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IDEA Class Actions After Wal-Mart v. Dukes

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Abstract

Wal-Mart v. Dukes overturned the certification of a class of a million and a half female employees alleging sex discrimination in Wal-Mart's salary and promotion decisions. The Supreme Court ruled that the case did not satisfy the requirement that a class have a common question of law or fact, and said that the remedy sought was not the type of relief available under the portion of the class action rule permitting mandatory class actions. Over the last two years, courts have struggled with how to apply the ruling, especially how to apply it beyond its immediate context of employment discrimination litigation.

In two prominent cases under the Individuals with Disabilities Education Act (IDEA), the federal courts of appeals have displayed remarkably different attitudes about class actions after Wal-Mart. This article will discuss these two leading cases, describe additional post-Wal-Mart class action decisions in IDEA and analogous contexts, then consider how Wal-Mart will affect the litigation decisions of advocates trying to address systemic violations of IDEA, and the courts' likely reactions.

Analysis of Wal-Mart and the cases decided in its wake suggests that group litigation to enforce IDEA will continue to be viable, but also that the litigation will change. Plaintiffs bringing IDEA class actions will likely attempt to distinguish Wal-Mart as a case preoccupied with interpreting underlying employment discrimination law. They will frame their cases as challenges to specifically defined policies and practices, and they will probably propose smaller, more tightly circumscribed classes or subclasses. They will also be likely to pursue non-class action approaches to addressing systemic violations of the law, bringing individual actions for broad relief, asking for group administrative remedies, and seeking action by governmental entities with the power to sue to enforce the IDEA rights.

Much has been written about the Wal-Mart and its impact on class action procedure and the enforcement of substantive law. This Article seeks to contribute to the discussion by analyzing the case's application to a field in which class action litigation has been a prominent means of enforcing important statutory rights, and by determining how litigants and courts are likely to respond.

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IDEA Class Actions After *Wal-Mart v. Dukes*

*Wal-Mart v. Dukes*¹ overturned the certification of a class of a million and a half female employees claiming sex discrimination in Wal-Mart's salary and promotion decisions. The Supreme Court ruled that the case did not satisfy the requirement that a class have a common question of law or fact,² and said that the remedy sought was not the type of relief available under the portion of the class action rule providing for mandatory class actions.³ After the Court decided *Wal-Mart* in 2011, courts have struggled with how to apply the ruling, especially how to apply it beyond its immediate context of allegations of employment discrimination in violation of Title VII of the Civil Rights Act.⁴

Nowhere are the questions more pressing than in cases under the federal law guaranteeing the right to appropriate education for children with disabilities. In two prominent cases under the Individuals with Disabilities Education Act (IDEA),⁵ the federal courts of appeals have displayed remarkably different attitudes about class actions after *Wal-Mart*.⁶ This article will discuss these two leading cases, describe a range of additional post-*Wal-Mart* class action decisions in IDEA and analogous contexts, then consider how *Wal-Mart* will affect the litigation decisions of advocates trying to address systemic violations of IDEA, and the courts' likely reactions.

Analysis of *Wal-Mart* and the cases decided in its wake suggests that group litigation to enforce IDEA will continue to be viable, but also that the litigation will change. Plaintiffs

¹ 131 S. Ct. 2541 (2011).

² *Id.* at 2553.

³ *Id.* at 2557 (referring to FED. R. CIV. P. 23(b) (2)).

⁴ 42 U.S.C. §§ 2000e-1 to 2000e-17 (2006).

⁵ 20 U.S.C. §§ 1400-1482 (2006).

⁶ *DL v. District of Columbia*, 713 F.3d 120 (D.C. Cir. 2013); *Jamie S. v. Milwaukee Pub. Schs.*, 668 F.3d 481 (7th Cir. 2012).

bringing IDEA class actions will likely attempt to distinguish *Wal-Mart* as a case preoccupied with interpreting underlying employment discrimination law. They will frame their cases in terms of challenges to carefully defined policies and practices, and they will probably advance smaller, more tightly circumscribed classes or subclasses. They may also to pursue non-class action approaches to addressing systemic violations of the special education law by bringing individual actions for broad relief, asking for group administrative remedies, and seeking action by governmental entities with the power to sue to enforce the IDEA rights in the courts.

IDEA is a critical component of education law in the United States,⁷ and no small source of business for the federal and state courts.⁸ Originally passed as the Education for All Handicapped Children Act of 1975,⁹ IDEA requires that states that receive federal special education money (now all fifty states as well as six outlying areas) ensure that all children with disabilities are offered free, appropriate public education, with necessary related services, in settings that are, to the maximum extent appropriate, inclusive with children who do not have disabilities.¹⁰ IDEA's "child-find" provision demands that all children with disabilities be identified, located, and evaluated, and that a practical method be developed and implemented to determine which children with disabilities currently receive the special education and related

⁷ As a small indication of this fact, Education Law casebooks uniformly devote at least one chapter to IDEA and the education of children with disabilities. *See, e.g.*, SCOTT F. JOHNSON & SARAH E. REDFIELD, *EDUCATION LAW: A PROBLEM-BASED APPROACH* ch. 12 (2d ed. 2012); CHARLES J. RUSSO, *REUTTER'S THE LAW OF PUBLIC EDUCATION* ch. 15 (8th ed. 2012).

⁸ A modest indication of this reality is that the Supreme Court has decided fourteen cases involving the statute since its passage. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009); *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007); *Arlington Cent. Sch. Dist. v. Murphy*, 548 U.S. 291 (2006); *Schaffer v. Weast*, 546 U.S. 49 (2005); *Zobrest v. Catalina Foothills Sch. Dist.*, 501 U.S. 1 (1993); *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66 (1999); *Bd. of Educ. v. Grumet*, 512 U.S. 687 (1994); *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993); *Delmuth v. Muth*, 491 U.S. 223 (1989); *Honig v. Doe*, 484 U.S. 305 (1988); *Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359 (1985); *Smith v. Robinson*, 468 U.S. 992 (1984); *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984); *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982). Several of these cases have been legislatively overruled in whole or part as the statute has been amended over the years.

⁹ Pub. L. No. 94-142, 89 Stat. 773.

¹⁰ 20 U.S.C. §§ 1401(9) (free, appropriate public education and related services), (26) (related services); 1412(a)(1) (free, appropriate public education), (a)(5) (inclusion with children without disabilities) (2006).

services they need and which do not.¹¹ The statute affords procedural rights¹² and sets out protections from student discipline measures that might interfere with delivery of educational services.¹³ Significantly, parents have the right to go to court to challenge failures to provide educational rights and services guaranteed by the law.¹⁴ Frequently, they have exercised these rights by bringing class action cases in federal court asserting that school districts or state educational agencies have systemically failed to comply with the law. These systemic failings include imposing arbitrary limits on the availability of services rather than treating children individually, charging parents for services that are supposed to be free, not identifying, locating, and evaluating all children with disabilities within the jurisdiction of a school district, or engaging in other large-scale violations of the statute's terms.¹⁵

Though *Wal-Mart* is barely two years old, the scholarship on it fills volumes.¹⁶ Many scholars have questioned its interpretation of the federal class action rule¹⁷ or contended that its

¹¹ *Id.* § 1412(a)(3)(A) (“Child find”).

¹² *Id.* § 1415 (procedural rights).

¹³ *Id.* § 1415(k) (disciplinary protections).

¹⁴ *Id.* § 1415(i).

¹⁵ See, e.g., cases cited *infra* notes ____ and accompanying text (describing class action litigation under IDEA).

¹⁶ One such volume of interest is the aptly titled Symposium, *Class Action Rollback: Wal-Mart v. Dukes and the Future of Class Action Litigation*, 62 DEPAUL L. REV. 653 (2013).

¹⁷ E.g., Jennifer Brooks-Crozier, *Put Up Your Dukes: The Fight over Commonality in the Era of Wal-Mart v. Dukes*, 19 TEX. WESLEYAN L. REV. 711, 721 (2013) (“The blurring of the commonality and predominance standards is problematic because it makes prediction difficult. Have the two standards disappeared, replaced by one “predominance of common questions” standard?”); Sergio J. Campos, *Proof of Classwide Injury*, 37 BROOK. J. INT’L L. 751, 758 (2012) (“[P]roof of classwide injury should not be required to certify a class. Instead, a class action should be certified if, along with the other prerequisites of Rule 23, the class shares common questions of liability, not common answers of injury. Accordingly, the trend of requiring proof of classwide injury, most strikingly seen in the Wal-Mart decision and its interpretation of the commonality requirement, should reverse course.”); Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U.L. REV. 729, 776 (2013) (“The majority decision in *Dukes* cannot be squared with the text, structure, or history of Rule 23(a)(2). Nothing in the text of Rule 23(a)(2), or in the Advisory Committee Notes thereto, requires that the common question be central to the outcome.”); Suzette M. Malveaux, *How Goliath Won: The Future Implications of Dukes v. Wal-Mart*, 106 NW. U.L. REV. Colloquy 34, 44-45 (2011) (“[T]o satisfy commonality generally, judges may now require a stronger causal connection between an employer’s discretionary decisionmaking policy and a disparity or adverse employment action. This shift will make it harder for employees relying on this theory to act collectively. . . . The Court’s unanimous conclusion that back pay was not appropriate for the type of class action certified in *Dukes* was surprising. This gratuitous decision effectively reversed almost a half-century of Title VII jurisprudence permitting back pay under such circumstances.”) (footnote omitted); Marcia L. McCormick, *Implausible Injuries: Wal-Mart v. Dukes and the Future of Class Actions and Employment Discrimination Cases*, 62 DEPAUL L. REV. 711, 718 (2013) (“The Court’s

approach works at cross-purposes to underlying Title VII objectives.¹⁸ Others have defended the ruling, saying that if it is read properly, it will make systemic litigation more manageable.¹⁹ This

analysis in *Dukes* is highly puzzling as a doctrinal matter, with regard to both the law governing class actions and the law of employment discrimination.”); Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 153 (2011) (“These *Wal-Mart* rulings crafted new impediments to the congressional charter authorizing private enforcement of Title VII as well as to Rule 23’s recognition of different kinds of relatedness (the (b)(1), (b)(2), and (b)(3) classes) as a predicate for aggregation under judicial supervision.”); A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 444 (2013) (“Nothing in the language or history of Rule 23(a)(2) supports the *Dukes* majority’s interpretation of it.”); see Erwin Chemerinsky, *New Limits on Class Actions*, Trial, Nov. 2011, at 54 (“It is difficult, if not impossible, to reconcile the Court’s approach in *Wal-Mart* with an abuse-of-discretion standard of review. The district court made extensive findings as to why there was sufficient commonality to permit a class action suit, but at no point did Scalia’s majority opinion suggest the slightest deference to the trial court. . . . The *Wal-Mart* decision reflects a conservative majority that is quite hostile to class action suits.”).

¹⁸ E.g., Deborah Thompson Eisenberg, *Wal-Mart Stores v. Dukes: Lessons for the Legal Quest for Equal Pay*, 46 NEW ENG. L. REV. 229, 234-35 (2012) (“Although Title VII disparate- impact theory permits plaintiffs to allege that an otherwise neutral employment policy has discriminatory results, the Court’s holding in *Wal-Mart* may eviscerate the viability of this theory for many women, particularly national classes.”) (footnote omitted); Armin J. Jezari, *In Lieu of Wal-Mart v. Dukes: A Need to Promulgate a More Reasonable Significant Proof Standard for Title VII Class Certification*, 26 S.U. L. REV. 119, 141 (2012) (“These new models of class certification for Title VII suits seem to undermine theories of disparate impact.”); Tristin K. Green, *The Future of Systemic Disparate Treatment Law*, 32 BERKELEY J. EMP. & LAB. L. 395, 413 (2011) (stating that Court’s approach of requiring discriminatory policy “pushes a reshaping of the use of statistics in systemic disparate treatment cases.”); Melissa Hart, *Civil Rights and Systemic Wrongs*, 32 BERKELEY J. EMP. & LAB. L. 455, 464-66, 468-74 (2011) (criticizing Court’s rejection of statistical modeling for remedial interpretations as destructive of Title VII principles); Suzette M. Malveaux, *Power and Promise of Procedure: Examining the Class Action Landscape after Wal-Mart v. Dukes*, 62 DEPAUL L. REV. 659, 661 (2013); Natalie Bucciarelli Pedersen, *The Hazards of Dukes: The Substantive Consequences of a Procedural Decision*, 44 U. TOL. L. REV. 123, 132-33 (2012) (contending that *Wal-Mart* undermined precedent permitting disparate impact liability based on delegation of subjective decision making and opened door to unconscious bias); Michael J. Zimmer, *Wal-Mart v. Dukes: Taking the Protection Out of Protected Classes*, 16 LEWIS & CLARK L. REV. 409, 447 (2012) (concluding that *Wal-Mart* effectively altered law of systemic employment discrimination).

