adequate interpretation and translation services).

265. *See* Chester Upland Sch. Dist. v. Pennsylvania, No. 12-132, 2012 WL 1473969, *3–*4 (E.D. Pa. Apr. 25, 2012) (alleging proposed school closure will result in a denial of FAPE); Swan *ex rel.* I.O. v. Bd. of Educ. of Chi., No. 13 C 3623, 2013 WL 4047734, at*6 (N.D. Ill. Aug. 9, 2013) (alleging school closure will result in denial of FAPE); Barron *ex rel.* D.B. v. S.D. Bd. of Regents, 655 F.3d 787, 787 (8th Cir. 2011) (alleging closure of school for the deaf will result in FAPE denial); Hernandez v. Grisham, 494 F. Supp. 3d 1044, 1044 (D.N.M. 2020) (alleging COVID-19 related school closure will result in denial of FAPE).

266. K.S. v. R.I. Bd. of Educ., No. 14-77, 2016 WL 1065822 (D. R.I. Mar. 17, 2016); A.R. v. Conn. State Bd. of Educ., No. 3:16-cv-01197, 2020 WL 2092650 (D. Conn. May 1,

enforcement of due process orders,[267] shortened school days,[268] and limits on related services.[269] Additionally, since 2020, several class actions have been directed at school closures as a result of the COVID-19 pandemic.[270] While they vary in scope, many have attempted to leverage the IDEA for access to in-person learning.[271] But virtually none of these class actions tackle substantive issues involving the educational program itself. This is not to diminish the value of advocacy involving procedural issues, but it illustrates the limits of class action advocacy to impact programmatic changes to educational programs for students with disabilities.

Some class action lawsuits, however, have been able to leverage procedural claims to bring about significant substantive changes to school systems. For example, a class of students in Flint, Michigan, brought a lawsuit against the Michigan Department of Education and their local school district alleging that state and local educators violated the IDEA by failing to identify students who needed special education services.[272] Plaintiffs argued that children were at risk of developing a disability due to their prolonged exposure to lead, and that both the state and local education authorities were not prepared to effectively identify those students and provide them with

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2020); D.J. *ex rel.* O.W. v. Conn. State Bd. of Educ., No. 3:16-cv-01197, 2018 WL 1461895 (D. Conn. Mar. 23, 2018); E.R.K. *ex rel.* R.K. v. Haw. Dep't of Educ., 728 F.3d 982, 982 (9th Cir. 2013).

267. LV v. N.Y.C. Dep't of Educ., No. 03 Civ. 9917(RJH), 2005 WL 2298173 (S.D.N.Y. Sept. 20, 2005); Blackman v. District of Columbia, 454 F. Supp. 2d 1 (D.D.C. 2006); E.H. v. Miss. Dep't of Educ., No. 3:12-CV-00474-DPJ, 2013 WL 4787354 (S.D. Miss. Sept. 6, 2013).

268. Barr-Rhoderick *ex rel.* May v. Bd. of Educ. of Albuquerque Pub. Schs., No. CIV 04-0327 MCA/ACT, 2005 WL 5629693 (D.N.M. Sept. 30, 2005); J.N. v. Or. Dep't of Educ., No. 6:19-cv-00096-AA, 2021 WL 408093 (D. Or. Feb. 5, 2021).

269. M.G. v. N.Y.C. Dep't of Educ., 162 F. Supp. 3d 216 (S.D.N.Y. 2016); S.W. *ex rel.* J.W. v. Warren, 528 F. Supp. 2d 282, 287 (S.D.N.Y. 2007); R. A-G *ex rel.* R.B. v. Buffalo City Sch. Dist. Bd. of Educ., No. 12-CV-960S, 2013 WL 3354424 (W.D.N.Y. July 3, 2013); D.C. v. Pittsburgh Pub. Sch., 415 F. Supp. 3d 636, 645 (W.D. Pa. 2019); T.D. v. Rutherford Cnty. Bd. of Educ., No. 3:16-cv-1488, 2017 WL 77114 (M.D. Tenn. Jan. 9, 2017); Miller *ex rel.* S.M. v. Bd. of Educ. of Albuquerque Pub. Sch., 455 F. Supp. 2d 1286 (D.N.M. 2006).

