

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CASSANDRA BERRY, ET AL

VS.

PAUL PASTOREK, ET AL

CIVIL ACTION NO. 10-1049
NEW ORLEANS, LOUISIANA
TUESDAY, APRIL 26, 2011
10:00 A.M.
SECTION "A"

MOTION TO DISMISS CASE

BEFORE THE HONORABLE JAY C. ZAINNEY
UNITED STATES DISTRICT COURT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFFS:

BRENDA A. SHAUM, ESQ.
JENNIFER M. COCO, Esq.
JON M. GREENBAUM, ESQ.
Lawyers Committee for Civil Rights
1401 New York Avenue, N.W. Suit 400
Washington, D.C. 20005
(202) 662-8600

PATTERSON, BELLNAP, WEBB & TYLER, LLP
By: William F. Cavanaugh, Jr., Esq.
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000

EDEN B HEILMAN, ESQ.
Southern Poverty Law Center
4431 Canal Street
New Orleans, Louisiana 70119
(504) 186-8982

SHELIA A. BEDI, ESQ.
Southern Poverty Law Center
921 North President Street
Jackson, Mississippi 39202

APPEARANCES CONTINUED:

DAVIDA FINGER, ESQ.
Loyola Law School Clinic
7214 St. Charles Avenue
New Orleans, Louisiana 70118
(504) 861-5596

FOR THE DEFENDANT,
PAUL PASTOREK:

HOGAN LOYELLS, USLLP
By: Maree Sneed, Esq.
Columbia Square
555 Thirteenth St. NW
Washington, D.C. 20004
(202) 637-5910

J. A. GINSBERG, ESQ.
Legal Counsel
Recovery School District
Louisiana Department of Education
1641 Poland Avenue
New Orleans, Louisiana 70117
(504) 309-3647

JOAN E. HUNT, ESQ.
Louisiana Department Of Education
General Counsel
1201 N. 3rd Street
P.O. Box 94064
Baton Rouge, Louisiana 70804
(225) 342-3600

REPORTED BY:

VICTOR D. Di GIORGIO, CCR
OFFICIAL COURT REPORTER
500 Poydras Street, Room HB 406
New Orleans, Louisiana 70130
(504) 589-7782

Proceedings recorded by mechanical stenography.
Transcript produced by computer aided transcription.

1 P-R-O-C-E-E-D-I-N-G-S

2 (TUESDAY, APRIL 26, 2011)

3 (10:00 A.M. - MORNING SESSION)

4 (COURT CALLED TO ORDER)

5 THE DEPUTY CLERK: All rise.

6 Court's in session.

7 THE COURT: Good morning.

8 Please be seated.

9 THE DEPUTY CLERK: Civil Action Number 10-4049. Berry
10 versus Pastorek.

11 Counsel make your appearance, please.

12 MS. SHAUM: Brenda Shaum with Lawyers Committee on
13 behalf of the plaintiffs.

14 THE COURT: Thank you.

15 MS. SNEED: Maree Sneed with the defendants.

16 THE COURT: Thank you very much.

17 Why don't we go around the counsel table for
18 plaintiffs, and for the record, let everybody introduce
19 themselves, and do the same for defense counsel, starting with
20 the plaintiffs first.

21 MR. GREENBAUM: John Greenbaum for the Lawyers
22 Committee for the plaintiffs.

23 MS. COCO: Jennifer Coco for the Lawyers Committee for
24 the plaintiffs.

25 MS. FINGER: Good morning. Davida Finger, Loyola Law

1 Clinic.

2 THE COURT: Good morning,

3 MS. BEDI: Good morning. Shelia Bedi, Southern Poverty
4 Law Center for the Plaintiffs.

5 MR. CAVANAUGH: Good morning, Your Honor. Bill
6 Cavanaugh, Patterson, Belknap on behalf of the plaintiffs.

7 THE COURT: Great welcome. Thank you.

8 MS. HEILMAN: And, Your Honor, Eden Heilman on behalf
9 of the Southern Poverty Law Center also for the plaintiffs.

10 THE COURT: Welcome. Thank you.

11 MS. SNEED: Maree Sneed on behalf of the defendants.

12 THE COURT: Thank you.

13 MS. HUNT: Joan Hunt, Department of Education.

14 MR. GINSBERG: Jay Ginsberg with the Department of
15 Education and recovery schools.

16 THE COURT: Thank you.

17 Now, I don't want any of the counsel for plaintiffs to
18 fall asleep.

19 I just received a lot of paper that was filed at the
20 1:15 this morning electronically, and I'm sure defense counsel
21 has not had an opportunity to read it, nor have I, by the way.
22 This does not pertain to today, this matter, this is a motion
23 for a preliminary injunction and we will address this at the
24 end. Actually, what's interesting this is some of the issues I
25 wanted to speak with you all about at the end off the record.