¹⁹ E.g., Saby Ghoshray, *Hijacked by Statistics, Rescued by Wal-Mart v. Dukes: Probing Commonality and Due Process Concerns in Modern Class Action Litigation*, 44 LOY. U. CHI. L.J. 467, 471 (2012) (“[T]he Supreme Court’s holding in *Dukes* is merely a course correction to counter the unbridled use of statistics in class action litigation.”) (footnote omitted); Suzanna Sherry, *Hogs Get Slaughtered at the Supreme Court*, 2011 SUP. CT. REV. 1, 21 (2011) (“The Court was again correct in rejecting certification of the *Wal-Mart* class.”); Deborah M. Weiss, *A Grudging Defense of Wal-Mart v. Dukes*, 24 YALE J.L. & FEMINISM 119, 173-74 (2012) (contending that plaintiffs faced with *Wal-Mart*’s interpretation of common question of law and fact will be forced to develop more sophisticated and persuasive theories of discrimination); J. Britton Whitbeck, *Identity Crisis: Class Certification, Aggregate Proof, and How Rule 23 May Be Self-Defeating the Policy for Which It Was Established*, 32 PACE L. REV. 488, 512 (2012) (“[T]he Court’s scrutiny of statistical and anecdotal evidence provides greater assurance that broad conclusions and generalities will not satisfy the requirements of Rule 23. Most importantly, the Supreme Court in *Dukes* was able to reduce the inconsistent and varying standards for which the Rule was promulgated to prevent.”) (internal quotation omitted); cf. Kathryn Smith, *What Do 1.5 Million Wal-Mart Women Have in Common?: Dukes v. Wal-Mart Class Action Certification*, 52 B.C. L. REV. E SUPP. 149, 157 (2011), http://bclawreview.org/files/2012/12/12_smith.pdf (criticizing lower court decision that *Wal-Mart* overturned as creating unmanageable class and undermining Rule 23’s efficiency and fairness objectives). Some writers consider the case altogether less significant than it may appear. See, e.g., Elizabeth Tippet, *Robbing A Barren Vault: The Implications of Dukes v. Wal-Mart for Cases Challenging Subjective Employment Practices*, 29 HOFSTRA LAB. & EMP. L.J. 433, 434-36 (2012) (concluding from empirical study that effect of *Wal-Mart* on Title VII cases challenging subjective employment practices will be limited); Andrew J. Trask, *Reactions to Wal-Mart v. Dukes: Litigation Strategy and Legal Change*, 62 DEPAUL L.

Article seeks to contribute to the literature by analyzing the case's application to special education law, a field in which class action litigation has been a prominent mechanism in enforcing important statutory rights, and by working out how IDEA litigants and courts are likely to respond to the case.

Part I of this Article discusses the close relationship between IDEA and class action litigation. Part II takes up the *Wal-Mart* case, describing its facts and holding. Part III considers *Wal-Mart* in relation to IDEA, discussing the two leading decisions from the courts of appeals applying *Wal-Mart* to IDEA class actions, then considering additional IDEA cases and other potentially analogous post-*Wal-Mart* judicial decisions. Part IV maps out how IDEA litigants might respond to the invocation of *Wal-Mart*, and what success those responses might have in the courts. It develops ways in which the case might be distinguished in class litigation by raising differences in statutory terms between Title VII and IDEA, as well as by framing classes around specific system-wide policies and forming more compact classes. It also considers ways in which those attacking systemic violations of IDEA might bypass class action procedure in favor of other legal mechanisms.

I. IDEA and Class Actions

IDEA originated in class action litigation. In *Board of Education v. Rowley*,²⁰ the most prominent case interpreting the law that is now IDEA, the Supreme Court explained that the statute 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

REV. 791, 793, 796 (2013); *see also* Zimmer, *supra* note ____ at 456 (“[T]he *Wal-Mart* opinion is so confused and oddly organized that it may be viewed as having no effect on the law.”). As this and the preceding notes indicate, one effect of the decision has been to elicit an alarming number of puns from writers of law review articles.

²⁰ 458 U.S. 176 (1982).

services.²¹ The Court gave its greatest attention to two class actions, *PARC v. Pennsylvania*²² and *Mills v. District of Columbia*,²³ which Congress reviewed in detail when writing the law.²⁴ The legislative history of the statute evinces not merely an awareness of these and many other class action cases asserting the equal protection and due process rights of children with disabilities to an appropriate education,²⁵ but also a recognition that advocates would bring class action cases under the new law. Thus in discussing the Act's administrative exhaustion requirement, the principal author stated that in class actions brought under the federal statute, unnamed class members would not be expected to exhaust their administrative remedies.²⁶

²¹ *Id.* at 179 n.2 (“Two cases, *Mills v. Board of Education of District of Columbia*, 348 F. Supp. 866 (D.C.1972), and *Pennsylvania Assn. for Retarded Children v. Commonwealth*, 334 F. Supp. 1257 (ED Pa.1971) and 343 F. Supp. 279 (1972), were later identified as the most prominent of the cases contributing to Congress' enactment of the Act and the statutes which preceded it.”).

²² 334 F. Supp. 1257 (E.D. Pa.1971) (order entering agreement and injunction), 343 F. Supp. 279 (1972) (approving amended stipulation and consent decree).

²³ 348 F. Supp. 866 (D.D.C.1972) (finding liability and entering judgment).

²⁴ See *Rowley*, 458 U.S. at 193-200 (discussing impact of *PARC* and *Mills* on law that became IDEA). These cases were hardly unique. See, e.g., *Nickerson v. Thomson*, 504 F.2d 813 (7th Cir. 1974) (overturning decision to abstain in class action suit for establishment and maintenance of needed special education facilities); *McMillan v. Bd. of Educ.*, 430 F.2d 1145 (2d Cir. 1970) (reversing dismissal of class action right to education suit); see also sources cited *infra* note ____ [next note] (noting congressional awareness of class action litigation over educational rights of children with disabilities in many states). See generally MARTHA MINOW, IN BROWN'S WAKE: LEGACIES OF AMERICA'S EDUCATIONAL LANDMARK 72-76 (2010) (detailing impact of *PARC*, *Mills*, and other litigation on legislation that became IDEA).

²⁵ See, e.g., *Financial Assistance for Improved Educational Services for Handicapped Children: Hearings before the Select Subcommittee on Education of the H. Comm. On Education and Labor*, 93rd Cong. 277 (1974) (Statement of Dr. Harrie M. Selznick, Consultant on Education) (“That class action suits have been filed in more than thirty states by parents of handicapped children who have been denied enrollment in the special education programs of the public schools is also reflective of the situation as it actually exists.”); *Financial Assistance for Improved Educational Services for Handicapped Children: Hearings before the Select Subcommittee on Education of the H. Comm. On Education and Labor*, 93rd Cong. 208 (1974) (Statement of Samuel Teitelman, New Haven, Conn.) (“Parents of handicapped children are now going as far as they must to provide services for their children. You are well aware of the many ‘right to education’ class action suits currently in process in courts all over the country.”); *Education for All Handicapped Children, 1973-74: Hearings before the Subcomm. on the Handicapped of the S. Comm. on Labor and Public Welfare*, 93rd Cong. 118 (1973) (statement of William T. Cahill, Governor of New Jersey) (“The evident diversity throughout the Nation [in educational services for children with disabilities] in a large measure is due to the interrelationship between such factors as public attitudes, philosophical commitment, political and legislative interests in activism, local and State fiscal status, long term and more expedient priorities of the State, and the latest critical variable, class action court suits.”); 121 Cong. Rec. 19,486-92 (1975) (Statement of Sen. Harrison Williams) (detailing class action litigation in Colorado, Hawaii, Kentucky, Louisiana, Maryland, Massachusetts, Missouri, Nevada, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, Tennessee, and Wisconsin).

²⁶ 121 Cong. Rec. 37416 (1975) (Statement of Sen. Harrison Williams).

Precisely as Congress anticipated, class action litigation continued after the law came into full effect in 1978, with plaintiffs now seeking to enforce rights under the statute as well as constitutional rights.²⁷ In 1980, in *Battle v. Pennsylvania*,²⁸ the Third Circuit approved a class action decision enjoining a limit of 180 instructional days per year for students with disabilities, a restriction that applied irrespective of the students' individual needs.²⁹ Other class cases early in the life of the statute included *Roncker v. Walter*,³⁰ a decision from 1983 vacating the district court's refusal to certify a class in a case challenging a policy of automatically sending students with severe intellectual disabilities to county schools; *Edward B. v. Brunelle*,³¹ a 1986 disposition in which the court certified a class of children placed in residential facilities pursuant to juvenile court proceedings who claimed they were not offered appropriate special education services; *Andre H. v. Ambach*,³² granting certification in 1985 to a class of children at a juvenile center alleging they had been deprived of appropriate education, and *Tonya K. v. Chicago Board*

²⁷ See 20 U.S.C. § 1412(2)(B) (1976) (setting Sept. 1, 1978 as date for making appropriate education available to all eligible children).

²⁸ 629 F.2d 269 (3d Cir. 1980).

²⁹ The court required modifications of some district court orders, but left the injunctive and declaratory relief against the defendant in place pending the modification. *Id.* at 281. The court emphasized the broad discretion of the district court to define a class. *Id.* at 271 n.1.

³⁰ 700 F.2d 1058 (6th Cir.1983).

³¹ 662 F. Supp. 1025 (D.N.H.1986).

³² 104 F.R.D. 606 (S.D.N.Y. 1985).

of Education,³³ granting class certification in 1982 in an action alleging failures to place children in private special education schools in a timely manner.³⁴

Class action litigation over special education issues continued to be a prominent part of the picture during the various rewritings of IDEA, including the Handicapped Children's Protection Act of 1986,³⁵ which clarified rights to attorneys' fees and specified the applicability of exhaustion defenses,³⁶ the comprehensive revisions of the law in 1997³⁷ and, most recently, 2004,³⁸ all the way up to the present.³⁹ None of these revisions of the law ever placed any obstacles in the way of class action litigation.⁴⁰

³³ 551 F. Supp. 1107 (N.D. Ill. 1982). Other early cases approving classes under the statute that became IDEA include: *Jose P. v. Ambach*, 669 F.2d 865 (2d Cir. 1982) (affirming class action status despite argument plaintiffs failed to exhaust administrative remedies in case over delays in evaluation and placement of children with disabilities); *Parks v. Pavkovic*, 557 F. Supp. 1280 (N.D. Ill. 1983) (approving class certification in case challenging denial of free education to students with disabilities), *aff'd in part and rev'd in part on other grounds*, 753 F.2d 1397 (7th Cir. 1985); *William S. v. Gill*, 98 F.R.D. 463 (N.D. Ill. 1983) (certifying class challenging failure to guarantee related services deemed noneducational by defendant). As the *Parks* case exemplifies, disputes over class action status in these cases were less likely to turn on common question of law or fact and more likely to involve questions whether the claim of the named plaintiff was typical of that of the class. *See Parks*, 557 F. Supp. at 1285-86; *see also William S.*, 98 F.R.D. at 469-70 (rejecting challenge to class certification based on typicality).

³⁴ As early as 1979 the practice of using class actions to address systemic problems with implementation of laws passed to benefit those with disabilities was well enough established for legendary disability advocate Stanley Herr to remark that:

Many public interest law programs representing retarded persons eschew individual representation in favor of class action work, but the handful of aggressive advocacy organizations for the developmentally disabled correctly avoid distinguishing between law reform and individual service work, and see in each case some potential for affecting the entire system.

Stanley S. Herr, *The New Clients: Legal Services for Mentally Retarded Persons*, 31 STAN. L. REV. 553, 602 (1979). Herr was counsel for plaintiffs in *Mills*, among other noteworthy cases.

³⁵ Pub. L. No. 99-372, §§ 2-3, 100 Stat. 796, 797.

³⁶ *See Handicapped Children's Protection Act of 1985: Hearing Before the Subcomm. on the Handicapped of the S. Comm. on Labor and Human Resources*, 99th Cong. 106 (1985) (statement of E. Richard Larson, American Civil Liberties Union) ("If [section] 3 is not enacted, it will mean, for example, that an illegal or unconstitutional educational policy could not be challenged through a class action, which is the most convenient and inexpensive method for parents and educational agencies alike to resolve policy disputes affecting large numbers of handicapped children."); 131 CONG. REC. 21,393 (1985) (statement of Sen. Simon) ("S. 415 is also clearly not intended to modify traditional standards used by the courts for determining when a class action suit can be filed, and the circumstances under which it is appropriate to grant a preliminary injunction.").

