Administrative Exhaustion after *Perez*

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Abstract

On March 21, 2023, the United States Supreme Court delivered a seismic ruling in Perez v. Sturgis Public Schools*, a decision widely celebrated as a groundbreaking win for students with disabilities. Yet, while there is certainly cause for celebration, this Article takes on a decidedly critical view of the Court's unanimous decision, more for what the Court failed to clarify than for what it did. The* Perez *Court was presented with two questions. The first involved whether the Individuals with Disabilities Education Act ("IDEA"), the nation's preeminent disability rights statute for students with disabilities, required prospective plaintiffs to exhaust their administrative remedies under the IDEA prior to the filing of a claim in court under separate federal statutes, such as the Americans with Disabilities Act ("ADA") or Section 504 of the Rehabilitation Act of 1973 ("Section 504"). The second question concerned whether prospective plaintiffs must adhere to the IDEA's administrative procedures when the relief sought—namely, money damages—cannot be provided under the IDEA. Although the Court granted review on both questions, it declined to address the first, finding it unnecessary to determine "whether IDEA's exhaustion requirement is susceptible to a judge-made futility exception." The* Perez *Court's failure to resolve whether the IDEA's exhaustion requirement is susceptible to a judge-made futility exception leaves in place an enduring circuit split on the issue.*

This Article addresses, and attempts to resolve, this open question. Namely, if a plaintiff's claim implicates the IDEA's free appropriate education ("FAPE") provision, thereby requiring the exhaustion of their administrative remedies under the IDEA, is the plaintiff still required to exhaust if doing so would prove administratively futile? Despite the treatment that students with disabilities have received in judicial opinions and legal scholarship to date, neither forum has undertaken an exhaustive analysis of the prevailing circuit split as it applies to students with the most significant cognitive disabilities. This Article aims to fill that gap. In doing so, it seeks to clarify when the systemic violation exception to exhaustion—which has been found to fall under the broader catchment of a judge-made futility exception—must be applied. As a normative matter, moreover, the Article makes the case for the uniform adoption of the Ninth Circuit's approach to interpreting and applying the systemic violation exception to the IDEA's exhaustion requirement. It then argues that the disproportionate placement of students with the most significant cognitive disabilities into segregated educational settings by school personnel serves as a structural failure to comply with the IDEA's least restrictive environment ("LRE") requirement, thereby rendering the IDEA's exhaustion requirement susceptible to futility's systemic violation exception. By uniformly adopting the Ninth Circuit's approach in this way, courts will not only apply this futility exception more consistently, but also establish a uniform standard that aligns with the central purpose of the IDEA and its LRE mandate. Indeed, this purpose, as observed by one of the principal drafters of the IDEA's LRE provision, is to "represent a gallant and determined effort to terminate the two-tiered invisibility once and for all with respect to exceptional children in the nation's school systems."

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Introduction

On March 21, 2023, the United States Supreme Court delivered a seismic ruling in *Perez v. Sturgis Public Schools*,[1] a decision widely celebrated as a groundbreaking win for students with disabilities. Yet, while there is certainly cause for celebration, this Article takes on a decidedly critical view of the Court's unanimous decision, more for what the Court failed to clarify than for what it did. The *Perez* Court was presented with two questions. The first involved whether the Individuals with Disabilities Education Act ("IDEA"), the nation's preeminent disability rights statute for students with disabilities,[2] required prospective plaintiffs to exhaust their administrative remedies under the IDEA prior to the filing of a claim in court under separate federal statutes, such as the Americans with Disabilities Act ("ADA") or Section 504 of the Rehabilitation Act of 1973 ("Section 504").[3]

The second question concerned whether prospective plaintiffs must adhere to the IDEA's administrative procedures when the relief sought—namely, money damages—cannot be provided under the IDEA.[4] Although the Court granted review on both questions, it declined to address the first, finding it unnecessary to determine "whether IDEA's exhaustion requirement is susceptible to a judge-made futility exception."[5] The *Perez* Court's failure to resolve whether the IDEA's exhaustion requirement is susceptible to a judge-made futility exception leaves in place an enduring circuit split on the question.[6]

As to the second question before the Court, the *Perez* majority held that the IDEA's administrative procedures need not be exhausted when a complainant seeks—under a separate federal statute, like Section 504 or the ADA—remedies that are unavailable under the IDEA, such as money damages.[7] In so holding, the Court interpreted § 1415(*l*) of the IDEA, the central remedies provision at issue in the dispute, as only applying to disputes that seek remedies the IDEA also provides.[8] Put differently, a prospective IDEA

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[1] Perez v. Sturgis Pub. Schs., 598 U.S. 142 (2023).

[2] There are two other disability rights laws affecting students with disabilities: Section 504 of the Rehabilitation Act [29 U.S.C. § 794(a)] and the Americans with Disabilities Act ("ADA") [42 U.S.C §§ 12101 *et seq.*, as modified by the ADA Amendments Act of 2008, Pub. L. No. 110-325, 11 Stat. 3353 (2008)].

[3] *Perez*, 598 U.S. at 147-48.

[4] *Id.* at 147-50.

[5] *Id.* at 151.

[6] *See infra* section III.B (providing a full discussion of the instant circuit split); *see also Perez*, 598 U.S. at 151 (The Court continues by adding that "[t]he parties pose a number of additional questions they would like us to answer—including whether IDEA's exhaustion requirement is susceptible to a judge-made futility exception and whether the compensatory damages Mr. Perez seeks in his ADA suit are in fact available under that statute. But today, we have no occasion to address any of those things.").

[7] *Perez*, 598 U.S. at 150-51.

[8] *See id.* at 147-48; 20 U.S.C. § 1415(*l*) ("Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the

plaintiff who files a lawsuit under another federal statute must exhaust all of the IDEA's administrative procedures only when they are pursuing a remedy that the IDEA also provides. However, if a plaintiff seeks a remedy that the IDEA does not provide, such as money damages, then the plaintiff's lawsuit will not be subject to the IDEA's administrative exhaustion rule. Indeed, the *Perez* Court's interpretation of § 1415(*l*) "treat[ed] 'remedies' . . . as synonymous with the 'relief' a plaintiff 'seek[s],'" which is how a layperson, on the Court's view, "would understand this particular provision."[9]

The *Perez* ruling marked a significant shift in how the IDEA's exhaustion rule is interpreted and applied by the courts. Prior to the *Perez* decision, several lower courts had found that if the essence—or "gravamen"—of a complaint was the denial of a free appropriate public education ("FAPE"),[10] a cornerstone of special education law that guarantees students with disabilities the right to an education tailored to their unique needs at no cost to their families, a plaintiff could not circumvent the IDEA's exhaustion requirement by simply tacking on a claim for money damages, a remedy that is, as previously mentioned, unavailable under the IDEA.[11] Plaintiffs were thus required to exhaust the complex and time-intensive administrative procedures even when that process could not provide the relief they sought. In the wake of *Perez*, however, it is now far easier for prospective plaintiffs to bring a case directly to federal court. Yet, the tension faced by courts in balancing the benefits of exhaustion and the potential costs imposed by the exhaustion requirement remains an enduring one. As this Article demonstrates, however, this prevailing judicial tension undermines the congressional purpose of the IDEA's exhaustion requirement and further complicates the prevailing understanding of the conditions under which a judge-made exception to its terms applies.

In fact, one of the principal drafters of the IDEA expressly recognized the permissibility of specific exceptions to the exhaustion rule: "I want to underscore that exhaustion . . . should not be required for any individual complainant filing a judicial action in cases where such exhaustion would be

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Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.").

[9] *Perez*, 598 U.S. at 148.

[10] The statutory definition of "free appropriate public education" under the IDEA is provided in 20 U.S.C. § 1401(9), which reads: "[t]he term 'free appropriate public education' means special education and related services that– (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of this title."

[11] *See, e.g.*, K.D. *ex rel.* Carrera v. L.A. Unified Sch. Dist., 816 F. App'x 222, 224 (9th Cir. 2020); Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 63 (1st Cir. 2002).

futile either as a legal or practical matter."[12] The IDEA's legislative history offers further evidence for the existence of exceptions to the Act's exhaustion requirement, including when:

> (1) [I]t would be futile to use the due process procedures . . . ; (2) an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law; (3) it is improbable that adequate relief can be obtained by pursuing administrative remedies . . . ; and (4) an emergency situation exists . . . .[13]

Notwithstanding this history, courts "have not articulated a comprehensive standard for determining when exactly the exhaustion requirement applies"[14] or when such judge-made exceptions apply.[15] Similarly, legal scholars and commentators have long considered the exhaustion doctrine to be "troublesome to the courts" due, at least in part, to the countless decisions that have been both "confusing and poorly reasoned."[16] This Article aims to clarify such confusion and ultimately resolve the key question left open by the *Perez* Court: If a plaintiff's claim implicates FAPE, thereby requiring the exhaustion of one's administrative remedies under the IDEA, must the plaintiff exhaust even if doing so would prove futile?

Some courts have applied the futility exception, one of the more recognized exceptions to the exhaustion requirement, in cases where "administrative procedures do not provide [an] adequate remed[y]."[17] Other courts, by contrast, have employed the futility exception when the case at issue would not be "substantially benefit[ted] by having an administrative record."[18] In other courts, the futility exception has been applied in cases involving "systemic violations" of federal law.[19] In terms of the latter exception, "[w]hile several courts have recognized that IDEA claims raising 'systemic' or 'structural' allegations may not need to be administratively exhausted . . . ,

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[12] 121 CONG. REC. 37416 (1975) (statement of Sen. Williams).

[13] H.R. REP. NO. 99-296, at 7 (1985).

[14] Payne v. Peninsula Sch. Dist., 653 F.3d 863, 874 (9th Cir. 2011); *see also* Peter A. Devlin, *Jurisdiction, Exhaustion of Administrative Remedies, and Constitutional Claims*, 93 N.Y.U L. REV. 1234, 1249 ("When it comes to the [IDEA], courts are so confused by the state's exhaustion requirement that they ignore the issue and apply exceptions even before knowing its jurisdictionality. The result is either limbo or non-jurisdictional exhaustion with exceptions.").

[15] *See* Polera v. Bd. of Educ., 288 F.3d 478, 489 (2d Cir. 2002) (counseling against applying "[s]weeping exceptions" which "would swallow the exhaustion requirement").

[16] Marcia R. Gelpe, *Exhaustion of Administrative Remedies: Lessons from Environmental Cases*, 53 GEO. WASH. L. REV. 1, 3 (1985) (describing "the law governing exhaustion of administrative remedies [as] complex and confusing").

[17] *Polera*, 288 F.3d at 488 (citing Heldman v. Sobol, 962 F.2d 148, 158 (2d Cir. 1992)).

[18] Kent Sparks, *Requiring Administrative Exhaustion While the School Shuts Down: An Insurmountable Barrier to Seeking IDEA Enforcement*, 2014 MICH. ST. L. REV. 1161, 1177; *see also* Doe v. Ariz. Dep't of Educ., 111 F.3d 678, 681 (9th Cir. 1997).

[19] N.S. *ex rel.* J.S. v. Attica Cent. Schs., 386 F.3d 107, 113 (2d Cir. 2004).

what constitutes a systemic failure is not so easily defined."[20] This definitional absence has produced a circuit split.

Courts in the Second and D.C. Circuits have waived the exhaustion requirement under the systemic violation exception "in suits alleging systemwide violations of the processes for identifying and evaluating students with disabilities."[21] Moreover, the Third Circuit has employed the systemic exception to the exhaustion requirement where "the issue presented is purely a legal question"[22] or "where plaintiffs allege systemic legal deficiencies and, correspondingly, request system-wide relief that cannot be provided (or even addressed) through the administrative process."[23] The First Circuit, in a departure from all other federal circuit courts, has not decided whether to recognize a systemic exception to the exhaustion requirement.[24]

In the Tenth Circuit, courts have held that claims involving "only one component of [a] school district's special education program," such as policies regarding extended school year services, "neither rose to systemic proportions nor required structural relief."[25] The Ninth Circuit has also observed that:

> [A] claim is "systemic" if it implicates the integrity or reliability of the IDEA dispute resolution procedures themselves, or requires restructuring the education system itself in order to comply with the dictates of the Act; but . . . it is not "systemic" if it involves only a substantive claim having to do with limited components of a program, and if the administrative process is capable of correcting the problem.[26]

Accordingly, to clarify when futility's systemic violation exception to exhaustion must be applied, this Article makes the normative case for the uniform adoption of the Ninth Circuit's approach to the systemic violation exception to the exhaustion rule.

In the context of IDEA disputes involving improper placement determinations under the Act's least restrictive environment ("LRE") provision,[27] a uniform systemic violation exception is especially warranted.[28] Indeed, the improper placement of students within separate classrooms—or separate

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[20] *Doe v. Ariz. Dep't of Educ.*, 111 F.3d at 681.

[21] Parent/Pro. Advoc. League v. City of Springfield, 934 F.3d 13, 27 (1st Cir. 2019) (citing D.L. v. D.C., 713 F.3d 120, 124 n.4 (D.C. Cir. 2013); J.G. v. Bd. of Educ. of the Rochester City Sch. Dist., 830 F.2d 444, 445 (2d Cir. 1987)).

[22] T.R. v. Sch. Dist. of Phila. L.R., 4 F.4th 179, 185 (3d Cir. 2021) (quoting D.E. v. Cent. Dauphin Sch. Dist., 765 F.3d 260, 275 (3d Cir. 2014)).

[23] *Id.* (quoting Beth V. by Yvonne V. v. Carroll, 87 F.3d 80, 89 (3d Cir. 1996)).

[24] *Parent/Pro. Advoc. League*, 934 F.3d at 28.

[25] *Doe v. Ariz. Dep't of Educ.*, 111 F.3d at 681-82 (citing Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1308); *see also* Ass'n for Cmty. Living v. Romer, 992 F.2d 1040, 1043-45 (10th Cir. 1993).

[26] *Doe v. Ariz. Dep't of Educ.*, 111 F.3d at 682.

[27] *See infra* section I.A (providing a full discussion of the LRE principle).

[28] *See* 20 U.S.C. § 1412(a)(5)(A).

schools—is nothing short of endemic among students with the most significant cognitive disabilities, a distinct population comprising a "non-categorical designation for those students participating in their state alternate assessments based on alternate achievement standards (AA-AAAS)."[29] The Every Student Succeeds Act ("ESSA") mandates that all students, including those with disabilities, participate in annual statewide assessments to measure their academic progress and achievement.[30] This requirement aims to provide a comprehensive picture of how all students are performing and to inform instructional decisions tailored to their needs. Moreover, ESSA offers two assessment pathways for students with disabilities: the general assessment aligned with grade-level academic standards, or the AA-AAAS, for students with the most significant cognitive disabilities.[31] Regardless of the assessment path, *all* students are expected to demonstrate progress toward meeting the state's academic content standards, with appropriate modifications for those taking the AA-AAAS.[32]

Recent empirical evidence further suggests that, "[f]or the nearly 40,000 students participating in the AA-AAAS across a 15-state sample . . . a total of 93% [of students with the most significant cognitive disabilities] were served primarily in self-contained classrooms, separate schools, home[s], hospital[s], or residential settings."[33] In addition, students with the most significant cognitive disabilities—despite a wide body of research demonstrating that student learning and development are greatly improved in more integrated and inclusive educational placements[34]—continue to be placed in segregated settings "at a substantially greater rate . . . than . . . students in any single IDEA category."[35]

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[29] Harold Kleinert & Jacqui Kearns, *Reconsidering LRE: Students with the Most Significant Cognitive Disabilities and the Persistence of Separate Schools*, 2. TIES CENTER, https://publications.ici.umn.edu/ties/reconsidering-lre/main [https://perma.cc/UQ2R-L58X] (last visited Oct. 6, 2024).