1 So this will be a very good starting point. I have not even
2 read this yet, nor will this really be addressed as it relates
3 to the motion to dismiss, which is before the Court today.

4 Okay. As counsel for both parties know how I like to
5 do things here is I'm going to give my own take of what I
6 perceive the issues to be, then I'll have specific questions
7 that I'm going to ask counsel for the plaintiff as well counsel
8 for the defendant.

9 Now, reviewing everything, I believe that we all agree
10 that the New Orleans school system is unlike any other school
11 district in Louisiana or in the United States, for that matter.

12 As I understand it, the New Orleans public education
13 system operates through the following local entities.

14 First, the Orleans Parish School Board, which has a
15 local education agency which operates four traditional public
16 schools.

17 The Recovery School District, which as an LEA, operates
18 23 traditional public schools directly, and has authorized the
19 chartering of 46 schools, each of which operates as an
20 independent local educational agency, and three individual
21 charter schools each acting as its own educational agency under
22 the authorization of BESE. As I calculate it, there are 51
23 local educational agencies in New Orleans with control over 88
24 schools. Is that an accurate calculation.

25 MISS SNEED: Your Honor, your calculation, Mr. Ginsburg

1 has just --

2 THE COURT: Just get close to the microphone, please.
3 I can't hear you.

4 MS. SNEED: Mr. Ginsburg has just said you didn't
5 mention that the Orleans public schools also offered some
6 charter schools.

7 THE COURT: Okay. I thought I said that.

8 MS. SNEED: I wasn't clear. I was trying to make
9 notes. I just want to make it clear for the record, Your Honor.

10 THE COURT: How many charter schools does the Orleans
11 Parish School Board have?

12 MS. HUNT: 12.

13 THE COURT: 12. Okay.

14 You agree with what I just said with that addition?

15 MS. SNEED: Yes, Your Honor.

16 THE COURT: Okay. Let me ask the defendants. Do you
17 agree that this it is the defendants ultimate responsibility for
18 insuring that every school district and every school in the
19 State of Louisiana complies with the federal laws which are at
20 issue here?

21 MS. SNEED: Yes, Your Honor, we do.

22 THE COURT: And, of course, the federal laws are issued
23 here are the IDEA in Section 504, and the ADA. Since it is the
24 ultimate responsibility of the defendants, how has the State
25 done this, and what kind of oversight does the State have in

1 this regard as to special education?

2 MS. SNEED: Right. The State has done this through
3 monitoring that it does. It has done it through technical
4 assistance that it has provided both formal and informal. There
5 are conversations that go back and forth by phone as well as
6 formal technical assistance. It has done it by providing
7 training to the schools in New Orleans.

8 THE COURT: If they find that something has not been
9 complied with, what do they do?

10 MS. SNEED: They can -- if it's through a monitoring
11 process, then we'll ask them to do a corrective action plan,
12 which is required, that the process requires under federal law,
13 and then the school, the LEA's are required to do the corrective
14 action plan, then there's a followup to determine whether that
15 has been complied with and whether there's additional corrective
16 action that needs to be done.

17 THE COURT: We know what the laws are, of course, and
18 we also know what they're supposed to do. How do we know that
19 they have done what they're supposed to be doing?

20 MS. SNEED: Well, there is -- there are corrective
21 action plans that have been done, and there have been follow up
22 visits that have been done and documented. There was technical
23 systems --

24 THE COURT: Now, this is as it relates to Orleans
25 Parish Schools, special ed systems, is that correct?

1 MS. SNEED: And to RSD, and to the three charters that
2 are run by BESE. So all the schools in New Orleans, if I can
3 just talk about them, collectively, so they've done the
4 formalizing, and there are documents to reflect that. There
5 have been trainings that have been done in the summer, and there
6 would be agendas and that's a thing to show that the training
7 had occurred. You're asking for physical evidence. I know
8 there's some documentation that has been done when there's
9 technical assistance provided, but again, sometimes technical
10 assistance is more informal. A phone call to someone to say,
11 "What's required here, and so it may just be a formal technical
12 assistance, but there is formal technical assistance as well as
13 informal technical assistance, and that's how most school
14 directs are run and the kind of support that most states provide
15 the schools.

