IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

K.L.W., by and through his next friend, Rosetta Williams, on his own behalf and on behalf of those similarly situated,	)	
Plaintiffs,	)	**CLASS ACTION**
vs.	)	
RICHARD JAMES, in his official capacity as Acting Administrator of Columbia Training School; DONALD TAYLOR, in his official capacity as Executive Director of the Mississippi Department of Human Services; and KATHY PITTMAN, in her official capacity as Director of the Division of Youth Services,	)	CV -- _________
Defendants.	)	

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR IMMEDIATE PRELIMINARY INJUNCTION

Under the Defendants' unconstitutional policy, staff members at Columbia Training School are free to abuse their young prisoners with no fear of accountability. Even after the federal government found pervasive constitutional violations at Columbia – including hog-tying, pole-shackling, prolonged isolation, and excessive use of physical force, restraints, and chemical spray – the Defendants continue their efforts to conceal their illegal and inhumane conduct by refusing to allow children to access the courts for the presentation of constitutional claims. The United States Constitution imposes affirmative obligations on states to ensure that prisoners have meaningful and effective access to the courts. Because "[c]hildren, by definition, are not assumed to have the

capacity to take care of themselves," *Schall v. Martin*, 467 U.S. 253, 265 (1984), the State must exercise special care to ensure that their rights are protected. In this case, the State has abandoned any pretense of care. Defendants have not only failed to assist the class members in accessing the courts but have actively stood in their way by barring their access to attorneys. Accordingly, Plaintiff K.L.W. seeks immediate injunctive relief to protect his right to access the courts. He sues on his own behalf and on behalf of all current and future residents of Columbia.

Statement of Facts

K.L.W. is a developmentally disabled fourteen-year-old in custody at Columbia Training School, *see* Ex. 1: Williams Decl. at ¶ 1, a juvenile prison that houses ten- to eighteen-year-old girls and ten- to fourteen-year-old boys. Ex. 2: Miss. Dep't of Youth Services, *Columbia Training School: Weekly Offense Report – By County* (Mar. 16, 2004); Ex. 3: Miss. Dep't of Human Services, *Statistics for Fiscal Year 2003: Dispositions by Age*, available at < http://www.mdhs.state.ms.us/dys_ch11.html> (visited April 10, 2004). At a hearing that lasted approximately five minutes, Plaintiff K.L.W. was adjudicated delinquent on February 12, 2004 – he was accused of stealing a cellular telephone that belonged to his school. He has been confined at Columbia since February 18, 2004, *see id.*, and will remain there until Defendant James, the Acting Superintendent, decides to release him.[1] "The average length of stay . . . is two to three months, but some youth may stay up to six months or longer." Ex. 4: U.S. Dep't of Justice, *CRIPA*

[1] Under Mississippi law, the duration of a child's commitment to training school is within the facility administrator's discretion. Miss. Stat. § 43-21-605(1)(g)(iii); *accord Morgan v. Sproat*, 432 F. Supp. 1130, 1154-55 (S.D. Miss. 1977).

Investigation of Oakley & Columbia Training Schools in Raymond & Columbia, Mississippi at 2 (June 19, 2003) [hereinafter "DOJ Letter"].

Due to K.L.W.'s disability, he attends special education classes at home; his reading level is several grades below average for a child of his age. The lawyer who was appointed to represent K.L.W. at his delinquency hearing never made any effort to determine whether special education services were available at Columbia. *See* Ex. 1: Williams Decl. at ¶ 2. In fact, "Columbia has no options available" for children like K.L.W. Ex. 4: DOJ Letter at 31; *see also id.* at 30 ("The problems [DOJ] encountered with the provision of special education services at both facilities [Columbia and Oakley Training School] were pervasive."). Although there was a time when Columbia offered "individual and family counseling," DOJ found that those services had been discontinued. *Id.* at 31; *see also id.* at 32 ("Columbia provides no transition services for students' re-entry into their home communities – another violation of federal law.").

