IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

P.B., by and through his next friend, Cassandra Berry, et al., Plaintiffs, vs. PAUL PASTOREK, et al., Defendants.	Civil Case No. 2:10-cv-04049 Section A Judge Jay C. Zainey Magistrate Judge Karen Wells Roby Evidentiary Hearing Requested

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTIONS FOR A PRELIMINARY INJUNCTION AND EXPEDITED DISCOVERY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

Plaintiffs and proposed class members respectfully submit this memorandum of law in support of their motions for a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure and for expedited discovery in support of plaintiffs' motion for preliminary relief.

PRELIMINARY STATEMENT

The Defendants' pervasive violations of three federal statutes – the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA"), 20 U.S.C. § 1400 *et seq*., Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794, and Title II of the Americans with Disabilities Act ("Title II"), 42 U.S.C. § 12101, *et seq*. – have denied New Orleans students with disabilities access to a public education and subjected them to irreparable harm. As a result of the State's abdication of its responsibility to ensure that the multiple, independent entities charged with administering public education in the city of New Orleans comply with federal law, students are denied admission to public schools, prevented from accessing special education services, and removed from school as a consequence for behaviors related to their disabilities. As a result, some students with disabilities are denied access to educational services for months at a time. Others languish in schools that ignore their disabilities and refuse to accommodate their special needs as required by federal law. With this motion, Plaintiffs now ask this Court to begin to address and remedy the most glaring and urgent violations that are systematically causing irreparable harm to children with disabilities in New Orleans.

In an evidentiary hearing, Plaintiffs will demonstrate that the Louisiana Superintendent of Education Paul Pastorek, Louisiana Department of Education ("LDE"), and Louisiana Board of

Elementary and Secondary Education ("BESE") (collectively, the "Defendants") are failing to meet their statutory obligations, causing Plaintiffs immediate and irreparable harm.

After Hurricane Katrina, and at the Defendants' directive, New Orleans' public school system was eliminated and replaced with a decentralized system in which 51 separate school districts (local educational agencies or "LEAs") are responsible for providing public education in the city of New Orleans. But as part of their creation of a decentralized system, the Defendants left out a mechanism to provide the necessary oversight to ensure compliance with federal laws protecting students with disabilities. As a result, students with disabilities in New Orleans are falling through the cracks. Indeed, the Defendants' agents have recognized the possibility of this result. As noted in 2008 by outgoing Recovery School District Superintendent Paul Vallas, New Orleans schools must "adhere to special education mandates. If they don't, we're going to be facing one big class-action lawsuit. . . . They know, and we know, that the clock is ticking." Sarah Carr, *Charter Schools Struggle to Meet Special Education Needs*, New Orleans Times-Picayune, Jan. 5, 2008, attached as Ex. A to the Declaration of William Cavanaugh in Support of Plaintiffs' Motion for Preliminary Injunction ("Cavanaugh Declr."). The Defendants are responsible for ensuring that each of the 51 independent local educational agencies in New Orleans complies with federal law and for ensuring that children with disabilities are (i) given equal access to the educational programs offered to non-disabled students, (ii) identified and evaluated, and (iii) afforded certain procedural safeguards before being subjected to discipline or expulsion. Defendants have ignored these fundamental obligations to the detriment of New Orleans children with disabilities.

The Defendants' failure to ensure that New Orleans public schools comply with federal law has devastating effects on students with disabilities. Students with disabilities experience

significant difficulty trying to enroll in school because LEAs, ignorant of their responsibilities, are often unwilling to enroll them and accommodate their disabilities. Many are not routinely identified as eligible for special education and do not receive requisite services and protections. And there is no centralized office to ensure that each student has a seat in at least one school. Further, the failure of Defendants to train LEAs on the requirements of the IDEA has resulted in illegal disciplinary removals and punitive disciplinary tactics that lead to frequent disruptions in school attendance. As a result, Plaintiffs are denied the academic, emotional, and social benefits of a public education.

Some immediate remedial steps, such as requiring LDE to (i) evaluate students for special education eligibility, by identifying students through a systematic review of records, (ii) ensure that school administrators, special education directors, and teaching personnel attend training seminars designed to educate them about the services required under state and federal special education laws, (iii) mount a public information campaign designed to ensure that parents of children with disabilities understand that children cannot be denied admission to New Orleans schools on the basis of their disabilities, and (iv) review all LEA student codes of conduct and disciplinary policies to ensure that they do not violate the procedural safeguards afforded to students with disabilities by state and federal special education law, can begin to address these violations.

Remedying these violations comports with the public interest. When children with disabilities are denied access to schools and special education services, their academic, social, and emotional development can grind to a halt. These developmental delays can be irrevocable, leaving students struggling for a lifetime to catch up to their peers.

Plaintiffs further seek an Order directing the parties to begin expedited discovery in connection with Plaintiffs' motion for preliminary relief, leading up to an evidentiary hearing at which time Plaintiffs will present relevant testimony and documents supporting such relief.