270. Martinez v. Newsom, No. 5:20-cv-01796-SVW-AFM, 2020 WL 7786543 (C.D. Cal. Nov. 24, 2020), *appeal filed* (9th Cir. Dec. 28, 2020); Hernandez v. Lujan Grisham, 494 F. Supp. 3d 1044 (D.N.M. 2020), *appeal filed* (10th Cir. Dec. 23, 2020); J.T. v. de Blasio, 500 F. Supp. 3d 137 (S.D.N.Y. 2020), *appeal filed* (2d Cir. Dec. 14, 2020); C.M. v. Jara, No. 2:20-1562-JCM-DJA, 2020 WL 8671978, at *1 (D. Nev. Aug. 21, 2020).

271. C.M. v. Jara, No. 2:20-1562-JCM-DJA, 2020 WL 8671978, at *1 (D. Nev. Nov. 10, 2020) (alleging that a Nevada district and its administrators violated students' IDEA and Section 504 rights by failing to offer an option other than virtual instruction at the start of the 2020–21 school year).

272. D.R. v. Mich. Dep't of Educ., No. 16-13694, 2017 WL 4348818, at *1 (E.D. Mich. Sept. 29, 2017). Plaintiffs also alleged violations of the IDEA's safeguards against disciplining students with disabilities without first determining whether behavior was a result of disability.

appropriate special education supports and services as required under the IDEA.[273] The suit was built around the IDEA's "child find" requirement, which places an affirmative obligation on schools to identify students with disabilities in need of special education.[274] Thus the claim itself did not involve the substantive educational program, but rather the school district's obligation to identify students with disabilities who needed special education and supports as part of their educational program. The parties ultimately settled the case with the state and local education authorities agreeing to contribute more than ten million dollars towards special education services.[275] Part of the settlement was focused on improving the process of screening children for disabilities and ensuring high-quality evaluations.[276] However, the settlement also included over ten million dollars in state funding to be directed at strengthening special education services and supports. Unfortunately, the terms regarding how that money is to be spent are less clear.[277] Finally, the local school district agreed to undertake a comprehensive assessment of its preschool program and review its county-wide special education program to ensure effective delivery of special education services.[278]

While effective screening and high-quality evaluations are crucial to understanding how a disability impacts a child's learning, ensuring a school system has capacity to meet the needs of each child with high quality, appropriate instruction is equally important. Because the Flint settlement focused on improving identification and the evaluation of disability, it left open the question of whether, and to what degree, substantive educational instruction will change.[279] It remains to be seen whether Flint's school

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273. D.R. v. Mich. Dep't of Educ., No. 16-13694, 2017 WL 4348818, at *1 (E.D. Mich. Sept. 29, 2017).

274. 20 U.S.C. § 1412(a)(3).

275. Final Settlement Agreement, D.R. v. Mich. Dep't of Educ., No. 2:16-cv-13694-AJT-APP (July 14, 2020).

276. *Id.* The settlement also included the creation of the Neurodevelopmental Center of Excellence which will offer universal screening, in-depth neuropsychological assessments as necessary to all children impacted by the Flint water crises.

277. *Id.* Michigan agreed to contribute at least $9 million to establish the Flint Water Crisis Special Education Fund ("SEF") and the Genesee Intermediate School District agreed to $1 million for transportation and an additional $1 million for staff services. "The parameters, amount, timing and other criteria for the use, allocation and distribution of the SEF shall be determined by written, mutual agreement of the Parties . . . ." *Id.* at para. 1.a. At the time of this writing, additional details regarding how settlement funds were going to be spent were not publicly available.

278. *Id.*

279. *Id.* at para. 3. The settlement includes a requirement that the school district "evaluate and make necessary modifications" to the special education program, but provides no further instruction regarding the type of modification or outcomes to be met.

district will use funds to comprehensively ensure effective high-quality instruction for all children with disabilities, whether integration will be a central goal, and whether objective measurements of outcomes will be monitored.