16 THE COURT: Okay. Plaintiff, do you have any response
17 to that?

18 MS. SHUAM: Yes, Your Honor. First of all, our
19 information is that there's been no monitoring of the OSBP
20 schools.

21 THE COURT: What is that based on?

22 MS. SHAUM: I believe it's based on the fact that there
23 -- the State actually has submitted two monitoring reports. One
24 was done in February and March of 2009, and the second one was
25 done about a year later.

1 THE COURT: Well, let me ask you a question: Does the
2 law require them to send out periodic monitoring reports that
3 have not been done? You said that you received two. Does the
4 law compel to send them out on a monthly basis or semi-annual
5 basis or something like that, that they're not complying with
6 the law?

7 MS. SHAUM: The federal law does require that the State
8 engage in regular annual monitoring activities, and the most
9 recent report that OPSB did find that certain procedures --

10 THE COURT: Who's OPSB?

11 MS. SHAUM: Oh, I apologize. The office of special
12 education. The federal monitor of the State process, Your
13 Honor. And OPSB actually determined that the State was
14 noncompliant, and compliant in certain aspects of its monitoring
15 system, and so it is actually out of compliance and follows some
16 sort of corrective action plan with respect to some of these
17 statewide, not just Orleans Parish, but statewide monitoring.

18 THE COURT: Well, we're interested in this lawsuit in
19 Orleans Parish.

20 MS. SHAUM: Correct, Your Honor.

21 THE COURT: Have they been compliant or noncompliant as
22 it relates to Orleans Parish Special Ed Program?

23 MS. SHAUM: It's very difficult to tell, because the
24 federal monitoring report actually does not break out the
25 information in that way, it's requiring, as one might imagine,

1 compliance throughout the State, and so the areas of
2 noncompliance we're concerned were generated based on data that
3 was reported for the State as a whole, but what we do note is
4 that the report itself actually just identify the number of
5 schools and the types of schools, and I apologize, let me
6 backtrack.

7 The State monitoring report, the one that was done in
8 2009 and the followup report that was done in 2010, both of
9 those reports actually identify the number of schools and the
10 types of schools, meaning either a direct run or a charter
11 school that were part of the State monitoring process within
12 Orleans Parish. So you can tell the number of schools that were
13 actually looked at, and neither of those reports actually
14 reference any of the OPSB schools, and in addition, they did not
15 reference the BESE schools. But what's important for the Court
16 to understand is that both of those reports, as one might
17 expect, were based on sort of a limited sample, the number of
18 schools, 51 plus schools that are run in Orleans Parish. And
19 the State's own monitoring report, Your Honor, demonstrated that
20 both RC schools and charter schools are noncompliant.
21 Naturally, it identifies, and in the report itself refers to
22 systemic periods of noncompliance. The first being in the area
23 of the development, the implementation --

24 THE COURT: Is all of this in writing? You have
25 documents to substantiate what you are saying?

1 MS. SHUAM: Yes, Your Honor, these document are
2 actually referenced in the plaintiffs complaint.

3 THE COURT: Okay.

4 MS. SHAUM: So the 2009 State Monitoring Report
5 actually references sort of two major areas of systemic
6 noncompliance. The first being the failure to develop an
7 individual education plan for students with disabilities.

8 THE COURT: Well, I think in your complaint, as well
9 as in your memos you address four different areas, the IEP.

10 MS. SHUAM: Correct.

11 THE COURT: Discipline, child find, and denied
12 admissions, is that right?

13 MS. SHUAM: Correct.

14 And so, Your Honor, one of the things that's important
15 to remember is that the reason the State was paying attention to
16 the Orleans Parish schools in 2009 is because students with
17 disabilities is like, I believe, was a 95 percent failure rate
18 for eight graders who were taking the LEAP test, so that kicks
19 in sort of the attention of the State and they were only --

20 THE COURT: What is the rate around the State?

21 MS. SHUAM: I don't have that. I believe that that
22 information might be contained in the complaint, but it's
23 definitely contained in the State's report itself. But what is
24 important to really understand is that the 2009 report, as I
25 said, there is noncompliance in the areas of IT development and

1 implementation as well as transitional planning, but then the
2 follow up report that actually took place in 2010 also found
3 areas of noncompliance in student discipline procedures, and
4 that was again at both some of the RSD schools, the traditional
5 run public schools as well as the charter schools.

