Beyond the Point of Exhaustion: Reforming the Exhaustion Requirement to Protect Access to IDEA Rights in Juvenile Facilities

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Congress enacted the Individuals with Disabilities Education Act (IDEA), in conjunction with other federal and state laws, to recognize a substantive right to "a free appropriate public education" for youth with disabilities and to establish a process to make this right accessible. Although the IDEA guarantees youth in juvenile facilities the same legal rights to special education services as students attending traditional public schools, correctional and education agencies across the country struggle to provide students in these facilities with special education services that meet these legal mandates. When violations occur, the IDEA imposes a threshold requirement that families exhaust administrative remedies before bringing a claim in state or federal court. Courts have interpreted this requirement, and especially its exceptions for systemic allegations of IDEA violations, in different and unpredictable ways.

This Note analyzes the IDEA's application of the exhaustion requirement in the context of class action claims against juvenile facilities in federal courts. Part I outlines the substantive rights and procedural protections under the IDEA. Part II examines how structural features of juvenile facilities impede access to IDEA rights. Part III analyzes how the exhaustion requirement and its exceptions interact with the juvenile justice context to further deny access to IDEA rights. To address these concerns, Part IV proposes a range of reforms to the exhaustion requirement for allegations of systemic IDEA violations in juvenile facilities.

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INTRODUCTION

"[The Education for All Handicapped Children Act] establishes a process by which the goal of educating all handicapped can and will be accomplished."[1] The Individuals with Disabilities Education Act (IDEA), previously the Education for All Handicapped Children Act,[2] entitles all children between the ages of three and twenty-one ("youth") with a disability to "a free appropriate public education" (FAPE).[3] This entitlement extends to students attending schools in juvenile and adult correctional facilities.[4] Yet, research indicates that youth in the juvenile justice system frequently lack access to adequate education services, including essential instructional materials, requisite class time, and qualified teachers.[5] For youth with disabilities in juvenile facilities, special education services are particularly limited.[6]

Although states have an affirmative obligation under the IDEA's "Child Find" provision to identify, locate, and evaluate

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1. 121 CONG. REC. 37, 413 (1975) (statement of Senator Harrison Williams, principal author of the Education for All Handicapped Children Act of 1975).

2. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400–1482). For simplicity, this Note will henceforth refer to the Act as the IDEA.

3. 20 U.S.C. § 1412(1)(A).

4. 34 C.F.R. § 300.2(b) (explaining that IDEA provisions "apply to all political subdivisions of the State that are involved in the education of children with disabilities, including . . . state and local juvenile and adult correctional facilities").

5. *See generally* Lindsay McAleer, *Litigation Strategies for Demanding High Quality Education for Incarcerated Youth: Lessons from State School Finance Litigation*, 22 GEO. J. ON POVERTY L. & POL'Y 545, 551 (2015) ("Approximately one-quarter of youth in custody spend less than four hours per day at school . . . education provided by on-site schools is limited in instruction hours, relies heavily on worksheets, is far below grade level, fails to advance basic skills, and is not geared towards keeping students on track to graduate."); OFF. FOR C.R., U.S. DEP'T OF EDUC., PROTECTING THE CIVIL RIGHTS OF STUDENTS IN THE JUVENILE JUSTICE SYSTEM (Dec. 2, 2017), https://www2.ed.gov/about/offices/list/ocr/docs/2013-14-juvenile-justice.pdf [https://perma.cc/RU2Q-TEWS] ("Although youth in confinement are often the students in the greatest need of academic, emotional, and behavioral supports, the data reported by justice facilities . . . indicate that these students often receive less support than their peers who are not in confinement."); Peter E. Leone & Pamela Cichon Wruble, *Education Services in Juvenile Corrections: 40 Years of Litigation and Reform*, 38 EDUC. & TREATMENT CHILD. 587, 588–89 (2015) ("During the past 40 years local and state-operated juvenile prisons have frequently failed to meet state and federal regulations with regard to curriculum, length of the school day, teacher qualifications, instructional practices, and discipline.").

6. This Note uses "special education services" to refer to the special education and related services that youth with disabilities are entitled to receive under the IDEA. *See* 20 U.S.C. § 1412.

children with disabilities,[7] juvenile facilities often fail to identify students with disabilities in a timely manner, causing delays in access to special education services.[8] Even when facilities promptly identify students with disabilities, they often do not update or implement the student's Individualized Education Program (IEP).[9] Facilities commonly provide special education services based on available resources rather than what is legally mandated to meet students' individual needs, and there is wide variation among states and facilities in the quality of services provided.[10] Several factors contribute to the inadequacy of these services: short length of stays, placements geographically distant from a child's home and prior school district, inconsistent intake procedures, inaccessible records, failure to conform IEPs to juvenile facility contexts, lack of interagency collaboration, ineffective governance, and insufficient oversight and accountability.[11]

The connection between education and juvenile justice raises the stakes of providing special education in juvenile facilities.[12] On one hand, youth facing educational challenges related to their disabilities are at a higher risk of disciplinary exclusions and dropping out of school.[13] Dropping out of high school, in turn,

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7. 20 U.S.C. § 1412(a)(3)(A).

8. *See* Jennifer A.L. Sheldon-Sherman, *The IDEA of an Adequate Education for All: Ensuring Success for Incarcerated Youth with Disabilities*, 42 J.L. & EDUC. 227, 236 (2013); *see also* Mary Magee Quinn et al., *Youth with Disabilities in Juvenile Corrections: A National Survey*, 71 EXCEPTIONAL CHILD. 339 (2005) (discussing the results of a national survey examining the identification of youth with disabilities in the juvenile corrections system).

9. Sheldon-Sherman, *supra* note 8, at 237. For a definition and discussion of IEPs, see *infra* Part I.A.

10. *See id.*; *see also* Quinn et al., *supra* note 8, at 342.

11. *See infra* Part II.B.

12. *See* ANDREA J. SEDLAK & KARLA S. MCPHERSON, U.S. DEP'T OF JUST., NCJ NO. 227728, YOUTH'S NEEDS AND SERVICES: FINDINGS FROM THE SURVEY OF YOUTH IN RESIDENTIAL PLACEMENT 5 (Apr. 2010), https://www.ojp.gov/pdffiles1/ojjdp/227728.pdf [https://perma.cc/2HLN-FZ26] (discussing the connection between education and juvenile delinquency challenges).

13. *See* Peter E. Leone et al., *Special Education Programs for Youth with Disabilities in Juvenile Corrections*, 53 J. CORR. EDUC. 46, 46–47 (2002) ("Most incarcerated youth lag two or more years behind their age peers in basic academic skills, and have higher rates of grade retention, absenteeism, and suspension or expulsion."). In 2016–17, the U.S. average adjusted cohort graduation rate (ACGR) was eighty-five percent, but the average ACGR for students with disabilities was only sixty-seven percent. JOEL MCFARLAND ET AL., NAT'L CTR. FOR EDUC. STAT., TRENDS IN HIGH SCHOOL DROPOUT AND COMPLETION RATES IN THE UNITED STATES: 2019, 38 (Jan. 2020), https://nces.ed.gov/pubs2020/2020117.pdf [https://perma.cc/2Y36-CCLG].

places youth at a higher risk of juvenile system involvement.[14] Research indicates that access to appropriate special education services contributes to these dropout rates.[15] But when youth actively engage in educational programming during their confinement, they are less likely to have disciplinary problems in school and throughout the facility during their stay.[16] Access to education in juvenile facilities also reduces recidivism and increases post-release employment and life opportunities.[17]

Legal advocates have filed class action lawsuits under the IDEA in state and federal courts seeking to ensure the provision of special education services to youth in juvenile facilities, jails, and prisons.[18] Hampering these efforts, however, the IDEA

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14. KAITLYN SILL, CRIM. JUST. COORDINATING COUNCIL, A STUDY OF THE ROOT CAUSES OF JUVENILE JUSTICE SYSTEM INVOLVEMENT 7, 43 (Nov. 2020), https://cjcc.dc.gov/sites/default/files/dc/sites/cjcc/CJCC%20Root%20Cause%20Analysis%20Report_Compressed.pdf [https://perma.cc/3AE4-PQMJ] (discussing the increased rates of justice system involvement for students who have been suspended or dropped out of school).

15. Lisa M. Geis, *An IEP for the Juvenile Justice System: Incorporating Special Education Law Throughout the Delinquency Process*, 44 U. MEM. L. REV. 869, 885–86 (2014) ("Factors contributing to the special-needs dropout rate include 'frequent changes in the level of services received,' whether the student is pulled out of class or receives mainstream services, the amount of time allocated to special education services, and the type of services provided for the student.").

16. PETER LEONE & LOIS WEINBERG, CTR. FOR JUV. JUST. REFORM, ADDRESSING THE UNMET EDUCATIONAL NEEDS OF CHILDREN AND YOUTH IN THE JUVENILE JUSTICE AND CHILD WELFARE SYSTEMS 20 (May 2010) https://assets.aecf.org/m/resourcedoc/CJJR-AddressingtheUnmetEducationalNeeds-2010.pdf [https://perma.cc/NA7L-2KWH].

17. SUE BURRELL & LOREN WARBOYS, U.S. DEP'T OF JUST., NCJ NO. 179359, SPECIAL EDUCATION AND THE JUVENILE JUSTICE SYSTEM 10 (July 2000), https://www.ojp.gov/pdffiles1/ojjdp/179359.pdf [https://perma.cc/MH7X-8CM4]; *see also* Thomas G. Blomberg et al., *Juvenile Justice Education, No Child Left Behind, and the National Collaboration Project*, Juv. Just. News, Apr. 2006, at 143 ("Delinquent youths benefit from quality educational services and academic achievement while incarcerated because they are more likely to return to public school upon release, which leads to their reduced likelihood of rearrest."); COAL. FOR JUV. JUST., ABANDONED IN THE BACK ROW: NEW LESSONS IN EDUCATION AND DELINQUENCY PREVENTION 2 (2001), https://www.juvjustice.org/sites/default/files/resource-files/resource_122_0.pdf [https://perma.cc/YES7-5QWZ] ("For juveniles involved in quality education programs, reoffense rates can be reduced by 20 percent or more.").

18. *See* Leone & Cichon Wruble, *supra* note 5, at 592 (discussing class action litigation challenging the adequacy of special education services in juvenile corrections from 1975–2014). The IDEA entitles youth with disabilities confined in adult jails and prisons to a FAPE, subject to exceptions added by the 1997 IDEA amendments. For example, the 1997 amendments exempted states from the obligation to provide a FAPE to youth aged eighteen through twenty-one who were incarcerated in adult correctional facilities and were not identified as having a disability or did not have an individualized education program prior to incarceration. 20 U.S.C. § 1412(1)(B(ii). The 1997 amendments also excluded children incarcerated in adult prisons from requirements relating to participation in general assessments and transition planning and allowed for

requires plaintiffs to exhaust administrative remedies before filing a lawsuit in state or federal court.[19] This Note examines the IDEA's exhaustion requirement, focusing on its interaction with youth in juvenile facilities and their families. Part I discusses the IDEA's legislative history and the rights and protections it affords to youth with disabilities and their families. Part II explores how structural challenges in the juvenile facility context impede access to IDEA rights, and Part III examines how the exhaustion requirement and its exceptions interact with features of juvenile facilities to further prevent access to IDEA rights. Part IV addresses these concerns by proposing a range of reforms to the exhaustion requirement for systemic claims arising from juvenile facilities.

I. RIGHTS UNDER THE IDEA

In 1975, only 3.9 million of the 8 million children with disabilities across the country had access to an adequate education.[20] Public schools routinely excluded students with disabilities from meaningful instruction through expulsions, suspensions, and transfers among schools, and several states allowed school districts to turn away students deemed "uneducable" by educators.[21] Even when including students with disabilities in their classrooms, school systems often segregated them from general education students and failed to provide them with necessary support and services.[22] Congress responded to

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IEP modification if "the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated." 20 U.S.C. § 1414(d)(7). This Note focuses on the provision of special education in juvenile facilities and does not explore the challenges specific to youth with disabilities who are incarcerated in adult jails and prisons. Much of the discussion regarding juvenile facilities, however, also applies to youth incarcerated in adult jails and prisons. For a further discussion on special education in adult correctional facilities, see, e.g., Melissa Edelson, *Special Education in Adult Correctional Facilities: A Right Not a Privilege*, 50 LOY. L.A. L. REV. 93 (2017); Blakely Evanthia Simoneau, *Special Education in American Prisons: Risks, Recidivism, and the Revolving Door*, 15 STAN. J.C.R. & C.L. 87 (2019); Elizabeth Cate, *Teach Your Children Well: Proposed Challenges to Inadequacies of Correctional Special Education for Juvenile Inmates*, 34 N.Y.U. REV. L. & SOC. CHANGE 1 (2010).

19. 20 U.S.C. § 1415(*l*).

20. Rosemary Queenan, *Delay & Irreparable Harm: A Study of Exhaustion Through the Lens of the IDEA*, 99 N.C. L. REV. 985, 999 (2021).

21. Simoneau, *supra* note 18, at 92–93.

22. *Id.* at 93 ("[O]ther children were placed in separate rooms or schools with little to no teaching or interaction with general education students or curriculum, often referred to as 'warehousing.'").

these problems by enacting the IDEA. The law's stated purposes are to guarantee all children with disabilities "a free appropriate public education," to protect the rights of students with disabilities and their families, to assist state and local agencies in providing special education services, and to ensure the effectiveness of special education services.[23]

Prior class action litigation highlighting the widespread failure to provide special education services—most notably, *PARC v. Pennsylvania*[24] and *Mills v. District of Columbia*[25]—prompted congressional action and heavily influenced Congress' design of the IDEA.[26] As noted by the Court in *Board of Education v. Rowley*, "[the IDEA] was passed in response to Congress' perception that a majority of handicapped children in the United States 'were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to drop out.'"[27] Although the IDEA's legislative history does not explicitly mention students in juvenile facilities, Congress passed the IDEA with the intent to remedy educational conditions similar to those faced by youth in facilities

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23. 20 U.S.C. § 1400(d).

24. Pennsylvania Ass'n for Retarded Child. v. Com. of Pa., 343 F. Supp. 279 (E.D. Pa. 1972) (approving an amended consent agreement which stipulated that it was "the Commonwealth's obligation to place each [child with a disability] in a free, public program of education and training appropriate to the child's capacity"). Parties entered into this agreement after plaintiffs challenged state laws that authorized the State to change educational placements and exclude students with disabilities from a public education without initial notice and a hearing. *Id.*

25. Mills v. District of Columbia, 348 F. Supp. 866 (D.D.C. 1972) (holding that students with disabilities are entitled to receive publicly supported education and the "inadequacies of the District of Columbia public school system, whether occasioned by insufficient funding or administrative inefficiency, could not be permitted to bear more heavily on the 'exceptional' or handicapped child than on the normal child").