FACTUAL BACKGROUND

I. The Decentralization of New Orleans Schools is Causing Irreparable Harm to Students with Disabilities

In a traditional school system, an LEA exercises control over all of the schools located in the municipality; however, in New Orleans, public education is entirely decentralized. Fifty-one LEAs operate the City's 88 schools.[1] *See* Robert Garda, *The Politics of Education Reform: Lessons from New Orleans*, 40 J.L. & Educ. 57, 76-81 (2011), attached as Cavanaugh Declr. Ex. B. As a result, no one local administrative entity directly oversees and administers all of the schools in New Orleans, making it unlike any other school district in Louisiana and the United States. *See* Mark C. Weber, *Special Education from the (Damp) Ground Up: Children with Disabilities in a Charter School-Dependent Educational System*, 11 Loy. J. Pub. Int. Law 217, 217-18 (2010), attached as Cavanaugh Decl. Ex. C.

Because of this decentralization, LEAs operate without oversight and accountability. This reality has a profoundly negative impact on the administration of special education services. Students must travel from school to school in order to apply and gain admission to a public school. *See* Garda, *supra*, at 73-74; Boston Consulting Group, *The State of Public Education in New Orleans* 3 (June 2007), attached as Cavanaugh Declr. Ex. D (noting that "without sufficient

[1] The Orleans Parish School Board ("OPSB"), an LEA, operates four traditional schools and twelve charter schools. Garda, *supra*, at 77. The Recovery School District ("RSD"), a division of LDE that is overseen by BESE, directly operates twenty-three traditional public schools, and has authorized the chartering of forty-six schools. *Id.* Each of these charter schools operates as an independent LEA. Lastly, three additional charter schools, authorized by BESE, act as their own LEAs. *Id.* at 79.

support structures, individual schools are not in a position to overcome the systemwide challenges that affect all of them . . .").

Unlike some districts where students are assigned to schools based on geography, no New Orleans student has a right to attend any particular school. There is no central office tasked with ensuring that all New Orleans public school students have a seat in a classroom. This is devastating for students with disabilities for whom gaining admission to school is akin to the game of musical chairs. Because students are not guaranteed admission to any school, as a practical matter, students must apply to multiple schools in an attempt to ensure admittance to at least one school. As a result of the Defendants' failure to provide proper monitoring, training and oversight, New Orleans LEAs improperly deny admission to students with disabilities with impunity. Thus, students with disabilities are often left without a seat in *any* school.

II. Children with Disabilities Are Being Refused Admission to Public Schools

The Defendants have failed to ensure that children with disabilities are not being illegally denied admission to public schools on the basis of their disabilities. Through discovery of the Defendants and the testimony of Plaintiffs and proposed class members, Plaintiffs will show that many of New Orleans LEAs lack the facilities, programs, and resources to accommodate disabled children. The end result is that children with disabilities are often patently denied admission. For example, Plaintiff T.J., who suffers from dyslexia and ADHD, and Plaintiff N.F., who is autistic and has a complete visual impairment, have been denied admission to several public schools because the schools were unable and unwilling to provide the accommodations necessary to enroll these students. *See* Complaint ¶¶ 57-58. Plaintiff M.M., who suffers from acute cognitive delays, severe seizure disorder, and is wheelchair-bound, experienced significant difficulty identifying a school that was physically accessible. *Id.* ¶ 59. In a system where responsibility lies with the parents to find schools in which to enroll their children, parents of

children with disabilities sometimes must apply to over twenty schools before they secure enrollment at a school both willing and able to accommodate their children's disabilities. *Id.* ¶¶ 56, 117-18.

III. Children with Disabilities Are Not Being Identified and Evaluated

The Defendants have failed to promulgate and enforce an effective policy and program to ensure that students with disabilities in New Orleans are identified, located, and evaluated (known as the "Child Find" policy). *See* 20 U.S.C. § 1412(a)(3). As a result, children with disabilities who are in need of special education and related services go months or years without being provided the instructional and behavioral supports and accommodations they need to receive an appropriate education. *See* Complaint ¶¶ 67-71.

The Defendants' existing statewide Child Find policy simply cannot be implemented in New Orleans. The present policy presumes the existence of a centralized agency with jurisdiction and responsibility for *all* students residing in a single geographic area. Specifically, Louisiana regulations require each LEA to ensure that "[a]ll students with exceptionalities residing in the district, including students with exceptionalities who are homeless children or who are wards of the state, and students with exceptionalities attending private schools . . . and who are in need of special education and related services, are identified, located, and evaluated." *See* Bulletin 1508 – Pupil Appraisal Handbook, La. Admin. Code, tit. 28, pt. CL, § 103 (2009) ("Bulletin 1508"), attached as Cavanaugh Declr. Ex. E. This policy assumes that students reside in a discernable geographic school district, but, as explained above, this structure does not exist in New Orleans. Instead, children with disabilities in New Orleans cannot be identified, located, and evaluated by one of the 51 LEAs until *after* they are actually admitted and enrolled in a public school. *See* Complaint ¶¶ 65-66. The consequences are clear: children with disabling

conditions often float from school to school while no single entity assumes responsibility to ensure that these children are identified and evaluated in order to receive special education instruction and services. *Id*. ¶¶ 65-71.

