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JAMIE S. V. MILWAUKEE PUBLIC SCHOOLS: URBAN CHALLENGES CAUSE SYSTEMIC VIOLATIONS OF THE IDEA

I. INTRODUCTION

Child Find¹ is one of the most important provisions, if not *the* most important provision, of the Individuals with Disabilities Education Act (IDEA). Child Find requires states and districts to identify, locate, and evaluate all children with disabilities.² The IDEA mandates that a state must provide a Free Appropriate Public Education (FAPE) to every child with a disability as a prerequisite to receiving federal funding to help educate children with disabilities.³ The IDEA defines FAPE as “special education and related services.”⁴ If a school district violates the Child Find provision, this necessarily means that the district did not provide the student an appropriate FAPE.⁵ A failure to provide a child access to a FAPE causes a complete failure of the IDEA because FAPE is the “overriding concern of the Act.”⁶ Thus, Child Find is a gate-keeping provision that requires identification of children with disabilities.⁷ Identification leads to access to appropriate special education and other related services to which all disabled children are entitled by the IDEA.⁸

In *Jamie S. v. Milwaukee Public Schools*, the United States District Court for the Eastern District of Wisconsin delivered an opinion holding that Milwaukee Public Schools (MPS) and the Wisconsin Department of Public Instruction (DPI) violated the IDEA by failing to comply with the requirements of Child Find.⁹ The court determined the issue of liability;

1. 20 U.S.C. § 1412(a)(3) (2006).

2. *Id.* § 1412(a)(3)(A).

3. *Id.* § 1412(a)(1).

4. *Id.* § 1401(9).

5. *See* Dep’t of Educ. v. Cari Rae S., 158 F. Supp. 2d 1190, 1196 (D. Haw. 2001).

6. Clay T. v. Walton County Sch. Dist., 952 F. Supp. 817, 821 (M.D. Ga. 1997).

7. *See* JOHN W. NORLIN, IDENTIFY, LOCATE AND EVALUATE: CHILD FIND UNDER THE IDEA AND SECTION 504, at 1 (2002).

8. *See* 20 U.S.C. § 1412(a)(1)(A) (mandating that a free appropriate public education must be available to “all children” with disabilities).

9. 519 F. Supp. 2d 870, 903 (E.D. Wis. 2007). The court also found DPI in violation of IDEA. *Id.* As part of its oversight responsibilities of DPI of special education, DPI is required to monitor school districts and assure each district’s compliance with federal and state law. *Id.* at 873. A complete discussion of DPI’s liability is beyond the scope of this Note, and MPS will be the focus. In addition to violating the IDEA, both MPS and DPI violated related state statutes that effectuate the provisions of the IDEA. *See id.* at 903, 880. This Note largely focuses on federal legislation, namely

however, before the court enters a judgment, it must determine appropriate remedies for the plaintiff class and appropriate sanctions for MPS.¹⁰

This Note argues that while the decision of *Jamie S.*—finding systemic violations of MPS’s Child Find procedures—was justified, the systemic violations of MPS are largely due to unique challenges faced by urban school districts, like the MPS district. Part II gives an overview of special education law, including its beginnings as a social movement, the more recent legal movement, and an extensive discussion of the Child Find mandate. Part III provides a synopsis of the facts of *Jamie S.* and each of MPS’s systemic violations of the IDEA. Part IV argues that MPS’s failure to comply with Child Find is rooted in the challenges faced by an urban school district, and these challenges make compliance with the IDEA extremely difficult. Part V discusses the remedies and sanctions awarded in the case, including the settlement agreement between the plaintiffs and DPI and the remedy imposed by the court upon completion of Phase III litigation. Additionally, Part V argues for a new standard for urban school districts: courts should require satisfactory compliance instead of 100% compliance, which the IDEA currently requires. Further, in order to achieve satisfactory compliance courts must impose tailored remedies that take into account all of the urban challenges faced by MPS and similar districts.

II. BACKGROUND OF THE IDEA

A. Social Movement

Early treatment of individuals with disabilities revolved around social movements. Various social movements led the way these individuals were treated because there were no legal standards for treatment until the late twentieth century.¹¹ The earliest treatment of individuals with disabilities focused on segregating and removing these individuals from their families and communities.¹² Extreme treatment such as infanticide and shunning was common of individuals with disabilities in the seventeenth century.¹³

By the mid-1900s, institutionalization peaked and was society’s primary way of dealing with individuals with disabilities.¹⁴ At this time, a publicly

the IDEA.

10. *Id.* at 904.

11. See LARRY D. BARTLETT ET AL., SPECIAL EDUCATION LAW AND PRACTICE IN PUBLIC SCHOOLS 5 (2d ed. 2007).

12. See *id.*

13. *Id.*

14. See NIKKI L. MURDICK ET AL., SPECIAL EDUCATION LAW 3 (2d ed. 2007).

supported institution was in every state.¹⁵ The goals of institutionalizing individuals with disabilities were to contain them and their behavior and to protect the communities from which these people came.¹⁶ These individuals were excluded from virtually all activities in the community including public schools.¹⁷ This policy forced institutions to provide lifelong care as it was unlikely that an individual with a disability would have the skills to live independently.¹⁸ Mass institutionalization resulted in overcrowding, which spurred public concern over the quality of life afforded to individuals with disabilities.¹⁹

The social movement of deinstitutionalization was society's response to the quality-of-life concerns.²⁰ The movement's goal was to release individuals with disabilities back into their communities in order to integrate them into society to become productive citizens.²¹ During deinstitutionalization, parents of children with disabilities became advocates by forming powerful local and national support groups aimed at getting their children into tax-supported public schools.²²

The emergence of the Civil Rights Movement of the 1960s and early 1970s greatly affected educational services in this nation.²³ An overarching concern for the individual characterized the movement.²⁴ There were many victories in this era expanding the civil rights of individuals of different races.²⁵ These victories also affected the rights of individuals with disabilities. Advocates of these individuals used *Brown v. Board of Education*²⁶ to oppose the exclusion of individuals with disabilities from

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 3–4. The source was a national study completed by the American Association on Mental Deficiency and examining 134 public institutions. *Id.* at 4. The results indicated that 60% of institutions were overcrowded, 50% rated below minimum safety standards, 89% did not meet acceptable attendant/resident ratios, 83% did not meet professional staffing requirements, and 60% provided insufficient space for education and recreation. *Id.*

20. *Id.* at 5–6.

21. *Id.*

22. *Id.* at 6–7.

23. See MURDICK ET AL., *supra* note 14, at 8–9.

24. See *id.*

25. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967).

26. In *Brown*, the plaintiffs alleged that African-American children who were required to attend segregated schools were denied the equal protection of the laws under the Fourteenth Amendment. 347 U.S. at 488. This United States Supreme Court decision overturned *Plessy v. Ferguson*, 163 U.S. 537 (1896), in its holding that “separate but equal” schools were inadequate and required that the opportunity of education must be made available to all children on equal terms. *Brown*, 347 U.S. at 488, 495. This decision provided the basis for future rulings that children with disabilities may not

public schools.²⁷ This case became “the basic tenet for later federal legislation guaranteeing educational and civil rights for persons with disabilities.”²⁸

B. Legal Movement

The progression of each social movement combined with the explosion of court decisions²⁹ prompted a legal movement to enact legislation to codify and expand the foundations of the Civil Rights Movement for individuals with disabilities.³⁰ Section 504 of the Rehabilitation Act of 1973³¹ was the legal movement’s first legislative effort.³² Section 504 made it “illegal to deny participation in activities, benefits of programs, or to in any way discriminate against a person with a disability solely because of that disability. . . . Individuals with disabilities must have equal access to” any program or activity receiving Federal financial assistance.³³ Section 504 did not provide any funding; it provided only a guarantee of rights.³⁴

1. Education for All Handicapped Children Act

The Education for All Handicapped Children Act (EAHCA)³⁵ was the follow-up to Section 504 and laid the foundation for the most significant piece of legislation for individuals with disabilities today—the IDEA.³⁶ EAHCA

be excluded from public schools solely based upon having a disability. *See, e.g., Mills v. Bd. of Educ.*, 348 F. Supp. 866, 874–75 (D.D.C. 1972) (preventing schools from further excluding, suspending, expelling, reassigning, and transferring students with disabilities out of public schools without due process of law).

27. MURDICK ET AL., *supra* note 14, at 9.

28. *Id.* at 8–9.

29. *See, e.g., Brown*, 347 U.S. at 495 (holding “the doctrine of ‘separate but equal’ has no place” in public education); *Mills*, 348 F. Supp. at 878 (holding that every child is entitled “a free and suitable publicly-supported education regardless of the degree of the child’s mental, physical or emotional disability or impairment”); *Pa. Ass’n for Retarded Citizens v. Pennsylvania*, 343 F. Supp. 279, 302 (E.D. Pa. 1972) (enjoining the State of Pennsylvania from denying education to children with mental retardation who reside in the state); *Hobson*, 269 F. Supp. at 513 (declaring the policy of mislabeling and segregating African-American students a violation of the school system’s public responsibilities).

30. MURDICK ET AL., *supra* note 14, at 14.

31. Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794 (2006)).

32. MURDICK ET AL., *supra* note 14, at 14.

33. JIM YSSELDYKE & BOB ALGOZZINE, *THE LEGAL FOUNDATIONS OF SPECIAL EDUCATION: A PRACTICAL GUIDE FOR EVERY TEACHER* 11 (2006).

34. MURDICK ET AL., *supra* note 14, at 14.

35. Education for All Handicapped Children Act of 1975, Pub. L. 94-142, 89 Stat. 773 (codified at 20 U.S.C. §§ 1401–1461 (2006)).