26. *See* Mark C. Weber, *IDEA Class Actions After Wal-Mart v. Dukes*, 45 U. TOL. L. REV. 471, 475 (2014) ("[The IDEA] was Congress's response to a series of class actions brought in the federal courts claiming that children with disabilities had the constitutional right to obtain appropriate educational services."); *see also* Joshua M. Anderson, *IDEA Class Action Lawsuits and Other Means of Challenging Systemic Violations of Federal Special Education Law*, 15 TENN. J.L. & POL'Y 224, 229–30 (2021) (describing Congress' stated purposes for the IDEA; noting "[t]hese stated purposes and the corresponding operative sections of the Act were enacted in response to class action litigation challenging civil rights violations of students with disabilities"); *see also* Simoneau, *supra* note 18, at 94–98 (in reference to *PARC* and *Mills*, stating, "[o]ne can trace these cases to many of the cornerstone ideas that are still present in the IDEA today").

27. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley, 458 U.S. 176, 179 (1982) (quoting H.R. REP. NO. 94-332, at 2 (1975)).

today.[28] Additionally, at the time of the 1997 IDEA amendments,[29] Representative Matthew Martinez spoke directly on the Act's application to youth incarcerated in adult facilities. Martinez, on the congressional record, stated:

> [P]ublic agencies should remember that children with disabilities who are incarcerated in adult correctional facilities will be more likely to return to prison after their initial release if they do not have the educational tools to survive in life after prison. The small savings gained by not serving these children while they are in adult correctional facilities will pale in comparison to exorbitant future costs of additional prison time or reliance on social welfare programs.[30]

The IDEA requires states accepting federal special education funding to provide students with disabilities with a "free appropriate public education" in the "least restrictive environment."[31] To enforce this requirement, the law includes several mechanisms. These mechanisms include both procedural safeguards to ensure students receive their substantive educational rights[32] and administrative processes for resolving disputes between families and educational agencies when allegations of noncompliance arise.[33] Like other statutes providing judicial remedies,[34] the IDEA requires parents in most cases to exhaust local and state administrative remedies before filing a civil action in state or federal court.[35] The remainder of this Part reviews the IDEA's substantive and procedural protections and available administrative remedies.

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28. Congress enacted the IDEA to remedy the systemic failure to provide children with disabilities access to an appropriate education. *See generally* Simoneau, *supra* note 18, at 92–99.

29. As discussed, *supra* note 18, the 1997 IDEA amendments exempted states from various obligations concerning youth incarcerated in adult prisons and jails.

30. 143 CONG. REC. E973 (1997) (statement of Representative Matthew Martinez).

31. 20 U.S.C. § 1412(a)(1)(A); 20 U.S.C. § 1412(a)(5).

32. 20 U.S.C. § 1415.

33. *See generally* Joseph Fluehr, *Navigating Without a Compass: Incorporating Better Parental Guidance Systems into the IDEA's Dispute Resolution Process*, 8 DREXEL L. REV. 155, 164–69 (2015).

34. *See, e.g.*, 42 U.S.C. § 1997e(a) (requiring exhaustion under the Prison Litigation Reform Act); 28 U.S.C. § 2254(b)(1)(A) (requiring exhaustion under the Antiterrorism and Effective Death Penalty Act of 1996).

35. 20 U.S.C. § 1415(i); *see infra* Part III.A.

A. THE RIGHT TO A FREE APPROPRIATE PUBLIC EDUCATION

The IDEA is a comprehensive statutory scheme that guarantees students with disabilities a free appropriate public education (FAPE).[36] To be eligible to receive services under the IDEA, a student must be diagnosed with at least one statutorily defined disability, and, by reason of the disability, to be in need of special education and related services.[37] The statute defines FAPE as special education and related services provided at the public's expense that adhere to state educational agency standards. These services include an "appropriate" education from prekindergarten through twelfth grade that must be provided in accordance with an IEP.[38] In *Endrew F. v. Douglas County School District RE-1*, the Supreme Court clarified that the IDEA's FAPE provision requires an IEP be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."[39] The IDEA also imposes a continuing obligation on covered states[40] to identify, locate, and evaluate children who need special education and related services (known as the "Child Find" requirement).[41]

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36. 20 U.S.C. § 1412(a)(1)(A) ("A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.").

37. 20 U.S.C. § 1401(3)(A) (2006). Disabilities covered by the statute include "intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities." *Id.*

38. 20 U.S.C. § 1412(a)(1)(A); 20 U.S.C. § 1414(d). In addition to defining this educational right, the Act outlines a number of procedural and content requirements in its provision. For example, schools or school systems must organize a team to develop and annually review the child's IEP and consider "the concerns of the parents for enhancing the education of their child." 20 U.S.C. § 1414(d)(1)(B)(ii); 20 U.S.C. § 1414(d)(4)(A)(i)–(ii); 20 U.S.C. § 1414(d)(3)(A)(ii). The IEP team is composed of the child's parents, at least one regular education teacher (if the child is participating in regular education classes), at least one special education teacher, an administrator, a specialist, and the child, whenever appropriate. 20 U.S.C. § 1414(d)(1)(B).

39. Endrew F. *ex rel.* Joseph F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 999 (2017).

40. For simplicity, this Note refers to states receiving federal funds for special education under the IDEA as "covered states."

41. 20 U.S.C. § 1412(a)(3).

B. PROCEDURAL SAFEGUARDS

To ensure "meaningful parental participation in all aspects of a child's educational placement," the IDEA imposes "a comprehensive system of procedural safeguards"[42] to which parents or other caregivers have a right to notice.[43] Procedural safeguards include access to educational records; parental consent before conducting an initial evaluation or reevaluation and before initially providing services; prior written notice from an agency before it initiates or changes a child's identification, evaluation, or placement; independent educational evaluations; parental participation in meetings; the ability to present and resolve complaints; dispute resolution options; and a right for any party aggrieved by a decision in a due process hearing to file a civil action in state or federal court.[44] As recognized by the Supreme Court, these procedural safeguards "guarantee parents both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate."[45] The dispute resolution processes, mandated by the IDEA and relevant regulations, require states to provide parents with opportunities for voluntary mediation,[46] due process hearings,[47] and state complaint procedures.[48]

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

43. 20 U.S.C. § 1415(d) (requiring that at least once a year, parents receive a copy of available procedural safeguards and a description of these procedural safeguards in their native language "unless it clearly is not feasible to do so").

44. 20 U.S.C. § 1415; 34 C.F.R. § 300.151; 34 C.F.R. § 300.503; 34 C.F.R. § 300.300. In states with a two-tier due process system, parties must first appeal the initial due process hearing decision to the state educational agency before filing a civil action. 20 U.S.C. § 1415. For a more extensive discussion of the IDEA's procedural safeguards, see 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, 356–60 (2009).

45. *Honig*, 484 U.S. at 311–12.

46. 20 U.S.C. § 1415(e). Congress created the informal, non-decisional mediation process in response to criticisms of adversarial due process hearings and to facilitate the collaborative development of legally enforceable written agreements between parents and school districts on how to respond to parent concerns and provide appropriate services to their children. *See* Fluehr, *supra* note 33, at 165 ("Through their experiences, state officials noticed that once parents asserted their formal rights, there was less opportunity for compromise and cooperation. Thus, states found a need for informal alternative dispute processes. . . .").

47. 20 U.S.C. § 1415(f); 34 C.F.R. § 300.511. Unlike voluntary mediation, the due process hearing process requires formal complaints and results in written decisions. *See*

II. DIFFICULTIES AFFORDING IDEA RIGHTS IN THE JUVENILE FACILITY CONTEXT

The U.S. Constitution does not recognize a fundamental right to education.[49] Federal laws[50] and state constitutions,[51] however, impose standards for the quality of education inside juvenile facilities. The IDEA, specifically, does not relax its educational requirements for youth residing in juvenile facilities.[52] This Part discusses the structure of juvenile facilities and examines how the features of these institutions prevent students in juvenile facilities from accessing rights and protections mandated under the IDEA.

Perry A. Zirkel, *A Comparison of the IDEA's Dispute Resolution Processes-Complaint Procedures and Impartial Hearings: An Update*, 369 EDUC. L. REP. 550 (2019).

48. 34 C.F.R. § 300.151. Any person, not just the child's parents, can file a complaint with the state educational agency alleging a violation that "occurred not more than one year prior to the date that the complaint is received." 34 C.F.R. § 300.153(b)–(c). IDEA regulations oblige state educational agencies to adopt written procedures for state complaints, which vary by state. 34 C.F.R. § 300.151.

49. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (holding that education is not a right explicitly or implicitly protected under the U.S. Constitution).

50. For instance, the Every Student Succeeds Act (ESSA) provides states with federal funding for education with the obligation that states follow certain accountability requirements, with Title I, Part D of the Act specifically allocating funds for youth involved in or at risk of involvement in the justice system. 20 U.S.C. § 6421. Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disabilities Act (ADA) also provide federal protections to youth with disabilities in juvenile facilities. These statutes, however, protect against discrimination rather than create substantive rights to education. *See* Cate, *supra* note 18, at 20–22 (comparing the legal protections under the IDEA, Section 504, and the ADA).

51. *See* Katherine Twomey, *The Right to Education in Juvenile Detention Under State Constitutions*, 94 VA. L. REV. 765 (2008) (arguing that a right to education in juvenile detention facilities exists based on state constitutional provisions); *see also* Karen Sullivan, *Education Systems in Juvenile Detention Centers*, 2018 B.Y.U. EDUC. & L.J. 159, 159 (2018) (proposing that the government incentivize state reform of education in justice facilities through providing federal funding grants); *see also* McAleer, *supra* note 5, at 556–60 (suggesting that advocates use state constitutional guarantees in litigation addressing education in juvenile facilities); *see also* MOLLY A. HUNTER, EDUC. LAW CTR., STATE CONSTITUTION EDUCATION CLAUSE LANGUAGE, https://edlawcenter.org/assets/files/pdfs/State%20Constitution%20Education%20Clause%20Language.pdf [https://perma.cc/YSM2-H8HT] (excerpting sections of education clauses from each state's constitution).

52. IDEA rights and protections, however, do not apply fully to youth incarcerated in adult jails and prisons. *See supra* text accompanying note 18.

A. OVERVIEW OF JUVENILE FACILITIES

1. *Types of Juvenile Facilities*

Although youth confinement rates have decreased by about sixty percent since 2000,[53] on any given day, residential facilities across the United States still confine approximately 35,485 youth.[54] The Census of Juveniles in Residential Placement, a biennial census administered by the U.S. Census Bureau through an interagency agreement with the Office of Juvenile Justice and Delinquency Prevention (OJJDP), requires each juvenile residential facility in the United States to self-classify as one of the following facility types: detention center, long-term secure facility, reception/diagnostic center, residential treatment center, group home, ranch/wilderness camp, shelter, boot camp, or other.[55] The Census also collects information from each facility to report individual-level information on confined youth.[56]

Juvenile facility types have similar restrictive environments, but they serve different purposes within the juvenile justice system. In 2019, over sixty-five percent of all youth housed in juvenile facilities were placed in detention centers and long-term secure facilities,[57] which resemble adult correctional facilities.

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53. For a discussion of different factors contributing to this decrease in youth confinement rates, including the enactment of federal legislation protecting youth in facilities and state laws to "raise the age" for jurisdiction in juvenile courts, see Wendy Sawyer, *Youth Confinement: The Whole Pie 2019*, PRISON POL'Y INITIATIVE (Dec. 19, 2019), https://www.prisonpolicy.org/reports/youth2019.html [https://perma.cc/WM9K-N6BD].

54. Melissa Sickmund, *Easy Access to the Census of Juveniles in Residential Placement,* NAT'L CTR. FOR JUV. JUST. (2021), https://www.ojjdp.gov/ojstatbb/ezacjrp/asp/selection.asp (select "2019" for Year of Census; select "Detained" and "Committed" for Placement Status, General Status). The Census of Juveniles in Residential Placement provides one-day population counts, measuring the "standing population in facilities." *Methods, Easy Access to the Census of Juveniles in Residential Placement: 1997–2019*, NAT'L CTR. FOR JUV. JUST., https://www.ojjdp.gov/ojstatbb/ezacjrp/asp/methods.asp [https://perma.cc/RT7U-ALSC].

55. *Methods*, *supra* note 54. Note that in 2019, no facilities self-classified as "Other." Sickmund, *supra* note 54 (select "2019" for Year of Census; select "Year of Census" for Row Variable; select "Facility Self-Classification" for Column Variable). *See also* Sawyer, *supra* note 53.

56. *Census of Juveniles in Residential Placement*, U.S. CENSUS BUREAU, https://www.census.gov/econ/overview/go3100.html [https://perma.cc/RG36-HRPB]; *Census of Juveniles in Residential Placement: Overview*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, https://ojjdp.ojp.gov/research-and-statistics/research-projects/Census-of-Juveniles-in-Residential-Placement/overview [https://perma.cc/9XV9-HCXR].

57. Sickmund, *supra* note 54 (select "2019" for Year of Census; select "Detained" and "Committed" for Placement Status, General Status; select "Placement Status General" for Row Variable; select "Facility Self-Classification" for Column Variable).

Over ninety percent of youth housed in these facilities, in turn, were "restricted by locked doors, gates, or fences."[58] Furthermore, detention centers and long-term secure facilities more frequently use mechanical restraints and lock children alone in rooms for more hours a day than other types of juvenile facilities.[59] Detention facilities usually confine youth temporarily before their case is adjudicated and occasionally hold youth awaiting either disposition (sentencing) or transfer to court-mandated placements in a long-term facility.[60] In 2019, the majority of juvenile confinements in detention facilities lasted thirty days or less.[61] At long-term facilities, which include correctional facilities, fifty-nine percent of youth are held for longer than ninety days and eighteen percent are held for longer

58. *Id.* (select "2019" for Year of Census; select "Detained" and "Committed" for Placement Status, General Status; select "Placement Status General" for Row Variable; select "Lock Status" for Column Variable).