³⁷ Pub. L. No. 105-17, 111 Stat. 37.

³⁸ Pub. L. No. 108-446, §§ 2-3, 118 Stat. 2647.

³⁹ Notable recent cases include: *C.G. v. Penn. Dep't of Educ.*, CIV.A 1:06-CV-1523, 2009 WL 3182599 (M.D. Pa. Sept. 29, 2009) (certifying class challenging apportionment of special education funding); *D.S. ex rel. S.S. v. N.Y.C. Dep't of Educ.*, 255 F.R.D. 59 (E.D.N.Y. 2008) (granting class certification in action challenging absence of secondary school services for minority children with disabilities); *L.M.P. v. Sch. Bd.*, 516 F. Supp. 2d 1294 (S.D. Fla. 2007) (denying motion to dismiss and excusing exhaustion in class action alleging denial of appropriate services

II. *Wal-Mart v. Dukes*

Enter *Wal-Mart Stores, Inc. v. Dukes*.⁴¹ *Wal-Mart* reversed the certification of a class in an employment discrimination case brought by female workers at Wal-Mart's retail operations, who alleged that the discretion exercised by local supervisors over pay and promotion constituted unlawful sex discrimination.⁴² The Court held that the class did not satisfy the class action requirement of having a common question of law or fact.⁴³ It also ruled that the class could not be certified under the portion of the class action rule providing for class actions for declaratory and injunctive relief, given the nature of the relief the plaintiffs wanted.⁴⁴

The Supreme Court analyzed the case according to Federal Rule 23, which provides that class actions must meet all of the requirements of subsection (a) as well as the requirements of one of the (b) subsections.⁴⁵ Subsection (a) requires (1) that the class is so numerous that individual joinder is not practicable; (2) that there are questions of law or fact common to the class; (3) that the claims or defenses of the representative parties are typical of those of the class; and (4) that the representative parties will fairly and adequately protect the class's interests. Subsection (b) allows for three types of class actions. Subsection (b)(1) allows for a class when individual adjudications would establish incompatible standards of conduct for the party opposing the class or adjudications of individuals in the class would practically dispose of interests of others not party to the adjudications, for example, a limited-fund case in which class

for children with autism); J.S. *ex rel.* N.S. v. Attica Cent. Sch., No. 00 CV 513S, 2006 WL 581187 (W.D.N.Y. Mar. 8, 2006) (certifying class of children not properly determined to be eligible for services under IDEA); *see also* MARK C. WEBER, SPECIAL EDUCATION LAW AND LITIGATION TREATISE § 21.5 nn. 88-89 (3d ed. 2008 & supps.) (collecting sample of IDEA cases approving and denying class action status).

⁴⁰ *See* WEBER, *supra* note __ [treatise, previous note] §§ 1.3(2), .5-.6 (tracing amendments to original federal special education law up to present).

⁴¹ 131 S. Ct. 2541 (2011).

⁴² *Id.* at 2547.

⁴³ *Id.* at 2553.

⁴⁴ *Id.* at 2557.

⁴⁵ FED. R. CIV. P. 23.

members are competing against each other for a fixed asset. Subsection (b)(2) permits a class when the opponent of the class has acted or refused to act on grounds generally applicable to the class, making injunctive or declaratory relief for the class as a whole appropriate. Subsection (3) covers classes in which the questions of law or fact that are common to the class predominate over any questions affecting individual members, and the class action is superior to other methods for resolving the case fairly and efficiently.

At one and a half million members, the *Wal-Mart* class had no difficulty with the (a)(1) standard of numerosity.⁴⁶ The Court declined to pass on whether the class satisfied typicality (the (a)(3) requirement) and representative adequacy (required by (a)(4)), though it noted that common question of law or fact and typicality tend to merge together and to intertwine with representative adequacy.⁴⁷ Common question of law or fact, the (a)(2) requirement, was the problem the Court identified. The Court declared, “The crux of this case is commonality—the rule requiring a plaintiff to show that ‘there are questions of law or fact common to the class.’”⁴⁸ The Court began by its analysis of the requirement by saying it should not be read literally, for every proposed class will have some question of law or fact in common, such as the name of the defendant.⁴⁹ The Court then jumped directly into substantive employment discrimination law,

⁴⁶ See *Wal-Mart*, 131 S. Ct. at 2547.

⁴⁷ *Id.* at 2551 n.5.

⁴⁸ *Id.* at 2550-51.

⁴⁹ *Id.* at 2551. In a striking reversal of his frequent role as defender of literal readings of texts, Justice Scalia declared: “That language is easy to misread, since ‘[a]ny competently crafted class complaint literally raises common ‘questions.’” [Richard A.] Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 131–132 (2009). For example: Do all of us plaintiffs indeed work for Wal-Mart? Do our managers have discretion over pay? Is that an unlawful employment practice? What remedies should we get? Reciting these questions is not sufficient to obtain class certification. Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury.” *Wal-Mart*, 131 S. Ct. at 2551 (internal quotation and citation omitted). Justice Scalia’s departure from a textual approach has not escaped notice. See Klonoff, *supra* note __, at 776 (“It is ironic that Justice Scalia, who typically rejects sources other than the plain language in interpreting statutes and rules--and who has criticized his colleagues for relying on law review articles--would author an opinion basing an interpretation of Rule 23(a)(2) on a commentator's general discussion.”) (footnotes omitted); Spencer, *supra* note __, at 464 (“Justice Scalia, who often touts his fealty to the written text of enacted rules and statutes, displays none of that discipline in *Dukes*.”) (footnote omitted).

declaring that “Title VII [of the Civil Rights Act of 1964], for example, can be violated in many ways—by intentional discrimination, or by hiring and promotion criteria that result in disparate impact, and by the use of these practices on the part of many different superiors in a single company.”⁵⁰ Going back to the terms of Rule 23, the Court said that to satisfy Rule 23(a)(2), the “common contention . . . must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.”⁵¹ Returning to Title VII law, the Court said that inquiry on this point necessarily overlapped with the merits of the case because under Title VII, “the crux of the inquiry is the reason for a particular employment decision.”⁵² To have a valid class action concerning the employment decisions, there had to be “some glue holding the alleged reasons for all those decisions together,” in order to “produce a common answer to the crucial question why was I disfavored.”⁵³

Title VII precedent indicated that biased testing procedures would be a common practice that would support a class action; “significant proof of a general policy of discrimination” would also suffice.⁵⁴ But because there was no allegation that a test had been used, and because the Court believed that proof of a discriminatory general policy was “entirely absent,” it said the class failed to comply with Rule 23(a)(2).⁵⁵ Affording the managers discretion to promote and set pay could be the basis of employment discrimination liability under a disparate impact theory, but unless the plaintiffs “identified a common mode of exercising discretion that pervades the entire company,” there would be no common answer to the question whether

⁵⁰ *Wal-Mart*, 131 S. Ct. at 2551 (citing Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e-1 to 2000e-17) .

⁵¹ *Id.*

⁵² *Id.* at 2552.

⁵³ *Id.*

⁵⁴ *Id.* at 2553.

⁵⁵ *Id.*

discrimination occurred.⁵⁶ The court found weaknesses in the plaintiffs' social framework evidence, and declared that the statistical evidence they advanced did not support an inference of company-wide discrimination.⁵⁷ Moreover, said the Court, the disparate impact claim failed to identify a specific employment practice,⁵⁸ a key component of the Supreme Court case saying that giving managers discretion could supply a basis for Title VII disparate impact liability.⁵⁹

The Court also found that the plaintiffs' backpay claims were not proper for certification under Rule 23(b)(2), the part of the rule providing for classes seeking injunctive or declaratory relief on a classwide basis.⁶⁰ It ruled that individualized monetary claims of the type brought by the plaintiffs belonged in subsection (b)(3), which affords greater procedural protections.⁶¹ The Court said that Wal-Mart was entitled to individual determinations of eligibility for backpay for each worker; a sampling and inference procedure advanced by the plaintiffs was, according to the Court, inadequate.⁶² The necessity of individual litigation on liability and relief meant that backpay was not merely incidental to a classwide injunction, and so could not be afforded in a Rule 23(b)(2) class proceeding.⁶³

⁵⁶ *Id.* at 2554-55.

⁵⁷ *Id.* at 2553-55. The social framework evidence supported the conclusion that there was a corporate culture susceptible to gender bias, but did not specify how many employment decisions were determined by stereotyped thinking. *Id.* at 2553. The plaintiffs' region-by-region analysis of statistical disparities between number of women promoted and the numbers in the available pool of hourly workers did not establish a uniform store-by-store disparity, which the Court thought was needed to meet the common question requirement. *Id.* at 2555.

⁵⁸ *Id.* at 2555.

⁵⁹ *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988).

⁶⁰ *Wal-Mart*, 131 S. Ct. at 2557.

⁶¹ *Id.* at 2558-59.

⁶² *Id.* at 2560-61. There are well-thought out arguments for the use of sampling and inference in at least some instances of aggregate litigation. *See, e.g.*, Robert G. Bone, *A Normative Evaluation of Actuarial Litigation*, 18 CONN. INS. L.J. 227 (2012); Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815 (1992).

⁶³ *Wal-Mart*, 131 S. Ct. at 2561. Justice Ginsburg, in an opinion by joined by Justices Breyer, Sotomayor, and Kagan, agreed that the class should not have been certified under subsection (b)(2), but said the case may have been proper under subsection (b)(3); that issue should have been remanded to the lower courts. *Id.* (Ginsburg, J., concurring in part and dissenting in part). She contended the Court erred by confounding (a)(2)'s requirements with those of (b)(3), and preferred a more literal reading of (b)(2), complete with dictionary references, and she relied on the principle that certification is not to be overturned absent abuse of discretion. *Id.* at 2652. She cited the evidence that women fill 70 percent of hourly jobs at Wal-Mart but constitute only 33 percent of managerial employees, and

III. *Wal-Mart* Greets IDEA

It did not take long for defendants in IDEA actions to realize that *Wal-Mart's* interpretation of Rule 23 might be a basis to challenge motions for class certification or to induce courts to decertify classes previously approved. The courts of appeals for the Seventh Circuit and the District of Columbia Circuit have issued two major decisions applying *Wal-Mart* to IDEA classes. These remain the two most prominent cases on the topic. Courts have also responded to *Wal-Mart* in other IDEA actions, as well as in additional actions that may be analogous to IDEA cases, such as disability discrimination and other civil rights litigation. Plaintiffs have suffered some setbacks in these various encounters, but it appears that openings for IDEA class litigation continue to exist.

A. *Jamie S.* and *DL*

The most prominent post-*Wal-Mart* IDEA class action rulings are *Jamie S. v. Milwaukee Public Schools*,⁶⁴ decided by the Seventh Circuit early in 2012, and *DL v. District of Columbia*,⁶⁵ decided by the District of Columbia Circuit in 2013.

1. *Jamie S.* *Jamie S.* overturned a class action settlement and decree in a case brought by plaintiffs who contended that the Milwaukee Public Schools (MPS) violated the child-find requirements of IDEA and that the Wisconsin Department of Public Instruction (DPI) failed in

that in every region, women are paid less than men, a gap that widens over the years even when men and women are hired into the same positions at the same time. *Id.* at 2263. The company promotes from within, vacancies are not posted, and managers have discretion to choose which employees to promote to in-store management. *Id.* There is a uniform, \$2 band for every position's hourly pay rate, with managers again having discretion where to locate each hourly employee within the band. *Id.* And managers transfer frequently among stores, have frequent meetings, and are monitored closely. *Id.* The minority also relied on anecdotal evidence and the district court's evaluation of the statistical evidence presented by an expert. It concluded, "The District Court's identification of a common question, whether Wal-Mart's pay and promotions policies gave rise to unlawful discrimination, was hardly infirm." *Id.* at 2564. The Court, Justice Ginsburg said, was really insisting that the common questions predominate, and applying the (b)(3) standard to the (b)(2) determination was error. *Id.* at 2565-66.

⁶⁴ 668 F.3d 481 (7th Cir. 2012).