Similarly, the Defendants' statewide Child Find policy also assumes that each LEA has sufficient training to recognize when a student should be referred for an evaluation, and that each LEA employs certified pupil appraisal personnel such as certain diagnosticians, psychologists, social workers, and speech or language pathologists to carry out the identification and evaluation procedures. *See* Bulletin 1508, § 107(A)(2). But the Defendants have failed to ensure that New Orleans' LEAs – which are small and often consist of a single charter school – have the resources and expertise to perform these pupil appraisal responsibilities as required. *See* Educational Support Systems, Inc., *The Special Education Project: A Study of 23 Charter Schools in the Recovery School District*, 32 (2008), attached as Cavanaugh Declr. Ex. F.

The harm caused by the Defendants' failures to ensure that children with disabilities in New Orleans are identified and evaluated is imminent and results in lasting consequences for these children. For example, Plaintiff D.T., who presented medical diagnoses of emotional and behavioral disabilities, was never evaluated for special education services. He has missed valuable instructional time in the classroom, has been denied critical emotional and behavioral support services, and has been illegally disciplined and restrained as a result of this failure. *See* Complaint ¶¶ 67, 137-43. Plaintiff P.B., who has been medically diagnosed with ADHD and bipolar disorder, is repeating the seventh grade for the third time, yet he still has not been evaluated for special education eligibility. *Id.* ¶ 68. The Defendants have taken no actions to correct this widespread failure to identify and evaluate students for suspected disabilities resulting in dire consequences for these children. *Id.* ¶¶ 60-71.

IV. Children with Disabilities Are Subject to Unlawful Disciplinary Procedures

In addition to their failure to ensure equal access for students with disabilities and the identification of students with disabilities, the Defendants have also failed to ensure that children with disabilities in New Orleans are afforded the procedural safeguards mandated by the IDEA. For example, the IDEA provides that schools must address behavioral problems that are the manifestation of disabilities by creating behavioral intervention plans rather than resorting to disciplinary actions. *See* 20 U.S.C. §§ 1414(d)(3)(B)(i), 1415(k)(1)(F)(ii). In addition, the IDEA provides that students with disabilities may not be removed from school for longer than ten days in one academic year unless a school performs a manifestation determination review to determine if the student's behavior is related to his or her disability. *See* 20 U.S.C. § 1415(k)(1). But the Defendants have failed to ensure that the LEAs in New Orleans comply with these mandates when disciplining students with disabilities. In fact, some of the LEAs have written policies that *prima facie* fail to comply with the requirements of the IDEA. *See* Complaint ¶¶ 100-102. And in many New Orleans LEAs, students with disabilities are disciplined at extraordinarily high rates when compared to their non-disabled peers. *See* Louisiana Department of Education, *Special Education Performance Profile* (2008-09), attached as Cavanaugh Declr. Ex. G. As a result, many New Orleans students with disabilities are unlawfully excluded from the classroom – sometimes for weeks or even months at a time. *See* Complaint at ¶¶ 103-08.

ARGUMENT

I. Plaintiffs Should be Granted Preliminary Relief

Preliminary injunctive relief is appropriate where the movant demonstrates: (i) a substantial likelihood of prevailing on the merits, (ii) a substantial threat of irreparable injury if the injunction is not granted, (iii) that the threatened injury outweighs the threatened harm to the nonmoving party, and (iv) that the injunction will not disserve the public interest. *Lake Charles*

Diesel, Inc. v. Gen. Motors Corp., 328 F.3d 192, 195-96 (5th Cir. 2003) (citation omitted). Although "the purpose of a preliminary injunction is to preserve the status quo," the Court of Appeals for the Fifth Circuit has explained that "[i]f the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury, either by returning to the last uncontested status quo between the parties, by the issuance of a mandatory injunction, or by allowing the parties to take proposed action that the court finds will minimize the irreparable injury." *Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974). "The focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo." *Id.*

As discussed below, there are compelling reasons to alter the status quo, which is causing ongoing, irreparable injury to Plaintiffs and members of the proposed class.

A. Federal Law Prohibits Discrimination Based on Disability, Requires Defendants to Locate and Identify Children with Disabilities, and Guarantees Procedural Safeguards Before a Child is Subjected to Discipline

The Defendants are ultimately responsible for ensuring that all children with disabilities in New Orleans receive the full protections and services guaranteed by federal law. *See Corey H. v. Bd. of Educ. of Chic.*, 995 F. Supp. 900, 904 (N.D. Ill. 1998) ("[C]ongress placed the ultimate responsibility of [IDEA] compliance with the state educational agency"); *St. Tammany Parish Sch. Bd. v. Louisiana*, 142 F.3d 776, 784 (5th Cir. 1998) ("IDEA places primary responsibility on the state educational agency").

1. Section 504 and Title II Prohibit Discrimination Based on Disability

Section 504 and Title II[2] prohibit public entities from discriminating against individuals with disabilities and prohibit public schools from excluding students with disabilities from participating in or receiving the benefits of a school's programs, activities, and benefits. *See* 29 U.S.C. § 794(a); 42 U.S.C. § 12132. Each student with a disability must be provided access to all programs provided to non-disabled students. *See* 29 U.S.C. § 794(a); 42 U.S.C. § 12132. Further, reasonable accommodations and modifications must be provided to ensure meaningful access to educational benefits or as necessary to avoid discrimination on the basis of disability. *See* 34 C.F.R. § 104.33; 28 C.F.R. § 34.130(b)(7).