59. SARAH HOCKENBERRY & ANTHONY SLADKY, U.S. DEP'T OF JUST., NCJ NO. 251785, JUVENILE RESIDENTIAL FACILITY CENSUS, 2016: SELECTED FINDINGS 16 (Dec. 2018), http://www.ncjj.org/pdf/Juvenile%20Justice%20Bulletin/JFRC2016.pdf [https://perma.cc/Z4K8-TNGD] (Forty-four percent of detention centers and fifty-two percent of training schools, a type of long-term secure facility, reported using mechanical restraints, such as "handcuffs, leg cuffs, waist bands, leather straps, restraining chairs, strait jackets, or other mechanical devices" in the previous month. Forty-four percent of detention centers and forty percent of training schools reported locking "a youth alone in some type of seclusion for four or more hours to regain control of their unruly behavior." By contrast, only four percent of shelters, one percent of group homes, nineteen percent of ranch/wilderness camps, and fourteen percent of residential treatment centers reported using mechanical restraints, and four percent of shelters, zero percent of group homes, seven percent of ranch/wilderness camps, and nine percent of residential treatment centers reported locking youth in isolation).

60. *Glossary, Easy Access to the Census of Juveniles in Residential Placement: 1997–2019*, NAT'L CTR. FOR JUV. JUST., https://www.ojjdp.gov/ojstatbb/ezacjrp/asp/glossary.asp [https://perma.cc/B8MB-NQX3] (defining a "detention center" as "a short-term facility that provides temporary care in a physically restricting environment for juveniles in custody pending court disposition and, often, for juveniles who are adjudicated delinquent and awaiting disposition or placement elsewhere, or are awaiting transfer to another jurisdiction"); *see also* Michael P. Krezmien et al., *Detained and Committed Youth: Examining Differences in Achievement, Mental Health Needs, and Special Education Status*, 31 EDUC. & TREATMENT CHILD. 445, 449 (2008) (describing the differences between stays in detention and commitment facilities).

61. Sickmund, *supra* note 54 (select "2019" for Year of Census; select "Detained" and "Committed" for Placement Status, General Status; select "Placement Status General" for Row Variable; select "Days Since Admission" for Column Variable). In 2019, 20.6% of stays at juvenile detention centers were six days or less, 55.3% of stays were thirty days or less, and 81.4% of stays were one hundred eighty days or less. Less than three percent of all stays lasted longer than a year. *Id.*

than a year.[62] The vast majority of youth at long-term facilities are confined there pursuant to a court-ordered disposition.[63]

2. *Disparities in Youth Confinement*

Youth with disabilities are significantly overrepresented in the juvenile justice system. One national survey of state correctional facilities in 2000 found that, on average, 33% of youth in juvenile facilities receive special education services, compared with the 8.8% of youth nationwide who were served under the IDEA that year.[64] The study noted that those figures likely understate the proportion of youth with disabilities in juvenile facilities, given both the wide variability among states in the rates of detained youth receiving IDEA services and the inadequate procedures facilities often use to identify youth with disabilities.[65] Although the precise number of incarcerated youth with disabilities is difficult to assess, researchers have generally estimated that between thirty to seventy percent of youth in juvenile facilities have disabilities, with some studies estimating up to eighty-five percent.[66]

Youth of color are also overrepresented in juvenile facilities.[67] Black youth are more than sixteen times as likely to be confined

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62. *Id.*; *see also Glossary*, *supra* note 60 (defining "long-term secure facility" as "a specialized type of facility that provides strict confinement for its residents," which includes "training schools, reformatories, and juvenile correctional facilities").

63. Sickmund, *supra* note 54 (select "2019" for Year of Census; select "Long-term Secure" for Facility Self-Classification, Facility Characteristics; select "Year of Census" for Row Variable; select "Placement Status Detail" for Column Variable). In 2019, approximately eighty-six percent of youth held in long-term facilities were placed as part of a court-ordered disposition and fourteen percent were being detained prior to adjudication or disposition. *Id.*

64. Quinn et al., *supra* note 8, at 342 ("Our data indicate that the number of youth identified and receiving special education services in juvenile corrections is almost four times higher . . . than in public school programs during the same time period.").

65. *Id.* at 342–43 (noting that "five of the states responding to this survey reported that [fifty percent] or more of their students were identified as having a disabling condition and were receiving special education services").

66. *Id.* at 342 (noting that a substantial portion of research in this area "has been limited geographically and has been compromised by methodological problems"); *see also* NAT'L COUNCIL ON DISABILITY, BREAKING THE SCHOOL-TO-PRISON PIPELINE FOR STUDENTS WITH DISABILITIES 5 (June 18, 2015), http://www.ncd.gov/sites/default/files/Documents/NCD_School-to-PrisonReport_508-PDF.pdf [https://perma.cc/3UQY-H2NM] ("Studies show that up to [eighty-five] percent of youth in juvenile detention facilities have disabilities that make them eligible for special education services.").

67. *See* ANNIE E. CASEY FOUND., *Youth Incarceration in the United States* (Dec. 14, 2021), https://assets.aecf.org/m/resourcedoc/aecf-youthIncarcerationinfographic-2021.pdf [https://perma.cc/2ENH-986N]; *see also* McAleer, *supra* note 5, at 547 ("[T]he residential

than their Asian and Pacific Islander peers, four times as likely as their white peers, and three times as likely as their Hispanic peers.[68] One factor contributing to this racial disparity is the national increase in schools instituting zero-tolerance and exclusionary discipline policies (often associated with the "school-to-prison pipeline") that criminalize minor transgressions at school and disproportionately push students of color out of the classroom and into the juvenile and adult criminal justice systems.[69] Likewise, students with disabilities are disproportionately subject to exclusionary discipline practices and the disparities in punishment increase when disaggregated by race.[70] In 2017–18, youth with disabilities served under the IDEA accounted for 13.2% of the total national student enrollment but 24.5% of the students receiving one or more out-of-school suspensions.[71] In 2017–18, Black students served under the IDEA represented 2.3% of total student enrollment, but made up 8.8% of students receiving one or more out-of-school suspensions, 8.4% of students referred to law enforcement, and 9.1% of students who were arrested.[72]

placement rate for black youth was more than 4.5 times the rate for white youth, and the rate for Hispanic youth was 1.8 times the rate for white youth.").

68. ANNIE E. CASEY FOUND., *supra* note 67.

69. *See generally* Samantha Buckingham, *A Tale of Two Systems: How Schools and Juvenile Courts Are Failing Students*, 13 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 179 (2013) (describing the "school-to-prison pipeline"); Geis, *supra* note 15, at 880–82 (discussing the higher rates of suspensions and expulsions for students with disabilities).

70. OFF. FOR C.R., U.S. DEP'T OF EDUC., AN OVERVIEW OF EXCLUSIONARY DISCIPLINE PRACTICES IN PUBLIC SCHOOLS FOR THE 2017–2018 SCHOOL YEAR (June 2021), https://ocrdata.ed.gov/assets/downloads/crdc-exclusionary-school-discipline.pdf [https://perma.cc/WV9Y-Z3YP]; *see also* Leah Aileen Hill, *Disrupting the Trajectory: Representing Disabled African American Boys in A System Designed to Send Them to Prison*, 45 FORDHAM URB. L.J. 201, 214–15 (2017) (describing the "double bind" several students with disabilities, especially behavioral difficulties, face wherein "the very nature of their disabilities makes it difficult for them to manage their behavior"); Taryn VanderPyl, *Incarcerated DisCrit: The Intersection of Disproportionality in Race*, JUST. POL'Y J., Spring 2018, at 1, http://www.cjcj.org/uploads/cjcj/documents/incarcerated_discrit_the_intersection_of_disproportionality_in_race_disability_and_juvenile_justice.pdf [https://perma.cc/VM6G-EETM] (examining the intersectionality of race, disability, and juvenile justice using the Disability Critical Race Studies (DisCrit) framework).

71. OFF. FOR C.R., *supra* note 70.

72. *Id.* A referral to law enforcement occurs when "a school official reports a student to a law enforcement agency or official, including a school police unit, for an incident that occurs on school grounds, during school-related events, or while taking school transportation, regardless of whether official action is taken." *Id.*

B. FEATURES OF JUVENILE FACILITIES THAT UNIQUELY IMPEDE ACCESS TO IDEA RIGHTS

1. *Features Impeding Access to a FAPE*

Although the IDEA grants youth with disabilities in juvenile facilities a right to FAPE, youth in the juvenile justice system have limited access to special education services. Historically, juvenile facilities have struggled to promptly[73] identify and evaluate youth with disabilities, and even when facilities have provided special education services, they have frequently failed to meet federally mandated standards.[74] Surveys and reports on juvenile facilities highlight overcrowded classes, truncated instructional periods, insufficient classroom materials, staff shortages, and inadequately trained teachers.[75] Teachers working with youth in juvenile facilities rarely have experience with or training on special education and the rights of students with disabilities under the IDEA.[76] This section discusses

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73. Public agencies must conduct an initial evaluation "within 60 days of receiving parental consent for the evaluation, or, if the State establishes a timeframe within which the evaluation must be conducted, within such timeframe" to determine whether a student has a disability and the "educational needs of such child." 20 U.S.C. § 1414(a)(1)(C)(i). When a student transfers to a new school district within the same state, the IDEA requires that the new school "take reasonable steps to promptly obtain the child's records" and the previous school "take reasonable steps to promptly respond to such request from the new school." 20 U.S.C. § 1414(d)(2)(C).

74. *See* David B. Leitch, *A Legal Primer for Special Educators in Juvenile Corrections: From Idea to Current Class Action Lawsuits*, 64 J. CORR. EDUC. 63, 66 (2013) ("[T]he average length of time between commitment and the IEP meeting at a longterm correctional facility was over 90 days, significantly longer that [sic] statutory directives."); Sheldon-Sherman, *supra* note 8, at 236; Angela M.T. Prince et al., *A Systematic Content Analysis of FAPE Cases Involving Detained Youth with Disabilities*, 71 J. CORR. EDUC. 57, 67 ("Judgments reveal that there are many instances where the most basic educational services are unavailable to youth with disabilities who are detained or incarcerated.").

75. *See generally* Sheldon-Sherman, *supra* note 8, at 236; OFF. FOR C.R., *supra* note 5; Leone & Cichon Wruble, *supra* note 5, at 591 (discussing the inadequate access to instructional technology and teacher and staff shortages in juvenile corrections facilities). Although this Note does not focus on educational conditions in adult facilities, other articles have highlighted additional concerns regarding the educational services provided to youth housed in adult facilities. *See, e.g.*, Simoneau, *supra* note 18, at 112 (noting that in comparison to juvenile facilities, adult facilities have higher average student-teacher ratios, less qualified staff members, and fewer appropriate classroom spaces).

76. Barbara A. Moody, *Juvenile Corrections Educators: Their Knowledge and Understanding of Special Education*, 54 J. CORR. EDUC. 105, 105 (2003) ("Educators working with youth in correctional institutions seldom have background or training in special education beyond their basic initial teacher preparation."); Sheldon-Sherman, *supra* note 8, at 236 ("[J]uvenile facilities frequently lack qualified education staff. . . . More importantly, staff typically does not receive on-the-job training on these topics.").

structural features and administrative challenges that hinder the ability of juvenile facilities to provide FAPE.

a. Shared Educational Responsibilities and Inconsistent Interagency Coordination

As compared to the administration of public schools, the responsibility of agencies to oversee and administer education within juvenile facilities is more widely dispersed and varied among different states and types of facilities.[77] A 2014 study found significant variation in the types of agencies designated to provide educational services to students in juvenile facilities.[78] According to that study, sixteen states have created separate juvenile justice departments to oversee education within state juvenile facilities, eleven states assign responsibility to social services departments or agencies, seventeen states authorize state educational agencies to operate schools directly in juvenile facilities, and six states assign responsibility to corrections departments.[79] Contributing to further variation, some states have created a statewide special school district operated by a juvenile justice, social service, or state educational agency.[80]

Federal regulations require any agency involved in the education of youth with disabilities in covered states to comply with the IDEA.[81] These agencies—including state educational agencies, local educational agencies,[82] and local juvenile and adult correctional facilities—are also responsible for ensuring youth transferred by the public agency to private facilities have access to the same rights and protections under the Act.[83] In a

77. *See generally* U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUST., GUIDING PRINCIPLES FOR PROVIDING HIGH-QUALITY EDUCATION IN JUVENILE JUSTICE SECURE CARE SETTINGS 2 (Dec. 2014), https://www2.ed.gov/policy/gen/guid/correctional-education/guiding-principles.pdf [https://perma.cc/FQR9-T32E].

78. S. EDUC. FOUND., JUST LEARNING: THE IMPERATIVE TO TRANSFORM JUVENILE JUSTICE SYSTEMS INTO EFFECTIVE EDUCATIONAL SYSTEMS 5 (2014), https://www.southerneducation.org/wp-content/uploads/2019/02/Just-Learning-Final.pdf [https://perma.cc/M579-E8TT].

79. *Id.*

80. *Id.*

81. 34 C.F.R. § 300.2(b).

82. A local educational agency is "a public board of education or other public authority legally constituted within a State for either administrative control or direction of . . . public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for a combination of school districts or counties." 34 C.F.R. § 303.23.

83. 34 C.F.R. § 300.2.

2014 Dear Colleague letter, the U.S. Department of Education provided further guidance on education in juvenile facilities by outlining the responsibilities of state educational agencies and other public agencies, such as local educational agencies and correctional facilities.[84] State educational agencies are ultimately responsible for providing FAPE to confined youth with disabilities but may delegate responsibilities to the other public agencies.[85] All agencies have a shared obligation to provide special education services to confined youth,[86] and federal guidance requires that states establish interagency agreements or other mechanisms for ensuring interagency coordination with non-educational public agencies.[87] Interagency agreements must designate the financial responsibilities of each agency in ensuring the provision of FAPE and outline procedures for reimbursing local educational agencies, resolving interagency disputes, and determining each agency's responsibilities in delivering services.[88]

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84. OFF. OF SPECIAL EDUC. & REHABILITATIVE SERVS., U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER (Dec. 5, 2014), https://sites.ed.gov/idea/files/idea-letter.pdf [https://perma.cc/JP95-N5D5].

85. *Id.* However, for the education of youth in adult facilities, the IDEA allows states to transfer authority from the state educational agency to another public agency. In the event that the public agency violates the IDEA, the U.S. Department of Education is only authorized to withhold funding from the responsible agency in proportion to the number of eligible students with disabilities under their supervision. *Id.* For IDEA violations that occur in adult jails and prisons, the federal government may only withhold funding from the agency responsible for providing special education in an amount proportional to the number of eligible students in the adult correctional facilities for which the agency is responsible. 20 U.S.C. § 1416(h).