⁶⁵ 713 F.3d 120 (D.C. Cir. 2013).

its responsibilities to ensure MPS followed the law.⁶⁶ The district court certified a class of “students eligible to receive special education from MPS ‘who are, have been or will be’ denied or delayed entry into or participation in the . . . process” of determining eligibility for special education services and creating individualized educational programs.⁶⁷ After a bench trial, the court found MPS and DPI liable for failing to identify, locate, and evaluate children with disabilities in the Milwaukee school district, in violation of IDEA’s child-find provision.⁶⁸ A settlement between the plaintiffs and DPI, but not MPS, followed.⁶⁹ The district court approved the settlement, which included requiring DPI to impose on MPS benchmarks for compliance with the law requiring timely identification and evaluation of children in MPS’s jurisdiction who might be eligible for services.⁷⁰ The court imposed a remedial plan on MPS, requiring a court-monitored system to ensure identification and evaluation of the children, and creation of programs for them.⁷¹ MPS appealed from the classwide remedial order.

In vacating the district court’s order, the Seventh Circuit panel identified a number of fatal problems with the class: definiteness, commonality, appropriateness of unitary injunctive relief, and imposition of settlement terms on a nonsettling party.⁷² With regard to definiteness, the court said that “there is no way to know or readily ascertain who is a member of the class.”⁷³ This criterion is not actually in Rule 23, nor is it in *Wal-Mart*. In fact, the 1966 Advisory Committee Notes say with regard to subdivision (b)(2), “Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually

⁶⁶ *Id.* at 485-86.

⁶⁷ *Id.* at 485.

⁶⁸ *Id.* at 488 (discussing district court’s findings regarding compliance with IDEA child-find provision, 20 U.S.C. § 1412(a)(3)).

⁶⁹ *Id.* at 488-89.

⁷⁰ *Id.*

⁷¹ *Id.* at 489.

⁷² *Id.* at 486.

⁷³ *Id.* at 495.

one whose members are incapable of specific enumeration.”⁷⁴ But the court did not go back to basic principles of class action law, and instead declared on its own authority that “a class of unidentified but potentially IDEA-eligible disabled students is inherently too indefinite to be certified.”⁷⁵

The court also said that the class failed “to satisfy Rule 23(a)(2)’s commonality prerequisite.”⁷⁶ Common question of law or fact was the key problem in *Wal-Mart*, and received the bulk of the *Jamie S.* court’s exposition. The court said the class in *Jamie S.*, which included children never identified as disabled as well as those identified as disabled but not properly taken through the process of determining appropriate services, lacked anything more than a generic common question whether IDEA had been violated, and said that question needed to be answered separately for each class member.⁷⁷ The court thought that child-find violations were necessarily child specific, and found no proof of a general policy.⁷⁸ The Seventh Circuit stressed *Wal-Mart*’s requirement that the plaintiff class members suffer the same injury and have a common contention capable of classwide resolution.⁷⁹ This aspect of *Jamie S.* is the part most closely tied to the *Wal-Mart* decision. Its persuasiveness depends on how broadly *Wal-Mart* should be applied outside the context of employment discrimination, a question explored later in this Article.⁸⁰

The *Jamie S.* court also said that final injunctive relief was not appropriate respecting the class as a whole, because individual determinations of eligibility for special education services,

⁷⁴ FED. R. CIV. P. 23 adv. cmte. note.

⁷⁵ *Jamie S.*, 668 F.3d at 496.

⁷⁶ *Id.* at 497.

⁷⁷ *Id.* at 498.

⁷⁸ *Id.*

⁷⁹ *Id.* at 497.

⁸⁰ See generally *infra* text accompanying notes ____ (discussing distinctions between special education law obligations and employment discrimination law prohibitions).

and hence relief, would be necessary.⁸¹ *Wal-Mart* made this point with regard to monetary relief, specifically the back pay claims of the class members: “We think it clear that individualized monetary claims belong in Rule 23(b)(3).”⁸² *Wal-Mart* actually did not rule that individualized relief could never be a component of an injunctive decree that applied to all persons in a class, even if the relief entailed payment of money.⁸³ With regard to individual relief, an IDEA class action like *Jamie S.*, even one in which the class members seek tuition reimbursement or compensatory education, is less like a Title VII case than like *Quern v. Jordan*,⁸⁴ in which the Supreme Court approved an order requiring the defendant in a Rule 23(b)(2) class case to send claims forms to the class members enabling them to use state administrative procedures to obtain wrongfully withheld welfare money.⁸⁵ The Seventh Circuit itself approved relief in a Rule 23(b)(2) class action that required a state educational agency to pay individual class members’ outstanding bills for educational expenses wrongfully left unpaid in violation of the statute that is now IDEA.⁸⁶ Unlike Title VII, IDEA confers neither a right to a jury trial,⁸⁷ nor to compensatory damages relief,⁸⁸ so the logistics of individual relief for group members would be immensely easier under IDEA than under Title VII. Moreover, in *Jamie S.* the court did not

⁸¹ *Id.* at 499.

⁸² *Wal-Mart*, 131 S. Ct. at 2558. The Court went so far as to reserve the question whether some forms of monetary relief other than individual back pay awards might be permitted under (b)(2). *See id.* at 2560. This action would imply that forms of individual relief that do not involve money at all, such as compensatory education or prospective orders with respect to specific students, might be cognizable without resort to (b)(3).

⁸³ *See id.* at 2560 (reserving decision on whether incidental monetary relief may be awarded under Rule 23(b)(2)).

⁸⁴ 440 U.S. 332 (1979).

⁸⁵ *Id.* at 346-49.

⁸⁶ *Parks v. Pavkovic*, 753 F.2d 1397, 1408 (7th Cir. 1985).

⁸⁷ *Compare Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1313 (11th Cir. 2003) (“No IDEA jury trial right exists.”) with 42 U.S.C. § 1981a(c) (2006) (requiring jury trial on demand in suits for compensatory or punitive damages under Title VII).

⁸⁸ *See Smith v. Robinson*, 468 U.S. 992, 1020 n.24 (1984) (reserving issue but noting consensus of lower courts that damages are available “only in exceptional circumstances”), *superseded by statute*, 20 U.S.C. § 1415(i)(3)(B), (I) (2006). Under Title VII, in addition to back pay and similar remedies, compensatory and punitive damages are available to prevailing claimants, subject to limits and conditions, in cases of intentional discrimination. *See* 42 U.S.C. § 1981a(b) (2006).

consider whether a class action seeking individual retrospective relief could be certified under Rule 23(b)(3), the alternative course of action held out in *Wal-Mart*.⁸⁹

Finally, *Jamie S.* said there cannot be a class settlement without a properly certified class, and the settlement prejudiced the legal rights of the nonsettling MPS by requiring more of it than the state DPI can require under state law.⁹⁰ There is a strange aspect to this part of the decision. If the federal statute requires the DPI to do what the settlement demanded it to do, then the state law would have to yield under the Supremacy Clause.⁹¹ But the court never asked whether the settlement embodied a mandatory duty under IDEA on the part of state educational agencies to ensure that all school districts in a state comply with child-find obligations.

It should be noted that the Seventh Circuit panel was extremely skeptical on the merits of the case.⁹² It criticized the district court's reliance on an extrapolation by an expert from a sample that was never proven to be a representative one, to conclude that children were not being identified and referred for evaluation.⁹³ And the court made negative comments about the trial judge's decision to excuse exhaustion on the ground that the case was a systemic challenge, though the Seventh Circuit rendered no final decision on that issue.⁹⁴

The court of appeals, however, was not entirely in agreement. An opinion by Judge Rovner, concurring in part and dissenting in part, accepted the majority's position that it was

⁸⁹ See *Wal-Mart*, 131 S. Ct. at 2558 (“[W]e think it clear that individualized monetary claims belong in Rule 23(b)(3).”).

⁹⁰ *Jamie S.*, 668 F.3d at 502.

⁹¹ U.S. CONST. art. VI.

⁹² For a comprehensive discussion of the interaction between the merits of a proposed class action and the class action determination in light of *Wal-Mart*, see George Rutherglen, *The Way Forward After Wal-Mart*, 88 NOTRE DAME L. REV. 871 (2012). For an evaluation the use of the merits in two class actions considered by the Supreme Court after *Wal-Mart*, see Mark Moller, *Common Problems for the Common Answers Test: Class Certification in Amgen and Comcast*, 2013 CATO SUP. CT. REV. 301. The Seventh Circuit did not in any obvious way pick up on whatever cues *Wal-Mart* may have provided on this topic.

⁹³ *Jamie S.*, 662 F.3d at 488.

⁹⁴ *Id.* at 494 & nn.2-3.

error to impose a class settlement with the state defendant upon the school district defendant.⁹⁵

But Judge Rovner rejected the rest of the decision, emphasizing that she was “not convinced that no class was feasible in this case”; she also disagreed that it is necessary to identify class members at any time before the remedial phase of the litigation.⁹⁶ “A class action based on truly systemic child-find failure may be viable”; indeed, a class action may constitute “the only realistic avenue of relief for those injured by systemic violations of their rights.”⁹⁷ Policies or “[w]idespread practices would support a claim” for violations of the child-find requirement.⁹⁸

Some have viewed *Jamie S.* as a reason to doubt that IDEA class actions have a future at all. One commentator declared, “[T]he Seventh Circuit opinion, combined with a June 2011 Supreme Court decision (*Wal-Mart Stores, Inc. v. Dukes*), means it is likely that *Jamie S.* already has played a significant role in ending a period in which class action challenges to special education systems in school districts around the United States were relatively frequent.”⁹⁹ But the other prominent court of appeals decision issued after *Wal-Mart*, *DL v. District of Columbia*,¹⁰⁰ has a much more sympathetic view of IDEA classes, and it is likely to be as influential as *Jamie S.*

2. *DL*. In *DL*, the District of Columbia Circuit vacated a class judgment in a case that like *Jamie S.* challenged a public school system’s failure to identify, locate, and evaluate children, and to develop individualized educational programs for them.¹⁰¹ The opinion of the court of appeals, however, suggested that a revised class or set of subclasses could satisfy the requirements of the federal rule as interpreted by *Wal-Mart*. The court said that the broad class

⁹⁵ *Id.* at 503 (Rovner, J., concurring in part and dissenting in part).

⁹⁶ *Id.*

⁹⁷ *Id.* at 504-05.

⁹⁸ *Id.* at 505.

⁹⁹ Alan J. Borsuk, *The Complex Legacy of Jamie S*, MARQUETTE LAW., Fall 2013, at 19, 19.

¹⁰⁰ 713 F.3d 120 (D.C. Cir. 2013).

¹⁰¹ *Id.* at 120.

certified by the district court, one that embraced plaintiffs suffering harms from different policies and practices at different phases of the child find and service delivery process, lacked a “single or unified policy or practice” bridging all the class members’ claims.¹⁰² The court compared the class to the one disapproved in *Jamie S.*, but in the same breath cited Judge Rovner’s partial dissent with approval and said, “We do not suggest that widespread policies and practices in violation of the IDEA could never satisfy Rule 23(a)(2)’s commonality requirement after *Wal-Mart*.”¹⁰³

The court went on to comment that the plaintiffs themselves had proposed to the district court that it create four subclasses: first, children not identified or located; second, children not provided timely initial evaluations; third, children not given timely determinations of eligibility for services; fourth, those not provided a smooth and effective transition from infant and toddler services to special education services.¹⁰⁴ The district court did not act on the proposal, but instead retained the broad class definition it had entered in 2006. The court of appeals pointed out that in a different disability rights case another court of appeals had declared that subclassing could resolve post-*Wal-Mart* Rule 23(a) problems,¹⁰⁵ and it remanded for the district court to consider a different class definition or set of subclass definitions, and then to redetermine liability and enter relief, if appropriate.¹⁰⁶ A concurrence by Judge Edwards echoed the point that “the District Court will be free to certify a class or subclass if it determines that a single policy or practice effectively forecloses disabled children in that class or subclass from pursuing IDEA

¹⁰² *Id.* at 127.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 128.

¹⁰⁵ *Id.* (citing *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832 (5th Cir. 2012), discussed *infra* text accompanying notes ____).

¹⁰⁶ *Id.* at 129.

benefits.”¹⁰⁷ Judge Edwards cautioned the district court not to be led astray by any contrary arguments from the defendant.¹⁰⁸

On remand, the district court took the hint from the court of appeals and certified four subclasses: (1) children with disabilities between ages three and five who are not identified and located; (2) children with disabilities in the same age bracket who are not timely evaluated; (3) children with disabilities, again three to five, who do not receive a timely eligibility determination and referral for services; (4) children with disabilities of the same ages who do not receive a smooth and effective transition from birth-through-two services to services from the public schools.¹⁰⁹ The court found each of the subclasses to meet the common question of law or fact criterion and the other standards of Rule 23. Discussing common question of law or fact—what the *Wal-Mart* Court termed commonality—the district court said the certification of:

Subclasses divided according to specific IDEA violations solves the broadness problem . . . Each proposed subclass poses the question whether the District’s policies were adequate to fulfill a specific statutory obligation under the IDEA. Stated differently, each subclass alleges a uniform practice of failure that harmed every subclass member the same way.¹¹⁰

The district court also took up the topic of definiteness, and disagreed with the *Jamie S.* court’s contention that “precise ascertainability” is required in a class under subdivision 2(b) of

¹⁰⁷ *Id.* at 131 (Edwards, J., concurring). The concurrence quoted extensively from Judge Rovner’s opinion in *Jamie S.*

¹⁰⁸ *Id.*

¹⁰⁹ *DL v. District of Columbia*, Civ. No. 05-1437 (RCL), 2013 U.S. Dist. LEXIS 160018, at *44-*46 (D.D.C. Nov. 8, 2013).