The statutes' anti-discrimination mandates apply to any "qualified individual[]" with a disability, which is defined as "a handicapped person (i) of an age during which non-handicapped persons are provided [public preschool, elementary, secondary, or adult educational services], (ii) of any age during which it is mandatory under state law to provide such services to handicapped persons, or (iii) to whom a state is required to provide a free appropriate public education under [the IDEA]." 34 C.F.R. § 104.3(l)(2). Section 504 and Title II define "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities." 29 U.S.C. § 705; 42 U.S.C. § 12102(2).

[2] Section 504 and Title II prohibit entities from discriminating against individuals on the basis of their disabilities, and use nearly identical language. *See* Section 504 at 29 U.S.C. § 794(a) and Title II at 42 U.S.C. § 12132. The only meaningful difference between the two statutes is that the Rehabilitation Act applies only to federally-funded recipients. Hence, when applying both laws in the context of state actors receiving federal funding for the provision of elementary and secondary education, the Court of Appeals for the Fifth Circuit has concluded that the rights and remedies under both statutes are the same, and that both statutes may be used interchangeably. *See Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 287-88 (5th Cir. 2005).

2. The IDEA Requires Effective "Child Find" Policies and Practices

Congress passed the IDEA in response its "perception that . . . handicapped children in the United States were either totally excluded from schools or [were] sitting idly in regular class rooms awaiting the time when they were old enough to drop out." *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 180 (1982) (quotation marks omitted). The IDEA "confers upon disabled students an enforceable substantive right to public education . . . and conditions federal financial assistance upon a State's compliance with the substantive and procedural goals of the Act." *Honig v. Doe*, 484 U.S. 305, 310 (1988). The statute establishes a system of procedural and substantive requirements to which the state educational agencies, i.e., LDE and BESE, must adhere.

Because the Defendants are the gatekeepers to special education services, the IDEA requires them, among other things, to have "in effect policies and procedures to ensure" that each child with disability is located and identified. 20 U.S.C. § 1412(a)(3)(A); *see Schaeffer v. Weast*, 546 U.S. 49, 53 (2005) (noting that "[s]tate educational authorities must identify and evaluate disabled children."). LDE and BESE are ultimately responsible for ensuring that each LEA is monitored for implementation and compliance with the IDEA's mandate that children with disabilities be identified and evaluated. *See* 20 U.S.C. § 1412(a)(11)(A).

3. The IDEA Guarantees Procedural Safeguards Before Students with Disabilities Are Subjected to Discipline

The IDEA mandates that students with disabilities receive accommodations for behaviors stemming from their disabilities, in the form of behavioral intervention plans ("BIPs") informed by functional behavioral assessments ("FBAs"). 20 U.S.C. §§ 1414(d)(3)(B)(i), 1415(k)(1)(F)(i)-(ii). These accommodations ensure that students with disabilities will not be disciplined for manifestations of their disabilities, but rather will receive appropriate

accommodations. Further, students with disabilities must receive certain procedural protections before they are suspended for more than ten cumulative school days, expelled, or transferred to an alternative school setting. Specifically, the IDEA requires that a "manifestation determination review" be performed to determine whether the child's conduct was either: (1) caused by or related to his disability, or (2) resulted from a failure to implement the child's individualized education program, which is required by the IDEA for children with disabilities. 20 U.S.C. § 1415(k)(1)(E). In the case of either event, and subject to certain exceptions, a student with a disability may not be suspended or expelled from school or removed to an alternative school setting. 20 U.S.C. § 1415(k)(1)(F)(iii). These protections are also afforded to students who the school knew or should have known to have disabilities. 20 U.S.C. § 1415(k)(5). The Defendants have a statutory obligation to ensure that these disciplinary safeguards are provided and a duty to intervene when an LEA's rate of suspending and expelling students with disabilities is disproportionate to that of non-disabled students. 20 U.S.C. § 1412(a)(22); 34 C.F.R. § 300.170.

B. Plaintiffs Are Likely to Succeed on the Merits

In the Fifth Circuit, when analyzing the degree of success on the merits, courts "employ[] a sliding scale involving the balancing [of] the hardships associated with the issuance or denial of a preliminary injunction with the degree of likelihood of success on the merits." *McWaters v. Fed. Emergency Mgmt. Agency*, 408 F. Supp. 2d 221, 228 (E.D. La. 2005). Although a plaintiff seeking an injunction bears the burden of showing probability of success,

> [plaintiff] is not required to prove to a moral certainty that his is the only correct position. The prerequisite, as an absolute, is more negative than positive: one cannot obtain a preliminary injunction if he clearly will not prevail on the merits; however, that he is unable, in an abbreviated proceeding, to prove with certainty eventual success does not foreclose the possibility that *temporary restraint* may be appropriate.