[30] 20 U.S.C. § 6311(b)(2).

[31] Memorandum from Patrick Rooney, Dir., Sch. Support & Accountability Off. of Elementary & Secondary Educ. & Valerie Williams, Dir., Special Educ. Programs, Off. of Special Educ. & Rehab. Servs., to State Assessment Dirs., State Title I Dirs. & State Special Educ. Dirs. 1 (Sept. 20, 2023) [hereinafter *Waiver Requirement Memorandum*], https://www.ed.gov/sites/ed/files/2023/09/OnePercentWaiverRequirements20232492023.pdf [https://perma.cc/7QSX-QEFD].

[32] *Id.* ("One important step in the inclusion of all children with disabilities is State- and district-wide assessments as determined by their respective individualized education programs . . . , as required under section 612(a)(16) of the Individuals with Disabilities Education Act . . . – either in a general grade level assessment with or without accommodations or, for those students with the most significant cognitive disabilities, an alternate assessment aligned with alternate academic achievement standards . . . .").

[33] Kleinert & Kearns, *supra* note 29.

[34] *Id.*; *see also* Jennifer A. Kurth, Mary E. Morningstar & Elizabeth B. Kozleski, *The Persistence of Highly Restrictive Special Education Placements for Students with Low-Incidence Disabilities*, 39 RSCH. & PRAC.FOR PERS. WITH SEVERE DISABILITIES 227, 228 (2014) ("Furthermore, others have found that individuals with low-incidence disabilities demonstrate improved academic achievement by participation in inclusive programs.").

[35] Kleinert & Kearns, *supra* note 29.

Whether students with the most significant cognitive disabilities sacrifice their right to an integrated educational opportunity raises novel issues at the intersection of both liberty and equality. Despite the treatment that students with disabilities have received in judicial opinions and legal scholarship to date, neither forum has undertaken an exhaustive analysis of the prevailing circuit split as it applies to students with the most significant cognitive disabilities. This Article aims to fill that gap. In doing so, it seeks to clarify when the systemic violation exception to exhaustion—which has been found to fall under the broader catchment of a judge-made futility exception—must be applied. As a normative matter, moreover, the Article makes the case for the uniform adoption of the Ninth Circuit's approach to interpreting and applying the systemic violation exception to the IDEA's exhaustion mandate. It then argues that the disproportionate placement of students with the most significant cognitive disabilities into segregated educational settings by school personnel constitutes a structural failure to comply with the IDEA's LRE requirement, thereby rendering the IDEA's exhaustion requirement susceptible to futility's systemic violation exception.

By uniformly adopting the Ninth Circuit's approach in this way, courts will not only apply this futility exception more consistently, but also establish a uniform standard that is aligned with the central purpose of the IDEA and its LRE mandate. Indeed, this purpose, as observed by one of the principal drafters of the IDEA's LRE provision, is to "represent[] a gallant and determined effort to terminate the two-tiered invisibility once and for all with respect to exceptional children in the Nation's school systems."[36]

The Article proceeds as follows. Part I briefly summarizes the IDEA's legislative history, its key substantive requirements, and its attendant procedural protections. Part II surveys the IDEA's dispute resolution procedures, with a specific focus on its exhaustion mandate. Part III assesses the relevant exceptions to the exhaustion requirement as well as the requirement's broader statutory purpose and practical application. Part IV explores the value and costs of educational inclusion and exclusion, respectively. Employing Massachusetts as a case example, it then catalogs the substantive and procedural harms associated with AA-AAAS participation. Part V argues in favor of uniformly adopting the Ninth Circuit's approach to applying the systemic violation exception to the IDEA's exhaustion mandate for at least two principal reasons.

First, the Article contends that the disproportionate placement of students with the most significant cognitive disabilities into segregated educational settings violates the LRE requirement, thereby implicating the statutory integrity of the IDEA. Second, it argues that courts which compel prospective litigants to resolve such educational placement disputes through the IDEA's administrative procedures will, at best, engender inconsistent results and, at

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[36] Robert T. Stafford, *Education for the Handicapped: A Senator's Perspective*, 3 VT. L. REV. 71, 72 (1978).

worst, find themselves unable to remedy the alleged systemic violation. The Article then places the foregoing arguments in the context of its broader normative claim: that the uniform adoption of the Ninth Circuit's approach to the systemic violation exception best aligns with both the congressional purpose of the IDEA and the legislative intent of its exhaustion requirement. Part VI responds to key counterarguments and policy limitations to further bolster the Article's thesis. The Article then offers brief concluding remarks.

I. Substantive and Procedural Protections for Students with Disabilities under the Individuals with Disabilities Education Act

The IDEA stands as a cornerstone in safeguarding the educational rights of students with disabilities in the United States.[37] Enacted in 1975, the IDEA ensures that students with disabilities receive a FAPE tailored to their individual needs.[38] Both substantive and procedural protections are integral components of the IDEA, working cohesively to uphold the rights of students with disabilities. Accordingly, the following sections examine the history of the IDEA as well as the procedural and substantive protections afforded by the Act.

A. IDEA and the History of Exclusion

Well before the enactment of the IDEA, students with disabilities encountered a protracted history marked not only by educational exclusion but also by social exclusion. In the nineteenth century, children with disabilities were predominantly perceived as a private concern or "private trouble."[39] However, by the turn of the twentieth century, this exclusionary landscape changed drastically with the advent of compulsory school attendance laws, disrupting the social exclusion that prevailed during the preceding era.[40] These school attendance laws compelled a population of children previously deemed "seemingly uneducable"[41] to enroll in public schools for the first time.

From the 1950s to the early 1970s, the neglect and ableist hostility that characterized the broader social exclusion of children with disabilities in the preceding century persisted within the nation's public schools.[42] The sys-

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[37] *See* 20 U.S.C. § 1401(9); *see also* Sytsema *ex rel*. Sytsema v. Acad. Sch. Dist. No. 20, 538 F.3d 1306, 1312 (10th Cir. 2008) ("The FAPE concept is the central pillar of the IDEA statutory structure.").

[38] 20 U.S.C. § 1412(a)(1).

[39] Marvin Lazerson, *The Origins of Special Education*, *in* Special Education Policies: Their History, Implementation, and Finance 15, 16 (Jay G. Chambers & William T. Hartman eds., 1983).

[40] *Id.* at 18-19.

[41] *See id.*; *see also* Edwin W. Martin, Reed Martin & Donna L. Terman, *The Legislative and Litigation History of Special Education*, 6 The Future of Child, no. 1, Spring 1996, at 26.

[42] Debra Chopp, *School Districts and Families Under the IDEA: Collaborative in Theory, Adversarial in Fact*, 32 J. Nat'l Ass'n Admin. L. Judiciary 423, 426-27 (2012).

tematic segregation of students with disabilities in these schools prompted the White House Committee on Special Classes to denounce the conditions of the nation's special education classrooms as little more than a dumping grounds for students with specialized needs.[43]

In the face of the deplorable classroom conditions experienced by students with disabilities, parents and community advocates "lobbied aggressively to root out [the] entrenched discrimination" that pervaded the nation's public schools.[44] However, by the 1971-72 school year—three years prior to the enactment of the IDEA—"seven states were still educating fewer than 20% of their known children with disabilities, and [in] 19 states, fewer than a third. Only 17 states had even reached the halfway figure."[45] Absent federal laws guaranteeing the right to attend public schools, activists in the disability rights movement campaigned for the meaningful inclusion of students with disabilities into standard educational environments.[46] Drawing inspiration from the principles outlined in the *Brown v. Board of Education* decision,[47] these advocates contended that segregated educational facilities and distinct special education classes led to unequal and inferior educational experiences for students with disabilities.[48] Ultimately, the preceding advocacy efforts played a crucial role in establishing constitutional protections for students with disabilities, particularly at the district court level. The following examples are illustrative of these victories.

In the landmark case *Mills v. Board of Education*,[49] parents of students with disabilities initiated a class action lawsuit against the District of Columbia's Board of Education, contesting the exclusion of students with disabilities from public education in the District.[50] Employing a legal strategy reminiscent of that in *Brown*, the plaintiffs in *Mills* argued that the systematic

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[43] Lazerson, *supra* note 39, at 35.

[44] Chopp, *supra* note 42, at 426.

[45] Martin et al., *supra* note 41, at 29 (emphasis omitted).

[46] *Id.*; *see also* Jacob W. Wohl, *A Better IDEA: Utilizing the Department of Education's Rulemaking Authority to Reform the Special Education Process*, 74 Admin. L. Rev. 621, 627 (2022) ("During that period, no federal law provided children with disabilities the right to attend public school.").

[47] *See* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) ("In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.").

[48] *See* Kerrigan O'Malley, *From Mainstreaming to Marginalization?—IDEA's De Facto Segregation Consequences and Prospects for Restoring Equity in Special Education*, 50 U. Rich. L. Rev 951, 952-53 (2016) ("The Supreme Court's Brown decision resonated with families of disabled children who responded by challenging practices that segregated the disabled student population or deprived such children of educational opportunities altogether."); *see also* Martha Minow, *Surprising Legacies of* Brown v. Board, 16 Wash. U. J. L. & Pol'y 11, 25 (2004) ("Prior to the 1970s, only seven states provided education for more than half of their children with disabilities. Those children with disabilities who did receive educational programming did so largely in classrooms or schools removed from their peers.").

[49] Mills v. Bd. of Educ., 348 F. Supp. 866 (D.D.C. 1972).

[50] *Id.* at 868.

denial of education to children with disabilities violated their constitutional rights under the federal Equal Protection Clause.[51] The *Mills* court agreed, asserting that the District of Columbia's public schools were obligated to furnish a "free and suitable publicly-supported education[,] regardless of the degree of the child's . . . disability or impairment."[52] Consequently, the court's ruling in *Mills* served as a watershed legal moment in the ongoing advocacy for full inclusion by affirming that students with disabilities possess a fundamental right to education.

In *Pennsylvania Association for Retarded Children v. Pennsylvania* ("*PARC*"), a case filed concurrently with *Mills*, parents of children with intellectual disabilities contested the exclusion of these students from the state's public K-12 education system.[53] Similar to the strategy employed in *Mills*, plaintiff parents in *PARC* drew inspiration from the legal strategy used in *Brown* to challenge prevailing state statutes and official school policies that permitted district officials to exclude children deemed "uneducable" from school.[54] The court's ruling in *PARC* recognized the systematic exclusion of these students and mandated significant reforms to ensure the provision of appropriate educational services.[55] Collectively, the decisions in *PARC* and *Mills* laid the groundwork for the subsequent development of the Education for All Handicapped Children Act ("EHA"), which—in a subsequent reauthorization—was renamed as the IDEA.[56] However, it was the *Mills* decision in particular that played a crucial role in establishing the "blueprint for what would later become federal special education law."[57]

B. Surveying IDEA's Substantive Protections

The IDEA's substantive protections are centered around the fundamental principle of ensuring that students with disabilities receive a FAPE

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[51] *See id.* at 874-76; Martin et al., *supra* note 41, at 28 ("The U.S. District Court ruled that school districts were constitutionally prohibited from deciding that they had inadequate resources to serve children with disabilities because the equal protection clause of the Fourteenth Amendment would not allow the burden of insufficient funding to fall more heavily on children with disabilities than on other children.").

[52] *Mills*, 348 F. Supp. at 878.

[53] Pa. Ass'n for Retarded Child. v. Pennsylvania, 343 F. Supp. 279, 281-82 (E.D. Pa. 1972).

[54] Elizabeth A. Shaver, *Every Day Counts: Proposals to Reform IDEA's Due Process Structure*, 66 Case W. Res. L. Rev. 143, 147 (2015).

[55] *Pa. Ass'n for Retarded Child.*, 343 F. Supp. at 302 ("Approval means that plaintiff retarded children who heretofore had been excluded from a public program of education and training will no longer be so excluded."); *see also* Shaver, *supra* note 54, at 147.

[56] Shaver, *supra* note 54, at 149-50; *see also* Pub. L. No. 101-476, 104 Stat. 1103 (1990) (codified as amended at 20 U.S.C. §§ 1400-1482).

[57] Chopp, *supra* note 42, at 428; *Mills*, 348 F. Supp. at 878-83 (requiring the identification of students with disabilities, the creation of individually tailored plans, the availability of compensatory services, and the provision of due process rights).

tailored to their unique needs.[58] One of the key substantive protections to provide a FAPE is the development and implementation of an individualized education program ("IEP").[59] The IEP is a personalized educational plan crafted collaboratively by parents, educators, and relevant specialists to address the specific academic, developmental, and functional needs of the student.[60] It serves as a comprehensive educational roadmap, outlining measurable goals, specialized services, and necessary accommodations to facilitate the student's academic success and overall well-being.[61] By emphasizing the creation of an individualized and responsive educational plan, the IDEA seeks to provide substantive safeguards that go beyond a one-size-fits-all approach.

Another critical substantive protection is the requirement that all students with disabilities be educated in the LRE.[62] This principle underscores the importance of integrating students with disabilities into general education classrooms to the maximum extent appropriate.[63] The central goal of the LRE mandate is to foster inclusion and ensure that students have the opportunity to interact with their typically-achieving peers.[64] The LRE provision is also informed by the fact that students with disabilities, as well as their typically-achieving peers, benefit academically and socially from exposure to diverse learning environments.[65] Moreover, the IDEA's substantive protections extend to the provision of related services that may be necessary to support a student's education, such as transportation, physical therapy, and counseling services.[66] These services are designed to enhance the student's ability to benefit from special education and full participation in the general school curriculum and its attendant activities to the maximum extent appropriate.[67] Accordingly, this substantive protection reflects a commitment to creating an inclusive educational culture that ultimately prepares students for active participation within and beyond the classroom.

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[58] Chopp, *supra* note 42, at 429.

[59] 20 U.S.C. § 1414(d)(1)(A).

[60] *Id.*

[61] *Id.* § 1414(d)(4).

[62] 20 U.S.C. § 1412(a)(5)(A).

[63] *Id.*

[64] *Id.*

[65] 34 C.F.R. §§ 300.114-300.120 (2024) (describing the types of services and placements school districts must provide).

[66] 34 C.F.R. § 300.115(a) (2024) (providing that school districts "must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services").

[67] 20 U.S.C. § 1412(a)(5)(A) ("To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.").

C. Examining IDEA's Procedural Protections

The procedural protections under the IDEA play a crucial role in ensuring the fair and equitable treatment of students with disabilities and their parents throughout the special education process. These safeguards are designed to guarantee the rights of parents or guardians to participate in decisions regarding the identification, evaluation, and educational placement of their child.[68] One fundamental procedural protection is the right to notice, which mandates that parents be informed, in writing, before any action is taken by the school district in relation to their child's education.[69] This includes notice of meetings, evaluations, and proposed changes to the student's educational program.[70] Overall, the provision of timely and comprehensive information empowers parents to actively participate in the decision-making process.

