

Educational Death Sentences: Addressing The Plight of Students With Disabilities in Adult Jails And Prisons

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ABSTRACT

This Article examines barriers to and strategies for enforcing the rights of students with disabilities in adult jails and prisons. The carceral system often functions as a pressure valve for the public education system. When students with disabilities get in trouble at school or in the community, schools routinely force them out of school and into the school-to-prison pipeline, rather than provide the special education and related services these students need and to which they are entitled under the Individuals with Disabilities Education Act (“IDEA”). The adult carceral system then denies these students the same necessary services. For this group of students in adult carceral facilities, this denial of services can result in an end to their special education services and permanent disengagement from the education system — the equivalent of an educational death sentence. The predictable result of excluding and criminalizing students with disabilities is reflected in the fact that as many as 70% of young people in jails and prisons have a disability.

It does not have to be this way. The IDEA’s current legal provisions and available remedies provide a path to disrupt this downward spiral, especially amid recent developments that have exposed the extent to which special education services for students with disabilities in adult jails and prisons are deficient. Much of the relevant literature focuses on the barriers to meaningful special education services in adult jails and prisons, including provisions in the IDEA that weaken these students’ rights. This Article is the first to focus on existing legal mechanisms that can be used to strengthen these students’ rights considering these recent developments.

*First, this Article describes the overrepresentation of students with disabilities in adult jails and prisons, some important provisions of the IDEA, and the application of the law to these students. Second, this Article analyzes two relevant recent developments. The first is the Supreme Court’s 2017 decision, *Endrew F. v. Douglas County School District*, which clarified and raised the standard for what schools, including those in adult jails and prisons, must provide all students with disabilities. The second development is the COVID-19 pandemic’s further degradation of educational services in these facilities. The combination of these events has enhanced the opportunity to improve educational services for students with disabilities in adult jails and prisons through class-action and systemic litigation. Within this context, this Article then examines how class-action and systemic litigation can utilize two existing legal mechanisms under the IDEA to pursue this goal. First, litigation can force State Educational Agencies (“SEAs”) to perform their duties under the IDEA to*

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monitor and enforce the provision of special education services in adult carceral settings. Second, litigation can require these facilities to provide compensatory education to students with disabilities to remedy years of denied services. Next, this Article analyzes how two class-action lawsuits, *Adam X. v. New Jersey Department of Corrections* and *Charles H. v. District of Columbia*, focused on the role of SEAs and relief in the form of compensatory education in an attempt to enhance the educational opportunities for these students. Finally, this Article concludes that the tools already exist to improve the enforcement of rights that have seemed unenforceable for many students with disabilities incarcerated in adult jails and prisons.

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INTRODUCTION

“The teachers are supposed to be there for us, to teach us, but it was a jail mindset, just babysitting – they’d slide worksheets under the door.”¹

¹ *A Student’s Journey: Fighting for Education Rights While in Prison*, ACLU N.J. (Mar. 2, 2022, 2:45 PM), <https://www.aclu-nj.org/en/news/students-journey-fighting-education-rights-while-prison> [<https://perma.cc/F4YM-D39K>].

These are the reflections of Brian Y., one of the named plaintiffs and class representatives in the lawsuit *Adam X. v. New Jersey Department of Corrections*, which was filed in 2017 to challenge the systemic denial of special education and related services² to students with disabilities in New Jersey’s state prison system.³ Despite having a history of disability diagnoses and struggles in public school, Brian Y. found himself in an adult prison classroom with students of different ages, most learning the same material from teachers who were not qualified to teach the relevant subjects.⁴ Brian Y. was under eighteen years old when the state placed him in an adult prison.⁵ But he understood he was entitled to a better education: “I knew from my time in regular school that what was happening wasn’t normal. But all of this was my first time in jail or prison, so I thought that it was the norm: a tenth grader and a seventh grader all in the same class.”⁶

Brian Y.’s story is not unique. Brian Y., like many other students with disabilities, found himself on the prison end of the school-to-prison pipeline.⁷ Schools fail these students en masse early and often, pushing them

² The Individuals with Disabilities Education Act (“IDEA”) defines special education as “specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability.” 20 U.S.C. § 1401(29); 34 C.F.R. § 300.39. This can “includ[e] instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings.” 20 U.S.C. § 1401(29); 34 C.F.R. § 300.39. The IDEA defines related services as “transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education . . .” 20 U.S.C. § 1401(26); 34 C.F.R. § 300.34 (listing specific related services, including, *inter alia*, speech-language pathology, psychological services, physical and occupational therapy, counseling services, and social work services).

³ Brian Y. is a pseudonym used in the *Adam X.* lawsuit. See *Adam X. v. N.J. Dep’t of Corr., Disability Rts. Advocs.*, <https://dralegal.org/case/adam-x-et-al-v-new-jersey-department-corrections-et-al/> [<https://perma.cc/W4PA-359K>] (last visited July 23, 2023). As a former attorney with Disability Rights Advocates, the Author worked on the *Adam X.* lawsuit until February 2020. Lawyers from Disability Rights Advocates filed the lawsuit with lawyers from the American Civil Liberties Union of New Jersey and Proskauer Rose LLP.

⁴ First Amended Class Action Complaint at ¶¶ 58, 110, 116, *Adam X. v. N.J. Dep’t of Corr.*, No. 3:17-cv-188 (D.N.J. Apr. 7, 2017), https://dralegal.org/wp-content/uploads/2017/01/26_First_Amended_Complaint_ACCESSIBLE.pdf [<https://perma.cc/TJ99-ZNUV>] [hereinafter *Adam X. FAC*].

⁵ *Id.* at ¶¶ 108, 120.

⁶ *A Student’s Journey: Fighting for Education Rights While in Prison*, *supra* note 1.

⁷ The school-to-prison pipeline refers to “the intersection of the K-12 public education system and law enforcement, and the trend of referring students directly to law enforcement for committing offenses at school or creating conditions that increase the probability of students eventually becoming incarcerated, such as suspending or expelling them.” Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919, 923 (2016); see also Joseph B. Tulman & Kylie A. Schofield, *Reversing the School-to-Prison Pipeline: Initial Findings from the District of Columbia on the Efficacy of Training and Mobilizing Court-Appointed Lawyers to Use Special Education Advocacy on Behalf of At-Risk Youth*, 18 UDC L. REV. 215, 222 n.35 (2015) (defining the school-to-prison pipeline as “the product of the policies of school districts, law enforcement agencies, and courts that criminalize in-school behavior or otherwise push disadvantaged, underserved, and at-risk children from mainstream educational environments into the juvenile justice system, and all too often [into] the criminal justice system”) (quoting Ronald K. Lospennato, *Multifaceted Strategies to STOP the School-to-Prison Pipeline*, 42 CLEARINGHOUSE REV. 528, 529 (2009)).

into the juvenile and, eventually, the adult criminal legal system.⁸ In this way, the carceral system often functions as a pressure valve for the public schools in a community, relieving them of their obligations to serve these students. For many students with disabilities, entrance into the adult carceral system results in an end to special education services and permanent disengagement from school, the equivalent of an educational death sentence.

Much of what happened to Brian Y. and other students with disabilities on their pathway from school to jail or prison violates the Individuals with Disabilities Education Act (“IDEA”),⁹ a long-standing federal statute that guarantees students with disabilities a free appropriate public education (“FAPE”).¹⁰ The IDEA requires education providers to identify students with disabilities¹¹ and provide these students with special education and related services listed in an Individualized Education Program (“IEP”) developed by an IEP team.¹² School personnel must also ensure these students receive supports and services to address behaviors relating to their disabilities, as well as transition services to ensure they have post-secondary plans for further schooling, work, and/or independent living.¹³ To enforce its requirements, the IDEA establishes “general supervision” responsibilities¹⁴ that include affirmative monitoring and enforcement duties on the part of State Educational Agencies (“SEAs”) and gives them the power (on behalf of the state) to issue “a corrective action plan or improvement plan” or even

⁸ See, e.g., Jackie Mader & Sarah Butrymowicz, *Pipeline to Prison: Special Education Too Often Leads to Jail for Thousands of American Children*, THE HECHINGER REPORT (Oct. 26, 2014), <https://hechingerreport.org/pipeline-prison-special-education-often-leads-jail-thousands-american-children/> [<https://perma.cc/3VUX-YNPE>] (“Across the country, students with emotional disabilities are three times more likely to be arrested before leaving high school than the general population.”).

⁹ 20 U.S.C. § 1400.

¹⁰ 20 U.S.C. § 1400(d)(1)(A).

¹¹ 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a). The IDEA covers children with disabilities from an enumerated list of disabilities. See 20 U.S.C. § 1401(3) (defining a child with a disability as a child “with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities . . . who, by reason thereof, needs special education and related services”). Many students with disabilities in adult jails and prisons have disabilities that affect their behavior, thus making it more likely they will be pushed out of school. See, e.g., Amanda Merkwae, Note, *Schooling the Police: Race, Disability, and the Conduct of School Resource Officers*, 21 MICH. J. RACE & L. 147, 148–49 (2015) (describing how schools criminalize students for disability-related misbehavior).

¹² 20 U.S.C. § 1414(d).

¹³ 20 U.S.C. § 1415(k)(1)(F); 20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.530(f); 34 C.F.R. § 300.43.

¹⁴ See OFFICE OF SPECIAL EDUC. & REHAB. SERVS., U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER: STATE GENERAL SUPERVISION RESPONSIBILITIES UNDER PARTS B AND C OF THE IDEA 2 (July 23, 2023), <https://sites.ed.gov/idea/files/dcl-general-supervision-responsibilities.pdf> [<https://perma.cc/476W-R5V2>] [hereinafter STATE GENERAL SUPERVISION RESPONSIBILITIES]; see also 34 C.F.R. § 300.149.

withhold funding from school districts that fail to comply with the IDEA.¹⁵ The IDEA also allows educational rights holders, which may be students or their parents or guardians, to enforce its provisions.¹⁶ Using these rights, a student can pursue a number of remedies, including compensatory education, a judicially-created remedy that “involves discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency’s failure over a given period of time to provide FAPE to a student.”¹⁷

Despite the IDEA’s clear statutory and regulatory mandates, many public schools funnel students with disabilities into the carceral system in a variety of ways that violate the IDEA. Sometimes schools fail to identify these students as needing special education services altogether despite clear indications and an affirmative statutory obligation to do so.¹⁸ Other times schools refuse to provide these students with the behavioral supports to which they are entitled under the IDEA, and instead send them to segregated educational placements for students with disabilities.¹⁹ Or, when students exhibit challenging behaviors related to their disabilities, schools sometimes use exclusionary discipline and law enforcement to push these students out

¹⁵ 34 C.F.R. § 300.600; *see also* 20 U.S.C. § 1416(a)(1)(C).

¹⁶ 20 U.S.C. § 1415(b)(6)(A). A state can designate that the rights to enforce the IDEA’s provisions transfer from a parent or guardian to the student when the student reaches the age of majority under state law, assuming the child has not been found “incompetent” under state law. 34 C.F.R. § 300.520. Thus, in adult jails and prisons, the student may pursue a complaint, rather than the parent. For ease of reference, this Article will refer to the IDEA rights holders as “students.” Recently, in a case involving a student with disabilities in a state prison in New York who had prevailed on claims for compensatory education, the Second Circuit confirmed that a student who brings a claim on his own behalf and prevails is entitled to attorney’s fees under the IDEA. *J.S. v. New York State Dep’t of Corr. & Cmty. Supervision*, 2023 WL 4938345, at *7 (2d Cir. Aug. 3, 2023).

¹⁷ Leah Aileen Hill, *Disrupting the Trajectory: Representing Disabled African American Boys in a System Designed to Send Them to Prison*, 45 *FORDHAM URB. L.J.* 201, 237 n.184 (2017) (quoting *G ex rel. RG v. Fort Bragg Dependent Sch.*, 343 F.3d 295, 309 (4th Cir. 2003)).

¹⁸ *See, e.g.*, 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a) (describing the affirmative obligation, known as “[C]hild [F]ind,” to identify students with disabilities under the IDEA); Yael Cannon, Michael Gregory & Julie Waterstone, *A Solution Hiding in Plain Sight: Special Education and Better Outcomes for Students with Social, Emotional, and Behavioral Challenges*, 41 *FORDHAM URB. L.J.* 403, 438 (2013) (“When a school fails in its Child Find obligations and a child’s disabilities are discovered at an older age, it may be too late to reverse the course of school push-out and incarceration.”).

¹⁹ *See, e.g.*, 20 U.S.C. § 1415(k)(1)(F); 34 C.F.R. § 300.530(f) (describing IEP teams’ obligations to conduct functional behavioral assessments and develop behavioral intervention plans); Cannon et al., *supra* note 18, at 478 (“When schools adhere to the requirements of manifestation determination reviews, develop effective positive behavior intervention plans, and implement positive behavioral interventions and supports . . . children with disabilities . . . can be supported to remain in the classroom and can avoid juvenile detention and other poor outcomes.”); COUNCIL OF THE GREAT CITY SCHOOLS, *IMPROVING SPECIAL EDUCATION IN NEW YORK CITY’S DISTRICT 75* 37 (June 2008), <https://www.uft.org/files/attachments/nyc-cgcs-report.pdf> [<https://perma.cc/Z3Q5-ZFLQ>] (finding that students with disabilities “with challenging behaviors” were often sent to District 75, New York City’s entirely segregated school district for students with disabilities, without efforts to provide behavioral services mandated under the IDEA).

of school and into the legal system.²⁰ As a result, students with disabilities are massively overrepresented in the juvenile and criminal legal systems, with estimates as high as 70% of incarcerated young people having a disability.²¹ The racial disparity in the population of young people “detained or committed in juvenile facilities” is stark.²² For example, 41% of youth in juvenile facilities are Black, despite the fact that only 15% of youth in the United States are Black.²³ Income disparities are also striking, as the median income of incarcerated people is 41% less than that of non-incarcerated people.²⁴

The implementation gap between the IDEA’s mandates and what many students experience in schools widened with the blessing of numerous federal courts until the Supreme Court’s 2017 decision in *Andrew F. v. Douglas County School District*.²⁵ In 1982, the Supreme Court held in *Board of Education v. Rowley* that a student’s IEP must be “reasonably calculated to enable the child to receive educational benefits,” which for students in the general education classroom means “advanc[ing] from grade to grade.”²⁶ In the thirty-five years between *Rowley* and *Andrew F.*, some federal courts effectively nullified *Rowley*’s educational benefit standard for many students with disabilities. In the Tenth Circuit, for example, schools only had to provide students with an educational program that enabled “‘merely more than *de minimis*’ progress.”²⁷ *Andrew F.* rejected that low bar and announced what the Supreme Court called a “markedly more demanding” standard.²⁸ Under *Andrew F.*, schools must provide all students with

²⁰ See, e.g., Merkwae, *supra* note 11, at 148–49, 151 (noting that “[o]ver the past few decades, schools across the country have adopted extremely harsh discipline policies to control student misbehavior that may be caused by an underlying disability,” including the use of police in schools).

²¹ See, e.g., NAT’L DISABILITY RTS. NETWORK, ORPHANAGES, TRAINING SCHOOLS, REFORM SCHOOLS AND NOW THIS?: RECOMMENDATIONS TO PREVENT THE DISPROPORTIONATE PLACEMENT AND INADEQUATE TREATMENT OF CHILDREN WITH DISABILITIES IN THE JUVENILE JUSTICE SYSTEM 12 (June 2015), https://www.ndrn.org/wp-content/uploads/2019/02/NDRN_-_Juvenile_Justice_Report.pdf [<https://perma.cc/UXS4-3GXX>] (“Prevalence studies have found that 65-70 percent of youth in the justice system meet the criteria for a disability, a rate that is more than three times higher than that of the general population.”); SUE BURRELL & LOREN WARBOYS, OFFICE OF JUVENILE JUST. & DELINQUENCY PREVENTION, SPECIAL EDUCATION AND THE JUVENILE JUSTICE SYSTEM 1 (July 2000), <https://www.ojp.gov/pdffiles1/ojjdp/179359.pdf> [<https://perma.cc/G7VY-L76Q>] (noting that “studies of incarcerated youth reveal that as many as 70 percent suffer from disabling conditions”).

²² Joshua Rovner, *Black Disparities in Youth Incarceration*, THE SENTENCING PROJECT (July 15, 2021), <https://www.sentencingproject.org/fact-sheet/black-disparities-in-youth-incarceration/#footnote-ref-2> [<https://perma.cc/85PG-DPVM>].

²³ *Id.*

²⁴ BERNADETTE RABUY & DANIEL KOPE, PRISONS OF POVERTY: UNCOVERING THE PRE-INCARCERATION INCOMES OF THE IMPRISONED, PRISON POLICY INITIATIVE (July 9, 2015), <https://www.prisonpolicy.org/reports/income.html> [<https://perma.cc/9PJE-YS4X>].

²⁵ 580 U.S. 386 (2017).

²⁶ 458 U.S. 176, 177 (1982).

²⁷ *Andrew F.*, 580 U.S. at 402.

²⁸ *Id.*

disabilities with “an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”²⁹ For most students who receive services in the general education classroom, this standard reiterated that *Rowley*’s holding means “advancement from grade to grade” each year.³⁰ However, for all other students with disabilities, regardless of their educational placement, *Endrew F.*’s clarified and elevated standard means that the students “should have the chance to meet challenging objectives[,]” and thus their “educational program[s] must be appropriately ambitious in light of [their] circumstances.”³¹ The *Endrew F.* standard applies to students with disabilities who receive education in adult jails and prisons³² and provides a legal basis to demand better services for these students.³³

For good reason, much of the literature about the school-to-prison pipeline focuses on critiquing or solving problems in schools.³⁴ If communities could solve problems in schools, they could spare students from entering the pipeline at all. This approach, however, disregards the many students with disabilities who already attend school in adult jails and prisons and may be too old to return to a school in their community if and when they are released. The literature about students with disabilities in adult jails and prisons mostly focuses on explaining the regulatory and statutory frameworks that govern the area and the barriers to using the IDEA to secure

²⁹ *Id.* at 403.

³⁰ *Id.* at 401.

³¹ *Id.* at 402.

³² This Article refers to “adult jails and prisons.” While the precise meaning of these terms varies across localities, this Article intends “adult jails and prisons” to include county and state carceral facilities that hold people both pre- and post-conviction, excluding juvenile facilities. See *The United States of Incarceration: Jails v. Prisons*, THE MARSHALL PROJECT, <https://www.themarshallproject.org/2020/11/11/the-united-states-of-incarceration> [https://perma.cc/U8JM-ZHYL] (last visited Oct. 8, 2022). This distinction is important for several of the exceptions in the IDEA that apply only to students with disabilities being held in adult prisons. See discussion *infra* Part I.D. This Article does not address the educational rights of students with disabilities in juvenile or federal carceral facilities.

³³ See *Charles H. v. District of Columbia*, No. 1:21-CV-00997 (CJN), 2021 WL 2946127, at *9 (D.D.C. June 16, 2021) (relying on the *Endrew F.* standard to award a preliminary injunction to a class of eighteen- to twenty-two-year-old students with disabilities who were denied special education and related services in an adult jail during the COVID-19 pandemic).

³⁴ See, e.g., Nance, *supra* note 7, at 927 (urging school districts to reform school practices to avoid pushing students into the juvenile justice system); Dean Hill Rivkin, *Decriminalizing Students with Disabilities*, 54 N.Y.L. SCH. L. REV. 909, 951 (2010) (calling for reinterpretation of the IDEA to further limit schools’ ability to refer behavioral incidents for students with disabilities to law enforcement); Judith A.M. Scully, *Examining and Dismantling the School-to-Prison Pipeline: Strategies for a Better Future*, 68 ARK. L. REV. 959, 995 (2016) (listing school-based reforms to dismantle the school-to-prison pipeline); Stephanie M. Poucher, Comment, *The Road to Prison Is Paved with Bad Evaluations: The Case for Functional Behavioral Assessments and Behavior Intervention Plans*, 65 AM. U. L. REV. 471, 517–22 (2015) (emphasizing the need to reform the way schools implement behavioral interventions).

appropriate services.³⁵ This Article is the first to advocate for using existing legal mechanisms under the IDEA to strengthen these students' rights amid two recent developments. First, the Supreme Court's decision in *Andrew F.* clarified and raised the standard for services schools must provide to students with disabilities in many jurisdictions. Second, the COVID-19 pandemic and its lingering effects have further degraded the quality of educational services for students in adult jails and prisons. The combination of these developments has enhanced the opportunity and demonstrated the urgency to improve educational services for these students.