6 THE COURT: Now, did the 2010 report address the
7 noncompliance of 2009?

8 MS. SHUAM: Absolutely, Your Honor, and it did actually
9 document improved compliance, but it absolutely concludes in
10 that 2010 report that there are ongoing continued noncompliance
11 in those areas.

12 THE COURT: In the same areas?

13 MS. SHUAM: Yes. And what I wanted to mention to the
14 Court is that the report actually did not, and was not intended
15 to look at ever single aspect of the special education system.
16 It was really -- the State actually selected which sort of
17 characteristics of the special educational system it was going
18 to take a look at and then survey a sample of the schools in
19 Orleans Parish in order to generalize whether or not there were
20 areas of concern or areas of noncompliance, and so one of the
21 things that is really critical for this Court to understand is
22 that the federal law defines a student's rights to education --
23 as a capable student's rights to education as a free and
24 appropriate education.

25 THE COURT: That's the IDEA?

1 MS. SHAUM: Exactly. And there are four cornerstones
2 essentially, Your Honor, to that right in order to give that
3 right meaning, meaning a substantive meaning. And the first we
4 would assert is essentially very simple. Don't discriminate on
5 the disability. That's actually a function more of 504 in Title
6 II, but it applies to literally people with disability who
7 trying to go to school in New Orleans. So fundamental to a
8 child's ability to access the rights that they're entitled to
9 under federal law is, first, the State cannot discriminate in
10 the ability of students with disabilities to access people
11 educational opportunity.

12 Second, is that the State is required specifically
13 under the IDEA to implement a child's find policy and procedure
14 that's uniformly applicable to sutdents within its jurisdiction,
15 so that every student with a suspected disability is located,
16 identified, and evaluated if they're in need of special
17 educational services.

18 Another critical cornerstone of this right under
19 federal law is the right to essentially be educated, and the way
20 we define that is through a child's IEP, which is essentially an
21 individualized education plan, which is a blueprint for that
22 child's education based on the unique special needs, and through
23 the States own monitoring process documents that there are
24 difficulties in the development and the implementation of IEP.
25 We're talking about fundamental systemic failure of special

1 education in the context of New Orleans.

2 And then, finally, the fourth cornerstone of this right
3 to education under federal law is that students with
4 disabilities must receive certain basic procedural protection if
5 they're being subject to school discipline. And again, Your
6 Honor, what the State's 2010 monitoring report shows is that
7 actually in that particular instance the direct run of
8 traditional schools had more concerning measures than the
9 charter schools that they looked at. They looked at more a
10 higher number of traditional public schools under the RSD, then
11 they did charter schools, but those systems demonstrated a
12 failure to provide education following a child's exclusion from
13 education for more than ten days, and that is a direct violation
14 of students rights to a free and appropriate public education.

15 THE COURT: Let me ask you this question, then
16 obviously the defense is going to be given the opportunity to
17 respond.

18 These problems, that you call them systemic problems.

19 MS. SHUAM: Systemic, Your Honor.

20 THE COURT: How do these systemic problems in New
21 Orleans compare to problems around the State?

22 MS. SHUAM: Your Honor, that's not a question we're
23 addressing in this lawsuit. This lawsuit is focused on the
24 students in New Orleans.

25 THE COURT: No, I understand that. I know exactly

1 that, that's why I'm questioning, what pertains to New Orleans,
2 and what pertains to the rest of the State though, and how does
3 New Orleans compare to the rest of the State.