¹¹⁰ *Id.* at *26. Rather than reinstate its earlier findings on the merits, the court said it would undertake new proceedings to determine the current state of facts. *Id.* at *46-*48. The court rejected a motion to dismiss the case based on standing and mootness, holding that the class determination would relate back in time to the original class certification that was vacated by the court of appeals. *Id.* at *48-*55.

Rule 23.¹¹¹ It cited the advisory committee note and authorities from the First and Tenth Circuits.¹¹² The court further stated, however, that each of the subclasses was sufficiently objective in its definition that membership in the class could be determined if necessary.¹¹³

B. Other Post-Wal-Mart Decisions

Jamie S. and *DL*'s confrontation with *Wal-Mart* did not take place in a vacuum. Several less well known cases concerning special education of children with disabilities have considered class certification and decertification after *Wal-Mart*. Various disability discrimination cases and other civil rights actions not involving education have also responded to the decision and its gloss on Rule 23.

1. Special Education Cases. In several IDEA cases, courts have approved or maintained class action status after considering *Wal-Mart*. In *Corey H. v. Chicago Board of Education*,¹¹⁴ a panel of the Seventh Circuit that did not overlap with that of *Jamie S.* dismissed as moot the defendant Chicago Public School System's appeal of the district court's refusal to decertify the class and vacate a consent decree the defendant had agreed to in 1998 and 2010. The consent decree resolved plaintiffs' complaint that the school system assigned students with disabilities to schools and classrooms based solely on the students' disability classifications, in violation of IDEA's requirements of individualization and least restrictive environment.¹¹⁵ The consent decree expired by its own terms on September 1, 2012, and so the case was no longer a live controversy and the appeal had to be dismissed.¹¹⁶ But in rendering that decision the court stated,

¹¹¹ *Id.* at *42.

¹¹² *Id.* at *42-*43 (citing *Shook v. El Paso Cnty.*, 386 F.3d 963, 972 (10th Cir. 2004), and *Yaffe v. Powers*, 454 F.2d 1362, 1366 (1st Cir. 1972); noting disagreement by Fifth, Sixth, and Seventh Circuits).

¹¹³ *Id.* at *44.

¹¹⁴ No. 12-2834, 2013 WL 4535788 (7th Cir. Aug 28, 2013) (unpublished).

¹¹⁵ *Id.* at *1.

¹¹⁶ *Id.* at *2.

“Even if this case were not moot, we would not grant the relief CPS seeks.”¹¹⁷ The court stressed that no objection had previously been made about the class definition, and that no meaningful change in circumstances had occurred since certification,¹¹⁸ a conclusion apparently unaffected by *Wal-Mart*. The district court had made the point with respect to *Wal-Mart*’s impact:

[N]either [*Wal-Mart v. Dukes* nor *Jamie S.* “changed” the law on class certification. Class certification is still governed by Fed. R. Civ. P. 23, and the requirements of that rule have not changed substantively since [the original certification of] the instant class, and have not changed at all since November 2010 when [the Chicago Public Schools] agreed to the extension of the decree. Indeed, both *Dukes* and *Jamie S.* specifically reaffirm that class certification is governed by Rule 23, and each analyzed the proposed class under the well-established mandates of that rule. . . . The two cases represent nothing more than the application of Rule 23 to specific sets of facts or, perhaps, to a specific type of claim under two distinct federal laws—Title VII and the IDEA—both of which provide for individual equitable relief in addition to injunctive relief. Thus, while *Dukes* and *Jamie S.* may represent clarifications of law, they do not represent a change in law that requires modification of this consent decree.¹¹⁹

Other post-*Wal-Mart* IDEA cases have applied reasoning similar to that of the *Corey H.* district court in approving a class action brought by parents of students with autism who said the

¹¹⁷ *Id.* at *3 (“As the district court noted, over the past twenty-one years, during which the parties invested thousands of hours and spent tens of millions of dollars in an effort to reform the CPS special education system for the benefit of disabled children, no one—not the plaintiffs, ISBE, or CPS—has ever complained about the class certification definition. Why, at this late date, the CPS would try to obliterate two decades’ worth of effort is mystifying to us. The CPS just reaffirmed its commitment to the decree in 2010, and nothing has occurred since then to suggest that complying with the terms of the decree had changed in any meaningful way.”)

¹¹⁸ *Id.*

¹¹⁹ *Corey H. v. Board of Educ.*, No. 92 C 3409, 2012 WL 2953217, at *5 (N.D. Ill. July 19, 2012), *app. dismissed*, No. 12-2834, 2013 WL 4535788 (7th Cir. Aug. 28, 2013).

children were more likely to be transferred to new schools after completing a grade than other students were, and that transfers were made without notice or individual consideration;¹²⁰ a class action challenging delays in putting into place related services for children with disabilities at the start of each school year;¹²¹ and a class action in a school funding case concerning reallocation of resources from public schools to charter schools.¹²²

But the record is mixed, and it is too early to brand *Jamie S.* an outlier.¹²³ A district court denied class action status to two cases claiming that planned school closings in Chicago would have the likely effect of violating students' right under IDEA; the court concluded that the plaintiffs failed to show that the school closings worked a common harm on the members of the class, affecting them in a uniform way.¹²⁴ Class certification was also denied in a case alleging that a school system's failure to provide specified services for children with autism violated Section 504 of the Rehabilitation Act¹²⁵ and Title II¹²⁶ of the Americans with Disabilities Act (ADA).¹²⁷

2. Other Disability Discrimination Actions. Several classes have been certified post-*Wal-Mart* in actions under disability discrimination statutes; these decisions are closely analogous to IDEA cases and so might reinforce the conclusion that IDEA class actions remain viable. For example, a district court certified a class of persons with mental illnesses challenging

¹²⁰ *P.V. v. Sch. Dist. of Phila.*, 289 F.R.D. 227 (E.D. Pa. 2013).

¹²¹ *R.A.-G v. Buffalo City Sch. Dist. Bd. of Educ.*, No. 12–CV–960S, 2013 WL 3354424 at *1 (W.D.N.Y. July 3, 2013).

¹²² *Chester Upland Sch. Dist. v. Pennsylvania*, No. CIV A 12-132, 2012 WL 1473969 (E.D. Pa. Apr. 25, 2012).

¹²³ The record of class certifications is mixed as well in the other contexts discussed below, but the cases in courts granted certification are selected for discussion in the next subparts of this Article because of the light they shed on the probable strategies of advocates in cases brought under IDEA.

¹²⁴ *McDaniel v. Bd. of Educ. of City of Chi.*, No. 13 C 3624, 2013 WL 4047989 (N.D. Ill. Aug. 9, 2013); *Swan v. Bd. of Educ. of City of Chi.*, No. 13 C 3623, 2013 WL 4047734 (N.D. Ill. Aug. 9, 2013).

¹²⁵ 29 U.S.C. § 794 (2006).

¹²⁶ 42 U.S.C. §§ 12131-12165 (2006).

¹²⁷ *Z.F. v. Ripon Unified Sch. Dist.*, No. 2:10-CV-00523-GEB, 2013 WL 1178224 (E.D. Cal. Mar. 21, 2013). The request was for certification under Rule 23(b)(3) and the court said that the common questions did not predominate. *Id.* at *2-*5.

unnecessary institutionalization in state facilities in violation of ADA and Section 504.¹²⁸ A case of this type strongly resembles an IDEA case claiming violations of that statute's least restrictive environment mandate.¹²⁹ Another district court certified a class in a case challenging a practice of placing people with developmental or intellectual disabilities in sheltered workshops when they can be accommodated instead in supported employment settings.¹³⁰ The court acknowledged that the class members could have different needs and preferences regarding employment services, but it distinguished *Wal-Mart* on the ground that the intent of the defendant need not be shown in any of the class members' cases:

Unlike this case, *Wal-Mart* was a Title VII gender discrimination case in which the plaintiffs sought damages. . . . In contrast, the Rehabilitation Act claims alleged in this case do not require proof of the intent behind the alleged discrimination, but instead rely on a denial of benefits to disabled persons. Thus, the Title VII analysis in *Wal-Mart* is not closely on point. Moreover, plaintiffs in this case point to a common policy and practice of unnecessary segregation by DHS and its programs which is capable of classwide resolution.¹³¹

¹²⁸ Kenneth R. *ex rel.* Tri-County CAP, Inc./GS v. Hassan, No. 12–CV–53–SM, 2013 WL 5273800, (D.N.H. Sept. 17, 2013) The class was defined as: “All persons with serious mental illness who are unnecessarily institutionalized in New Hampshire Hospital or Glenclyff or are at serious risk of unnecessary institutionalization in these facilities. At risk of institutionalization means persons who, within a two year period: (1) had multiple hospitalizations; (2) used crisis or emergency room services for psychiatric reasons; (3) had criminal justice involvement as a result of their mental illness; or (4) were unable to access needed community services.” *Id.* at *8. Title II of the ADA and Section 504 prohibit disability discrimination by state and local government, and by recipients of federal financial assistance, respectively. See Mark C. Weber, *Disability Discrimination by State and Local Government: The Relationship Between Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act*, 36 WM. & MARY L. REV. 1089 (1995). A regulation promulgated to enforce Title II requires that governments “administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.” 28 C.F.R. § 130(d) (2013).

¹²⁹ 20 U.S.C. § 1412(a)(5) (2006).

¹³⁰ Lane v. Kitzhaber, 283 F.R.D. 587 (D. Or. 2012). The class definition was: “‘Individuals with intellectual or developmental disabilities who are in, or who have been referred to, sheltered workshops’ and ‘who are qualified for supported employment services.’” *Id.* at 602.

¹³¹ *Id.* at 595-96.

Similarly, no intent need be shown to sustain an IDEA violation, and, as discussed below, plaintiffs will frequently be able to identify policies and practices of defendants that violate the law.¹³² A case challenging segregated placements for adults in sheltered workshops is analogous to a case challenging placements for children in separate classes for emotional disturbance or other disabilities.

3. Other Civil Rights Cases. Cases brought under civil rights laws that do not encompass disability discrimination and cases brought under constitutional theories are somewhat further afield from IDEA actions, but to the degree that they exemplify courts taking narrow rather than broad readings of *Wal-Mart*, they are relevant to the future of IDEA class actions. They show that class actions are still possible in disparate impact Title VII cases, even though Title VII was the subject matter of *Wal-Mart*. That reality supports the proposition that class actions should be available in cases under different statutes and theories.¹³³

A case in point is *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,¹³⁴ in which yet another Seventh Circuit panel reversed the denial of class certification in a Title VII case. The district judge had refused class action status after reviewing *Wal-Mart*,¹³⁵ but the court of appeals reversed and said that plaintiffs could represent a class consisting of 700 African-American brokers in an action against the company over compensation decisions that were at the discretion of 135 supervisors, each controlling several branch offices.¹³⁶ The court distinguished *Wal-Mart* on the ground that the plaintiffs identified two discrete policies, one permitting brokers to form teams among themselves to share clients, the other reassigning clients of those who left

¹³² See *infra* text accompanying notes ____ (discussing identification of policies or practices).

¹³³ In fact, as to be developed below, certification should be easier in non-Title VII cases, so the fact that classes remain available in Title VII actions may establish, a fortiori, that they should be widely available in IDEA cases. See *infra* text accompanying notes ____ (discussing distinctions between Title VII and IDEA).

¹³⁴ 672 F.3d 482 (7th Cir.), *cert. denied*, 133 S. Ct. 338 (2012).

¹³⁵ District Judge Gettleman (the same judge whose decision not to decertify the class was appealed in *Corey H.*) noted that the plaintiffs nevertheless had a strong argument for certification, and encouraged an appeal. *Id.* at 488.

