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ARTICLE

IDEA CLASS ACTION LAWSUITS
AND OTHER MEANS OF CHALLENGING SYSTEMIC VIOLATIONS OF FEDERAL SPECIAL EDUCATION LAW

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I. Background

A. The Individuals with Disabilities Education Act

The Individuals with Disabilities Education Act ("IDEA")[1] has been at the forefront of American Special Education Law for nearly four decades. The procedures and practices required by the IDEA impact over seven million students, and their parents, guardians, and teachers, every day.[2] In exchange for funds provided to state educational agencies and local educational agencies,[3] the IDEA guarantees, among other things, that those agencies will provide students with disabilities a Free Appropriate Public Education ("FAPE")[4] in the Least Restrictive Environment ("LRE").[5] With those funds, however, also comes accountability. The IDEA mandates that fund recipient agencies meet procedural safeguards[6] including the ability of parents and guardians to challenge decisions made regarding students' education and related services.[7]

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[1] Pub. L. No. 101-476, 104 Stat. 1142 (1990) (codified as amended at 20 U.S.C. § 1400 et seq. (2020)). This timeframe includes the enactment of the predecessor legislation to the IDEA, the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773.
[2] *Students With Disabilities,* NAT'L CTR. FOR EDUC. STATISTICS, https://nces.ed.gov/programs/coe/indicator_cgg.asp (last visited Sept. 11, 2020).
[3] *See* 20 U.S.C. § 1411 (2020).
[4] *See* 20 U.S.C. § 1401(9) (2016).
[5] *See* 20 U.S.C. § 1412(a)(5) (2016).
[6] *See* 20 U.S.C. § 1412(a)(6) (2016).
[7] *See* 20 U.S.C. § 1415 (2005).

Inevitably, there is much disagreement about what "appropriate" education for students with disabilities means. Parents[8] and school systems often find themselves at difficult impasses, leading to the necessity for dispute resolution.[9] If the parties are not able to reach an agreement about a student's Individualized Education Program ("IEP"),[10] they then may voluntarily proceed to mediation,[11] or the parents may challenge the IEP at an impartial due process hearing,[12] typically heard before a hearing officer or administrative law judge ("ALJ").[13] If the parents are still aggrieved with the determination of the due process hearing, they are entitled to challenge the final state decision by filing a civil action in any state court of competent jurisdiction or in a district court of the United States.[14]

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[8] From here further the author will use the term "parent(s)" for purposes of conciseness, but this term should be understood to mean parents or guardians of a child.

[9] *See generally* U.S. DEP'T OF EDUC., DISPUTE RESOLUTION PROCEDURES UNDER PART B OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (PART B) MEMORANDUM (July 23, 2013), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/acccombinedosersdisputeresolutionqafinalmemo-7-23-13.pdf

[10] *See* 20 U.S.C. § 1414(d)(1)(A) (2016).

[11] *See* 20 U.S.C. § 1415(e) (2005).

[12] *See* 20 U.S.C. § 1415(f) (2005).

[13] In some states, the impartial due process hearing is conducted by the local educational agency, in which case the parents may then appeal the local hearing officer's decision to the state educational agency. 20 U.S.C. § 1415(g) (2005).

[14] *See* 20 U.S.C. § 1415(i) (2005). In practice, however, almost all challenges are brought in United States District Courts. Anecdotally, practitioners explain that this is due to the expertise and experience that the federal courts have in deciding this type of matter. *See* Michael Gehring, *Federal Court Appeals of Decisions of Special Education Hearing Officers*, MCANDREWS LAW OFFICES, https://mcandrewslaw.com/publications-and-presentations/articles/federal-court-

It is important to understand that parents generally are required to exhaust their administrative remedies – complete the impartial due process hearing and preceding procedures – *before* they may file suit in a court of law.[15] This exhaustion requirement is also applied to all other federal special education laws, including "the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973 [29 U.S.C.S. §§ 790 et seq.], or other Federal laws protecting the rights of children with disabilities" when the relief sought under those provisions would also be available under the IDEA.[16]

B. Other Federal Special Education Laws

These other pieces of legislation are also an important part of federal special education law and play an important role in challenging systemic violations. Section 504 of the Rehabilitation Act of 1973 (commonly referred to as "Section 504" in the special education community) prohibits recipients of federal financial assistance, including educational agencies, from discriminating against individuals with disabilities.[17] Section 504 has its own cause of action, which may be brought in the form of a civil rights suit.[18] Title II of the Americans with Disabilities Act of 1990 ("ADA")[19] prohibits discrimination on the basis of disability by state and local governments regardless of whether they receive

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appeals-of-decisions-of-special-education-hearing-officers/ (last visited December 11, 2020) ("almost all appeals are taken by the party filing a lawsuit in the geographically appropriate federal district court").