In addition to notice, the IDEA emphasizes the importance of parental participation through mechanisms like the aforementioned IEP process.[71] Parents are integral team members in the development, review, and revision of the IEP, ensuring that their unique insights into their child's abilities and needs are considered.[72] The IDEA also provides parents with the right to obtain an independent educational evaluation ("IEE") at public expense if they disagree with the school district's assessment.[73] This safeguard serves as a procedural check of sorts, allowing parents to seek an impartial evaluation if they question the validity, reliability, or comprehensiveness of the school's assessment.[74]

Relatedly, the IDEA establishes a range of dispute resolution procedures to address disagreements between parents and school districts. These procedures include resolution sessions,[75] mediation,[76] due process hearings,[77] and the filing of state complaints.[78] Mediation offers a voluntary and

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[68] *See* 34 C.F.R. § 300.501(b)(1) (2024) ("The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to—(i) [t]he identification, evaluation, and educational placement of the child; and (ii) [t]he provision of FAPE to the child.").

[69] 20 U.S.C. § 1415(d)(2).

[70] *Id.*

[71] *See id.* §§ 1415(b)(5), 1415(e)(1); *see also* 34 C.F.R § 300.507(a)(1) (2024) ("A parent . . . may file a due process complaint on any . . . matters (relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child).").

[72] 20 U.S.C. §§ 1415(b)(5), 1415(e)(1).

[73] *Id.* § 1415(d)(2).

[74] *Id.*

[75] 20 U.S.C. § 1415(f)(*1*)(B)(i) (describing the IDEA's resolution sessions); 34 C.F.R. § 300.510(a) (2024).

[76] 20 U.S.C. § 1415(e) (describing the IDEA's mediation procedures).

[77] *Id.* § 1415(f) (describing the IDEA's due process hearing procedures).

[78] *Id.* § 1415(b)(5)-(8) (describing procedures in the IDEA that allow parents to file an administrative complaint directly with the state educational agency, which investigates and rules on the claim).

confidential process whereby a neutral third-party facilitates communication and negotiation between the parties.[79] IDEA due process hearings are formal legal proceedings where an impartial hearing officer makes a binding decision after considering evidence from both parties.[80] State complaints allow individuals to file written complaints with the state education agency, triggering an investigation into alleged violations of the IDEA.[81] These procedural protections collectively ensure that parents have the tools and mechanisms to actively advocate for their child's educational rights and to resolve disputes in a fair and transparent manner.

Taken together, the IDEA combines substantive and procedural protections to create a comprehensive framework for safeguarding the rights of students with disabilities. By fostering a culture of accountability, the IDEA strives to guarantee that the educational system remains vigilant in addressing the unique challenges and opportunities associated with providing an inclusive and effective education for students with disabilities. Consistent with these aims, Congress amended the IDEA so that "[p]arents and schools [could] . . . resolve their disagreements [over the education of students with disabilities] in positive and constructive ways."[82] The next Part further explores the IDEA's dispute resolution procedures.

II. Mapping the IDEA's Dispute Resolution Procedures

The IDEA constitutes a comprehensive federal statute designed to ensure that children with disabilities receive a FAPE. The IDEA has robust dispute resolution procedures that are central to its effectiveness in resolving disagreements between parents and educational agencies regarding the identification, evaluation, placement, and provision of special education services. These procedures are critical to safeguarding the rights of children with disabilities and their parents, fostering collaborative decision-making and upholding the overarching goal of the IDEA: the provision of an inclusive, meaningful, and equitable educational experience for *all* students with disabilities. As previously mentioned, the IDEA's dispute resolution procedures encompass a wide range of levers to achieve these ends, including mediation, due process hearings, and state complaints. These mechanisms exist, at least in part, because "[t]he IDEA favors prompt resolution of dispute[s]."[83] This Part explores the scope of these mechanisms and their protective function in turn.

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[79] *Id.* § 1415(b)(5)-(7) (noting the scope of IDEA's procedural requirements as to parents who dispute elements of the IEP process).

[80] *Id.* §§ 1415(b)(5)-(8), 1415(f).

[81] 34 C.F.R. §§ 300.151-300.153 (2024).

[82] 20 U.S.C. § 1400(c)(8).

[83] Sanders v. Santa Fe Pub. Schs., 383 F. Supp. 2d 1305, 1311 (D.N.M. 2004). *But see* Herbin *ex rel.* Herbin v. District of Columbia, 362 F. Supp. 2d 254, 265 (D.D.C. 2005) (allowing a four-month delay in responding to a request for re-evaluation).

A. Mediation

The mediation provision under the IDEA, codified at 20 U.S.C. § 1415(e), establishes a formalized process for resolving disputes between parents and educational agencies regarding the identification, evaluation, or placement of students with disabilities. The mediation process, which is conducted by a qualified and impartial mediator, is designed to facilitate communication and negotiation between the parties, with the goal of reaching a mutually agreeable resolution.[84] Participation in mediation is voluntary, but must be formalized in writing.[85] Discussions that occur during the mediation process are confidential and cannot be used as evidence in any subsequent due process hearing or civil proceeding.[86] Once a mediation agreement is signed, however, it is enforceable in state and federal court.[87] Accordingly, the mediation provision aims to promote collaboration, enhance communication, and expedite the resolution of disputes without needing to undertake formal legal proceedings under the IDEA.

B. Resolution Sessions

If mediation proves unsuccessful, school leaders must convene a resolution session "with the parent and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the . . . complaint" within fifteen days of receiving the due process complaint.[88] A resolution session's primary objective is to allow the parent to discuss their concerns,[89] the facts underlying their due process complaint,[90] and the proposed resolution with representatives of the Local Education Agency ("LEA").[91] School districts must address and respond to the matters raised in the parent's due process complaint during the resolution session.[92] However, a parent may be excused from conducting the resolution session when (1) either the LEA or the parent agree, in writing, to waive the session, or (2)

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[84] 34 C.F.R. § 300.506(b)(1) (2024).

[85] *Id.* § 300.506(b)(6)(ii).

[86] *Id.* § 300.506(b)(6)(i).

[87] *Id.* § 300.506(b)(7).

[88] *Id.* § 300.510(a)(1); *see generally* Massey v. District of Columbia, 400 F. Supp. 2d 66 (D.D.C. 2005) (holding that a district's inability to communicate with the parents to schedule the resolution meeting will not excuse its failure to hold a resolution meeting).

[89] 34 C.F.R. § 300.510(a)(2) (2024).

[90] *Id.*

[91] 34 C.F.R. § 300.510(a) (2024).

[92] *See* Polanco v. Porter, No. 21-cv-10176, 2023 WL 2242764, at *5-6 (S.D.N.Y. Feb. 27, 2023) (noting that, when a school district receives a due process complaint, it must organize a resolution meeting to address the allegations and suggest potential solutions, but the effectiveness of this process depends on the complaint's completeness in encompassing all of the parent's concerns regarding the proposed IEP or placement); 34 C.F.R. § 300.510(a)(1) (2024).

the LEA and parent agree to engage in the mediation process instead.[93] In other words, the resolution meeting can only be waived or replaced by mediation through mutual written agreement between the parent and the school district. If either party does not agree, the resolution session is required within fifteen calendar days of the school district's receipt of the parent's due process complaint. Absent such a waiver, if the parties reach a resolution during this session, a legally binding agreement is created.[94] If no resolution is achieved within thirty days, however, the due process hearing may proceed as planned.[95] Altogether, the resolution session provision aims to encourage open communication between parties, facilitate prompt resolution of disputes, and avoid protracted legal proceedings under the IDEA where possible.

C. Due Process Hearing

If a resolution is not reached through a resolution session, the parent may request an impartial due process hearing. This hearing is conducted by an impartial hearing officer ("IHO"),[96] who is appointed by either the state educational agency ("SEA") or the LEA.[97] The IHO presides over the proceedings, ensures a fair and orderly resolution of the dispute, and ultimately renders a final decision on the matter at issue.[98] In addition, parties to a due process hearing possess the "right to present evidence and confront, cross-examine, and compel the attendance of witnesses."[99] The IHO must then prepare findings of fact before rendering a decision on the matter in dispute.[100] It should be noted, however, that a due process hearing can be either a one-tier or two-tier process, depending on the state.[101]

In states that have adopted a one-tier due process hearing structure, the IHO simply presides over the due process hearing and issues a final decision on the dispute.[102] This means that the IHO is responsible for overseeing the resolution session, considering evidence and arguments from both parties during the hearing, and rendering a final determination on the matter. The vast majority of jurisdictions have adopted a one-tier due process hearing

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[93] 34 C.F.R. § 300.510(a)(3) (2024) (explaining the parties' capacity to utilize mediation appropriately either in addition to or instead of a resolution session).

[94] It is helpful to note, however, that either party—the LEA or parent representative—has three (3) business days from the date of execution to void the agreement. 34 C.F.R. § 300.510(e) (2024).

[95] 20 U.S.C. § 1415(f)(1)(B)(ii); 34 C.F.R. § 300.510(b) (2024).

[96] 20 U.S.C. § 1415(e)(2)(A)(iii); 34 C.F.R. § 300.511(c) (2024).

[97] *See* 34 C.F.R. § 300.511(b) (2024).

[98] *See* 20 U.S.C. §§ 1415(f)(3)(A), 1415(g)(2).

[99] *Id.* § 1415(h)(2).

[100] *Id.* § 1415(h)(3).

[101] 34 C.F.R. §§ 300.514(a)-(b), 300.516(b) (2024).

[102] 20 U.S.C. § 1415(f)(1)(A).

structure,[103] which means that a decision issued by an IHO is final and may be appealed to a state court or a federal district court.[104] By contrast, in states that have adopted a two-tier due process hearing structure, the initial due process hearing is conducted by an IHO, but parties who are dissatisfied with the outcome have the option to appeal the decision to a state-level review officer or panel.[105] This additional tier provides an extra layer of review beyond the IHO's decision and aims to enhance the fairness and thoroughness of the due process resolution process in those states. In states that have adopted a two-tier system, however, the parties must first exhaust IDEA's administrative remedies in the state system prior to bringing a claim in federal court.[106]

On the whole, when a party is aggrieved by a decision rendered in either a one-tier or two-tier state, the instant party is permitted to appeal the adverse decision by filing a civil action in state or federal court.[107] A due process hearing, therefore, serves as a crucial statutory safeguard designed to protect the rights of students with disabilities while ensuring a fair and transparent resolution process for disputes arising under the IDEA.

D. Judicial Appeals from Due Process Hearings

Following a due process hearing and the issuance of a final decision by the IHO, either party may appeal the decision to a court of competent jurisdiction.[108] The appeal is initiated by the filing of a civil action in the appropriate state or federal court within 90 days of receiving the IHO's decision.[109] Such judicial review provides an avenue for parents or educational agencies to seek redress and ensures an impartial evaluation of the legal and factual issues raised during the due process hearing.[110] Upon the initiation of a judicial appeal, the court's role is not to conduct a de novo review of the case but rather to scrutinize the administrative record from the due process hearing.[111] The court may, however, consider additional evidence, if the court finds it to be relevant and necessary for a complete and fair resolution

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[103] *Id.*; *see also* Jennifer F. Connolly, Perry A. Zirkel & Thomas A. Mayes, *State Due Process Hearing Systems under the IDEA: An Update*, 30 J. Disability Pol'y Stud. 156, 158 (2019).

[104] 20 U.S.C. § 1415(i)(1)(A)-(B).

[105] 20 U.S.C. § 1415(g); 34 C.F.R. § 300.515(b) (2024); *see, e.g.*, E.L. *ex rel.* G.L. v. Chapel Hill-Carrboro Bd. of Educ., 975 F. Supp. 2d 528 (M.D.N.C. 2013), *aff'd*, 773 F.3d 509 (4th Cir. 2014) (recognizing the presence of a dual-tiered system in North Carolina).

[106] Gibson v. Forest Hills Loc. Sch. Dist. Bd. of Educ., 655 F. App'x 423 (6th Cir. 2016) (determining that the school district neglected to complete its administrative procedures by refraining from appealing the decision of an impartial hearing officer to a state-level review officer, resulting in the preclusion of its federal claim).

[107] 20 U.S.C. § 1415(i)(2)(A).

[108] *Id.*

[109] *Id.* § 1415(i)(2)(B).

[110] *Id.* § 1415(g)(1).

[111] *Id.* § 1415(i)(2)(C)(i).

of the legal issues.[112] On balance, a judicial appeal from a due process hearing allows for a comprehensive examination of legal and factual questions presented during the due process hearing, ensuring that the final resolution is grounded in a thorough analysis of the evidence and legal arguments presented by both parties.

In addition, the reviewing court possesses broad authority to render a decision on the merits via a preponderance of the evidence standard.[113] It may also affirm, modify, or set aside the IHO's decision based on the legal standards articulated in the IDEA and any relevant legal precedent.[114] The court's judgment serves as a final resolution of the dispute, providing closure to the parties involved in the dispute and affirming the principle that access to an impartial and judicious review process is fundamental to safeguarding the educational rights of students with disabilities.[115] The judicial appeals provision under the IDEA not only establishes a vital safeguard of these rights but also guarantees that the due process hearing decisions are subject to rigorous and independent scrutiny by the judicial system. Before initiating a civil action in court, however, the aggrieved party must have completed, or "exhausted," all of the foregoing administrative remedies at the state or local level.[116]

In short, the IDEA's judicial appeals process—more specifically, the statute's exhaustion requirement—underscores the significance of allowing SEAs and LEAs an opportunity to address disputes internally before resorting to judicial intervention. At the same time, courts are largely in agreement that exhaustion may not always be required.[117] The following Part will examine the scope of the exhaustion mandate's central purpose, when the exhaustion requirement must be applied, and the circumstances under which exhaustion may be excused through judge-made exceptions to this mandate.

III. Analyzing the Purpose, Application, and Exceptions to Exhaustion

The exhaustion doctrine's application and purpose appear straightforward: Prior to having one's day in court, prospective litigants must first navigate the IDEA's administrative process. Despite this ostensibly straightforward process, however, the mechanics of the IDEA's administrative exhaustion requirement have engendered much confusion, especially in the wake of the *Perez* decision.[118] Consider the following example. The Council

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[112] *Id.* § 1415(i)(2)(C)(ii).

[113] *Id.* § 1415(i)(2)(C)(iii).

[114] *Id.*

[115] *Id.*

[116] *Id.* §§ 1415(*l*), 1415(i)(2)(A).

[117] Sparks, *supra* note 18.

[118] Perry Zirkel, *The Meaning of* Perez v. Sturgis Public Schools*: Neither Exhausting nor Exhaustive*, 409 Ed. L. Rep. 606 (2023).

of Administrators of Education, a national coalition of special education leaders,

> not only acknowledged misunderstanding[s] about the [*Perez*] decision but also offered the following problematic interpretation: When families believe their child has been denied a free appropriate public education, they have a procedure that allows them to dispute the school district's decision. That administrative process must be exhausted before they turn to courts for final adjudication. This decision has not changed that longstanding understanding of the law.[119]

Such confusion among education advocates, as well as among the courts, has ultimately led legal scholars to implore the judiciary to reexamine the exhaustion doctrine's basic structure, "not only to indicate how the cases should be decided, but also to clarify issues sufficiently to guide parties' behavior so that they may avoid litigation over exhaustion's requirements."[120] Although courts have made exceptions to this exhaustion requirement in specific instances,[121] the doctrine itself remains far from clear.[122] Accordingly, the following section examines the exhaustion doctrine, its application, and when it may be excused.