36. Education of the Handicapped Act Amendments of 1990, Pub. L. 101-476, 104 Stat. 1103 (codified at 20 U.S.C. § 1400 (2006)) (renaming the act the Individuals with Disabilities Education

improved upon Section 504 in two obvious ways. First, it combined guarantees of rights for individuals with disabilities with federal funding.³⁷ Second, it focused only on school-aged children, while Section 504 covered children, employees, and others who may visit a school.³⁸

EAHCA was based on several core principles that still exist in the current version of the IDEA. The first principle, “zero reject,”³⁹ establishes that all children with disabilities, regardless of severity or type of impairment, are entitled to receive a “free appropriate public education.”⁴⁰ The second principle, nondiscriminatory assessment, states that all “testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of children with disabilities for services under this chapter will be selected and administered so as not to be racially or culturally discriminatory.”⁴¹

The third principle requires students with disabilities to be educated in their least restrictive environment.⁴² The preferred placement for students with disabilities is in the general education classroom with students who are not disabled.⁴³ Students with disabilities should be removed from that environment only when a disability is severe enough that instruction in the general education classroom is ineffective.⁴⁴

Finally, the fourth principle is the requirement of an individualized education program (IEP).⁴⁵ An IEP is a written document that describes the student’s level of functioning, goals and objectives, duration of services, and evaluation procedures to monitor progress.⁴⁶ Parent participation is vital in this process, and EAHCA requires parents to be part of the IEP team.⁴⁷

Act).

37. ALLAN G. OSBORNE, JR. & CHARLES J. RUSSO, *SPECIAL EDUCATION AND THE LAW: A GUIDE FOR PRACTITIONERS* 10–11 (2d ed. 2006).

38. *Id.*

39. *Id.* at 10; *see also* Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618, 620 (6th Cir. 1990) (explaining that the EAHCA adopted the “zero reject” principle).

40. 20 U.S.C. § 1400(d) (2006).

41. *Id.* § 1412(a)(6)(B).

42. *Id.* § 1412(a)(5).

43. *Id.* § 1412(a)(5)(A).

44. *Id.*

45. *Id.* § 1412(a)(4).

46. 20 U.S.C. § 1414(d)(1)(A)(i) (2006).

47. *Id.* § 1414(d)(1)(B)(i); MURDICK ET AL., *supra* note 14, at 24–28; YSSELDYKE & ALGOZZINE, *supra* note 33, at 20.

2. Individuals with Disabilities Education Act

The reauthorization of the EAHCA was amended and renamed the Individuals with Disabilities Education Act.⁴⁸ Congress enacted the IDEA in 1990, amended it in 1997, and reauthorized the law in 2004.⁴⁹ As described earlier, the IDEA is much narrower in scope than Section 504. To qualify for services under the IDEA, a child must meet three requirements. First, the child must be between the ages of three and twenty-one years old.⁵⁰ Second, the child must have a specifically identifiable disability.⁵¹ Third, the child must show a need for special education services.⁵²

The IDEA aims to improve educational results for individuals with disabilities. The purpose is “to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.”⁵³ The IDEA provides federal funding to states for the education of individuals with disabilities, provided the states comply with certain goals and procedures.⁵⁴

3. Child Find

In exchange for federal funds, states must comply with the Child Find provision. This places an affirmative duty on states or local education agencies (LEAs) to develop and implement a practical method used to identify, locate, and evaluate all children with disabilities residing within the state.⁵⁵ The Child Find duty has long been a crucial component of the IDEA as it is the gateway to receiving the benefits of other provisions of the Act.

48. Individuals with Disabilities Education Act of 1990, Pub. L. 101-476, 104 Stat. 1103 (codified as amended at 20 U.S.C. §§ 1401–1487).

49. *See id.*; Individuals with Disabilities Education Act Amendments of 1997, Pub. L. 105-17, 111 Stat. 37 (adding new amendments to the Act); Individuals with Disabilities Education Improvement Act of 2004, Pub. L. 108-446, 118 Stat. 2647 (codified as 20 U.S.C. §§ 1400–1482). To avoid confusion, all three laws will be referred to collectively as the IDEA.

50. 20 U.S.C. § 1412(a)(1)(A).

51. *See id.* § 1401(3)(A)(i). A child with a specifically identifiable disability is a child “with mental retardation, 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; and who, by reason thereof, needs special education and related services.” *Id.* § 1401(3)(A)(i)–(ii).

52. *Id.* § 1401(3)(A)(ii).

53. *Id.* § 1400(d)(1)(A).

54. *See id.* § 1412(a).

55. *Id.* § 1412(a)(3)(A); 34 C.F.R. § 300.111(a)(i) (2008). States also have enacted provisions governing the duties of LEAs. *See, e.g.*, WIS. STAT. § 115.77 (2007–2008).

Unless a child is “found,” meaning he or she is identified as potentially having a disability, that student is not entitled to special education services of any kind.⁵⁶

Under the Child Find provisions, states or LEAs are required to implement policies and procedures ensuring that:

All children with disabilities residing in the State . . . regardless of the severity of their disabilities, and who are in need of special education and related services, are *identified, located, and evaluated* and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.⁵⁷

The Child Find provision is very broad in scope, and successful compliance is difficult to achieve.⁵⁸ “Not only must districts establish virtually fail-safe procedures to find students with disabilities within the school system, but they must also make determined efforts to locate students who either are not yet in school or are enrolled in private or parochial schools.”⁵⁹ In Wisconsin, schools are required to identify, locate, and evaluate all children with disabilities from birth through age twenty-one.⁶⁰ Child Find aims to protect all children who reside in a state, including children who attend public and private schools, highly mobile children, migrant children, homeless children, and children who are wards of the state.⁶¹

Child Find also includes “[c]hildren who are *suspected* of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade.”⁶² “[T]he child find duty is triggered when the state or LEA has reason to suspect a disability, and reason to suspect that special education services may be needed to address that disability.”⁶³ If the school district fails to act on the child’s behalf when this duty is triggered, the

56. See *D.L. v. District of Columbia*, 450 F. Supp. 2d 11, 13–14 (D.D.C. 2006).

57. 20 U.S.C. § 1412(a)(3)(A) (emphasis added).

58. NORLIN, *supra* note 7, at vii.

59. *Id.*

60. WIS. STAT. §§ 115.76(3), 115.77(1m)(a).

61. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a)(1)(i), (c)(2) (2008).

62. 34 C.F.R. § 300.111(c)(1) (emphasis added).

63. *Dep’t of Educ. v. Cari Rae S.*, 158 F. Supp. 2d 1190, 1194 (D. Haw. 2001) (quoting *Corpus Christi Indep. Sch. Dist.*, 31 IDELR 41, 158 (1999) (internal quotations omitted)).

district has defaulted in its obligation to identify, locate, and evaluate all children with disabilities.⁶⁴

The Child Find duty is an affirmative one.⁶⁵ A parent's failure to request a special education evaluation for their child does not relieve the district of its duties.⁶⁶ School districts may *not* await parental demands to evaluate a child.⁶⁷ Furthermore, a district's unawareness of a student's potential disability does not relieve the district of its duties; it should have suspected the disability.⁶⁸ The IDEA does not provide any guidance to school districts on how to comply with Child Find's affirmative duty.⁶⁹ Thus, the issue of whether a particular district is in compliance is largely "in the hands of courts and administrative agencies."⁷⁰ Instead of providing specific methods that districts must use to comply, the IDEA requires each state to devise a "practical method" to determine which children are receiving needed special education services and which children are not receiving services but should be.⁷¹

There are varieties of methods that have been used to comply with the identification step of Child Find. The Office for Civil Rights of the United States Department of Education has accepted plans including, but not limited to, door-to-door surveys, brochures, mailings, public education programs and other public meetings, physician referrals, contacts with day care providers, and surveys of private school personnel.⁷² Other accepted public awareness programs used to identify children with disabilities include medical outreach; television advertisements; coordination with hospitals, clinics, and service agencies; and periodic school screening.⁷³ Using assessment test results to screen students has also been found to be an acceptable method.⁷⁴ In *Clay T.*

64. *See id.* at 1196.

65. NORLIN, *supra* note 7, at vii.

66. *Id.* at 1.

67. *Branham v. District of Columbia*, 427 F.3d 7, 8 (D.C. Cir. 2005); *Scott v. District of Columbia*, No. 03-1672 DAR, 2006 U.S. Dist. LEXIS 14900, at *20 (D.D.C. Mar. 31, 2006) (quoting *Reid v. District of Columbia*, 401 F.3d 516, 518–19 (D.C. Cir. 2005)).

68. NORLIN, *supra* note 7, at 1.

69. *Id.* at 2. The Child Find provision is consistent with the rest of the IDEA in that it places "excessive focus on process over substance." Samuel R. Bagenstos, *Where Have All the Lawsuits Gone? The Shockingly Small Role of the Courts in Implementing the Individuals with Disabilities Education Act 2* (Wash. U. Sch. of Law Faculty Working Papers Series No. 08-12-05, Nov. 15, 2008), available at <http://ssrn.com/abstract=1302085>. Some critics view this lack of guidance for school districts as one of the main downfalls of the federal legislation. *See id.* at 1–2.

70. NORLIN, *supra* note 7, at 2.

71. 20 U.S.C. § 1412(a)(3)(A) (2006).

72. Pamela Wright & Peter Wright, *The Child Find Mandate: What Does It Mean to You?*, WRIGHTSLAW, Sept. 26, 2007, <http://www.wrightslaw.com/info/child.find.mandate.htm>.