[15] 20 U.S.C. § 1415(l) (2005).

[16] *Id.*

[17] Pub L. No. 93-12, 87 Stat. 355 (codified as 29 U.S.C. § 794).

[18] *See* 29 U.S.C. § 794a (2009).

[19] Pub. L. No. 101-336, 104 Stat. 327 (codified 42 U.S.C. § 12101 et seq).

federal financial assistance.[20] The civil rights remedies available under the Rehabilitation Act of 1973 are also available to enforce the ADA.[21] The U.S. Department of Education, Office of Civil Rights also provides administrative enforcement of violations of Section 504[22] and Title II of the ADA.[23] These civil rights administrative remedies will be discussed further in the latter part of this article.[24]

Again, it is important to reiterate that civil causes of action under these other laws are generally not available when the relief sought is also available under the IDEA's administrative remedies, until those administrative remedies have first been exhausted.[25] Some courts have interpreted and applied this exhaustion requirement in a very firm way, not allowing any of these separate claims to proceed unless administrative remedies have been exhausted, while other courts have allowed a great deal more flexibility.[26] Exceptions to the exhaustion requirements in regard to these provisions and the IDEA will be discussed further in this article.[27]

C. The Systemic and Class Action Background of the IDEA

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[20] *See* 42 U.S.C. § 12132.
[21] *See* 42 U.S.C. § 12133.
[22] *See generally* 34 C.F.R. § 104.
[23] *See generally* 28 C.F.R. § 35.
[24] *See infra* p. 22. The administrative remedies provided by the U.S. Department of Education, Office of Civil Rights, do not fulfill the exhaustion requirements under 20 U.S.C. § 1415(l).
[25] *See* 20 U.S.C. § 1415(l).
[26] For a further discussion on this topic, see MARK C. WEBER, DISABILITY HARASSMENT 86–90 (2007); *see also* 4 EDUCATION LAW § 10C.13 (2019).
[27] *See infra* p. 12.

The IDEA's predecessor statute, the Education for All Handicapped Children Act of 1975, was enacted for the express purpose of addressing the systemic violations of the civil rights of students with disabilities throughout the United States.[28] The four stated purposes of the Act were:

> (1) "to assure that all children with disabilities have available to them .... a free appropriate public education which emphasizes special education and related services designed to meet their unique needs"
> (2) "to assure that the rights of children with disabilities and their parents .... are protected."
> (3) "to assist States and localities to provide for the education of all children with disabilities," and
> (4) "to assess and assure the effectiveness of efforts to educate all children with disabilities."[29]

These stated purposes and the corresponding operative sections of the Act were enacted *in response* to class action litigation challenging civil rights violations of students with disabilities.[30] Specifically, the drafters of the Act pointed to two cases, *Pennsylvania Association for Retarded Children (P.A.R.C.) v. Commonwealth of Pennsylvania*[31] and *Mills v. Board of Education of the*

[28] Pub. L. No. 94-142, 89 Stat. 773. (codified as amended at 20 U.S.C. § 1400(d)).
[29] *Id.* at § 601(c).
[30] *See* Mark C. Weber, *IDEA Class Actions After Wal-Mart v. Dukes*, 45 U. TOL. L. REV. 471 (2014).
[31] 334 F. Supp. 1257 (E.D. Pa. 1971); 343 F. Supp. 279 (E.D. Pa. 1972).

District of Columbia,[32] upon which they relied heavily in formulating the statute.[33]

In *P.A.R.C.*, a class of students with intellectual disabilities brought the suit against the Commonwealth of Pennsylvania for denial of their right to a free public education.[34] The parties ultimately agreed to a joint decree in which Pennsylvania agreed to not enforce certain statutory provisions that discriminated against the students.[35] The order also stated that due to Pennsylvania having undertaken to provide a free public education to all children, that it was also their obligation to provide:

> [A] free, public program of education and training appropriate to the child's capacity, within the context of a presumption that, among the alternative programs of education and training required by statute to be available, placement in a regular public school class is preferable to placement in a special public school class and placement in a special public school class is preferable to placement in any other type of program of education and training.[36]

Congress recognized this as the leading case whichbegan a movement of other state and federal courts recognizing the principle that all children with disabilities had a constitutional right to public education.[37]

Mills was also a class action suit brought by several students with disabilities in the District of

[32] 348 F. Supp. 866 (D.D.C. 1972).
[33] Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773, Report.
[34] P.A.R.C., 334 F. Supp. at 1259.
[35] *Id.* at 1258–59.
[36] *Id.* at 1260.
[37] Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773, Report.