Texas v. Seatrain Int'l, S.A., 518 F.2d 175, 180 (5th Cir. 1975) (emphasis added). Hence, the Court of Appeals has recognized that "[i]n a preliminary injunction context, the movant need not prove his case." *Lakedreams v. Taylor*, 932 F.2d 1103, 1109 n.11 (5th Cir. 1991). "A reasonable probability of success, not an overwhelming likelihood, is all that need be shown for preliminary injunctive relief." *Casarez v. Val Verde Cnty.*, 957 F. Supp. 847, 858 (W.D. Tex. 1997). "[W]hen the other factors weigh in favor of an injunction, a showing of some likelihood of success on the merits will justify temporary injunctive relief." *McWaters*, 408 F. Supp. 2d at 228.

Here, Plaintiffs and proposed class members are likely to succeed on their claims because Plaintiffs will demonstrate that the Defendants have deprived them of their rights in violation of the IDEA, Section 504, and Title II.

1. Violations of Section 504 and Title II by Denying Access

To demonstrate violations of Section 504 and Title II in the education context, a plaintiff must show that (i) the plaintiff has a disability, as defined by the statutes, (ii) the plaintiff is otherwise qualified to participate in school activities, (iii) the school receives federal financial assistance, and (iv) the plaintiff was excluded from participation in, denied the benefits of, or subject to discrimination at school. *D.A. ex rel. Latasha A. v. Houst. Indep. Sch. Dist.*, 716 F. Supp. 2d 603, 618 (S.D. Tex. 2009), *aff'd*, 629 F.3d 450 (5th Cir. 2010). Plaintiffs will satisfy these elements.

Plaintiffs and proposed class members will be able to demonstrate that Defendants have failed to ensure that each LEA in New Orleans offers equal access to the same educational programs and services that are available to non-disabled students. Because the Defendants have failed to ensure that LEAs comply with federal law, students with disabilities are denied

admission to public school on the basis of their disabilities in violation of Section 504 and Title II. The Defendants' failures have left many of the New Orleans schools unaware of the mandates under federal law to provide complete special education services to children with disabilities. *See* Complaint ¶ 53. And of those that may be independently aware of the federal requirements, many lack the necessary facilities or staff to provide the essential services. *Id.* ¶¶ 51-53. Thus, often when a child with a disability expresses interest in a school, the school discourages the child from applying by claiming that it lacks the resources to serve the child. *Id.* ¶¶ 151-54. Sometimes a school will simply deny admission to a child on the basis of disability. *Id.* When a school does admit a child with a disability, it will sometimes then "counsel out" the child, convincing the child's family that the child should withdraw because the school cannot or will not accommodate the child's disability. *Id.* ¶¶ 116-18. Although the Defendants have been on notice that such acts of discrimination are occurring in New Orleans, they have failed to take any action to remedy these ongoing violations.

As a result of the Defendants' failures, several of the Plaintiffs have been denied admission to public schools because they have been told that the schools do not have the facilities or resources to educate them. Plaintiff P.B., for example, was "counseled out" of his school on the basis of behaviors related to his disabilities without any attempt to accommodate his behavioral or educational needs. *See* Complaint ¶¶ 56, 116-18. Attempts to place him in another school – including contacting approximately 20 schools – have failed as the schools display no willingness or ability to place him. *Id.*

2. Violations of the IDEA by Failing to Establish Adequate Child Find Policies and Programs

Plaintiffs and proposed class members will be able to establish that the Defendants are in violation of the IDEA's Child Find mandate because they have failed to ensure that children with suspected disabilities are found and evaluated to determine their eligibility for the IDEA. *See* 20 U.S.C. § 1412(a)(3); *Jamie S. v. Milwaukee Pub. Schs.*, 519 F. Supp. 2d 870, 882 (E.D. Wis. 2007) (holding that failure to ensure compliance with Child Find results in violation of the IDEA). Many school-age children with disabilities in New Orleans are neither identified nor evaluated to determine their eligibility for services and protection under the IDEA, sometimes as part of deliberate policy by the schools.

The Defendants' Child Find policy, as applied in New Orleans, is inadequate on its face. The existing statewide Child Find policy, by definition, cannot be implemented without a centralized agency with jurisdiction over all potentially disabled students in a single geographic area. *See* Bulletin 1508, § 103. But currently no single local entity bears responsibility for all New Orleans children. Instead, there is a patchwork system in which each of the 51 LEAs asserts responsibility and jurisdiction over only those students currently enrolled in their respective schools. *See* Complaint ¶¶ 65-66; *see also* Cowen Institute for Public Education Initiatives, "Public Education in New Orleans: Updated September 2010," attached as Cavanaugh Declr. Ex. H. This leaves a void of responsibility at the local level for all children with disabilities in New Orleans, including those who may not be enrolled in a school or those who are homeless, migrant, or attending private school. *See* Complaint ¶¶ 65-66. The result is that many potentially disabled children fall through the cracks and go unidentified in violation of IDEA's Child Find mandate.