III. Solutions

The IDEA's failure in high-poverty schools reflects the broader problem of inequity in America's public schools. And like that decades-old problem, there are no quick fixes. However, because the IDEA has established oversight measures which require states to regularly report back to the DOE on a variety of indicators, there is capacity to build incentives within that model that would encourage states to improve outcomes for students with disabilities. The following Section explores targeted funding through a grant system to encourage improved educational practices and outcomes. It then discusses the possibility of increased federal enforcement by expanding the DOJ's role to include the independent authority to investigate and litigate cases. Finally, it considers how class action lawsuits can be used to effectuate programmatic change in educational practices, with the ultimate goal of improving student outcomes.

A. Targeted Funding

Since its enactment in 1975, the IDEA has never been fully funded at the promised 40% federal contribution level.[280] In 2019, the federal government appropriated less than 15% of the money it had authorized towards the IDEA.[281] Yet, the law both assumes and demands a significant level of resources to be effective.[282] Some studies indicate that educating students with disabilities costs 90% more than educating non-disabled students.[283] Inevitably, a lack of funding has resulted in a number of patently illegal actions designed to avoid the costs of compliance. For instance, Texas placed a statewide cap on IDEA identification.[284] At the local level, school districts have placed limits on hiring specialized providers, restricted services hours, and cut specialized programs.[285] Regrettably, these illegal

280. BROKEN PROMISES, *supra* note 30, at 20.

281. IDEA FUNDING PRIMER, *supra* note 46.

282. BROKEN PROMISES, *supra* note 30 (discussing how lack of funding denies critical resources to students with disabilities).

283. *Id.* at 33.

284. Brian M. Rosenthal, *Denied: Schools Push Students Out of Special Education to Meet State Limit*, HOUS. CHRON. (Oct. 22, 2016), https://www.houstonchronicle.com/denied/2 [https://perma.cc/3PGS-C8M4].

285. BROKEN PROMISES, *supra* note 30, at 46.

actions and their negative effects disproportionately fall on poor students because their schools are the most cash-strapped and least able to comply with the IDEA.[286]

Therefore, as a first step, fully funding the IDEA would go a long way in resolving the inequities and burdens unjustly placed on the shoulders of low-income students of color. Improved federal funding could result in better-trained teachers and staff, evidence-based educational programs and specialized supports, and improved access to integrated educational settings.[287] Alternatively, Congress could take a page from President Barack Obama's Race to the Top grants and incentivize improved educational outcomes through competitive grants.[288] Through this initiative, the federal government was able to develop a collaborative process through which states sought to develop their own solutions to improve public education.[289] The DOE coordinated the program and maintained considerable control in selecting the policies that would be rewarded, as well as the oversight measures to induce compliance.[290] Though it was subject to criticism,[291] the program produced far-reaching changes to state-level education policies based on the incentives attached to funding.[292]

A similar structure could target funding towards those districts that have the highest level of need and incentivize their participation in finding evidence-based solutions to improve student outcomes. Currently, the IDEA requires states to monitor local school districts for compliance with the

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286. Jackson et al., *supra* note 8.

287. BROKEN PROMISES, *supra* note 30, at 41.

288. RACE TO THE TOP EXECUTIVE SUMMARY, *supra* note 49.

289. *Id.*

290. *Id.*

291. Diane Ravitch, *The Big Idea—It's Bad Education Policy*, L.A. TIMES (Mar. 14, 2010), https://www.latimes.com/archives/la-xpm-2010-mar-14-la-oeravitch142010 mar14-story.html [https://perma.cc/RRW7-6CD6]; Seyward Darby, *The New Republic: Defending Obama's Education Plan*, NPR (July 29, 2010), https://www.npr.org/templates/ story/story.php?storyId=128843021 [https://perma.cc/4G83-FWTQ]; Michele McNeil, *Civil Rights Groups Call for New Federal Education Agenda*, EDUC. WK. (July 26, 2010), https://www.edweek.org/policy-politics/civil-rights-groups-call-for-new-federal-education-agenda/2010/07 [https://perma.cc/WNK2-BT4L] ("[L]eading civil rights groups . . . called on U.S. Secretary of Education Arne Duncan today to dismantle core pieces of his education agenda, arguing that his emphases on expanding charter schools, closing low-performing schools, and using competitive rather than formula funding are detrimental to low-income and minority children.").