Columbia, alleging that the District's public-school system had not provided them with an adequate education.[38] The court held that:

> The defendants are required by the Constitution of the United States, the District of Columbia Code, and their own regulations to provide a publicly-supported education for these "exceptional" children. Their failure to fulfill this clear duty to include and retain these children in the public school system, or otherwise provide them with publicly-supported education, and their failure to afford them due process hearing and periodical review, cannot be excused by the claim that there are insufficient funds.[39]

The court then enjoined the school system from further acts of discrimination, required an implementation plan be reported to the court, and further required the District to provide due process hearings in regard to students with disabilities' educational programs, laying out specific procedures to follow.[40] Congress recognized that this was the first case recognizing a constitutional right to publicly supported education "regardless of any exceptional condition or handicap."[41]

The drafters of the Act observed that the notions from the holdings in the aforementioned cases led to a pattern among state and federal courts with similar holdings that children with disabilities were entitled to a free public, appropriate education.[42] In response to these rulings, the drafters stated that Congress adopted Public Law 93-380, allowing for one year of emergency

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[38] *Mills*, 348 F. Supp. at 868.
[39] *Id.* at 876.
[40] *Id.* at 877–83.
[41] Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773, Report.
[42] *Id.*

appropriations and study of how a national program should be implemented, assisting states with meeting their obligation to provide free and appropriate public education to all students with all disabilities.[43]
Since the enactment of the Education for All Handicapped Children Act of 1975, thousands of civil actions have been brought over alleged violations of the legislation's procedural and substantive protections. Many of these suits have been class actions, a trend that Congress has been aware of in its subsequent amendments to the Act and other legislation, but has left untampered.[44]

II. Class Action Lawsuits Under the IDEA

Though class action litigation of special education claims has been left unhindered by statutory law, disfavor by some courts and policymakers of systemic challenges, and increasingly stringent requirements to form a representative class, have made it more difficult to bring such actions.[45] To understand the problems facing special education class actions, one must first understand the challenges of initiating a class action to begin with. We will begin with a brief review of the Federal Rules of Civil Procedure and the current controlling case law in this area.

A. Federal Rule of Procedure Rule 23

Federal class action lawsuits are governed by Federal Rules of Civil Procedure Rule 23.[46] In order to certify a representative class of plaintiffs, one must meet

[43] *Id.* (citing Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484).
[44] Weber, *supra* note 30, at 476–77.
[45] *See e.g.*, Parent/Prof'l Advocacy League v. City of Springfield, 934 F.3d 13, 28 (1st Cir. 2019).
[46] FED. R. CIV. P. 23 (2019).

the obligations contained in this rule. To begin with, all prerequisites of Rule 23(a) must be met, which states in pertinent part:

> (a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
> (1) the class is so numerous that joinder of all members is impracticable;
> (2) there are questions of law or fact common to the class;
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
> (4) the representative parties will fairly and adequately protect the interests of the class.[47]

If all of the requirements of Rule 23(a) are met, then at least one of the requirements of Rule 23(b) must also be met, which states in pertinent part:

> (b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:
> (1) prosecuting separate actions by or against individual class members would create a risk of:
> (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
> (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of

[47] FED. R. CIV. P. 23(a).

> the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
> (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
> (D) the likely difficulties in managing a class action.[48]

All of the above provisions have been heavily litigated at courts of all levels.[49] Judges have applied varying levels of scrutiny in ascertaining whether a prospective class meets the requirements, and they have been interpreted

[48] FED. R. CIV. P. 23(b).
[49] *See e.g.*, Amchem Prods. v. Windsor, 521 U.S. 591 (1997); Allison v. Citgo Petroleum Corp., 151 F.3d 402 (5th Cir. 1998); Anderson Living Trust v. WPX Energy Prod., LLC, 306 F.R.D. 312 (D.N.M. 2015).