¹³⁶ *Id.*

the firm to other brokers on the basis of the brokers' records of revenue generated and other criteria.¹³⁷ Although supervisors had discretion to veto teams and to supplement the reassignment criteria, the court thought the policies could have a disparate impact if racial prejudice made it harder for African-American brokers to join teams or to generate enough revenue to have lucrative accounts of former employees reassigned to them.¹³⁸ The court stressed the judicial economy involved with adjudicating the legality of the policies in a class proceeding, even though "hundreds of separate trials may be necessary to determine which class members were actually adversely affected by one or both of the practices and if so what loss each class member sustained."¹³⁹ It concluded, "We have trouble seeing the downside of the limited class action treatment that we think would be appropriate in this case."¹⁴⁰

In another Title VII action, a court refused to decertify a Rule 23(b)(2) class of African-American and Latino teachers alleging that the school board required them to pass a test to receive or retain their teaching licenses and the test had an unjustified disparate impact.¹⁴¹ The court limited the class claims to those for non-individualized remedies, including a declaratory judgment as to liability and injunctive relief benefiting the class as a whole.¹⁴² In a case alleging violations of substantive due process and other constitutional rights of children in foster care long-term residential settings, asserting unsafe living conditions and severe risks of psychological and physical harm, a district court recertified a class after an earlier certification

¹³⁷ *Id.* at 489.

¹³⁸ *Id.* at 489-90.

¹³⁹ *Id.* at 491.

¹⁴⁰ *Id.* at 492. The court pointed out that certification on limited issues is permitted under FED. R. CIV. P. 23(c)(4). *Id.* at 491.

¹⁴¹ *Gulino v. Bd. of Educ.*, 907 F. Supp. 2d 492 (S.D.N.Y. 2012) The court noted that Wal-Mart left open the possibility of incidental monetary relief in a (b)(2) class, but said that incidental monetary relief would not cover claims that would require individual hearings to adjudicate. *Id.* at 505 n.4. The court reserved the issue of whether a Rule 23(b)(3) class could be established with regard to relief upon the finding that liability existed. *Id.* at 507.

¹⁴² *Id.* at 506-08.

had been vacated by the court of appeals.¹⁴³ The district court distinguished *Wal-Mart* on the basis of the conduct the plaintiffs identified as leading to the physical and psychological harms the class suffered: the practice of assigning caseworkers excessive caseloads and the lack of any practice of considering a child's special needs when making caseloads assignments.¹⁴⁴

IV. Potential Responses to *Wal-Mart* in IDEA Cases

On the record so far, it is hardly obvious that *Wal-Mart* will mean the end of IDEA class actions, or even create much of a barrier to class litigation in special education cases. As the post-*Wal-Mart* caselaw suggests, however, plaintiffs who wish to challenge what they perceive as systemic violations of the law will likely try to distinguish IDEA from Title VII cases similar to *Wal-Mart*, and they may have to alter the classes they ask to be certified and the relief they ask to be entered. Alternatively, they may change their entire approach to systemic litigation by using various non-class-action procedures for achieving legal relief for groups of parents and children.

A. Class Action Approaches

After *Wal-Mart*, it is likely that plaintiffs and their lawyers will rely on three possible approaches in pursuing IDEA class actions.¹⁴⁵ First, they might argue that *Wal-Mart* is largely irrelevant to cases under IDEA because so much of its reasoning depends on aspects of substantive employment discrimination law that differ from the law of special education. Under a second approach, they would take *Wal-Mart*'s applicability to IDEA as a given but distinguish

¹⁴³ *M.D. v. Perry*, No. 2:11-CV-84, 2013 WL 4537955 (S.D. Tex. 2013) (certifying class), *on remand from M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832 (5th Cir. 2012) (vacating prior class certification).

¹⁴⁴ *Id.* at *26-*34.

¹⁴⁵ One recent source questions whether class actions are likely to be an effective strategy in addressing the enforcement of IDEA for children who are in poverty, noting potential logistical and doctrinal obstacles. Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1456-58 (2011). The methods suggested here respond to at least some of the problems of legal doctrine, but it is not contended that class actions are the ideal solution to all deprivations of educational rights of children with disabilities.

Wal-Mart by identifying policies and practices precisely and framing classes around them. A third approach, probably combined with one of the other two, would be simply to make proposed classes smaller and more homogenous.¹⁴⁶

1. Distinctions Between Title VII and IDEA. *Wal-Mart*'s insistence that there be a uniform policy being challenged in a class case is linked to the specifics of Title VII disparate impact law.¹⁴⁷ Plaintiffs in IDEA cases might argue that the court in *Jamie S.* fell into the trap of thinking that the underlying Title VII law in *Wal-Mart* is the same as the underlying law in an IDEA case. They would have a point: the law is not the same; it is not even similar. As noted, much of the common-question part of *Wal-Mart* looks more like a the interpretation of substantive Title VII law than an interpretation of Rule 23 that would apply to other contexts.¹⁴⁸

The Supreme Court said in *Wal-Mart* that the need to specify a policy arose because of the

¹⁴⁶ This discussion places to one side the possibility of class action litigation in the state courts, for if defendants anticipate that the federal courts will be less favorably disposed to class litigation, they will probably remove the case to federal district court under 28 U.S.C. § 1441(a). On the general topic of state court class action litigation on the basis of non-federal claims, see Mark C. Weber, *Thanks for Not Suing: The Prospects for State Court Class Action Litigation over Tobacco Injuries*, 33 GA. L. REV. 979 (1999).

¹⁴⁷ See Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 WASH. U.L. REV. 1027, 1028 (2013) (“[T]he commonality holding in *Dukes* is at base a statement of Title VII policy.”); see also *id.* at 1029 (“A more careful focus on the relationship between Title VII policy and the operation of Rule 23 serves to clarify the *Dukes* decision and highlights possible grounds for critiquing and distinguishing the Court’s ruling.”).

¹⁴⁸ As the Court stated in *Wal-Mart*: “The class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s cause of action.” 131 S. Ct. at 2551-52 (2011) (internal quotation marks and citation omitted); see also Robin J. Effron, *The Shadow Rules of Joinder*, 100 GEO. L.J. 759, 801 (2012) (“An alternative reading of *Wal-Mart* . . . would be to simply conclude that the majority has used the procedural question in Rule 23(a)(2) to make both factual and legal conclusions about the merits of the *Wal-Mart* case.”); Ellen Meriwether, *The “Hazards” of Dukes: Antitrust Class Action Plaintiffs Need Not Fear the Supreme Court’s Decision*, ANTITRUST, Fall 2011, at 18 (“Certainly, given the size and shape of the *Dukes* class, the idiosyncratic nature of employment decisions, and the nuances of Title VII jurisprudence at issue there, *Dukes* can be convincingly distinguished.”) Noah D. Zatz, *Introduction: Working Group on the Future of Systemic Disparate Treatment Law*, 32 BERKELEY J. EMP. & LAB. L. 387, 387 (2011) (“Although *Wal-Mart* formally is a case about class certification, the procedural analysis takes shape in the shadow of the substantive theory of liability.”). Courts in cases other than those brought under IDEA and the disability discrimination statutes have relied on the differences between Title VII and the statutory claims in the cases. See Trask, *supra* note ____ [DePaul], at 799 & n.44 (collecting cases). On the other hand, *Wal-Mart*’s focus on individual employment decisions and relief may further complicate class action litigation in Americans with Disabilities Act cases concerning employment. See Brandon L. Garrett, *Aggregation and Constitutional Rights*, 88 NOTRE DAME L. REV. 593, 640 (2012) (discussing potential impact of *Wal-Mart* on ADA class action employment litigation); cf. Michael Ashley Stein & Michael E. Waterstone, *Disability, Disparate Impact, and Class Actions*, 56 DUKE L.J. 861, 883-84 (2006) (noting infrequency of ADA employment class actions).

disparate impact nature of the Title VII claim the plaintiffs advanced.¹⁴⁹ In *Jamie S.*, the plaintiffs were not alleging discrimination in the Title VII disparate impact sense, but rather the failure to follow a specific statutory duty to identify and serve a designated group of children. Neither the motivation of the defendants—the key issue in any Title VII disparate treatment case,¹⁵⁰ nor a practice with an unjustified negative impact on a protected group—the key issue in a Title VII disparate impact case,¹⁵¹ is relevant to the question whether a public school system failed to meet its child-find obligations. IDEA cases concerning placement, least restrictive environment, appropriate education, related services, and other issues, similarly do not depend on the defendant’s motivation. The question is simply whether the defendant met its statutory obligations.

The elements of an IDEA claim differ from those of a Title VII claim because the statutory obligations of IDEA are of a profoundly different character than those of Title VII. With an exception not relevant here,¹⁵² the obligation Title VII imposes is negative: the

¹⁴⁹ *Id.* at 2555 (“There is another, more fundamental, respect in which respondents’ statistical proof fails. Even if it established (as it does not) a pay or promotion pattern that differs from the nationwide figures or the regional figures in all of Wal-Mart’s 3,400 stores, that would still not demonstrate that commonality of issue exists. Some managers will claim that the availability of women, or qualified women, or interested women, in their stores’ area does not mirror the national or regional statistics. And almost all of them will claim to have been applying some sex-neutral, performance-based criteria—whose nature and effects will differ from store to store. In the landmark case of ours which held that giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory, the plurality opinion conditioned that holding on the corollary that merely proving that the discretionary system has produced a racial or sexual disparity is not enough. ‘[T]he plaintiff must begin by identifying the specific employment practice that is challenged.’ *Watson [v. Fort Worth Bank & Trust]*, 487 U.S., at 994; *accord*, *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656 (1989) (approving that statement), *superseded by statute on other grounds*, 42 U.S.C. § 2000e–2(k).”)

¹⁵⁰ *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973) (establishing method to prove motivation of employer in disparate treatment case under Title VII).

¹⁵¹ *See* 42 U.S.C. § 20003-2(k)(1)(A) (2006) An unlawful employment practice based on disparate impact is established under this subchapter only if-- (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or (ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.”).

¹⁵² Title VII imposes an affirmative obligation to provide reasonable accommodation of religion, but this duty is modest. *See Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 89 (1977) (Marshall, J., dissenting) (describing

employer must not discriminate. In *Wal-Mart*, the Court required the proponents of the class to show that the defendant acted to commit a violation of that negative duty, in a sufficiently uniform way for the effects on the class members to be common. The plaintiff had to identify a policy or practice in order to show that the actions were similar enough to meet the standards of Rule 23 as the Court understood it. By contrast, in an IDEA case the defendant has affirmative obligations, not merely negative ones.¹⁵³ It must identify, evaluate, create appropriate programs, make placements in integrated settings with adequate related services, review the programs, etc. These are all affirmative obligations, and simply not doing any one or more of them will in a similar way affect all children for whom the defendant fails to meet the obligation.

This point was, of course, the guiding insight of the court of appeals opinion in *DL*. In that case, the district court on remand placed the contrast with *Wal-Mart* in sharp relief:

Absent a uniform policy of discrimination, the [*Wal-Mart*] Court found it impossible to establish the same discriminatory bias among managers from over 3,000 stores throughout the country. By contrast, resolution of the present claims turns on objective, statutorily defined obligations that lack the amorphous quality of Title VII decisions . . . Where there is a statutory obligation to act, there is a significant difference between challenging the inadequacy or complete failure to

Court's interpretation of 42 U.S.C. § 2000e(j) as "nullifying" religious accommodation duty). The obligation to provide reasonable accommodation for disability under the Americans with Disabilities Act is much higher. *See* H.R. REP. NO. 101-485, pt. 2, at 68 ("The Committee wishes to make it clear that the principles enunciated by the Supreme Court in *TWA v. Hardison* . . . are not applicable to this legislation."); S. REP. NO. 101-116, at 36 (same).¹⁵³ Distinctions of this type are pervasive in Civil Rights Law, and frequently call for vastly different judicial outcomes depending on whether the legal obligation that exists is one to affirmatively do something or merely to refrain from doing something. *See* Mark C. Weber, *Home and Community-Based Services, Olmstead, and Positive Rights: A Preliminary Discussion*, 39 WAKE FOREST L. REV. 269, 289-90 (2004) (contrasting negative obligations under Constitution as currently interpreted with positive obligations under Americans with Disabilities Act).

enact policies and procedures and alleging an erroneous application of a policy to individuals.¹⁵⁴

All this is not to say that these distinctions between Title VII law and IDEA will necessarily be persuasive to all courts. Perhaps wishing more than predicting, scholars thought that the Supreme Court's first cases lowering summary judgment standards for defendants¹⁵⁵ and raising pleading standards for plaintiffs¹⁵⁶ would have limited reach in civil rights actions because the cases dealt with antitrust claims, and oddly conceived antitrust claims at that.¹⁵⁷ The Supreme Court promptly proved these views wrong by applying the changes in summary judgment¹⁵⁸ and pleading¹⁵⁹ practice to civil rights and other areas.¹⁶⁰

2. Framing IDEA Cases as Challenges to Policies. In IDEA cases involving systemic violations of the IDEA by a school district, plaintiffs will often be able to identify policies or practices the class was subject to, even if a court insists that the policies be narrowly framed. Specification of a policy should avoid the definiteness and identification-of-class-members problems that the *Jamie S.* court found present in that case.¹⁶¹ Naming a policy “pins down,” or at least creates the possibility of pinning down, the identities of the class members, for each class member is a child subject to the policy.¹⁶² *Alliance to End Repression v. Rochford*,¹⁶³ a Seventh

¹⁵⁴ *DL v. District of Columbia*, Civ. No. 05-1437 (RCL), 2013 U.S. Dist. LEXIS 160018, at *27 (Nov. 8, 2013).