Part I of this Article starts by describing the staggering overrepresentation of students with disabilities in adult jails and prisons and how racism and ableism contribute to pushing students of color with disabilities into the school-to-prison pipeline. Part I also outlines the relevant provisions of the IDEA and the barriers to the IDEA's enforcement in carceral facilities, including applicable exceptions in the IDEA. Part II discusses the effects of the Supreme Court's *Andrew F.* decision and the pandemic on the standard for what special education services must be provided and the quality of the services that students receive in adult carceral settings. Then, in light of these recent developments, Part III discusses how two existing legal mechanisms under the IDEA provide a potential pathway to systemic liability and remedies that can be used to improve educational opportunities for these students. These mechanisms include the under-utilized role of SEAs to monitor and ensure that school districts implement the IDEA, and, when schools fail to provide services, the possibilities for courts to award compensatory education to students. These mechanisms can shift resources into the hands of students with disabilities and increase accountability for adult jails and prisons that do not currently provide services in accordance with the IDEA. Part IV explores two recent case studies to demonstrate how class-action litigation can use these two mechanisms to improve services for these students. Finally, the Conclusion argues that the tools already exist to improve educational opportunities for many students with disabilities incarcerated in adult jails and prisons.

³⁵ See, e.g., Elizabeth Cate, *Teach Your Children Well: Proposed Challenges to Inadequacies of Correctional Special Education for Juvenile Inmates*, 34 N.Y.U. REV. L. & SOC. CHANGE 1, 7 n. 22, 35–53 (2010) (focusing on the rights of “juveniles in adult prisons” and analyzing the dismal state of special education in these facilities, and calling for legislative reform, media campaigns, and litigation); Thomas A. Mayes & Perry A. Zirkel, *The Intersections of Juvenile Law, Criminal Law, and Special Education Law*, 4 U.C. DAVIS J. JUV. L. & POL'Y 125, 126–27 (2000) (analyzing the “systemic framework for understanding the overlap of the special education” and carceral systems “by synthesizing the available literature and applicable law,” focusing on the IDEA); Blakely Evanthia Simoneau, *Special Education in American Prisons: Risks, Recidivism, and the Revolving Door*, 15 STAN. J. C.R. & C.L. 87, 112–13, 131 (2019) (detailing exceptions in the IDEA for adult prisons and calling for legislative reform); Melissa Edelson, Note, *Special Education in Adult Correctional Facilities: A Right Not a Privilege*, 50 LOY. L.A. L. REV. 93, 118–22 (2017) (detailing the barriers to special education services in “adult correctional facilities” and calling for legislative reform with a focus on California).

I. THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT IN ADULT JAILS AND PRISONS

Congress first passed a federal special education law named the Education for All Handicapped Children Act (“EAHCA”) in 1975.³⁶ In a subsequent overhaul in 1990, Congress changed the name to the Individuals with Disabilities Education Act.³⁷ At the time of the EAHCA’s passage, less than half of the eight million children with disabilities living in the United States were receiving “appropriate educational services which would enable them to have full equality of opportunity.”³⁸ Congress passed the EAHCA in the wake of several groundbreaking lawsuits that established that states could not exclude students with disabilities from public schools.³⁹ The EAHCA recognized that students with disabilities not only have a right to attend school, but that they also have a right to receive FAPE with special education and related services.⁴⁰

Despite the tremendous need for the EAHCA, President Gerald Ford expressed doubt about its goals when he signed the law: “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 [T]he funding levels proposed in this bill will simply not be possible”⁴¹ Regrettably, President Ford’s warnings proved prescient: The federal government has failed to accomplish the IDEA’s goals and to fund it adequately. Despite a commitment to fund at least 40% of states’ costs of providing special education,⁴² the federal government provides just 13% of special education funding, leaving states and local school districts to fill the gaps.⁴³

³⁶ Pub. L. No. 94-142, 89 Stat. 773.

³⁷ Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, 104 Stat. 1142, § 901(a). The IDEA was later amended as the Individuals with Disabilities Education Improvement Act (“IDEIA”) in 2004, Pub. L. No. 108-446, 118 Stat. 2647. This Article refers to the law as the IDEA rather than the IDEIA, as most sources do.

³⁸ Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773, § 3.

³⁹ Simoneau, *supra* note 35, at 94–98 (describing two 1972 class-action lawsuits that gave rise to the foundational concepts of the IDEA, including the rights for students with disabilities to attend school and receive appropriate services).

⁴⁰ Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773, § 3.

⁴¹ Statement on Signing the Education for All Handicapped Children Act of 1975 by President Gerald R. Ford (Dec. 2, 1975), <https://www.fordlibrarymuseum.gov/library/speeches/750707.htm> [<https://perma.cc/2JPY-MN9X>].

⁴² See Crystal Grant, *COVID-19’s Impact on Students with Disabilities in Under-Resourced School Districts*, 48 *FORDHAM URB. L.J.* 127, 129 (2020) (“However, Congress has never fully funded states with 40% of the special education costs that the IDEA promised.”).

⁴³ Kara Arundel, *IDEA Turns 45: Is Congress Close to Guaranteeing Full Special Ed Funding?*, K-12 DIVE (Nov. 24, 2020), <https://www.k12dive.com/news/growing-hope-for-special-education-full-funding/589543/> [<https://perma.cc/XDH9-7XEB>]. For example, in Michigan, the 2022 budget increased special education funding by \$312 million, raising the state allocation to \$1.9 billion. Lily Altavena, *Michigan Increases Special Education Funding for Schools*

“This discrepancy between the monies promised and the amount actually provided has created inconsistencies in the way school districts implement the IDEA.”⁴⁴

Evaluated against the 1975 status quo, the IDEA has led to progress for students with disabilities. For example, schools and communities now generally accept that students with disabilities have the right to attend school and, at least in theory, receive the services they need to succeed. As of 2017, 65% of students with disabilities graduated from high school on time.⁴⁵ However, these gains have not been consistent across race and socio-economic status as access to quality special education services is scarce “in under-resourced school districts that primarily serve students of color.”⁴⁶ School districts across the country have fallen far short of accomplishing the IDEA’s goal of providing FAPE to all students with disabilities. Indeed, it is estimated that 90% of students with disabilities could graduate from high school “if they receive[d] proper support along the way.”⁴⁷ Nowhere are the IDEA’s failures and inequities more apparent than in adult jails and prisons.

This Part starts by describing the population of students with disabilities in adult jails and prisons. It then explores the prominent roles that racism and ableism play in forcing students of color with disabilities into the school-to-prison pipeline. After providing an overview of the IDEA, along with relevant exceptions in the law, this Part concludes by analyzing challenges to enforcing the IDEA that are unique to carceral settings.

A. *Students with Disabilities in Adult Jails and Prisons*

Students with disabilities are overrepresented and routinely denied services to which they are legally entitled in adult jails and prisons. The United States has the “highest incarceration rate in the world,”⁴⁸ and it “confine[s] youth

by §312M: ‘A Significant Step’, DET. FREE PRESS (July 1, 2022), <https://www.freep.com/story/news/education/2022/07/01/michigan-special-education-funding-increase-budget/7785572001/> [<https://perma.cc/7NUY-B9VU>]. This increase in funding was meant to partially address the nearly \$700 million budget shortfall in special education funding across the state. *Id.*

⁴⁴ Grant, *supra* note 42, at 129.

⁴⁵ Sarah Butrymowicz & Jackie Mader, *Almost All Students with Disabilities Are Capable of Graduating on Time. Here’s Why They’re Not*, THE HECHINGER REPORT (Nov. 4, 2017), <https://hechingerreport.org/high-schools-fail-provide-legally-required-education-students-disabilities/> [<https://perma.cc/CS9D-WPKQ>].

⁴⁶ Grant, *supra* note 42, 129–30 (explaining the inequities in access to special education services that result from “less resourced school districts” receiving the same amount of special education funding as wealthier districts “without accounting for the reality that their students have more needs”).

⁴⁷ Butrymowicz et al., *supra* note 45.

⁴⁸ Emily Widra & Tiana Herring, *States of Incarceration: The Global Context 2021*, PRISON POL’Y INITIATIVE (Sept. 2021), <https://www.prisonpolicy.org/global/2021.html> [<https://perma.cc/NZ39-EJW2>].

at many times the rates of other nations.”⁴⁹ Many of these young people are in adult jails or prisons through “juvenile transfer,” a process that allows children below the minimum age for adult criminal court jurisdiction to be prosecuted in the adult system.⁵⁰ Juvenile transfer provisions typically cover a specific set of crimes.⁵¹ Additionally, in many states, youth may be old enough to fall within the jurisdiction of adult courts even if they are under the age of eighteen.⁵²

Ascertaining the exact number of youth in adult carceral settings “is difficult for many reasons, including high turnover rates and movement of [people] within the facilities.”⁵³ Over a one-year period, there could “be ten to twenty times” more youth in jails and prisons “than the numbers gathered in the one-day count.”⁵⁴ At the end of 2019, there were 653 youth age seventeen or younger being held in private and public adult prisons.⁵⁵ In the same time period, approximately 9,662 people age eighteen to nineteen and approximately 111,814 people age twenty to twenty-four were incarcerated in adult prisons run by state and federal authorities.⁵⁶ The number of “youth under age 18 [who] end up in the adult criminal justice system every year” could be as high as 250,000.⁵⁷ Of these youth in adult jails and prisons, it is unclear exactly how many of them receive, or should be receiving, special education services. In 2020–2021, 15% of all public-school students age three to twenty-one received special education services.⁵⁸ Meanwhile,

⁴⁹ Richard Mendel, *Why Youth Incarceration Fails: An Updated Review of the Evidence*, THE SENTENCING PROJECT (Mar. 2023), <https://www.sentencingproject.org/reports/why-youth-incarceration-fails-an-updated-review-of-the-evidence/> [https://perma.cc/XZM8-3UTC].

⁵⁰ *Practice Profile: Juvenile Transfer to Adult Court*, NAT’L INSTITUTE OF JUST.: CRIME SOLS. (Mar. 27, 2017), <https://crimesolutions.ojp.gov/ratedpractices/64#mao> [https://perma.cc/2KWJ-9ZYH].

⁵¹ *Id.* While juvenile transfer “has been a feature of the juvenile court since its inception,” this practice expanded in the 1990s and early 2000s due in part to policy reforms that expanded the mechanisms for states to transfer youth. Thomas A. Loughran et al., *Differential Effects of Adult Court Transfer on Juvenile Offender Recidivism*, 34 LAW & HUM. BEHAV. 6, 477 (2010). These expansions of options for juvenile transfer “made it easier for a broader group of adolescents to be processed by the adult court.” *Id.*

⁵² See Mayes & Zirkel, *supra* note 35, at 132; see also JASON ZIEDENBERG, NAT’L INST. OF CORR., U.S. DEP’T OF JUST., YOU’RE AN ADULT NOW: YOUTH IN ADULT CRIMINAL JUSTICE SYSTEMS 3–4 (Dec. 2011), <https://www.njjn.org/uploads/digital-library/You're-An-Adult-Now-Youth-In-Adult-Criminal-Justice-Systems-Jason-Zeidenberg-NIC-Dec2011.pdf> [https://perma.cc/2HPP-2XSS] (discussing the various ways states define a youth for adult criminal legal system purposes and listing ways in which youth can be placed in the adult system).

⁵³ Simoneau, *supra* note 35, at 107.

⁵⁴ *Id.* (quoting Andrea Wood, *Cruel and Unusual Punishment: Confining Juveniles with Adults After Graham and Miller*, 61 EMORY L.J. 1445, 1459 (2012)) (internal quotations omitted).

⁵⁵ E. ANN CARSON, OFFICE OF JUST. PROGRAMS BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., *Prisoners in 2019* 19 (Oct. 2020), <https://bjs.ojp.gov/content/pub/pdf/p19.pdf> [https://perma.cc/9S4B-KLWL].

⁵⁶ *Id.* at 15.

⁵⁷ Ziedenberg, *supra* note 52, at 2.

⁵⁸ NAT’L CTR. FOR EDUC. STAT., U.S. DEP’T OF EDUC., INST. OF EDUC. SCIS., *Students with Disabilities* (May 2022), <https://nces.ed.gov/programs/coe/indicator/cgg> [https://perma.cc/L7UW-JT5J].

studies that relied on self-reporting from facilities suggest that 33.4% of youth in carceral settings have a disability qualifying them for special education services.⁵⁹ Up to 70% of incarcerated youth have a disability that may or may not qualify them for services under the IDEA.⁶⁰ Although the exact number of potentially IDEA-eligible students in adult jails and prisons is unclear, the total is likely thousands of students.⁶¹

Under the IDEA, students with disabilities are eligible for services until they either receive a valid high school diploma or turn twenty-one, or in some places, twenty-two.⁶² Students with disabilities incarcerated in adult jails and prisons are some of the most vulnerable students in the country. These students, throughout their lives, suffer the consequences of the policies and societal structures that contribute to and sustain the school-to-prison pipeline. Students in jail or prison “are predominantly drawn” from low-income schools⁶³ as the IDEA “fails a majority of students who currently attend poorly functioning and under-resourced public schools.”⁶⁴ Indeed, “the path to prison often starts very early for kids who struggle to manage behavioral or emotional disabilities in low-performing schools that lack mental health care, highly qualified special education teachers, and appropriately trained staff.”⁶⁵

⁵⁹ Mary Magee Quinn, Robert B. Rutherford, Peter E. Leone, David M. Osher & Jeffrey M. Poirier, *Youth with Disabilities in Juvenile Corrections: A National Survey*, 71 EXCEPTIONAL CHILD 339, 342 (2005).

⁶⁰ See, e.g., NAT’L DISABILITY RTS. NETWORK, *supra* note 21, at 12; Burrell & Warboys, *supra* note 21, at 1.

⁶¹ See OFFICE OF SPECIAL EDUC. & REHAB. SERVS., U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER: IDEA IN CORRECTIONAL FACILITIES 2 (Dec. 5, 2014), <https://www2.ed.gov/policy/gen/guid/correctional-education/idea-letter.pdf> [<https://perma.cc/FQ46-Y2HY>] [hereinafter DEAR COLLEAGUE LETTER ON THE IDEA] (“States reported that in 2012–2013, of the 5,823,844 students with disabilities, ages 6 through 21, served under IDEA, Part B, 16,157 received special education and related services in correctional facilities.”) (quoting U.S. DEP’T OF EDUC., EDFACTS DATA WAREHOUSE, OMB # 1875-0240: IDEA, PART B CHILD COUNT AND EDUCATIONAL ENVIRONMENTS COLLECTION (2012)). While this estimate includes students in juvenile facilities as well as adult facilities, it does not include students in adult jails and prisons who should be receiving services but are not. Given that over 60 percent of facilities as recently as 2005 provided no special education services at all, see James J. Stephan, BUREAU OF JUST. STAT., U.S. DEP’T OF JUSTICE, CENSUS OF STATE AND FEDERAL CORRECTIONAL FACILITIES, 2005 6 (Oct. 1, 2008), <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=530> [<https://perma.cc/R3LS-QCMG>], the number of students with disabilities who are entitled to special education services but are not receiving them is likely substantial, cf. Quinn et al., *supra* note 59, at 342 (noting “in all likelihood the number of students with disabilities in juvenile corrections compared to the number of youth incarcerated in juvenile corrections who are actually eligible for special education services is underestimated”).

⁶² U.S. DEP’T OF EDUC., *Year of Age Cohort (for Years of Age 3 Through 21) for Which FAPE Is Ensured* (Jan. 1, 2020), <https://sites.ed.gov/idea/files/Grants-B-Year-of-Age-Cohort.pdf> [<https://perma.cc/MF6M-GHPB>] (showing that students with disabilities in Washington, D.C. and several other states are entitled to FAPE beyond the age of twenty-one).

⁶³ Cate, *supra* note 35, at 17.

⁶⁴ Claire S. Raj, *Rights to Nowhere: The IDEA’s Inadequacy in High-Poverty Schools*, 53 COLUM. HUM. RTS. L. REV. 409, 412 (2022).

⁶⁵ Mader & Butrymowicz, *supra* note 8.

Even in the face of nearly a lifetime of challenges, barriers, and denied services, most incarcerated youth remain hopeful about their education.⁶⁶ In fact, most of these students still believe they will self-determine their educational futures as 57% of incarcerated youth “expect to go at least as far [in school] as they want.”⁶⁷

Despite the large number of students with disabilities in the adult carceral system, carceral facilities across the country violate the IDEA by failing to provide appropriate educational services.⁶⁸ As compared to juvenile facilities, adult jails and prisons “probably provide markedly less education.”⁶⁹ As of 2005, only 37% of adult jails and prisons operating under state or federal authority provided any special education services to students.⁷⁰ For students with disabilities placed in one of the facilities that provides special education services, information is scarce regarding the quality of the services they receive;⁷¹ what little information does exist indicates that the quality is quite low.⁷² “Adult correctional facilities may fail to offer educational programs at all,” and the programs that do exist may be administered “by entities ill-equipped to educate school-age youth, or may have insufficient resources to provide appropriate services.”⁷³

Writing about her experience in solitary confinement in an adult prison in Texas, Kwaneta Harris described the education that the other young women in solitary confinement receive.⁷⁴ Despite the fact that the women in solitary confinement with Harris have an average education level of seventh grade, Harris reports that their education “consists of a packet of education materials dropped at [their] cell door[s].”⁷⁵ According to Harris, “[t]here are

⁶⁶ See Lindsay McAleer, Note, *Litigation Strategies for Demanding High Quality Education for Incarcerated Youth: Lessons from State School Finance Litigation*, 22 GEO. J. ON POVERTY L. & POL’Y 545, 549 (2015) (“[A] national study of 7073 incarcerated youth found that more than two-thirds reported that they have aspirations of higher education and most believe they will achieve their educational goals.”).

⁶⁷ Andrea J. Sedlak & Carol Bruce, *Youth’s Characteristics and Backgrounds*, OFFICE OF JUSTICE PROGRAMS, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP’T OF JUSTICE 7 (Dec. 2010), <https://www.ojp.gov/pdffiles1/ojjdp/227730.pdf> [<https://perma.cc/G4KL-66TM>].

⁶⁸ See Christine D. Ely, Note, *A Criminal Education: Arguing for Adequacy in Adult Correctional Facilities*, 39 COLUM. HUM. RTS. L. REV. 795, 805 (2008) (“Many young people do not receive education at all while in adult correctional facilities. Other youth may have access only to inadequate programming that fails to meet baseline education standards for non-incarcerated youth.”).

⁶⁹ *Id.* at 801.

⁷⁰ Stephan, *supra* note 61, at 6.

⁷¹ See Ziedenberg, *supra* note 52, at 6 (stating “there is no information on the kinds of services, interventions and programming youth may be receiving while in custody”).

⁷² Ely, *supra* note 68, at 801.

⁷³ *Id.*

⁷⁴ Kwaneta Harris, *My Neighbors in Solitary*, SLATE (Aug. 2, 2023), <https://slate.com/human-interest/2023/08/prison-experiences-female-inmate-solitary-confinement-texas.html> [<https://perma.cc/KZ4T-LB2E>].

⁷⁵ *Id.*

no teachers for us here. If there are, I've never seen or heard them."⁷⁶ Aaron, who is held in an Illinois state prison,⁷⁷ described barriers he has personally experienced when trying to access adult educational programs, especially college courses. These barriers included waitlists for courses ordered by a student's length of sentence and a refusal by the prison to provide proctors for standardized tests administered by external bodies.⁷⁸ As Aaron concluded, "[i]n my quest for education, I've experienced the frustration and disappointment that many incarcerated people encounter in Illinois when trying to learn."⁷⁹

The absence of educational programs also contributes to a dangerous environment in adult carceral settings. According to Miguel, a student who entered an adult jail in Florida at the age of fifteen, "the lack of school and other productive activities fostered violence, creating a fight club atmosphere."⁸⁰ If there had been school in that facility — "or any form of education" — Miguel thinks "[i]t would have made everything a lot less violent and a lot less scary."⁸¹ Indeed, studies confirm Miguel's experience: participants in educational programs in prisons show a "statistically significant" reduction in disciplinary infractions and misconduct.⁸²

The failure to provide appropriate special education services also ignores the well-established benefits that flow from people in prison receiving an education. People in prison who participate in education programs "had 43 percent lower odds of recidivating than [those] who did not."⁸³ Education also increases employment rates after release.⁸⁴ In fact, "[c]orrectional education is almost twice as cost effective as incarceration" at preventing

⁷⁶ *Id.*

⁷⁷ Aaron is an incarcerated person in Illinois who publishes under his first name in an attempt to avoid retaliation. Aaron, *If Illinois Wants Less Recidivism, Prisoners Need More Education*, PRISON JOURNALISM PROJECT (Aug. 24, 2022), https://prisonjournalismproject.org/2022/08/24/less-recidivism-more-education-prison/?gclid=Cj0KCQjwmZejBhC_ARIsAGhCqndm6SBSeEzfzy7EX5Wijt_Wtwr3QCxZPKgnQimgjXi7uKpmKGAAxQlaAmx_EALw_wcB [https://perma.cc/CQ4R-A9YV].

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Destined to Fail: How Florida Jails Deprive Children of Schooling*, SO. POVERTY L. CTR. 5 (2018), https://www.splcenter.org/sites/default/files/cr_ctaa_report_2018_web_final.pdf [https://perma.cc/YC4H-WTRV].