73. BARTLETT ET AL., *supra* note 11, at 44.

74. *See* RUTH A. WILSON, SPECIAL EDUCATIONAL NEEDS IN THE EARLY YEARS 160–61

v. Walton County School District,⁷⁵ the court found that a school district that relied upon periodic assessment test results in concluding a student was not eligible for special education did not violate Child Find.⁷⁶

All of these methods have been found to satisfy a school district's general identification responsibilities; however, if a student is not identified and found eligible for special education services in a timely manner, Child Find may still be violated.⁷⁷ Additionally, the school district may "[n]ot use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child."⁷⁸ Instead, the regulations require the district to "[u]se a variety of assessment tools and strategies."⁷⁹

School districts and public agencies must give written notice whenever they propose, refuse to initiate, or change "the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child."⁸⁰ This is a procedural safeguard in place for the parents of the child.⁸¹ A district's refusal to evaluate a child after a parental request can demonstrate the district had knowledge of a child's disability, thus violating the evaluation requirement of Child Find if that child is later diagnosed with a disability.⁸²

To receive federal funding under Part C (special service from birth to two years) of the IDEA, dealing with early intervention of infants and toddlers, states are required to establish "[a] comprehensive child find system . . . including a system for making referrals to service providers . . . that ensures rigorous standards for appropriately identifying infants and toddlers with

(1998). For more examples of effective Child Find strategies, see JUDITH A. BONDURANT-UTZ, PRACTICAL GUIDE TO ASSESSING INFANTS AND PRESCHOOLERS WITH SPECIAL NEEDS 174–76 (2002).

75. 952 F. Supp. 817 (M.D. Ga. 1997).

76. *Id.* at 823–24. Clay, the student in this case, took assessment tests in first, second, and third grades without demonstrating any significant decreased academic achievement. *Id.* at 819–20. Clay earned low marks in several classes; however, Clay testified that this was due to his failure to complete homework. *Id.* at 819. The next year, Clay was diagnosed with a learning disability. *Id.* at 820. Clay's parents asserted that the district failed to comply with Child Find because their son was never referred for special education services. *Id.* at 820–21. The court rejected this assertion finding the school district's screening and assessment procedures in compliance with Child Find. *Id.* at 823–24.

77. *E.g.*, *W.B. v. Matula*, 67 F.3d 484, 501 (3d Cir. 1995) (explaining that "a school official who failed to carry out his or her 'child find' duty within a reasonable time 'would understand that what he is doing violates that duty'" (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987))).

78. 34 C.F.R. § 300.304(b)(2) (2008); *see also* WILSON, *supra* note 74, at 164, 169.

79. 34 C.F.R. § 300.304(b)(1).

80. 20 U.S.C. § 1415(b)(3)(A)–(B) (2006).

81. *See id.* § 1415.

82. NORLIN, *supra* note 7, at 9.

disabilities for services.”⁸³ To locate, identify, and evaluate infants and toddlers with disabilities, many school districts conduct annual screening days for kindergarteners and preschool-aged children.⁸⁴

Child Find is the first step to providing special education to all children who need it. Meeting the Child Find duty is very “challenging” and requires school districts to establish “fail-safe procedures to find students with disabilities.”⁸⁵ Compliance challenges are even greater in urban school districts like MPS versus smaller, suburban school districts.⁸⁶

III. THE *JAMIE S.* DECISION: SYSTEMIC VIOLATIONS OF CHILD FIND

Jamie S. v. Milwaukee Public Schools began in September 2001, when the plaintiffs filed a complaint against MPS and DPI alleging violations of the IDEA.⁸⁷ Subsequently, the plaintiffs filed a motion for class certification, seeking to proceed on their complaints with class action status.⁸⁸ The court entered a decision and order granting class status and defined the class as follows:

Those students eligible for special education services from the Milwaukee Public School System who are, have been or will be either denied or delayed entry or participation in the processes, which result in a properly constituted meeting between the [individualized education program] team and the parents or guardians of the student.⁸⁹

As a result of the plaintiffs’ class certification, in order to find that the defendants violated the rights of the plaintiff class, all violations of the IDEA must be “systemic violations, violations that were not amenable to individual exhaustion.”⁹⁰

[A] claim is “systemic” if it implicates the integrity or reliability of the IDEA dispute resolution procedures

83. 20 U.S.C. § 1435(a)(5) (2006).

84. OSBORNE & RUSSO, *supra* note 37, at 40–41.

85. NORLIN, *supra* note 7, at vii.

86. JASON SNIPES ET AL., MDRC FOR THE COUNCIL OF THE GREAT CITY SCH., FOUNDATIONS FOR SUCCESS: CASE STUDIES OF HOW URBAN SCHOOL SYSTEMS IMPROVE STUDENT ACHIEVEMENT 21–29 (2002), available at <http://www.cgcs.org/images/Publications/Foundations.pdf>; Michael Heise, *Litigated Learning, Law’s Limit, and Urban School Reform Challenges*, 85 N.C. L. REV. 1419, 1419–24 (2007).

87. *Jamie S. v. Milwaukee Pub. Sch.*, 519 F. Supp. 2d 870, 871 (E.D. Wis. 2007).

88. *Id.*

89. *Id.*

90. *Id.* at 881.

themselves or requires restructuring the education system itself in order to comply with the dictates of the Act; but that it is not “systemic” if it involves only a substantive claim having to do with limited components of a program, and if the administrative process is capable of correcting the problem.⁹¹

The court separated the trial into three phases. Phase I involved the presentation of expert witness testimony.⁹² The plaintiff class presented expert testimony to prove that MPS systemically violated the IDEA.⁹³ The defendants presented expert testimony establishing that its policies and practices concerning Child Find complied with the IDEA and that all violations alleged by the plaintiffs were not systemic violations.⁹⁴ Upon the conclusion of Phase I, the court advised the parties of its reactions to the testimony and exhibits.⁹⁵ The court stated that it found the plaintiffs’ experts more persuasive than the defendants’ experts.⁹⁶

Phase II consisted of factual presentations of forty-eight witnesses on which the experts formed their respective opinions.⁹⁷ In this phase of the trial, the plaintiffs presented testimony of certain members of the plaintiff class and illustrated how MPS violated Child Find in each instance.⁹⁸ Testimony from the plaintiff class presented “the reality underlying the foregoing conclusions of the experts.”⁹⁹ For example, plaintiff Melanie V. was a good student until fourth grade.¹⁰⁰ In fifth grade, she began missing school a lot and felt she was “not herself.”¹⁰¹ Melanie failed the sixth grade.¹⁰² During her repeat year, her grades did not improve, she wrote notes about killing herself, and she was

91. *Id.* at 882 (quoting *Doe v. Ariz. Dep’t of Educ.*, 111 F.3d 678, 682 (9th Cir. 1997)).

92. *Id.* at 872.

93. *Id.* at 883.

94. *Id.* at 885–86.

95. *Id.* at 883.

96. *Id.* The plaintiffs presented the testimony of Dr. Diana Rogers Adkinson, an expert in the field of special education. *Id.* Dr. Adkinson engaged in a quantitative analysis to ascertain Child Find patterns and trends and projected her findings to all of MPS. *Id.* at 884. Specifically, Dr. Adkinson opined, “MPS engaged in a pattern of suspending students as a way of coping with the discipline and behavioral problems of students.” *Id.* at 885. The court accepted her analysis methodology, the Child Find trends, and their application to MPS. *Id.* at 884–85. The court also noted, and found significant, that MPS failed to produce any evidence to rebut Dr. Adkinson’s findings. *Id.* at 883–84. As a result, “there [was] no compelling reason not to accept the findings of Dr. Rogers Adkinson.” *Id.* at 884.

97. *Id.* at 872.

98. *Id.* at 889–97.

99. *Id.* at 889.

100. *Id.* at 890.

101. *Id.*

102. *Id.*

suspended for possessing a razor blade at school.¹⁰³ Melanie was sent to the Milwaukee County Mental Health Complex three times in one semester.¹⁰⁴ At this time, MPS conducted a hearing and the school principal forced Melanie to enroll in a different school; she did not receive a special education referral.¹⁰⁵ Finally, almost two years after Melanie's problems began, she received a special education evaluation upon her mother's request.¹⁰⁶ Melanie was determined to be eligible for special education.¹⁰⁷ The plaintiffs presented this testimony to demonstrate MPS's violation of the identification aspect of Child Find.¹⁰⁸

In Phase III of the trial, the plaintiffs and MPS presented evidence on the most appropriate remedies and sanctions for MPS's systemic violations of Child Find.¹⁰⁹ DPI did not participate in this phase of the litigation because it entered into a settlement agreement with the plaintiffs.¹¹⁰ This phase of the litigation was the most important of the three, as the effectiveness of the remedy will have a significant impact on MPS's ability to achieve satisfactory compliance with the IDEA.

Upon completion of Phases I and II of the trial, the court concluded that MPS violated the IDEA and related state statutes.¹¹¹ These violations included a failure to comply with Child Find.¹¹² "MPS failed to adequately identify, locate and evaluate children with disabilities in need of special education and related services. . . . [T]he violations of MPS during this period . . . were systemic in nature and thus violated the rights of the plaintiff class."¹¹³ The court found that MPS violated the rights of the individual plaintiffs, and as a result of the systemic violations, MPS also violated the rights of the plaintiff class.¹¹⁴ More specifically, the court concluded that MPS systemically violated the Child Find mandate in four specific ways.¹¹⁵

First, MPS failed to refer children with a suspected disability in a timely manner for an initial evaluation.¹¹⁶ Initial evaluations are timely when they

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 889–90.

109. *See id.* at 904; *infra* Part V.

110. *See* Settlement Agreement, *Jamie S. v. Milwaukee Pub. Sch.*, No. 01-C-928 (E.D. Wis. Feb. 27, 2008).