¹⁵⁵ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

¹⁵⁶ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

¹⁵⁷ See, e.g., Jana E. Cuellar, Comment, *The Age Discrimination in Employment Act: Handling the Element of Intent in Summary Judgment Motions*, 38 EMORY L.J. 523, 548-49 (1989) (discussing summary judgment standard after *Matsushita*); Michael Dorf, *The End of Notice Pleading*, Dorf on Law (May 24, 2007, 7:35 AM), <http://www.dorfonlaw.org/2007/05/end-of-notice-pleading.html> (discussing pleading standard after *Twombly*).

¹⁵⁸ See, e.g., *Scott v. Harris*, 550 U.S. 372 (2007).

¹⁵⁹ See, e.g., *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

¹⁶⁰ One source has raised the same point regarding *Wal-Mart*. Sherry, *supra* note ___, at 34 (“There is a danger that future cases building on the *Wal-Mart* precedent will engage in the same kind of expansive interpretation as occurred between *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*.”) (footnotes omitted).

¹⁶¹ See Trask, *supra* note ___, at 800-01 (describing use of this approach in employment discrimination and other contexts and collecting cases).

¹⁶² *Jamie S.*, 668 F.3d at 497.

¹⁶³ 565 F.2d 975 (7th Cir. 1977).

Circuit case criticized by *Jamie S.*,¹⁶⁴ but ultimately distinguished rather than limited or overruled,¹⁶⁵ supports the idea that specification of a policy will provide enough definiteness to support class certification. *Rochford* pointed out, “In those cases in which class certification has been denied on account of indefiniteness, the primary defect in the class definition has been that membership in the class was contingent on the state of mind of the prospective class members,”¹⁶⁶ rather than contingent on the defendant’s conduct toward the class members. In contrast, all individuals subject to a policy or practice are affected by the conduct of the defendant.¹⁶⁷ As noted above, the state of mind of neither the defendant nor the class member is likely to be of relevance in an IDEA case.¹⁶⁸

Specification of a policy will also take a class past the common-question-of-law-or-fact problem of *Wal-Mart*. *Jamie S.*’s language is instructive:

There is no such thing as a “systemic” failure to find and refer individual disabled children for IEP evaluation—*except perhaps if there was “significant proof” that MPS operated under child-find policies that violated the IDEA*. As the Supreme Court noted in *Wal-Mart*, an illegal policy might provide the “glue” necessary to litigate otherwise highly individualized claims as a class. But again, as in *Wal-Mart*, proof of an illegal policy “is entirely absent here.”¹⁶⁹

It is likely that plaintiffs confronted with a challenge based on this aspect of *Jamie S.*’s interpretation of *Wal-Mart* will take the *Jamie S.* court’s “except perhaps” and run with it. *Corey*

¹⁶⁴ *Jamie S.*, 668 F.3d at 496 (“*Rochford*’s tolerance of a wildly indefinite class definition under Rule 23 is no longer the norm.”).

¹⁶⁵ *Id.* at 497.

¹⁶⁶ *Rochford*, 565 F.2d at 978.

¹⁶⁷ *Id.* (“In our case membership in the classes certified by the district court is based exclusively on the defendants’ conduct with no particular state of mind required. Thus, there is no definiteness problem, as read into Rule 23 by other courts, created by these classes.”).

¹⁶⁸ See *supra* text accompanying notes ____ (discussing irrelevance of motivation in IDEA cases).

¹⁶⁹ 668 F.3d 481, 498 (7th Cir. 2012) (emphasis added; citations and additional reference deleted).

H. demonstrates the strength of this approach. The district court in *Corey H.* said: “As the Seventh Circuit noted in *Jamie S.*, the Supreme Court’s decision in *Dukes* indicates that an illegal policy that applies to the entire class ‘provide[s] the “glue” necessary to litigate otherwise highly individualized claims as a class.’”¹⁷⁰

Courts in other IDEA cases have certified classes after *Wal-Mart* on the basis of policies and practices that were not closely specified, thus suggesting that the name-the-policy hurdle is not a high one. For example, a school district’s practice of being likely to involuntarily transfer children with autism upon completion of a grade sufficed;¹⁷¹ a practice of delaying the start of related services until after the beginning of the school year was enough;¹⁷² and special education funding allocation decisions were sufficient as well.¹⁷³ So too in non-IDEA cases. In *McReynolds*, the Title VII case involving the African-American brokers, the court found that the Rule 23(a)(2) common-question requirement was met when the plaintiffs challenged two company-wide policies (allowing brokers themselves, rather than their managers, to form and staff teams, and basing account redistribution on the past success of brokers competing for the transferred accounts) and viewed this as sufficient to distinguish the case from *Wal-Mart*, even though the company delegated broad discretion over decisions affecting compensation to supervisors in 600 branch offices.¹⁷⁴

If a policy is adequately identified, plaintiffs should have no difficulty satisfying the Rule 23(b)(2) requirement that injunctive relief be appropriate regarding the class as a whole, the second obstacle to class certification in *Wal-Mart*. Appropriate classwide relief would be

¹⁷⁰ *Corey H. v. Bd. of Educ.*, No. 92 C 3409, 2012 WL 2953217, at *7 (N.D. Ill. July 19, 2012) (citations omitted), *app. dismissed*, No. 12-2834, 2013 WL 4535788 (7th Cir. Aug. 28, 2013).

¹⁷¹ *P.V. v. Sch. Dist. of Phila.*, 289 F.R.D. 227 (E.D. Pa. 2013).

¹⁷² *R.A-G v. Buffalo City Sch. Dist. Bd. of Educ.*, No. 12–CV–960S, 2013 WL 3354424 at *1 (W.D.N.Y. July 3, 2013).

¹⁷³ *Chester Upland Sch. Dist. v. Pennsylvania*, No. CIV A 12-132, 2012 WL 1473969 (E.D. Pa. Apr. 25, 2012).

¹⁷⁴ *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith*, 672 F.3d 482, 488-91 (7th Cir.), *cert. denied*, 133 S. Ct. 338 (2012).

abolishing the policy plus ancillary steps the Supreme Court has already approved incident to abolishing policies, such as notice of the right to demand a hearing to obtain individualized relief.¹⁷⁵ The fact that individual determinations would be needed in addition to the classwide injunction did not stop the court in *McReynolds* from overturning the denial of certification under 23(b)(2):

Obviously a single proceeding, while it might result in an injunction, could not resolve class members' claims. Each class member would have to prove that his compensation had been adversely affected by the corporate policies, and by how much. So should the claim of disparate impact prevail in the class-wide proceeding, hundreds of separate trials may be necessary to determine which class members were actually adversely affected by one or both of the practices and if so what loss each class member sustained—and remember that the class has 700 members. But at least it wouldn't be necessary in each of those trials to determine whether the challenged practices were unlawful. Rule 23(c)(4) provides that “when appropriate, an action may be brought or maintained as a class action with respect to particular issues.” The practices challenged in this case present a pair of issues that can most efficiently be determined on a class-wide basis, consistent with the rule just quoted.¹⁷⁶

The dissent and concurrence in *Jamie S.* made the same point as *McReynolds* with regard to Rule 23(a)(2) common question of law or fact:

The problem here is that the plaintiffs' claims appear to be based on multiple, disparate failures to comply with the school district's statutory child-find

¹⁷⁵ *Quern v. Jordan*, 440 U.S. 332 (1979). See generally *supra* text accompanying notes ____ (discussing *Quern* and other authority).

¹⁷⁶ *McReynolds*, 672 F.3d at 490-91.

obligations rather than a truly systemic policy or practice which affects them all.¹⁷⁷

Judge Rovner also said “widespread practices might also support . . . a claim.”¹⁷⁸ She cited the example of a school district ignoring and failing to refer to evaluation students with a particular type of disability, for example, dyslexia, so all class members would suffer a common injury from failure to have appropriate systems in place to identify them. She also cited several prominent cases in which class members could not be identified until they come forward for relief, and declared, “[T]here will be times when the nature of the challenged conduct makes it difficult if not impossible to identify who is in the class and is entitled to relief absent some sort of opt-in procedure by putative class members coupled with an adjudicatory procedure to confirm that they in fact qualify as class members.”¹⁷⁹

One can easily imagine that plaintiffs in a case alleging violations of IDEA child-find will try to find an email or other directive telling teachers not to refer children for evaluation, or not to refer them after a certain point in the school year. Similarly, they may look for evidence of a quota system for referrals, or a system by which an administrator in no position to make informed, individualized determinations has to approve referrals. Or plaintiffs might seek evidence that teachers receive bad evaluations or are penalized in some other way if they make too many requests that children be evaluated for special education. Any of these things could amount to proof of a policy or practice that would support certification. In a case concerning failure to place in the least restrictive environment, plaintiffs might look for directives that children with a certain disability classification always be placed in a program of a specific type irrespective of individual needs and abilities. In a case challenging denial of a particular type of

¹⁷⁷ *Jamie S.*, 668 F.3d at 505 (Rovner, J. concurring).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 506.

appropriate but costly services, such as applied behavioral analysis, the plaintiffs might try to uncover evidence of written or unwritten orders not to find that children have needs that can be met by the services.

A prominent authority on class action litigation has noted that specifying a policy appears to be a successful means to avoid the effects of *Wal-Mart* in cases not involving employment discrimination:

When we look at cases outside the employment-discrimination field, we find many courts that have been able to distinguish *Wal-Mart* because the case before them involves a common policy that is applied uniformly to all class members and does not depend on discretionary decision makers. This has been true, for example, in wage-and-hour labor disputes under state and federal law, where courts have noted that uniform underlying policies are involved and that there are no discretionary decisions by supervisors at issue. Similar reasoning and distinctions have supported favorable Rule 23(a)(2) rulings in suits involving breach of form contracts, deceptive trade or advertising practices, insurance coverage, securities and antitrust class actions, and in prisoner civil-rights cases, Fair Housing Act litigation, and other constitutional litigation. And in yet other cases, courts have distinguished *Wal-Mart* on the ground that the statistical or other proof provided by the plaintiffs was sufficient to identify a common course of conduct.¹⁸⁰

IDEA litigation may well become another such category of cases.

¹⁸⁰ Mary Kay Kane, *The Supreme Court's Recent Class Action Jurisprudence: Gazing into a Crystal Ball*, 16 LEWIS & CLARK L. REV. 1015, 1042-44 (2012) (footnotes omitted).

3. Creating Smaller and Simpler classes. The *Wal-Mart* Court seemed bothered by the fact that the class was so large, and in *McReynolds*, the court mentions the potential that accuracy of case resolutions will be undermined if the magnitude of a class so raises the stakes that reasonable defendants have no option but settling.¹⁸¹ *Jamie S.* did not identify the size of the class as an independent problem with certification, but it did refer to the problems with proving the case on the merits when the district court's inference that children were not being identified and evaluated depended on extrapolation from a non-scientifically selected sample of 200 files for a school system with an annual enrollment of 95,000 to 97,000 students, 16,000 of whom were special-education eligible in any given year.¹⁸² Perhaps too much should not be made of the issue of size. *Corey H.* was huge in scale, and that did not faze the court of appeals. The Chicago school-closing litigation involved relatively small classes, and yet the court denied certification, though in those instances the injury was not particularly similar among class members.

Simplicity and homogeneity may be the real desiderata of the courts interpreting *Wal-Mart*. *DL*, for example, opened the door for an argument that the subclasses suggested by the plaintiffs could satisfy Rule 23(a)(2) as interpreted by *Wal-Mart*.¹⁸³ Each of those subclasses would of course be smaller than the mega-class created by the order the court vacated; more to the point, each would be homogeneous in that in each the children suffered from a specific, common violation of the law.¹⁸⁴

¹⁸¹ *McReynolds*, 672 F.3d at 491 (“If resisting a class action requires betting one's company on a single jury verdict, a defendant may be forced to settle; and this is an argument against definitively resolving an issue in a single case if enormous consequences ride on that resolution.”). This problem appears to be more realistic in cases involving business defendants and large-scale damages relief than in IDEA cases.