86. 34 C.F.R. § 300.2(b)(2) (stating that requirements are "binding on each public agency in the State that provides special education and related services to children with disabilities, regardless of whether that agency is receiving funds under Part B of the Act").

87. 34 C.F.R. § 300.154. *See also* OFF. OF SPECIAL EDUC. & REHABILITATIVE SERVS., *supra* note 84, at 3 ("States must have interagency agreements or other methods for ensuring interagency coordination in place so that it is clear which agency or agencies are responsible for providing or paying for services necessary to ensure FAPE for students with disabilities in correctional facilities."); JOSEPH C. GAGNON ET AL., NAT'L TECH. ASSISTANCE CTR. FOR EDUC. OF NEGLECTED OR DELINQ. CHILD. & YOUTH, ISSUE BRIEF: KEY CONSIDERATIONS IN PROVIDING A FREE APPROPRIATE PUBLIC EDUCATION FOR YOUTH WITH DISABILITIES IN JUVENILE JUSTICE SECURE CARE FACILITIES 3 (2015), https://files.eric.ed.gov/fulltext/ED571826.pdf [https://perma.cc/92UQ-YGT3] ("Partnerships at the Federal, State, and local levels are critical to ensuring appropriate general education and FAPE requirements, which include providing appropriate special education and related services at no cost to the parents of eligible children and youth with disabilities in juvenile justice secure care facilities.").

88. 34 C.F.R. § 300.154(a). *See also* 34 C.F.R. § 300.154(c) (stating that the requirements of this section can be met through state statute or regulation, signed agreements between agency officials, or other written mechanisms).

Because multiple state and local agencies often share unclear and overlapping responsibilities for overseeing and administering special educational services, interagency coordination is critical.[89] Federal regulations require interagency coordination and agreements when implementing the IDEA.[90] Research reveals, however, inadequate levels of collaboration among agencies in many states.[91] Disputes between and among school districts and juvenile justice agencies over which agency bears responsibility for providing special education services in juvenile facilities have generated litigation in many states.[92] For example, in situations where local educational agencies have been held responsible for funding special education services for youth transferred into juvenile facilities, local educational agencies, juvenile agencies, and other governmental agencies have disagreed with one another over these costs.[93]

89. *See generally* GAGNON ET AL., *supra* note 87, at 3 ("Partnerships at the Federal, State, and local levels are critical to ensuring appropriate general education and FAPE requirements. . . ."); Leone et al., *supra* note 13, at 48 ("The quality of educational and vocational services for students becomes contingent upon successful interagency collaboration."); STEPHANIE ARAGON, EDUC. COMM'N OF THE STATES, STATE AND FEDERAL POLICY: INCARCERATED YOUTH 2 (Nov. 2016), https://www.ecs.org/wp-content/uploads/State_and_Federal_Policy_for_Incarcerated_Youth.pdf [https://perma.cc/TU29-74HB] ("In most cases, the care and education of incarcerated youth is managed by multiple state and local agencies—including juvenile courts and justice departments, social service agencies, state or local education agencies and public or private providers. . . .").

90. 34 C.F.R. § 300.154 (requiring that the Chief Executive Officer of a State ensure an interagency agreement or coordination mechanism is in effect between each noneducational public agency and the state educational agency that identifies: (1) each agency's financial responsibility for providing services, (2) "the conditions, terms, and procedures under which [a local educational agency] must be reimbursed by other agencies," (3) "procedures for resolving interagency disputes," and (4) policies for determining each agency's coordination responsibilities to timely and appropriately deliver services).

91. GAGNON ET AL., *supra* note 87, at 3 ("[T]he provision of high-quality education services, particularly special education services, in juvenile justice secure care facilities is often challenging because of a lack of collaboration between government agencies and those not involved in public education. . . . Often, partner agencies do not establish and use interagency agreements or other mechanisms for interagency coordination.").

92. Sheldon-Sherman, *supra* note 8, at 237; *see, e.g.*, King v. State Educ. Dep't, 182 F.3d 162 (2d Cir. 1999).

93. Thomas A. Mayes & Perry A. Zirkel, *The Intersections of Juvenile Law, Criminal Law, and Special Education Law*, 4 U.C. DAVIS J. JUV. L. & POL'Y 125, 148 (2000) (describing the conflicts arising from "concurrent jurisdiction," including when parents of a child with disabilities seek reimbursement from the district for their child's court-ordered placement and when a juvenile court's placement interferes with a child's educational placement).

Furthermore, coordination between agencies during transition periods is often inadequate.[94] Coordination issues in particular can impede records transfer which, along with inconsistent intake procedures, can result in gaps in the identification and provision of special education services. Although Child Find procedures are available for use during intake screenings to trace newly admitted youth back to the school they most recently attended, studies show that facilities do not always utilize those procedures effectively.[95] One study found that in 2016, notwithstanding improvement from previous years, only eighty-six percent of facilities reported conducting educational screenings within the first week that youth were held in the facilities.[96]

Even once the proper school is identified, juvenile facilities frequently lack adequate processes for exchanging academic records with local school districts in a timely manner,[97] and litigation on behalf of youth in juvenile facilities frequently documents facilities' failures to obtain prior school records.[98] For youth who were not attending school immediately prior to confinement or had attended numerous schools, accessing prior records poses additional challenges.[99] Substantial geographic distances between school districts and juvenile facilities and short average length of stays in facilities also contribute to these

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94. ARAGON, *supra* note 89, at 2; Greg Carter, *Repairing the Neglected Prison-to-School Pipeline: Increasing Federal Oversight of Juvenile Justice Education and Re-Entry in the Reauthorization of the Elementary and Secondary Education Act*, GEO. J. ON POVERTY L. & POL'Y 371, 388–93 (2018) (discussing the insufficient interagency coordination when youth transition between facilities and during the transition out of facilities).

95. GAGNON ET AL., *supra* note 87, at 5.

96. OFF. OF JUV. JUST. & DELINQ. PREVENTION, U.S. DEP'T OF JUST., EDUCATION FOR YOUTH UNDER FORMAL SUPERVISION OF THE JUVENILE JUSTICE SYSTEM 7 (Jan. 2019) https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/media/document/education-for-youth-in-the-juvenile-justice-system.pdf [https://perma.cc/5YNZ-LE7V].

97. *See, e.g.*, *id.* at 8 ("[O]ne qualitative study involving 48 teachers working within pretrial detention facilities in Connecticut found that . . . 67 percent reported that school districts drastically differed in their ability to provide academic records to detention center education staff in a timely manner. . . ."). *See also* GAGNON ET AL., *supra* note 87, at 5 ("[F]acilities often lack, or poorly implement, systematic processes for record exchange between juvenile justice facilities and public schools."); Carter, *supra* note 94, at 389–90.

98. Peter E. Leone & Sheri Meisel, *Improving Education Services for Students in Detention and Confinement Facilities*, NAT'L CTR. ON EDUC., DISABILITY & JUV. JUST. (1997), http://www.edjj.org/Publications/pub12_20_99.html [https://perma.cc/F6DV-AFFD].

99. SHERI MEISEL ET AL., COLLABORATE TO EDUCATE: SPECIAL EDUCATION IN JUVENILE CORRECTIONAL FACILITIES 66 (1998), https://files.eric.ed.gov/fulltext/ED453624.pdf [https://perma.cc/FAH7-YPQB].

facilities' failures to obtain school records.[100] Thus, in detention facilities, it is especially common for students to leave their placements before the facility is ever able to obtain school records.[101] Without students' records—indeed, without a student's IEP itself—educators are forced to provide instruction without the individualized consideration of academic achievement levels and specific needs required by the IDEA.[102]

A lack of coordination among education, juvenile justice, mental health, and social services staff is also present within individual juvenile facilities.[103] Jurisdictional ambiguities and inadequate collaboration procedures impede the ability of interagency staff to meet youth's interconnected academic, social, emotional, behavioral, and mental health needs.[104] Research shows that cooperation between security and education staff increases the likelihood of access to appropriate educational services.[105]

b. Competing Administrative Priorities

Conflicting administrative priorities also uniquely hamper the provision of special education services in juvenile facilities. Juvenile facilities' focus on punishment, safety, and a variety of non-education-related rehabilitation concerns generates a surfeit of administrative rules that can lessen educators' and principals' autonomy within juvenile facilities and their time with students.[106] Even with respect to rehabilitation, juvenile facilities must balance competing priorities from agencies administering education, mental health, and social services.[107] Thus, unlike schools with singular educational missions, juvenile facilities often give education services a low priority.[108]

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100. Sheldon-Sherman, *supra* note 8, at 238 (discussing the impact of distance on the timely transfer of school records); Krezmien et al., *supra* note 60, at 449 (examining the failure of detention facilities to obtain records because of the relatively short length of stays).

101. Krezmien et al., *supra* note 60, at 449 ("Youth often leave these placements before educational records are obtained from their previous school.").

102. *See* 20 U.S.C. § 1412; Carter, *supra* note 94, at 390.

103. *See* Leone et al., *supra* note 13, at 49.

104. MEISEL ET AL., *supra* note 99, at 68.

105. LEONE & WEINBERG, *supra* note 16, at 20.

106. Sheldon-Sherman, *supra* note 8, at 236.

107. MEISEL ET AL., *supra* note 99, at 62.

108. *See* Leone et al., *supra* note 13, at 49 ("Education services, whether operated by a juvenile corrections agency, the state department of education, or a local school district,

Juvenile facilities balance both rehabilitative and punitive policy goals, the latter hindering the delivery of special education services in many facilities.[109] For example, teachers who worked in Southern California detention facilities in 2020 reported having trouble providing educational services as a result of "overly punitive" and "narrow approaches" to schooling by correctional administrators.[110] Teachers discussed the strain imposed on them by scheduling conflicts with students' court appearances,[111] administrative policies requiring non-educational surveillance tasks, correctional officers' interference with instruction,[112] and their students' confinement to cells resulting from trivial infractions.[113] Other research notes that students placed on administrative or disciplinary segregation may temporarily lose access to all education services.[114]

c. Lack of Resources and Access

Agencies providing special education services in juvenile facilities are often unable to access necessary resources; many times, because the resources aren't there in the first place. Many administrators of schools in juvenile facilities have responsibility over the daily school operations but lack independent budget authority.[115] With limited resources, services are often provided in accordance with what is available,[116] rather than by what is "reasonably calculated to enable a child to make progress

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are a low priority for many correctional administrators."); Sheldon-Sherman, *supra* note 8, at 232.

109. Sheldon-Sherman, *supra* note 8, at 235.

110. Jerry Flores & Kati Barahona-Lopez, *"I Am in a Constant Struggle:" The Challenges of Providing Instruction to Incarcerated Youth in Southern California*, 76 INT'L J. EDUC. DEV. 1, 7 (2020).

111. *Id.* at 6 (noting teachers' challenges "keeping track of the constant ebb and flow of students going to court" and "having to negotiate court dates").

112. *Id.* at 7. One teacher describes, "It is different that we have to be much stricter in an incarceration setting than I would even with one of our community schools. I have absolute setting [sic] charts and you can't stand up without permission." *Id.*

113. *Id.* "[The teachers] noted that guards harassed their students, made them do push-ups as punishment for trivial offenses, or increase[d] the amount of time they were forced to stay in their cell for behavior such as talking in line." *Id.*

114. *See* MEISEL ET AL., *supra* note 99.

115. *Id.* ("Without independent budget authority, principals may have to go hat-in-hand to correctional administrators to fund even the basic supplies associated with operating a school.").

116. *See* Sheldon-Sherman, *supra* note 8, at 237.

appropriate in light of the child's circumstances."[117] In part due to competing administrative priorities and the insufficient allocation of resources to educational purposes, schools in juvenile facilities are often overcrowded and lack adequate classroom space.[118] Juvenile facilities often lack qualified staff with experience or training working with youth in the juvenile justice system.[119] In addition, schools in juvenile facilities seldom have administrators and teachers with the requisite training to develop and implement IEPs, and teachers in facilities often lack access to professional development opportunities.[120]

d. Inadequate Oversight and Enforcement

Although schools in juvenile facilities frequently fall short of meeting federal special education requirements, they are seldom held accountable, in part due to lack of oversight and enforcement by local and state educational agencies.[121] As a result, only about half of the education programs in juvenile facilities follow state or district curricula and assessments;[122] many programs limit instruction in reading and math to worksheet-based drill and practice.[123]

Charles H. et al. v. District of Columbia, a case concerning the provision of special education services during COVID-19 for youth attending a school within a Washington, D.C. jail, recently discussed these issues.[124] The court granted the plaintiffs' motion for a preliminary injunction[125] after the facility discontinued in-

117. Endrew F. *ex rel.* Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988, 999 (2017).

118. Leone et al., *supra* note 13, at 49 ("Lack of adequate space, overcrowding, insufficient fiscal resources, and ineffective governance all interfere with providing appropriate education services to youth.").

119. Sheldon-Sherman, *supra* note 8, at 236.

120. *Id.*

121. Joseph Gagnon et al., *IDEA-Related Professional Development in Juvenile Corrections Schools*, 26 J. SPECIAL EDUC. LEADERSHIP 93, 93 (2013) ("[Juvenile corrections] schools have a disturbing record of noncompliance with federal special education requirements due, in part, to inadequate oversight and enforcement at the local education agency (LEA) and state levels.").

122. Joseph Gagnon, *State-Level Curricular, Assessment, and Accountability Policies, Practices, and Philosophies for Exclusionary School Settings*, 43 J. SPECIAL EDUC. 206, 215 (2010).

123. LEONE & WEINBERG, *supra* note 16, at 21.

124. Charles H. v. D.C., No. 1:21-CV-00997 (CJN), 2021 WL 2946127 (D.D.C. June 16, 2021).

125. *Id.* at 14.

person instruction and only provided students with infrequently delivered work packets.[126] Even though the state educational agency had established a tracking system to monitor the local educational agency and identify potential FAPE violations, its oversight was insufficient to adequately address the long-lasting and wide-ranging violations.[127] In granting the plaintiffs' preliminary injunction, the court ordered the local educational agency and the state educational agency, along with other requirements, to provide a FAPE to all plaintiffs within fifteen days and provide monthly status reports on the implementation of IDEA services.[128]

2. *Features That Impede Procedural Protections*

Many of the procedural safeguards under the IDEA are less accessible to families with youth in juvenile facilities. As discussed in Part I.B, these protections guarantee parents prior written notice;[129] require parental consent before conducting an initial evaluation or a reevaluation of their child, or before initially providing services;[130] and provide parents the opportunity to present and resolve complaints with the state educational agency.[131] For parents of children in juvenile facilities, especially in facilities far from their child's home and previous school, the opportunities for involvement are less accessible. Due to challenges locating parents, parental permission for initial evaluations and reevaluations is frequently difficult to obtain for youth in facilities, thus preventing parents from encouraging and enabling educators to identify and evaluate special needs.[132] Facilities also face additional barriers in providing notice consistent with the IDEA's requirements,

126. *Id.* at 3.