⁸¹ *Id.*

⁸² Jeremy A. Courtney, *The Relationship Between Prison Education Programs and Misconduct*, 70 J. CORR. EDUC. 3, 57 (2019).

⁸³ LOIS M. DAVIS ET AL., EVALUATING THE EFFECTIVENESS OF CORRECTIONAL EDUCATION: A META-ANALYSIS OF PROGRAMS THAT PROVIDE EDUCATION TO INCARCERATED ADULTS, RAND CORP. & BUREAU OF JUST. ASSISTANCE, U.S. DEP'T OF JUSTICE 57 (2013), https://www.rand.org/pubs/research_reports/RR266.html [https://perma.cc/37SA-YSP6] (emphasis in the original omitted).

⁸⁴ *Id.* at 43–44 (finding that participating in educational programs increases the odds of someone finding a job after being released from prison by 13%).

crimes.⁸⁵ The failure of many adult jails and prisons to provide appropriate services to IDEA-eligible students with disabilities prevents these students from receiving these benefits.

B. *Racism and Ableism in the School-to-Prison Pipeline*

Racism and ableism help shape school discipline policies and practices that force a disproportionate number of students of color with disabilities into the juvenile and criminal legal systems. “[T]here is overwhelming evidence suggesting that students of color and students with disabilities are funneled into the justice system due to the disparate impact of exclusionary discipline polices [sic] and discretionary arrests in schools.”⁸⁶

The present racial disparities in the school-to-prison pipeline reflect the intersectional history of racism and ableism in the special education system.⁸⁷ In the wake of *Brown v. Board of Education*’s⁸⁸ 1954 mandate to desegregate public schools, schools developed numerous methods and student tracking systems to keep students segregated according to race based on “dubious measures of ability or aptitude.”⁸⁹ One such method and “one of the most effective and pernicious means of resisting desegregation has been to over refer students of color to segregated special education classes.”⁹⁰ For example, between 1955 and 1956, the Washington, D.C. school system doubled the number of students in special education, with Black students comprising 77% of students placed in special education classes.⁹¹

⁸⁵ Audrey Bazos & Jessica Hausman, *Correctional Education as a Crime Control Program*, UCLA SCHOOL OF PUBLIC POLICY & SOCIAL RESEARCH: DEPARTMENT OF POLICY STUDIES 10, <https://www.dropbox.com/s/nvya4pyz18mz4w5/CorrEdVsMorePrisons.pdf> [https://perma.cc/KUA9-PDGK] (last visited July 13, 2023).

⁸⁶ Merkwae, *supra* note 11, at 180; *see also* Janel George, *Populating the Pipeline: School Policing and the Persistence of the School-to-Prison Pipeline*, 40 NOVA L. REV. 493, 494 (2016) (stating that “children of color . . . are disproportionately targeted for referral and arrest by police in schools”).

⁸⁷ These racial disparities in the school-to-prison pipeline should not be conflated with over- or under-identification of students of color in the special education system. Recent studies have questioned the “conventional wisdom that [Black students] are over identified for special education.” Nora Gordon, *Race, Poverty, and Interpreting Overrepresentation in Special Education*, BROOKINGS, (Sept. 20, 2017), <https://www.brookings.edu/articles/race-poverty-and-interpreting-overrepresentation-in-special-education/> [https://perma.cc/5WH9-BZL3] [NTQ9-D92U] (discussing studies finding that “when you take other student characteristics—notably family income and achievement—into account, racial and ethnic minority students are *less* likely to be identified for special education than white students”). This is an important issue for federal law and policy but examination of this issue is beyond the scope of this Article.

⁸⁸ 347 U.S. 483 (1954).

⁸⁹ Beth A. Ferri & David J. Connor, *In the Shadow of Brown: Special Education and Overrepresentation of Students of Color*, 26 REMEDIAL & SPECIAL EDUC. 2, 96 (2005).

⁹⁰ *Id.*

⁹¹ *Id.* at 96–97.

Segregated special education systems for students with disabilities across the country continue to reflect this legacy of racial segregation. In New York City, as of 2008, Black students with emotional disabilities⁹² were nearly three times more likely than white students to be placed in the city-wide segregated school district for students with disabilities, District 75.⁹³ In Georgia, thousands of students with disabilities attend school in the separate, statewide network of special education schools and programs called the Georgia Network for Educational and Therapeutic Support (“GNETS”) program.⁹⁴ Statewide, 54% of students in GNETS are Black despite the fact that only 37% of students in all public schools in Georgia are Black.⁹⁵ In half of the GNETS programs, more than 60% of students are Black, and in one program, 90% are Black.⁹⁶ Some of the GNETS programs are housed “in the same inferior buildings that served [B]lack children in the days of Jim Crow,”⁹⁷ making the intertwined legacies of race- and disability-based segregation explicit. These segregated placements condemn these students to an inferior education as studies show that students with disabilities, including those students with “extensive support needs,” do better and “actually acquire more academic benefits when included in general education instruction.”⁹⁸

National statistics confirm that public schools continue to funnel students of color with disabilities out of classrooms and into the school-to-prison pipeline from an early age.⁹⁹ Black children comprise only 18% of preschool enrollment but 48% of preschoolers subjected to more than one

⁹² Emotional disability, or “emotional disturbance” as termed in the IDEA, refers to a group of qualifying disabilities under the IDEA, including bipolar disorder, that result in, *inter alia*, “an inability to learn that cannot be explained by intellectual, sensory, or health factors.” 34 C.F.R. § 300.8(c)(4).

⁹³ COUNCIL OF THE GREAT CITY SCHOOLS, *supra* note 19, at 35.

⁹⁴ Alan Judd, *Georgia ‘Psychoeducational’ Students Segregated by Disability, Race*, THE ATLANTA JOURNAL-CONSTITUTION (Apr. 28, 2016), http://specials.myajc.com/psychoeducation/?ecmp=AJC_internallink_4292016_AJctoMyAJC_psycho_ed_atlanta [<https://perma.cc/3EFU-6N2Y>]. GNETS is the subject of litigation being pursued on behalf of parents of children with disabilities, The Arc, and the Georgia Advocacy Office by the Bazelon Center for Mental Health Law, Center for Public Representation, DLA Piper LLP, Georgia Advocacy Office, Goodmark Law Firm, and The Arc. *Georgia Advocacy Office v. Georgia*, THE ARC (July 24, 2019), <https://thearc.org/resource/georgia-advocacy-office-v-georgia/> [<https://perma.cc/E6NN-ZD9V>].

⁹⁵ Judd, *supra* note 94.

⁹⁶ *Id.*

⁹⁷ Marian Wang, *Georgia Is Segregating Troublesome Kids in Schools Used During Jim Crow*, PROPUBLICA (July 29, 2015), <https://www.propublica.org/article/georgia-is-segregating-troublesome-kids-in-schools-used-during-jim-crow> [<https://perma.cc/89P4-GCTZ>].

⁹⁸ NAT’L COUNCIL ON DISABILITY, *IDEA Series: The Segregation of Students with Disabilities* 38–39 (Feb. 7, 2018), https://ncd.gov/sites/default/files/NCD_Segregation-SWD_508.pdf [<https://perma.cc/ED3X-J8KX>].

⁹⁹ See generally U.S. DEP’T OF EDUC. OFFICE FOR C.R., *Civil Rights Data Collection Data Snapshot: School Discipline* (2014), <https://ocrdata.ed.gov/assets/downloads/CRDC-School-Discipline-Snapshot.pdf> [<https://perma.cc/Q8W4-H47M>].

out-of-school suspension.¹⁰⁰ Beyond preschool, only 5% of white students are suspended compared to 16% of Black students.¹⁰¹ Disability status increases the chances of an out-of-school suspension as nearly 25% of male students of color with disabilities and 20% of female students of color with disabilities receive an out-of-school suspension.¹⁰² These disparities manifest themselves in arrests and law enforcement referrals in schools. Despite comprising only 16% of the student population, Black students represent 27% of students “referred to law enforcement, and 31% of students subjected to a school-related arrest.”¹⁰³ The combined effect of racism and ableism results in even worse outcomes for many students of color with disabilities: “Black and Latino boys with disabilities were 3[%] of students but were 12[%] of school arrests.”¹⁰⁴

Once students of color enter the criminal legal system, prosecutors and judges treat them more harshly than their white counterparts.¹⁰⁵ “National data show that Black youths and other youths of color are more likely than white youths to be arrested, referred to court, petitioned after referral (i.e., handled formally), and placed in an out-of-home facility after being adjudicated.”¹⁰⁶ Black “youth are 62% of the youth prosecuted in the adult criminal system and are nine times more likely than white youth to receive an adult prison sentence.”¹⁰⁷ The result is extreme racial disproportionality in the carceral system as states incarcerate Black individuals at “five times the rate of white” individuals in state prisons and “Latinx individuals . . . [at] 1.3 times the incarceration rate of whites.”¹⁰⁸ Seven states have worse than a nine to one disparity between Black and white people in state prisons.¹⁰⁹ Meanwhile, people with disabilities are held in carceral settings at disparate rates.¹¹⁰ These statistics demonstrate how racism and ableism help sustain

¹⁰⁰ *Id.* at 7.

¹⁰¹ *Id.* at 1.

¹⁰² *Id.* at 4.

¹⁰³ *Id.* at 6.

¹⁰⁴ Amir Whitaker, Sylvia Torres-Guillén, Michelle Morton, Harold Jordan, Stefanie Coyle, Angela Mann & Wei-Ling Sun, *Cops and No Counselors: How the Lack of School Mental Health Staff Is Harming Students*, ACLU, 5, https://www.aclu.org/sites/default/files/field_document/030419-acluschooldisciplinereport.pdf [<https://perma.cc/2KZ4-EMHE>].

¹⁰⁵ See Ziedenberg, *supra* note 52, at 7.

¹⁰⁶ OFFICE OF JUV. JUST. & DELINQUENCY PREVENTION, *Racial and Ethnic Disparity in Juvenile Justice Processing, Literature Review: A Product of the Model Programs Guide* (Mar. 2022), <https://ojjdp.ojp.gov/model-programs-guide/literature-reviews/racial-and-ethnic-disparity#nlydqf> [<https://perma.cc/9CR4-HSTN>] (collecting sources).

¹⁰⁷ Ziedenberg, *supra* note 52, at 7.

¹⁰⁸ ASHLEY NELLIS, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS, THE SENT’G PROJECT: RSCH. & ADVOC. FOR REFORM 5 (2021), <https://www.sentencingproject.org/app/uploads/2022/08/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf> [<https://perma.cc/6UFW-JD46>].

¹⁰⁹ *Id.*

¹¹⁰ See sources cited *supra* note 21.

the path to an educational death sentence for an inordinate number of students of color with disabilities.

C. *An Overview of the IDEA*

The central requirement of the IDEA is that all students with disabilities receive FAPE.¹¹¹ To ensure that eligible students receive FAPE, the IDEA and its implementing regulations require school districts to comply with a process for the identification of students with disabilities, the provision of special education and related services, and procedural protections for challenging violations of the law.

To be eligible for services under the IDEA, a student must have one or more disabilities from an enumerated list.¹¹² The law places an affirmative duty, known as “Child Find,” on school districts to locate, identify, and evaluate students with suspected disabilities.¹¹³ For any student with a suspected disability, the school must determine whether the student qualifies for special education and related services and reevaluate the student every three years¹¹⁴ and any time the student’s circumstances suggest a new evaluation is necessary.¹¹⁵

After identifying a student as eligible under the IDEA, the IEP team should develop and implement an IEP designed to meet the needs of the student.¹¹⁶ The IDEA requires that the IEP team includes people knowledgeable about the child’s needs, including the parent(s) of the child and, “whenever appropriate,” the child.¹¹⁷ The IEP must list both the special education and related services the student needs.¹¹⁸ For older students, the IEP must include transition services, which are defined as “a coordinated set of activities” intended “to facilitate the child’s movement from school to post-school activities, including postsecondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation[.]”¹¹⁹ The IDEA also requires that schools place students in the least restrictive environment (“LRE”) based on their disability and educational needs, dictating placement in the same classroom as students without disabilities “[t]o the maximum extent appropriate[.]”¹²⁰

¹¹¹ 20 U.S.C. § 1400(d)(1)(a); 34 C.F.R. § 300.101(a).

¹¹² 20 U.S.C. § 1401(3); 34 C.F.R. § 300.8.

¹¹³ 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a).

¹¹⁴ 20 U.S.C. § 1414(a)(1)(A), (2)(B); 34 C.F.R. § 300.303.

¹¹⁵ 20 U.S.C. § 1414(a)(2)(A); 34 C.F.R. § 300.303(a).

¹¹⁶ *See* 20 U.S.C. § 1414(d).

¹¹⁷ 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.321(a).

¹¹⁸ 20 U.S.C. § 1414(d)(1)(A)(IV); 34 C.F.R. § 300.320(a)(4).

¹¹⁹ 34 C.F.R. § 300.43(a).

¹²⁰ 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114.

The IDEA further regulates how schools can discipline students and provides procedural protections for students if schools punish them for disability-related behavior. When school staff remove a student with disabilities from the classroom for more than ten days (or multiple incidents lead to exclusion totaling more than ten days), the IEP team must determine if the behavior at issue constitutes a “manifestation” of the student’s disability.¹²¹ The IDEA considers the behavior a manifestation if either “the conduct in question was caused by, or had a direct substantial relationship to, the child’s disability” or if the relevant behavior “was the direct result of the local educational agency’s failure to implement the IEP.”¹²² Importantly, students must continue to be provided with services if they are excluded from school.¹²³ If the IEP team determines that the behavior is a manifestation of the student’s disability, the IDEA offers the student additional protections. In these situations, the IEP team must conduct a functional behavioral assessment in order to develop a behavior intervention plan, or, if there is already a behavior plan in place, the plan must be reviewed and modified, if necessary.¹²⁴ Except for limited circumstances, if the IEP team determines that the behavior at issue is a manifestation, then the student must be returned to the original placement.¹²⁵

The IDEA also provides enforcement mechanisms. The IDEA gives the student the right to file a complaint with the local educational agency (“LEA”)¹²⁶ and participate in an impartial due process hearing “with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.”¹²⁷ The IDEA requires the student to exhaust this administrative process before seeking relief in federal court,¹²⁸ with limited exceptions.¹²⁹

¹²¹ 20 U.S.C. § 1415(k); 34 C.F.R. §§ 300.530(e), 300.536(a).

¹²² 20 U.S.C. § 1415(k)(1)(E); 34 C.F.R. § 300.530(e)(1).

¹²³ 20 U.S.C. § 1415(k)(1)(D); 34 C.F.R. § 300.530(d)(1)(i).

¹²⁴ 20 U.S.C. § 1415(k)(1)(F); 34 C.F.R. § 300.530(f)–(g).

¹²⁵ 20 U.S.C. § 1415(k)(1)(F)-(G); 34 C.F.R. § 300.530(f).

¹²⁶ The IDEA defines a local educational agency as “a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State . . . [.]” 20 U.S.C. § 1401(19); 34 C.F.R. § 303.23(a). For ease of reference, the terms LEA and school district are used interchangeably throughout this Article.

¹²⁷ 20 U.S.C. § 1415(b)(6)(A).

¹²⁸ See 20 U.S.C. § 1415(l).

¹²⁹ Generally, exhaustion is required when “a lawsuit seeks relief for the denial of a FAPE,” which should be determined by looking to “the gravamen . . . of the plaintiff’s complaint.” *Fry v. Napoleon Cmty. Sch.*, 580 U.S. 154, 168–69 (2017). However, exhaustion is not required where it “would be futile or inadequate,” *Honig v. Doe*, 484 U.S. 305, 327 (1988), and where claims involve “issues of a purely legal nature” or “emergency situations where exhaustion would cause ‘severe or irreparable harm.’” Raj, *supra* note 64, at 450–51 (quoting 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,

If the due process hearing officer determines that the child did not receive FAPE, the hearing officer may order several remedies, including tuition reimbursement for students already attending private schools¹³⁰ or compensatory education, which seeks to return students to the position they would have been in had the deprivation never occurred.¹³¹

In addition to students' due process rights, the IDEA also requires the SEA for each state to monitor and enforce LEAs' implementation of the IDEA.¹³² SEAs play "a key role" under the IDEA "in providing FAPE to children with disabilities."¹³³ The IDEA gives the SEA responsibility for the "general supervision" of:

[E]nsuring that . . . all educational programs for children with disabilities in the State, including all such programs administered by any other State agency or local agency — (I) are under the general supervision of individuals in the State who are responsible for educational programs for children with disabilities; and (II) meet the educational standards of the State educational agency[.]¹³⁴

If the SEA finds an LEA out of compliance with the IDEA, it can utilize enforcement mechanisms, including placing conditions on the LEA's special education funding, issuing "a corrective action plan or improvement plan," or "withholding funds, in whole or in part."¹³⁵

The law mandates that SEAs "proactively supervise local school districts and other entities involved with providing special education . . . [and] take reasonable corrective action when those entities violate the rights of children with disabilities."¹³⁶ Each SEA also must have in place written procedures for the filing of state complaints by an individual or an organization alleging either individual or systemic issues.¹³⁷ The SEA must operate

395–96 (2009)); *see also* *Perez v. Sturgis Pub. Sch.*, 143 S. Ct. 859, 865 (2023) (finding that lawsuits "premised on the past denial of a free appropriate public education may nonetheless proceed without exhausting IDEA's administrative processes if the remedy a plaintiff seeks is not one IDEA provides").

¹³⁰ *Sch. Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369 (1985); *see also* 34 C.F.R. 300.148(c) (codifying tuition reimbursement under the IDEA).

¹³¹ *See Reid v. D.C.*, 401 F.3d 516, 527 (D.C. Cir. 2005).

¹³² 20 U.S.C. § 1416(a)(1)(C); 34 C.F.R. § 300.600; *see also* 20 U.S.C. § 1412(a)(11).

¹³³ Thomas A. Mayes & Perry A. Zirkel, *State Educational Agencies and Special Education: Obligations and Liabilities*, 10 B.U. PUB. INT. L.J. 62, 64–65 (2000).

¹³⁴ 20 U.S.C. § 1412(11). The IDEA further notes that the SEA's supervisory responsibilities "shall not limit the responsibility of agencies in the State other than the State educational agency to provide, or pay for some or all of the costs of, a free appropriate public education for any child with a disability in the State." 20 U.S.C. § 1412(11)(B).

¹³⁵ 34 C.F.R. § 300.600(a)(3). In some circumstances, an SEA may be required to provide direct services to students with disabilities in order "to ensure that 'all children with disabilities' receive an [sic] FAPE." Mayes & Zirkel, *supra* note 133, at 69 (quoting 20 U.S.C. § 1412(a)(1) (A)).

¹³⁶ Mayes & Zirkel, *supra* note 133, at 90.

¹³⁷ 34 C.F.R. §§ 300.151, 300.153.

this state complaint system in addition to its administrative due process complaint system. In response to a state complaint, the SEA has sixty days to investigate, which includes the response time for the public agency under investigation.¹³⁸ Within this sixty-day period, the SEA must issue a written decision.¹³⁹ The SEA must also establish procedures for “effective implementation” of its decision, which can include “technical assistance activities” and “corrective actions to achieve compliance.”¹⁴⁰ According to recent guidance from the United States Department of Education (hereinafter “Department of Education”), “[d]ue process complaints and the resulting hearing decisions, and State complaints . . . are an important source of compliance information” that the SEA should review for patterns to “determine whether systemic noncompliance occurred or is occurring and ensure correction in a timely manner.”¹⁴¹

There may be an agency other than the SEA assigned to this role for a limited subset of students with disabilities in adult prisons. Each state’s governor may assign a state agency other than the SEA “the responsibility of ensuring” that the requirements of the IDEA “are met with respect to students with disabilities who are convicted as adults under State law and incarcerated in adult prisons.”¹⁴² However, “[s]uch a transfer does not occur automatically” as “[a] state must elect to transfer supervisory authority to the other state agency.”¹⁴³ Since this provision only applies to students incarcerated in adult prisons and does not apply to students who have not been convicted under state law, even in situations where the responsibility has been reassigned, the SEA remains responsible for ensuring that the IDEA is implemented for students in adult jails.¹⁴⁴ In states where the responsibility for these students has been transferred, the assigned agency has the responsibility to ensure that the IDEA’s requirements are met for these students.¹⁴⁵

¹³⁸ 34 C.F.R. § 300.152(a).

¹³⁹ *Id.*

¹⁴⁰ 34 C.F.R. § 300.152(b).

¹⁴¹ STATE GENERAL SUPERVISION RESPONSIBILITIES, *supra* note 14, at 7.

¹⁴² 20 U.S.C. § 1412(a)(11)(C); 34 C.F.R. § 300.149(d).