111. *Jamie S.*, 519 F. Supp. 2d at 903.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

occur within ninety days of the student's referral.¹¹⁷ Evidence showed that from June 2000 to June 2003, 9.9% of all initial evaluations were not conducted within the ninety-day time period after referral.¹¹⁸ Additionally, many cases were marked closed without reason prior to conducting an evaluation on the child.¹¹⁹

Second, MPS improperly extended the ninety-day time requirement.¹²⁰ Extensions of this time requirement may be granted under special circumstances.¹²¹ An extension is appropriate when a child enrolls in a new school after the ninety-day evaluation period has begun and before the child's previous school has determined whether the child has a disability.¹²² The new school must show it is making sufficient progress to ensure the evaluation is completed, and determine with the child's parent or parents a specific time when the evaluation will be completed.¹²³ An extension may also be appropriate if the "child's parent repeatedly fails or refuses to produce the child for the evaluation."¹²⁴ MPS demonstrated a pattern of improperly extending its ninety-day deadline.¹²⁵ This was largely due to the fact that MPS did not conduct any evaluations during the summer months, often waiting until October of the following school year.¹²⁶ This is an improper extension of the ninety-day evaluation period.¹²⁷

Third, MPS suspended students in a manner that impeded its ability to refer children with suspected disabilities for an initial evaluation.¹²⁸ Suspensions are indicative of a child having a disability when combined with other behavior by the child that also suggest a disability is present.¹²⁹ This pattern of behavior should alert a district to suspect a disability, thus triggering the Child Find duty to refer the child for an evaluation.¹³⁰ MPS systemically failed to complete this task.¹³¹ For example, one plaintiff

117. *Id.* at 881. The IDEA and related Wisconsin statutes now require that evaluations take place within sixty days. 20 U.S.C. § 1414(a)(1)(C)(i)(I) (2006) (effective July 1, 2005); WIS. STAT. § 115.78(3)(a) (2007–2008).

118. *Jamie S.*, 519 F. Supp. 2d at 895.

119. *Id.*

120. *Id.* at 897.

121. WIS. STAT. § 115.78(3)(b)(1)–(2) (2007–2008).

122. *Id.* § 115.78(3)(b)(1).

123. *Id.*

124. *Id.*

125. *Jamie S.*, 519 F. Supp. 2d at 884–85.

126. *Id.*

127. *See id.* at 885.

128. *Id.* at 896.

129. *Id.* at 898.

130. *See id.*

131. *Id.* at 903.

received forty-four suspensions in first and second grade and fell below the school's academic standards.¹³² MPS students in this situation were regularly "subject to discipline and suspensions instead of being promptly referred for special education."¹³³ This is a clear violation of the IDEA, as it should alert a teacher that a referral is necessary.¹³⁴

Fourth, MPS failed to ensure parent or guardian participation at the initial evaluation.¹³⁵ The IDEA requires parents of a child with a disability to be part of the IEP team.¹³⁶ The school district is required to provide the parent with a meaningful opportunity to attend all meetings regarding their child's identification, evaluation, and placement.¹³⁷ The school must notify parents early enough to ensure their opportunity to attend.¹³⁸ Decisions regarding the identification, evaluation, and placement of the child can be made in the absence of the parent, but only when the school can document its reasonable efforts to notify the parent.¹³⁹ Plaintiff Jamie S.'s mother repeatedly requested her daughter be evaluated for special education services.¹⁴⁰ Finally, Jamie was tested for a disability after exhibiting cognitive delays for more than four years; however, MPS did not attempt to notify Jamie's mother of her daughter's IEP meeting.¹⁴¹ As a result, she was unable to participate in any way in her daughter's special education program.¹⁴²

Although not a specific violation of Child Find, the court noted that MPS's procedure to ensure that all children with disabilities are identified and located was inadequate.¹⁴³ MPS informed the public about its special education programs by disseminating a handbook at the beginning of each school year to parents with children enrolled in the MPS district.¹⁴⁴ Upon request, MPS also sent Child Find information to community organizations and area clinics.¹⁴⁵ "Even though MPS tries to get the word out about its

132. *See id.* at 896.

133. *Id.*

134. *See* 20 U.S.C. § 1415(k)(1)(B) (2006) (mandating that students with disabilities may be suspended for not more than ten days).

135. *Jamie S.*, 519 F. Supp. 2d at 903.

136. 20 U.S.C. § 1414(d)(1)(B)(i) (2006).

137. *BARTLETT ET AL.*, *supra* note 11, at 25; *see also* *Schaffer v. Weast*, 546 U.S. 49, 53 (2005) (acknowledging that parents are to play a "significant role" in the special education process).

138. *BARTLETT ET AL.*, *supra* note 11, at 25.

139. *Id.*

140. *Jamie S.*, 519 F. Supp. 2d at 891.

141. *Id.*

142. *See id.*

143. *See id.* at 893.

144. *Id.*

145. *Id.*

special education services, it is still missing too many children with needs.”¹⁴⁶ Expert Dr. Diana Rogers Adkinson estimated that MPS missed hundreds of students with disabilities.¹⁴⁷ Disseminating information is required to comply with Child Find;¹⁴⁸ however, if the school district is not identifying and locating *all* children with disabilities by disseminating information, then something more is required to meet this goal.¹⁴⁹ MPS failed to implement other methods to achieve compliance with Child Find.¹⁵⁰

The court noted that throughout this period,¹⁵¹ MPS was aware of its duties under Child Find and acknowledged that MPS made efforts to discharge these responsibilities.¹⁵² Its efforts, while made in good faith, were inadequate.¹⁵³

IV. URBAN CHALLENGES: WHY MPS VIOLATED CHILD FIND

In light of all of the facts in *Jamie S.*, the court’s holding that MPS violated Child Find was undoubtedly the correct decision. The circumstances of the members of the class of plaintiffs clearly supported each systemic violation found by the court.¹⁵⁴ What the court did not address in its opinion was what went wrong in the MPS district. MPS’s policies and procedures would likely achieve full compliance with Child Find in other school districts, but for MPS they were wholly inadequate.¹⁵⁵ The court stated that MPS’s efforts to comply with the IDEA were made in good faith, but the district still came up short.¹⁵⁶ So what went wrong? Why did MPS’s method of locating, identifying, and evaluating students with disabilities systemically violate its Child Find duties under the IDEA? The systemic failures of MPS are attributable to the unique challenges faced by urban school districts like the MPS district.¹⁵⁷

146. *Id.*

147. *Id.*

148. *Id.*

149. *See id.*

150. *See id.*

151. The time period under consideration during the trial was from September 2000 to June 2005. *Id.* at 872.

152. *Id.* at 903–04.

153. *Id.* at 904.

154. *See id.* at 889–99.

155. *See Doe v. Metro. Nashville Pub. Sch.*, 9 F. App’x 453, 456 (6th Cir. 2001) (holding that the distribution of informational material to area schools, agencies, and professionals who encounter children with disabilities brought this school district in compliance with Child Find).

156. *Jamie S.*, 519 F. Supp. 2d at 904.

157. SNIPES ET AL., *supra* note 86, at 21–29; Heise, *supra* note 86, at 1419–24.

Some argue that “[t]he appalling outcomes in urban schools are arguably the most pronounced social policy problem facing leaders today.”¹⁵⁸ Many urban districts acknowledge a simple fact: academic performance is unsatisfactory.¹⁵⁹ The MPS district is no exception; Milwaukee public schools are labeled as “failing.”¹⁶⁰ The minority population represents a majority of the students. In the 2007–2008 school year 87.6% of the student population was non-white.¹⁶¹ The enrollment of white students has consistently declined over the last ten years.¹⁶² The number of students who qualify for free or reduced lunch is the most reliable indicator of how many students are from low-income families. Seventy-seven percent of students in MPS qualified for free or reduced lunch.¹⁶³ Individually, 60 of the district’s 213 schools had rates over 90%, and about half of the district’s schools had rates over 80%.¹⁶⁴ Stark academic achievement gaps for low-income and minority students remain a defining feature of urban school districts.¹⁶⁵ It is no surprise that since the majority of MPS consists of low-income *and* minority students there is a significant achievement gap between the MPS district and the rest of the state.

The following statistics demonstrate just how wide the achievement gap the district faces is. In the 2007–2008 school year, only 60% of third graders in the MPS district were reading at a proficient level.¹⁶⁶ Even worse, reading proficiency fell to 38% in the tenth grade.¹⁶⁷ A much more impressive 75% of tenth graders in the remainder of the state of Wisconsin were reading at a

158. Andrew J. Rotherham & Sara Mead, *A New Deal for Urban Public Schools*, HARV. L. & POL’Y REV. ONLINE, http://www.hlpronline.com/2007/04/rotherham_mead_01.html (last visited May 26, 2009).

159. SNIPES ET AL., *supra* note 86, at 21.

160. DENNIS W. REDOVICH, CTR. FOR THE STUDY OF JOBS & EDUC. IN WIS. & THE U.S., *THE WAR AGAINST THE MILWAUKEE PUBLIC SCHOOLS 4* (2004). There has been a steady achievement gap between MPS and the state over the last four years. See DIV. OF RESEARCH & ASSESSMENT, MILWAUKEE PUB. SCH. 2007–2008 DISTRICT REPORT CARD 12 chart 14 (2008), available at http://www2.milwaukee.k12.wi.us/acctrep/0708/2008_district.pdf [hereinafter DISTRICT REPORT CARD]. Overall, many of the MPS’s 218 schools are “making little headway in changing their status among Wisconsin’s worst performing schools.” Alan J. Borsuk, *Suspension Rate Deemed Too High: MPS Superintendent Seeks Alternatives in Minor Matters*, MILWAUKEE J. SENTINEL, Jan. 7, 2008, at 1B.

161. See DISTRICT REPORT CARD, *supra* note 160, at 6 chart 3.

162. *Id.* at 5.

163. *Id.* at 8 chart 9.

164. *Id.* at 8.

165. JASON SNIPES & AMANDA HORWITZ, COUNCIL OF THE GREAT CITY SCH., RESEARCH BRIEF: RECRUITING AND RETAINING EFFECTIVE TEACHERS IN URBAN SCHOOLS 1 (2007), available at http://www.cgcs.org/publications/TQ_Brief_final.pdf.