4 MS. SHUAM: What we've discovered, Your Honor, is that
5 in the wake of Hurricane Katrina when the State moved in and
6 dismantled the traditional local school district that was --

7 THE COURT: You feel that New Orleans fell through the
8 cracks?

9 MS. SHUAM: Absolutely.

10 And so I think what is very clear from stories of these
11 ten plaintiffs and the class and of the 4500 kids, that they
12 proposed to represent, Your Honor, is that the IDEA and
13 Americans Disabilities Act, and the Rehabilitation Act, they
14 established a set of legal mandates, and those do not map
15 legally onto the framework for public education that the State
16 has embraced in New Orleans, so under federal law it's clear
17 that the State remains directly responsible for insuring
18 compliance with federal civil rights laws and federal special
19 education laws for every single student within Orleans Parish,
20 and that has become complicated by the structure and the system
21 that they've chosen to embrace in New Orleans, but it does not
22 relieve them of their ultimate obligation to insure that every
23 student with disabilities in New Orleans is receiving a free and
24 appropriate public education.

25 THE COURT: All right. Thank you very much.

1 Counsel, do you want to respond?

2 Now, counsel we're going to into -- you have four major
3 arguments about why this matter should be dismissed, and we're
4 not going to go into those yet. Why don't you just limit your
5 argument right now to responding to what she just argued,
6 please.

7 MS. SNEED: It's hard to limit it, because what she's
8 done is labeled systemic violations, which we don't believe
9 rise to the level of being systemic violations. In fact, we
10 believe that all of the allegations that they have purport can
11 be dealt with through due process hearings, and there are plenty
12 of examples of that happening now with these ten individual
13 kids, which I don't want to talk about specifically in court
14 other than what's in the allegation, but there's clearly with
15 these kids and with other kids are focused on their individual
16 needs as they're required, and taking them through due process
17 if necessary, but also making sure that their needs are dealt
18 with.

19 We concede that, just as you said, this is a very
20 different set of circumstances here in New Orleans, but the
21 State also knows it has its obligations and has worked very hard
22 with all the State level people as well as the local people to
23 ensure that the needs, the individual needs of the kids are met,
24 and we think that there's a process in place if the needs aren't
25 being addressed through the administrative due process.

1 THE COURT: Let me ask you this question, and I don't
2 know that you can answer this. I'm sure that, because federal
3 monies are involved in the spending clause, of course, the
4 Constitution is involved.

5 MS. SNEED: Right.

6 THE COURT: There's loads of statistics everywhere.

7 MS. SNEED: There are.

8 THE COURT: Now, you just mentioned that the 10 named
9 plaintiffs in this case on behalf of the punitive class, they're
10 at various stages possibility of due process. Okay. With that
11 said, can you give me any statistics as to how many of the 4500
12 special ed kids in New Orleans are in the process of or have
13 been over the past year or two in due process?

14 MS. SNEED: I do not have the specifics of the due
15 process requests, nor do I have the process, you know of kids
16 who then are in the evaluation process to be identified. And as
17 you know the one thing when IDEA was reauthorized a number of
18 years ago, the federal government, as always were very concerned
19 about over identification so there's a lot now that happened
20 before that to ensure that the kids aren't inappropriately
21 identified towards a pretty complex process. But I am sorry,
22 Your Honor, I do not have that information.

23 THE COURT: You wouldn't have any way of knowing that,
24 would you, counsel?

25 MS. SHAUM: Well, Your Honor, my co-counsel Ms. Coco

1 actually did try to determine the rates of the number of due
2 process administrative hearings that took place in the last
3 year, and I think she determined that the number was four.

4 MS. SNEED: And, Your Honor, it's hard to draw a
5 conclusion from that. I don't know whether that's right or
6 wrong, because it's something I didn't look at. It could mean
7 that the process is working, that when the State or the ORSP,
8 or, you know, one of the charter's determines that there's an
9 issue, that they're actually trying to see whether the kids
10 should be in special ed or not. It's hard to draw a conclusion,
11 we have to dig further and understand what that means.

12 THE COURT: Right.

13 All right. As I understand it, your motion to dismiss
14 is based on your trying to organize these four major arguments.

15 First, plaintiffs have failed to resolve some
16 administrative remedies under the IDEA.

17 Second, the relief that plaintiffs seek is unavailable
18 as a matter of law.

19 Third, the IDEA claims are not supported by sufficient
20 factual allegations; and

21 Fourth, the Section 504, ADA claims are not supported
22 by adequate factual allegations. Is that a fair
23 characterization?

24 MS. SHAUM: Yes, Your Honor.

25 THE COURT: Let's turn our attention to your first

1 argument, which is whether or not the plaintiffs have failed to
2 exhaust their administrative remedies under the IDEA.