Not only have the Defendants created a structure that frustrates their ability to identify and evaluate children with disabilities, the existing structure allows administrators to willfully ignore their responsibilities to search out and help these children. Survey evidence confirms that New Orleans school officials often under-identify children with disabilities in an effort to avoid the legal obligations that come with identifying a child with special needs. *See* Educational Support Systems, Inc., *supra*, at 19-20. The survey notes that "several [special education coordinators] estimated that at least 30% of students with [Section] 504 plans would qualify for special education eligibility [under the IDEA]. The unusual application of [Section] 504 plans suggests a possible misinterpretation and use of Section 504 . . . and could make charter schools liable for failure to conduct Child Find . . . under IDEA . . . ." *Id.*

The Defendants' failure to ensure that effective Child Find activities are occurring in New Orleans is evidenced by their failures to monitor compliance in this area. LDE has conducted only two monitoring visits to a limited number of RSD traditional and independent charter schools over the past five years, and *none* of the monitoring visits assessed LEAs' abilities to comply with the State's Child Find policy. *See* Louisiana Department of Education, *Continuous Improvement and Focused Monitoring Report* (2009-2010), attached as Cavanaugh Declr. Ex. I. Further, there have been no documented monitoring activities of the OPSB schools over the past five years. Plaintiffs will seek discovery of the Defendants to confirm the inadequacy of the Defendants' efforts to ensure the identification and evaluation of Plaintiffs and members of the proposed class.

3. Violations of the IDEA by Failing to Ensure That Procedural Protections Related to Discipline Are Afforded

Plaintiffs and proposed class members will be able to demonstrate that the Defendants have failed to ensure that students with disabilities in New Orleans are provided the disciplinary

protections of the IDEA before being subjected to excessive and disproportionate disciplinary practices. Alone, the suspension rates for students with disabilities in New Orleans schools, as compared to their non-disabled peers, are staggering and evidence of continuing noncompliance. *See* Louisiana Department of Education, *Special Education Performance Profile* (2008-09), *supra*. More than 26 percent of students with disabilities are suspended in RSD schools, a rate far higher than the statewide average of 16 percent. *Id*. And students with disabilities fare far worse at many of the independent LEA charter schools in New Orleans. For example, Sojourner Truth Academy suspended almost 54 percent of all students with disabilities, and New Orleans College Prep Charter School suspended over 52 percent of all students with disabilities. *Id*. Some of the schools also suspend students with disabilities at a substantially disproportionate rate when compared to non-disabled students. For example, Langston Hughes Academy Charter School suspends students with disabilities at a rate of almost 39 percent, while its suspension rate for non-disabled students is only 12 percent. *Id*. McDonough 42 Elementary Charter School suspends students with disabilities at a rate of approximately 39 percent, while it suspends non-disabled students at a rate of approximately 20 percent. *Id*.

LDE has the responsibility to ensure that each LEA establishes, maintains and implements procedural safeguards that meet IDEA requirements. *See* 20 U.S.C. § 1412(a)(6). LDE has entirely abdicated this responsibility in New Orleans as demonstrated by well-documented systemic violations. The State's 2010 monitoring report of the New Orleans schools provides that "there is a weak link in implementing and monitoring the actual disciplinary actions" taken by and among the New Orleans schools. *See* Louisiana Department of Education, *Continuous Improvement and Focused Monitoring Report*, *supra*. The State's monitoring further demonstrates that students with disabilities do not receive educational services after the

tenth day of suspension, do not receive functional behavioral assessments and behavior intervention plans, and are not provided manifestation determination reviews before being disciplined. *Id.* The monitoring reports also document the consequences of this system in which no centralized agency or authority has jurisdiction over all schools. Specifically, the report states that differences in the collection of disciplinary data across school sites has resulted in "erroneous data keeping" making it difficult to know the actual number of students suspended. *Id.* The report also notes problems of students with disabilities not being appropriately tracked when they exit a school to determine if they officially enroll in a new school. *Id.*

C. Plaintiffs Will Suffer Irreparable Harm in the Absence of a Preliminary Injunction

"[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). When a child is denied an education, she is irreparably harmed. *See, e.g.*, *RV v. Bd. of Educ.*, 321 F. Supp. 2d 538 (E.D.N.Y. 2004) ("[I]t is universally acknowledged that good schooling for all is essential in a republic, particularly one engaged in global competition for minds and dollars.").

Numerous courts have found that the failure to provide special education services and accommodations to children with disabilities as required by the IDEA results in irreparable harm. *See, e.g.*, *D.R. ex rel. Courtney R. v. Antelope Valley Union High Sch. Dist.*, 746 F. Supp. 2d 1132, 1145 (C.D. Cal. 2010) ("[Plaintiff's] absences from the classroom have detrimentally affected her academic performance . . . ."); *Massey v. Dist. of Columbia*, 400 F. Supp. 2d 66, 75 (D.D.C. 2005) (in an IDEA case, holding that denial of education to a child is irreparable injury; "a child without disabilities would suffer harm from being unable to attend school; such harm is heightened for a disabled child with much greater need for daily structure and consistency.");

Nieves-Marquez v. Puerto Rico, 353 F.3d 108 (1st Cir. 2003) (injunction in favor of hearing impaired student affirmed).

Absent an injunction, the Defendants will continue to allow overt acts of discrimination against students with disabilities in New Orleans, such as named Plaintiffs P.B., N.F., and M.M., causing additional students to be denied access to New Orleans public schools. Children with disabilities who are out of school will face an increased risk of academic failure, exposure to the juvenile justice system, and adult incarceration. *See* Complaint ¶ 173. Further, the Defendants will continue to disregard the use of aggressive and highly disproportionate disciplinary practices rather than special education accommodations for children with disabilities, which will cause these students to experience emotional and psychological trauma. *Id.* ¶¶ 142-43, 163-65. Accordingly, absent a preliminary injunction, Plaintiffs and proposed class members will suffer irreparable harm.