K.L.W.'s mother, Rosetta Williams, visits her son at Columbia as often as the Defendants' policies permit. *See* Ex. 1: Williams Decl. at ¶ 3. During one of her March visits, Ms. Williams was alarmed to see dark bruises circling her son's neck and wrists. *Id.* Fearfully, K.L.W. told her that a security guard had choked him, handcuffed him so tightly that the restraints left marks that lasted for days, and threatened to increase his sentence if he told anyone. *Id.* at ¶¶ 3-4 & 7. Understandably, the incident and the threats terrified K.LW., who told his mother that "he was more scared than he had ever been in his life." *Id.* at ¶¶ 7 & 9. Ms. Williams was horrified and complained to a staff member. *Id.* at ¶ 8. The staff member – who identified herself as the "on-call counselor"

– advised Ms. Williams to have her son file a grievance. *Id.* Although Ms. Williams was concerned that her son's disability would make it difficult or impossible for him to file a grievance, she relayed the staff member's advice to him and encouraged him to follow it. *Id.* at ¶ 9. She also asked K.L.W. if he was interested in speaking with a lawyer; he said that he was. *Id.* at ¶ 10.

Attorneys at the Mississippi Center for Justice ("MCJ") and the Southern Poverty Law Center ("SPLC") had previously told Ms. Williams that they were willing to meet with K.L.W. on a pro bono basis, but warned her that the Defendants' attorney visitation policy had so far prohibited them from visiting with any children at Columbia. Under the Defendants' policy, a child with a constitutional claim may not even speak with a lawyer unless the child can somehow persuade the lawyer – presumably in writing or through an intermediary – to file an appearance in his youth court proceedings, a pleading that could obligate the attorney to assume full responsibility for the child's delinquency case. *See* Ex. 5: Ltr. from D. Lipow et al. to R. James of 2/25/04. After filing an appearance, the attorney must then seek and obtain the youth court's permission before she can meet with her client. *Id.* MCJ and SPLC attorneys have attempted to comply with this policy in the past, to no avail. *See* Ex. 6: Miller Decl. at ¶¶ 3-7. In practice, the Defendants' insistence on a youth court order erects an impenetrable barrier between children and the courts.[2]

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[2] That barrier is even sturdier for children who wish to consult with out-of-state attorneys. Mississippi law imposes significant disincentives on *pro hac vice* appearances by out-of-state attorneys. First, an out-of-state attorney may not appear in more than five unrelated cases in Mississippi courts within a twelve-month period. Miss. R. App. P. 46(b)(8)(ii). Second, a $200 fee is assessed for each appearance. Miss. R. App. P. 46(b)(5); *cf. id.* (providing that court may waive the fee for indigent clients upon a showing of good cause). Third, Mississippi courts must

After seeing the bruises on her son's body and hearing the fear in his voice, Ms. Williams reiterated her desire for MCJ/SPLC's help in protecting K.L.W. from further abuse and retaliation. MCJ/SPLC attorneys agreed to meet with K.L.W. as soon as possible and advised Ms. Williams to contact Columbia and request a legal visit. Ms. Williams called the Acting Administrator of Columbia, Defendant James, and asked if a visit could be arranged. When he heard what Ms. Williams wanted, he told her to get a court order and abruptly hung up the telephone. *See* Ex. 1: Williams Decl. at ¶ 11. After weeks of worry, Ms. Williams was finally allowed to return to Columbia. During that visit, she asked K.L.W. if he had filed a grievance. He has not – though not for lack of trying. K.L.W. reported that he had asked his counselor for a grievance form. Despite her promises to give him a form, she has never done so. *See id.* at ¶ 12.

Recent investigations by the United States Department of Justice ("DOJ") and the Mississippi legislature have shown that K.L.W. is not the only child at risk of imminent harm at Columbia.[3] More than one hundred other children share his plight – some as young as eleven years old.[4] Particularly on point is DOJ's finding that staff members use "excessive force [against youth] with impunity." Ex. 4: DOJ Letter at 10. Indeed, an administrator told DOJ that "youth were not allowed to defend themselves against staff who assaulted them." *Id.* Neither training school has effective internal

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wait at least 21 days before ruling on a motion for *pro hac vice* admission. Miss. R. App. P. 46(b)(6); *see also* Miss. R. App. P. 46(b)(5)(xi) (requiring court order for out-of-state attorney to withdraw from any state court action in which attorney has sought *pro hac vice* admission).

[3] *See* Ex. 4: DOJ Letter; Ex. 7: Mississippi Joint Legislative Committee on Performance Evaluation & Expenditure Review ("PEER"), *Health & Safety Issues at the Oakley & Columbia Training Schools* (May 14, 2002) [hereinafter "PEER Report"].