292. William G. Howell, *Results of President Obama's Race to the Top*, 15.4 EDUC. NEXT (July 14, 2015), https://www.educationnext.org/results-president-obama-race-to-the-top-reform [https://perma.cc/FTM9-VZH6] ("Race to the Top had a meaningful impact on the production of education policy across the United States").

statute's terms, but with minimal effect.[293] That is, federal compliance monitoring has not had the ability to incentivize state-level change in special education programs.[294] However, a grant-based program could encourage states to shift their programs towards more evidence-based solutions. For instance, education researchers Bryan Hassel and Patrick Wolf, critical of the IDEA's compliance model of enforcement, urge lawmakers to align incentives with improved performance in three categories, all of which are associated with improved student outcomes: (1) effective intervention (evidence-based specialized instruction and support), (2) effective remediation (transitioning students out of special education), and (3) effective prevention (ramping up effective general education instruction and support).[295] Based on research concerning organizational motivation, they recommend including "nested goals." The concept is to build symbiotic goals into each layer of the structure, beginning with individual student goals and increasing throughout the educational system to school-level, district-level, and state-level objective goals.[296] Ideally, goal setting should be negotiated at each level through performance agreements that set measurable targets for annual success.[297]

A federal grant program could incentivize evidence-based research on practices known to improve student outcomes and encourage the adoption of practices known to improve organizational motivation. And, because the IDEA already has federal oversight structures in place to monitor a state's use of IDEA funding,[298] a grant program could quite seamlessly be merged into this existing structure and allow for federal assistance and monitoring of awarded grant funds and outcomes.

B. Federal Enforcement

Congress should also consider amending the IDEA to provide the Department of Justice with the independent authority to investigate and

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293. Bryan Hassel & Patrick J. Wolf, *Effectiveness and Accountability (Part 2): Alternatives to the Compliance Model*, *in* RETHINKING SPECIAL EDUCATION FOR A NEW CENTURY 309 (Chester E. Finn et al. eds., May 2001), https://fordhaminstitute.org/national/research/rethinking-special-education-new-century [https://perma.cc/43JF-M6RH].

294. SEGREGATION OF STUDENTS, *supra* note 32, at 32 (finding the DOE is not holding states accountable for their failure to uphold LRE, and instead have set targets for minimal improvement over the years).

295. Hassel & Wolf, *supra* note 293, at 320–23.

296. *Id.* at 327–28.

297. *Id.* at 324.

298. The Office of Special Education Programs in the DOE is required to monitor state compliance with the IDEA and determine when states need assistance implementing the law or need substantial intervention. It has the authority to direct the use of state funding, withhold funding, or refer violations to the DOJ for enforcement. 20 U.S.C. §§ 1402(a), 1416(e)(1)–(3), 1416(e)(6)(A).

litigate cases under the IDEA. Federal enforcement of the law is necessary to address the inequities embedded in a private enforcement scheme which limit its usefulness for students from low-income families. Currently, the DOE [299] monitors state compliance with the IDEA through annual performance reports, detailing each state's compliance with the statute across a number of indicators, including placement, discipline, and academic performance. [300] The greatest penalty the DOE can issue for non-compliance is to withhold federal funds.[301] Because of the enormity of repercussions (potentially borne by students) that could occur from withholding funds, the DOE rarely takes that step and instead focuses on negotiating agreements for minimal state improvements to the IDEA compliance.[302] The DOE does not have any authority to investigate or resolve individual due process complaints. While it does have the ability to refer potential cases to the DOJ for noncompliance, but it very rarely takes that step.[303]

Given the inability of many students in high-poverty schools to leverage the IDEA for remedies, federal enforcement could prove an important tool in forcing states and districts to face their decades-long neglect of high-poverty schools and compel programmatic changes that individual students could not engender alone. Further, because of the oversight systems in place which currently require states to report a multitude of IDEA compliance indicators to the DOE,[304] it would be feasible

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299. *Welcome to OSEP*, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/offices/list/osers/osep/index.html [https://perma.cc/P2SK-DMJU]. This Article refers to the larger structure of the DOE for simplicity.