D. The Remedies Sought by Plaintiffs Will Begin Addressing This Harm

The IDEA directs the Court to "grant such relief as [it] determines is appropriate" to remedy violations of the statute. *See* 20 U.S.C. § 1415(e). The Supreme Court has explained that "[t]he ordinary meaning of the language . . . confers broad discretion on the [district] court. . . [T]he only possible interpretation is that the relief is to be 'appropriate' in light of the purpose of the Act." *Sch. Comm. of Burlington v. Mass. Dep't of Educ.*, 471 U.S. 359, 369 (1985). A "mandatory injunction directing school officials to provide educational services meeting these needs [of students with disabilities] would obviously constitute 'appropriate' relief." *Hall v. Knott Cnty. Bd. of Educ.*, 941 F.2d 402, 406 (6th Cir. 1991). The Court may grant similar types of relief for violations of Section 504 and Title II. *See, e.g.*, 42 U.S.C. § 12133 (remedies under Title VII available); *United States v. Criminal Sheriff, Parish of Orleans*, 19 F.3d 238, 239-40

(5th Cir. 1994) ("broad discretion to fashion remedies as the equities of a particular case compel").

Plaintiffs' proposed remedies are appropriate, and seek to ensure that the Defendants begin to comply with federal law. For instance, to redress the Defendants' violations of Section 504 and Title II for the Defendants' failure to provide disabled children with equal access to the same services as those provided to non-disabled children, Plaintiffs propose that the Court order the Defendants, among other things:

- to create a centralized admissions process for all New Orleans students; and
- to provide training to school administrators, special education directors, and teaching personnel regarding their obligations not to deny any services to children with disabilities.

In order to remedy violations of the IDEA's requirements that the Defendants have in place policies and practices to ensure that children with disabilities are identified and evaluated, Plaintiffs request that the Court order the Defendants, among other things:

- to undertake a public information campaign calculated to inform New Orleans parents with school age children with disabilities about the Defendants' obligations under the IDEA. Informing parents about their rights to seek a free initial educational evaluation and special education services will increase the odds that children with disabilities will be evaluated and identified in accordance with the IDEA; and
- to review LEA policies and procedures to ensure that Section 504 plans are not inappropriately being used as alternatives to IEPs required under the IDEA, which will likely lead to more children being identified and referred for evaluations under the IDEA. Further, requiring the Defendants to conduct intensive training of the LEAs will increase the likelihood that the LEAs will provide adequate evaluations and services, as required under federal law.

And to cease the Defendants' violations of the IDEA's requirements that students with disabilities are provided procedural safeguards before they are disciplined, Plaintiffs propose that the Court order the Defendants to undertake, among other things, the following:

- to review all LEA student codes of conduct and ensure that the disciplinary provisions therein do not violate the procedural safeguards guaranteed to students with disabilities by state and federal law;
- to train all LEAs on the procedural safeguards guaranteed by the IDEA, including conducting functional behavioral assessments, writing effective behavioral intervention plans, and conducting appropriate manifestation determination reviews; and
- to develop a plan for reducing the rate of suspensions, expulsions and school removals in New Orleans public schools by 20 percent.

E. Balance of Hardship Weighs in Plaintiffs' Favor

The balance of hardships in this case tips overwhelmingly in favor of Plaintiffs and proposed class members. In the absence of an injunction, Plaintiffs and proposed class members will suffer a daily worsening of the irreparable harm of not being provided a free appropriate public education and discrimination on the basis of their disability. *See Morel v. Giuliani*, 927 F. Supp. 622, 639 (S.D.N.Y. 1995) ("Injunctive relief is therefore warranted to prevent a worsening of the harms demonstrated by Plaintiffs"). As one court balancing the hardships in an IDEA case has noted, "[plaintiff] has a legal entitlement to the services at issue; the longer [defendant] fails to provide them, the greater harm [plaintiff] suffers. Providing statutorily granted special services to a child does not harm [defendant]; doing so is its function under state and federal law." *John T. ex rel. Paul T. v. Pennsylvania*, No. 98-CV-5781, 2000 WL 558582, at *8 (E.D. Pa. May 8, 2000).

In sum, any possible harm that the Defendants may suffer from complying with federal law does not outweigh the overwhelmingly negative impact their lack of compliance has on New Orleans children with disabilities.

F. The Public Interest Favors Preliminary Injunctive Relief

Plaintiffs seek a preliminary injunction to require the Defendants to comply with federal law and to respect the rights of their citizens. "[T]he public interest always is served when public officials act within the bounds of the law and respect the rights of the citizens they serve." *Nobby Lobby, Inc. v. City of Dall.*, 970 F.2d 82, 93 (5th Cir. 1992) (quoting case below, 767 F. Supp. 801, 821 (N.D. Tex. 1991)). There is no more clear expression of the public interest than statutory language of the IDEA, Section 504, and Title II, and no better way to effectuate that interest than by directing the Defendants to provide the statutorily required services to children with disabilities. *See John T. ex rel. Paul T. v. Pennsylvania*, No. 98-CV-5781, 2000 WL 558582, at *8 (E.D. Pa. May 8, 2000) ("It is in the public interest to provide benefits to those entitled to them under the law.").