[4] *See* Ex. 2: Columbia Weekly Offense Report ; *see also* Ex. 3: DHS Statistics (training school commitments in 2003 included ten-year-olds).

reporting mechanisms or grievance procedures. *Id.* at 12. Children and staff stated that they rarely reported incidents of abuse because they feared retaliation from other staff members. *Id.* at 10; 12-13. "Staff repeatedly stated that they are unable to protect youth from harm." *Id.* at 14. This culture of violence and fear was perpetuated by abusive disciplinary practices such as hog-tying, pole-shackling, and mace. *Id.* at 6 & 11.

Sadly, K.L.W.'s disability is no more unique than the constant threat of violence that hangs over his head. A recent study commissioned by the Mississippi Department of Public Safety and the Mississippi Department of Mental Health indicates that most of the children at Columbia suffer from mental disorders or disabilities that inhibit their ability to communicate effectively. *See* Ex. 8: Angela Robertson & Jonelle Husain, Miss. State Univ., *Prevalence of Mental Illness & Substance Abuse Disorders Among Incarcerated Juveniles* at 2 & 27 (July 2001) [hereinafter "Mental Illness"] (finding that 66% to 85% of incarcerated juveniles in Mississippi suffer from at least one diagnosable mental disorder, compared to only 14% to 20% of youth in the general population); *see also id.* at 27 (finding that at least 54% of incarcerated juveniles in Mississippi have multiple psychiatric disorders); Ex. 4: DOJ Letter at 15 ("Oakley and Columbia house a large population of juveniles who suffer from mental disorders, substance abuse, and suicidal thoughts."). The prevalence of mental and emotional disabilities among children confined to the training schools renders the mental health-related findings by DOJ and PEER even more tragic.

DOJ found that suicidal youth at Columbia – particularly girls – were sometimes stripped naked and confined in "The Dark Room," a locked, windowless room with no

toilet or ventilation, for periods of up to three consecutive days. Ex. 4: DOJ Letter at 7-8. Columbia staff acknowledged the use of the Dark Room, and prolonged periods of confinement were documented in facility logbooks. *Id.* Columbia staff also used chemical spray to punish children, including children in emotional crisis. "Incident reports make clear that suicidal youth are sprayed for their suicidal gestures and behaviors . . . . [Records showed] that a suicidal girl was sprayed because she refused to remove her clothes before being placed in the "dark room." *Id.* at 11. Overall, DOJ found that "youth with mental health concerns receive haphazard and cursory treatment," and that the State does "not provide adequate services for this vulnerable population." *Id.* at 15-16. Among PEER's recommendations to the legislature was a suggestion that Columbia change its suicide policy to require that staff respond to suicidal children by "counseling [them] rather than using punitive or disciplinary measures." Ex. 7: PEER Report at 27.

Discussion

In order to prevail on a motion for preliminary injunctive relief, an applicant must demonstrate:

> (1) a substantial likelihood of success on the merits; (2) a substantial threat that the movant will suffer irreparable injury if the injunction is denied; (3) that the threatened injury outweighs any damage that the injunction might cause the defendant; and (4) that the injunction will not disserve the public interest.

Reliant Energy Serv., Inc. v. Enron Canada Corp., 349 F.3d 816, 826 n.7 (5th Cir. 2003) (internal quotations and citation omitted). All four requirements must be met. *See Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi*

Negara, 335 F.3d 357, 363 (5th Cir. 2003). There is no question that the Plaintiffs in this case have carried their burden of persuasion on all counts.

I. There Is a Substantial Likelihood of Success on the Merits

To determine the likelihood of success on the merits, courts look to the standards provided in the relevant substantive law. *See Valley v. Rapides Parish School Bd.*, 118 F.3d 1047, 1051 (5th Cir. 1997). Here, those standards are found in the leading Supreme Court cases governing the rights of incarcerated persons to access the courts. *See generally Lewis v. Casey*, 518 U.S. 343 (1996); *Bounds v. Smith*, 430 U.S. 817 (1977).

A. Incarcerated Persons Are Constitutionally Entitled to Meaningful and Effective Access to the Courts

"It is now established beyond doubt that prisoners have a constitutional right of access to the courts." *Bounds*, 430 U.S. at 821; *accord Lewis*, 518 U.S. at 350. To survive a constitutional challenge, the State must "insure that inmate access to the courts is adequate, effective, and meaningful." *Bounds*, 430 U.S. at 822. This right is not limited to incarcerated adults – it applies with equal force to children. *See In Re Gault*, 387 U.S. 1, 13 (1967) ([N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone."); *see also, e.g., John L. v. Adams*, 969 F.2d 228, 230 (6th Cir. 1992) (holding that juveniles have constitutional right to access courts); *Germany v. Vance*, 868 F.2d 9, 16 (1st Cir. 1989) (same); *Alexander S. by and through Bowers v. Boyd*, 876 F. Supp. 773, 790 (D.S.C. 1995) (same); *Morgan v. Sproat*, 432 F. Supp. 1130, 1158 (S.D. Miss. 1977) (same).