A. Canvassing Exhaustion's Purpose and Application

Beyond the context of the IDEA, the exhaustion doctrine has long been interpreted by courts as a "rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."[123] As a general matter, the exhaustion doctrine has three central purposes. First, the doctrine ensures that congressional authority is delegated to the appropriate federal agencies.[124] Second, by delegating such authority to federal agencies, agency officials are afforded relatively broad latitude in applying their discretion and expertise to a given issue or matter.[125] Third, the exhaustion doctrine

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[119] *Id.*

[120] Gelpe, *supra* note 16, at 3.

[121] 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, 384-411 (2009) (identifying "cases in which courts have excused . . . exhaustion and plac[ing] them into categories").

[122] Jeffrey S. Lubbers, *Fail to Comment at Your Own Risk: Does Issue Exhaustion Have a Place in Judicial Review of Rules?*, 70 ADMIN. L. REV. 109, 124 (2018) (describing the inconsistent application of issue exhaustion requirements in rulemaking contexts).

[123] Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938).

[124] *See* McCarthy v. Madigan, 503 U.S. 140, 145 (1992).

[125] *See* Crocker v. Tenn. Secondary Sch. Athletic Ass'n, 873 F.2d 933, 935 (6th Cir. 1989) ("States are given the power to place themselves in compliance with the law . . . . Federal Courts—generalists with no experience in the educational needs of handicapped students—are given the benefit of expert factfinding by a state agency devoted to this very purpose.").

promotes judicial efficiency by reducing the need for additional fact-finding on claims that have already been resolved administratively.[126]

Within the context of the IDEA, the exhaustion doctrine's application and purpose are virtually identical as it relates to resolving special education disputes. First, in terms of its purpose, "[t]he IDEA's exhaustion requirement was intended to channel disputes related to the education of [children with disabilities] into an administrative process that could apply administrators' expertise in the area and promptly resolve grievances."[127] Second, the IDEA's exhaustion rule was drafted to "prevent premature interference with agency processes," while affording agency officials the "opportunity to correct its own errors" through an expertise rarely found within the judiciary.[128] Regarding the provision's application, the IDEA's statutory language sets forth that:

> Nothing in [the IDEA] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 . . . [Section 504 of the Rehabilitation Act], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under [the IDEA], the [state's administrative procedures] shall be exhausted to the same extent as would be required had the action been brought under [the IDEA].[129]

In other words, prior to filing a claim under the ADA[130] or Section 504,[131] a litigant must first exhaust the administrative procedures set forth in the IDEA *if* the relief sought is also provided for under the IDEA.[132] What is less clear, however, is whether litigants are obligated to exhaust the IDEA's administrative remedies when the desired relief is already stipulated in the IDEA itself. Put differently, relief that is *provided for* under the IDEA includes remedies that can be granted through the administrative process, such as changes to an IEP, compensatory education, and other educational adjustments. For instance, in *Fry v. Napoleon Community Schools*, the Supreme Court clarified that if the gravamen of a plaintiff's suit is the denial of a FAPE, then the plaintiff must exhaust the IDEA's procedures before seeking relief under the ADA or Section 504.[133] In contrast, relief that is *stipulated in* the IDEA refers to specific remedies explicitly mentioned within the

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[126] McKart v. United States, 395 U.S. 185, 194 (1969).

[127] Polera v. Bd. of Educ., 288 F.3d 478, 487 (2d Cir. 2002).

[128] Weinberger v. Salfi, 422 U.S. 749, 765 (1975); *see McKart*, 395 U.S. at 194-95.

[129] 20 U.S.C. § 1415(*l*).

[130] Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327.

[131] Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355.

[132] Fry v. Napoleon Cmty. Schs., 580 U.S. 154, 167-68 (2017).

[133] *Id.*

statute itself. This includes procedural safeguards, the right to an impartial due process hearing, and the right to appeal decisions. The Supreme Court in *Perez v. Sturgis Public Schools* held that if a plaintiff seeks relief not available under the IDEA, such as monetary damages, they are not required to exhaust the IDEA's administrative remedies.[134] Accordingly, the *Perez* decision underscored the distinction between relief provided for and relief stipulated in the IDEA.

This ruling also diverged from the traditional understanding that any claim related to the denial of a FAPE must first go through the IDEA's administrative process. By allowing claims for non-IDEA remedies to bypass this requirement, the *Perez* decision created a potential loophole, complicating the exhaustion doctrine and raising concerns about the consistency and predictability of its application in future cases. The foregoing uncertainty arises particularly when exhausting these remedies becomes futile due to the systemic violations of federal law, a key exception to the IDEA's exhaustion mandate.

B. Key Exceptions to Exhaustion

As discussed briefly in this Article's introduction, courts have long recognized key exceptions to the IDEA's exhaustion requirement. Indeed, the Supreme Court has held that "Congress sets the rules—and courts have a role in creating exceptions only if Congress wants them to."[135] As a consequence, the "[a]pplication of the doctrine to specific cases requires an understanding of its purposes and of the particular administrative scheme involved."[136] Although courts have not required exhaustion "where administrative and judicial interests would counsel otherwise,"[137] the courts have also failed to define "a logically consistent set of exceptions" to the exhaustion rule.[138] This is a problem, as courts not only risk imposing "inconsistent treatment of similar cases," but also risk hamstringing litigants who "cannot accurately predict whether a court would require exhaustion."[139]

Several circuits have recognized, among other key exceptions to the exhaustion rule, a "systemic"[140] violation exception, a "policy or practice of

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[134] Perez v. Sturgis Pub. Schs., 598 U.S. 142, 151 (2023).

[135] Ross v. Blake, 578 U.S. 632, 639 (2016).

[136] McKart v. United States, 395 U.S. 185, 193 (1969).

[137] McCarthy v. Madigan, 503 U.S. 140, 146 (1992).

[138] Robert C. Power, *Help is Sometimes Close at Hand: The Exhaustion Problem and the Ripeness Solution*, 1987 U. Ill. L. Rev. 547, 558 (1988).

[139] Gelpe, *supra* note 16, at 26-27.

[140] J.S. *ex rel.* N.S. v. Attica Cent. Sch. Dist., 386 F.3d 107, 114 (2d Cir. 2004) (describing that exhaustion can be excused when systemic violations of the IDEA are unable to be remedied by either state or local administrative agencies "because the framework and procedures for assessing and placing students in appropriate educational programs [are] at issue, or because the nature and volume of complaints [are] incapable of correction of the administrative hearing process").

generalized applicability"[141] exception, and an "emergency"[142] exception to the IDEA's exhaustion requirement—while other circuits have not considered or ruled on the issue in the first instance.[143] These exceptions notwithstanding, the IDEA does not expressly codify any exceptions to the exhaustion requirement in its statutory language.[144] Yet, in terms of the systemic violation exception, the First Circuit has adopted a narrow interpretation of the exhaustion requirement, generally requiring exhaustion unless the administrative process is demonstrably futile or inadequate.[145] This circuit has not explicitly recognized a systemic violation exception, focusing instead on individual claims and remedies.[146] The Second Circuit has recognized the futility exception but has been cautious in applying it.[147] This circuit has not formally adopted a systemic violation exception, often requiring plaintiffs to demonstrate that administrative remedies are inadequate on a case-by-case basis.[148]

The Third Circuit has acknowledged the futility exception and has shown some openness to systemic claims, particularly when plaintiffs can demonstrate that the administrative process is incapable of addressing widespread issues.[149] However, it has not explicitly codified a systemic violation exception.[150] The Fourth Circuit has taken a more conservative tack in its application of exceptions to the exhaustion requirement, generally requiring plaintiffs to exhaust administrative remedies unless they can clearly demonstrate futility or inadequacy.[151] Much like the First, Second, and Third

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[141] Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1304 (9th Cir. 1992).

[142] Komninos v. Upper Saddle River Bd. of Educ., 13 F.3d 775, 779 (3d Cir. 1994) (emphasizing that the emergency exception to the IDEA's exhaustion requirement is to be "sparingly invoked" and reserved for truly extraordinary circumstances that pose immediate, irreparable harm to the student's educational rights).

[143] *See* Parent/Pro. Advoc. League v. City of Springfield, 934 F.3d 13, 27 (1st Cir. 2019) (noting that the First Circuit has not explicitly recognized a systemic violation exception and focuses on individual claims and remedies).

[144] *See* 20 U.S.C. § 1415(i)(1)-(2).

[145] *See* Rose v. Yeaw, 214 F.3d 206, 210 (1st Cir. 2000) (holding that exhaustion is required unless the administrative process is demonstrably futile or inadequate).

[146] *See Parent/Pro. Advoc. League*, 934 F.3d at 27.

[147] *See* J.S. *ex rel.* N.S. v. Attica Cent. Sch. Dist., 386 F.3d 107, 113 (2d Cir. 2004) (holding that futility may excuse exhaustion where plaintiffs allege systemic violations that the administrative process cannot address).

[148] *See* Polera v. Bd. of Educ., 288 F.3d 478, 488 (2d Cir. 2002) (requiring plaintiffs to demonstrate that administrative remedies are inadequate on a case-by-case basis).

[149] *See* T.R. v. Sch. Dist. of Phila., 4 F.4th 179, 185 (3d Cir. 2021) (acknowledging the futility exception and noting that systemic claims may be considered when the administrative process is inadequate).

[150] *See* Beth V. *ex rel.* Yvonne V. v. Carroll, 87 F.3d 80, 89 (3d Cir. 1996) (recognizing that plaintiffs *may* be excused from exhausting administrative remedies when they allege systemic legal deficiencies and request system-wide relief that cannot be provided through the administrative process).

[151] *See* M.M. *ex rel.* D.M. v. Sch. Dist. of Greenville Cnty., 303 F.3d 523, 536 (4th Cir. 2002) (holding that exhaustion is required unless plaintiffs can clearly demonstrate futility or inadequacy).

Circuits, the Fourth Circuit has not formally recognized a systemic violation exception.[152] Moreover, although the Ninth Circuit has never published a case in which a claim fell within this exception to the exhaustion requirement,[153] it has long maintained that the IDEA's exhaustion requirement does not extend to claims seeking systemic or structural relief.[154] At the same time, however, the Ninth Circuit has also asserted that the exhaustion requirement controls *unless* the policy under consideration directly affects the integrity of the IDEA's dispute resolution procedures or necessitates a restructuring of the education system.[155] This Article's thesis is grounded, in part, on the assertion that undermining the integrity of the IDEA's comprehensive statutory framework, which inherently includes its dispute resolution procedures, poses significant risks to the law's effectiveness.

In addition, courts have recognized[156] that the exhaustion requirement's legislative history allows for "certain situations in which it is not appropriate to require the use of due process and review procedures set out in [the IDEA] before filing a lawsuit."[157] One such situation, which is described in more detail below, flows from the disproportionate placement of students with the most significant cognitive disabilities into segregated

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[152] *See* K.I. v. Durham Pub. Sch. Bd. of Educ., 54 F.4th 779 (4th Cir. 2022) (reiterating the requirement for plaintiffs to exhaust administrative remedies unless they can demonstrate futility or inadequacy).

[153] Martinez v. Newsom, 46 F.4th 965, 974 (9th Cir. 2022).

[154] The Ninth Circuit has maintained the systemic violation exception to the IDEA's exhaustion requirement through its jurisprudence, despite never having decided a case where claims successfully invoked this exception. The circuit first recognized the systemic violation exception in *Hoeft v. Tucson Unified School District*, where it held that exhaustion is not required when plaintiffs seek systemic or structural relief that cannot be addressed through the administrative process. *See* 967 F.2d 1298, 1303-04 (9th Cir. 1992). The Ninth Circuit has reiterated this principle in subsequent cases, emphasizing that the exhaustion requirement does not apply when the policy under consideration directly affects the integrity of the IDEA's dispute resolution procedures or necessitates a restructuring of the education system. *See, e.g.*, Paul G. v. Monterey Peninsula Unified Sch. Dist., 933 F.3d 1096, 1101-02 (9th Cir. 2019); Doe *ex rel.* Brockhuis v. Ariz. Dep't of Educ., 111 F.3d 678, 682 (9th Cir. 1997) (defining a systemic claim as one that either "implicates the integrity or reliability of the IDEA dispute resolution procedures themselves, or requires restructuring the education system itself in order to comply with the dictates of the Act"). However, the Ninth Circuit has consistently found that plaintiffs failed to meet the criteria for this exception, often because they could not identify an agency decision, regulation, or other binding policy that caused their injury. *See, e.g.*, Student A *ex rel.* Parent A v. S.F. Unified Sch. Dist., 9 F.4th 1079, 1084-85 (9th Cir. 2021) (finding plaintiffs did not meet the criteria for the systemic violation exception because they failed to identify an agency decision or binding policy causing their injury); *Martinez*, 46 F.4th at 973-74 (reiterating that plaintiffs must identify a specific policy or practice to invoke the systemic violation exception). This cautious approach ensures that the systemic violation exception remains a viable but narrowly applied doctrine, preserving the integrity of the IDEA's administrative process while allowing for judicial intervention in truly systemic cases.

[155] *Doe v. Ariz. Dep't of Educ.*, 111 F.3d at 682.

[156] *See* Pihl v. Mass. Dep't of Educ., 9 F.3d 184, 190 n.10 (1st Cir. 1993) (noting that the legislative history of the IDEA supports the view that exhaustion is not a rigid requirement); Heldman v. Sobol, 962 F.2d 148, 158 (2d Cir. 1992) (tracing the existence of a futility exception to the legislative history of the 1975 Act).

[157] H.R. Rep. No. 99-296, at 7 (1985).

educational settings. As this Article contends, the systematic relegation of these students into segregated educational settings undermines the central purpose of the IDEA, impairing both the effectiveness and integrity of the Act and its dispute resolution procedures. The next Part explores the harms engendered when students with the most significant cognitive disabilities are disproportionately placed in these highly restrictive educational environments.

IV. Educating Students with the Most Significant Cognitive Disabilities

Students identified as possessing the most significant cognitive disabilities are disproportionately assigned to segregated and highly restrictive educational environments.[158] While nearly two-thirds of students with less severe disabilities were placed in general education classrooms at least eighty percent of the time during the 2017-18 school year,[159] only three percent of students with the most significant cognitive disabilities experienced similar placement in general education classrooms for at least eighty percent of the time.[160] Worse yet, over ninety percent of students with the most significant cognitive disabilities were placed in segregated settings, including within self-contained classrooms and entirely separate schools.[161]

These disparities not only run counter to the legislative intent behind the IDEA's LRE requirement—which requires that, to the maximum extent appropriate, children with disabilities are to be educated with their typically-achieving peers—but also result in significant short- and long-term consequences for students with the most significant cognitive disabilities. This Part proceeds as follows: Section IV.A outlines the value derived from receiving an education in an integrated classroom environment, particularly among students with the most significant cognitive disabilities. Section IV.B then examines the adverse outcomes engendered by schools and districts that fail to adhere to the LRE mandate. Section IV.C concludes by providing Massachusetts as a case example to underscore the educational costs wrought by the disproportionate exclusion of students with the most significant cognitive disabilities from both the general education classroom and curriculum.