3 The Fifth Circuit in the Gardner case has held that the
4 statutory scheme of the IDEA requires that a plaintiff first
5 exhaust his State administrative remedies before bringing an
6 action in court.

7 I think we all agree, and I think both parties have
8 cited that there is an exception to this, so that exception is
9 where the plaintiff could demonstrate that the State's
10 administrative procedures would be futile or inadequate when
11 systemic IDEA failures are involved.

12 Let me ask plaintiff counsel this question:

13 Although the Fifth Circuit alluded to the futile
14 inadequate exception in the Gardner case, and I know that you
15 rely heavily on a number of cases, one of which is Gardner. In
16 Gardner the Court held that the exhaustion was not -- or that
17 exhaustion was necessary even where parents sought to challenge
18 a local school board's policy that precluded the parents from
19 orientating IEP conferences.

20 What makes this case before the Court today any
21 different than the issues brought out in Gardner?

22 MS. SHUAM: Your Honor, this case is actually very
23 distinguishable from that which was taking place in Garner,
24 which is that the plaintiffs were basically challenging a local
25 policy that was preventing them from tape recording their IEP.

1 We are addressing something that goes way beyond that, that is
2 structural in nature and it is absolutely impossible for these
3 10 individual plaintiffs or any of the 4500 kids that they
4 purport to represent to achieve meaningful and adequate relief
5 through the administrative process.

6 THE COURT: Give me some examples of why it's
7 impossible for them to do so.

8 MS. SHUAM: Absolutely, Your Honor, and I think that
9 you would have to look no further than our complaint
10 essentially.

11 First of all, I wanted to clarify one of the things
12 that defense counsel mentioned. I think that there was an
13 impression created that some of the students are in due process
14 are having their needs being met. First of all, that is not the
15 subject of today's decision, but in addition, it's not accurate,
16 none of those kids are actually in process, but I do think that
17 what is important to remember is that everything we want --

18 THE COURT: You're saying none of the 10 named
19 plaintiffs are currently in due process?

20 MS. SHAUM: That is correct, Your Honor.

21 MS. SNEED: If I left that impression, I'm sorry. They
22 are in the process of evaluation.

23 At lease one I know off the top of my head is being
24 evaluated. There maybe a second, but if I left that impression,
25 I apologize.

1 THE COURT: Okay.

2 MS. SHAUM: I don't think that defense counsel intended
3 to create that impression at all.

4 THE COURT: No, she wasn't trying to mislead the Court.

5 MS. SHAUM: I felt like one of your questions might
6 have reflected that there was an idea that these students were
7 in process of getting administrative relief.

8 THE COURT: I understood that to be the case, but I
9 misunderstood.

10 MS. SHUAM: Okay. I just wanted to clarify that.

11 THE COURT: Counsel, do not mislead me at all.

12 Go ahead.

13 MS. SHAUM: First of all, Your Honor, the law is clear
14 that in this circuit under Papania-Jones versus Supreme, the law
15 is clear that you do not need to exhaust your administrative
16 remedies to pursue administrative remedies with the futile or
17 inadequate, and in this circuit because of Papania-Jones, it's
18 absolutely clear that a systemic violation under the IDEA can be
19 viewed as futile, and like I say --

20 THE COURT: But in Papania the exception did not apply,
21 that is.

22 MS. SHUAM: Absolutely, Your Honor. I think that case
23 compared with J.S. is actually quite instructive.

24 THE COURT: J.S. is a Second Circuit case, right?

25 MS. SHUAM: That's a second Circuit case, and actually

1 that's the case that's specifically referenced in the decision
2 in Papania-Jones.

3 First of all, I think that the difference between the
4 factual circumstances of Papania-Jones and the situation, which
5 is presented by the complaint in this case, the differences are
6 stacked and they are obvious that the plaintiffs in our case are
7 asserting systemic violations, structural violations of the New
8 Orleans special education system. They are not seeking
9 individualized relief for individualized --

10 THE COURT: I understand that. You keep saying
11 systemic violations. You continue saying that over and over
12 again, obviously for you to prevail you have to prove that.
13 What are the systemic violations, though?

14 MS. SHUAM: Well, You've already identified them for
15 us, Your Honor. As it says in the complaint, we are alleging
16 systemic violations.

17 THE COURT: Okay. So the four areas that I have
18 already addressed.

19 MS. SHAUM: Absolutely. And all four of those areas
20 are integral to a child's ability to receive every appropriate
21 public education he could.