in broad and narrow ways. For purposes of this article, the author will not labor into every interpretation of every part of this Rule.[50] However, the authority currently having the biggest impact on IDEA class action and other civil rights claims is the Supreme Court's decision in *Wal-Mart v. Dukes*.[51]

B. The Supreme Court and *Wal- Mart v. Dukes*

In *Wal-Mart v. Dukes*, the Supreme Court decided whether a class of 1.5 million female Walmart employees alleging sex discrimination in employment decisions, represented by three current or former employees, could proceed as a certified class under Rule 23.[52] Pertinently, the Court addressed the commonality requirement of Rule 23(a) as the main problem confronting the proposed class.[53] The Court held:

> Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury,' . . . . [t]his does not mean merely that they have all suffered a violation of the same provision of law . . . . [t]hat common contention, moreover, must be of such a nature that it is capable of classwide resolution--which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.[54]

In other words, the Court states that it is not as important that the same legal claims are brought by the class members, rather the focus is on the judgment that

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[50] For further discussion, *see generally* CLASS ACTIONS: THE LAW OF 50 STATES § 6.01 et seq. (2019).
[51] 564 U.S. 338 (2011).
[52] *Id.* at 343.
[53] *Id.* at 346–49.
[54] *Id.* at 349–50.

those class members seek and whether one ruling, and corresponding same or similar relief, can resolve the dispute for all class members.

The Court concluded that the commonality requirement was not met in this case, because the Walmart employees' challenge of individual determinations are not altogether the result of some overlying policy or other reason for the employment decisions.[55] The Court pointed to its decision in *General Telephone Co. v. Falcon*,[56] for examples of circumstances in which a class action for employment discrimination would likely be appropriate.[57] These examples included if the company in question conducted a biased testing procedure that resulted in prejudicial determinations or, if there is "'[s]ignificant proof that an employer operated under a general policy of discrimination,'" and the policy manifested itself in the same or similar way through subjective employment decision making.[58]

After stating that the first example was clearly not applicable in this case, the Court then concluded that there was no evidence indicating that there was a "general policy of discrimination."[59] The Court held that the testimony of an expert witness who stated that there was a disparate employment effect was not sufficient due to the lack of certainty upon which that testimony was based.[60] The Court further observed that the only policy in question was the policy of hiring discretion, which is directly the opposite of what would be necessary for a common discriminatory policy.[61]

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[55] *Id.* at 352.
[56] 457 U.S. 147 (1982).
[57] *Dukes,* 564 U.S. at 353.
[58] *Id.* (quoting *Falcon*, 457 U.S. at 159 (1982)).
[59] *Id.* at 353.
[60] *Id.* at 354.
[61] *Id.* at 355–56.

Shortly after this decision, its holding was applied to IDEA class action lawsuits.[62] While the *Dukes* decision was clearly a setback for special education and related civil rights lawsuits, these cases have been able to continue with some degree of success.[63] Dividing a class into subclasses has proven to be an effective means of certifying these types of class actions[64]

It is also briefly worth mentioning that many states vary to the extent upon which they adopt and rely on federal rules and interpretations in regard to such procedural rules.[65] Bringing class action lawsuits in state court, as opposed to federal court, may prove easier to meet class certification requirements in some jurisdictions, though plaintiffs bringing a state action must be aware of potential removal of that action to federal court.[66] State suits may be worth exploring in certain situations, but will not be discussed further for the purposes of this article.

C. The Exhaustion Requirement and Exceptions

While the procedural rules and case law of class actions have been a major hurdle for the certification of IDEA class actions, other hurdles also emerge from the IDEA itself. As previously mentioned, generally, prospective plaintiffs must exhaust (complete) the administrative remedies (procedures and hearings) available to them under the IDEA when the relief sought is available through those administrative processes.[67] Only upon exhausting those remedies may a civil action,

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[62] Weber, *supra* note 30, at 481.
[63] Weber, *supra* note 30, at 481.
[64] Weber, *supra* note 30, at 498–99.
[65] *See* CLASS ACTIONS: THE LAW OF 50 STATES § 4.01 et seq. (2019) for a survey of certain state class action requirements.
[66] *See* 28 U.S.C. § 1446; 28 U.S.C. § 1453.
[67] 20 U.S.C. § 1415(l).

challenging the findings and decision of the state and local authorities below, be brought.[68] Some courts have been willing to recognize exceptions to this exhaustion requirement for certain situations, such as for the types of systemic violations a class action would address, while others have applied it regardless and without appreciation of the allegations and circumstances.[69]