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[158] Kurth et al., *supra* note 34, at 227.

[159] *Percentage Distribution of School-age Students Served under Individuals with Disabilities Education Act (IDEA), Part B, by Educational Environment and Type of Disability: Selected Years, Fall 1989 through Fall 2022*, Inst. of Educ. Sci., https://nces.ed.gov/programs/digest/d22/tables/dt22_204.60.asp [https://perma.cc/2HRR-D4JD] (updated through Fall 2022).

[160] Harold Kleinert & Jacqui Kearns, *Where Students with the Most Significant Cognitive Disabilities Are Taught: Implications for General Curriculum Access*, 81 Exceptional Child 312, 314 (2015).

[161] *Id.* at 312.

A. Examining the Value of Educational Inclusion

The segregation of students with the most significant cognitive disabilities overlooks the myriad benefits that an inclusive education brings to students with and without the most significant cognitive disabilities.[162] These benefits include, among other things, "higher academic achievement . . . greater self-determination skills . . . and improved communication skills."[163] Among students without disabilities, moreover, the advantages of educational inclusion are manifold. According to the National Council on Disability ("NCD"), general educational settings that were inclusive of students with the most significant cognitive disabilities contributed to a "reduced fear of human differences, increased comfort and awareness of differences, growth in social cognition, improvements in self-concept, growth of ethical principles, and caring friendships" among students without disabilities.[164] Furthermore, placement in inclusive educational settings aligns with the IDEA provision requiring specially designed instruction and support services for all students to the maximum extent appropriate.[165] Therefore, when IEP teams provide an inclusive education to all students—including those identified as possessing the most significant cognitive disabilities—these students receive access to a more comprehensive curriculum and a wide range of social and emotional advantages that would not arise in more restrictive or segregated educational settings.[166]

B. Assessing the Costs of Educational Exclusion

The costs of educational exclusion are primarily experienced by students with the most significant cognitive disabilities, whose placement in segregated educational environments exacerbates feelings of social isolation and marginalization.[167]

The harms of segregation become apparent when students with the most significant cognitive disabilities are denied the opportunity to engage

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[162] Martha Minow, Making All the Difference: Inclusion, Exclusion, and American Law 84-86 (1990) (denoting the myriad educational benefits that course material offered in sign language and by spoken word has on both students who are deaf and/or hard-of-hearing and students who are not deaf and/or hard-of-hearing).

[163] Mary Curran Mansouri, Jennifer A. Kurth, Elissa Lockman Turner, Kathleen N. Zimmerman & Teran A. Frick, *Comparison of Academic and Social Outcomes of Students with Extensive Support Needs Across Placements*, 47 Rsch. & Prac. for Pers. with Severe Disabilities 111, 112 (2022).

[164] Nat'l Council on Disability, The Segregation of Students with Disabilities 39 (2018), https://www.ncd.gov/assets/uploads/docs/ncd-segregation-swd-508.pdf [https://perma.cc/7XSG-YXUT].

[165] *Id.* at 18.

[166] *Id.*

[167] *See* O'Malley, *supra* note 48, at 952-53; *see also* Matthew E. Brock, John M. Schaefer & Rachel L. Seaman, *Self-Determination and Agency for All: Supporting Students with Severe Disabilities*, 59 Theory Into Pract. 162, 165 (2020).

with their typically-achieving classmates. By isolating these students from their peers, this form of segregation undermines their social development and imposes lasting harm on their sense of self-worth and overall well-being.[168] The negative impact of exclusion is not only emotional, but academic as well. Students placed in separate, less academically demanding environments encounter lower expectations for their achievement.[169] This is problematic because students with significant cognitive disabilities in these settings are often held to standards that are far below those expected of their peers, reinforcing a cycle of low achievement.[170] Consequently, this lowered academic standard denies these students the opportunity to engage with challenging material and develop the skills needed to succeed in more rigorous academic contexts.[171]

Such exclusionary practices reinforce the harmful notion that students with significant cognitive disabilities are incapable of achieving at the same level as their peers, thereby perpetuating academic and social inequities. When these students are segregated from their peers, they are placed in environments that fail to foster their academic and social growth. These environments not only limit their academic potential but also isolate them from opportunities to form meaningful relationships with other students, which are essential for building both social skills and a sense of belonging. In doing so, this segregation sends a broader societal message that students with significant cognitive disabilities do not deserve the same opportunities as their peers, reinforcing stigma and further marginalizing them from the educational system and society as a whole.[172]

Environments with reduced academic rigor can hinder sustained learning, impede academic achievement, and ultimately constrain future educational and occupational opportunities. Indeed, recent empirical research indicates that "[i]n studies examining the academic outcomes of participants with [significant cognitive disabilities] across settings, the inclusive environment was associated with higher scores and larger effect sizes in literacy . . . and math . . . compared with the segregated environment."[173] In addition, "[o]ut of the studies examining students' social outcomes across settings (i.e., inclusive; segregated), the majority (80%) demonstrated that students with [significant cognitive disabilities] served in the general

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[168] Brock et al., *supra* note 167, at 165-66.

[169] *Id.*

[170] Jennifer A. Kurth, Andrea L. Ruppar, Samantha Gross Toews, Katie M. McCabe, Jessica A. McQueston & Russell Johnston, *Considerations in Placement Decisions for Students with Extensive Support Needs: An Analysis of LRE Statements*, 44 Rsch. & Prac. for Pers. with Severe Disabilities 3, 3 (2019) (noting "a growing body of research documents negative consequences of teaching students with ESN in restrictive settings" such as "settings with less access to the general education curriculum, activities, and discourse than general education settings").

[171] *Id.*

[172] *See* O'Malley, *supra* note 48, at 952-53; *see also* 20 U.S.C. § 6311(b)(2)(D)(i).

[173] Mansouri et al., *supra* note 163, at 122.

education classroom alongside same-age peers had better outcomes than those served in segregated settings."[174] The next section provides a case example to further illustrate the detrimental effects engendered by excluding students with the most significant cognitive disabilities from both the general educational environment and the curriculum.

C. Miseducating Students with the Most Significant Cognitive Disabilities

Pursuant to the Every Student Succeeds Act ("ESSA"), every student—including those with disabilities—must take part in state assessments to assess their ongoing academic attainment and progress.[175] To ensure that students with disabilities receive an equitable evaluation of their learning and academic progress, school districts must provide appropriate accommodations to students who qualify for appropriate IDEA services and accommodations.[176] Two discrete avenues exist for school districts to fulfill ESSA's state assessment mandate: School districts must (1) provide typically-achieving students with the standard assessment aligned with grade-level standards, or (2) provide alternate academic achievement standards ("AA-AAAS") that are specifically tailored for students with the most substantial cognitive disabilities.[177] Irrespective of the assessment avenue selected, all students are required to meet the state's academic content standards, with appropriate adjustments for those students assigned to participate in AA-AAAS.[178]

It is important to recognize that participation in AA-AAAS is permitted exclusively for students with the most significant cognitive disabilities.[179] It is likewise important to note that neither the IDEA or ESSA defines the scope or meaning of "students with the most significant cognitive

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[174] *Id.* at 124-25.

[175] 20 U.S.C. § 6311(b)(2).

[176] *Id.*

[177] *Waiver Requirement Memorandum*, *supra* note 31, at 1.

[178] *Id.* ("One important step in the inclusion of all children with disabilities is State- and district-wide assessments as determined by their respective individualized education programs . . . , as required under section 612(a)(16) of the Individuals with Disabilities Education Act . . . – either in a general grade level assessment with or without accommodations or, for those students with the most significant cognitive disabilities, an alternate assessment aligned with alternate academic achievement standards . . . .").

[179] Although the IDEA fails to offer a definition or guidance on determining what constitutes the most significant cognitive disabilities, Section 300.304(c)(1) provides that "[a]ssessments and other evaluation materials used to assess a child under this part–(i) [a]re selected and administered so as not to be discriminatory on a racial or cultural basis; (ii) [a]re provided and administered in the child's native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer; (iii) [a]re used for the purposes for which the assessments or measures are valid and reliable; (iv) [a]re administered by trained and knowledgeable personnel; and, (v) [a]re administered in accordance with any instructions provided by the producer of the assessments." 34 C.F.R. § 300.304(c)(1) (2024).

disabilities."[180] Notwithstanding the absence of a guiding definition at the federal level, ESSA has imposed a limit on states regarding the number of students eligible for assessment through the AA-AAAS, which the Act sets at 1% of the total number of students tested in a given year for each academic subject.[181] At the same time, however, ESSA permits a state to exceed the 1% cap if it files a waiver request with the U.S. Department of Education ("USED").[182] A state utilizing AA-AAAS then holds a fundamental duty to ensure that, in accordance with the relevant principles set forth in ESSA, only students classified with the most significant cognitive disabilities—and for whom, solely due to their disability, achieving grade-level standards is impossible, even with optimal educational support and interventions—are deemed eligible for AA-AAAS.[183] Still, states are often derelict in meeting this duty, which has led to lasting harms for students. Consider, for example, AA-AAAS participation in Massachusetts.

1. AA-AAAS Participation in Massachusetts

In Massachusetts, evaluating students using AA-AAAS—often as early as third grade—carries with it significant implications for student learning and achievement. One such implication involves the requirement that students achieve a specific competency determination score on the state's alternative exam, also known as the Massachusetts Comprehensive Assessment

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[180] *See* 20 U.S.C. § 6311(b)(1)(E); 34 C.F.R. § 200.6(d)(1) (2024) ("If a State adopts alternative academic achievement standards for students with the most significant cognitive disabilities and administers an alternate assessment aligned with those standards, the State must—(1) Establish, consistent with section 612(a)(16)(C) of the IDEA, and monitor implementation of clear and appropriate guidelines for IEP teams to apply in determining, on a case-by-case basis, which students with the most significant cognitive disabilities will be assessed based on alternate academic achievement standards. Such guidelines must include a State definition of 'students with the most significant cognitive disabilities' that addresses factors related to cognitive functioning and adaptive behavior, such that—(i) The identification of a student as having a particular disability as defined in the IDEA or as an English learner does not determine whether a student is a student with the most significant cognitive disabilities; (ii) A student with the most significant cognitive disabilities is not identified solely on the basis of the student's previous low academic achievement, or the student's previous need for accommodations to participate in general State or districtwide assessments; and (iii) A student is identified as having the most significant cognitive disabilities because the student requires extensive, direct individualized instruction and substantial supports to achieve measurable gains on the challenging State academic content standards for the grade in which the student is enrolled. . . .").

[181] 20 U.S.C. § 6311(b)(2)(D)(i)(I).

[182] 34 C.F.R. § 200.6(c)(4) (2024); *see also Waiver Requirement Memorandum*, *supra* note 31, at 4 ("For a State to be eligible to receive a 1.0 percent cap waiver for a subject area, it must have assessed at least 95 percent of all students enrolled and 95 percent of children with disabilities in the previous year in the grades assessed in that subject area. As part of its waiver request, a State must submit SY 2022-23 assessment participation rates overall and for students with disabilities for each subject for which it is requesting a waiver. If a State did not meet the 95 percent assessment participation requirement in SY 2022-23, it is not eligible to receive a waiver from the 1.0 percent cap in AA-AAAS participation for SY 2023-24.").

[183] The failure to definitively establish this impossibility is what I define as an erroneous assignment. *See* 34 U.S.C. § 200.6(d); 34 U.S.C. § 200.6(c)(4)(iv)(A).

System Alternate ("MCAS-Alt") exam,[184] as a condition of receiving a high school diploma.[185] This high-stakes decision underscores an enduring conflict between the overarching goals of Massachusetts' special education program and the competency score requirements for those students participating in the standard Massachusetts Comprehensive Assessment System ("MCAS"). On one hand, the state's special education program aims to facilitate the identification and proper accommodation of students with distinct learning needs.[186] On the other hand, Massachusetts requires that all students earn a specific MCAS determination score as a prerequisite to earning a high school diploma, irrespective of their special education status.[187] This inconsistency between the state's policy recognizing and accommodating the distinctive learning needs of its special education students and its policy requiring the same MCAS determination score as that of their typically-achieving peers has imposed substantial short- and long-term harms onto students with the most significant cognitive disabilities across the Commonwealth.

These systemic issues highlight the critical importance of the IDEA's exhaustion requirement. Under the Ninth Circuit's approach, which allows for exceptions to exhaustion when administrative remedies are inadequate or futile, parents and advocates can more effectively challenge systemic policies or practices that produce, at least in part, such widespread disparities. By bypassing an often protracted and ineffective administrative process, they can seek timely judicial intervention to address the fundamental misalignment between state policies and the educational needs of students with significant cognitive disabilities. This approach ensures that the rights of these students are upheld without unnecessary delays, aligning with the IDEA's core objective of providing a FAPE in the least restrictive environment.

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[184] 603 Mass. Code Regs. § 30.03 (2022) (describing the parameters of the Competency Determination requirement); *see also* Mass. Gen. Laws ch. 69, § 1D (2022); Mass. Dep't of Elementary and Secondary Educ., Massachusetts Comprehensive Assessment System: Alternate Assessment Based on Alternate Achievement Standards for Students with Disabilities, 2024 Educator's Manual for MCAS-Alt 66 (2023) ("State graduation requirements apply to all students, even those taking the MCAS-Alt. All students without exception are required to meet the competency determination graduation standard on the ELA, mathematics, and one high school science and technology/engineering assessment to be eligible to earn a high school diploma. Local graduation requirements must also be met. Since students who take alternate assessments are those with significant cognitive disabilities, the number earning a competency determination remains low in relation to the number of students who meet the competency determination requirement on the standard MCAS tests. Students remain eligible for special education services until they meet all graduation requirements or turn 22 years of age.").

[185] 2024 Educator's Manual for MCAS-Alt, *supra* note 184, at 66 ("Since students who take alternate assessments are those with significant cognitive disabilities, the number earning a competency determination remains low in relation to the number of students who meet the competency determination requirement on the standard MCAS tests.").

[186] 603 Mass. Code Regs. § 28.01 (2022) (describing the purpose of the state's special education program).

[187] 603 Mass. Code Regs. § 30.03(1) (2022) (establishing a minimum passing MCAS score).

2. *Cataloging the Substantive Harms of AA-AAAS Participation in Massachusetts*

One significant harm that flows from these disproportionate placements onto the AA-AAAS track is that doing so diverts students from both post-secondary and employment pathways. To properly adopt the AA-AAAS for students with significant cognitive disabilities, adopting states must guarantee that "those standards . . . are aligned to ensure that a student who meets the alternate academic achievement standards is on track to pursue postsecondary education or employment . . . ."[188] The Massachusetts Department of Elementary and Secondary Education's ("DESE") use of AA-AAAS presents an active barrier—both in terms of ongoing student learning and a student's long-term odds of attaining the aforementioned competency determination score[189]—for those students seeking employment or post-secondary opportunities.[190] Therefore, placement decisions associated with AA-AAAS carry substantial implications for a student's academic and non-academic trajectory, posing an active barrier, rather than serving as an entry point, to post-secondary success.