300. 20 U.S.C. § 1418(a)(1)(A). States are required to produce annual reports that disclose the number and percentage of children who are receiving FAPE, participating in regular education, placed in separate classes or facilities, and subject to alternative placements as a result of disciplinary measures. *See also* U.S. DEP'T OF EDUC., 2020 DETERMINATION LETTERS ON STATE IMPLEMENTATION OF IDEA (Nov. 25, 2020), https://sites.ed.gov/idea/files/ideafactsheet-determinations-2020.pdf [https://perma.cc/HL62-4EJQ] (summarizing states' reporting requirements under the statute).

301. 20 U.S.C. § 1416(e)(1)–(3).

302. JANE WEST, NAT'L COUNCIL ON DISABILITY, BACK TO SCHOOL ON CIVIL RIGHTS: ADVANCING THE FEDERAL COMMITMENT TO LEAVE NO CHILD BEHIND 7–9 (Jan. 25, 2000), https://files.eric.ed.gov/fulltext/ED438632.pdf [https://perma.cc/G6HH-P3LK] (finding that every state failed to ensure compliance with the requirements of the IDEA to some extent and more than half failed to ensure compliance in five of the seven main compliance areas, and that the DOE emphasizes collaboration with states through technical assistance, corrective action plans and compliance agreements); *see also* SEGREGATION OF STUDENTS, *supra* note 32, at 32 (finding that the DOE is not holding states accountable for their failure to uphold LRE, and instead has set targets for minimal improvement over the years).

303. WEST, *supra* note 302, at 9.

304. 20 U.S.C. § 1418(a)(1)(A).

to use this monitoring system to target school districts that were both serving high-poverty populations and demonstrating poor educational outcomes for students with disabilities.[305] A necessary change would be to begin collecting data on the socioeconomic status of students with disabilities.[306] By requiring states to report the income status of students with disabilities, DOE could help target oversight efforts towards those school districts where private enforcement was likely being underutilized. This would also unearth disparities in the use of special education services by socioeconomic status.

To be successful, federal enforcement must be targeted in scope and used in conjunction with additional federal or state funding directed towards low-income school districts. The DOJ should be directed to prioritize investigations on allegations of systemic violations in high-poverty school districts. However, rather than punishing bad actors by withholding federal dollars, a more productive strategy would be to direct failing school districts to engage in a planning phase. In conjunction with DOE and education experts, these planning phases could have the mission of developing a realistic improvement plan with objectively quantifiable goals and incentives to reach those goals. Incentives might come in the form of increasing local control and decreasing oversight as well as transparency.[307]

C. Repurpose Class Actions

Class actions can remain a useful tool to help reform special education systems, but advocates must target their efforts on substantive systemic changes. They must shift away from challenging only procedural issues to tackling educational practices at the school level. Advocates may be able to leverage procedural challenges to pressure school districts into

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305. Pasachoff, *supra* note 19, at 1465–70 (calling for public enforcement and offering several thoughtful proposals, including remedying information gaps and expanding current oversight structure to include auditing the quality of IEPs in high-poverty schools as compared to wealthier school districts).

306. Currently, data is disaggregated "by race, ethnicity, limited English proficiency status, gender, and disability category." 20 U.S.C. § 1418(a)(1)(A).