¹⁴³ Thomas A. Mayes, *Denying Special Education in Adult Correctional Facilities: A Brief Critique of Tunstall v. Bergeson*, 2003 BYU EDUC. & L.J. 193, 198 n.39 (2003).

¹⁴⁴ Edelson, *supra* note 35, at 109 (citing 20 U.S.C. § 1416(h)).

¹⁴⁵ See STATE GENERAL SUPERVISION RESPONSIBILITIES, *supra* note 14, at 1; see also Mayes, *supra* note 143, at 199 n. 42 (noting that students in adult prisons in states where the SEA authority has been transferred “remain entitled to FAPE,” but “the remedy for denial of FAPE would lie against ‘the other state agency,’ not the SEA”). This IDEA provision weakens one of the federal government’s “principal enforcement mechanisms to ensure IDEA compliance” — the power to withhold IDEA funds from the state. Edelson, *supra* note 35, at 109. In states where the SEA has transferred its power to another agency, the Department of Education may only withhold funds from the state “proportionate to the total funds allotted . . . to the State as the number of eligible children with disabilities in adult prisons . . . is proportionate to the number of eligible individuals with disabilities in the State under the supervision of the State educational agency.” 20 U.S.C. § 1416(h)(1). This reduces the incentive for states to ensure that students in adult prisons are receiving appropriate services because the state’s entire pot of IDEA funding is not at risk. See Edelson, *supra* note 35, at 109; but cf. Sasha Samberg-Champion,

D. Exceptions in the IDEA for Adult Jails and Prisons

While the IDEA and the majority of its requirements apply to many students with disabilities in adult jails and prisons, there are four important exceptions in the IDEA that enable these facilities to deny services to some students with disabilities.¹⁴⁶ These exceptions fall under critical sections of the IDEA that leave some students with disabilities in adult jails and prisons vulnerable to partial and sometimes complete denial of services.¹⁴⁷

First, the IDEA eliminates any affirmative Child Find duty on behalf of adult jails and prisons for a large group of students (hereinafter “Child Find Exception”). The Child Find Exception relieves adult jails and prisons of their obligation to provide services to the subset of students with disabilities who become incarcerated at the age of eighteen or older without having previously been identified as having a disability.¹⁴⁸ The Child Find Exception applies to all “students with disabilities who, in the last educational placement prior to their incarceration in an adult correctional facility, were not actually identified as being a student with a disability under the IDEA and did not have an IEP under the IDEA.”¹⁴⁹ If schools in the community fail to identify students with disabilities for long enough, then adult jails and prisons have no obligation to identify and provide these students with special

How to Read Gonzaga: Laying the Seeds of a Coherent Section 1983 Jurisprudence, 103 COLUM. L. REV. 1838, 1859 (2003) (arguing that “[e]mpirical data show” that federal agencies withholding funds under Spending Clause statutes “is a rarity.”). Congress should repeal this provision to better incentivize states to comply with the IDEA. A full exploration of this issue is beyond the scope of this Article.

¹⁴⁶ See DEAR COLLEAGUE LETTER ON THE IDEA, *supra* note 61, at 5 n.10. A general provision in the IDEA that is not specific to adult jails and prisons has also been used to deny services to students with disabilities in these facilities. According to the IDEA, states do not have to provide FAPE to children with disabilities “aged . . . 18 through 21 in a State to the extent that its application to those children would be inconsistent with State law or practice, or the order of any court, respecting the provision of public education to children in those age ranges.” 20 U.S.C. § 1412(a)(1)(B)(i); 34 C.F.R. § 300.102(a)(1). In *Tunstall ex. rel Tunstall v. Bergeson*, the Supreme Court of Washington interpreted this provision to allow the state to exclude students with disabilities age eighteen through twenty-one in adult jails and prisons from the protections of the IDEA “because such would be inconsistent with state law.” 141 Wash.2d 201, 228 (2000). While the reasoning in *Tunstall* has been criticized, see Mayes, *supra* note 143, at 194 (arguing that *Tunstall* misinterprets “the language and structure of the IDEA”), the United States Supreme Court declined to review *Tunstall* “thereby leaving open a mechanism for states to deny the provision of special education to students incarcerated in adult facilities.” Edelson, *supra* note 35, at 102.

¹⁴⁷ Congress added these provisions to the IDEA in 1997 “as an apparent compromise between those who would remove any right to special education for incarcerated youth, and those who saw benefits to providing special education to this population.” Simoneau, *supra* note 35, at 113.

¹⁴⁸ 34 C.F.R. § 300.102(a)(2)(i).

¹⁴⁹ DEAR COLLEAGUE LETTER ON THE IDEA, *supra* note 61, at 5 n.10 (citing 34 C.F.R. § 300.102(a)(2)(i)). The Child Find Exception does not exclude children with disabilities between the ages of eighteen and twenty-one who “[h]ad been identified as a child with a disability . . . and had received services in accordance with an IEP, but who left school prior to their incarceration” or students who “[d]id not have an IEP in their last educational setting, but who had actually been identified as a child with a disability under” the IDEA. 34 C.F.R. § 300.102(a)(2)(ii).

education services.¹⁵⁰ In this way, the Child Find Exception contradicts the IDEA's fundamental principle that every student with disabilities must receive FAPE,¹⁵¹ and it is particularly problematic considering the population of students in adult jails and prisons. These students frequently came from low-income backgrounds and attended under-resourced public schools,¹⁵² and they are less likely to have been identified as requiring special education services in these schools.¹⁵³

Three additional exceptions in the IDEA erode the rights of a smaller subset of "otherwise eligible students with disabilities who have been convicted as adults under State law and incarcerated in adult prisons."¹⁵⁴ The IDEA allows states to exclude this group of students with disabilities from state and districtwide assessments (hereinafter "Assessments Exception").¹⁵⁵ The Assessments Exception removes a critical standardized tool that SEAs typically use to track the performance of students with disabilities.¹⁵⁶ In fact, these assessments may be even more important to track the progress of students incarcerated in adult prisons than other students.¹⁵⁷ By excluding these students from districtwide assessments, the Assessments Exception reduces

¹⁵⁰ However, the Child Find Exception does not relieve adult jails and prisons from having Child Find policies and procedures in place because these facilities must identify students with disabilities who enter prior to their eighteenth birthdays. See 34 C.F.R. § 300.102(a)(2)(i).

¹⁵¹ The language of the regulation concedes that these students have disabilities, but adult jails and prisons do not have to identify these students or provide them with services because of their previous schools' failure to identify their disabilities. See 34 C.F.R. § 300.102(a)(2)(i).

¹⁵² See, e.g., Karen Dolan, Ebony Slaughter-Johnson, and Myacah Sampson, *Students Under Siege: How the School-to-Pipeline, Poverty, and Racism Endanger our School Children*, INSTITUTE FOR POLICY STUDIES 16 (2018), <https://ips-dc.org/wp-content/uploads/2018/08/KAREN-REPORT-2.pdf> [<https://perma.cc/5CSH-Z2K9>]; Cate, *supra* note 35, at 17 (noting that students who are incarcerated "are predominantly drawn" from low-income schools) (citing HOWARD N. SNYDER & MELISSA SICKMUND, NAT'L CTR. FOR JUVENILE JUST., JUVENILE OFFENDERS AND VICTIMS: NATIONAL REPORT 110, 7 (2006), <https://www.ojjdp.gov/ojstatbb/nr2006/downloads/NR2006.pdf> [<https://perma.cc/QFP6-KXHZ>]).

¹⁵³ See Cannon et al., *supra* note 18, at 438 (discussing the connection between schools' failure to identify students with disabilities and incarceration); see also Simoneau, *supra* note 35, at 116 (arguing that "[t]his exception relies on a system that routinely fails to identify children with disabilities before the age of eighteen, making its application dubious at best").

¹⁵⁴ DEAR COLLEAGUE LETTER ON THE IDEA, *supra* note 61, at 5 n.10. These three exceptions do not apply to students in adult jails or other carceral settings who have not been convicted of a crime. See Mayes & Zirkel, *supra* note 35, at 139.

¹⁵⁵ 34 C.F.R. § 300.324(d)(1)(i).

¹⁵⁶ See 20 U.S.C. §§ 1412(a)(16)(A)-(D).

¹⁵⁷ Simoneau, *supra* note 35, at 121 (arguing that because students in adult prisons are frequently "moved around," and because of "the potential for inconsistency in education, assessments may be one of the most reliable means of identifying and tracking the progress" of these students). The IDEA also contains an exception to standardized assessments for a "child who cannot participate in the regular assessment." 34 C.F.R. § 300.320(a)(6). However, in those circumstances the child must still take an "alternate assessment . . . [that] is appropriate for the child." *Id.* The fact that the Assessments Exception exists alongside the "alternate assessment" provision in the IDEA suggests the Assessments Exception is intended to relieve adult prisons of their duty to track student progress rather than to spare students from taking high-stakes tests that may be inappropriate for them.

transparency and thus accountability for the quality of special education services adult prisons provide these students.

Adult prisons also do not have to provide transition services to students with disabilities who will age out of IDEA coverage “before they will be eligible to be released from prison” (hereinafter “Transition Services Exception”).¹⁵⁸ The need for support for older students with disabilities as they transition to adulthood has little to do with when, if ever, they will be released from prison. In fact, for this population of students, transition services could be one of the IDEA’s most important provisions. People returning from carceral settings face reentry barriers to employment¹⁵⁹ and education,¹⁶⁰ and the IDEA’s definition of transition services covers both.¹⁶¹ The Transition Services Exception also has a disproportionate impact on students of color. Black students with disabilities are overrepresented in the juvenile and criminal legal systems¹⁶² and are more likely to receive longer prison sentences,¹⁶³ thus being ineligible for transition services.

The last exception in the IDEA that applies to adult prisons allows IEP teams to “modify” a student’s IEP or placement “if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated” (hereinafter “Modifications Exception”).¹⁶⁴ The IDEA does not define “a bona fide security or compelling penological interest.”¹⁶⁵ However, commentary from the Department of Education emphasized several limitations to the Modifications Exception: (1) the changes made must be time-limited and “last only so long as the State’s interest lasts” and (2) “cost containment is not a sufficient state interest to implicate this regulation.”¹⁶⁶

The authority to modify an IEP self-evidently does not encompass the authority to nullify the IEP. In *Buckley v. State Correctional Institution-Pine Grove*, the IEP team in a state prison relied on the Modifications Exception to change a student’s IEP while he was in the Restricted Housing

¹⁵⁸ 34 C.F.R. § 300.324(d)(1)(ii).

¹⁵⁹ See Bronwyn Mauldin, THE ANNIE E. CASEY FOUNDATION, *Reentry and Barriers to Employment: Lessons from Casey’s Investments* 5–10 (Sept. 2016), <https://assets.aecf.org/ml/resourcedoc/AECF-ReentryAndBarrierstoEmp-2016.pdf> [<https://perma.cc/Y9BE-6N67>] (discussing barriers to employment for people returning from carceral settings).

¹⁶⁰ See Sarah Beebe & Dustin Rynders, *Overcoming Barriers to School Reentry for Youth Leaving Juvenile Justice Facilities*, 42 U. ARK. LITTLE ROCK L. REV. 689, 690 (2020) (discussing barriers to students reentering public schools after leaving detention centers).

¹⁶¹ See 34 C.F.R. § 300.43(a).

¹⁶² See discussion *supra* Part I.B.

¹⁶³ Wendy Sawyer, *Visualizing the Racial Disparities in Mass Incarceration*, PRISON POLICY INITIATIVE (July 27, 2020), <https://www.prisonpolicy.org/blog/2020/07/27/disparities/#slideshow/slideshow4/3> [<https://perma.cc/9PRD-F8MR>] (graph showing that Black people comprise only thirteen percent of the population but receive forty-eight percent of the life, life without parole, or “virtual life” sentences).

¹⁶⁴ 34 C.F.R. § 300.324(d)(2)(i).

¹⁶⁵ Simoneau, *supra* note 35, at 124.

¹⁶⁶ Mayes & Zirkel, *supra* note 35, at 138–39.

Unit (“RHU”).¹⁶⁷ In the RHU, prison staff confined the student to his cell for twenty-three hours per day and gave the student “self-study packets” of worksheets that were not individualized to his needs.¹⁶⁸ Interpreting the word “modify” in the relevant regulation, the court found that the Modifications Exception does not give a student’s IEP team “*carte blanche* to denude an IEP of special education services . . . an education program should be revised, not annulled, in light of these interests.”¹⁶⁹ *Buckley* is a persuasive case, but for some of the reasons discussed in Part I.E, *infra*, federal courts rarely review an individual student’s special education program in an adult prison.

To summarize, Congress has embedded in the IDEA four provisions that, as to students with disabilities in adult carceral settings, contradict the purposes of the law. The next Part discusses some of the challenges to enforce IDEA provisions that, notwithstanding these exceptions, *do* apply in adult jails and prisons.

E. Challenges to Enforcing the IDEA in Adult Jails and Prisons

In addition to the exceptions in the IDEA that provide a basis for adult jails and prisons to withhold special education services, numerous factors unique to carceral settings thwart the usual methods of IDEA enforcement. Congress established several mechanisms for enforcing the IDEA. For individuals, “the law is privately, not publicly enforced.”¹⁷⁰ The IDEA gives students¹⁷¹ the right to file a “due process complaint”¹⁷² if they disagree with their placement or believe that public school or other government personnel are otherwise violating their rights.¹⁷³ On the systemic level, Congress required that the SEAs monitor and enforce LEAs’ implementation of the IDEA, including but not limited to, establishing and administering a state complaint system.¹⁷⁴

Incarceration amplifies the challenges of filing a due process complaint, particularly for low-income students.¹⁷⁵ Incarcerated students may only have

¹⁶⁷ 98 F. Supp. 3d 704, 707–10 (M.D. Pa. 2015).

¹⁶⁸ *Id.* at 707–08, 709–10.

¹⁶⁹ *Id.* at 718.

¹⁷⁰ *See* Raj, *supra* note 64, at 422.

¹⁷¹ *See supra* text accompanying note 16.

¹⁷² “Due process complaint” is the term used by the IDEA to refer to a complaint filed by the educational rights holder. 20 U.S.C. § 1415(b)(7)(A).

¹⁷³ 20 U.S.C. § 1415(b)(6)(A); *see also* discussion *supra* Part I.C.

¹⁷⁴ 34 C.F.R. §§ 300.151, 300.153; *see also* discussion *supra* Part I.C.

¹⁷⁵ Low-income students and their parents face unique challenges in exercising their due process rights under the IDEA, and as a result, these mechanisms do not work well generally in community schools and especially in high-poverty schools. *See* Raj, *supra* note 64, at 432; *see also* Elisa Hyman, Dean Hill Rivkin & Stephen A. Rosenbaum, *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, 135 (2011)

limited contact with their parents¹⁷⁶ and likely are unable to navigate the system on their own or identify a lawyer willing to represent them.¹⁷⁷ As a result, it is unlikely that incarcerated students would file a due process complaint on their own against an adult jail or prison, essentially nullifying one of the IDEA's primary enforcement mechanisms. For many of these same reasons, it is difficult for students with disabilities in adult jails and prisons to file state complaints with the SEA.

The carceral context also limits the types of remedies that students with disabilities can pursue. One of the main remedies that students with disabilities and their parents can pursue under the IDEA is tuition reimbursement, which allows families to be reimbursed if they place their child in a private school because of a denial of FAPE in the public school.¹⁷⁸ The threat of having to pay for a student to attend private school deters school districts from violating the IDEA. However, tuition reimbursement is not readily available for incarcerated students. The parents of students with disabilities in adult jails and prisons cannot simply place their children in a private school and seek reimbursement. Unless these students secure a virtual alternative that could function as the equivalent of a private placement, adult jails and prisons avoid altogether a major financial incentive to comply with the IDEA.

The Prison Litigation Reform Act¹⁷⁹ ("PLRA") presents additional hurdles to students in adult jails and prisons pursuing their education or disability-related claims in federal court. The PLRA "heavily restricts inmates' ability to challenge prison conditions in the courts."¹⁸⁰ Before filing a lawsuit in federal court, students with disabilities have to exhaust not only administrative procedures pursuant to the IDEA but also facilities-based grievance procedures under the PLRA.¹⁸¹ This exhaustion scheme means that students with disabilities in adult jails and prisons have to understand

[<https://perma.cc/6WA2-GGXC>] (discussing that parents frequently do not fully understand their due process rights under the IDEA).

¹⁷⁶ See DEAR COLLEAGUE LETTER ON THE IDEA, *supra* note 61, at 18 (describing difficulties facing parents' participation in their child's education if the child is incarcerated).

¹⁷⁷ See, e.g., Hyman et al., *supra* note 175, at 113 ("Access to attorneys in the special education realm is relatively rare."); Simoneau, *supra* note 35, at 125 ("The chances of an individual [in prison] having the resources and knowledge of the complex system to file such a complaint appears slim."). The relative dearth of attorneys willing to take these cases may partly reflect the lack of training in disability law at law schools. Cf. Nicole Buonocore Porter, *Explaining "Not Disabled" Cases Ten Years After the ADA: A Story of Ignorance, Incompetence, and Possibly Animus*, 26 GEO. J. ON POVERTY L. & POL'Y 383, 410 (2019) (analyzing the relative lack of disability law courses in law schools and arguing that increasing access to these courses would improve the skill of attorneys litigating disability cases).

¹⁷⁸ See *Sch. Comm. of Burlington*, 471 U.S. at 369.

¹⁷⁹ 42 U.S.C. § 1997e.

¹⁸⁰ Lauren A. Koster, Note, *Who Will Educate Me? Using the Americans with Disabilities Act to Improve Educational Access for Incarcerated Juveniles with Disabilities*, 60 B.C. L. REV. 673, 693 (2019).

¹⁸¹ *Id.* at 694.

and navigate an additional, complicated set of bureaucratic rules as compared to students with disabilities in community schools.¹⁸² For those students who understand how to file a due process complaint and exhaust their remedies under the PLRA, the threat of retaliation looms for bringing legal claims against jail or prison officials.¹⁸³ Thus, the IDEA's individual enforcement mechanisms are mostly inadequate for incarcerated students with disabilities.

II. RECENT DEVELOPMENTS THAT AFFECT SPECIAL EDUCATION IN ADULT JAILS AND PRISONS

Two recent developments have impacted the standards for and quality of the special education services that adult jails and prisons must provide students with disabilities. In a landmark special education decision in 2017, *Andrew F. v. Douglas County School District*,¹⁸⁴ the Supreme Court announced a “markedly more demanding” standard for what schools must provide students with disabilities.¹⁸⁵ Three years later, the COVID-19 pandemic caused massive disruptions to the delivery of special education services.¹⁸⁶ The pandemic's impact on special educational services in carceral settings further eroded already crumbling systems and its effects continue to linger in some facilities. This Part explores the effects of both events on special education services in adult jails and prisons and the enhanced opportunity these events have created to push for systemic reform.

A. *Andrew F. v. Douglas County School District*

The story of *Andrew F.* and its potential impact on the services that students with disabilities receive traces back to 1982, when the Supreme Court decided *Board of Education v. Rowley*.¹⁸⁷ In *Rowley*, the parents of a deaf student named Amy Rowley asked her school to provide a qualified

¹⁸² See Nicola A. Cohen, Note, *Why Ross v. Blake Opens a Door to Federal Courts for Incarcerated Adolescents*, 51 COLUM. J.L. & SOC. PROBS. 177, 207–09 (2017) (discussing why juveniles have difficulty understanding the PLRA grievance procedures).

¹⁸³ See, e.g., James E. Robertson, “One of the Dirty Secrets of American Corrections”: *Retaliation, Surplus Power, and Whistleblowing Inmates*, 42 U. MICH. J. L. REFORM 611, 612 (2009) (detailing the types of retaliation people in prison face for filing grievances or lawsuits); Simoneau, *supra* note 35, at 125 (“For many reasons, [a person] may not want to file a complaint against these individuals while under their care.”).

¹⁸⁴ 580 U.S. 386 (2017).

¹⁸⁵ *Id.* at 402.

¹⁸⁶ See OFFICE FOR CIV. RTS., U.S. DEP'T OF EDUC., EDUCATION IN A PANDEMIC: THE DISPARATE IMPACTS OF COVID-19 ON AMERICA'S STUDENTS 1 (June 9, 2021), <https://www2.ed.gov/about/offices/list/ocr/docs/20210608-impacts-of-covid19.pdf> [<https://perma.cc/U78B-XM2L>] [hereinafter EDUCATION IN A PANDEMIC] (discussing the pandemic's impact on the country's education system).