As another court has noted, "the public interest is served whenever a handicapped child is given an appropriate public education. An appropriate education serves to increase the independence of the handicapped." *Espino v. Besteiro*, 520 F. Supp. 905, 913-14 (S.D. Tex. 1981); *see also Massey*, 400 F. Supp. 2d at 76 ("T]he public interest lies in the proper enforcement of . . . the IDEA and in securing the due process rights of special education students and their parents provided by statute." (quoting *Petties v. Dist. of Columbia*, 238 F. Supp. 2d 88, 99 (D.D.C. 2002)); *Antelope*, 746 F. Supp. 2d at 1149 ("The Rehabilitation Act and ADA embody the public interest in empowering individuals with disabilities to maximize independence, and inclusion and integration into society." (internal quotation marks omitted)).

Accordingly, the public interest favors granting a preliminary injunction.

II. The Court Should Order Expedited Discovery

This Court has the authority, pursuant to Rule 34 of the Federal Rules of Civil Procedure, to direct the parties to engage in expedited discovery in connection with Plaintiffs' preliminary injunction motion. *See Providence Prop. & Cas. Ins. Co. v. PeapLease Corp.*, No. 06-CV-285, 2007 WL 2241492 (E.D. Tex. Aug. 03, 2007) (granting plaintiff's and counter-defendant's applications for preliminary injunction and motion to compel expedited discovery); *Wright Med. Tech., Inc. v. Somers*, 37 F. Supp. 2d 673, 679 (D.N.J. 1999) (parties conducted expedited discovery before the hearing on plaintiffs' application for a preliminary injunction barring plaintiffs' former employee from working for a competitor). "Expedited discovery is particularly appropriate when a plaintiff seeks injunctive relief because of the expedited nature of injunctive proceedings." *Ellsworth Assoc., Inc. v. United States*, 917 F. Supp. 841, 844 (D.D.C. 1996). Accelerated discovery is appropriate where "[f]urther development of the record before the preliminary injunction hearing will better enable the court to judge the parties' interests and respective chances for success on the merits." *Educata Corp. v. Scientific Computers, Inc.*, 599 F. Supp. 1084, 1088 (D. Minn.), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 429 (8th Cir. 1984).

Plaintiffs seek an evidentiary hearing on their motion at which they will present fact and expert witnesses in support of the preliminary relief sought herein. Plaintiffs seek limited discovery of critical documents in the possession of the Defendants and third parties, as well as the testimony of employees of the Defendants and certain third parties which will demonstrate the violations of federal law alleged by Plaintiffs and the need for immediate remedial relief to address the ongoing irreparable harm to the Plaintiffs and the proposed class.

Plaintiffs are prepared to work with the Defendants to arrive at an acceptable schedule for discovery and a hearing on Plaintiffs' preliminary injunction motion.

CONCLUSION

For all of the foregoing reasons, this Court should enter a preliminary injunction in the form of the Proposed Order attached hereto.

Dated this 26th day of April, 2011.

Respectfully submitted,

s/Eden B. Heilman, La. Bar No. 30551
Sheila A. Bedi, Miss. Bar No. 101652*
Southern Poverty Law Center
4431 Canal Street
New Orleans, Louisiana 70119
eden.heilman@splcenter.org
sheila.bedi@splcenter.org
504-486-8982 (phone)
504-486-8947 (fax)

James Comstock-Galagan, La. Bar No. 05880
Southern Disability Law Center
4431 Canal Street
New Orleans, Louisiana 70119
jgalagan@sdlcenter.org
504-486-8982 (phone)
504-486-8947 (fax)

Davida Finger, La. Bar No. 30889
Stuart H. Smith Law Clinic and Center for Social Justice
Loyola University New Orleans College of Law
7214 St. Charles Avenue, Box 902
New Orleans, Louisiana 70118
dfinger@loyno.edu
504-861-5596 (phone)
504-861-5440 (fax)

Jon Greenbaum, D.C. Bar No. 489887*
Brenda L. Shum, Or. Bar No. 961146*
Jennifer M. Coco, Ill. Bar No. 6303071*
Lawyers' Committee for Civil Rights Under Law
1401 New York Avenue NW, Suite 400
Washington, District of Columbia 20005
jgreenbaum@lawyerscommittee.org
bshum@lawyerscommittee.org
jcoco@lawyerscommittee.org
(202) 662-8600 (phone)

(202) 783-0857 (fax)

William F. Cavanaugh, N.Y. Bar No. 1715481*
Eugene M. Gelernter, N.Y. Bar No. 1758374*
Rosanne Felicello, N.Y. Bar No. 4534442*
Patterson Belknap Webb & Tyler, LLP
1133 Avenue of the Americas
New York, New York 10036
wfcavanaugh@pbwt.com
emgelernter@pbwt.com
rfelicello@pbwt.com
(212) 336-2000 (phone)
(212) 336-2222 (fax)

* Admitted *Pro Hac Vice*