As to employment pathways, every student, regardless of the assessment they participate in, must receive instruction aligned with state academic content standards for their enrolled grade.[191] For students who participate in AA-AAAS, however, the expectations for achievement are adjusted with respect to the grade-level content that students with the most significant cognitive disabilities are taught.[192] This discrepancy, which results in a lack of equal access to the same academic skills as their typically-achieving peers, constitutes a distinct harm with enduring implications for students with the most significant cognitive disabilities. Without the opportunity to learn at the same rigorous academic standards as their peers without such disabilities,

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[188] 20 U.S.C. § 6311(b)(1)(E)(i)(V).

[189] 603 Mass. Code Regs. § 30.03 (2022).

[190] 2024 Educator's Manual for MCAS-Alt, *supra* note 184, at 66 ("Standards-based instruction is for all students. All students are capable of learning at a level that engages and challenges them. One important reason to include students with significant cognitive disabilities in standards-based instruction is to explore their capabilities. While 'daily living skills' are critical for these students to function independently, academic skills are also important. Standards in the Massachusetts Curriculum Frameworks are defined as 'valued outcomes for all students.'").

[191] 20 U.S.C. § 6311(b)(1)(A)-(B) (All states must "adopt[ ] challenging academic content standards and aligned academic achievement standards" that "shall apply to all public schools and public school students in the State; and with respect to academic achievement standards, include the same knowledge, skills, and levels of achievement expected of all public school students in the State").

[192] *Id*. (States must also "implement[ ] a set of high-quality student academic assessments in mathematics, reading or language arts, and science" that "shall . . . be the same academic assessments used to measure the achievement of all public elementary school and secondary school students in the State; . . . administered to all public elementary school and secondary school students in the State; . . . be aligned with the challenging State academic standards, and provide coherent and timely information about student attainment of such standards and whether the student is performing at the student's grade level").

students placed on the AA-AAAS track are effectively denied the necessary skills to pass the general MCAS. This, in turn, significantly hinders these students' ability to earn a standard high school diploma in Massachusetts.[193]

The long-term harms associated with failing to earn a high school diploma in the twenty-first century are well-established.[194] The lack of a high school diploma also has significant ramifications for post-secondary employment, including substantial negative impacts on employment prospects and earning potential. For example, individuals without a high school diploma face much higher unemployment rates compared to those with higher levels of education.[195] Additionally, those without a high school diploma earn significantly less on average, making only 79% of what high school graduates earn, 67% of what associate's degree holders earn, and 47% of what bachelor's degree holders earn.[196] Notwithstanding the foregoing substantive harms wrought by placement on the AA-AAAS, there are also significant procedural harms that should be considered. The following section explores these harms in more detail.

3. Cataloging the Procedural Harms of AA-AAAS Participation in Massachusetts

As discussed previously, states are permitted to exceed the federally imposed 1% cap on students placed on the AA-AAAS track by filing a waiver with the USED.[197] Despite securing five waivers from USED since the 2017-18 academic year, Massachusetts remains in violation of ESSA's 1% cap requirement for students assessed using AA-AAAS. Put another way, the prior waivers granted to DESE have failed to effectively empower Massachusetts to meaningfully reduce both the raw number and relative proportion of students engaged in AA-AAAS assessments in English language arts ("ELA"), mathematics, or science and technology/engineering ("STE"). During the 2022-23 school year, Massachusetts demonstrated only a marginal reduction in the percentage of students taking AA-AAAS assessments

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[193] 2024 Educator's Manual for MCAS-Alt, *supra* note 184, at 66 ("Standards-based instruction is for all students. All students are capable of learning at a level that engages and challenges them. One important reason to include students with significant cognitive disabilities in standards-based instruction is to explore their capabilities. While 'daily living skills' are critical for these students to function independently, academic skills are also important. Standards in the Massachusetts Curriculum Frameworks are defined as 'valued outcomes for all students.'").

[194] *See* Cuillo v. Cuillo, 763 A.2d 1105, 1111-12 (Conn. Super. Ct. 2000) ("[A]n individual who lacks a high school diploma in this country today, is both socially stigmatized and vocationally handicapped."); Ryan Hartwig & Patricia L. Sitlington, *Employer Perspectives on High School Diploma Options for Adolescents with Disabilities*, 19 J. Disability Pol'y Stud. 5, 6 (2008).

[195] *Table 5.1 Unemployment Rates and Earnings by Educational Attainment, 2023*, U.S. Bureau of Lab. Stats., https://www.bls.gov/emp/tables/unemployment-earnings-education.htm [https://perma.cc/P539-XTB8] (last updated Aug. 29, 2024).

[196] *Id.*

[197] 34 C.F.R. § 200.6(c)(4) (2024).

across ELA, mathematics, and STE compared to the previous academic year.[198] The decrease was minimal, with the rates remaining nearly identical across all three subject areas.[199] This slight decline continues a trend of minimal progress since the 2018-19 school year, with Massachusetts achieving only modest reductions in AA-AAAS participation rates across ELA, mathematics, and STE.[200] Altogether, these minimal improvements underscore the ongoing challenge Massachusetts faces in meaningfully reducing both the absolute number and relative proportion of students participating in AA-AAAS assessments, despite having secured multiple waivers from USED since the 2017-18 school year.

Moreover, the state has fallen short in avoiding disparities in the placement of these students onto the AA-AAAS track, and it has yet to showcase tangible advancements in the academic achievement of students assessed through AA-AAAS. In fact, DESE has neglected to ensure a proportionate distribution of students of color, students from low-income backgrounds, and English learners with disabilities in AA-AAAS placements. For example, the data presented in DESE's waiver request for the 2022-23 school year exposes a lack of critical examination, and action, in addressing the disproportionate allocation of students taking an AA-AAAS over the previous five-year waiver period.[201] During the 2021-22 academic year, the percentage of African American students, Latinx students, emergent bilingual students, students from low-income backgrounds, and students with disabilities far surpassed the federally imposed 1% cap on AA-AAAS placement.[202] These specific populations were significantly more likely to be directed to participate in AA-AAAS relative to their white peers, those proficient in English, and students from more affluent backgrounds.[203] Worst still, the most blatant imbalance exists between students from low-income families and their more affluent peers, with the former being subjected to AA-AAAS at a rate 2.5 times higher than for students from middle- or upper-income families.[204]

To be sure, Massachusetts is not an exception when it comes to segregating students with the most significant cognitive disabilities and assessing them on AA-AAAS. Indeed, "for Fall 2018, placement rates in separate schools, by state, varied from well under 1% of all students with intellectual disabilities to a high of 22%."[205] Still, in order to secure a waiver extension—which, as of this writing, Massachusetts has formally

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[198] *See* Mass. Dep't of Elementary & Secondary Educ., Massachusetts "One Percent" ESSA Waiver Extension Request for School Year 2022-2023 (2022) [hereinafter *Waiver Request*].

[199] *Id.*

[200] *Id.*

[201] *See* 34 C.F.R. § 200.6(c)(4)(iii)(B)-(iv)(C) (2024); *Waiver Request*, *supra* note 198.

[202] *See Waiver Request*, *supra* note 198, at 2-3.

[203] *See id.* at 6.

[204] *Id.*

[205] Kleinert & Kearns, *supra* note 29.

requested—a state must provide evidence that prior waivers "ha[ve] been effective in enabling the State . . . to carry out the activities for which the waiver was requested and the waiver has contributed to improved student achievement."[206] Considering the underlying purpose of the 1% cap, and the specific stipulations outlined in 34 C.F.R. § 200.6 for obtaining a waiver to this cap, it is clear that the effectiveness of previous waivers hinges on the state's ability to demonstrate its facilitative role. Specifically, to qualify as "effective," the state must show that the waiver enabled adherence to the 1% cap in relevant content areas and prevented inappropriate student assignments to AA-AAAS by LEAs.[207] Additionally, the waiver must have contributed to measurable advancements in academic achievement on the whole and across discrete student groups.[208] As the foregoing data suggest, however, Massachusetts has fallen short of meeting these commands.

Additionally, 34 C.F.R. § 200.6(c)(4)(v) stipulates that if a state seeks an extension of a waiver for an additional year, as Massachusetts has done, the request must satisfy the criteria outlined in paragraphs (c)(4)(i) through (iv) of this section.[209] The state must also demonstrate substantial progress in accomplishing each component specified in the prior year's plan and timeline, as mandated by paragraph (c)(4)(iv) of this section.[210] Although the term "substantial" lacks a regulatory definition, it is evident that its usage is deliberate and implies more than just any measurable amount of progress towards fulfilling the plan and timeline.[211] Perhaps more importantly, at least for purposes of this Article's thesis, DESE has not adequately improved the implementation of its guidelines, as per 34 C.F.R. § 200.6(d), so as to ensure that Massachusetts complies with the 1% cap and students are not inappropriately designated to take AA-AAAS. Indeed, DESE has not

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[206] 20 U.S.C. § 7861(d)(2)(A); *see also Waiver Request*, *supra* note 198.

[207] 20 U.S.C. § 7861(d)(2) (noting that a state's receipt of a waiver extension requires the receiving state to demonstrate that the waiver "has been effective in enabling the State . . . to carry out the activities for which the waiver was requested and the waiver has contributed to improved student achievement").

[208] S. Rep. No. 114-231, at 18 (2016) (when this requirement is interpreted in conjunction with the purpose of the 1% cap—which aims to "ensur[e] that all students, including children with disabilities, are held to the highest standards of academic achievement, and to protect against the inappropriate use of the alternate assessment"—and the specific waiver conditions outlined in 34 C.F.R. § 200.6, it becomes evident that a state must prove the waiver's effectiveness by showing it enabled compliance with the 1% cap in the relevant content areas and prevented Local Educational Agencies (LEAs) from inappropriately assigning students to the Alternate Assessment based on Alternate Academic Achievement Standards (AA-AAAS)).

[209] 34 C.F.R. § 200.6(c)(4)(v) (2024) ("If [a] State is requesting to extend a waiver for an additional year, [such a request must] meet the requirements in paragraph (c)(4)(i) through (iv) of this section and demonstrate substantial progress towards achieving each component of the prior year's plan and timeline required under paragraph (c)(4)(iv) of this section.").

[210] *Id*.

[211] *See* Improving the Academic Achievement of the Disadvantaged, 81 Fed. Reg. 88886, 88915 (Dec. 8, 2016) (codified at 34 C.F.R § 200.6) (electing to dispatch a commenter's proposal advocating that "any measurable amount of progress towards achieving the plan and timeline" should be "considered sufficient to receive a waiver in a future year").

established clear and valid guidelines for IEP teams that outline criteria and procedures for AA-AAAS assignments.[212] This deficiency not only hinders Massachusetts from meeting this 1% cap, but also fails to safeguard against the erroneous assignment of students to take AA-AAAS.

As an initial matter, moreover, DESE's recently adopted definition of "student with the most significant cognitive disability" incorporates elements that are inadequate for, or even unrelated to, distinguishing between students who meet the criteria for "cognitive disabilities" relative to those with the "most significant cognitive disabilities."[213] For example, whether a student exhibits "significant delays in attaining age-level academic achievement standards, even with systematic, extensive[,] individually designed instruction, related services, and modifications," or faces substantial difficulty in "educational performance and [their] ability to apply learning from one setting to another" may either (1) be unrelated to the presence of a cognitive disability or (2) for students with cognitive disabilities, stem from factors other than disability-related causes.[214] These non-disability-related causes can include ineffective instruction, teaching by unqualified educators, and/or a lack of appropriate special education and supportive services that would enable the student to access the general education curriculum and achieve the same challenging academic standards as students without disabilities.

Second, DESE has not provided a defined process or set of criteria for IEP teams to employ when distinguishing between students classified as having "the most significant cognitive disabilities" in general and those who may qualify to take an AA-AAAS. In its recently-introduced Training for District IEP Teams,[215] DESE rightly acknowledges that merely being a student with one of the most significant cognitive disabilities does not automatically grant an

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[212] *See id*. at 88915-16.

[213] Massachusetts defines "students with the most significant cognitive disabilities" as those who meet all of the following criteria: (1) have cognitive disabilities evidenced by significant delays in attaining age-level academic achievement standards, even with systemic, extensive individually designed instruction, related services, and modifications, (2) have cognitive disabilities that significantly impact their educational performance and ability to apply learning from one setting to another, (3) require extensive, direct individualized instruction and substantial supports to achieve measurable gains on the challenging State academic content standards for the grade in which the student is enrolled, and (4) perform significantly below average in general cognitive functioning and adaptive behavior. *The MCAS Alternate Assessment (MCAS-Alt) and the Every Student Succeeds Act (ESSA)*, Mass. Dep't Elementary & Secondary Educ., https://www.doe.mass.edu/mcas/alt/essa/ [https://perma.cc/9DW7-WA7Y] (last updated Oct. 18, 2024). Note: "Significantly below average" is defined as a student functioning two or more standard deviations below the mean on commonly accepted norm-referenced assessments in both cognitive functioning and adaptive behavior (e.g. two or more adaptive skill areas such as daily living skills, communication, self-care, social skills, and academic skills).

[214] *Id.*

[215] *The MCAS Alternate Assessment (MCAS-Alt) and the Every Student Succeeds Act (ESSA), Updated Training for District IEP Teams (Powerpoint)*, Mass. Dep't of Elementary & Secondary Educ. 7, https://www.doe.mass.edu/mcas/alt/essa/ [https://perma.cc/3JCH-MEVD] (last updated Sept. 10, 2024).

IEP team the authority to administer an AA-AAAS.[216] Notwithstanding this distinction, however, DESE has failed to provide clarifying guidance on how IEP teams are expected to decide—and, critically, on what basis they are permitted to assign—a student to participate in AA-AAAS.[217] DESE's communication on its AA-AAAS webpage elicits further confusion, as a prominent header therein declares "Determining Which Students Should Participate in the Alternate Assessment,"[218] which is immediately followed by their new definition for students with the most significant cognitive disabilities. This creates the potential for further confusion because the website's surrounding text implies that if a student meets the definition for students with the most significant cognitive disabilities, the student should be assigned to take an AA-AAAS.[219] This notion directly contradicts DESE's earlier guidance, as well as the individualized determination provision required by the IDEA itself.[220] In this regard, DESE fails to state that the only students classified as having the most significant cognitive disabilities—and who should also participate in AA-AAAS—are those for whom, solely due to their disability, it is infeasible to attain grade-level achievement standards even with optimal educational supports and interventions. Accordingly, DESE's failure to provide appropriate guidance raises significant access concerns and, more centrally, erodes the credibility of the assessment process as a valid proxy of one's learning and overall academic progress.

As a final matter, DESE's guidance seems to erroneously suggest that, if a student participates in an AA-AAAS for one subject, the student must participate in an AA-AAAS in all academic subject areas.[221] The absence of clarity here raises additional concerns regarding, among other things, the

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[216] *Id.* ("Simply because the student is eligible does not warrant the Team recommending participation in the MCAS-Alt.").

[217] *See The MCAS Alternate Assessment (MCAS-Alt) and the Every Student Succeeds Act (ESSA), Sample MCAS-Alt Participation Tool*, MASS. DEP'T OF ELEMENTARY & SECONDARY EDUC., https://www.doe.mass.edu/mcas/alt/essa/ [https://perma.cc/3JCH-MEVD] (last updated Sept. 10, 2024).