The United States Supreme Court brought some clarity to the issue of exhaustion in *Fry v. Napoleon Community Schools*.[70] The Court held that "§ 1415(l)'s exhaustion rule hinges on whether a lawsuit seeks relief for the denial of a free appropriate public education 'FAPE'. . . [i]f a lawsuit charges such a denial, the plaintiff cannot escape § 1415(l) merely by bringing her suit under a statute other than the IDEA."[71] In determining whether the suit is seeking redress for denial of a FAPE, the Court said that one should look to "the gravamen of a complaint" and see if it "seeks redress for a school's failure to provide a FAPE, even if not phrased or framed in precisely that way."[72] The Court further advised that, in making this determination, one should look to the other disability rights statutes (the ADA, Rehabilitation Act, etc.) and ask if the same suit could be filed in a non-education setting to seek the same relief.[73] If the answer is that a suit could be brought in another setting and context, then it is less likely that the issue would be redressable as a FAPE violation, and it is less likely that exhaustion would be required.[74]

The exhaustion requirement is not absolute, as courts have universally recognized exceptions to the

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[68] *See* 20 U.S.C. § 1415(i).
[69] WEBER, *supra* note 26, at 86.
[70] 137 S. Ct. 743 (2017).
[71] *Id.* at 754.
[72] *Id.* at 755.
[73] *Id.* at 755–56.
[74] *Id.*

requirement.[75] The legislative history of the IDEA's predecessor statute, the Education for All Handicapped Children Act of 1975, also indicated that Congress was well aware of exceptions to the exhaustion requirement—especially in regard to class action lawsuits. The sponsor of the legislation, Senator Harrison Williams, stated on the record:

> [W]ith regard to complaints, I want to underscore 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. Nor is it intended that the availability of these administrative procedures be construed so as to require each member of the class to exhaust such procedures in any class action brought to redress an alleged violation of the statute.[76]

This history shows the nature of the exhaustion requirement as Congress (or at least the drafters) intended it to be in this provision, and also the nature of its application to class action lawsuits, which will be discussed further *infra*.

Federal courts have universally recognized the exception alluded to in the above mentioned remarks, that "parents need not exhaust the procedures set forth in 20 U.S.C. § 1415 where resort to the administrative

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[75] Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 (9th Cir. 1992). For a general discussion of the exhaustion exceptions applied by various courts, see A.H. v. Clarksville-Montgomery Cty. Sch. Sys., No. 3:18-cv-0081, 2019 U.S. Dist. LEXIS 20060, at *13–15 (M.D. Tenn. Feb. 7, 2019).

[76] 121 Cong. Rec. 37,416 (1975) (remarks of Sen. Harrison Williams).

process would be either futile or inadequate."[77] The futility and inadequacy principles are based on general exhaustion principles of administrative law.[78] The legislative history of the IDEA also recognizes a third exception to the exhaustion requirement, that it is not appropriate in certain situations to require the "use of due process and review procedures set out in [20 U.S.C. § 1415(b) and (c)] of the [IDEA] before filing a law suit."[79] Such situations are present if:

> '(1) it would be futile to use the due process procedures . . . . ; (2) an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law; (3) it is improbable that adequate relief can be obtained by pursuing administrative remedies (e.g., the hearing officer lacks the authority to grant the relief sought)'[80]2

The court in *Hoeft* clarified that exhaustion is not automatically excused when "policy underlying an individual education program is challenged as unlawful," rather the term "'contrary to the law'. . . . suggests that when only questions of law are involved in determining the validity of a policy, as when the policy facially violates the IDEA, exhaustion may not be required."[81]

The *Hoeft* court also directly addressed the exhaustion requirement in terms of class action lawsuits. The court first rejected the notion that the class action nature of the suit alone entitled the plaintiffs to bypass the IDEA exhaustion requirement, holding that the "administrative remedies are not inadequate simply because a large class of plaintiffs is involved."[82] The court did note that the exhaustion requirement, however, is

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[77] *Hoeft*, 967 F.2d at 1303.
[78] *Id.*
[79] *Id.* (citing H.R. 296, 99th Cong. (1985)).
[80] *Id.* at 1303–04 (citing H.R. 296, 99th Cong. (1985)).
[81] *Id.* at 1305.
[82] *Hoeft*, 967 F.2d at 1309.

applied differently in class actions, adopting the legislative history mentioned previously.[83] The court construed the legislative intent to be that, although not every member of class must exhaust administrative remedies, at least some of the members must meet the exhaustion requirements.[84]