127. Joseph Gagnon & Amanda Ross Benedick, *Provision of a Free and Appropriate Public Education in an Adult Jail during COVID-19: The Case of Charles H. et al. v. District of Columbia et al.*, 11 J. EDUC. SCI. 767 (2021), https://www.mdpi.com/2227-7102/11/12/767/htm [https://perma.cc/82SY-GTQU] (discussing the state educational agency's lack of supervision and oversight).

128. Order Granting Plaintiffs' Motion for Preliminary Injunction, Charles H. v. D.C., No. 1:21-CV-00997 (D.D.C. June 16, 2021) (ECF No. 37).

129. 20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503.

130. 34 C.F.R. § 300.300.

131. 34 C.F.R. § 300.507.

132. Richard Morris & Kristin Thompson, *Juvenile Delinquency and Special Education Laws: Policy Implementation Issues and Directions for Future Research*, 59 J. CORR. EDUC. 173, 178 (2008).

affecting the opportunities available for parents to participate meaningfully in IEP meetings.[133]

Furthermore, the short average length of stay for youth, combined with administrative difficulties receiving school records and obtaining parental permission, lowers the likelihood that facilities will satisfy the IDEA's requirements for independent educational evaluations.[134] These evaluations are critical, even during brief stays, as access to appropriate special education services affects not only academic success, but also recidivism rates and post-release employment prospects.[135] The brief average length of youth confinements also makes it more difficult for parents to utilize the dispute resolution options afforded to them by the IDEA. Due process hearing procedures outline a timeline and necessary actions for filing a due process complaint, including requiring parents to first attend a resolution session before having the opportunity to be heard at a hearing.[136] The dispute resolution process can be time-consuming and expensive, and low-income families are less likely than middle- and high-income families to utilize these processes.[137]

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133. *Id.* at 184. The IDEA requires that public agencies "take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate, including notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and scheduling the meeting at a mutually agreed on time and place." 34 C.F.R. § 300.322(a); *see also* 34 C.F.R. § 300.501(b).

134. Morris & Thompson, *supra* note 132, at 178.

135. *See supra* note 17.

136. To request a due process hearing, parents must file a due process complaint against the local educational agency by providing it and the state educational agency with a copy of the due process complaint notice. 20 U.S.C. § 1415(b)(7)(A); 34 C.F.R. §§ 300.507–08. Next, parents must attend a resolution session that is convened by the local educational agency within fifteen days of it receiving notice of the complaint. 20 U.S.C. § 1415(f)(1)(B); 34 C.F.R. § 300.510(a). If the local educational agency does not resolve the dispute to the parents' satisfaction within thirty days of receiving the due process complaint, the state educational agency, or other public agency to which the state educational agency has delegated authority, must hold a due process hearing at which point the parties have "the right to present evidence and confront, cross-examine, and compel the attendance of witnesses." 20 U.S.C. § 1415(f)(1)(B)(ii); 20 U.S.C. § 1415(h)(2); *see also* 34 C.F.R. § 300.511. Subsequently, an impartial hearing officer will issue a written decision, and in some states, parents can appeal an adverse decision to the state educational agency. 20 U.S.C. § 1415(f)(3)(E)(ii); 20 U.S.C. § 1415(g).

137. Fluehr, *supra* note 33, at 170 ("Those parents who effectively use the IDEA's alternative dispute resolution processes tend to be wealthier, and the complexity of the processes and the lack of understanding among parents of lower income can prevent challenges to inappropriate placements.").

III. APPLICATION OF THE EXHAUSTION REQUIREMENT TO SYSTEMIC ALLEGATIONS IN JUVENILE FACILITIES

The IDEA establishes procedural safeguards to ensure parents of students with disabilities the opportunity to meaningfully participate in all educational decisions and request review of any decisions with which they disagree.[138] As discussed, however, families with youth in juvenile facilities often lack access to these protections. The IDEA's "procedural safeguards" provision, moreover, includes an exhaustion requirement prohibiting judicial review in most cases until the plaintiff has exhausted all administrative remedies.[139] The IDEA's exhaustion requirement states:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the 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*.[140]

This Part examines how, within the juvenile justice context, the IDEA's threshold exhaustion requirement and its exceptions impose rights-defeating burdens on parents that conflict with congressional intent for enacting the IDEA and the underlying purposes of the exhaustion doctrine.

A. THE EXHAUSTION REQUIREMENT AND ITS EXCEPTIONS

Although the exhaustion doctrine is well-established in administrative law, its application in IDEA litigation has generated some confusion.[141] In *Fry v. Napoleon Community*

138. Honig v. Doe, 484 U.S. 305, 311–12 (1988).
139. 20 U.S.C. § 1415(*l*).
140. *Id.* (emphasis added).
141. *See* Queenan, *supra* note 20, at 995 ("Scholars have described the doctrine as 'too rigid,' 'too complex,' 'confusing,' 'antiquated,' and 'amorphous' and have also commented

Schools, the Supreme Court clarified the scope of the exhaustion requirement when a party files a suit under a statute other than the IDEA.[142] The *Fry* Court held exhaustion is "not necessary when the gravamen of the plaintiff's suit is something other than the denial of the IDEA's core guarantee—[a FAPE]."[143] The IDEA's exhaustion requirements, however, remain unsettled in other respects. For example, circuit courts are split over whether courts may excuse exhaustion when a family seeks relief that a hearing officer is unable to provide, such as monetary damages, in addition to remedies granted under the IDEA.[144]

Although Congress emphasized the flexibility of the exhaustion requirement when enacting the IDEA, many courts have since interpreted the requirement rigidly, applying only narrow, well-established exceptions.[145] This section discusses the purposes of exhaustion, Congress' intent to recognize exceptions to the requirement, and the exceptions courts have recognized,

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that 'the case law is hopelessly confused' . . . . As a result, decisions on exhaustion have been 'unpredictable,' inconsistent, and likely to result in 'unnecessary litigation.'").

142. Fry v. Napoleon Cmty. Sch., 137 S. Ct. 743 (2017).

143. *Id.* at 748. *Fry* identified two primary "clues" in determining the gravamen, or "crux" of the plaintiff's complaint: (1) "could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was *not* a school—say, a public theater or library?" and (2) "could an *adult* at the school—say, an employee or visitor—have pressed essentially the same grievance?" If the answers to these questions is no, then the gravamen of the suit likely alleges a FAPE denial. *Id.* at 756.

144. *See* Chris Ricigliano, *Exhausted and Confused: How* Fry *Complicated Obtaining Relief for Disabled Students*, 16 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 34, 51 (2021) (noting that the Ninth Circuit, allowing exhaustion to be excused, is the only outlier). Other questions that remain unresolved include: (1) whether exhaustion is a jurisdictional issue (placing the burden of proof on the complainant) or an affirmative defense (giving the respondent the burden of raising and proving non-exhaustion); (2) whether the IDEA's exhaustion requirement exempts plaintiffs seeking monetary damages; and (3) whether *Fry*'s "gravamen" or "crux" clues are rigid tests in their own right or mere illustrative guides. *See id.* at 36; Queenan, *supra* note 20, at 1008; Perry A. Zirkel, *Post-*Fry *Exhaustion Under the IDEA*, 381 EDUC. LAW REP. 1, 14 (2020).

145. Mark C. Weber, *Disability Harassment in the Public Schools*, 43 WM. & MARY L. REV. 1079, 1136 (2002) ("Although Congress intended the exhaustion requirement to be flexible so that meritorious cases would get a judicial hearing, many courts have applied the rule rigidly, barring cases even when the plaintiffs present persuasive reasons for excusing exhaustion."); *compare* Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1302–03 (9th Cir. 1992) ("[T]his exhaustion requirement is not a rigid one, and is subject to certain exceptions."), *and* Ezratty v. Com. of Puerto Rico, 648 F.2d 770, 774 (1st Cir. 1981) ("[T]he exhaustion doctrine 'is not to be applied inflexibly' and courts are free to use their discretion, applying the doctrine, or not, in accordance with its purposes." (quoting McGee v. United States, 402 U.S. 479, 483 (1971))), *with* MM *ex rel.* DM v. Sch. Dist. of Greenville Cnty., 303 F.3d 523, 536 (4th Cir. 2002) ("The courts have recognized only three narrow exceptions to this exhaustion requirement. . . .").

including in cases where plaintiffs allege systemic violations of the IDEA.

1. *Purposes of the Exhaustion Requirement*

The requirement that parties must first exhaust administrative remedies, as interpreted by courts, is intended to serve various practical purposes.[146] The exhaustion requirement allows for "the full development of technical issues and a factual record prior to court review,"[147] permits "state and local agencies to exercise discretion and expertise in fields in which they have substantial experience,"[148] protects the authority and interests of state and local educational agencies,[149] prevents "deliberate disregard and circumvention of agency procedures established by Congress,"[150] and supports Congress' aim to encourage parents and local educational agencies to work together in developing a child's IEP.[151] Requiring exhaustion also allows agencies the first opportunity to correct any mistakes in their special education programs and is grounded in the notion that "the agencies

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146. *See, e.g.*, J.B. *ex rel.* Bailey v. Avilla R-XIII Sch. Dist., 721 F.3d 588, 594 (8th Cir. 2013) ("[A]pplication of the exhaustion doctrine is 'intensely practical.'") (quoting Bowen v. City of New York, 476 U.S. 467, 484 (1986)).

147. Ass'n for Retarded Citizens of Alabama, Inc. v. Teague, 830 F.2d 158, 160 (11th Cir. 1987); *see also* Riley v. Ambach, 668 F.2d 635, 640 (2d Cir. 1981) (acknowledging the value of the record developed in administrative proceedings "since the administrative agency will likely have probed the issue with more expertise than a federal court could bring to bear, and therefore, have illuminated the issue for final decision in the federal court").

148. Komninos by Komninos v. Upper Saddle River Bd. of Educ., 13 F.3d 775, 779 (3d Cir. 1994); *see also Teague*, 830 F.2d at 160 (remarking on the importance of allowing agencies to exercise discretion and expertise "on issues requiring these characteristics").

149. *See, e.g.*, Cox v. Jenkins, 878 F.2d 414, 419 (D.C. Cir. 1989) (noting that the exhaustion doctrine "prevents the parties from undermining the agency by deliberately flouting the administrative process"); Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 (9th Cir. 1992) (describing "the traditionally strong state and local interest in education" that is recognized by the exhaustion requirement); Riley v. Ambach, 668 F.2d 635, 640 (2d Cir. 1981) (acknowledging a "strong state interest" as supporting the exhaustion requirement).

150. *Teague*, 830 F.2d at 160.

151. *Id.* at 161 (holding that plaintiffs were required to first exhaust administrative remedies where "the legislative record reflects a strong emphasis on the role of parental involvement in assuring that appropriate services are provided to a handicapped child"); *see also* Smith v. Robinson, 468 U.S. 992, 1012 (1984) (emphasizing Congress' position that parents and local educational agencies collaborate to formulate a child's IEP); Heldman on Behalf of T.H. v. Sobol, 962 F.2d 148, 150 (2d Cir. 1992) (noting that "rather than detailing the precise substantive rights applicable to all affected children, Congress opted for individually tailored programs—programs crafted by parents and educators working together to determine what is appropriate for each child").

themselves are in the optimal position to identify and correct their errors and to fine-tune the design of their programs."[152] Thus, courts have attributed the doctrine with promoting "accuracy, efficiency, agency autonomy, and judicial economy."[153]

2. *Exceptions to the Exhaustion Requirement*

Despite acknowledging the benefits of exhaustion, courts have permitted plaintiffs to bypass the requirement in certain situations.[154] The categorization and definition of these exceptions to the exhaustion requirement, however, differ across circuits.[155] This section examines legislative history concerning exceptions to the IDEA's exhaustion requirement, discusses the varying exceptions that courts have recognized, and analyzes the courts' application of exceptions in cases where plaintiffs allege systemic violations.

a. *Congressional Intent for Exceptions to the Requirement*

As previously noted, Congress enacted the IDEA in response to class action litigation challenging the systemic denial of special education services for youth with disabilities.[156] Not surprisingly, therefore, Congress expected advocates to use class action litigation to enforce the Act[157] and intended to keep the exhaustion requirement flexible, especially in class action litigation. As Senator Harrison Williams, the Act's principal author, stated on the House floor:

> [The Exhaustion Requirement] should not be required for any individual complainant filing a judicial action in cases where such exhaustion would be futile either as a legal or

152. Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist., 288 F.3d 478, 489 (2d Cir. 2002); *see also* Riley v. Ambach, 668 F.2d 635, 640 (2d Cir. 1981) (noting state and federal interests in "providing a means whereby official abuse can be corrected without resort to lengthy and costly trial" as reasons for the exhaustion requirement).

153. *See* Ezratty v. Com. of Puerto Rico, 648 F.2d 770, 774 (1st Cir. 1981); *see also* Christopher W. v. Portsmouth Sch. Comm., 877 F.2d 1089, 1094 (1st Cir. 1989).

154. *See, e.g.*, Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 (9th Cir. 1992) (stating that the exhaustion rule "is not a rigid one, and is subject to certain exceptions").

155. *See generally* Queenan, *supra* note 20 (exploring the lack of clarity in terms of exhaustion and exceptions recognized by courts).

156. *See supra* note 26.

157. Weber, *supra* note 26, at 475–76.

> practical matter. Nor is it intended that the availability of these administrative procedures be construed so as to require each member of the class to exhaust such procedures in any class action brought to address an alleged violation of the statute.[158]

Legislative history concerning the 1986 amendments to the IDEA provides more specifics on Congress' assumption that the Act's exhaustion requirement had exceptions for futility and extenuating circumstances.[159] Addressing the issue of exhaustion within a broader discussion of attorney's fees, Representative George Miller of California, a cosponsor of the 1975 Act, asserted, "neither I nor others who wrote the law intended that parents should be forced to expend valuable time and money exhausting unreasonable or unlawful administrative hurdles."[160] Representative Miller then outlined four situations in which the exhaustion requirement may be inappropriate, including:

> complaints that . . . [(1)] an agency has failed to provide services specified in the child's individualized educational program . . . [(2)] an agency has abridged or denied a handicapped child's procedural rights . . . [(3)] an agency had adopted a policy or pursued a practice of general applicability that is contrary to the law, or where it would otherwise be futile to use the due process procedures . . . and [(4)] an emergency situation exists.[161]

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158. 121 CONG. REC. S20433 (1975) (remarks of Senator Harrison Williams).