307. Brian P. Gill et al., *Reimagining Accountability in K-12 Education: A Behavioral Science Perspective*, 2 BEHAV. SCI. & POL'Y 56, 56 (Apr. 2016) ("Promoting continuous improvement in schools is likely to require multiple forms of accountability that not only offer rewards and sanctions but also increase the transparency of educational practice and provide mechanisms for improving practice.").

settlements that include larger fixes to the substance of educational programs, but must stay keenly focused on measurable outcomes.[308]

Professor Thomas Hehir suggests several components to more effective class-based strategies for educational reform.[309] First, advocates must educate themselves on evidence-based educational practices and promote those that are most associated with improved educational outcomes. For example, integration is associated with better outcomes and students with disabilities attending high-poverty schools are disproportionately pushed into segregated settings.[310] By forcing school districts to improve integration, advocates would increase students with disabilities' access to the general education curriculum and improve their chance at better outcomes.[311] Second, settlements should focus on data-based agreements that include easily quantifiable measurements.[312] Data that tracks the degree of integration, number of suspension days, graduation rates, performance on standardized testing, and placement of students in special education by race and income level may help to signal the overall health of the educational program and can be used to objectively measure improvements.[313] Third, advocates should also acknowledge that true systemic reform will involve some level of capacity building and thus, settlements should attempt to include strategies to tackle depleted resources. Acknowledging that access to funding will be essential to shoring up the capacity of high-poverty school districts, Hehir recommends that class-based litigation target states, in addition to school districts, because districts, particularly those that serve low-income populations, will need increased funding to build capacity.

Class-based litigation remains a viable tool in pushing programmatic reforms, but it is not enough for advocates to go after low-hanging fruit. Rather, they must do the harder work of understanding what programmatic changes are most closely aligned with improved student outcomes and demand solutions that target the implementation of those practices. They must also ensure settlements or outcomes contain appropriate accountability measures that decentralize control and empower

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308. D.R. v. Mich. Dep't of Educ., No. 16-13694, 2017 WL 4348818, at *1 (E.D. Mich. Sept. 29, 2017) (alleging violations of the state's duty to identify and evaluate students with disabilities under the IDEA's child find requirement, but settlement included funding for substantive changes to the educational programs.)

309. Hehir, *supra* note 51, at 837–39.

310. *Id*. at 837–38.

311. Hehir, *supra* note 51, at 837–38.

312. *Id.* at 838.

313. *Id.*

principals, teachers, and local school boards to make necessary changes in order to achieve set outcomes.[314]

CONCLUSION

The IDEA was a monumental achievement on the path towards educational opportunity and the full inclusion of children with disabilities in public schools. Yet, more than forty years after the original bill's enactment, it has not delivered on its promise. For thousands of low-income students with disabilities who attend under-resourced public schools, the IDEA's rights ring hollow. The law has yet to scratch the surface of their circumstances, leaving the programmatic deficiencies in underfunded, high-poverty schools untouched. Its failure largely rests on internal structures premised on the notion that public schools start from a place of adequate resources to ensure quality regular education programming. When that premise is shattered, the law's protections crumble alongside it.

Fundamentally, the IDEA's failure in high-poverty schools is interwoven with the decades-old problem of inequity in public education. The IDEA's success is tied not simply to legal rules and doctrines, but also the overall political will to adequately fund public schools. Addressing the entirety of America's educational inequities stretches beyond the IDEA's reach. But ignoring the IDEA's role in perpetuating systemic barriers to equitable educational opportunity is unacceptable. At a minimum, advocates and policy makers must acknowledge the IDEA's inequities as applied to high-poverty schools and begin the hard work of addressing them.

Recognizing political will to fully fund the IDEA remains scarce, this Article proposes that Congress adopt a grant program directing resources towards high-poverty schools with the objective of incentivizing programmatic reforms tied to educational outcomes. Given that the IDEA already has federal funding and compliance structures in place, additional grant funding is a feasible and efficient proposal. Advocates, too, could continue to pressure school districts and states through class actions lawsuits aimed at improving instructional practices. With these calculated steps, the IDEA can move closer to its original goal of improving the lives of *all* children with disabilities.

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314. Charles F. Sable & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1100–01 (2004).