Other courts have applied the exceptions to the exhaustion requirement with a more systemic focus.[85] "When a plaintiff was denied a FAPE due to a systemic problem that could not have been remedied by the administrative complaint process," courts have often found exhaustion to be futile.[86] It is especially noteworthy that some courts have recognized a totally separate and distinct exception to the exhaustion requirement for systemic violations.[87] It appears most courts have declined to recognize a separate systemic exception.[88]

Some courts have excused the exhaustion requirement altogether when a class action lawsuit's claims are challenging a policy or practice that constitutes a systemic violation, not requiring that any

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[83] *Id.* (citing 121 Cong. Rec. 37,416 (1975) (remarks of Sen. Harrison Williams)).
[84] *Id.*
[85] *Clarksville-Montgomery Cty. Sch. Sys.*, 2019 U.S. Dist. LEXIS 20060, at *14–15.
[86] *Id.* at *14 (citing D.R. v. Mich. Dep't of Educ., No. 16-13694, 2017 U.S. Dist. LEXIS 222030, at *9 (E.D. Mich. Sept. 29, 2017)).
[87] *Id.* at *15 (citing Urban by Urban v. Jefferson Cty. Sch. Dist. R-1, 89 F.3d 720, 725 (10th Cir. 1996)); *see also* Ass'n for Cmty. Living v. Romer, 992 F.2d 1040, 1044 (10th Cir. 1993); J.G. v. Bd. of Educ., 830 F.2d 444, 446–47 (2nd Cir. 1987).
[88] *Id.* at *14–15 (citing several unpublished cases from the United States Court of Appeals for the Sixth Circuit); *see also* Parent/Prof'l Advocacy League v. City of Springfield, 934 F.3d 13, 28 (1st Cir. 2019) (declining to adopt a separate systemic exception at this time).

number of class members exhaust.[89] Most jurisdictions have appeared to follow the legislative history of the act,[90] adopting the rule that generally at least some members must exhaust their administrative remedies to be excepted from the requirement.[91] This rule is applied differently based on the facts of each individual case—in some instances a minimal number would need to exhaust, while in others, it could be possible that every class member would be required to exhaust.[92]

Plaintiffs have also had success in bypassing the exhaustion requirement in some instances by merely filing disability civil claims under other statutes, disregarding the IDEA, or seeking to enforce the IDEA requirements through civil rights claims.[93]

D. An Example: *Parent/Professional Advocacy League v. City of Springfield*

Now that a framework has been laid, in showing the challenges a prospective class of plaintiffs would face in terms of procedural barriers and administrative exhaustion requirements in bringing a class action, this paper will briefly note a recent case to illustrate how these barriers often times play out.

Parent/Professional Advocacy League v. City of Springfield,[94] initiated by the plaintiffs in the United States District Court for the District of Massachusetts,

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[89] *See* Handberry v. Thompson, 446 F.3d 335, 343 (2d Cir. 2006).
[90] *See* 121 Cong. Rec. 37,416 (1975) (remarks of Sen. Harrison Williams).
[91] *See Romer*, 992 F.2d at 1045; *Parent/Prof'l Advocacy League*, 934 F.3d at 32.
[92] *Parent/Prof'l Advocacy League*, 943 F.3d at 32.
[93] See discussion about this topic generally in Mark C. Weber, *Disability Harassment in the Public Schools*, 43 WM. & MARY L. REV. 1079, 1138–41 (2002).
[94] 934 F.3d 13 (1st Cir. 2019).

sought relief for claims of alleged violations of Title II of the ADA.[95] The suit specifically alleged that the local school system was unnecessarily segregating students with mental health disabilities into a separate and inferior school.[96] One affected student brought this action on behalf of himself and a class of "all students with a mental health disability who are or have been enrolled at [the separate school]."[97] The plaintiffs sought injunctive and declaratory relief, including an order that the school system provide "school-based behavior services in neighborhood schools to afford [the students] an equal educational opportunity and enable them to be educated in neighborhood schools."[98] The district court denied class certification.[99] The plaintiffs filed this consolidated appeal challenging the district court's determination in regard to class certification and the IDEA exhaustion requirement.[100]

The court first determined that the relief sought in this suit was relief available under the IDEA.[101] Applying *Fry*,[102] the court held that the "crux of the complaint is that the defendants failed to provide the educational instruction and related services that the class plaintiffs need to access an appropriate education in an appropriate environment."[103] "That is not a claim of simple discrimination; it is a claim 'contesting the adequacy of a special education program.'"[104] The court