The right to access the courts arises from two constitutional provisions – the First Amendment's right to petition the government for redress of grievances and the Fourteenth Amendment's due process clause. *Jackson v. Procunier*, 789 F.2d 307, 310 (5th Cir. 1986). Although the right was originally recognized in the context of direct appeals and habeas petitions, the Supreme Court has "extended [the] universe of relevant claims . . . to 'civil rights actions' – i.e., actions under 42 U.S.C. § 1983 to vindicate 'basic constitutional rights.'" *Lewis*, 518 U.S. at 354 (quoting *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974)). This extension reflects the Court's understanding that "civil rights actions are of fundamental importance . . . in our constitutional scheme because they directly protect our most valued rights." *Bounds*, 430 U.S. at 827 (internal quotations and citations omitted).

Meaningful access to the courts is "one of, perhaps **the**, fundamental constitutional right." *Cruz v. Hauck*, 475 F.2d 475, 476 (5th Cir. 1973) (emphasis in original). "In an organized society it is the right conservative [sic] of all other rights, [lying] at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship . . . granted and protected by the federal constitution." *Jackson*, 789 F.2d at 311 (quoting *Chambers v. Baltimore & O.R. Co.*, 207 U.S. 142, 148 (1907) (ellipsis in original)). In light of the core importance of the right, it is not surprising that the Supreme Court has "consistently required States to shoulder affirmative obligations to assure all prisoners meaningful access to the courts." *Bounds*, 430 U.S. at 824.

To fulfill its constitutional mandate, the State must do more than stand aside – it must provide the "tools" that inmates need "to challenge the conditions of their confinement." *Lewis*, 518 U.S. at 355; *see, e.g. Bounds*, 430 U.S. at 826 & 828 (holding that State must provide "adequate law libraries or adequate assistance from persons with legal training"); *Johnson v. Avery*, 393 U.S. 483, 490 (1969) (holding that State cannot prohibit consultations with "jailhouse lawyers" in the absence of a "reasonable alternative to assist inmates"). The Court has emphasized that the constitution "guarantees no particular methodology but rather the conferral of a capability – the capability of bringing contemplated challenges to sentences or conditions of confinement before the courts." *Lewis*, 518 U.S. at 356.

Although the State may confer that "capability" on adults in a variety of ways, thereby fulfilling its constitutional obligations, *see Lewis*, 518 U.S. at 356, "special concerns . . . are present when young persons, often with limited experience and education and with immature judgment, are involved." *Fare v. Michael C.*, 442 U.S. 707, 725 (1979); *cf. Bellotti v. Baird*, 443 U.S. 622, 635 (1979) ("[A]lthough children generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for children's vulnerability . . . ."). In order to insure that incarcerated children have adequate, effective, and meaningful access to courts, "the State must provide the juveniles with access to an attorney." *John L.*, 969 F.2d at 230. Because the Defendants' current policy effectively prohibits children from meeting with lawyers – thereby denying them any hope of meaningful access to the courts – it cannot withstand constitutional scrutiny.

B. Access to Counsel is the Only Means of Ensuring that Incarcerated Children Have Meaningful and Effective to Access to the Courts.

Here, the State has done nothing to facilitate the class members' access to courts. To the contrary, the Defendants have actively impeded that access by creating a system whereby young children – most of whom are mentally or emotionally disabled and many of whom cannot even read – must somehow locate an attorney and persuade her to represent them. Children are expected to accomplish this task either in writing or through an intermediary. If those efforts fail, children with valid claims are expected to research, draft, and file their own pleadings in order to present pro se challenges to their commitments or the conditions of their confinement. To prepare such pleadings, children at Columbia are expected to divine the contours of the substantive law, identify and satisfy any preconditions (e.g., exhaustion), and anticipate and prepare to meet the State's counter-arguments. *Cf. Bounds*, 430 U.S. at 825-26 ("If a lawyer must perform such preliminary research, it is vital for a pro se prisoner."). These expectations are simply not realistic. Even "[t]he most informal and well-intentioned of judicial proceedings are technical; few adults without legal training can influence or even understand them; certainly a child cannot." *Gault*, 387 U.S. at 38 n.65 (internal quotations and citation omitted).