[218] *The MCAS Alternate Assessment (MCAS-Alt) and the Every Student Succeeds Act (ESSA)*, MASS. DEP'T OF ELEMENTARY & SECONDARY EDUC., https://www.doe.mass.edu/mcas/alt/essa/ [https://perma.cc/3JCH-MEVD] (last updated Sept. 10, 2024).

[219] *See id.*

[220] *See id.*

[221] *See, e.g.*, *The MCAS Alternate Assessment (MCAS-Alt) and the Every Student Succeeds Act (ESSA), Updated Training for District IEP Teams (PowerPoint)*, MASS. DEP'T OF ELEMENTARY & SECONDARY EDUC. 9 https://www.doe.mass.edu/mcas/alt/essa/ [https://perma.cc/3JCH-MEVD] (last updated Sept. 10, 2024) ("Participation in the alternate assessment indicates that all content areas will be assessed. (ELA, Math, Science)."); *The MCAS Alternate Assessment (MCAS-Alt) and the Every Student Succeeds Act (ESSA), Companion document: Alternate Assessment Participation Tool*, MASS. DEP'T OF ELEMENTARY & SECONDARY EDUC., https://www.doe.mass.edu/mcas/alt/essa/participation-tool.pdf [https://perma.cc/5JZ6-FFVN] (last updated Sept. 10, 2024) ("Participation in the alternate assessment indicates that all content areas will be assessed. (ELA, Math, Science)."); *The MCAS Alternate Assessment (MCAS-Alt) and the Every Student Succeeds Act (ESSA), Sample MCAS-Alt Participation Tool*, MASS. DEP'T OF ELEMENTARY & SECONDARY EDUC., https://www.doe.mass.edu/mcas/alt/essa/sample-participation-tool.pdf [https://perma.cc/ESK7-Z4TB] (last updated Sept. 10, 2024) ("Participation in the alternate assessment indicates that all content areas will be assessed. (ELA, Math, Science).").

consistent application of AA-AAAS across diverse academic subjects with respect to individual capabilities. Moreover, DESE's guidance permits IEP teams to take into account factors that are unrelated to the presence or severity of a cognitive disability when assigning students to take AA-AAAS, as long as those factors are not the "sole" reason for doing so.[222] These factors encompass "a particular disability or placement; lack of standards-based instruction participation in [AA-AAAS] the previous year (since this is an annual decision); English learner (EL) status; low income [status], child[ren] in foster care, or interrupted formal education; potential impact on a school's accountability rating; [and] previous low achievement on MCAS."[223]

To address these disparities and disproportionalities that flow from such educational segregation and AA-AAAS participation, the next Part makes the case for uniformly adopting the Ninth Circuit's approach to applying the systemic violation exception to the IDEA's exhaustion requirement.

V. Discussion: Adopting the Ninth Circuit's Approach to Applying the Systemic Violation Exception to IDEA's Exhaustion Requirement

A. Violation of the LRE Requirement Compromises the Integrity of the IDEA

The violation of the LRE requirement, particularly through the disproportionate placement of students with significant cognitive disabilities into segregated educational settings, goes beyond a mere breach of a particular statutory provision. Rather, it strikes at the heart of the IDEA's foundational principles, fundamentally compromising the integrity of the IDEA's broader statutory framework.[224] The IDEA's LRE mandate was crafted to ensure that students with disabilities are not arbitrarily separated from their typically-achieving peers without a compelling educational justification.[225] As this Article contends, such disproportionate placements not only undermine this core tenet, but also erode the trust and confidence that parents, educators, and the public place in the IDEA as a guarantor of equal educational opportunities for students with disabilities.[226]

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[222] *See The MCAS Alternate Assessment (MCAS-Alt) and the Every Student Succeeds Act (ESSA), Updated Training for District IEP Teams (PowerPoint)*, Mass. Dep't of Elementary & Secondary Educ. 10, https://www.doe.mass.edu/mcas/alt/essa/ [https://perma.cc/D7M3-M3DJ].

[223] *Id.*

[224] *See* 20 U.S.C. § 1412(a)(1).

[225] *See id.* § 1412(a)(5)(A); 34 C.F.R. § 300.101 (2024).

[226] *See* Kurth et al., *supra* note 170, at 9 ("Contrary to guidelines in IDEA [§ 1412(a)(5)], which compel IEP teams to only remove students from general education 'when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily,' no LRE justification statement in this analysis referred to supplementary aids and services, nor any discussion of how these were considered when making LRE decisions.").

In addition, the systemic violation of the LRE requirement perpetuates a cycle of exclusion that runs counter to the inclusive spirit of the IDEA. In fact, the legislative intent underlying the LRE provision was to foster a learning environment where students with disabilities could interact, learn, and develop alongside their typically-achieving peers to the greatest extent possible.[227] Segregating students with significant cognitive disabilities disrupts this intent and perpetuates the notion that these students are fundamentally different and, as a consequence, perpetually excluded from the mainstream educational experience.[228] In so doing, the very essence of the IDEA, which is aimed at dismantling barriers and fostering inclusivity, is compromised.

The integrity of the IDEA is further compromised because this LRE violation perpetuates societal stereotypes and prejudices against individuals with disabilities.[229] The disproportionate placement of students with significant cognitive disabilities into segregated settings reinforces stigmas surrounding their capabilities and potential contributions.[230] Such placement communicates a message of limited expectations,[231] hindering the broader societal shift towards inclusivity and the recognition of the diverse strengths that individuals with disabilities bring to the educational environment and broader community.[232] By uniformly adopting the Ninth Circuit's approach, which identifies this violation as a systemic failure, courts can actively contribute to dismantling these harmful stereotypes and advancing the IDEA's underlying principles of inclusivity and substantive diversity. This is because the Ninth Circuit's four-factor balancing test, as articulated in *Sacramento City Unified School District v. Rachel H.*,[233] provides a robust framework for evaluating compliance with the LRE mandate.

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[227] *See* Stafford, *supra* note 36.

[228] *See* Heather J. Russell, Florence County School District Four v. Carter*: A Good "IDEA"; Suggestions for Implementing the* Carter *Decision and Improving the Individuals with Disabilities Education Act*, 45 Am. U. L. Rev. 1479, 1482 (1996) ("[E]ncouraging access of handicapped students to public schools[,] [*Mills* and *PARC*] spurred Congress in 1974 to increase federal funding for existing programs and require, for the first time, that states adopt as their goal to 'provide full educational opportunities to all handicapped children.'") (quoting Education of the Handicapped Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 578, 580).

[229] Janet S. Sauer & Cheryl M. Jorgensen, *Still Caught in the Continuum: A Critical Analysis of Least Restrictive Environment and Its Effect on Placement of Students with Intellectual Disability*, 4 Inclusion 56, 61 (2016) ("[T]hese parallel educational systems in which students are sorted by presumed performance hierarchies perpetuate negative stereotypes of certain students with disabilities compared to their typically developing peers.").

[230] *See* Brock et al., *supra* note 167, at 165 (describing how such segregation perpetuates social isolation and marginalization).

[231] *See id.*

[232] *See* Mansouri et al., *supra* note 163, at 124-25 ("Out of the studies examining students' social outcomes across settings (i.e., inclusive; segregated), the majority (80%) demonstrated that students with [significant cognitive disabilities] served in the general education classroom alongside same-age peers had better outcomes than those served in segregated settings.").

[233] 14 F.3d 1398, 1403-04 (9th Cir. 1994).

This test considers the academic benefits of placement in a regular classroom, the non-academic benefits derived from such placement, the potential negative effects on the education of other students, and the cost of supplementary aids and services.[234] In applying this comprehensive test, courts can ensure that the educational placement decisions for students with disabilities are made with a holistic understanding of their needs and potential benefits, rather than defaulting to segregation based on perceived limitations.

To be sure, the application of these factors may yield disparate and inconsistent outcomes across different courts. The Ninth Circuit has clarified that the first factor—academic benefits—should be assessed based on the student's progress on IEP goals rather than grade-level performance, acknowledging that students with significant disabilities may not achieve at the same academic level as their non-disabled peers but can still make meaningful progress.[235] This nuanced understanding ensures that the presence of supplementary aids and services is seen as a means to facilitate inclusion rather than a justification for more restrictive settings. Although "the Rachel H. opinion itself gives no guidance on the proper weight of each factor or the result in case of a tie,"[236] courts have generally tried to "interpret the requirements of IDEA by using a cost/benefit analysis of sorts, weighing the academic and nonacademic benefits to the disabled child against the costs—both the cost in resources to the public school and the effect on the education of the nondisabled children in the regular classroom community."[237]

Accordingly, incorporating the Ninth's Circuit's approach, which characterizes LRE violations as systemic failures, would enable courts to play a key role in challenging pervasive stereotypes while furthering the IDEA's core commitment to inclusivity and substantive diversity. Importantly, the systemic violation exception to the IDEA's exhaustion requirement is particularly relevant here. As discussed in prior sections, this exception allows plaintiffs to bypass the administrative process when there is a system-wide failure to comply with the basic goals of the IDEA, such as ensuring that students with disabilities are educated in the least restrictive environment. Therefore, recognizing LRE violations as systemic failures under this exception, then, underscores the pervasive nature of such violations and the need for immediate judicial intervention to rectify them.

Compromising the IDEA's integrity in this way extends to the erosion of the collaborative partnership between parents and educational institutions.[238]

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[234] *Id.* at 1404.

[235] *Id.* at 1401.

[236] Sarah E. Farley, *Least Restrictive Environments: Assessing Classroom Placement of Students with Disabilities Under the IDEA*, 77 WASH. L. REV. 809, 831 (2002).

[237] Anne Proffitt Dupre, *Disability and the Public Schools: The Case Against "Inclusion,"* 72 WASH. L. REV. 775, 797 (1997).

[238] *See* Chopp, *supra* note 42, at 426-27.

The IDEA, as mentioned previously, encourages and facilitates a collaborative decision-making process between individual schools and parents, emphasizing the importance of parental involvement in the education of children with disabilities.[239] Disproportionately segregated placements not only impede the realization of this collaborative process, but can strain the relationship between parents and educational authorities.[240] By recognizing the violation of the LRE requirement as a systemic failure, the courts can reinforce the collaborative spirit embedded in the IDEA, promoting a partnership that prioritizes the best interests of all students, including those with the most significant disabilities.

On balance, the violation of the LRE requirement through such disproportionate placement is not a mere technical breach but rather a systemic failure that strikes at the core of the IDEA's statutory and administrative integrity. The erosion of the IDEA's foundational principles, perpetuation of exclusionary practices, reinforcement of stereotypes, and strain on collaborative partnerships counsel in favor of uniformly adopting the Ninth Circuit's approach to the systemic violation exception, thereby preserving the integrity and overall effectiveness of the IDEA.

B. Courts Compelling Administrative Resolution and the Risk of Inconsistent Results

Compelling litigants to address such improper segregation through the IDEA's administrative procedures introduces a substantial risk of inconsistent results.[241] This is due, at least in part, to the fact that the IDEA's administrative framework is designed to address individual disputes, not systemic failures.[242] In addition, given the limited power of administrative hearing officers,[243] there is a significant likelihood that decisions will lack the necessary coherence to address the systemic nature of the alleged violation. Although "[a] hearing officer . . . [has] the ability to determine whether a school district has appropriately applied the state's current policies and practices concerning placement of disabled students in special education or regular classrooms to a particular student, [a hearing officer] would not have the ability to direct the state to overhaul its policies and practices."[244] This

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[239] *See* 34 C.F.R. §§ 300.501-300.502 (2024) ("The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to—(i) [t]he identification, evaluation, and educational placement of the child; and (ii) [t]he provision of FAPE to the child.").

[240] *See* Chopp, *supra* note 42, at 431.

[241] *See* J.S. *ex rel*. N.S. v. Attica Cent. Schs., 386 F.3d 107, 114 (2d Cir. 2004).

[242] *See id.* ("[T]he nature and volume of complaints were incapable of correction by the administrative hearing process.").

[243] *See id.*

[244] N.J. Prot. & Advoc., Inc. v. N.J. Dep't of Educ., 563 F. Supp. 2d 474, 487-88 (D.N.J. 2008).

inconsistency not only undermines the overall effectiveness of the IDEA's administrative process but also fails to provide a comprehensive remedy for the alleged systemic violation.

Moreover, the complexity and time-intensive nature of the administrative process may further exacerbate the risk of inconsistent outcomes.[245] The administrative proceedings under the IDEA often involve detailed fact-finding and legal analysis, thereby prolonging the resolution of disputes.[246] In cases where systemic failures are alleged, then, this protracted process may worsen the harm caused by ongoing segregation, rendering the administrative remedy ill-suited to address the urgency of such a systemic issue.[247] The potential for inconsistent results, coupled with the inefficiency of the administrative process, underscores the inadequacy of compelling litigants to pursue remedies through the IDEA's administrative channels.

The inherent limitations of the administrative process in addressing systemic violations also become evident when considering the scope of relief available. As previously mentioned, the administrative remedies available under the IDEA are primarily geared toward individualized solutions, such as specific placements determinations or discrete educational services.[248] In cases of systemic violations—as in the disproportionate placement of students with the most significant cognitive disabilities into separate educational settings, where the remedy necessitates broader structural changes—administrative decisions may necessarily fall short.[249] Courts compelling litigants to pursue administrative resolution may inadvertently restrict the remedies available, preventing the court from crafting comprehensive relief that adequately addresses the systemic violation.[250] This limitation further highlights the inadequacy of the IDEA's administrative process in handling, and ultimately resolving, such complex and system-wide issues.[251]

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[245] *See* Jose P. v. Ambach, 669 F.2d 865, 869 (2d Cir. 1982) (excusing exhaustion as futile after the defendant acknowledged that "he would be unable to expeditiously process the appeals of all the members of the plaintiff class were they to pursue administrative proceedings").

[246] *See* Jane R. Wettach & Bailey K. Sanders, *Insights into Due Process Reform: A Nationwide Survey of Special Education Attorneys*, 20 Conn. Pub. Int. L.J. 239, 251-52 (2021) ("Yet despite such differences, the literature on due process hearings speaks to a common theme that transcends state boundaries: the due process system is not living up to expectations. Indeed, over the past twenty-five years, there has been a steady stream of studies highlighting various flaws of the due process system. The general take away is that the system is inefficient, prohibitively expensive, and time-consuming.").

[247] *See* CG v. Pa. Dep't of Educ., 547 F. Supp. 2d 422, 432-33 (M.D. Pa. 2008), *on reconsideration sub nom.* C.G. v. Pa. Dep't of Educ., No. CIV. A.1:06-CV-1523, 2008 WL 4820474 (M.D. Pa. Nov. 3, 2008).

[248] *See* 20 U.S.C. § 1400(c)(5).

[249] *See* J.G. *ex rel.* Mrs. G. v. Bd. of Educ. of Rochester City Sch. Dist., 830 F.2d 444, 447-48 (2d Cir. 1987).

[250] *See* 20 U.S.C. § 1415(*l*) ("Nothing in this chapter shall be construed to restrict or limit the rights, procedures, *and remedies* available under . . . [f]ederal laws protecting the rights of children with disabilities . . . .") (emphasis added).