¹⁸⁷ 458 U.S. 176 (1982).

sign-language interpreter.¹⁸⁸ Amy was making academic progress in the general education classroom without the interpreter, and as a result, her school denied the request.¹⁸⁹ Amy's parents filed for an administrative hearing, and a hearing officer determined that the "interpreter was not necessary because 'Amy was achieving educationally, academically, and socially' without such assistance."¹⁹⁰ Amy's parents appealed, and the federal trial court ruled that, because Amy could be performing better with the interpreter, school administrators had denied Amy a "'free appropriate public education,' which the court defined as 'an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children.'"¹⁹¹

After the Second Circuit affirmed, the Supreme Court rejected this equal educational opportunity standard and declined to define clearly a substantive standard for what schools must provide students with disabilities under the IDEA. Instead, the Supreme Court held that FAPE requires that schools provide students with disabilities with "personalized instruction with sufficient support services to permit the [student with disabilities] to benefit educationally from that instruction."¹⁹² For students with disabilities in the general education classroom like Amy, this meant "the IEP should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."¹⁹³ Amy's IEP did just that, and so there was no IDEA violation.¹⁹⁴

From 1982 until 2017, federal courts filled in the gaps that the *Rowley* Court created in the FAPE standard with its announcement of the "some educational benefit" test.¹⁹⁵ Lower courts' interpretations about what educational benefit schools had to provide students with disabilities "ranged from 'merely . . . more than *de minimis*,' to 'whether the child makes progress toward the goals set forth in her IEP,' to a 'meaningful education—more than mere access to the schoolhouse door.'"¹⁹⁶ The Tenth Circuit's "merely more than *de minimis*" standard at issue in *Andrew F.* (and other similar standards) essentially transformed the IDEA from a law meant to protect the rights of students with disabilities into a law that protected school districts that failed to provide students with a meaningful education. If school districts followed the appropriate procedures under the IDEA and checked the

¹⁸⁸ *Id.* at 184.

¹⁸⁹ *Id.* at 184–85.

¹⁹⁰ *Id.* at 185.

¹⁹¹ *Id.* at 185–86.

¹⁹² *Id.* at 177.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ See, e.g., *Andrew F. v. Douglas Cnty. Sch. Dist.*, 798 F.3d 1329, 1338 (10th Cir. 2015), vacated, 580 U.S. 386 (2017) (citing *O'Toole v. Olathe Dist. Sch. Unified Sch. Dist.*, 144 F.3d 692, 707–08 (10th Cir. 1998)) (characterizing the *Rowley* standard as "some educational benefit").

¹⁹⁶ Allison Zimmer, Note, *Solving the IDEA Puzzle: Building a Better Special Education Development Process Through Andrew F.*, 93 N.Y.U. L. REV. 1014, 1037–38 (2018) (internal quotations omitted).

right boxes, it was unlikely that a court would find that the school district failed to provide some educational benefit.¹⁹⁷

Andrew F. presented the Supreme Court with “[t]hat more difficult problem,” which it did not answer in *Rowley*, of describing a “standard for determining ‘when [children with disabilities] are receiving sufficient educational benefits to satisfy the requirements of the [IDEA].’”¹⁹⁸ Andrew, a student with autism, qualified for services under the IDEA.¹⁹⁹ Starting in preschool and continuing until the fourth grade, Andrew attended Douglas County School District.²⁰⁰ During this time, Andrew made little progress in school, and his IEPs “largely carried over the same basic goals and objectives from one year to the next, indicating that he was failing to make meaningful progress toward his aims.”²⁰¹ Andrew’s parents, concerned about his lack of progress and his school’s failure to adequately address his behavioral issues, removed him from his public school and enrolled him in a private school specifically tailored to the needs of students with autism.²⁰² Andrew’s new school implemented an effective behavioral intervention plan, and he began to make the progress that had been denied to him for years in his public school.²⁰³ About six months after Andrew had started at his private school, Douglas County School District offered his parents an IEP for fifth grade with a behavioral plan similar to that of his previous IEPs.²⁰⁴ Andrew’s parents rejected this IEP, and they eventually sued the school district seeking reimbursement for Andrew’s private school tuition.²⁰⁵

The Tenth Circuit ruled against the parents because Douglas County School District had provided Andrew with an “educational benefit” that was “merely . . . more than *de minimis*.”²⁰⁶ The Supreme Court, in a unanimous decision, rejected the Tenth Circuit’s “merely more than *de minimis*” standard in favor of a standard that was “markedly more demanding:”

When all is said and done, a student offered an educational program providing “merely more than *de minimis*” progress from year to year can hardly be said to have been offered an education at all The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.²⁰⁷

¹⁹⁷ *Id.* at 1038 (arguing that in school districts that followed the Tenth Circuit’s “merely more than *de minimis*” standard, courts held that schools satisfied a students’ right to FAPE “when academic progress [was] essentially invisible, and the status quo [was] the norm.”).

¹⁹⁸ *Andrew F.*, 580 U.S. at 390.

¹⁹⁹ *Id.* at 395.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 396.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 397 (internal quotations omitted).

²⁰⁷ *Id.* at 402–03.

For children in the general education classroom, like Amy Rowley, *Endrew F.* reiterated that this standard means an educational program that allows them to advance grade-to-grade each year.²⁰⁸ For students with disabilities, like *Endrew*, “who [are] not fully integrated in the regular classroom and not able to achieve on grade level,” the educational program they receive “must be appropriately ambitious in light of [their] circumstances.”²⁰⁹ Indeed, the Supreme Court declared that “every child should have the chance to meet challenging objectives.”²¹⁰

If nothing else, in *Endrew F.* the Supreme Court rejected the *de minimis* standard that had undermined the holding of *Rowley* and recognized that the IDEA requires more than just procedural compliance through a “checklist of items the IEP must address.”²¹¹ Instead, the IDEA imposes a meaningful substantive standard on the educational services that schools must provide *all* students with disabilities. Even if the substantive standard remains nebulous for many students, we know it must be “markedly more demanding” than the *de minimis* or a similarly weak standard that had prevailed in some school districts.

Since *Endrew F.*, much has been written about the case’s potential impact on the education that public schools in the community must provide students with disabilities.²¹² Much less has been written about what *Endrew F.* means for students with disabilities receiving education in adult jails and prisons.²¹³ The *Endrew F.* standard *should* mean the same thing for students in adult jails and prisons that it means for students attending community schools. Aside from the limited circumstances in which the Modifications Exception applies, none of the exceptions in the IDEA regarding adult jails

²⁰⁸ *See id.* at 402.

²⁰⁹ *Id.* at 402.

²¹⁰ *Id.*

²¹¹ *Endrew F.*, 580 U.S. at 401–02.

²¹² *See, e.g.,* Terrye Conroy & Mitchell L. Yell, *Free Appropriate Public Education After Endrew F. v. Douglas County School District (2017)*, 35 *TOURO L. REV.* 101, 137 (2019) (discussing lower court rulings applying the standard announced in *Endrew F.* and concluding “that the *Endrew* ruling was a victory for students with disabilities and their parents”); Raj, *supra* note 64, at 441 (discussing the limits of *Endrew F.* in improving special education services for students with disabilities in under-resourced and low-functioning school districts); Josh Cowin, *Is That Appropriate?: Clarifying the IDEA’s Free Appropriate Public Education Standard Post-Endrew F.*, 113 *Nw. U. L. REV.* 587, 622 (2018) (noting the ambiguity of the *Endrew F.* standard and the resulting confusion among parents and school officials about “how to apply the new standard in their schools”).

²¹³ The Author identified two articles that specifically referenced the application of *Endrew F.* in the adult carceral context: Joseph Calvin Gagnon & Amanda Ross Benedick, *Provision of a Free and Appropriate Public Education in an Adult Jail During COVID-19: The Case of Charles H. et al. v. District of Columbia et al.*, 11 *EDUC. SCIS.*, 767 (2021) (arguing that the special education services provided at the D.C. jail during the pandemic that are the subject of the *Charles H.* litigation violated the IDEA); Allison Thibault, *Using Hindsight Evidence When Evaluating IEPs for Youth with Disabilities in Adult Correctional Facilities*, 31 *GEO. MASON U. C.R. L. J.* 157, 178–79 (2021) (referencing the *Endrew F.* standard in discussing that adult jails and prisons “are in danger of violating the IDEA” if they do not ensure that students with disabilities can obtain an “educational benefit”).

and prisons dilute the substantive standard for the special education services these facilities must offer students.²¹⁴ Students with disabilities in the general education classroom in adult jails or prisons should be advancing grade-to-grade under this standard.²¹⁵ All other students with disabilities “should have the chance to meet challenging objectives” and thus their “educational program[s] must be appropriately ambitious in light of [their] circumstances.”²¹⁶

The standard announced in *Andrew F.*, much like the statute the case interpreted, is not self-enforcing. Until 2017, *Rowley* and its progeny, depending on the applicable lower court standard, essentially functioned as an exception for many adult jails and prisons (and many public schools in the community, too) that freed them of meaningful substantive obligations regarding the quality of the special education services they provided to students.²¹⁷ While “*Andrew F.* did not overrule *Rowley* . . . *Andrew F.* made clear that an interpretation of *Rowley*, and of appropriate education, that imposes only minimal obligations is wrong.”²¹⁸ “The IDEA demands more”²¹⁹ than the typical contents of special education programs in many adult jails or prisons consisting of few services, classrooms full of students of different ages at various grade levels, and an overreliance on worksheets.²²⁰ *Andrew F.*

²¹⁴ Cf. *Charles H.*, 2021 WL 2946127, at *9 (awarding a preliminary injunction to a class of students with disabilities in the D.C. jail who had been denied special education and related services during the pandemic).

²¹⁵ See *Andrew F.*, 580 U.S. at 402.

²¹⁶ *Id.* Writing about *Andrew F.*’s application to students in high-poverty schools, Professor Claire Raj, Director of the Education Rights Clinic at the University of South Carolina’s Joseph F. Rice School of Law, interprets *Andrew F.*’s standard to mean that students must be in the general education class *and* be capable of achieving at grade level for the higher standard of grade-to-grade advancement to apply. Raj *supra* note 64, at 441. According to Professor Raj, “in some high-poverty schools virtually no children are meeting grade level standards . . . [and] the more amorphous guideline requiring ‘appropriately ambitious goals’ takes hold and opens the door to lower academic standards.” *Id.* The FAPE standard under *Andrew F.*, Professor Raj argues, “rather than raising the bar . . . aligns with a lowered standard reflecting the depressed level of achievement in these schools.” *Id.* at 442; *but see Charles H.*, 2021 WL 2946127, at *2, *7 (discussing grade-to-grade advancement in evaluating special education services offered at the D.C. jail during the pandemic). Regardless of which *Andrew F.* standard applies to students with disabilities in adult carceral systems given the circumstantial consideration embedded in the legal standard, many carceral facilities will likely have difficulty showing that the special education programs they offer have provided even a *de minimis* educational benefit, much less challenging objectives. See Thibault, *supra* note 213, at 177 (arguing that courts must consider whether students made progress in evaluating whether an IEP is appropriate because “allowing an IEP to be deemed appropriate despite lack of any progress at all would set a standard even lower than more than *de minimis*”). Indeed, rejecting these types of meaningless educational programs under the guise of providing a *de minimis* educational benefit is the core holding of *Andrew F.*

²¹⁷ See Zimmer, *supra* note 196, at 1038 (“And if, prior to *Andrew F.*, the educational benefit standard was increasingly meaningless, then schools were given free rein to provide students with a virtually meaningless educational program . . .”).

²¹⁸ Mark C. Weber, *Andrew F. Clairvoyance*, 35 *TOURO L. REV.* 591, 595 (2019).

²¹⁹ *Andrew F.*, 580 U.S. 386 at 403.

²²⁰ See discussion *supra* Part I.A and *infra* Part IV.

breathed life into the IDEA for many students with disabilities in adult jails and prisons. The question now is how to enforce these rights.

B. *The COVID-19 Pandemic*

The COVID-19 pandemic and its lingering effects further reduced meaningful special education services in many adult carceral facilities. The pandemic caused massive changes to schools and carceral facilities. Many schools closed their doors and switched to virtual instruction,²²¹ and conditions in carceral settings became deadly.²²² Many families of students with disabilities reported their children “receiv[ed] no services at all” as of May 2020.²²³ Across the country, “COVID-19 may have put special education back years.”²²⁴ As schools switched to remote instruction and virtual classrooms, “students with disabilities [were] unable to receive services that fully replace[d] those they had received before the COVID-19 outbreak.”²²⁵

One positive effect of the pandemic, however, was the liberation of people from carceral facilities to prevent the spread of COVID-19.²²⁶ Unfortunately, people who were left behind in these facilities, including children, faced worsening conditions.²²⁷ Meanwhile, some students with disabilities continued to be funneled from the virtual classroom into the school-to-prison pipeline.²²⁸

²²¹ Grant, *supra* note 42, at 127–28.

²²² See Katie Park, Keri Blakinger & Claudia Lauer, *A Half-Million People Got COVID-19 in Prison. Are Officials Ready for the Next Pandemic?*, THE MARSHALL PROJECT (June 30, 2021), <https://www.themarshallproject.org/2021/06/30/a-half-million-people-got-covid-19-in-prison-are-officials-ready-for-the-next-pandemic> [<https://perma.cc/9SDD-ETSY>].

²²³ See EDUCATION IN A PANDEMIC, *supra* note 186, at 25–26.

²²⁴ See Jessica K. Heldman, Margaret A. Dalton & Robert Fellmeth, *COVID-19 and Preventing Harm to Vulnerable Children*, 57 SAN DIEGO L. REV. 865, 896 (2020).

²²⁵ Thomas A. Mayes, *The Long, Cold Shadow of Before: Special Education During and After COVID-19*, 30 S. CAL. REV. L. & SOC. JUST. 89, 92 (2021).

²²⁶ See Laura Cohen, *Incarcerated Youth and COVID-19: Notes from the Field*, 72 RUTGERS U. L. REV. 1475, 1477 (2021) (“Nationally, advocates and some government officials have worked to alleviate these dangers through furloughs, expedited parole, and medical releases of adult prisoners” mostly in local jails, and in “rarer” instances, in state prisons).

²²⁷ See Jessica K. Heldman et al., *supra* note 224, at 873–74 (listing the ways in which conditions in youth facilities deteriorated because of the pandemic, including increased use of solitary confinement because of staffing shortages, denial of in-person family visits, and reduced educational opportunities).

²²⁸ See Victor M. Jones, *COVID-19 and the “Virtual” School-to-Prison Pipeline*, 41 CHILD. LEGAL RTS. J. 105, 112, 124–25 (2021) (listing examples of how public schools continued to use exclusionary discipline for students with disabilities during virtual instruction, including the example of “a fifteen-year-old Black girl with ADHD in Michigan [who] was sent to a juvenile detention center in May 2020 for failing to turn in her online homework, an act that the juvenile court determine was a violation of her probation”) (citing Jodi S. Cohen, *A Teenager Didn’t Do Her Online Schoolwork. So a Judge Sent Her to Juvenile Detention*, PROPUBLICA (Jul. 14, 2020), <https://www.propublica.org/article/a-teenager-didnt-do-her-online-schoolwork-so-a-judge-sent-her-to-juvenile-detention> [<https://perma.cc/CA3Q-64ZD>]).

Despite these conditions, school districts remained obligated to provide FAPE to students with disabilities during the pandemic. According to the Department of Education’s March 2020 guidance, if schools continued to provide education “to the general student population,” then they had to continue to provide FAPE to students with disabilities.²²⁹ After some school districts stopped providing services to all students to avoid potential liability under federal disability law,²³⁰ the Department of Education elaborated that it “will offer flexibility where possible” and acknowledged that “FAPE may include, as appropriate, special education and related services provided through distance instruction provided virtually, online, or telephonically.”²³¹ However, the Department of Education later clarified “that no matter what primary instructional delivery approach is chosen, SEAs, LEAs, and individualized education program (IEP) [t]eams remain responsible for ensuring that a free appropriate public education (FAPE) is provided to all children with disabilities.”²³²

While educational services for students with disabilities in many adult jails and prisons were frequently inadequate prior to March 2020,²³³ the pandemic temporarily eliminated any semblance of meaningful instruction in some facilities for these students.²³⁴ Many carceral facilities confined students to their cells, gave them worksheets to complete, and left them to learn the material on their own.²³⁵ In New Jersey, students in juvenile facilities

²²⁹ See U.S. DEP’T OF EDUC., QUESTIONS AND ANSWERS ON PROVIDING SERVICES TO CHILDREN WITH DISABILITIES DURING THE CORONAVIRUS DISEASE 2019 OUTBREAK (2020) [hereinafter QUESTIONS AND ANSWERS MARCH 2020], <https://sites.ed.gov/idea/files/qa-covid-19-03-12-2020.pdf> [<https://perma.cc/2AKH-U2ZD>].

²³⁰ Mayes, *supra* note 225, at 104.

²³¹ See OFFICE FOR CIV. RTS. & OFFICE SPECIAL EDUC. & REHAB. SERVS., SUPPLEMENTAL FACT SHEET ADDRESSING THE RISK OF COVID-19 IN PRESCHOOL, ELEMENTARY AND SECONDARY SCHOOLS WHILE SERVING CHILDREN WITH DISABILITIES (2020), <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf> [<https://perma.cc/V7TZ-3QDK>].

²³² OFFICE OF SPECIAL EDUC. AND REHAB. SERVS., OFFICE OF SPECIAL EDUC. PROGRAMS, OSEP QA 20-01 2 (Sept. 28, 2020), <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-provision-of-services-idea-part-b-09-28-2020.pdf> [<https://perma.cc/6JTE-LGLS>] (emphasis in the original omitted). Throughout the Department of Education’s pandemic-era special education guidance, the Author did not identify any specific exceptions for special education services provided to students in adult jails and prisons.

²³³ See discussion *supra* Part I.A and *infra* Part IV.A.

²³⁴ See *State Orders Chicago to Fix Special Education in Detention*, NBC CHI. (Apr. 24, 2021, 9:19 AM), <https://www.nbcchicago.com/news/local/state-orders-chicago-to-fix-special-education-in-detention/2494434/> [<https://perma.cc/96M2-QEKF>] (describing how similar issues and barriers to special education services arose in Chicago, New York City, and Washington, D.C. for incarcerated students during the pandemic) [hereinafter NBC CHI.]. This Part relies on sources describing special education services in both juvenile and adult carceral settings during the pandemic for two reasons. First, there is limited information specific to the quality of special education services in adult jails and prisons. Second, the educational practices and adjustments made in response to the pandemic appear to have been consistent across juvenile and adult carceral settings.

²³⁵ See Subini Ancy Annamma & Jamelia Morgan, *Youth Incarceration and Abolition*, 45 N.Y.U. REV. L. & SOC. CHANGE 471, 476 (2022) (“Education programs in these facilities have

held “in quarantine ha[d] no interactions with teachers.”²³⁶ In New York City, students in juvenile detention centers had no communications with their teachers other than “text chat.”²³⁷

These educational deprivations affected all students, but the pandemic resulted in essentially a temporary end to special education services, compounding the harms to students with disabilities. In Chicago, the juvenile facilities “‘essentially halted’ special education services during the pandemic.”²³⁸ In the Washington, D.C. jail, students with disabilities received “packets of worksheets and pre-programmed information and activities on a tablet,” without access to live instruction or feedback.²³⁹ One student in the D.C. jail said the jail failed to update the worksheets on his tablet for several months after he completed his work.²⁴⁰

“The requirement to provide FAPE to incarcerated youth with disabilities, including specially designed instruction and monitoring of student academic progress, did not cease with the onset of the COVID-19 pandemic.”²⁴¹ Similar to many pre-pandemic educational practices in adult carceral facilities, the fact that the practices were mostly uniform across facilities — some facilities stopped providing special education services — means that these types of violations should be vulnerable to challenge through class-action and systemic litigation. Even recognizing that the Department of Education initially offered “flexibility” to education providers to respond to the pandemic, adult jails and prisons would have difficulty justifying their pandemic-era educational programs as an appropriate use of that flexibility. Moreover, courts would have to strain beyond recognition *Andrew F.*’s pronouncement that all students with disabilities “should have the chance to meet challenging objectives”²⁴² to approve educational programs that lacked meaningful objectives altogether beyond completing worksheets alone in a jail or prison cell.

Now, some adult jails and prisons have replaced their pandemic-era special education systems with their old practices.²⁴³ If a facility completely

been shifted to distance learning and, for many youth, reduced to doing packets alone in their cells.”).

²³⁶ Cohen, *supra* note 226, at 1481.

²³⁷ NBC CHI., *supra* note 234.

²³⁸ *Id.* (quoting LEGAL AID CHI. & EQUIP FOR EQUALITY, *State Complaint Re: Special Education at Cook County Juvenile Temporary Detention Center/Nancy B. Jefferson High School 3* (Nov. 2, 2020), available at <https://www.documentcloud.org/documents/20613447-20201102-ltr-to-isbe-systemic-complaint>) [<https://perma.cc/V96S-9R66>].

²³⁹ Gagnon & Benedick, *supra* note 213, at 5. The special education services offered in the D.C. jail are the subject of the *Charles H.* litigation, one of the case studies explored in Part IV.