166. DISTRICT REPORT CARD, *supra* note 160, at 12 chart 14.

167. *Id.*

proficient level in 2007–2008.¹⁶⁸ Similar trends follow for mathematics.¹⁶⁹ MPS as a whole has a 42% proficiency rate in math, compared to the state’s 74% proficiency in math.¹⁷⁰

“A key measure of school performance is the percent of students graduating from high school.”¹⁷¹ The most recent statistics show that the state of Wisconsin had a 91% graduation rate, while the MPS district had a 69% graduation rate.¹⁷² To put these numbers in perspective, it is important to note that the state target is an 80% graduation rate.¹⁷³ Another important measure of school performance is habitual truancy. More than 75% of high school students and nearly 50% of all students in the MPS district are habitually truant.¹⁷⁴ “[A]n average of 4,000 MPS students [are] unexcused and absent on any given school day.”¹⁷⁵ MPS also has a high incidence of poverty and unwed pregnancies.¹⁷⁶ These characteristics are typical of almost all urban school districts.¹⁷⁷

These statistics make it clear that the characteristics of the students themselves create many challenges that suburban schools do not face, or face on a much less serious level.¹⁷⁸ However, challenges to urban districts like MPS go much deeper than student demographics; challenges are engrained in

168. *See id.*

169. *See* COUNCIL OF THE GREAT CITY SCH., BEATING THE ODDS: ASSESSMENT RESULTS FROM THE 2005–2006 SCHOOL YEAR 279–80 (2006); DISTRICT REPORT CARD, *supra* note 160, at 12.

170. DISTRICT REPORT CARD, *supra* note 160, at 17 chart 21.

171. *Id.* at 28.

172. *Id.* at 29 chart 45. For older statistics on graduation rates, see WIS. DEP’T OF PUB. INSTRUCTION, WISCONSIN SCHOOL PERFORMANCE REPORT, *available at* <http://dpi.state.wi.us/spr/xls/grad03.xls>.

173. DISTRICT REPORT CARD, *supra* note 160, at 28.

174. *Id.* at 25 chart 37. A habitual truant is defined as “a pupil who is absent from school without an acceptable excuse . . . for part or all of 5 or more days on which school is held during a school semester.” WIS. STAT. § 118.16(1)(a) (2007–2008).

175. Dani McClain, *Alderman Calls MPS Truancy Efforts “B-R-O-K-E-N,”* MILWAUKEE J. SENTINEL ONLINE, News and Opinion Blogs, <http://www.jsonline.com/blogs/news/31984204.html> (Sept. 15, 2008). “Perhaps the most alarming case in the district is Custer High School, where the chronic truancy rate was 98% two years in a row.” Dani McClain, *Half of MPS Students Regularly Skip School, Report Shows,* MILWAUKEE J. SENTINEL, Sept. 12, 2008, at A1.

176. George Lightbourn, *Milwaukee Public Schools: A City’s Lost Economic Promise*, 13 WIS. INT. 13, 14 (2004).

177. *Id.*

178. *See* WIS. DEP’T OF PUB. INSTRUCTION, SPECIAL EDUCATION DISTRICT PROFILE: MILWAUKEE SCHOOL DISTRICT (2006–2007), *available at* <https://www2.dpi.state.wi.us/DistrictProfile/Pages/DistrictProfile.aspx> (select “Milwaukee Sch. Dist.” and “2006–2007” from the drop down menus) [hereinafter SPECIAL EDUCATION DISTRICT PROFILE] (reporting that the Milwaukee School District had lower graduation rates, higher dropout rates, more suspensions and expulsions, and lower proficiency rates in all subject areas for students receiving special education when compared to the State of Wisconsin).

the school system itself.¹⁷⁹ For example, most urban schools are plagued by low expectations of students and lack a demanding curriculum.¹⁸⁰ In a case study of several urban school systems, in each district teachers reported feeling “overwhelmed . . . by the substantial challenges faced by many of their lower-income and minority students.”¹⁸¹ This led the staff to lower their expectations of achievement for these students.¹⁸²

Low expectations and low standards may be affecting Child Find efforts in MPS because students who have disabilities may be meeting the academic standards of the classroom only because standards are so low.¹⁸³ In a classroom with higher expectations, these students may fail academically, and consequently, teachers or parents could identify earlier those who are failing as the result of a suspected disability. While low standards are a problem for all students in urban districts, they are a particularly severe problem for students with disabilities.¹⁸⁴ “The importance of early identification . . . for any child who may have special educational needs cannot be over-emphasized. The earlier action is taken, the more responsive the child is likely to be.”¹⁸⁵

Special education teaches students with disabilities ways to cope with their impairments and identifies accommodations that make educational success more likely. If students with disabilities never receive special education services, they are not learning ways to succeed in the workforce despite having disabilities. A school district’s sub-par standards may conceal students’ disabilities because even students with learning impairments may be capable of reaching such low standards. As soon as these children leave the school district by graduating or dropping out of high school, they will be faced with average expectations, which are much higher than the low standards of their school district. This is likely when a disability will present itself—when it is too late to receive special education services. Students with disabilities who never receive special education are likely to develop

179. WIS. DEP’T OF PUB. INSTRUCTION, ADEQUATE YEARLY PROGRESS REVIEW SUMMARY: MILWAUKEE SCHOOL DISTRICT (2007), available at http://www2.dpi.state.wi.us/sifi/ayp_summary.asp?year=2007&districtcd=3619 (finding that reading and mathematics in the Milwaukee School District were at unsatisfactory levels and did not meet adequate yearly progress).

180. SNIPES ET AL., *supra* note 86, at 25.

181. *Id.*

182. *Id.*

183. *See id.*

184. *See* SPECIAL EDUCATION DISTRICT PROFILE, *supra* note 178 (reporting statistics that show the students that are identified as having disabilities in the Milwaukee School District are significantly less proficient in reading and math than students with disabilities in the rest of the State of Wisconsin).

185. WILSON, *supra* note 74, at 158 (quoting CODE OF PRACTICE ON THE IDENTIFICATION & ASSESSMENT OF SPECIAL EDUCATIONAL NEEDS 10 (1994)).

secondary handicaps and function at a level well below average learning and development.¹⁸⁶ Additionally, students with disabilities who are never formally diagnosed are doomed for failure in light of the fact that the largest achievement gap among all student subgroups is between students with disabilities (those who actually participate in special education) and general education students.¹⁸⁷ Although there are no statistics to prove it, it is logical to assume that the achievement gap between students with disabilities who never receive special education and general education students is even wider.

There are often high rates of student mobility in urban districts.¹⁸⁸ This is especially problematic in Milwaukee where public school choice is available to all students.¹⁸⁹ In MPS, one of every five high school students transfers to another school during the year.¹⁹⁰ “Schools that receive large numbers of new students during the school year often experience greater academic challenges in serving these students.”¹⁹¹ Greater academic challenges result in part from inconsistent instructional strategies. Undoubtedly, every teacher and school approaches the curriculum differently; thus, when a student jumps from school to school constantly switching teachers, this creates inconsistencies that negatively affect student learning.¹⁹² Also, it takes time for a teacher to become familiar with a student’s style of learning. When faced with a new student, the teacher is unfamiliar with the student’s typical level of achievement and as a result, it may take the full school year, possibly longer, to recognize whether a particular student is over or under-achieving relative to past performances.¹⁹³

There is high teacher mobility in urban school districts as well.¹⁹⁴ Overall, “[t]hirty-three percent of new teachers leave teaching within the first three years.”¹⁹⁵ This trend is even more severe in urban school districts. The

186. *Id.*

187. DISTRICT REPORT CARD, *supra* note 160, at 16.

188. SNIPES ET AL., *supra* note 86, at 26; SNIPES & HORWITZ, *supra* note 165, at 3.

189. Public school choice allows parents to “list up to three schools they would like their children to attend.” DAVID DODENHOFF, WIS. POLICY RESEARCH INST., FIXING THE MILWAUKEE PUBLIC SCHOOLS: THE LIMITS OF PARENT-DRIVEN REFORM 5 (2007). In 2006, almost 17,000 parents utilized their school choice rights, and nearly 95% of parents received their first choice school. *Id.* The theory behind school choice is that the more parents who exercise their option to choose, the more the education system will operate like a marketplace, which will positively impact school improvement and student achievement. *Id.* at 4. However, estimates of only about 10% of MPS parents are utilizing school choice by actively choosing a school, choosing between two or more schools, and considering academic factors in their choice. *Id.* at 8–9.

190. DISTRICT REPORT CARD, *supra* note 160, at 9 chart 12.

191. *Id.* at 9.

192. SNIPES ET AL., *supra* note 86, at 26.

193. See SNIPES & HORWITZ, *supra* note 165, at 2.

194. *Id.* at 4.

195. *Id.*

turnover rate of teachers in high-poverty, urban schools is 70% higher than in school districts with low-poverty rates.¹⁹⁶ Even more troubling is the fact that the most effective teachers are also the most likely to leave the profession. Research shows that the most academically qualified teachers and those who work in “hard-to-staff” areas, meaning those who work with high concentrations of disadvantaged children, are the most likely to leave.¹⁹⁷ Urban school districts have become “training grounds” for inexperienced teachers who then move out of the district and on to more affluent and less troubled areas as soon as they can.¹⁹⁸

High teacher and student mobility is particularly problematic in achieving Child Find compliance. A large portion of identification of students with disabilities comes from teacher referrals.¹⁹⁹ This is because the classroom teachers spend the most time with the students and are the most familiar with a student’s academic ability and achievement. This dependency on teacher referrals is even greater in urban school districts because of decreased parental involvement.²⁰⁰

If students and teachers are constantly moving in and out of school districts, they are unable to develop a meaningful classroom relationship.²⁰¹ Teachers struggle to keep track of the students in their classrooms and consequently are unable to identify and refer students with disabilities for evaluations because they are unfamiliar with the student’s typical level of achievement. Tracking a student’s progress from year to year is the most reliable way for a teacher to recognize a student with a disability.²⁰² It is extremely difficult to track a student if the student is hopping from school to

196. *Id.* For example, “[i]n New York City, only 28[%] of teachers were teaching in the same school after five years, compared with 43[%] of teachers in suburban schools throughout New York State.” *Id.*

197. U.S. DEP’T OF EDUC., ATTRACTING, DEVELOPING AND RETAINING EFFECTIVE TEACHERS: BACKGROUND REPORT FOR THE UNITED STATES 50 (2004), available at http://www.nctq.org/p/publications/docs/us_bkgnd_reprt_20071129024238.pdf.