159. 131 CONG. REC. 31376 (1985) (statement of Representative George Miller). As of 1986, futility was a well-recognized exception to exhaustion requirements in administrative law. For instance, when Congress codified an exhaustion requirement for habeas corpus actions in 1948, it included a statutory exception excusing exhaustion if "(i) there is an absence of available State corrective process; or (ii) *circumstances exist that render such process ineffective to protect the rights of the applicant*." Judicial Code of 1948, ch. 646, § 2254, 62 Stat. 869, 967 (codified as amended at 28 U.S.C. § 2254(b)(1)(B)(ii)) (emphasis added). For a discussion of case law interpreting the "ineffective," or futility, exception in habeas corpus law, see RANDY HERTZ & JAMES S. LIEBMAN, 2 FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 23.4 (2021) ("The controlling question is whether the state remedy is 'adequate' or, on the other hand, whether invocation of the remedy would be 'futile' or effectively so.").

160. 131 CONG. REC. 31376 (statement of Representative George Miller).

161. *Id.*

b. Judicial Recognition and Application of Exceptions

Although it is well-established that the IDEA's exhaustion requirement is not absolute, the exceptions recognized by courts are not uniform across circuits.[162] When determining whether to acknowledge an exception to exhaustion, courts have allowed for varying degrees of flexibility. For instance, the Fourth and Sixth Circuits frequently describe exceptions to the requirement as "narrow,"[163] whereas courts in other circuits have emphasized the flexibility of the doctrine.[164] As described by the First Circuit, the court maintains discretion in "applying the doctrine, or not, in accordance with its purposes."[165] It is common for courts considering the exhaustion requirement to examine "whether pursuit of administrative remedies under the facts of a given case will further the general purposes of exhaustion and the congressional intent behind the administrative scheme."[166] Several courts, in fact, have declined to excuse exhaustion in cases where plaintiffs allege facts that support a recognized exception but fail to show "that the underlying purposes of exhaustion would not be furthered by enforcing the exhaustion requirement."[167]

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162. *See generally* Wasserman, *supra* note 44.

163. *See, e.g.*, MM *ex rel.* DM v. Sch. Dist. of Greenville Cty., 303 F.3d 523, 536 (4th Cir. 2002) ("[T]he courts have recognized only three narrow exceptions to this exhaustion requirement."); F.C. v. Tennessee Dep't of Educ., 745 F. App'x 605, 608 (6th Cir. 2018) ("[T]here are narrow exceptions to the exhaustion requirement.").

164. *See, e.g.*, Christopher W. v. Portsmouth Sch. Comm., 877 F.2d 1089, 1094 (1st Cir. 1989) ("[T]he exhaustion doctrine 'is not to be applied inflexibly.'" (quoting McGee v. United States, 402 U.S. 479, 483 (1971))); Mrs. W. v. Tirozzi, 832 F.2d 748, 756 (2d Cir. 1987) ("Exhaustion is not an inflexible rule."); N.B. by D.G. v. Alachua Cty. Sch. Bd., 84 F.3d 1376, 1379 (11th Cir. 1996) ("The exhaustion requirement . . . is not jurisdictional and therefore 'is not to be applied inflexibly.'") (quoting *McGee*, 402 U.S. at 483))).

165. Ezratty v. Com. of Puerto Rico, 648 F.2d 770, 774–75 (1st Cir. 1981) (noting that exhaustion is required when the assorted interests served support the requirement, but where the interests "pull in different directions, analysis of the particular case at hand is necessary").

166. Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 (9th Cir. 1992). This inquiry is not specific to the Ninth Circuit and has been cited by other circuits. *See, e.g.*, Ass'n for Cmty. Living in Colorado v. Romer, 992 F.2d 1040, 1044 (10th Cir. 1993); J.S. *ex rel.* N.S. v. Attica Cent. Sch., 386 F.3d 107, 112 (2d Cir. 2004); J.B. *ex rel.* Bailey v. Avilla R-XIII Sch. Dist., 721 F.3d 588, 596 (8th Cir. 2013); T.R. v. Sch. Dist. of Philadelphia, 4 F.4th 179, 192 (3d Cir. 2021).

167. *Hoeft*, 97 F.2d at 1304; *Bailey*, 721 F.3d at 596 (declining to "automatically" excuse exhaustion when a plaintiff alleges that administrative procedures are inadequate; instead, requiring plaintiffs to demonstrate that the alleged violations are "such that it would not further the underlying purposes of exhaustion to require it"); O.V. v. Durham Pub. Sch. Bd. of Educ., No. 1:17CV691, 2018 WL 2725467, at *13 (M.D.N.C. June 6, 2018),

i. Categories of Recognized Exceptions

In accordance with the exhaustion requirement's policy aims and the IDEA's legislative history, courts frequently recognize an exception to the requirement in cases where exhaustion would be futile or inadequate.[168] The Supreme Court, recognizing this exception, found the burden rests with the plaintiff to demonstrate that an exception to the requirement applies.[169] In terms of defining and applying the futility exception, courts have taken different approaches.[170] The Fifth Circuit, and often the Second Circuit, do not recognize exceptions separate from futility, and instead, define the futility exception broadly.[171] The Second Circuit has recognized that exhaustion is futile in cases where "the agency either was acting in violation of the law or was unable to remedy the alleged injury,"[172] or where parents had not been notified of available remedies.[173] Finding the Second Circuit's futility analysis "instructive," the Fifth Circuit outlined factors courts can turn to when examining futility, including whether the plaintiff alleges a systemic violation that a hearing officer would have no power to remedy or whether the plaintiff

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report and recommendation adopted, No. 1:17-CV-691, 2018 WL 3370644 (M.D.N.C. July 10, 2018) (holding plaintiffs bear the burden of showing that requiring exhaustion would not support the general purposes of exhaustion in their case).

168. *See Hoeft*, 967 F.2d at 1303 (stating that the futility exception is "universally" recognized by courts based on "general exhaustion principles" and "the legislative history of the IDEA"); Heldman on Behalf of T.H. v. Sobol, 962 F.2d 148, 158 (2d Cir. 1992) (noting that the IDEA's futility exception "can be traced to the legislative history of the 1975 Act"); *see also* Honig v. Doe, 484 U.S. 305, 326–27 (1988) (noting exhaustion may be excused where plaintiff demonstrates the futility or inadequacy of administrative review).

169. *Honig*, 484 U.S. at 327.

170. Queenan, *supra* note 20, at 1007 ("While the futility exception has been recognized when the agency cannot adequately award relief, such as in cases involving systemic violations, no clear definition of futility has emerged."); *see also* Doe By & Through Brockhuis v. Arizona Dep't of Educ., 111 F.3d 678, 681 (9th Cir. 1997) ("[W]hat constitutes a systemic failure is not so easily defined.").

171. The Second Circuit has recognized separate categories of exceptions outlined in the IDEA's legislative history. *See, e.g.*, Mrs. W. v. Tirozzi, 832 F.2d 748, 756 (2d Cir. 1987); Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195, 199 (2d Cir. 2002).

172. Heldman on Behalf of T.H. v. Sobol, 962 F.2d 148, 159 (2d Cir. 1992); *see also* Coleman v. Newburgh Enlarged City Sch. Dist., 503 F.3d 198, 205 (2d Cir. 2007) (defining "adequate remedies" as those which afford "realistic protection to the claimed right"); Jose P. v. Ambach, 669 F.2d 865, 869 (2d Cir. 1982) (holding exhaustion was excused where "adequate and speedy state remedies" were unavailable); *but see* Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist., 288 F.3d 478, 490 (2d Cir. 2002) (declaring that "the supposed slowness of the administrative process" in this case did not satisfy a finding of futility).

173. Weixel v. Bd. of Educ. of City of New York, 287 F.3d 138, 149 (2d Cir. 2002).

challenges a "settled state policy that could not be addressed through the IDEA's administrative remedies."[174]

Other circuits recognize futility as one of multiple, distinct exceptions to the exhaustion requirement. Largely drawing from the IDEA's legislative history, courts have acknowledged that exhaustion may be excused in cases where (1) parents are not afforded proper notice of procedural administrative rights;[175] (2) exhaustion would cause severe harm to a litigant;[176] (3) administrative remedies are unable to provide adequate relief;[177] or (4) "an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law."[178]

ii. Exceptions for "Systemic" Allegations

For claims alleging systemic violations, courts have repeatedly recognized the possibility that exhaustion may be unnecessary. As acknowledged by the Ninth Circuit, however, "what constitutes a systemic failure is not so easily defined."[179] Courts have analyzed systemic allegations under the futility exception,[180]

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174. Papania-Jones v. Dupree, 275 F. App'x 301, 304 (5th Cir. 2008).

175. *See* MM *ex rel.* DM v. Sch. Dist. of Greenville Cty., 303 F.3d 523, 536 (4th Cir. 2002); Crocker v. Tennessee Secondary Sch. Athletic Ass'n, 873 F.2d 933, 936 (6th Cir. 1989).

176. *See* Christopher W. v. Portsmouth Sch. Comm., 877 F.2d 1089, 1095 (1st Cir. 1989) (remarking that purposes of exhaustion are not served when "exhaustion 'will work severe harm upon a litigant'" (quoting Ezratty v. Com. of Puerto Rico, 648 F.2d 770, 774 (1st Cir. 1981))); *MM ex rel. DM*, 303 F.3d at 536 (acknowledging an exception when exhaustion would cause "severe harm upon a disabled child"); *but see* Komninos by Komninos v. Upper Saddle River Bd. of Educ., 13 F.3d 775, 778–79 (3d Cir. 1994) (acknowledging that exhaustion is not required if it results in "irreparable harm"; cautioning that this emergency situation exception should be "sparingly invoked" and only after "a sufficient preliminary showing that the child will suffer serious and irreversible mental or physical damage").

177. *See, e.g.*, Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303–04 (9th Cir. 1992) (recognizing an exception where it is improbable that administrative remedies will result in adequate relief); Ass'n for Cmty. Living in Colorado v. Romer, 992 F.2d 1040, 1044 (10th Cir. 1993) (acknowledging that exhaustion is not required where it would "fail to provide adequate relief"); J.M. v. Francis Howell Sch. Dist., 850 F.3d 944, 950 (8th Cir. 2017) (recognizing the "inability of the administrative remedies to provide adequate relief" as an exception to the exhaustion requirement).

178. *See, e.g.*, *Hoeft*, 967 F.2d at 1303–04 (quoting H.R. REP. NO. 99-296, at 7 (1985)); Urb. by Urb. v. Jefferson Cty. Sch. Dist. R-1, 89 F.3d 720, 724 (10th Cir. 1996) (quoting H.R. REP. NO. 99-296, at 7 (1985)).

179. Doe By & Through Brockhuis v. Arizona Dep't of Educ., 111 F.3d 678, 681 (9th Cir. 1997).

180. *See, e.g.*, Heldman on Behalf of T.H. v. Sobol, 962 F.2d 148, 158–59 (2d Cir. 1992) ("[T]he futility exception is particularly relevant in actions . . . that allege systemic violations of the procedural rights accorded by IDEA."); Easter v. D.C., 128 F. Supp. 3d

the "policy or practice of generalized applicability" exception,[181] or, often, a combination of exceptions.[182] A few courts go further, acknowledging an exception "hing[es] only on the systemic nature of the plaintiff's allegations," regardless of any connection to "futility."[183] In addition, the standard used to define "systemic" and the court's interpretation of how that standard, along with the underlying purposes of exhaustion, apply to facts of a case largely determine whether exhaustion will be excused. To illustrate the effect of these factors, the remainder of this section briefly examines two cases addressing the issue of whether a claim was "systemic," and thus, not subject to the exhaustion requirement. The first case, *J.S. ex rel. N.S. v. Attica Cent. Schools*,[184] involves allegations against a school district; the second, *Doe By & Through Brockhuis v. Arizona Dep't of Educ.*,[185] arises from youth confined in a county jail. The next section provides a more comprehensive discussion of the application of the exhaustion requirement within the context of juvenile facilities.

In *Attica*, six students brought an action against a school district alleging numerous systemic IDEA violations, including deprivation of access to certain rooms in the school, failure to provide appropriate IEPs, and failure to provide notice to

173, 178 (D.D.C. 2015); Papania-Jones v. Dupree, 275 F. App'x 301, 304 (5th Cir. 2008); J.S. *ex rel.* N.S. v. Attica Cent. Sch., 386 F.3d 107, 113 (2d Cir. 2004).

181. *See, e.g.*, Paul G. By & Through Steve G. v. Monterey Peninsula Unified Sch. Dist., 933 F.3d 1096, 1101–02 (9th Cir. 2019).

182. *See, e.g.*, Grieco v. N.J. Dep't of Educ., No. 06-CV-4077PGS, 2007 WL 1876498, at *6 (D.N.J. June 27, 2007) (analyzing claim under the futility and inadequate exceptions); Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1304–10 (9th Cir. 1992) (analyzing claim under the inadequate relief and policy or practice of generalized applicability exceptions); Ellenberg v. New Mexico Mil. Inst., 478 F.3d 1262, 1277 (10th Cir. 2007) (analyzing claim under the inadequate relief and policy or practice of generalized applicability exceptions); Beth V. *ex rel.* Yvonne V. v. Carroll, 87 F.3d 80, 89 (3d Cir. 1996) (recognizing an exception where plaintiffs "allege systemic legal deficiencies and, correspondingly, request system-wide relief that cannot be provided (or even addressed) through the administrative process"). The court in *Beth V.*, however, declined to decide whether this exception "merely flows implicitly from, or is in fact subsumed by, the futility and no-administrative-relief exceptions." *Id.*

183. A.H. By & Through A.H. v. Clarksville-Montgomery Cnty. Sch. Sys., No. 3:18-CV-00812, 2019 WL 483311, at *5 (M.D. Tenn. Feb. 7, 2019); *see also* Anderson, *supra* note 26, at 241 (discussing different judicial approaches to excusing exhaustion for systemic violations).