²⁴⁰ *Id.*

²⁴¹ *Id.* at 4; see also *White v. District of Columbia*, 2022 WL 971330, at *6 (D.D.C. Mar. 31, 2022) (“The IDEA contains no exception that would allow suspending special education services because a global pandemic forced schools online.”).

²⁴² *Andrew F.*, 580 U.S. at 402.

²⁴³ See, e.g., Gagnon & Benedick, *supra* note 213, at 5 (“Limited face-to-face instruction was initiated for some students more than a year after the onset of COVID-19 at [the D.C. jail].”).

ceased its pandemic-era practices more than two years ago, then the IDEA's two-year statute of limitations from the time the student "knew or should have known" about the violation may bar legal claims for these violations,²⁴⁴ unless an exception applies.²⁴⁵

However, persistent and ongoing staffing shortages in carceral facilities that the pandemic exacerbated²⁴⁶ suggest that the pandemic-era educational practices may still exist in some facilities. In Texas, for example, as of April 2023, "the Texas Juvenile Justice Department [(“TJJD”)] has been asking judges to push more of its most troubled kids into the adult prison system” after “TJJD hit a historic point in its staffing crisis last year.”²⁴⁷ As a result of these staffing shortages, “restrictions that might have begun as a way to stop the spread of COVID-19 have continued because there aren’t enough guards to supervise activities”²⁴⁸ in all types of carceral facilities, including cuts to education programs.²⁴⁹

²⁴⁴ The fact that years of potential claims for pandemic-era compensatory education for students in adult jails and prisons could be barred by the IDEA's statute of limitations reflects the urgent need for an increase in systemic advocacy on behalf of this population of students.

²⁴⁵ 20 U.S.C. § 1415(f)(3)(C). The IDEA lists the following two exceptions to its two-year statute of limitations: (i) “specific misrepresentations by the local education agency that it had resolved the problem forming the basis of the complaint; or (ii) the local education agency’s withholding of information from the parent that was required under this subchapter to be provided to the parent.” 20 U.S.C. § 1415(f)(3)(D). Additionally, certain breaches of ongoing duties under the IDEA, like some of those that occurred during the pandemic, are “not a single event like a decision to suspend or expel a student” and may have continued “into the limitations period.” *Indep. Sch. Dist. No. 283 v. E.M.D.H.*, 960 F.3d 1073, 1083–84 (8th Cir. 2020) (“But, because of the District’s continued violation of its child-find duty, at least some of the Student’s claims of breach of that duty accrued within the applicable period of limitation.”) (internal citations omitted).

²⁴⁶ See, e.g., Austin Jenkins, *States Explore Tech Solutions to Prison Staff Shortages*, *Pluribus News* (Jan. 13, 2023, 1:00 PM), <https://pluribusnews.com/news-and-events/states-explore-tech-solutions-to-prison-staff-shortages/> [<https://perma.cc/Q2A4-AJKH>] (describing how state prison staffing shortages “grew worse during the COVID pandemic,” citing staffing crises in West Virginia, Montana, and Nevada); Keri Blakinger, Jamiles Lartey, Beth Schwartzapfel, Christie Thompson & Michael R. Sisak, *US Prisons Face Staff Shortages as Officers Quit Amid COVID*, *THE ASSOCIATED PRESS* (Nov. 1, 2021, 6:01 AM), <https://apnews.com/article/coronavirus-united-states-prisons-staff-shortages-health-dba13f1c6368392be2bc5e7375170a78> [<https://perma.cc/78HC-557W>] (detailing how the pandemic “pushed many corrections systems into crisis” by exacerbating longstanding staff shortages).

²⁴⁷ Jolie McCullough, “A Way to Throw Kids Away”: *Texas’ Troubled Juvenile Justice Department Is Sending More Children to Adult Prisons*, *THE TEXAS TRIBUNE* (Apr. 28, 2023, 5:00 AM), <https://www.texastribune.org/2023/04/28/texas-juvenile-justice-prison-transfers/> [<https://perma.cc/V6BX-TJ6B>].

²⁴⁸ Blakinger et al., *supra* note 246.

²⁴⁹ See, e.g., Glenn Thrush, *Short on Staff, Prisons Enlist Teachers and Case Managers as Guards*, *N.Y. TIMES* (May 1, 2023), <https://www.nytimes.com/2023/05/01/us/politics/prison-guards-teachers-staff.html> [<https://perma.cc/T53Z-YRS8>] (arguing that among the problems associated with staffing shortages at federal prisons “perhaps most concerning of all is the use of educational and vocational aides for other jailhouse duties”); McCullough, *supra* note 247 (noting that “education classes were replaced with work packets” in Texas’ youth prisons because of staffing shortages); Ben Conarck, *Fewer Activities, More Assaults: Maryland Prisons Are Short 3,400 Officers, Union Warns*, *THE BALTIMORE BANNER* (April 20, 2023, 2:27 PM), <https://www.thebaltimorebanner.com/community/criminal-justice/maryland-prison-staffing-shortages-report-UKJR6D3ECVA4PAXUVGRRX3U6R4/#:~:text=They%20found%20that%20>

The combination of the pandemic's lingering effects and *Andrew F.* have provided an enhanced opportunity to improve educational opportunities for students with disabilities in adult jails and prisons through systemic advocacy. Part III discusses existing legal mechanisms that can help accomplish this goal.

III. LEVERAGING EXISTING LEGAL MECHANISMS TO ENFORCE THE RIGHTS OF STUDENTS WITH DISABILITIES IN ADULT JAILS AND PRISONS

The IDEA's core protections apply to many students with disabilities in adult jails and prisons, and students, advocates, and lawyers can use existing legal mechanisms to improve educational opportunities for these students. Prior to this Article, much of the literature about special education services in adult carceral settings has focused on the exceptions in the IDEA that weaken the rights of students with disabilities in these facilities.²⁵⁰ Writing about this topic over twenty years ago, Professor Perry Zirkel and Thomas Mayes explained the relevant legal framework, with a focus on the exceptions in adult jails and prisons, in order to "provide practitioners and future authors with a useful framework for analysis and application."²⁵¹ Analyzing this same legal framework in 2019, Blakely Evanthia Simoneau wrote that "the IDEA omits from its protection some of the most vulnerable individuals – individuals with disabilities incarcerated in American prisons."²⁵² To remedy this omission, Simoneau calls for legislative action to "remove these exceptions completely from the IDEA" or "at the very least each exception must be critically reexamined and narrowed."²⁵³

Legislative action to remove the relevant exceptions in the IDEA would benefit students with disabilities in adult carceral facilities immensely, especially if the Child Find Exception was removed to expand the number of students who are eligible for these services. In addition to simply eliminating or narrowing the Child Find, Assessments, Transition Services, and Modifications Exceptions, Congress could further strengthen the rights of these students given the current state of services in many of these facilities. Congress could establish heightened protections to recognize that this population is especially vulnerable to violations of their federal right to special education services and that these violations have a disproportionate impact on low-income students of color. For example, Congress could require more reporting about student progress, lengthen incarcerated students' eligibility

staffing%20shortages,and%20officers%20attacking%20prisoners%2C%20the [https://perma.cc/383T-2SA6] (noting that "the staffing shortages have impacted . . . educational activities" in Maryland state prisons); Blakinger et al., *supra* note 246 (describing how ongoing staffing shortages prevent people in prison from "tak[ing] classes").

²⁵⁰ See sources cited *supra* note 35.

²⁵¹ Mayes & Zirkel, *supra* note 35, at 158.

²⁵² Simoneau, *supra* note 35, at 90.

²⁵³ *Id.* at 131.

for services under the IDEA, or make it easier for these students to file individual due process or state complaints. Moreover, the IDEA functions as the floor for what states must provide students with disabilities and “states can also enact their own laws to protect these individuals, negating these exceptions.”²⁵⁴

While the exceptions in the IDEA harm many students with disabilities in adult carceral facilities, the right to FAPE remains mostly intact for many others, even if it is not currently enforced. Notwithstanding potential legislative action, the confluence of the preexisting deficient practices, the standard announced in *Andrew F.*, and the lingering effects of the pandemic have enhanced the opportunity to challenge systemic deprivations of the rights of students with disabilities in adult jails and prisons. In response to the pandemic, some carceral facilities implemented policies and practices that intensified systemic violations of students’ rights in mostly uniform ways by terminating in-person instruction and replacing it with worksheets and remote learning but not providing meaningful special education services. The deprivations of FAPE in these facilities became more extreme during the pandemic, but the ability to do something to improve the situation already existed. Some federal courts in some circuits had used the amorphous *Rowley* standard to dilute the right to FAPE, but, even in those jurisdictions, the denials of FAPE in some adult jails and prisons were blatant. *Andrew F.* will help in those jurisdictions by raising the standard for the services that must be provided to all students with disabilities.

In jurisdictions that adopted a higher standard than the *de minimis* approach pre-*Andrew F.*, a bad legal standard does not necessarily explain why so many adult jails and prisons disregarded the educational rights of incarcerated students with disabilities. The barriers to IDEA enforcement in carceral settings described in *supra* Part I.E. help explain the current situation in facilities in these jurisdictions. The exceptions in the IDEA relevant to these facilities also expose the view of some policymakers that these students are undeserving of appropriate educational services. This sentiment is reflected in these IDEA exceptions that essentially sanction educational death sentences for some students with disabilities in adult jails and prisons.

In the special educational void that exists in some adult jails and prisons, class-action and systemic litigation can harness the power of two existing legal mechanisms – the monitoring and enforcement obligations of SEAs and the equitable remedy of compensatory education – to improve educational opportunities for students with disabilities and prevent these types of legal violations in the future. This Part discusses these legal mechanisms specifically in the carceral context.

²⁵⁴ *Id.*

A. State Educational Agencies

State Educational Agencies and their obligations under the IDEA provide a pathway to potential liability in systemic litigation aimed at strengthening the rights of students with disabilities in adult jails and prisons. “[T]he State . . . has ultimate responsibility for ensuring FAPE is made available to all eligible students with disabilities residing in State and local juvenile and adult correctional facilities.”²⁵⁵ The responsibilities on behalf of the state usually fall to the SEA.²⁵⁶ An SEA’s responsibility under the IDEA “includes monitoring public agencies that are responsible for providing FAPE to students with disabilities in correctional facilities” and “ensur[ing] that such programs meet the education standards of the SEA and IDEA requirements.”²⁵⁷

While the IDEA does not specify each detail of exactly how the SEA must execute its duties,²⁵⁸ the Department of Education has clarified that the SEA must do much more than simply monitor for problems.²⁵⁹ According to Zirkel and Mayes, the Department of Education “rejected several suggested changes to its proposed regulations” about the scope of SEA authority aimed at narrowing the SEA’s duties to consist mostly of monitoring.²⁶⁰ Instead, the Department of Education emphasized that SEAs must monitor, prescribe corrective action when noncompliance is identified, and provide technical assistance to correct problems.²⁶¹ Courts have also rejected the argument that the SEA has only “supervisory obligations with limited or no enforcement powers.”²⁶² The SEA’s “role amounts to more than creating and publishing some procedures and then waiting for the phone to ring.”²⁶³

²⁵⁵ DEAR COLLEAGUE LETTER ON THE IDEA, *supra* note 61, at 6.

²⁵⁶ 20 U.S.C. § 1412(a)(11); *see also supra* Part I.C (describing the obligations of SEAs under the IDEA); *but see* discussion *supra* p. 18 (explaining that the governor of any state may transfer responsibility over students with disabilities who are convicted under state law and incarcerated in adult prisons from the SEA to another state agency).

²⁵⁷ DEAR COLLEAGUE LETTER ON THE IDEA, *supra* note 61, at 3, 8.

²⁵⁸ *See, e.g.,* STATE GENERAL SUPERVISION RESPONSIBILITIES, *supra* note 14, at 2 (listing the eight components of a “reasonably designed State general supervision system” but noting that “each state has the flexibility to develop its own model of general supervision”); Erin B. Stein, Comment, *The Individuals with Disabilities Education Act (IDEA): Judicial Remedies for Systemic Noncompliance*, 2009 WIS. L. REV. 801, 807–08 (2009) (“IDEA does not specifically state what the compliance policies and procedures must contain; therefore, the states have the power to devise their own compliance and monitoring system.”).

²⁵⁹ Mayes & Zirkel, *supra* note 133, at 67–68.

²⁶⁰ *Id.* at 67.

²⁶¹ *Id.* at 67–68.

²⁶² *Id.* at 69 (listing federal court decisions rejecting this argument).

²⁶³ *Cordero by Bates v. Pennsylvania Dep’t of Educ.*, 795 F. Supp. 1352, 1362 (M.D. Pa. 1992).

The SEA must proactively identify problems through “required periodic monitoring,”²⁶⁴ and when it discovers noncompliance, the SEA must fix it.²⁶⁵

The SEA’s role to proactively monitor, identify, and correct noncompliance *should* be a self-enforcing mechanism that ensures implementation of the IDEA. The promise of the IDEA in adult jails and prisons, however, remains unfulfilled. Previous scholarship has focused on the potential loopholes in the SEA scheme under the IDEA.²⁶⁶ As Zirkel and Mayes observed, “the IDEA does not hold SEAs to a standard of perfection or make them strictly liable for” failures at the district level.²⁶⁷ Nevertheless, courts have been willing to hold SEAs accountable when they fail to carry out their duties under the IDEA.²⁶⁸

Many SEAs, or any other agency who has been assigned the SEA’s responsibilities, have arguably failed in their duties in adult jails and prisons. The scope of the disruptions to special education in adult jails and prisons caused by the pandemic and its lingering effects compounded existing problems in these facilities. Now that the acute public health crisis associated with the pandemic has largely passed, the current state of special education systems in these facilities could make courts willing to hold SEAs liable and require improvements through injunctive relief.

The SEA’s duties and responsibilities under the IDEA provide a potential model for relief in systemic litigation. Because the SEA has systemic obligations for monitoring and ensuring the implementation of the IDEA, its failures may be systemic, too. The SEA, and by extension the state, also serves as a back-up for additional resources in litigation if school districts

²⁶⁴ Mayes & Zirkel, *supra* note 133, at 71.

²⁶⁵ See *Corey H. v. Bd. of Educ. of Chi.*, 995 F. Supp. 900, 910 (N.D. Ill. 1998) (holding the Illinois SEA liable under the IDEA for identifying failures on the part of the Chicago Board of Education but not correcting the issues). SEAs must also review due process complaints and state complaints to check “whether systemic noncompliance occurred or is occurring and ensure correction in a timely manner.” STATE GENERAL SUPERVISION RESPONSIBILITIES, *supra* note 14, at 7.

²⁶⁶ See, e.g., Monica Costello, Note, *Systemic Compliance Complaints: Making IDEA’s Enforcement Provisions a Reality*, 41 U. MICH. J.L. REFORM 507, 511 (2008) (arguing that the lack of details under the IDEA about how SEAs must carry out their duties has left loopholes for SEAs to avoid their duties); Edelson, *supra* note 35, at 109 (arguing that SEAs that shift their authority to other agencies for a subset of students with disabilities in adult prisons have reduced incentives to carry out their duties because less special education funding is at risk).

²⁶⁷ Mayes & Zirkel, *supra* note 133, at 71.

²⁶⁸ See, e.g., *Pachl v. Seagren*, 453 F.3d 1064, 1070 (8th Cir. 2006) (“Thus, state educational agencies may be responsible for violations of the IDEA when the state agency in some way ‘fail[s] to comply with its duty to assure that the IDEA’s substantive requirements are implemented.’”) (internal quotations omitted) (quoting *John T. v. Iowa Dep’t of Educ.*, 258 F.3d 860, 864–65 (8th Cir. 2001)); *Corey H.*, 995 F. Supp. at 910 (holding the Illinois SEA liable under the IDEA for identifying failures on the part of the Chicago Board of Education but taking “few if any actions to ‘ensure’ that these failures were corrected, and in fact consciously allowed Chicago to continue violating the mandate”); Mayes & Zirkel, *supra* note 133, at 69–71 (“If, however, an SEA fails to maintain a monitoring regime or to act when it detects an LEA denying a student’s FAPE, it is liable under the IDEA.”).

raise capacity or funding issues to excuse their failures.²⁶⁹ Moreover, some courts have been willing to excuse claims against SEAs from the IDEA's administrative exhaustion requirement.²⁷⁰ Finally, the SEA's statutory duties provide a framework for injunctive relief that could prevent these types of violations in the future.²⁷¹

An SEA that has conducted its affirmative monitoring duties or reviewed relevant due process or state complaints should be on notice that systemic problems with the provision of special education services existed in many adult jails and prisons for years and were intensified by the pandemic.²⁷² Once aware of noncompliance, if an SEA does not take corrective action to fix these problems, it can be held liable by a federal court.²⁷³ Systemic litigation can potentially force the SEA to execute its duties under the IDEA to monitor, identify deficiencies in services, and provide corrective action and technical assistance to correct these problems.

²⁶⁹ See Raj, *supra* note 64, at 465 (discussing Education Professor Thomas Hehir's insistence on including states as defendants in educational reform class-action lawsuits to help address funding shortages and other capacity issues raised by local school districts) (citing 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, 837–39 (Gary Sykes et al., eds., 2009)).

²⁷⁰ Mayes & Zirkel, *supra* note 133, at 84 (listing cases). *But see Doe ex rel. Brockhuis v. Arizona Department of Education*, 111 F.3d 678, 684 (9th Cir. 1997) (plaintiffs who were students with disabilities in an adult jail were required to exhaust IDEA claims because the SEA did not have notice that the students were in the facility and so the denial of services occurred because of “inadvertent neglect” by the SEA).

²⁷¹ See Stein, *supra* note 258, at 815–16 (“Remedies for systemic noncompliance on the state level will focus on the adequacy of state monitoring procedures and the ways in which the state monitors compliance at the local educational-agency level.”). In response to state complaints, the SEA has a duty to design corrective action plans, which can lead to systemic change, including the provision of compensatory education for students who have been denied services. See Hyman et al., *supra* note 175, at 150–51 (analogizing the relief available from the SEA in “a corrective action” to “class litigation relief” as it “can lead to changes in policies and procedures, additional or different services, compensatory education, reimbursement, or the provision of future educational services”).

²⁷² In a recent guidance document, the Department of Education reaffirmed that “[e]ven during disasters, SEAs must ensure the requirements of IDEA Part B are met under 34 C.F.R. § 300.149 (SEA responsibility for general supervision) and ensure the implementation of IDEA Part B.” STATE GENERAL SUPERVISION RESPONSIBILITIES, *supra* note 14, at 12. However, the Department of Education did note that if a “State determines that an [IDEA] requirement was not met solely due to the disaster (e.g., a service could not be provided because of public health restrictions imposed as a result of the disaster), it may” not require policy or other systemic changes but still must “ensur[e] that the appropriate services are provided, including, as appropriate, the consideration and determination of compensatory services.” *Id.* at 32.

²⁷³ See *Corey H.*, 995 F. Supp. at 910 (finding the Illinois SEA liable because it failed to take action to correct problems it identified); see also *Gadsby by Gadsby v. Grasmick*, 109 F.3d 940, 953 (4th Cir. 1997) (“Therefore, we hold that the SEA is ultimately responsible for the provision of a free appropriate public education to all of its students and may be held liable for the state’s failure to assure compliance with IDEA.”).

B. *Compensatory Education*

Securing compensatory education for students with disabilities in adult jails and prisons is critical to addressing the longstanding problems with the provision of special education services in many of these facilities. Because of its flexibility, compensatory education is the appropriate remedy to respond to systemic denials of FAPE, especially in some carceral facilities where services have been completely denied, such as during the pandemic.²⁷⁴

One of the touchstones of compensatory education is its flexibility.²⁷⁵ Compensatory education “encompasses a gamut of equitable remedies, including direct services or new services, and is used to make up for the loss in progress when services should have been offered, but were not.”²⁷⁶ Compensatory education can also include funds given directly to the student to be used for services to address the educational deficit resulting from the denial of FAPE based on the number of hours of education missed.²⁷⁷ The constraints on fund use vary, but incarcerated students may be able to use the funds for educational providers not affiliated with the jail or prison or even after they exit the carceral facility.²⁷⁸ The bounds of what constitutes compensatory education

²⁷⁴ See, e.g., Heldman et al., *supra* note 224, at 896 (arguing that compensatory education “seems most appropriate in a post-COVID world” to remedy the deprivations of special education that occurred); Bruce A. Easop, Note, *Education Equity During COVID-19: Analyzing In-Person Priority Policies for Students with Disabilities*, 74 STAN. L. REV. 223, 265 (2022) (arguing that “districts should expand access to both compensatory education and extended school year services in order to truly compensate for the inadequate education provided during the 2019–2020 and 2020–2021 academic years”). The Department of Education issued guidance during the pandemic that said, “an IEP Team . . . would be required to make an individualized determination as to whether compensatory services are needed under applicable standards and requirements.” QUESTIONS AND ANSWERS MARCH 2020, *supra* note 229, at 2. According to Professor Zirkel, “compensatory services” is a distinct remedy from compensatory education. See Perry A. Zirkel, *COVID-19 Confusion: Compensatory Services and Compensatory Education*, 30 S. CAL. REV. L. & SOC. JUST. 391, 392–93 (2021). The Department of Education’s guidance combined with inconsistent actions across different states, has led to confusion between the two remedies. *Id.* at 395. In addition, the legal weight of the Department of Education’s guidance calling for compensatory services has been questioned by courts. See *id.* at 403–04. Despite Professor Zirkel’s distinction, some sources appear to refer to these two remedies interchangeably. See Statement of Interest of the United States at 12–13, *Charles H. v. District of Columbia*, No. 1:21-cv-00997-CJN (May 26, 2021), https://static1.squarespace.com/static/5a2af8a0f14aa1cbbcf14079/t/60ba69fb0ce2e444cbc2fea7/1622829564158/24_Statement+of+Interest+of+the+United+States+of+America+%2800178913xC4EOD%29.PDF [<https://perma.cc/WER8-3DAV>] [hereinafter Statement of Interest].