198. SNIPES & HORWITZ, *supra* note 165, at 9; U.S. DEP’T OF EDUC., *supra* note 197, at 52 (“A recent study of nearly 400,000 teachers . . . found that teachers who choose to change districts are more likely to take a job where there are fewer minorities, lower poverty rates and higher student achievement.”).

199. ROGER PIERANGELO & GEORGE GIULIANI, 100 FREQUENTLY ASKED QUESTIONS ABOUT THE SPECIAL EDUCATION PROCESS 22 (2007); see Eve Joan Kelemen Lohnas, Assessing Learning Handicapped Student Performance Through Time-Series Analysis of Curriculum-Based Measurement Techniques: Monte Carlo Simulation Study (Dec. 1988) 149 (unpublished Ph.D. dissertation, University of California, Santa Barbara) (on file with author) (finding support for the previous theory that a teacher’s decision to refer a student is the central factor in special education placement).

200. DODENHOFF, *supra* note 189, at 1.

201. See SNIPES ET AL., *supra* note 86, at 26.

202. Kelemen Lohnas, *supra* note 199, at 149–50 (finding that the best predictor of referral was the teacher’s evaluation of the student’s ability to perform).

school, especially in a school district with a large student population.²⁰³ Thus, with increased dependency on teacher referrals and high student and teacher mobility inhibiting a meaningful relationship, many students likely go unidentified as having, or suspected of having, a disability.²⁰⁴ This can profoundly affect a school district's level of compliance with Child Find.

As stated above, teachers are a large source of special education referrals.²⁰⁵ Through frequent referrals of their own children for evaluations, parents also play a significant role in discharging a school's Child Find duties.²⁰⁶ Additionally, the school district needs a parent's or guardian's consent for an evaluation.²⁰⁷ Thus, a non-responsive parent can halt the diagnostic process despite the existence of a referral for an evaluation. This becomes problematic in urban school districts because parents are less involved in their child's education.²⁰⁸ Many parents of students in MPS are considered "disadvantaged."²⁰⁹ The disadvantaged include minority and single parents and those with limited income, education, or English-language proficiency.²¹⁰ Overall, all of these categories are indicators of decreased parental involvement in their child's education and MPS's "numbers are substantially less favorable than those in the U.S. at large."²¹¹ In the MPS district, only 11% of parents of fourteen- through seventeen-year-olds are actively involved both at school and at home.²¹²

Parents with children in urban school districts are much less likely to refer their children for special education evaluations because this would require involvement in their child's education.²¹³ This involvement would include a parent monitoring his or her child's academic progress, speaking with a teacher or administrator to request an evaluation, and explaining exactly why the parent suspects his or her child of having a disability. Parental involvement of this type is unlikely in urban districts.²¹⁴ Thus, a large referral

203. MPS's total student enrollment in the 2008–2009 school year was 85,369. DISTRICT REPORT CARD, *supra* note 160, at 5 chart 1.

204. *See* Kelemen Lohnas, *supra* note 199, at 149.

205. *Id.* at 149–50.

206. PIERANGELO & GIULIANI, *supra* note 199, at 22.

207. 34 C.F.R. § 300.300(a)(1)(i) (2008).

208. DODENHOFF, *supra* note 189, at 6.

209. *Id.*

210. *See id.*

211. *Id.* at tbl.1 (reporting 55% minorities, 18.5% of families with children are living below the poverty line, 19% of parents speak languages other than English, 58% are single-parent families, and 20% of adults have less than a high school diploma).

212. *Id.* at 2 (reporting on parental involvement of children in the fourteen- to seventeen-year-old age group).

213. *See id.* at 6.

214. *See id.* at 2.

source is severely decreased or eliminated, making compliance with Child Find even more difficult because this burden shifts to the school district. It is unlikely that teacher referrals are picking up all the slack, and as a result, many students are not referred and go unevaluated.

A final, and likely the most significant, contributor to MPS's systemic violation of Child Find is the myriad of issues and needs faced by the district.²¹⁵ Urban school districts, like the students they educate, do not face one or two challenges but a constellation of barriers to effectively educating students with and without disabilities.²¹⁶ In addition to the issues mentioned above—widening achievement gap, high student and teacher mobility, and decreased parental involvement—further challenges include budget constraints, deteriorating facilities, decreased public confidence, and negative racial attitudes.²¹⁷ In a recent survey, all of America's major urban public school systems were asked to identify what they believed to be the most pressing needs faced by their urban district.²¹⁸ Special education needs were ranked twenty-third out of forty-three listed.²¹⁹ This report demonstrates that while special education is among the most pressing needs, it is *nowhere* near the top of any school district's priority list.²²⁰ It is probable that this is the key problem MPS faces in its failed efforts to comply with Child Find.²²¹ If compliance with Child Find was the only problem MPS faced, it likely would have implemented a reform strategy and improved its compliance.²²² However, if leaders in the district do not make compliance with Child Find a top priority, no reform or improvement strategies will be implemented, and children will remain without special education services.

215. JASON SNIPES ET AL., COUNCIL OF THE GREAT CITY SCH., CRITICAL TRENDS IN URBAN EDUCATION: SIXTH SURVEY OF AMERICA'S GREAT CITY SCHOOLS 5–6 fig.4 (2006) available at http://www.cgcs.org/pdfs/06_07AR.pdf.

216. See Rotherham & Mead, *supra* note 158.

217. See generally SNIPES ET AL., *supra* note 86.

218. SNIPES ET AL., *supra* note 215, at 5–6 fig.4.

219. *Id.* at 6 fig.4.

220. *Id.* For example, MPS recently spent \$27,144 to purchase iPods to try and attract more students to eat the free breakfast offered at school. Charlie Sykes, Sykes Writes, *IPODS?*, available at <http://www.620wtmj.com/shows/charliesykes/35058319.html> (Nov. 25, 2008). In the midst of pending class action litigation the district would have been wise to spend its money on improving its Child Find procedures instead. This type of frivolous spending does little to send the message to the plaintiff class that it is making serious efforts to reform the special education procedures to ensure future compliance with the IDEA.

221. SNIPES ET AL., *supra* note 215, at 5–6 fig.4.

222. See *id.* at 11 (finding that current reforms and improvement strategies are making a difference in school systems).

V. PHASE III: REMEDIES AND SANCTIONS

Finally, the court addressed the issue of remedies and sanctions in Phase III of the trial.²²³ At the end of its decision in Phase II of the trial, the court encouraged the parties to renew settlement efforts to try to reach a mutually agreeable solution regarding remedies and sanctions.²²⁴ The court was very clear in its desire to avoid a court-imposed resolution in order to expedite the process and curtail litigation costs.²²⁵ DPI took seriously Judge Goodstein's open endorsement of negotiating a mutually agreeable settlement to avoid further litigation costs.²²⁶ Unfortunately, MPS did not take his words to heart. On November 6, 2008, more than seven years after the plaintiffs filed the complaint in this case Phase III of the trial began.²²⁷

A. *DPI's Settlement*

The plaintiff class and DPI reached a settlement agreement of which the court approved.²²⁸ Although DPI as a party defendant was not the focus of this Note, the terms of its settlement agreement will have a significant impact on the plaintiff class and all other students eligible for special education in MPS. The agreement awarded the plaintiffs declaratory and injunctive relief; aside from attorneys' fees, the plaintiffs did not seek any money damages.²²⁹ The highlights of the agreement include the following:

1. Dr. W. Alan Coulter was appointed as an independent outside expert funded by DPI to monitor MPS to ensure compliance with its federal and state special education obligations.²³⁰
2. The independent expert must conduct a review policy and procedures in MPS and conduct a needs assessment regarding Child Find. The expert will oversee the creation of a compliance plan to achieve performance standards in the MPS district and have the authority to ensure that those standards are met.²³¹
3. The parties established a compliance plan and measurable outcome standards for MPS's future performance with respect to timely initial

223. *Jamie S. v. Milwaukee Pub. Sch.*, 519 F. Supp. 2d 870, 904 (E.D. Wis. 2007).

224. *Id.*

225. *Id.*

226. *See id.* (encouraging the parties to settle); *see also* Settlement Agreement, *supra* note 110 (DPI settles.)

227. *Jamie S. v. Milwaukee Pub. Sch.*, No. 01-C-928 (E.D. Wis. Aug. 29, 2008) (scheduling order).

228. *Jamie S. v. Milwaukee Pub. Sch.*, No. 01-C-928 (E.D. Wis. July 28, 2008) (order granting approval of class settlement).

229. *See* Settlement Agreement, *supra* note 110, at exhibit A.

230. *Id.* at 7–12.

231. *Id.*

evaluations, parental participation in IEP meetings, referral of students who reach a set number of suspensions in a school year to an early intervention programs that will address the student's academic or behavior issues, and referral of students who are retained in a given school year to the early intervention program.²³²

4. DPI agreed to order MPS to provide training to staff on indicators of special education needs, referral procedures, and Child Find obligations.²³³

5. The creation of a parent trainer position funded by DPI housed at F.A.C.E.T.S.²³⁴ to provide training and support to MPS parents.²³⁵

6. Finally, DPI agreed to pay \$475,000 in attorneys' fees to the plaintiff's counsel.²³⁶

In response to the settlement agreement, State Superintendent Elizabeth Burmaster stated that “[b]y settling this long standing lawsuit, [DPI] can continue moving forward in building successful learning experiences for all students in MPS. . . . [W]e are getting back to serving the needs of all MPS students in the classroom, instead of continuing to debate the issues in the court room.”²³⁷

B. Urban Remedies: Bringing MPS into Satisfactory Compliance with the IDEA

As of the date of publication of this Note, the parties litigated and briefed the remedies portion of the trial;²³⁸ however, due to the complexity of the case the court had not yet issued its decision. In cases like *Jamie S.*, brought under the IDEA, a court is empowered to “grant such relief as the court determines

232. *Id.* at 4–7.