The "touchstone" of the analysis in any access to courts claim is whether the proposed mechanism – here, access to counsel -- is necessary to guarantee that the plaintiff has meaningful access to courts. That inquiry requires a realistic assessment of "the experience and intelligence of the inmate[s]." *John L. v. Adams*, 750 F. Supp. 288,

295 (M.D. Tenn. 1990) (citation and footnote omitted), *aff'd in pertinent part by John L.*, 969 F.2d 228; *cf., e.g.*, *Johnson*, 393 U.S. at 487 ("Jails and penitentiaries include among their inmates a high percentage of persons who are totally or functionally illiterate, whose educational attainments are slight, and whose intelligence is limited."). In this case, the Court must consider the fact that the class includes children as young as ten years old. *See* Ex. 3: DHS Statistics. The prevalence of mental disabilities among class members is also critically important. *See* Ex. 8: Mental Illness at 27; Ex. 4: DOJ Letter at 15.

In the context of adults, the Supreme Court has approved several means of protecting access to courts as sufficient, including:

- a prison law library with adequate materials to enable an inmate to conduct the legal research required to state a "nonfrivolous claim meeting all procedural requirements" and "rebut the State's [counter] argument," *Bounds*, 430 U.S. at 826 & 828;

- assistance from "jailhouse lawyers" or "writ writers" – i.e., "old hands or exceptionally gifted prisoners" who are capable of providing limited guidance to other, less experienced or less educated inmates, *see Johnson*, 393 U.S. at 487-88; and

- direct access to lawyers or other persons trained in the law, *see Bounds*, 430 U.S. at 828 & 831-32.

But "[c]hildren, by definition, are not assumed to have the capacity to take care of themselves." *Schall*, 467 U.S. at 265. Accordingly, neither a law library nor a system of writ writers – who would also be children -- would suffice for incarcerated youth. *Cf. id.* ("[T]he Constitution does not mandate elimination of all differences in the treatment of juveniles."). Given the relative immaturity of children – particularly young, mentally disabled children – the only means of ensuring that the class members have "adequate,

effective, and meaningful" access to courts is to permit them to consult with attorneys. *Bounds*, 430 U.S. at 822; *see John L.*, 969 F.2d at 230; *Alexander S.*, 876 F. Supp. at 790.

The Supreme Court has repeatedly recognized that children are particularly helpless in legal matters:

> Age 15 is a tender and difficult age for a boy . . . . He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces. . . [A child] needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, may not crush him.

Gault, 387 U.S. at 45-46 (internal quotations and citation omitted); *see also Michael C.*, 442 U.S. at 725 ("[S]pecial concerns . . . are present when young persons, often with limited experience and education and with immature judgment, are involved."); *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) (noting that even the most sophisticated child needs adult guidance in legal matters); *Haley v. Ohio*, 332 U.S. 596, 599 (1948) (characterizing child as "easy victim of the law" and admonishing courts to exercise "special care" to ensure that children's constitutional rights are protected).

Due to their age, lack of sophistication, and limited educations, numerous federal courts have concluded that "merely providing [children] with access to a law library . . . would fail to assure meaningful access." *John L.*, 969 F.2d 228; *accord Alexander S.*, 876 F. Supp. at 790 ("As a practical matter, juveniles between the ages of twelve and nineteen, who, on average, are three years behind their expected grade level, would not benefit in any significant respect from a law library, and the provision of such would be a foolish expenditure of funds."); *John L.*, 750 F. Supp. at 295 (noting that because

"juveniles are not likely to benefit from a law library[,] . . . courts recognize that an adequate law library does not provide meaningful access to the courts for inmates unable to comprehend legal materials") (citation and footnote omitted), *aff'd in pertinent part by John L.*, 969 F.2d 228; *Morgan*, 432 F. Supp. at 1158 ("[W]ithout assistance [fifteen- to twenty-year-old youth] could not make effective use of legal materials.").