²⁷⁵ See generally Terry Jean Seligmann & Perry A. Zirkel, *Compensatory Education for IDEA Violations: The Silly Putty of Remedies?*, 45 URB. LAW. 281 (2013) (comparing equitable remedies like compensatory education to silly putty); see also Easop, *supra* note 274 at 271–72 (listing types of compensatory education that courts have awarded).

²⁷⁶ Heldman et al., *supra* note 224, at 896.

²⁷⁷ See Seligmann & Zirkel, *supra* note 275, at 302 (describing cases applying the “quantitative approach” to compensatory education that awards a dollar value based on how many hours of special education services the school denied the student).

²⁷⁸ See discussion *infra* Part IV.

are “constantly evolving.”²⁷⁹ In addition to funds for education services, compensatory education can include, *inter alia*, tutoring services, laptop computers, vocational services for older students,²⁸⁰ and extending eligibility beyond when students age out of services under the IDEA.²⁸¹

According to the “leading” method for calculating the amount of compensatory education,²⁸² courts should follow a “flexible approach” in which the “services [the student] needs to elevate him to the position he would have occupied absent the school district’s failures” determine the final award.²⁸³ Sometimes this calculation will exceed a one-for-one, hour-for-hour calculation for the number of hours of services a school denied a student.²⁸⁴ The final amount, however, must always “be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.”²⁸⁵ Finally, and critically for the population of students with disabilities in adult jails and prisons, compensatory education can be offered to students beyond when they age out of IDEA services, even if the student has already earned a high school diploma.²⁸⁶

Compensatory education is especially important to respond to special education denials in adult jails and prisons because these facilities historically have had what amounts to practical immunity from tuition reimbursement, one of the principal remedies under the IDEA and an incentive for school districts to comply with the law.²⁸⁷ Tuition reimbursement allows parents to front the costs for a private school and seek reimbursement from the public school district. As a remedy under the IDEA, it “has allowed parents with resources to pursue disputes over their child’s FAPE while simultaneously securing what they believe to be appropriate special education.”²⁸⁸ Tuition reimbursement prevents the student from falling further behind in an educational placement that is eventually found to be inappropriate.

²⁷⁹ Maria N. Liberopoulos, Note, *Land of the Free (Appropriate Public Education), Home of the Deprived: How Vocational Services Can Remedy Education Deprivations for Former Students with Disabilities*, 26 WASH. & LEE J. C.R. & Soc. JUST. 191, 204 (2019).

²⁸⁰ See, e.g., *id.* at 207, 209–11 (listing different types of compensatory education and arguing that the Department of Education should adopt a regulation that explicitly recognizes vocational services as compensatory education for older students with disabilities); see also discussion *infra* Part IV.

²⁸¹ See *Ferren C. v. Sch. Dist.*, 612 F.3d 712, 720 (3d Cir. 2010).

²⁸² Zirkel, *supra* note 274, at 393.

²⁸³ Reid, 401 F.3d at 524, 527.

²⁸⁴ *Id.* at 524.

²⁸⁵ *Id.*

²⁸⁶ Liberopoulos, *supra* note 279, at 205–06.

²⁸⁷ Courts developed compensatory education as an equitable remedy under the IDEA relying on the Supreme Court’s decision in *Burlington v. Department of Education of Massachusetts* “that the IDEA authorized tuition reimbursement as an equitable remedy within the court’s discretionary power to grant ‘appropriate’ relief.” Seligmann & Zirkel, *supra* note 275, at 292–93 (quoting *Burlington*, 471 U.S. at 369–70).

²⁸⁸ *Id.* at 296.

Students in adult jails and prisons have one readily available option for special education services, and sometimes no option at all if their facilities do not provide services. These students and their parents likely cannot seek out an alternative placement like Andrew's parents did,²⁸⁹ and thus, tuition reimbursement is of little use to them.²⁹⁰ Compensatory education, however, can provide these students with services or resources to secure services to make up for past deprivations. Without compensatory education, these students would be stuck "in the cycle of challenging the adequacy of each following IEP on a yearly basis in order to address deficiencies stemming from already established denials of service," which "neither helps the child nor deters the district."²⁹¹

Pursuing compensatory education as a remedy also has the potential to reduce some of the possible harms of carceral reform litigation. One of the critiques of systemic litigation focused on reforming rather than abolishing a carceral system is that it can do harm by potentially feeding the system more resources.²⁹² With more resources, the carceral system grows. As the carceral system grows, it ensnares more people, including children. Thus, lawsuits that are successful in getting more services for students with disabilities in adult jails and prisons could lead to more students with disabilities incarcerated in these facilities *because of* the increased resources. Moreover, by improving education systems in carceral settings, reform litigation can promote the myth of the good jail or prison²⁹³ and bolster the argument that students with disabilities *need* rehabilitation, rather than, *inter alia*, community-based mental health services, stable housing, and effective schools.

Litigation that seeks compensatory education for students with disabilities in adult jails and prisons in the form of resources to use towards educational services that suit the students' interests and needs can avoid at least some of these pitfalls. Compensatory education awards can ensure that the money and resources flow directly to students to get services, or at least that those resources are spent on services for the student *with* the student's input. Thus, compensatory education remedies can avoid awarding more resources to carceral systems for disregarding the needs of students with disabilities. Instead, compensatory education has the potential to take money from the carceral system and put it in the hands of incarcerated students, providing these students with a little control over their future in a system designed to

²⁸⁹ See *Andrew F.*, 137 S. Ct. at 996.

²⁹⁰ See also Seligmann & Zirkel, *supra* note 275, at 296 (tuition reimbursement "does not assist the child whose parents lack either the resources or the knowledge to obtain the needed special education services during the time that FAPE is denied").

²⁹¹ *Id.*

²⁹² See, e.g., Charlotte Rosen, *The False Promise of Criminal Justice Reform*, THE NATION (Jan. 5, 2022), <https://www.thenation.com/article/culture/carceral-con-review/> [https://perma.cc/SV9G-4NYP] (reviewing source that argues that "criminal justice reform actually *proliferates* punishment and harm") (citing Kay Whitlock & Nancy Heitzeg, *CARCERAL CON: THE DECEPTIVE TERRAIN OF CRIMINAL JUSTICE REFORM* (2021)) (emphasis in original).

²⁹³ Cf. Annamma & Morgan, *supra* note 235, at 503 ("There is no way to make a gentler and more humane system that is built on caging kids.").

rob them of agency. Part IV explores two case studies that have utilized both mechanisms featured in this Part to enhance educational opportunities for students with disabilities in adult carceral settings.

IV. CASE STUDIES OF ENFORCEMENT

Two recent class-action lawsuits, *Adam X. v. New Jersey Department of Corrections* and *Charles H. v. District of Columbia*, provide roadmaps for challenging the role that SEAs have played in decaying special education systems in some adult jails and prisons and structuring systemic compensatory education programs for students with disabilities who have been harmed.²⁹⁴ Each case utilized different legal strategies, but both cases demonstrate how to present the lived experiences of students with disabilities in these facilities in stark contrast to what the IDEA requires.²⁹⁵ *Adam X.* is an example of how a pre-pandemic class-action lawsuit used the IDEA

²⁹⁴ In addition to IDEA claims, plaintiffs in both *Adam X.* and *Charles H.* brought claims under Section 504 of the Rehabilitation Act of 1973 (“Section 504”), 29 U.S.C. § 794, the Americans with Disabilities Act (“the ADA”), 42 U.S.C. § 12101, and local laws. The ADA and Section 504 provide important protections to students with disabilities who may not be covered under the IDEA, including in adult jails and prisons. See Claire Raj, *The Lost Promise of Disability Rights*, 119 MICH. L. REV. 933, 978 (2021); see also Koster, *supra* note 180, at 675 (arguing that the ADA is useful in challenging educational denials in the carceral context because the ADA applies to the entire facility and can be used to attack other conditions of confinement that prevent young people with disabilities from accessing their education). The ADA and Section 504 give students with disabilities “the right to an educational program ‘designed to meet [the] individual educational needs of [persons with disabilities] as adequately as the needs of [persons without disabilities].’” Raj at 979 (quoting 34 C.F.R. § 104.33). While pursuing ADA and Section 504 claims against adult jails and prisons is critical and can expand the potential relief, analysis of these claims is beyond the scope of this Article.

²⁹⁵ This Article does not intend to present class-action or systemic litigation (or any of the other strategies discussed here) as a panacea for all educational problems in every county and state adult carceral facility. There are hurdles to filing effective class-action lawsuits in the special education context beyond how long it can take to secure relief on behalf of a class of students. See Simoneau, *supra* note 35, at 125 (noting that “[c]ases often take years to resolve, plagued by procedural delays and a slow-moving system”). For example, the IDEA discourages and impedes many class-action lawsuits because of the exhaustion requirement, not to mention courts’ uneven application of exceptions to this requirement. See Raj, *supra* note 64, at 451 (“Class action suits invoking the IDEA are often thwarted by the exhaustion clause when courts refuse to permit applicable exceptions, specifically, the futility exception.”). Exhaustion requires students either to file individual due process complaints or risk the court’s dismissal of the case for a failure to exhaust. Even when IDEA class-action lawsuits clear the exhaustion hurdle, the relief they achieve can be ineffectual. According to Raj, “Class actions can remain a useful tool to help reform special education systems, but advocates must target their efforts on substantive systemic changes.” *Id.* at 464. Instead of seeking mere procedural compliance with the IDEA’s requirements, Raj argues that effective class-action lawsuits must seek “improved educational practices at the school level.” *Id.* The class certification process and pursuing class-wide compensatory education as a remedy present additional hurdles given the IDEA’s focus on the individualization of services. Moreover, the ultimate success of systemic reforms through class-action litigation largely depends on monitoring and enforcing any relief that has been agreed upon or ordered. Even so, the widespread problems in many adult jails and prisons go to the basic adequacy of substantive programming as well as procedural compliance with the IDEA. Pursuing remedies like compensatory education and monitoring and enforcement by SEAs in addition to other substantive and procedural changes can help improve educational opportunities for students with disabilities in adult carceral settings.

provisions that apply to adult prisons to improve educational opportunities for students with disabilities. *Charles H.* shows how to push for quick, systemic relief in response to the educational conditions in an adult jail during the pandemic.²⁹⁶

A. *Adam X. v. New Jersey Department of Corrections*

On January 11, 2017, *Adam X. v. New Jersey Department of Corrections*²⁹⁷ was filed on behalf of three individual students with disabilities, an organizational plaintiff, and a putative class against the New Jersey Department of Corrections (“NJDOC”) and the New Jersey Department of Education (“NJDOE”).²⁹⁸ *Adam X.* “challenge[d] Defendants’ systemic failure to provide appropriate and equal education to high school students with disabilities who are incarcerated in adult prisons” in New Jersey.²⁹⁹ According to the *Adam X.* plaintiffs, “[t]he law is clear: Students with disabilities age twenty-one and younger are entitled to special education and related services and to equal educational access though incarcerated in adult prisons. Defendants are obligated to provide and monitor the provision of this education.”³⁰⁰

Adam X. alleged that the special education system in NJDOC facilities had been in disarray for years. Casey Z., a twenty-one-year-old student with disabilities at the time of filing, had been in NJDOC facilities since the age of nineteen.³⁰¹ His experience is illustrative. Prior to his incarceration, Casey Z. had received special education services in middle and high school.³⁰² Yet, according to the *Adam X.* complaint, Casey Z. received no special education services while in NJDOC custody.³⁰³ Not only did NJDOC deny Casey Z. special education services, but it also provided him with “very little direct instruction.”³⁰⁴ Instead, Casey Z. spent his time independently completing

²⁹⁶ This Part refers to students by the pseudonyms that were used in the *Adam X.* and *Charles H.* lawsuits.

²⁹⁷ *Adam X.* was filed by lawyers from the American Civil Liberties Union of New Jersey, Disability Rights Advocates, and Proskauer Rose LLP several months prior to the Supreme Court issuing the *Andrew F.* opinion.

²⁹⁸ Class Action Complaint at 2, *Adam X. v. N.J. Dep’t of Corr.*, No. 3:17-cv-188 (D.N.J. Jan. 11, 2017), <https://dralegal.org/wp-content/uploads/2017/01/NJDOC-Complaint.pdf> [<https://perma.cc/7MKH-KDXS>]. The *Adam X.* plaintiffs subsequently filed an amended complaint to add a second organizational plaintiff. *Adam X.* FAC, *supra* note 4, at 2. The two organizational plaintiffs in *Adam X.* were the American Civil Liberties Union of New Jersey and The Arc of New Jersey. *Id.* at ¶¶ 25, 27.

²⁹⁹ *Adam X.* FAC, *supra* note 4, at ¶ 1.

³⁰⁰ *Id.* at ¶ 2.

³⁰¹ *Id.* at ¶ 23.

³⁰² *Id.* at ¶ 136.

³⁰³ *Id.* at ¶ 145.

³⁰⁴ *Id.*

worksheets in a classroom composed of about eight other students “all from different grades.”³⁰⁵ If Casey Z. needed assistance with his worksheets, his teacher told him that “he should ask the other inmates who served as tutors.”³⁰⁶

Despite all this, Casey Z. still wanted, and had a right to, an appropriate education. In 2015, he repeatedly notified NJDOC officials about his entitlement to special education services.³⁰⁷ In response, NJDOC officials told him “that because of the length of his prison sentence, prison is his last stop and he was not entitled to special education services.”³⁰⁸ Casey Z. would later learn from an NJDOC official that he “received the same services as any other student classified in need of special education.”³⁰⁹

Brian Y., a nineteen-year-old student with disabilities and another of the named plaintiffs, spent most of his time in class “individually working on worksheets” with no “extra help or educational supports.”³¹⁰ Similarly, Adam X., a twenty-year-old student with disabilities and another named plaintiff, spent much of his time “individually working on printed worksheets.”³¹¹ Adam X. could ask questions of his teacher, “but teachers often did not know the answers because they taught multiple subjects in which they had no expertise.”³¹² The lawsuit alleged that none of these students received FAPE as defined by the IDEA.³¹³

According to the *Adam X.* complaint, when students with disabilities faced disciplinary sanctions, NJDOC could place them in “administrative segregation” in some facilities where the quality of educational services further declined.³¹⁴ Many of these students received worksheets “dropped off” at their cell door, “with no direct instruction at all.”³¹⁵ Other students, like Adam X. and Brian Y., completed packets of worksheets “in a cage in the middle of the unit.”³¹⁶ The students sat inside, “while the teacher stood outside of the cage.”³¹⁷

The plaintiffs also made allegations against the NJDOE, the SEA for New Jersey, for its failure to carry out its duties to “[m]onitor . . . [and]

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.* at ¶ 146.

³⁰⁸ *Id.* There is no provision in the IDEA that allows adult jails and prisons to deny special education services altogether based upon the length of the student’s prison sentence.

³⁰⁹ *Id.* at ¶ 147.

³¹⁰ *Id.* at ¶¶ 108, 120.

³¹¹ *Id.* at ¶¶ 80, 90.

³¹² *Id.* at ¶ 90.

³¹³ *Id.* at ¶¶ 5, 10, 51, 183.

³¹⁴ *Id.* at ¶ 69.

³¹⁵ *Id.*

³¹⁶ *See id.* at ¶ 94; *see also id.* at ¶¶ 19, 126.

³¹⁷ *Id.* at ¶ 94.

[e]nforce’ the rights [the] IDEA provides.”³¹⁸ According to the allegations in *Adam X.*, the NJDOE had “failed systemically” to carry out its federal obligations “to put in place adequate monitoring to ensure NJDOC Defendants’ compliance with [the] IDEA” and “to identify and correct the educational deficiencies” that existed in NJDOC facilities.³¹⁹

On March 3, 2022, over five years after *Adam X.* was filed, the court certified the class for settlement purposes and approved the class-wide settlement agreement in an unpublished decision.³²⁰ The *Adam X.* settlement agreement contains wide-ranging injunctive relief and policy changes to the NJDOC’s special education system. These changes include, *inter alia*, revised Child Find procedures, agreements to “develop and implement IEPs and Section 504 Plans” for students with disabilities, commitments to have “appropriately certified teachers to provide special education services,” and an agreement to use “research-based instructional practices, which may include the use of worksheets as reinforcement exercises.”³²¹ Additionally, the *Adam X.* settlement agreement requires that “[b]ehavioral assessments and plans . . . will be developed and implemented for students with disabilities in appropriate circumstances” and that “[m]anifestation determinations will be conducted . . . for disciplinary incidents that occur during the [s]chool [d]ay that result in a disciplinary charge.”³²² Finally, the *Adam X.* settlement agreement includes a commitment from the NJDOC “to ensure that the conditions of [the] educational environment[s]” for students held outside the general population “reflect classrooms in the general population by modifying the classroom setting.”³²³

The *Adam X.* settlement agreement also contains provisions relating to the NJDOE’s duties and compensatory education. The NJDOE agreed to monitor for noncompliance and require corrective action to fix any identified issues during the five-year term of the *Adam X.* settlement agreement,³²⁴ and to continue to monitor the NJDOC facilities and issue corrective action

³¹⁸ *Id.* at ¶¶ 74–75 (quoting 34 C.F.R. § 300.600).

³¹⁹ *Id.* at ¶ 78.

³²⁰ *Adam X. v. N.J. Dep’t of Corr.*, No. CV 17-00188FLWLHG, 2022 WL 621089, at *1, *4 (D.N.J. Mar. 3, 2022) [hereinafter *Adam X. Settlement Order*].

³²¹ Settlement Agreement and Order at 5–6, *Adam X. v. N.J. Dep’t of Corr.*, No. 3:17-cv-188 (D.N.J. July 16, 2021), https://dralegal.org/wp-content/uploads/2021/08/135-3_Exh_1_to_LoCicero_Decl_Settlement_Agreement.pdf [<https://perma.cc/5KV7-YYX6>] [hereinafter *Adam X. Settlement Agreement*]. The parties also agreed that “[a]ll students with disabilities will be provided with transition planning and services as defined under IDEA until June 30 of the [s]chool [y]ear in which the students turns twenty-one years old, regardless of their release date,” *see id.* at 5, even though the Transition Services Exception exempts adult prisons from this requirement for some students with disabilities. *See* discussion *supra* Part I.D.

³²² *Id.* at 6–7.

³²³ *Id.* at 7. According to the *Adam X.* settlement agreement, “[t]he educational module will be modified with an approximately eight-foot long noise reduction wall-curtain blocking off two-and-a-half walls that will be attached near the top of the educational module and remain open approximately two feet from the floor for visibility.” *Id.*

³²⁴ *Id.* at 12–13.

plans to fix issues after the settlement term expires.³²⁵ As to compensatory education, each named plaintiff received an individual award.³²⁶ More broadly, the NJDOC agreed to “establish a compensatory education fund to provide all eligible class members who apply for compensatory education with compensatory education, with a maximum of \$8,000 available to an eligible student for each year of denied services.”³²⁷ According to the *Adam X.* settlement agreement, the “eligibility [period] for compensatory education for applying class members . . . [is from] January 11, 2015 through October 31, 2020.”³²⁸ The parties retained an expert to review compensatory education requests and make final determinations “after consultation with the individual student and consideration of the student’s individual preferences to the extent the [e]xternal [m]onitor deems appropriate.”³²⁹ Students can use the compensatory education funds for a range of services, including, *inter alia*, vocational training courses, reentry services, and college courses.³³⁰ The compensatory education program provides these students a chance to have input in their education, a role that the IDEA envisions for them throughout their education as a member of the IEP team.³³¹ By the time the court approved the *Adam X.* settlement agreement on March 3, 2022, over one hundred people had submitted requests for compensatory education.³³²

B. *Charles H. v. District of Columbia*

On April 9, 2021, *Charles H. v. District of Columbia*³³³ was filed on behalf of two individual students and a putative class of high school students with disabilities detained at the District of Columbia’s Central Detention Facility and the Correctional Treatment Facility (hereinafter “D.C. jail”),³³⁴

³²⁵ *Id.* at 9.