184. J.S. *ex rel.* N.S. v. Attica Cent. Sch., 386 F.3d 107 (2d Cir. 2004).

185. Doe By & Through Brockhuis v. Arizona Dep't of Educ., 111 F.3d 678 (9th Cir. 1997).

parents.[186] The Second Circuit determined that exhaustion was excused for futility concerns where "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."[187] Furthermore, the court noted that requiring each plaintiff to exhaust administrative remedies in this case, would have led to "a high probability of inconsistent results" and an administrative record of no substantial benefit to the court.[188] Applying this standard in conjunction with the general purposes of exhaustion, the court held that the allegations were systemic and that exhaustion would be futile because the case concerned "the school district's total failure to prepare and implement Individualized Education Programs."[189]

By contrast, in *Brockhuis*, the Ninth Circuit declined to label claims brought by a class of approximately twenty-two youth with disabilities housed at a county jail, "systemic."[190] The plaintiffs alleged that the state educational agency had adopted a policy or practice of not complying with the IDEA after a showing that the state educational agency had neither monitored nor provided IDEA services to eligible youth in the jail for several months.[191] Based on its examination of multiple cases involving systemic allegations, the Ninth Circuit determined that an allegation is "systemic" when 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."[192] Where a claim concerns only "limited

186. J.S. *ex rel.* N.S., 386 F.3d at 110–12.
187. *Id.* at 114.
188. *Id.*
189. *Id.* at 115. The court also recognized three other allegations as concerning systemic issues; namely, the School District's alleged failures: (1) to notify parents of meetings as required by law; (2) to provide parents with legally required progress reports; and (3) to provide appropriate training to school staff. *Id.*
190. Doe By & Through Brockhuis v. Arizona Dep't of Educ., 111 F.3d 678 (9th Cir. 1997).
191. *Id.* at 680.
192. Wasserman, *supra* note 44, at 400 (2009) (quoting Doe v. Ariz. Dep't of Educ., 111 F.3d 678, 682 (9th Cir. 1997)); *see also* Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1307 (9th Cir. 1992) (noting "even where local school policies appear on their face to violate the IDEA, administrative exhaustion may be necessary to give the state a reasonable opportunity to investigate and correct such policies").

components of a program, and if the administrative process is capable of correcting the problem," it is not subject to exhaustion exception.[193] In applying this standard, the court concluded that although the state educational agency had not monitored or provided special education services for several months, "nothing suggests that the Department's neglect resulted from an agency decision, regulation, or other binding policy."[194] Because the Department acted in accordance with the IDEA once it became aware of the youth and the complaint concerned youth at a single facility, the court found that the alleged violations "might be corrected through IDEA hearings."[195]

In both these cases, the courts' decisions were impacted by the standard they used to determine a systemic claim and by their applications of that standard to the facts of each case. Notably, the Second Circuit recognized the "nature and volume of complaints" as a relevant factor in determining a systemic allegation,[196] whereas the Ninth Circuit focused on its distinction between allegations of structural failures and those targeting substantive concerns.[197]

In subsequent cases involving allegations of unlawful policies or practices of general applicability, several courts, applying the approach followed in *Doe v. Arizona Dept. of Educ.*, declined to excuse exhaustion on finding that it was possible for a hearing officer to provide some form of relief or where the underlying purposes of exhaustion, such as developing the factual record,

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193. *Id.*

194. Doe By & Through Brockhuis v. Arizona Dep't of Educ., 111 F.3d 678, 684 (9th Cir. 1997).

195. *Id.*

196. J.S. *ex rel.* N.S. v. Attica Cent. Sch., 386 F.3d 107, 114 (2d Cir. 2004). In Papania-Jones v. Dupree, 275 F. App'x 301, 304 (5th Cir. 2008), the Fifth Circuit described the Second Circuit's analysis on systemic allegations as "instructive." Subsequently, in J.R. by Analisa R. v. Austin Indep. Sch. Dist., No. 1:21-CV-279-LY, 2021 WL 6374871 (W.D. Tex. Dec. 2, 2021), a Texas district court, citing to the Second Circuit's analysis, allowed plaintiffs to bypass exhaustion based on allegations that delays in evaluating and reevaluating youth with disabilities were caused by the school district's policies and practices.

197. Similarly, the Third and Tenth Circuits have recognized claims as "systemic" where plaintiffs allege structural or systemic failure and seek systemwide reforms and where plaintiffs demonstrate that the policy is "contrary to the law" and that the general purpose of exhaustion would not be benefit by requiring administrative compliance. *See, e.g.*, Beth V. *ex rel.* Yvonne V. v. Carroll, 87 F.3d 80, 89 (3d Cir. 1996); Ellenberg v. New Mexico Mil. Inst., 478 F.3d 1262, 1276 (10th Cir. 2007).

could be advanced.[198] In 2021, for example, the Ninth Circuit remarked, "[t]o our knowledge, no published opinion in this circuit has ever found that a challenge was 'systemic' and exhaustion not required."[199] Likewise, as in *Doe v. Arizona Dept. of Educ.*, several courts have declined to excuse exhaustion upon determining that the plaintiffs' claims concern a substantive matter relating to a single component of a program.[200]

Courts have made additional distinctions when applying the exhaustion doctrine to claims of systemic violations, including distinguishing between allegations of systemic violations at the state level—where hearing officers lack authority to instruct the state on its policies and practices—versus at the school district level.[201] Some courts, declining to excuse exhaustion in cases involving allegations against systemic district policies and practices, have cited the doctrine's underlying purpose of encouraging parent-agency collaboration and the benefit afforded by first providing notice and an opportunity to the state to correct local compliance issues.[202]

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198. *See, e.g.*, Grieco v. N.J. Dep't of Educ., No. 06-CV-4077PGS, 2007 WL 1876498, at *7 (D.N.J. June 27, 2007) (requiring plaintiffs to exhaust administrative remedies where an administrative judge could provide "much of the relief" sought by plaintiffs and where it served general purposes of exhaustion); Mrs. M v. Bridgeport Bd. of Educ., 96 F. Supp. 2d 124, 131 (D. Conn. 2000) (declining to excuse exhaustion where violations could be addressed on a "case-by-case basis" by hearing officers and it would serve underlying exhaustion principles).

199. Student A By & Through Parent A v. San Francisco Unified Sch. Dist., 9 F.4th 1079, 1084 (9th Cir. 2021).

200. *See* Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298 (9th Cir. 1992) (requiring plaintiffs to exhaust administrative remedies because their allegations focused on a singular component of the school district's special education program: extended year programming); Ass'n for Cmty. Living in Colorado v. Romer, 992 F.2d 1040 (10th Cir. 1993) (declining to excuse exhaustion on finding plaintiffs' allegations concerning the state educational agency's extended school year and extended school day services implicated just one component of the state's educational program).

201. *See* N.J. Prot. & Advoc., Inc. v. N.J. Dep't of Educ., 563 F. Supp. 2d 474, 487–88 (D.N.J. 2008) (excusing exhaustion, noting "if each student who is improperly segregated is forced to assert his or her claims through the administrative process, there is a high probability that there will be inconsistent results and the alleged 'systematic' deficiency in the state's education system will not be remedied"); N.A. *ex rel.* D.A. v. Gateway Sch. Dist., 820 F. Supp. 2d 649 (W.D. Pa. 2011) (requiring plaintiffs to exhaust administrative remedies where their allegations concerned systemic deficiencies at the school district level).

202. *See Hoeft*, 967 F.2d at 1309 ("Because the named plaintiffs' cases are representative of the policies at issue in this case, individual administrative determinations would alert the state to local compliance problems and further correction of any problems on a state-local level."); Student A v. San Francisco Unified Sch. Dist., No. 19-CV-03101-WHO, 2020 WL 571052, at *1 (N.D. Cal. Feb. 5, 2020), *aff'd sub nom.* Student A By & Through Parent A v. San Francisco Unified Sch. Dist., 9 F.4th 1079 (9th

B. THE INTERACTION BETWEEN THE EXHAUSTION REQUIREMENT AND FEATURES OF JUVENILE FACILITIES

As described in Part II.B, although the IDEA's text and legislative history entitle youth in juvenile facilities to the same substantive and procedural guarantees as children in public schools, various factors unique to juvenile facilities act as systematic barriers to youth with special education rights in practice. These barriers include: distance from students' families and schools, time constraints of youth confinement, confusing overlaps and gaps in different agencies' responsibilities for particular students, administrative priorities that compete with and overshadow educational services, inadequate accountability mechanisms, and limited resources.[203] This section explains how the unique features of confinement in juvenile facilities interact with the threshold "exhaustion of administrative remedies" hurdle to create procedural bars that frustrate the IDEA's promise of FAPE and other statutory protections.

1. *The Underlying Purposes of Exhaustion Applied Within the Juvenile Facility Context*

In the context of juvenile facilities, the IDEA's exhaustion requirement imposes a rights-defeating burden on parents without providing the exhaustion doctrine's usual correlative substantive and procedural protections to education officials and the courts. Moreover, the provision of special education in juvenile facilities involves a complex institutional landscape that substantially differs from public schools.[204] The following table examines how the unique features of juvenile facilities interact with and often frustrate the underlying purposes of exhaustion.

Cir. 2021) (noting that exhaustion would provide "the State the opportunity to respond and step in to force [the local educational agency] to meet its requirements if, indeed, SFUSD is systemically failing scores of disabled students across all age ranges and with all disabilities"); Ass'n for Retarded Citizens of Alabama, Inc. v. Teague, 830 F.2d 158, 161 (11th Cir. 1987) ("[D]ue process hearings would serve to highlight the remedial action required to guarantee the rights of all members of plaintiffs' class and likely lead to the implementation of those remedies which are universally applicable.").

203. *See supra* Part II.B.

204. *See generally* U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUST., *supra* note 77, at 2; OFF. OF JUV. JUST. & DELINQ. PREVENTION, *supra* note 96, at 6.

TABLE 1

Underlying Purpose of Exhaustion	**Interaction with Juvenile Facility Context**
Support Congress' aim for encouraging parents and local educational agencies to work together	Due to institutional shortcomings and practical considerations, such as distance from the facility and brief confinement lengths, parents face increased challenges to participating meaningfully in their child's education process.[205]
Grant agencies the first opportunity to correct any mistakes in their special education programs	In many states, state educational agencies directly operate schools in juvenile facilities or statewide special school districts.[206] As courts have noted, it may be less consequential to provide agencies with an initial opportunity to correct errors when plaintiffs challenge the adequacy of state, rather than local, policies and procedures.[207]
Allow state and local agencies to exercise discretion and apply their expertise	On a system-wide level, state educational agencies share the responsibility for educating youth in facilities with local educational agencies and non-educational agencies.[208] These other agencies frequently have competing administrative priorities.[209] In turn, the provision of special education services in juvenile facilities may be less of an individualized,

205. Morris & Thompson, *supra* note 132, at 184; Gagnon et al., *supra* note 121, at 100.
206. S. EDUC. FOUND., *supra* note 78, at 5.
207. *See, e.g.*, Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1307 n.7 (9th Cir. 1992) ("Where a state policy is challenged, allowing the state an opportunity to correct its own errors by requiring exhaustion may not be as weighty a consideration."); Mrs. W. v. Tirozzi, 832 F.2d 748, 757 (2d Cir. 1987) (excusing exhaustion where plaintiffs' complaint concerned the adequacy of state procedures for due process hearings).
208. 34 C.F.R. § 300.154; 34 C.F.R. § 300.2; *see also* GAGNON ET AL., *supra* note 87, at 6–8.
209. *See* Leone & Meisel, *supra* note 98; Sheldon-Sherman, *supra* note 8, at 236.

	localized process informed by the expertise of administrators.[210] Moreover, juvenile facilities often have inexperienced staff and sparse professional development opportunities.[211]
Develop technical issues and a factual record prior to court review	Compared to public schools, the provision of special education in juvenile facilities is more often impacted by policies and practices involving non-educational considerations. Where plaintiffs allege IDEA violations as a result of non-educational agency decisions, complex and technical questions are less likely to be implicated and the factual development of a record before court review may be less important.[212]

2. *The Systemic Exception to Exhaustion Applied Within the Juvenile Facility Context*

There are few court decisions examining the issue of whether exhaustion is excused in class action lawsuits alleging FAPE denials in juvenile facilities.[213] As discussed in Part III.A.2.b, the court in *Brockhuis* held that the plaintiffs needed to exhaust administrative remedies after determining they failed to show that the state educational agency's violations were "systemic in nature."[214] By contrast, in *Derrick v. Glen Mills Sch.*, the court found that the plaintiffs had successfully demonstrated exhaustion would be futile where they alleged that "the wholesale absence" of any monitoring and the complete deprivation of all IDEA rights and services by the state educational agency, state

210. *Id.*
211. Sheldon-Sherman, *supra* note 8, at 236.
212. *See, e.g.*, *Hoeft*, 967 F.2d at 1306 (requiring exhaustion where plaintiffs challenged local school district policies, noting "adjudicating the validity of these policies requires a fact-specific inquiry into their operation in an individual case").
213. One significant reason for the absence of such court decisions is the high percentage of class action cases that have settled through consent decrees or settlement agreements. *See* Sheldon-Sherman, *supra* note 8, at 234–35.
214. Doe By & Through Brockhuis v. Arizona Dep't of Educ., 111 F.3d 678, 680 (9th Cir. 1997).

secretary of education, or the private residential rehabilitative institution responsible for providing educational services.[215] Citing the standard used in *Attica*, the court in *Glen Mills* found exhaustion futile "[g]iven the nature and volume of plaintiffs' claims, which allege a complete failure to provide special education services . . . to a putative class of potentially hundreds of minors placed at Glen Mills."[216] Similarly, in *Handberry v. Thompson*, the court allowed youth with disabilities incarcerated in a Rikers Island prison facility to bypass administrative remedies where their allegations involved "the absence of any services whatsoever."[217]

For youth in juvenile facilities and their families who seek to bypass exhaustion without alleging the complete deprivation of IDEA rights and services, however, the burden required to show systemic violations may be challenging to meet. Merely framing an allegation as a class action complaint, as several courts have advised, does not allow plaintiffs to bypass administrative remedies.[218] Circuit courts are also split as to whether or not exhaustion is a jurisdictional issue or a claims processing rule, and the majority of circuits find that it is jurisdictional.[219] As stated by the Tenth Circuit: "If exhaustion is a jurisdictional requirement, the district court must always dismiss if there has been a failure to exhaust. If exhaustion is not jurisdictional, the court must dismiss only if the issue has been properly presented for decision."[220] If exhaustion is jurisdictional, plaintiffs must

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215. Derrick v. Glen Mills Sch., No. 19-1541, 2019 U.S. Dist. LEXIS 220610, at *45–48 (E.D. Pa. Dec. 19, 2019).

216. *Id.* at 47–48.