22 THE COURT: Now, you also mention the Crawford case.

23 MS. SHUAM: Absolutely.

24 THE COURT: And actually the Crawford case, I believe,
25 was the only time in which it allowed parents to sue under the

1 IDEA for a broader change than what was necessary to vindicate
2 their individual rights.

3 MS. SHUAM: Absolutely, and that is the law of this
4 circuit, Your Honor.

5 THE COURT: Okay.

6 MS. SHUAM: And just so I appreciate the difficulty in
7 trying to conceptualize what a systemic violation is, and again
8 it goes to the very structure, the integrity of the special
9 education program, that's the language that was used in J.S.
10 Essentially, the court was trying to go through this same
11 analysis.

12 It took a look at four other Second Circuit cases, and
13 it came to a conclusion that a systemic violation under IDEA
14 implicates the framework of the procedures by which a student is
15 evaluated or educated in the special education system or the
16 number and the type of claims that are involved make it
17 impossible for the plaintiffs to receive relief, adequate relief
18 through the administrative procedure.

19 THE COURT: Okay. And again, we all agree that J.S. is
20 a Second Circuit case. The only case that I could find, and I'm
21 going to ask defense counsel next to distinguish this, if they
22 can, the only case that I could find that the exception -- in
23 the Fifth circuit -- that the exception applied was the Crawford
24 case. That was 1992, 1994, something like that. Judge Rubin
25 wrote the opinion for the Fifth Circuit, so I'm familiar with

1 that case.

2 How is that case distinguishable or that issue
3 distinguishable, not necessarily the facts, but the issue?

4 MS. SNEED: Your Honor, sorry, but interestingly
5 enough, in that case the State conceded it would be futile
6 because it was the State. I don't remember what footnote it is
7 in case, I could find it.

8 THE COURT: Right.

9 MS. SNEED: But that is key, because I struggled with
10 what it said, but it's the State there that said it would be
11 futile to do that.

12 THE COURT: Well, I don't know that that's key I mean,
13 the State there agreed that the exception applies, so they
14 admitted that. Y'all aren't admitting that in this case,
15 obviously, but that doesn't mean that it doesn't apply in this
16 case.

17 MS. SNEED: Right.

18 THE COURT: So what was the issue involved in Crawford
19 though. I know that they agreed, they did not contest that
20 issue, but remind me what the issue was.

21 MS. SNEED: The issue, I think, was a challenge to a
22 State policy that limits students being provided --

23 THE COURT: 180 days, I believe, yeah, yeah.

24 MS. SHAUM: 180 days. Yes, that was the issue in that
25 case, Your Honor.

1 THE COURT: Okay.

2 It seems to me that the problems that are alleged are
3 systemic because IDEA's basic goals are threatened by the
4 admissions that we detailed in the complaint.

5 Let me ask the defendants this: Is the conduct that's
6 being challenged here is the State's own conduct and not that of
7 the local board, and again the plaintiffs have alleged that this
8 is the State's conduct, how would exhaustion be helpful and not
9 futile? In other words, is the State going to remedy its own
10 conduct? I mean, how is that going to happen?

11 MR. SNEED: Well, they haven't -- you know, they
12 haven't alleged that there's anything wrong with the bulletins
13 and child finds or any State policy related to discipline. What
14 they have alleged that there be problems with individual
15 students, and the way that it would be remedied is by -- if
16 there's a need to go to due process and have the administrative
17 hearing, that's how it would be remedied. But it also might be
18 remedied at the school level through State monitoring, through
19 technical assistance, through the professional staff doing what
20 they need to do, and, in fact, that's how it's going on, and
21 that goes on for kids every day, and we know kids --

22 THE COURT: But I mean, you agree that it's
23 Superintendent Pastorek's responsibility for carrying out these
24 policies and programs which were adopted by BESE?

25 MS. SHAUM: I do.

1 THE COURT: Okay. Counsel for plaintiff had indicated
2 there's noncompliance issues. Can you respond to those?

3 MS. SNEED: I don't know how to respond to that,
4 because, you know, again that seems like a generalization to me.
5 What we have are ten individual kids that have --

6 THE COURT: Well, the noncompliance was not about these
7 10 kids.

8 What I understood plaintiffs counsel was saying, and
9 correct me if I'm wrong, that the State is required to present
10 the monitoring on an annual basis. The State did it in 2009 and
11 did it 2010 in some areas of noncompliance which were found to
12 be noncompliant did not address these ten kids problems, it just
13 addressed issues in general, that's 2009, and then same of the
14 same issues, as I understood plaintiffs counsel to say, still
15 exists in 2010.