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[95] *Id.* at 17.
[96] *Id.*
[97] *Id.* at 17–18. Two advocacy organizations also were joined as plaintiffs in this case, but for purposes of this paper, their claims and subsequent resolution will not be analyzed.
[98] *Id.* at 18.
[99] *Id.* (citing S.S. v. City of Springfield, 318 F.R.D. 210, 224 (D. Mass. 2016)).
[100] *Id.*
[101] *Id.* at 25.
[102] *Id.* at 24–25 (citing *Fry*, 137 S. Ct. at 756).
[103] *Id.* at 25.
[104] *Id.* (citing *Fry*, 137 S. Ct. at 755).

further observed that though the language of claims tracks that of ADA regulations, the claims still allege that the IDEA obligation that students be put in the least restrictive environment possible has been violated.[105] The court also observed that it was telling that the representative plaintiff first filed an administrative complaint under the IDEA, with the same allegations, before initiating this suit with ADA claims.[106]

Having concluded that the relief sought in the suit was available under the IDEA, and thus also subject to the IDEA's exhaustion requirement, the court proceeded to review the plaintiff's argument that an exception to the exhaustion requirement should be applied to an IDEA claim alleging systemic failures of the school system.[107] Analyzing decisions of other circuits applying such an exception, the court said that none of those applications are present here, as the plaintiff's suit is not "systemic" in the sense "contemplated by any such exception."[108] The court pointed to the individual determinations that would be necessary for each student and the lack of a "uniform system-wide policy 'enforced at the highest administrative level'" that is being challenged.[109] Due to such exception not being applicable here, the court declined to adopt such a rule.[110]

The court next proceeded to review the decision to decline certification of the proposed class.[111] The court began its analysis by stating that *Dukes* was applicable in this case.[112] Applying these standards to special education suits the court observed:

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[105] *Id.*
[106] *Id.* at 25–26 (citations omitted).
[107] *Id.* at 27.
[108] *Id.* at 27–28.
[109] *Id.* (citing *Hoeft*, 967 F.2d at 1305).
[110] *Id.* at 28.
[111] *Id.*
[112] *Id.* (citing *Dukes*, 564 U.S. at 350).

> "in class actions relating to special education (which are usually brought under the IDEA), plaintiffs can satisfy Rule 23(a)'s commonality requirement by identifying a uniformly applied, official policy of the school district, or an unofficial yet well-defined practice, that drives the alleged violation."[113]

The court further observed that "[i]dentification of an unofficial yet well-defined practice (or set of practices) that is consistently and uniformly applied might also satisfy the commonality prerequisite."[114]

The plaintiffs attempted to satisfy the commonality requirement by using expert testimony showing that a sample of the students segregated into the separate school did require such a placement, and further that the education provided at the separate school was inferior to the education provided at a regular school in the system.[115] The court stated that the problem with this expert opinion was "that the report claims to find a pattern of legal harm common to the class without identifying a particular driver—'a uniform policy or practice that affects all class members'—of that alleged harm."[116] This was the same problem that the plaintiffs faced in *Dukes*.[117] The court held that, absent some common policy being challenged, the appropriateness of each students educational placement would likely have to be determined individually rather than there being one common answer to that inquiry.[118] The court held that

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[113] *Id.* at 29.
[114] *Id.*
[115] *Id.* at 29–30.
[116] *Id.* at 30 (citing DL v. District of Columbia, 713 F.3d 120 (D.C. Cir. 2013)).
[117] *Id.* (citing *Dukes*, 564 U.S. at 350).
[118] *Id.* at 31.

the district court did not abuse its discretion in denying class certification for lack of commonality.[119]

The court also reviewed the district courts determination that all class members must exhaust their administrative remedies before forming a class.[120] The court observed that only the representative plaintiff had exhausted his administrative remedies.[121] The court noted that this could prove problematic for purposes of a civil action, given that individual students' conditions would differ greatly and the resulting administrative process would look different and likely yield different results for each student.[122] The court briefly surveyed the rules applied by other circuits as to how many class members must exhaust in varying circumstances.[123] The court adopted the approach of the Tenth Circuit, holding that not every plaintiff in a class action would need to exhaust, but the number needed would depend on the circumstances of the case.[124] Here, the court concluded that one plaintiff exhausting their remedies did not suffice, a conclusion supporting the decision to decline the certification of the class.[125]