For the same reasons, children's constitutional rights to access the courts cannot be entrusted to other youth – "no matter how sophisticated." *Gallegos*, 370 U.S. at 54; *cf. Johnson*, 393 U.S. at 490 (holding that assistance provided by adult "jailhouse lawyers" is too valuable to prohibit in the absence of a reasonable alternative). In contrast to the "old hands" who served as writ writers in *Johnson*, the Supreme Court has held that

> a 14-year-old boy, no matter how sophisticated, . . . is unable to know how to protest his own interests or how to get the benefits of his constitutional rights. . . . He cannot be compared with an adult in full possession of his senses . . . . Without some adult protection . . . , a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had.

Gallegos, 370 U.S. at 54. In this case, the class members' "ages, their lack of experience with the criminal justice system, and their relatively short confinement means that there cannot be a system of writ writers for students who need them." *Morgan*, 432 F. Supp. at 1158.

Plaintiffs have clearly demonstrated a substantial likelihood of success on the merits of their access to counsel claim. Given the patent inadequacy of law libraries or writ writers, the only constitutional means of protecting a child's right to meaningful

access to courts is to permit him to consult with an attorney. *John L.*, 969 F.2d at 230; *Alexander S.*, 876 F. Supp. at 790. In the words of the Supreme Court, a "juvenile needs the assistance of counsel to cope with problems of law [and] to make skilled inquiry into the facts . . . . The child requires the guiding hand of counsel at every step in the proceedings against him." *Gault*, 387 U.S. at 36 (internal quotations, citations, and footnotes omitted).

C. Plaintiffs' Constitutional Rights to Access the Courts Include the Right to be Free From Harassment or Other Retaliation.

Meaningful access to the courts is impossible for prisoners who fear retaliation. The Fifth Circuit has explicitly held that "prison officials may not retaliate against or harass an inmate because of the inmate's exercise of his right of access to the courts," nor may officials harass or "retaliat[e] against inmates who complain [outside the context of a lawsuit] of prison conditions or official misconduct." *Gibbs v. King*, 779 F.2d 1040, 1046 (5th Cir. 1986) (internal quotations and citations omitted). In this case, Plaintiff K.LW. faces a serious threat of retaliation for his participation in this lawsuit. As set forth in Ms. Williams' declaration, her son's attacker has already advised him that he would be punished for reporting the abuse. See Ex. 1: Williams Decl. at ¶ 7. That threat alone is sufficient to interfere with K.L.W.'s "fundamental constitutional right of access to the courts." *Bounds*, 430 U.S. at 828.

Again, K.L.W.'s circumstances are not unique – DOJ's investigation revealed a culture of fear and intimidation that included both children and staff. *See supra* at 5-6.

To ensure protection of the Plaintiffs' rights to access the courts, the Defendants (including their officials, employees, and other agents) must be enjoined from harassing, intimidating, or otherwise retaliating against children – including K.L.W. -- who try to exercise their constitutional right to access the courts.

II. Preliminary Relief is Essential to Prevent Irreparable Harm

This Court must act immediately to prevent continuing irreparable harm to the members of the class. The irreparable harm at issue is three-fold: (1) Defendants are interfering with Plaintiffs' access to courts by denying them access to counsel; (2) Defendants are retaliating and threatening to retaliate against Plaintiffs for attempting to exercise their rights to access the courts; and (3) Defendants' conduct has the result – whether intended or not – of undermining the Plaintiffs' substantive constitutional claims.

First, because the right to access the courts is grounded in large part in the First Amendment right "to petition the Government for a redress of grievances," U.S. Const. AMEND. I, even a temporary deprivation of the class members' rights to meaningfully access the courts constitutes irreparable harm. It is well-settled that the "[l]oss of First Amendment freedoms, even for minimal periods of time, constitute[s] irreparable injury." *Ingebretsen on behalf of Ingebretsen v. Jackson Public Schl. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996) (citing *Elrod v. Burns,* 427 U.S. 347, 373 (1976)). Second, the constant threat of retaliation that haunts children at Columbia has a chilling effect on their willingness to report abuse. Because that chilling effect not only interferes with the Plaintiffs' access to courts but also implicates other First Amendment freedoms, the threat of retaliation in itself constitutes an additional irreparable injury. *See Gibbs*, 779 F.2d at 1046; *see also*

Deerfield Medical Center v. City of Deerfield Beach, 661 F.2d 328, 338 (5th Cir. 1981) (holding that violation of constitutional rights alone constitutes irreparable harm).