[251] *See* Heldman v. Sobol, 962 F.2d 148, 149 (2d Cir. 1992).

Compelling litigants to exhaust administrative remedies may also pose a practical barrier to justice, especially among members of historically marginalized populations.[252] The administrative process demands considerable time, resources, and expertise that may not be readily available to all parents and guardians of students with disabilities, particularly those from disadvantaged backgrounds.[253] By requiring these individuals to navigate a complex administrative system, then, the risk of exacerbating existing disparities in access to the general educational classroom and curriculum becomes apparent.[254] A uniform systemic violation exception, on the other hand, ensures that justice is not contingent on one's ability to navigate intricate administrative procedures, which helps to better ensure equal access to our legal system for all students and their families, not just those with adequate resources and/or social capital.

In sum, the insistence on exhausting administrative remedies for systemic violations not only risks inconsistent results but also imposes practical and procedural barriers that may well hinder the pursuit of justice for students with the most significant cognitive disabilities. The uniform adoption of the Ninth Circuit's approach to applying the systemic violation exception is not only legally sound but also normatively imperative so as to ensure that all students, regardless of the severity of their disability, can access a fair and effective legal process when challenging systemic failures under the IDEA.

C. Adopting the Systemic Violation Exception Aligns with the IDEA's Congressional Purpose and Intent

The uniform adoption of the Ninth Circuit's approach to applying the systemic violation exception to the IDEA's exhaustion requirement aligns seamlessly with both the congressional purpose and legislative intent of the IDEA. Congress crafted the IDEA with the overarching goal of ensuring equal educational opportunities for all students with disabilities.[255] The systemic violation exception recognizes that certain issues, such as disproportionate placement of a specific population of students into separate educational settings, transcend individual disputes and implicate the broader

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[252] 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 J. GENDER, SOC. POL'Y & L. 107, 113 (2011) ("Under the IDEA, due process hearings and mediation are underutilized and are used mostly by wealthy families with financial means for a private school funding remedy.").

[253] *See id.*

[254] *See id.*

[255] *See* Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 (9th Cir. 1992); *see also Heldman*, 962 F.2d at 158 ("The existence of a futility exception to section 1415's exhaustion requirement can be traced to the legislative history of the 1975 Act."); H.R. REP. NO. 99-296, at 4 (1985); S. REP. NO. 99-112, at 2 (1985).

purpose of the statute.[256] By uniformly adopting this exception, then, federal courts comport with Congress's original intent to provide an effective remedy for systemic failures that hinder the realization of the IDEA's overarching purpose.

Moreover, the IDEA's exhaustion requirement, while an important procedural safeguard, acts as a barrier when pursuing justice for systemic violations. Indeed, the legislative intent behind the exhaustion requirement was to establish a structured procedure for individual disputes, ensuring that administrative remedies were exhausted before resorting to litigation.[257] However, when confronted with systemic issues that go beyond the capacity of the administrative process,[258] a uniform systemic violation exception—such as that which was adopted by the Ninth Circuit—becomes essential. Indeed, relative to neighboring circuits that have interpreted and applied this exception, the Ninth Circuit's interpretation and approach respects the essence of the exhaustion requirement while acknowledging its limitations in addressing systemic failures. Consider a hypothetical student in Massachusetts, "John," who has significant cognitive disabilities and is placed in a segregated educational environment.

John's parents believe that his placement violates the IDEA's LRE mandate and seek to challenge the placement. Under the Ninth Circuit's approach, John's parents could argue that the administrative process is futile because it cannot address the systemic issue of widespread segregation of students with significant cognitive disabilities. They could also argue that the relief sought—systemic changes to placement policies—cannot be granted by an administrative hearing officer.

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[256] J.S. *ex rel*. N.S. v. Attica Cent. Schs., 386 F.3d 107, 113 (2d Cir. 2004). The court held that certain systemic violations necessarily excused exhaustion, including when "the plaintiffs' problems could not have been remedied by administrative bodies because the framework and procedures for assessing and placing students in appropriate educational programs were at issue, or because the nature and volume of complaints were incapable of correction by the administrative hearing process. If each plaintiff had been forced to take his or her claim before a hearing officer and appeal to another local or state official, there would have been a high probability of inconsistent results. Moreover, the plaintiffs' claims were such that an administrative record would not have been of substantial benefit to the district court." *Id.* at 114.

[257] Stafford, *supra* note 36.

[258] *See, e.g.*, CG v. Pa. Dep't of Educ., 547 F. Supp. 2d 422, 432-33 (M.D. Pa. 2008), *on reconsideration sub nom.* C.G. v. Pa. Dep't of Educ., No. CIV. A.1:06-CV-1523, 2008 WL 4820474 (M.D. Pa. Nov. 3, 2008) (holding that "[a]lthough exhaustion is ordinarily required of individuals seeking FAPE, such exhaustion would be futile in the case sub judice. Accordingly, Defendants' motion to dismiss will be denied with respect to Plaintiffs' failure to exhaust."); Mrs. W. v. Tirozzi, 832 F.2d 748, 756-58 (2d Cir. 1987) (examining a judgment granted on the pleadings and determining that the plaintiffs were justified in being exempted from the obligation to exhaust administrative remedies. The Second Circuit's decision was based on the likelihood that the plaintiffs would not obtain sufficient relief, given that the hearing officer lacked the authority to implement class action and system-wide remedies); J.G. *ex rel.* Mrs. G. v. Bd. of Educ. of Rochester City Sch. Dist., 830 F.2d 444, 446-47 (2d Cir. 1987) (determining that class allegations pertaining to a systemic failure in evaluating and placing students, developing IEPs, and informing parents of their rights warranted an exception from administrative exhaustion requirements).

However, if John's parents brought suit in the First Circuit,[259] they would likely be required to exhaust all administrative remedies, even if the process is unlikely to provide adequate relief. This is because the First Circuit emphasizes the importance of developing a complete record and allowing educational agencies the first opportunity to address issues.[260] Moreover, the First Circuit's approach could delay the resolution of the issue and prolong John's exposure to a segregated environment, exacerbating the harms associated with educational exclusion.[261]

Similar to the First Circuit, the Second Circuit's approach would require John's parents to demonstrate that the administrative process is inadequate or that the claim involves systemic issues that cannot be addressed through individual due process hearings.[262] This is because the Second Circuit requires a strong showing of inadequacy before excusing exhaustion.[263] John's parents could potentially invoke the systemic exception to the exhaustion requirement if they brought suit before the Third Circuit, but they would need to provide evidence that the administrative process cannot address the systemic issues raised. This is because the Third Circuit requires a clear demonstration that the administrative process is inadequate for addressing the issues.[264]

In the Fourth Circuit, John's parents would likely be required to exhaust all administrative remedies, as this circuit treats the exhaustion requirement as a jurisdictional rule rather than a claims-processing rule.[265] In other words, if a plaintiff fails to exhaust administrative remedies, the court lacks subject matter jurisdiction to hear the case. However, the Fourth Circuit has also recognized three narrow exceptions to this exhaustion requirement: "(1) when the administrative process would have been futile; (2) when a school board failed to give parents proper notification of their administrative rights; or (3) when administrative exhaustion would have worked severe harm upon a disabled child."[266] Accordingly, John's parents would still need to show that the administrative process is clearly inadequate or futile, which is a high bar to meet. This could likewise result in significant delays and prolonged exposure to a segregated environment for John.

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[259] *See* Doucette v. Georgetown Pub. Schs., 936 F.3d 16, 31 (1st Cir. 2019) (holding that exhaustion is required unless it is shown to be futile or inadequate).

[260] *See id.* at 32 n.22 (reasoning that, because "an adjudicating court already ha[d] the benefit of the administrative record developed during the 2010 due process hearing . . . further administrative decisionmaking . . . [would offer] negligible [benefits]").

[261] *See id.* at 31.

[262] *See* J.S. *ex rel.* N.S. v. Attica Cent. Schs., 386 F.3d 107, 114-15 (2d Cir. 2004) (recognizing futility exception where systemic issues are alleged).

[263] *See id.*

[264] *See* T.R. v. Sch. Dist. of Phila., 4 F.4th 179, 192 (3d Cir. 2021) (holding that systemic issues may excuse exhaustion if the administrative process is inadequate).

[265] *See* MM *ex rel.* DM v. Sch. Dist. of Greenville Cnty., 303 F.3d 523, 536 (4th Cir. 2002) (treating exhaustion as jurisdictional).

[266] *Id.*

Similarly, under the Fifth Circuit's approach, as seen in *Papania-Jones v. Dupree*,[267] John's parents would be required to exhaust all administrative remedies, even if the process is unlikely to provide adequate relief. This could delay the resolution of the issue and prolong John's exposure to a segregated environment, exacerbating the harms associated with educational exclusion.

In comparison, the Ninth Circuit's approach is the preferable judicial approach because it allows for more timely and effective resolution of systemic issues, ensuring that students like John receive the appropriate educational placement without unnecessary delays. By recognizing the limitations of the administrative process in addressing broad policy issues, the Ninth Circuit's framework better aligns with the IDEA's goals of providing a free appropriate public education in the least restrictive environment.

VI. Responding to Counterarguments

Opponents argue that the exhaustion requirement serves a crucial purpose in the IDEA's broader statutory framework by promoting efficiency, allowing administrative bodies to address and rectify disputes before resorting to costly and time-consuming litigation.[268] By uniformly adopting and applying the Ninth Circuit's view on the systemic violation exception, critics contend that courts risk undermining the legislative intent behind the exhaustion mandate.[269] Such an approach could potentially lead to reduced judicial efficiency and a decline in deference to agency expertise.[270] This argument, at its core, emphasizes the importance of preserving procedural safeguards to prevent the inadvertent weakening of the broader administrative framework. Yet, as this Article demonstrates, courts have long found that the systemic violation exception enhances, rather than diminishes, the effectiveness of the IDEA.[271] Recognizing the systemic violation exception is not an abandonment of the exhaustion requirement but rather a nuanced recognition that systemic failures—such as the disproportionate placement into segregated educational

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[267] 275 F. App'x 301, 304 (5th Cir. 2008) (finding that plaintiff had "not proffered sufficient evidence to support their futility argument and bypass the important administrative review process").

[268] Wasserman, *supra* note 121, at 361 (describing that exhaustion "allows for the exercise of discretion and educational expertise by state and local agencies, affords full exploration of technical educational issues, furthers development of a complete factual record, and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcoming[s] in their educational programs for [children with disabilities]") (quoting Polera v. Bd. of Educ., 288 F.3d 478, 487 (2d Cir. 2002)).

[269] *See* McCarthy v. Madigan, 503 U.S. 140, 145 (1992) (interpreting the legislative purpose behind exhaustion, which turned on the idea that "agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer").

[270] *See Polera*, 288 F.3d at 487.

[271] *See* Beth V. *ex rel.* Yvonne V. v. Carroll, 87 F.3d 80, 89 (3d Cir. 1996); *see also* Grieco v. N.J. Dep't of Educ., No. 06-4077, 2007 U.S. Dist. LEXIS 46463, at *18 (D.N.J. June 27, 2007) (asserting that exhaustion is excepted when the plaintiff claims a structural or systemic breakdown and seeks comprehensive reforms across the system).

settings and inappropriate participation in AA-AAAS—often transcend the capabilities of the IDEA's administrative procedures.[272]

By uniformly adopting and applying the Ninth Circuit's view of the systemic violation exception, the exhaustion requirement's purpose of resolving individual disputes remains fundamentally unaltered. This ultimately preserves the dispute resolution procedure's efficiency while still allowing the flexibility needed to address broader, more systemic issues that demand immediate attention and comprehensive solutions—such as the systemic exclusion of students with the most significant cognitive disabilities from the general classroom and curriculum. Consider the following case example. In *New Jersey Protection & Advocacy, Inc. v. New Jersey Department of Education*, the court determined that the student-plaintiffs were not required to exhaust the administrative remedies under the IDEA when they asserted, among other claims, a systemic failure by the SEA to uphold the IDEA's LRE mandate.[273] The scope of the students' allegations included unnecessary segregation, infringement on students' entitlement to education alongside typically-achieving peers to the maximum extent suitable, and placement in general education classrooms without adequate aids, services, and accommodations necessary for receiving an appropriate education.[274] Given that the students' complaint asserted systemic violations and sought, through a judicial order, the restructuring of state mechanisms to enforce the IDEA's LRE mandate, the court concluded that there would be no utility in plaintiffs navigating and exhausting the IDEA's due process procedures.[275]

A prospective lawsuit in Massachusetts would look quite similar to the claims brought by the plaintiffs in *New Jersey Protection & Advocacy, Inc*. For instance, if John's parents in Massachusetts were to challenge his segregated placement, they could argue that the administrative process is futile because it cannot address the systemic issue of widespread segregation of students with significant cognitive disabilities. They could also argue that the relief sought—systemic changes to placement policies—cannot be granted by an administrative hearing officer. This argument aligns with the precedent set in *New Jersey Protection & Advocacy, Inc.*, where the court recognized that systemic issues require judicial intervention to restructure state mechanisms and enforce compliance with the IDEA's LRE mandate.

Conclusion

This Article addresses a key question left open by the *Perez* Court: If a plaintiff's claim implicates FAPE, thereby requiring the exhaustion of one's

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[272] *See* Gaskin v. Pennsylvania, No. CIV. A.94-4048, 1995 WL 154801, at *4 (E.D. Pa. Mar. 30, 1995).

[273] *See* 563 F. Supp. 2d 474, 488 (D.N.J. 2008).

[274] *Id.* at 486.

[275] *Id.* at 488.

administrative remedies under the IDEA, must the plaintiff still exhaust when doing so would prove futile? To answer this question, the Article demonstrates that the Ninth Circuit's interpretation of the systemic violation exception should be uniformly adopted as the most practical, politically feasible judicial standard with which to excuse the IDEA's exhaustion requirement. It then argues that the disproportionate placement of students with the most significant cognitive disabilities into segregated educational settings serves as a structural failure to comply with the IDEA's "Least Restrictive Environment" requirement, thereby rendering the need to exhaust one's administrative remedies futile under the systemic violation exception.

Moreover, the ongoing debate surrounding the systemic violation exception to the IDEA's exhaustion requirement involves a nuanced balancing act between effectuating the Act's procedural safeguards and the need for expeditious and comprehensive remedies when those safeguards are violated. While opponents argue that recognizing such a uniform exception may compromise the procedural efficiency intended by the exhaustion requirement, this Article contends that uniformly adopting the Ninth Circuit's interpretation and application of the systemic violation exception would better address systemic failures that surpass the capabilities of the IDEA's administrative procedures. As this Article has argued, the systemic violation exception is not an abandonment of the exhaustion requirement but a judicious recognition that certain issues demand a more immediate and holistic response. It contends that the disproportionate segregation of students with significant cognitive disabilities raises grave concerns about the fulfillment of a central goal of the IDEA: the inclusion of all students, irrespective of the nature or severity of one's disability, in the least restrictive environment to the maximum extent appropriate. Once courts embrace the Ninth Circuit test as the most practical national standard to assessing LRE compliance, then, every student with disabilities—including those with the most significant cognitive disabilities—will be better positioned to learn in an inclusive educational environment that is tailored to their unique needs and, ultimately, their potential.