III. Other Means of Challenging Systemic Violations

Now that we have completed our review of some of the problems facing prospective class action plaintiffs, it is important briefly to consider alternative legal methods to challenge systemic violations of special education and related disability rights laws in an

[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.* at 31.
[123] *Id.* at 32.
[124] *Id.* (citing Ass'n for Cmty. Living v. Romer, 992 F.2d 1040, 1045 (10th Cir. 1993)).
[125] *Id.* at 32–33.

educational context. While the relief is generally somewhat limited in these venues, it is more readily available, generally cheaper, and there are far fewer barriers to initiate the relief.

Alleging Systemic Violations in Individual Due Process Hearings and Subsequent Civil Actions

Although the due process procedures under the IDEA are generally concerned with deciding individual determinations, that does not preclude allegations of a more systemic nature being raised in these proceedings.[126] Furthermore, establishing systemic violations and practices on the administrative level forms a record upon which trial courts can review these allegations. The district courts and state courts in a subsequent civil action would have greater latitude to grant broader relief both for the individual plaintiff and in regard to the larger education system.[127]

A. State Administrative Complaints

Under the IDEA Federal Regulations, a state education agency must adopt state complaint procedures that may be filed alleging violations of the IDEA.[128] This provision allows for remedies including those that address "(1) The failure to provide appropriate services, including corrective action appropriate to address the needs of the child (such as compensatory services or monetary reimbursement); and (2) Appropriate future provision of services *for all children with disabilities*."[129] Individuals seeking relief under these state administrative complaints should seek information from their state department of education or equivalent state

[126] *See* 20 U.S.C. § 1415(i).
[127] *See* Weber, *supra* note 29, at 500–01.
[128] 34 C.F.R. § 300.151 (2019).
[129] 34 C.F.R. § 300.151(b) (emphasis added).

educational agency.[130] While relief typically appears to be limited to the state enforcing the IDEA against local education agencies' violative practices and ensuring that they do not continue, further relief may be available in limited circumstances, possibly against the state itself if the administrative enforcement and monitoring is inadequate.[131]

B. U.S. Department of Education, Office of Civil Rights Complaint

The U.S. Department of Education, Office of Civil Rights (OCR) receives complaints and investigates alleged violations of, among other civil rights laws, Title II of the ADA and Section 504 of the Rehabilitation Act of 1973.[132] OCR has the authority to bring limited actions to enforce the provisions of these statutes.[133] It should be noted, however, that the vitality of OCR complaints in regard to systemic violations has been called into question at the time of this article's drafting.[134] Nevertheless, OCR complaints remain an avenue for relief that has traditionally been a favored method by aggrieved parents or advocacy organizations.

C. Pursuing Legislative Remedies

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[130] For an example of state procedures, see TENN. DEP'T OF EDUC., GUIDE TO SPECIAL EDUCATION ADMINISTRATIVE COMPLAINTS (2015), https://www.tn.gov/content/dam/tn/education/legal/legal_administrative_complaint_guide.pdf.

[131] *See* Corey H. v. Bd. of Educ. of Chi., 534 F.3d 683 (7th Cir. 2008).

[132] *See* Office of Civil Rights, *About OCR*, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/offices/list/ocr/aboutocr.html (last visited Nov. 14, 2020).

[133] *See id.*

[134] *See* Laura Meckler, *Betsy DeVos's Civil Rights Office Closes More Cases than Predecessor*, WASH. POST, July 10, 2019.

Finally, legislative solutions represent potential effective and meaningful ways for individuals and groups to redress systemic problems in special education and education policy in general. Having a conversation with local board of education members, state administrative officials, state legislators, federal administrative officials, and members of Congress can prove to be a very helpful and insightful way to resolve disputes and seek policy change in a broad, impactful way.

IV. Conclusion

Class action lawsuits have always been an inherent part of special education litigation. From the enactment of the Individuals with Disabilities Education Act (IDEA) to the current day, class actions have been used to address and redress many systemic violations of the constitutional and statutory right of students with disabilities to receive a free, appropriate public education. Though it has become increasingly difficult to initiate such class actions due to procedural constraints, the courts have shown that they are not willing to foreclose all class relief. Class actions remain a viable and vital tool in ensuring that the rights of students with disabilities are protected now and in the future. Class actions and other administrative remedies can and should be used to address systemic failures on the part of America's public schools.