Third, preliminary injunctive relief is necessary to prevent irreparable harm of a more tangible nature: the destruction of evidence. The facts underlying the substantive claims for which K.L.W. seeks access to the courts provide a classic illustration of the oft-quoted maxim that "[j]ustice delayed is justice denied." *Coghlan v. Starkey*, 852 F.2d 806, 815 (5th Cir. 1988) (quoting *Stelly v. C.I.R.*, 761 F.2d 1113, 1116 (5th Cir. 1985)); *accord Matter of AWECO, Inc.*, 725 F.2d 293, 299 (5th Cir. 1984). When a child is abused in state custody – particularly in a system with such woefully inadequate investigation procedures (*see* Ex. 4: DOJ Letter at 12-14) – anything short of immediate access to counsel undermines the child's ability "to petition the Government for redress" of his injuries: bruises fade, as do the memories of potential witnesses; conditions of confinement claims become moot upon release; and deadlines pass unmet.

III. Preliminary Relief Would Not Disserve the Public Interest.

Because the defendants in this case are "public servants charged with the enforcement of the law" – including the federal constitution and the statutes of Mississippi – it is appropriate to "consider together the balancing of the equities required by test three and the question of whether the injunction would disserve the public interest, which is test four." *Spiegel v. City of Houston*, 636 F.2d 997, 1002 (5th Cir. 1981); *accord Thomas v. Johnston*, 557 F. Supp. 879, 918 (W.D. Tex. 1983). There is no question that both tests are met in this case. The relief requested by the Plaintiffs – access to attorneys who are willing to meet with them, notice of their right to consult

with an attorney about their commitments and the conditions of their confinement, contact information for available attorneys, and protection against retaliation -- would impose little or no burden on the Defendants. In contrast, that relief would be an enormously important first step in remedying grave constitutional -- and physical – injuries to the members of the class. *Cf. Gault*, 387 U.S. at 38 n.64 ("[C]ounsel can play an important role in the process of rehabilitation.").

IV. The Requirement That a Bond Be Posted Should Be Waived

The Plaintiffs respectfully request that the Court exercise its discretion to waive the bond requirement customarily associated with the issuance of preliminary injunctive relief. *See* Fed. R. Civ. P. 65(c). Several courts have declined to require plaintiffs to post bond in connection with temporary restraining orders and preliminary injunctions. *See Moltan Co. v. Eagle-Picher Indus., Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995) (approving waiver of bond given strength of case and "the strong public interest involved"); *Bookfriends, Inc. v. Talt*, 223 F. Supp. 2d 932, 953 (S.D. Ohio 2002) (declining to require bond based on finding that defendants would suffer no monetary damage in the event they were wrongfully enjoined); *Sluiter v. Blue Cross & Blue Shield*, 979 F. Supp. 1131, 1145 (E.D. Mich. 1997) ("Due to the strong likelihood of Plaintiffs' success on the merits and their demonstrated financial inability, the Court finds it would be improper to require any security in this matter."). In this case, several factors counsel in favor of waiver, including the strength of the claims, the Plaintiffs' indigency, the strong public interest involved, and the fact that a preliminary injunction would not require the defendants to incur any financial burdens.

Conclusion

For the foregoing reasons, Defendants must be ordered to revise their policies to facilitate – rather than impede – the Plaintiffs' access to counsel. *See Bounds*, 430 U.S. at 824 (requiring "States to shoulder affirmative obligations to assure all prisoners meaningful access to the courts"). Plaintiffs are not only entitled to meet with the attorney of their choice, they are also entitled to be advised of their right to access the courts to be heard on matters relating to their sentences and the conditions of their confinement. *See id.* Further, the members of the class are entitled have the names and contact information of available attorneys provided to them. *Cf. Johnson*, 393 U.S. at 488-89 (holding that warden's ad hoc policy of "sometimes allow[ing] prisoners to examine the listing of attorneys in the . . . telephone directory so they could select one to write to in an effort to interest him in taking the case" was "obviously far short of the showing required" to demonstrate that adult prisoners had meaningful access to courts). Finally, Plaintiffs are entitled to an order protecting them from harassment, intimidation, and other retaliation by the Defendants and their officials, agents, and employees. *See Gibbs*, 779 F.2d at 1046.

Accordingly, Plaintiffs request that their motion for an immediate preliminary injunction be granted and that the bond requirement be waived.

Respectfully submitted,

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pro hac vice motions pending

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served by hand delivery on:

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This ___ day of April, 2004.

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David B. Miller