¹⁸² *Jamie S.*, 668 F.3d at 488.

¹⁸³ *DL*, 713 F.3d at 128.

¹⁸⁴ See *DL*, 2013 U.S. Dist. LEXIS 160018, at *16 (“Certification of subclasses is particularly suitable in a case such as this, where each subclass ‘consists of smaller groups of children, each of which has separate and discrete legal claims pursuant to particular federal and state constitution, statutory, and regulatory obligations of the defendants.’”) (quoting *Marisol A. v. Giuliani*, 126 F.3d 372, 379 (2d Cir. 1997)).

As a matter of fundamental class action law, having a large number of class members is a necessity,¹⁸⁵ and bigness does not by itself disqualify a class.¹⁸⁶ The Court has continued to cite and rely upon *Califano v. Yamasaki*,¹⁸⁷ a case that approved a nationwide class of more than a million Social Security Old Age and Disability Insurance recipients,¹⁸⁸ in *Wal-Mart* itself¹⁸⁹ and most recently in 2013's *Comcast Corp. v. Behrend*.¹⁹⁰ But the risk that the judicial pendulum has begun to swing in the other direction may counsel caution about overly large classes.¹⁹¹

B. Non-Class Action Systemic Litigation

If *Wal-Mart*'s ultimate impact is to render class actions in IDEA cases more inaccessible, there may be other options to try to achieve group or systemwide impact. These possibilities include individual actions for broad relief, group-based administrative proceedings, and perhaps, with the cooperation of a public entity, government-sponsored litigation.

1. Individual Actions for Broad Relief. In some instances, courts have entered broad injunctions or other widely effective remedies in cases brought by individual plaintiffs. Some

¹⁸⁵ FED. R. CIV. P. 23(a) ("One or more members of a class may sue or be sued as representative parties on behalf of all members only if (1) the class is so numerous that joinder of all members is impracticable.").

¹⁸⁶ See generally William J. Hubbard, *Optimal Class Size, Dukes, and the Funny Thing about Shady Grove*, 62 DEPAUL L. REV. 693 (2013) (discussing economies of scale and other issues concerning large classes and collecting authorities).

¹⁸⁷ 442 U.S. 682 (1979).

¹⁸⁸ See *Elliott v. Weinberger*, 371 F. Supp. 960, 967 (D. Haw. 1974), *aff'd in part & rev'd in part*, 564 F.2d 1219 (9th Cir. 1977), *aff'd in part & rev'd in part sub nom. Califano v. Yamasaki*, 442 U.S. 682 (1979).

¹⁸⁹ *Wal-Mart*, 131 S. Ct. at 2550.

¹⁹⁰ 133 S. Ct. 1426, 1432 (2013).

¹⁹¹ One author notes that in response to the *Wal-Mart* decision, workers at the chain have begun a campaign of single-state class actions. Trask, *supra* note __ [DePaul L. Rev.] at 797 (citing news source); see also Mollie A. Murphy, *Rule 23(b) After Wal-Mart: (Re) Considering A "Unitary" Standard*, 64 BAYLOR L. REV. 721, 764 (2012) ("In the near-term, the Court's decision is likely to provoke a number of reactions as judges and lawyers sort out its implications. For example, lawyers may seek (and judges may be more likely to approve) certification of smaller, more cohesive classes."); Resnik, *supra* note __, at 164 ("[T]he Court in *Wal-Mart* is right to worry about the scope and size of the Dukes class, which would have had to prove that an official policy of nondiscrimination coupled with corporate culture and managerial discretion at 3400 stores worked, systemwide, a discriminatory pattern or practice or had a disparate impact."); Tippet, *supra* note __, at 468 (noting that class actions with localized geographic scope are more likely to satisfy *Wal-Mart* in employment discrimination cases challenging subjective decision making). As Professor Selmi has noted, a reason the *Wal-Mart* plaintiffs preferred a huge, nationwide class may have been to facilitate the use of statistical inference. Michael Selmi, *Theorizing Systemic Disparate Treatment Law: After Wal-Mart v. Dukes*, 32 BERKELEY J. EMP. & LAB. L. 477, 494 (2011) ("[T]he desire to cast the case as a nationwide class action appeared to be driven by statistical principles rather than the company's decision-making.").

celebrated cases in this category include *Regents of the University of California v. Bakke*,¹⁹² involving affirmative action in higher education, and *Honig v. Doe*,¹⁹³ involving disciplinary process protections for students with disabilities. *Olmstead v. L.C.*, the case establishing a right to placement in the community rather than institutions for individuals with intellectual disabilities who desired and could benefit from less restrictive settings, was not a class action.¹⁹⁴

Under the Federal Rules of Civil Procedure, whenever an action is brought in whole or in part for the benefit of persons other than the person bringing it and the court enters relief in accordance with that objective, the nonparty has a right to enforce the final order.¹⁹⁵ Following this principle, a court permitted nonparties to enforce an order against welfare cuts,¹⁹⁶ and another permitted individuals who were not parties to a consent decree that allowed some undocumented immigrants to receive Supplemental Security Income benefits to seek to enforce the injunction.¹⁹⁷

There are drawbacks to relying on individual actions, including the risk that defendants will ignore stare decisis effects of decisions they do not like, as well as the more favorable treatment of class cases with regard to some aspects of mootness doctrine, but in a given instance

¹⁹² 438 U.S. 265, 270-71 (1978).

¹⁹³ 484 U.S. 305 (1988).

¹⁹⁴ *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999); *cf. McCabe v. Atchison, Topeka & Santa Fe Ry.*, 235 U.S. 151, 161-62 (1914) (stating in dicta that under doctrine of separate but equal, single African-American would be entitled to separate train car offering first-class amenities if proper demand were made).

¹⁹⁵ FED. R. CIV. P. 71 (“When an order grants relief for a nonparty or may be enforced against a nonparty, the procedure for enforcing the order is the same as for a party.”).

¹⁹⁶ *Cal. Dep’t of Social Servs. v. Leavitt*, 444 F. Supp. 2d 1088 (E.D. Cal. 2006), *aff’d in part & rev’d in part on other grounds*, 523 F.3d 1025 (9th Cir. 2008).

¹⁹⁷ *Berger v. Heckler*, 771 F.2d 1556 (2d Cir. 1985); *cf. Floyd v. Ortiz*, 300 F.3d 1223 (10th Cir. 2002) (reversing decision striking prisoner’s petition for enforcement of judgment in case regarding use of canteen funds, in which class certification was not granted but resolved by agreement that said it would benefit and be enforceable by all inmates).

an individual case may achieve broad benefits.¹⁹⁸ There is no reason this cannot be true in at least some IDEA litigation.

2. Group-Based Administrative Proceedings. As Professor Davis once pointed out, historically a major motivation for creating administrative agencies was the widespread belief that the courts are slow, expensive, and potentially biased against enforcing reform legislation.¹⁹⁹ Group litigation in administrative settings may be a superior approach to perhaps chancy class action litigation brought in the first instance to the courts. In addition to providing for due process hearing procedures, IDEA requires that state educational agencies receive written complaints alleging violations of the statute, investigate them, and issue a decision within 60 days of filing.²⁰⁰ Advocates have used the administrative process to address widespread failings of school systems.²⁰¹ The Southern Poverty Law Center recently filed an administrative complaint on behalf of all students with special needs in the New Orleans public schools, claiming failure on a systemic basis to provide equal access to educational services in the charter school-dominated system established after Hurricane Katrina.²⁰² The Office for Civil Rights of the United States Department of Education accepts, investigates, and adjudicates complaints alleging discrimination on the basis of disability in federally assisted educational activities such as those of public school districts; these complaints may be brought on an individual or systemic

¹⁹⁸ See Mark C. Weber, *Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions*, 21 U. MICH. J.L. REFORM 347, 360-61 n.45 (1988) (collecting cases and other authorities supporting use of individual actions for systemic relief). *But see id.* at 355-63 (discussing reasons that class action proceedings are generally superior to individual cases for challenging broad-scale illegality).

¹⁹⁹ KENNETH CULP DAVIS, ADMINISTRATIVE LAW TEXT 14 (3d ed. 1972).

²⁰⁰ See 34 C.F.R. §§ 300.151-.153 (2013).

²⁰¹ See generally WEBER, *supra* note __ [Treatise] § 12.4 (describing complaint resolution process and collecting examples of its use in individual and systemic cases).

²⁰² See Southern Poverty Law Center, *Children with Disabilities Face Discrimination in New Orleans Schools*, <http://www.splcenter.org/get-informed/news/splc-complaint-children-with-disabilities-face-discrimination-in-new-orleans-school> (July 28, 2010).

basis.²⁰³ Scholars writing about areas other than special education law have urged the wider use of class-style administrative proceedings to address systemic illegality.²⁰⁴ Of course, if the group administrative challenge proves unsuccessful, the claimants contemplating judicial review of the decision will be left with many of the same post-*Wal-Mart* problems of bringing an action in court as they would have if they brought the action there in the first place.

3. Government-Initiated Group Litigation. Some governmental entities have the capacity to bring proceedings for the benefit of groups of individuals with disabilities, including children in schools;²⁰⁵ when those entities act they are not necessarily subject to the limits that courts may place on class representatives in federal cases. A district court in California recently rendered a decision in an action brought by the California Department of Fair Employment and Housing against the Law School Admission Council alleging failure to provide disability-related accommodations to LSAT takers, in violation of California law and the ADA.²⁰⁶ The action sought damages and injunctive relief “both on behalf of seventeen named individuals and as a ‘group or class’ complaint on behalf of ‘all disabled individuals in the State of California who requested a reasonable accommodation for the Law School Admission Test (LSAT) from

²⁰³ See, e.g., Cobb Cnty. (Ga.) Sch. Dist., 61 Individuals with Disabilities Educ. L. Rep. 146 (U.S. Dep’t of Educ. Office for Civil Rights 2013) (resolution agreement requiring maintenance and repair of school’s elevator for use of students with disabilities). See generally 34 C.F.R. §§ 101.1-131 (2013) (establishing rules for hearings conducted on administrative complaints by Office for Civil Rights, applicable to disability and other prohibited discrimination); *Overview of the Agency*, OCR OFFICE FOR CIVIL RIGHTS, <http://www2.ed.gov/about/offices/list/ocr/index.html> (last visited Dec. 3, 2013) (describing activities of receiving complaints and initiating compliance reviews).

²⁰⁴ Michael D. Sant’Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 COLUM. L. REV. 1992 (2012).

²⁰⁵ The Supreme Court has ruled that a state governmental agency created under laws requiring establishment of a state protection and advocacy system has the ability to sue state officials in their official capacities to redress violations of laws protecting people with disabilities. *Va. Office for Protection & Advocacy v. Stewart*, 131 S. Ct. 1632 (2011). These systems may be a source of assistance in addressing systemic failures to provide educational services to children with disabilities, but resource constraints may limit their role. See Alyssa Kaplan, Note, *Harm Without Recourse: The Need for a Private Right of Action in Federal Restraint and Seclusion Legislation*, 32 CARDOZO L. REV. 581, 607-09 (2010) (describing resource limits of state protection and advocacy agencies).

²⁰⁶ *Dep’t of Fair Emp’t & Hous. v. Law Sch. Admission Council, Inc.*, No. C-12-1830 EMC, 2013 WL 1739434 (N.D. Cal. Apr. 22, 2013).

January 19, 2009 to the present.’’²⁰⁷ The court held that the agency did not need to make a motion for class certification under Rule 23.²⁰⁸ It pointed out that the Supreme Court had permitted the EEOC to bring an action under Title VII seeking broad injunctive relief and backpay for a company’s employees in several states without seeking class certification, and relied on the analogy to that and other similar cases.²⁰⁹

Conclusion

Class actions remain an option to address systemic violations of the special education law. They may be somewhat different in form and size after *Wal-Mart*, and they may be supplemented, though probably not supplanted, by other mechanisms to enforce the law when a school system or other entity commits a widespread violation of the educational rights of children with disabilities. The class action landscape has been altered, but the ground remains.

²⁰⁷ *Id.* at *1.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at *11-*12 (citing *General Tel. Co. v. EEOC*, 446 U.S. 318 (1980)). More vigorous action by the EEOC and similar entities has been urged as a response to the difficulties to private class action litigation created by *Wal-Mart*. Cindy A. Schipani & Terry Morehead Dworkin, *Class Action Litigation After Dukes: In Search of A Remedy for Gender Discrimination in Employment*, 46 U. MICH. J.L. REFORM 1249, 1265-73 (2013).