233. *Id.* at 13.

234. See Wisconsin Family Assistance Center for Education, Training and Support, <http://www.wifacets.org/programs09.html> (last visited May 26, 2009). F.A.C.E.T.S. is an acronym for the Wisconsin Family Assistance Center for Education, Training and Support, Inc., which is a nonprofit organization serving Wisconsin children and adults with disabilities, their families, and those who support them. *Id.*

235. The settlement agreement states that the parent trainer position will not exceed an annual cost of \$75,000 and the total cost is not to exceed \$300,000. Settlement Agreement, *supra* note 110, at 13.

236. *Id.* at 18.

237. Press Release, Wis. Dep't of Pub. Instruction, DPI, DRW and DPI Agree to Special Education Lawsuit Settlement, MPS Has Not Reached an Agreement (Apr. 7, 2008), available at http://dpi.wi.gov/eis/pdf/dpi2008_64.pdf.

238. The evidentiary portion of Phase III commenced on November 6, 2008, and concluded on November 14, 2008. *Jamie S. v. Milwaukee Pub. Sch.*, No. 01-C-928 (E.D. Wis. Aug. 29, 2008) (scheduling order). At the close of trial, the court established a post-hearing briefing schedule and requested that the parties address certain questions in their post-trial briefs. The post-hearing briefing closed on February 9, 2009. *Jamie S. v. Milwaukee Pub. Sch.*, No. 01-C-928 (E.D. Wis. Nov. 17, 2008) (post-Phase III scheduling order).

is appropriate.”²³⁹ Courts have the authority “to impose a broad range of equitable remedies.”²⁴⁰ As a result, it is difficult to speculate about what remedies the court will impose because it has such broad discretion. There is, however, a large body of case law that provides some guidance as to what remedies courts typically impose upon finding a violation of the IDEA.²⁴¹ However, if the court in this case imposes a generic remedy dictated by case law, it will almost surely prove unsuccessful. The key to remedying MPS’s systemic Child Find violations is a remedy that is carefully tailored to MPS’s unique urban challenges. Further, a court must be willing to hold MPS, and other urban school districts, to a standard of substantial compliance instead of

239. 20 U.S.C. § 1415(i)(2)(C)(iii) (2006).

240. NORLIN, *supra* note 7, at 15.

241. By the time this Note is published, the court likely will have issued its decision of Phase III of the trial. Thus, an in-depth discussion speculating what remedies the court may impose will likely be a moot one. However, a brief overview of the remedies available under the IDEA may provide useful background information to help put the court’s decision into context.

Since 1975, there have been steady increases in the relief awarded to children with disabilities under the IDEA. Stephen C. Shannon, Note, *The Individuals With Disabilities Education Act: Determining “Appropriate Relief” in a Post-Gwinnett Era*, 85 VA. L. REV. 853, 854 (1999). The most traditional form of relief for FAPE violations, which would include MPS’s Child Find violation, is injunctive relief in the form of ordering an appropriate placement for a child or developing an appropriate IEP for the student. *Taylor v. Honig*, 910 F.2d 627, 628 (9th Cir. 1990); *Miener v. Missouri*, 673 F.2d 969, 979 (8th Cir. 1982); *Anderson v. Thompson*, 658 F.2d 1205, 1211–12 (7th Cir. 1981). One court noted that this form of injunctive relief is the most consistent with the goals of the IDEA, which explains why many courts are comfortable awarding this type of relief. *See Marvin H. v. Austin Indep. Sch. Dist.*, 714 F.2d 1348, 1356 (5th Cir. 1983).

Compensatory education is another possible remedy that awards extra educational services beyond the services normally due to a student under state law. MITCHELL L. YELL, *THE LAW AND SPECIAL EDUCATION* 366–67 (2d ed. 2006). This remedy is designed to make up for students’ lost progress because of previous denials of FAPE. *Id.* As a result, compensatory education typically extends a student’s eligibility for educational services beyond age twenty-one. *Id.* at 367.

Tuition reimbursement is another available remedy and is commonly awarded to compensate parents for the costs of placing their child in a private school as a result of the public school failing to provide their child a FAPE. *Id.* at 363. This remedy is appropriate only when parents can afford to place their child in a private school. *See* 20 U.S.C. § 1412(a)(10)(C)(ii) (2006). However, when parents cannot afford to place their children in private schools, awarding compensatory education is a more appropriate remedy. *Meiner v. Missouri*, 800 F.2d 749, 753 (8th Cir. 1986).

Retroactive tuition reimbursement is one of the few codified remedies included in the IDEA. 20 U.S.C. § 1412(a)(10)(C)(ii). Although not included in the original text of the law, reimbursement has been determined appropriate in cases where the school district fails to conduct “sufficient ‘child-find’” activities or upon finding “sufficiently serious procedural failures.” *Doe v. Metro. Nashville Pub. Sch.*, 133 F.3d 384, 388 (6th Cir. 1998) (reversing on other grounds). Courts have recognized other forms of reimbursement as remedies for Child Find violations as well. For example, in *Department of Education v. Cari Rae S.*, the school district was required to reimburse the plaintiffs for hospitalization costs incurred as a result of an especially egregious Child Find violation. *See* 158 F. Supp. 2d 1190, 1200 (D. Haw. 2001).

100% compliance. Only this will facilitate MPS in meeting its Child Find duties.²⁴²

As they did in their settlement with DPI, the plaintiffs sought only declaratory and injunctive relief; the only money damages sought are attorney's fees and costs.²⁴³ The plaintiffs filed a motion seeking interim attorney's fees and costs incurred from the beginning of litigation through the end of September 2007.²⁴⁴ The IDEA codifies attorney's fees as an appropriate remedy for the "prevailing party."²⁴⁵ The prevailing party seeking the attorney's fees must secure a judgment on the merits of at least some of the party's claims.²⁴⁶ Further, interim attorney's fees are appropriate "once a plaintiff obtains substantive relief that is not defeasible by further proceedings."²⁴⁷ The defendants' potential liability for attorney's fees is extremely important in a case like this where the "potential liability for fees . . . can be as significant as, and sometimes even more significant than, their potential liability on the merits."²⁴⁸

In their motion for interim attorney's fees and costs the plaintiffs sought "\$1,200,891.32 in attorneys' fees and \$119,007.57 in costs incurred through the end of September 2007."²⁴⁹ In *Jamie S.*, the court decided the question of liability when it issued its decision and order in Phase II of the trial.²⁵⁰ It is

242. 20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111 (2008).

243. Settlement Agreement, *supra* note 110, at exhibit A; *Jamie S. v. Milwaukee Bd. Sch. Dirs.*, No. 1-C-928, 2008 U.S. Dist. LEXIS 66447, at *2 (E.D. Wis. Aug. 15, 2008).

244. *Jamie S.*, 2008 U.S. Dist. LEXIS 66447, at *5. The plaintiffs likely will recover the remaining attorney's fees and costs upon the court's issuance of its decision of Phase III of the trial.

245. 20 U.S.C. § 1415(i)(3)(B)(i)(I).

246. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 (2001) (quoting *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980)).

247. *Jamie S.*, 2008 U.S. Dist. LEXIS 66447, at *4 (quoting *Dupuy v. Samuels*, 423 F.3d 714, 719 (7th Cir. 2005) (internal quotation marks omitted)).

248. *Evans v. Jeff D.*, 475 U.S. 717, 734 (1986). This is true because attorney's fees are likely the only form of monetary compensation the parents of the students will receive. Only in "exceptional situations" are parents entitled to monetary damages. Pamela Wright & Peter Wright, *Class Action Lawsuit: Judge Orders Sanctions Against School District, Remedies for Kids*, WRIGHTSLAW, Oct. 14, 2007, <http://www.wrightslaw.com/law/art/wi.jamie.mps/wdpi.htm>; *see, e.g., W.B. v. Matula*, 63 F.3d 484, 495 (3d Cir. 1995) (awarding monetary damages but cautioning lower courts that compensatory damages may be an inferior remedy to compensatory education or tuition reimbursement). Many courts have determined that monetary damages are not available to parents because that type of remedy does not further the goal of providing education for students with disabilities. *See, e.g., Anderson v. Thompson*, 658 F.2d 1205, 1213 (7th Cir. 1981) (determining that educational programs would suffer if school officials hesitated to implement educational reforms for fear of exposing themselves to monetary liability and this would ultimately "hinder rather than help the very children for whose benefit [EAHCA] was enacted"). As previously noted, the plaintiff class did not seek any monetary damages other than attorney's fees. Settlement Agreement, *supra* note 110, at exhibit A.

249. *Jamie S.*, 2008 U.S. Dist. LEXIS 66447, at *5.