³²⁶ *Id.* at 9–10. Adam X. received \$16,000, Brian Y. received \$32,000, and Casey Z. received \$16,000. *Id.* at 9. The named plaintiffs each received also a \$5,000 “incentive award” for their “willingness to dedicate their time and efforts to this important matter” *Adam X.* Settlement Order, *supra* note 320, at *12.

³²⁷ See *Adam X.* Settlement Agreement, *supra* note 321, at 10.

³²⁸ *Id.* at 10–11.

³²⁹ *Id.*

³³⁰ *Id.* at 11. The NJDOE also agreed to “recommend compensatory education, in appropriate circumstances, for class members” from November 1, 2020 through the termination of the *Adam X.* settlement agreement as part of its ongoing monitoring activities. *Id.* at 10.

³³¹ See discussion *supra* p. 16.

³³² *Court Grants Final Approval of Settlement That Reforms Special Education Services in New Jersey Prisons, Negotiated Relief Now Takes Effect*, ACLU N.J. (March 3, 2022), <https://www.aclu-nj.org/en/press-releases/court-grants-final-approval-settlement-reforms-special-education-services-new-jersey> [<https://perma.cc/2L4D-UP4E>].

³³³ The lawsuit was filed by lawyers from the Washington Lawyers’ Committee for Civil Rights, School Justice Project, and Terris, Pravlik & Millian, LLP.

³³⁴ Class Action Complaint for Declaratory, Injunctive, and Other Relief at ¶ 2, *Charles H. v. District of Columbia*, No. 1:21-cv-00997-CJN (D.D.C. April 9, 2021), <https://static1.squarespace.com/static/62544656450656130c8a2f77/t/63ed251ff3634d1f1090cb22/1676485919732/Class+Action+Complaint+for+Declaratory%2C+Injunctive%2C+and+Other+Relief.pdf>

an adult jail. Students who attended school in the D.C. jail were “enrolled in its on-site school called the Inspiring Youth Program ([“IYP”]), run by District of Columbia Public Schools” (“DCPS”) at the time.³³⁵ *Charles H.* was filed against the District of Columbia, DCPS, and the Office of the State Superintendent of Education (“OSSE”).³³⁶ According to the allegations in *Charles H.*, “[f]or the past fourteen months, students have received work packets in lieu of classes, effectively requiring that these students with disabilities teach themselves all of their subjects.”³³⁷

Charles H. alleged that DCPS treated students attending school in the IYP, “all of whom have disabilities and special education needs,” differently than students who were learning from home during the pandemic.³³⁸ While DCPS discontinued in-person classes for all its students on the same day (March 13, 2020), it promptly “provided class materials and direct instruction by teachers through an online platform with two-way videoconference classes” to “students learning from home.”³³⁹ Meanwhile, by the time of filing, “DCPS [had] never resumed classes in any format” for students in the

[<https://perma.cc/W8XD-GQBF>] [hereinafter *Charles H. Compl.*]. On June 1, 2021, the *Charles H.* plaintiffs filed an amended complaint to add a third plaintiff, Malik Z. Amended Class Action Complaint for Declaratory, Injunctive, and Other Relief at ¶ 16, *Charles H. v. District of Columbia*, No. 1:21-cv-00997-CJN (D.D.C. June 1, 2021).

³³⁵ *Charles H. Compl.*, *supra* note 334, at ¶ 2, No. 1:21-cv-00997-CJN. Since the filing of *Charles H.*, “the District replaced DCPS as the LEA responsible for the provision of education at the DC Jail complex” with Maya Angelou Public Charter School Academy, “which took over education at the DC Jail complex” on October 1, 2021. *Charles H. v. District of Columbia Class Action*, SCHOOL JUSTICE PROJECT, (last visited Aug. 24, 2023), <https://www.sjpd.org/charles-h-case#:~:text=The%20lawsuit%20alleged%20that%20the,laws%20when%20they%20failed%20to> [<https://perma.cc/G462-9EU2>].

³³⁶ *Charles H. Compl.*, *supra* note 334, at ¶ 2, No. 1:21-cv-00997-CJN. On July 21, 2021, the *Charles H.* plaintiffs filed a second amended complaint, Second Amended Class Action Complaint for Declaratory, Injunctive, and Other Relief, *Charles H. v. District of Columbia*, No. 1:21-cv-00997-CJN (D.D.C. July 21, 2021) [hereinafter *Charles H. SAC*], to clarify that all claims are brought against the District of Columbia, who “is responsible for the acts and omissions of OSSE and DCPS,” Memorandum of Points and Authorities in Support of Plaintiffs’ Motion for Leave to File a Second Amended Complaint at 4, *Charles H. v. District of Columbia*, No. 1:21-cv-00997-CJN (D.D.C. July 21, 2021). In plaintiffs’ opposition to defendants’ motion to dismiss in part the *Charles H. SAC*, in which defendants argued that DCPS and OSSE should be dismissed from the case because “a department or agency of the District of Columbia cannot sue or be sued in its own name in the absence of a statutory provision to that effect,” Defendants’ Memorandum of Points and Authorities in Support of Motion to Dismiss in Part Plaintiffs’ Second Amended Complaint at 9 (D.D.C. Aug. 26, 2021) (quoting *Bynum v. District of Columbia*, 424 F. Supp. 3d 122, 128 (D.D.C. 2020)), plaintiffs conceded that “DCPS and OSSE need not remain as defendants” because “all claims are now properly against the District of Columbia.” Plaintiffs’ Opposition to Defendants’ Motion to Dismiss in Part Plaintiffs’ Second Amended Complaint at 2 n. 2, *Charles H. v. District of Columbia*, No. 1:21-cv-00997-CJN (D.D.C. Sept. 9, 2021). As a result, “plaintiffs [did] not oppose the Court’s dismissal of DCPS and OSSE as party defendants.” *Id.* at 45.

³³⁷ *Charles H. SAC*, *supra* note 336, at ¶ 1.

³³⁸ *Id.* at ¶¶ 3–4. There were forty students attending school in the IYP at the time of filing, and all forty of them had disabilities and were entitled to special education services. *Id.* at ¶ 49.

³³⁹ *Id.* at ¶ 3.

IYP.³⁴⁰ Instead, students with disabilities in the IYP received work packets, either on paper or uploaded on their tablets, with practically no opportunity for instruction or feedback.³⁴¹ These work packets arrived “sporadically.”³⁴² Even though the work packets were supposed to take two weeks to complete, one of the named plaintiffs received “only five instances of work packet delivery” in the seven-month period from March 2020 through October 2020.³⁴³ At the time of filing, the *Charles H.* plaintiffs alleged that students in the IYP had not received any special education or related services for more than one year.³⁴⁴

As far back as April 20, 2020, a coalition of education advocates and attorneys had put OSSE — the SEA for these students — on notice of DCPS’s failure to provide special education services to students at the IYP.³⁴⁵ Prior to the filing of the class-action lawsuit, two named plaintiffs, Charles H., a twenty-year-old student with disabilities, and Israel F., an eighteen-year-old student with disabilities, also put OSSE on notice by including allegations in their individual due process complaints.³⁴⁶ Both students alleged that OSSE “failed to meet its supervisory and monitoring duties” in addition to allegations against DCPS for its failure to provide them with FAPE.³⁴⁷ Evaluating Charles H.’s claims against the SEA, the hearing officer noted that OSSE had failed “to monitor and supervise DCPS’ compliance with [the] IDEA” and “to intervene” after it had notice of the problems.³⁴⁸ The hearing officer concluded that “OSSE offered no evidence that it performed even the minimal monitoring and supervising functions that it concedes are its responsibility.”³⁴⁹ As the plaintiffs alleged in *Charles H.*, “[h]ad OSSE and the District sufficiently monitored DCPS at the start of distance learning, or at any point since, they would have known that students at [the] IYP were not being provided with necessary technology and/or other supports to access special education or related services and were being denied FAPE.”³⁵⁰

Soon after they filed the original complaint, the *Charles H.* plaintiffs filed for a preliminary injunction,³⁵¹ and on June 16, 2021, the court issued a

³⁴⁰ *Id.*

³⁴¹ *Id.* at ¶ 4.

³⁴² *Charles H. SAC*, *supra* note 336, at ¶ 70.

³⁴³ *Id.* at ¶¶ 65, 70.

³⁴⁴ *Id.* at ¶ 6.

³⁴⁵ *Id.* at ¶ 73.

³⁴⁶ *Id.* at ¶¶ 14–15.

³⁴⁷ *Id.*

³⁴⁸ *Id.* at ¶ 45.

³⁴⁹ *Id.*

³⁵⁰ *Id.* at ¶ 227.

³⁵¹ While the preliminary injunction motion was pending, the United States filed a statement of interest “to explain the protections afforded to students with disabilities by the IDEA and its implementing regulations.” Statement of Interest, *supra* note 274, at 1. While explaining the standard for what students with disabilities must be provided in an adult jail, the statement of interest cited *Andrew F.* numerous times. *Id.* at 10. According to the statement of interest,

preliminary injunction on behalf of a “provisionally certified class.”³⁵² After analyzing the pandemic-era special education system at the IYP, the court relied on the *Andrew F.* standard to rule on behalf of plaintiffs:

In short, based on the evidence presented thus far, Plaintiffs are likely to demonstrate that Defendants [sic] IEP deviations afforded IYP students little more than *de minimis* progress throughout the pandemic. See *Andrew F. ex rel Joseph F.*, 137 S. Ct. 988, 1001 (2017). As *de minimis* progress hardly counts as “an education at all,” the Court finds that Plaintiffs are likely to establish that Defendants failed to provide IYP students with FAPE in violation of [the] IDEA.³⁵³

The preliminary injunction order required the defendants to, within fifteen days, provide all students attending school at the IYP with the services listed in their IEPs “through direct, teacher-or-counselor-led group classes and/or one-on-one sessions, delivered via live videoconference calls and/or in-person interactions.”³⁵⁴

Defendants failed to do what the court ordered. As a result, the *Charles H.* plaintiffs asked the court to hold defendants in contempt of the preliminary injunction order, and on February 16, 2022, the court did just that.³⁵⁵ In the contempt order, the court required defendants to submit for each student “individualized plans on how to rectify the hours deficit of each student enrolled in” school at the IYP for the five-month period from September 2021 through January 2022.³⁵⁶ The court also extended “the IDEA eligibility of all students . . . beyond their 22[nd] birthday for the amount of time necessary to ensure that they receive the education that they would have received” if the preliminary injunction order had been implemented appropriately.³⁵⁷

Unsurprisingly, the *Charles H.* court found in its preliminary injunction order that a special education program that provided “little more than *de minimis* progress throughout the pandemic” likely violated the IDEA.³⁵⁸ With

worksheet-based (“packet-based”) instruction, “particularly when it is the sole method of instruction,” can violate the IDEA. *Id.* at 11. The statement of interest also endorsed compensatory education as a potential remedy to address the denials of FAPE that occurred because of the pandemic. See *id.* at 12–13.

³⁵² Order Granting Plaintiffs’ Motion for Preliminary Injunction at 1, *Charles H. v. District of Columbia*, No. 1:21-cv-00997-CJN (June 16, 2021), https://static1.squarespace.com/static/5a2af8a0f14aa1cbbcf14079/t/61659c69e1da4d3ae0eb5345/1634049129661/37_Order+Granting+Preliminary+Injunction+%2800179691xC4E0D%29.PDF [https://perma.cc/Y3Y8-KUGH] [hereinafter *Charles H.* Preliminary Injunction Order].

³⁵³ *Charles H.*, 2021 WL 2946127, at *9 (quoting *Andrew F.*, 580 U.S. 386, 403).

³⁵⁴ *Charles H.* Preliminary Injunction Order, *supra* note 352, at 1.

³⁵⁵ *Charles H. v. District of Columbia*, No. 1:21-CV-00997 (CJN), 2022 WL 1416645, at *2 (D.D.C. Feb. 16, 2022).

³⁵⁶ *Id.*

³⁵⁷ *Id.* at *3.

³⁵⁸ *Charles H.*, 2021 WL 2946127, at *9.

this finding, *Endrew F.* may have established a floor for what is unacceptable generally and in adult carceral settings specifically. The court's willingness to hold the *Charles H.* defendants in contempt demonstrates the extent to which the educational conditions resulting from the pandemic — compared to the standard announced in *Endrew F.* — can convince courts to order necessary relief.³⁵⁹

On September 25, 2023, the parties submitted a proposed class-wide settlement agreement to the court for approval.³⁶⁰ As part of the *Charles H.* settlement agreement, the defendants agreed to a range of relief, including, *inter alia*, “fully implement[ing] students’ IEPs regardless of the students’ housing placement” and providing funding to hire teachers and staff.³⁶¹ The *Charles H.* settlement agreement’s provisions relating to OSSE’s monitoring duties require at least quarterly meetings with the relevant entities overseeing the delivery of educational services, and, no less than two times per year, OSSE must review the records of at least 20% of student files and conduct on-site monitoring.³⁶² In addition to its monitoring duties, the *Charles H.* settlement agreement requires OSSE to document where noncompliance has not been corrected within the applicable timeframes and provide “targeted technical assistance and direct supports to ensure correction.”³⁶³

The *Charles H.* settlement agreement also establishes a compensatory education program that entitles “166 students [to] receive ‘significant compensatory education packages.’”³⁶⁴ The compensatory education program applies to “instruction and/or related services missed from March 24, 2020 through August 31, 2021 and/or February 1, 2022” through the *Charles H.* settlement agreement’s effective date.³⁶⁵ The amount of each student’s compensatory

³⁵⁹ *See id.* at *2 (“The Court does not enter this [contempt] Order lightly. It certainly does not wish to be in the business of micromanaging the D.C. Jail or Defendants’ compliance with the Preliminary Injunction.”)

³⁶⁰ Joint Notice Lodging the Settlement Agreement with the Court at 1, *Charles H. v. District of Columbia*, No. 1:21-cv-00997-CJN (D.D.C. Sept. 25, 2023).

³⁶¹ Settlement Agreement and Release at ¶¶ 45, 76, *Charles H. v. District of Columbia*, No. 1:21-cv-00997-CJN (D.D.C. Sept. 25, 2023), https://static1.squarespace.com/static/625444656450656130c8a2f77/t/6511eee578ac7058dfeaf97/1695674085917/Settlement+Agreement_092523_191-1.pdf [<https://perma.cc/4WS5-4Y62>] [hereinafter *Charles H. Settlement Agreement*]. The effective date of the *Charles H.* settlement agreement is September 22, 2023 and “the settlement agreement shall expire on August 1, 2025” *Id.* at ¶¶ 16, 145; 67.

³⁶² *Id.* at ¶ 80.

³⁶³ *Id.* at ¶ 80(g).

³⁶⁴ Lauren Lumpkin, *D.C. Settles Suit Over Failure to Provide Special Ed to Jailed Students*, THE WASHINGTON POST (Sept. 26, 2023), <https://www.washingtonpost.com/education/2023/09/25/dcps-settles-lawsuit-incarcerated-high-school-students/> [<https://perma.cc/657F-75B6>]. The *Charles H.* settlement agreement includes provisions to ensure that students receive the compensatory education services that the court ordered as part of its February 2022 contempt order, with the option to convert the services into an educational expense award. *Charles H. Settlement Agreement*, *supra* note 361, at ¶¶ 82, 88.

³⁶⁵ *Charles H. Settlement Agreement*, *supra* note 361, at ¶ 90. The *Charles H.* settlement agreement also provides a subset of settlement class members with the opportunity for “extended enrollment” for students who are seeking their high school diplomas or GEDs but aged out of

education award is determined by a formula that considers the number of hours of missed instruction.³⁶⁶ Each student can choose to receive the award as compensatory services or an educational expense award, “equivalent to the monetary value of the services.”³⁶⁷ Students can spend the award on a wide array of options, including reentry programs, educational technology, vocational training, and tuition for post-secondary education.³⁶⁸ On October 18, 2023, the court “preliminarily certified” the settlement class “pursuant to Rules 23(b)(2) and (23)(b)(3) of the Federal Rules of Civil Procedure” and “grant[ed] preliminary approval of the terms and conditions contained in the proposed” *Charles H.* settlement agreement.³⁶⁹

CONCLUSION

Brian Y. described what it felt like to try to focus on his education in a “cage” in administrative segregation:

I was so young. I don’t even know how to describe it. I felt like an animal. I’m sitting in a room right now looking at a square table. Now, imagine us in a room. It’s you and the table, and everything around you is three stories high. Everyone is looking down at you.

IDEA eligibility between March 24, 2020 and the effective date of settlement agreement. *Id.* at ¶ 106. These students’ enrollment extends “until the Expiration Date or until the [s]ettlement [c]lass [m]ember receives their high school diploma, whichever occurs first.” *Id.* Furthermore, the *Charles H.* settlement agreement includes adult education and post-secondary programming and support for settlement class members aged twenty-four and older living in the community who have aged out of the IDEA during the relevant time period. *Id.* at ¶¶ 107–09.

³⁶⁶ *Id.* at ¶¶ 91–92. For the award period from March 24, 2020 through August 31, 2021, compensatory education awards will be calculated “with the assumption that no instruction or related services were received during that period” and students will be entitled to sixty percent of the total of missed hours. *Id.* at 91. The assumption that no instruction or related services were received in that period “is made to simplify award calculations . . . and is not an admission by [d]efendants concerning the number of hours any [s]ettlement [c]lass [m]ember received during that time.” *Id.* For the award period from February 1, 2022, through the effective date, the parties agreed on a formula to determine how much “teacher-facing instruction” each student received. *Id.* at ¶ 92; see generally Exhibit 3 to Settlement Agreement: Compensatory Education for Class Members, *Charles H. v. District of Columbia*, No. 1:21-cv-00997-CJN (D.D.C. Sept. 25, 2023), <https://static1.squarespace.com/static/62544656450656130c8a2f77/t/6511f3257713662b05201e09/1695675173196/Presumptively+Approved+Educational+Expenses+191-5.pdf> [<https://perma.cc/2TT2-5PQ4>] (explaining the formula to calculate compensatory education awards for the award period starting on February 1, 2022).

³⁶⁷ *Charles H.* Settlement Agreement, *supra* note 361, at ¶ 96.

³⁶⁸ See Exhibit 4 to Settlement Agreement: Presumptively Approved Educational Expenses, *Charles H. v. District of Columbia*, No. 1:21-cv-00997-CJN (D.D.C. Sept. 25, 2023), <https://static1.squarespace.com/static/62544656450656130c8a2f77/t/6511f3257713662b05201e09/1695675173196/Presumptively+Approved+Educational+Expenses+191-5.pdf> [<https://perma.cc/PA46-89VY>] (listing twenty-four approved educational expenses).

³⁶⁹ Order Preliminarily Approving the Settlement Agreement at ¶¶ 5, 9, *Charles H. v. District of Columbia*, No. 1:21-cv-00997-CJN (D.D.C. Oct. 18, 2023), <https://static1.squarespace.com/static/5a2af8a0f14aa1cbbcf14079/t/65319752658e2839fce0a995/1697748818689/Order+Granting+Preliminary+Approval.pdf> [<https://perma.cc/5HYC-DJFP>]. The court scheduled a fairness hearing for December 18, 2023 “to determine whether the proposed settlement is fair, reasonable, and adequate, and whether it should be finally approved by the Court.” *Id.* at ¶ 22.

And you're in the middle, with lights on you, and a cage all around you. People outside are screaming and yelling. You're trying to focus – but how can you? You can't focus.³⁷⁰

It would be naïve to think that young people in jails and prisons across the country do not experience similar kinds of dehumanizing treatment. After all, the carceral system for young people “is built on caging kids.”³⁷¹

Deteriorating special education systems in many adult carceral settings make explicit what the exceptions in the IDEA for adult jails and prisons imply — much of society no longer views students with disabilities as *students* when they enter an adult prison cell; they are *prisoners*. However, this Article is premised on recognizing the educational rights of young people in adult jails and prisons and ensuring they are treated like students. This is what the spirit of the IDEA demands. Notwithstanding its exceptions, the IDEA has a revolutionary mission to ensure that every student with disabilities receives a free appropriate public education. Adam X., Charles H., and their fellow class members fall squarely within that mission.

A young person's right to an appropriate education is more than just an entitlement to services. It is the right to dream beyond one's current situation and a potential pathway to the power to realize those dreams. Congress *should* close the loopholes embodied in the IDEA exceptions that prevent the full implementation of the law's provisions for all students with disabilities in adult jails and prisons. That, however, is unlikely to happen soon. Fortunately, the IDEA already prohibits educational death sentences for many of these students and has done so for a long time. These students are not stuck waiting for Congress to act because the IDEA provides tools that can be used to improve their educational opportunities now.

³⁷⁰ *A Student's Journey: Fighting for Education Rights While in Prison*, *supra* note 1.

³⁷¹ Annamma & Morgan, *supra* note 235, at 503.