217. Handberry v. Thompson, 446 F.3d 335, 344 (2d Cir. 2006).

218. *See* Ass'n for Cmty. Living in Colorado v. Romer, 992 F.2d 1040, 1044 (10th Cir. 1993) (holding that the allegations were "not the kind of systemic violation that renders the exhaustion requirement inadequate or futile, and framing a complaint as a class action challenge to a general policy does not convert it into one"); Mrs. M v. Bridgeport Bd. of Educ., 96 F. Supp. 2d 124, 135 (D. Conn. 2000) (declining to recognize as systemic, allegations that the local educational agency engaged in a practice of unlawfully over-identifying Black and Latino children for IDEA services); Grieco v. N.J. Dep't of Educ., No. 06-CV-4077PGS, 2007 WL 1876498, at *9 (D.N.J. June 27, 2007) (asserting that to excuse exhaustion whenever a plaintiff simply alleged a "systematic failure, without any logical mechanism to draw reasonable conclusions about individual needs with respect to such a large category of students, would undermine the IDEA and rationale for the exhaustion requirement").

219. *See generally* Wasserman, *supra* note 44, at 411 (examining the majority view that exhaustion is jurisdictional); *see also* Queenan, *supra* note 20, at 995 (discussing circuit split over whether exhaustion is jurisdictional).

220. McQueen *ex rel.* McQueen v. Colorado Springs Sch. Dist. No. 11, 488 F.3d 868, 873 (10th Cir. 2007).

allege facts that, if assumed true but without drawing inferences in the plaintiffs' favor, establish that exhaustion is not required.[221] In the context of juvenile facilities, it is likely that plaintiffs will face increased hurdles to meet this initial burden as a result of the structural features previously discussed.

Courts have also repeatedly required exhaustion after determining that the plaintiffs' allegations, while challenging a policy of general applicability, only relate to a singular component of a local educational agency's educational program.[222] Likewise, in *Brockhuis*, the court found allegations involving children at only one facility to fall short of the "systemic" classification. For youth in juvenile facilities and their families, the process of obtaining the information necessary to allege broad violations requiring "restructuring the education system itself"[223] is likely more troublesome and complicated than in public schools. Youth juvenile facilities are secluded, and families may face greater difficulty ascertaining details about the adequacy of educational services in their child's juvenile facility due to the often far distances between a facility and a child's home. Decreased opportunities for families of youth in facilities to communicate with their children, educational staff members, facility administrators, and other families of children housed in facilities may also hinder information gathering. Compared to the public school context, parents also have fewer opportunities to learn about educational conditions within other facilities in the same district and state, making it more challenging to allege broad, structural IDEA violations. Due to confusion surrounding the shared, and often, overlapping agency responsibilities and the security interests of juvenile facilities, families may also have difficulty gathering information about agency policies and practices.

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221. Norton v. Larney, 266 U.S. 511, 515 (1925) ("[T]he jurisdiction of a federal court must affirmatively and distinctly appear and cannot be helped by presumptions or by argumentative inferences drawn from the pleadings.").

222. *See, e.g.*, Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298 (9th Cir. 1992); *Romer*, 992 F.2d at 1044; J.T. *ex rel.* A.T. v. Dumont Pub. Sch., 533 F. App'x 44 (3d Cir. 2013).

223. Doe By & Through Brockhuis v. Arizona Dep't of Educ., 111 F.3d 678, 682 (9th Cir. 1997).

IV. PROPOSALS FOR REFORM

For the reasons set out in Part II of this Note, structural features of juvenile facilities (1) make it difficult for juvenile justice and educational agencies to provide youth in juvenile facilities and their families with FAPE and the procedural protections the IDEA intends all public school children and their families to have and (2) prevent many families from accessing the IDEA's substantive and procedural protections. As laid out in Part III, the exhaustion requirement, in turn, heightens both of those barriers to the enforcement of IDEA rights on behalf of youth in juvenile facilities. To alleviate these problems, this Part proposes a range of reforms that courts could adopt when they interpret the IDEA's exhaustion requirement or that Congress could recognize by revising the Act. These proposed reforms would better align with the IDEA drafters' original understanding of how the exhaustion requirement should operate and would better achieve the Act's longstanding FAPE objective and procedural protections. The reforms also provide more predictability for parents seeking to challenge systemic violations of the IDEA and ensure that the exhaustion requirement does not prevent courts from appropriately addressing systemic infirmities.

In addition, relaxing the exhaustion requirement for families of children in juvenile facilities could induce the formation of consent decrees by promoting a more equitable balance of power between agencies and families. Although more research is needed to understand the connection between exempting exhaustion requirements and the likelihood of negotiations, an analogy can be made to the theory of destabilization rights proposed by Professor Charles F. Sabel and Professor William H. Simon.[224] As Professors Sabel and Simon describe, "[a] public law destabilization right is a right to disentrench or unsettle a public institution when, first, it is failing to satisfy minimum standards of adequate performance and, second, it is substantially immune from conventional political mechanisms of correction."[225] Under

224. *See generally* Charles F. Sabel, William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004). An extensive discussion of this model and its potential impact on class action litigation arising from juvenile facilities is outside the scope of this Note.

225. *Id.* at 1062.

this theory, the court's role is to publicly acknowledge the illegitimacy of the status quo, and by providing legitimacy to the plaintiff's claims, there is a resulting shift in the balance of power between the plaintiff and defendant.[226] Applying this theory, recognizing plaintiffs' systemic claims could help put pressure on agencies to take action and increase monitoring and enforcement efforts by state educational agencies.

A. OVERVIEW OF REFORM OPTIONS

1. *A Bright-Line Exception*

First, the IDEA could be read by courts or revised by Congress to acknowledge a bright-line exception to the exhaustion requirement when plaintiff youth and their families allege systemic FAPE violations in juvenile facilities. Such reform would provide the most assurance that the exhaustion requirement would not be imposed in situations where administrative remedies would be futile, and thus, only serve to delay and prevent families from receiving appropriate relief. The reform would be easily administrable by courts and provide predictability to families seeking to file a civil action. It would, however, minimize the amount of discretion afforded to courts to make individualized determinations based on the facts of a given case and would remove the capacity of administrative actors by carving out a scenario whereby their authority is entirely transferred to the courts. Although adopting this new exception would markedly lessen the discretion afforded to agencies, it may be the appropriate balance in a context where education is rarely the top priority of any agency.

2. *A Per se Rule*

For an alternative solution, courts could adopt or Congress could recognize a per se rule allowing plaintiffs to bypass administrative remedies upon meeting certain conditions. Drawing from recognized exceptions, the rule would require courts to excuse exhaustion whenever a claim alleges systemic IDEA violations occurring in juvenile facilities and plaintiffs

226. *Id.* at 1056.

show the existence of one of the following factors: (1) families were denied notice of or access to procedural administrative rights,[227] (2) administrative remedies are unable to provide *all* adequate relief,[228] or (3) an agency has adopted a policy or pursued a practice of general applicability that is unlawful.[229] Due to this reform's revised standards for each factor, the rule would be more responsive to the structural features of juvenile facilities than the standard for exceptions applied by many courts today. Moreover, by adopting a per se rule, families would be afforded more predictability, and circuit courts would apply the exhaustion doctrine more uniformly. Although this reform would permit more case-specific considerations than the first option, it nonetheless affords less discretion to judges than do currently recognized exceptions.

3. *Features of Juvenile Facilities as a Factor in Exhaustion Inquiry*

Lastly, at the very least, when claims arise from alleged systemic IDEA violations in juvenile facilities, courts should account for this factor in their exhaustion inquiries. Specifically, when determining whether to allow plaintiffs to bypass administrative remedies, courts should consider how the structural features of juvenile facilities interact with the general purposes of exhaustion[230] and the congressional intent behind the IDEA. As courts already exercise discretion when they apply the exhaustion doctrine, by considering the requirement's practical implications in their inquiries, it follows naturally that courts should recognize the unique barriers in juvenile facilities. Acknowledging these factors would ensure that courts'

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227. In order to demonstrate that this exception applies, plaintiffs would not be required to affirmatively show that the agency's failure to provide notice deprived them of administrative remedies. The purpose of this relaxed requirement is to incentivize agencies to prophylactically take measures to ensure adherence to IDEA procedural requirements.

228. This exception would not only be limited to situations where hearing officers lacked the authority to grant any requested relief. For a critique of the proposition that plaintiffs are subject to the exhaustion requirement whenever the administrative process can provide *some* relief, see P.V. *ex rel.* Valentin v. Sch. Dist. of Philadelphia, No. 2:11-CV-04027, 2011 WL 5127850, at *8–9 (E.D. Pa. Oct. 31, 2011).

229. Due to the unique features of juvenile facilities discussed in Part II.B *supra*, this exception would apply in instances where plaintiffs' allegations concern only a singular component of a program or the existence of a practice, rather than a formal policy.

230. *See supra* Part III.B.

application of the exhaustion doctrine most accurately supports Congress' intent to recognize and protect the rights of students with disabilities and ensure effective and accessible special education services.[231] Although this reform option is most attentive to case-specific considerations and minimizes under- and over-inclusivity, it provides less predictability to families and is subject to significant variation across courts.

B. ANALYSIS OF REFORM OPTIONS

As a whole, the proposed reforms draw from the existing exhaustion doctrine and Congress' intent in enacting the IDEA. Examining these options in terms of the exhaustion doctrine, the well-recognized futility exception and the exception for "systemic violations'" support all three reform options. Notably, however, the existing judicially recognized exceptions most easily accommodate the third proposal because it would not require the declaration of an entirely new category of exceptions. The legislative history regarding the IDEA's exhaustion requirement also, to varying degrees, supports each of the reform options. As discussed in Part III.A.2.a, Senator Williams, the Act's principal author, expressly recognized that exhaustion should be excused when it would be futile,[232] and Representative Miller later expanded on this futility exception when he outlined four scenarios where exhaustion may be inappropriate.[233]

Despite the doctrinal and legislative support for these reforms, it could raise separation of powers concerns if courts unilaterally recognized a new bright-line category or per se rule for excusing exhaustion in cases involving systemic violations in juvenile facilities. The IDEA's legislative history indicates Congress' intent to keep the exhaustion requirement flexible. Without initial action from Congress expressing support for rigid or

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231. 20 U.S.C. §§ 1400–1482.

232. 121 CONG. REC. S20433 (1975) (remarks of Senator Harrison Williams).

233. These include when:

> [(1)] an agency has failed to provide services specified in the child's individualized educational program . . . [(2)] an agency has abridged or denied a handicapped child's procedural rights . . . [(3)] an agency had adopted a policy or pursued a practice of general applicability that is contrary to the law, or where it would otherwise be futile to use the due process procedures . . . and [(4)] an emergency situation exists. . . .

131 CONG. REC. 31376 (1985) (statement of Representative George Miller).

formulaic exceptions, a court's application of the first or second reform could be viewed as exceeding the court's judicial role.

These reforms, however, need not be recognized by courts or adopted by Congress in isolation. The well-established statutory and non-statutory exceptions in habeas corpus law provide an informative analogy.[234] Section 2254(b)(1)(B) of the Judicial Code includes two distinct exceptions to the requirement that a petitioner must exhaust state remedies before seeking a habeas writ in federal court.[235] These exceptions apply if "(i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant."[236] In addition to these statutory exceptions, courts have recognized non-statutory exceptions that, as described by Professors Randy Hertz and James S. Liebman, "are relegated largely to the discretion of the lower courts as informed by concern for the interests of justice, judicial economy, comity, and federalism."[237]

C. COUNTERARGUMENTS

1. *Abuse of the Exception*

Recognizing an exception for systemic claims arising from juvenile facilities will likely raise concerns that the exception will be subject to abuse by skillful litigators. In *Hoeft v. Tucson Unified School Dist.*, the court declared that structuring a complaint as a class action seeking injunctive relief does not by itself excuse exhaustion—"to hold otherwise would render the IDEA's exhaustion requirement meaningless because it could be bypassed merely by styling the challenge a class action for injunctive relief."[238] Likewise, it could be argued that advocates

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234. *See* RANDY HERTZ & JAMES S. LIEBMAN, 2 FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 23.4 (2021) (discussing the statutory exceptions recognized in Section 2254(b)(1)(B) of the Judicial Code).

235. 28 U.S.C. § 2254(b)(1)(B).

236. *Id.*

237. HERTZ & LIEBMAN, *supra* note 234. Two well-recognized non-statutory exceptions are (1) "[t]he lack of exhaustion was discovered after a full hearing was held in the district court or after other proceedings were had, and dismissal would be wasteful of judicial resources" and (2) "[d]ismissal would serve 'no interest state or federal,' would burden the states with unnecessary litigation, or 'would constitute a 'hollow exercise in etiquette.'" *Id.*

238. Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1308–09 (9th Cir. 1992).

would craft complaints, appearing to challenge systemic practices in juvenile facilities, when in actuality, the complaints concern individual allegations. This is a risk posed by the reform, but increasingly strict requirements to certify a representative class may safeguard against abuse of this exception.[239] In addition, the second and third reform options protect against misuse by either requiring the presence of specific conditions or allowing for judges to exercise discretion based on case-specific considerations.

2. *Judicial Efficiency and Deference*

Opponents may also call into question the reform's impact on decreasing judicial efficiency and deference to agencies—two main purposes behind the IDEA's exhaustion requirement.[240] In practice, however, requiring plaintiffs to exhaust administrative remedies for systemic claims does not serve these policy aims. In the context of juvenile facilities, where multiple agencies share responsibility for the provision of education services, class action claims of IDEA violations are more likely to be the result of systemwide policies. Agencies administering services are also more likely to lack administrative autonomy over the provision of these services.[241] Thus, where the remedy necessitates revision of a systemwide policy or practice, hearing officers lack the requisite authority to grant this relief and there is no added efficiency to requiring plaintiffs to utilize the dispute resolution process.[242]

CONCLUSION

This Note has provided an analysis of special education within juvenile facilities, specifically examining where the IDEA's presumed protections fall short as a result of institutional and structural factors. It has also proposed responsive reforms to the statute's exhaustion requirement. Although class action litigation regarding IDEA denials at juvenile facilities have seldom reached the courtroom, consent decrees are capable of addressing plaintiffs' systemic concerns. Reforming the

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239. *See* Anderson, *supra* note 26, at 232 (discussing the stringent requirements for forming a representative class of plaintiffs).

240. *See* Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist., 288 F.3d 478, 487 (2d Cir. 2002).

241. McAleer, *supra* note 5, at 551.

242. Weber, *supra* note 145, at 1136–37.

exhaustion requirement for this narrow category of cases shifts the distribution of power from agencies to parents in a way that aligns with the IDEA's legislative intent and has the possibility of inducing negotiations between the parties.