250. *Jamie S. v. Milwaukee Pub. Sch.*, 519 F. Supp. 2d 870, 903 (E.D. Wis. 2007).

clear that the “plaintiffs have prevailed. There is nothing that could be reasonably expected to occur in Phase III that would remove such status from the plaintiffs.”²⁵¹ Thus, the court granted the plaintiffs’ motion for interim attorney’s fees but made several reductions to the original amount the plaintiffs’ requested.²⁵² The court awarded a total of \$934,123.96 in interim attorneys’ fees.²⁵³ After subtracting the \$475,000 that DPI agreed to pay in its settlement with the plaintiffs,²⁵⁴ MPS’s total obligation was \$459,123.96.²⁵⁵

The court denied the plaintiffs’ request for costs because the district’s local rules explicitly state that costs are not recoverable until after the entry of a judgment.²⁵⁶ Thus, the court denied the plaintiffs’ request for costs without prejudice as the any amount awarded is premature until a judgment is entered.²⁵⁷

It is reasonable to anticipate that MPS will take the position that it should not have been found liable and should not be sanctioned or ordered to engage in widespread remedial efforts within the school system because of the extraordinary challenges MPS faced and continues to face as a result of being an urban district and because its efforts to comply with the IDEA were made in “good faith.”²⁵⁸ While MPS warrants special attention, it does not deserve special treatment. When viewed in light of the totality of the circumstances facing MPS, identifying, locating, and evaluating *all* children with disabilities may seem like an unreasonable burden. However, the way the IDEA and case law stand today, extrinsic factors—even difficult ones—are not taken into account in determining if a district is in compliance with the law.²⁵⁹

The IDEA is clear in its purpose: “to ensure that *all* children with disabilities have available to them a free appropriate public education . . . designed to meet their unique needs and prepare them for further education, employment, and independent living.”²⁶⁰ MPS should be

251. *Jamie S.*, 2008 U.S. Dist. LEXIS 66447, at *4–5.

252. *Id.* at *10–23. The court reduced the hourly rate for paralegals and law clerks from \$80.00 per hour to \$50.00 per hour and from \$40.00 per hour to \$25.00 per hour, respectively. *Id.* at *6, 11. The court found further reductions of the total hours claimed warranted. The court found reductions appropriate for certain IEP meetings; time spent in contact with the media; a 5% reduction of hours for the portions of the case on which plaintiffs were unsuccessful; and an additional 5% reduction of hours for vague entries in the plaintiffs’ 104-page exhibit it submitted detailing the fees the legal team incurred. *Id.* at *14, 20, 21–22.

253. *Id.* at *22.

254. *Id.*; Settlement Agreement, *supra* note 110, at 18.

255. *Jamie S.*, 2008 U.S. Dist. LEXIS 66447, at *22.

256. *Id.*

257. *Id.*

258. *Jamie S. v. Milwaukee Pub. Sch.*, 519 F. Supp. 2d 870, 904 (E.D. Wis. 2007).

259. See 20 U.S.C. § 1400 (2006).

260. *Id.* § 1400(d)(1)(A) (emphasis added).

required to engage in widespread remedial efforts because it directly advances the IDEA's goal of ensuring that *all* children with disabilities are receiving a proper education. The majority of IDEA violations involve an isolated incident of a school district depriving one child of appropriate services under the IDEA.²⁶¹ In *Jamie S.*, an entire school district, the largest district in the state, failed systemwide to comply with the IDEA and it continues to do so.²⁶² As a result, not just one, but hundreds of children are not receiving appropriate services;²⁶³ if left unremedied, potentially thousands of students will be affected. Failing to impose widespread remedies in this case would be in direct contravention to the IDEA's goal of educating all children by allowing MPS to continue failing to provide appropriate services to its students.

As stated, there is no qualifier in the IDEA's stated purpose—to educate individuals with disabilities—that allows school districts to provide each child a FAPE only to the extent its circumstances permit. Educating all children, including children with disabilities, is of utmost importance.²⁶⁴ The challenges faced by MPS are significant, and these challenges undoubtedly make compliance with Child Find more difficult; however, under the IDEA, no obstacle encountered by MPS excuses its obligation to provide a child with a disability a FAPE. The bottom line is that MPS fell short of its requisite goal of identifying, locating, and evaluating all students with disabilities. As a result of this failure, remedies and sanctions must be imposed.

The issue is not whether MPS should be required to comply with the IDEA; clearly, for the reasons stated above it is imperative that MPS be required to comply and resolve its systemic violations. The more pressing issue is determining what constitutes “satisfactory compliance”²⁶⁵ for an urban district like MPS. One hundred percent compliance is obviously ideal, but is this realistic for urban school districts? Perhaps something less than 100% compliance still constitutes *satisfactory* compliance, even if it does not under the IDEA and current case law, perhaps it should in MPS's case. The IDEA presents a paradox for urban school districts: it requires school districts to identify, locate, and evaluate *all* children with disabilities; essentially, the IDEA requires perfection.²⁶⁶ However, the challenges faced by an urban

261. *E.g.*, *Miener v. Missouri*, 800 F.2d 749 (8th Cir. 1986); *Dep't of Educ. v. Cari Rae S.*, 158 F. Supp. 2d 1190 (D. Haw. 2001); *Clay T. v. Walton County Sch. Dist.*, 952 F. Supp. 817 (M.D. Ga. 1997).

262. *Jamie S.*, 519 F. Supp. 2d at 903–04.

263. *Id.* at 893.

264. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (explaining that “education is perhaps the most important function of the state and local governments”).

265. *Jamie S.*, 519 F. Supp. 2d at 904.

266. *See* 20 U.S.C. § 1412(a)(3)(A) (2006).

school district make it impossible to achieve this standard. As a result, something less than 100% compliance should still constitute satisfactory compliance for MPS. What constitutes *something less* is likely a fact-intensive analysis to be determined by a court.

Even if something less than 100% compliance is acceptable under the IDEA, MPS still has a long way to go to enter the realm of satisfactory compliance. At one point, 17% of students identified as having disabilities at MPS did not have a current IEP and only 81.1% of evaluations of students had been timely completed.²⁶⁷ In order to achieve satisfactory compliance a court must impose remedies that are carefully tailored to MPS's urban challenges. This certainly is no easy task. First, the court has very little relevant precedent to use as guidance. The number of IDEA class action suits is "remarkably small."²⁶⁸ One author's research "uncover[ed] less than 100 cases in which class actions had ever been certified to pursue claims under the IDEA."²⁶⁹ Secondly, imposing sanctions to remedy a large urban school district's systemic violations is a daunting task, and there are no guarantees for effectiveness.²⁷⁰ Finally, this is a more difficult task because of the urgency of the problem. As noted, if the systemic violations of MPS are not remedied, potentially thousands of students with disabilities in MPS will not receive special education services.²⁷¹

In order to bring MPS into full compliance with the IDEA, the court needs to evaluate MPS's situation in light of its urban challenges.²⁷² In other words, the court must sufficiently tailor its remedy to the needs of an urban school district. MPS did not account for its urban challenges in constructing its original Child Find procedures, and consequently, the procedures were wholly inadequate. Similarly, if the court makes the same mistake and fails to account for urban challenges, its remedy will not correct MPS's systemwide failures.

MPS, under the directive of DPI, has been attempting to comply with Child Find since the birth of the *Jamie S.* litigation in 2001.²⁷³ The court noted, "[a]s DPI continued to insist upon more thorough internal accountability procedures, compliance by MPS did improve in some areas, but overall, remained uneven."²⁷⁴ One of the defendants' experts explained

267. *Jamie S.*, 519 F. Supp. 2d at 876.

268. Bagenstos, *supra* note 69, at 13.

269. *Id.*

270. The difficulty of this task is evidenced by MPS's failing efforts to achieve compliance since the advent of this case in 2001. *Jamie S.*, 519 F. Supp. 2d at 877–80.

271. *Id.* at 893.

272. *See supra* Part IV.

273. *Jamie S.*, 519 F. Supp. 2d at 904.

274. *Id.*

that it takes time for compliance strategies to work, but “things are improving.”²⁷⁵ By the time the court issues its decision in Phase III it will have had nearly two years to assess whether MPS has made any progress toward achieving satisfactory compliance. This certainly will be a factor in determining the level of invasiveness and the magnitude of changes required by the court-imposed remedy.²⁷⁶ Further, the court’s duty should not end once it issues a decision in Phase III of the trial; rather, the court should continue to monitor MPS’s compliance efforts and revisit and modify the remedy it imposed if necessary. This likely is the most efficient way for MPS to achieve the highest level of satisfactory compliance with the IDEA.

Imposing an effective remedy to bring the entire MPS district into compliance with Child Find is no small task for the court, especially in light of the challenges faced by an urban school district like MPS.²⁷⁷ Despite these challenges, the IDEA is not wavering in its demand for full compliance in order to receive federal funding for special education programs.²⁷⁸ This is an unattainable standard for urban school districts. Instead, something less than 100% compliance—satisfactory compliance—which takes into account a school district’s urban challenges, is the standard by which courts should hold urban school districts.

VI. CONCLUSION

All states receiving federal assistance under the IDEA are required to have in effect policies and procedures to ensure compliance with Child Find. Child Find requires that all children with disabilities residing in the state are “identified, located, and evaluated.”²⁷⁹ In *Jamie S.*, the court determined that MPS violated its Child Find requirements. The violations were systemic; therefore, MPS violated the rights of the entire class of plaintiffs. Being a large urban school district, MPS faces a myriad of challenges that make compliance with Child Find more difficult than in a typical suburban district. The key challenges MPS faces are diverse student and parent demographics, low expectations and standards, high student and teacher mobility, decreased parental involvement, and the low level of priority that special education receives.

Remedies for the plaintiffs and sanctions for the defendants were litigated in Phase III of the trial. The most effective remedy, and the one most consistent with the goal of the IDEA, is one that reforms old, ineffective

275. *Id.*

276. *See id.*

277. *See generally* DODENHOFF, *supra* note 189.

278. 20 U.S.C. § 1412 (2006).

279. *Id.* § 1412(a)(3)(A).

policies and procedures and develops new ones that MPS must implement throughout the district. The court must tailor the policies and procedures to account for MPS's urban challenges, and if necessary, revisit its remedy to make necessary modifications. If this is not done, MPS will continue its systemic violations of Child Find, and the *Jamie S.* litigation will have achieved nothing. Further, MPS should not be required to achieve 100% compliance with Child Find but should be held to a new standard of substantial compliance.

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