16 MS. SNEED: Well, some of them may, and it is a
17 process, that's what the IDEA seems it felt that it is a process
18 where --

19 THE COURT: How long does this process take? You have
20 students that are entitled to an education that's now a year and
21 it hasn't been resolved. It's a process. Who suffers? The
22 children suffer.

23 MS. SNEED: Well, right. But that assumes that these
24 children that are in the complaint problems have not been
25 resolved.

1 THE COURT: No, we're talking about policy now.

2 MS. SNEED: Right.

3 THE COURT: Well, we're talking about policy now. So
4 how does the State say, oh, no, we're complying with policy, and
5 individuals who might have their own issues they have to go
6 through the various stages, so that their individual rights, if
7 any, aren't violated, okay, but, no, we're now talking about
8 these, what I perceive to be issues of noncompliance that still
9 exist over a year later. That doesn't sound systemic to you?
10 It sounds that way to me.

11 MS. SNEED: Well, they may or may not relate to the
12 individual complaint here.

13 THE COURT: Well, I understand that. They may or may
14 not, but that's further discovery is going to tell us that, but
15 you want the case to be dismissed today.

16 MS. SNEED: Well, for example in the compliance review
17 there was a finding that there was noncompliance with regards to
18 tradition services.

19 THE COURT: Right.

20 MS. SNEED: For kids. I don't believe that there's
21 anything in the complaint about individual kids about transition
22 services just by way of example, but I don't believe that the .
23 Congress ever intended that just because, when the compliance
24 was done by the State, and then there were findings in a school
25 district or in LEA, that the answer to that was to go right to

1 federal Court.

2 THE COURT: I agree. I agree completely with you, the
3 law is very clear on that. The statute is very clear on that
4 point. Okay. So federal court is the court of last resort as
5 it relates to if things remain noncompliant. I mean, I'm
6 hearing now that in 2009, 2010, a year has passed and the State
7 is still not compliant on certain issues. Now, does that relate
8 to New Orleans? We don't know yet.

9 MS. SNEED: Right.

10 THE COURT: You want the lawsuit dismissed today before
11 there's any discovery that can be done so that we can see if it
12 relates to the special ed system in New Orleans. So how can I
13 in good faith dismiss this lawsuit today when I'm hearing that,
14 according to the State who says, "Hey, we're doing what we're
15 suppose to be doing we're monitoring". Well, that's fine and
16 dandy, but in the monitoring themselves, the Federal Government,
17 which gives the State all this money, okay, that there's still
18 noncompliance going on.

19 MS. SNEED: Well, they are monitoring and training and
20 providing technical --

21 THE COURT: Well, that's wonderful, but they're still
22 not complying.

23 MS. SNEED: Well, but that assumes they're not
24 complying in everything and that's not the case, Your Honor.
25 For example, I believe apparently things were okay --

1 THE COURT: Can you tell me that they're not complying
2 -- that the noncompliance that's in the monitoring has nothing
3 to do with the special ed program here in New Orleans? Can you
4 tell me that?

5 MS. SNEED: Oh, I think it does have to do, but it
6 doesn't necessarily have to do with the specific issues that are
7 in this complaint.

8 THE COURT: Okay. And we're not going to know that
9 until more discovery is complete, it seems to me. I mean, we're
10 talking about exhaustion on the one hand, and I understand that,
11 and that's your argument, number one, but then we're also
12 talking about talking about, well, yes, there has been
13 noncompliance, which over years passed still noncompliance. Oh,
14 yeah, Judge, and, yeah, well, it relates to, it could possibly
15 relate to the special ed system in New Orleans, but it might not
16 have been alleged in the complaint".

17 MS. SNEED: Well, but the process has worked, for
18 example, on the transition. So that transition services were
19 found to be an issue, there's no longer noncompliance.

20 I don't have the document before me, but one of the
21 issues was about achievement, so there has been improvement in
22 achievement, so there has been progress.

23 THE COURT: Good.

24 MS. SNEED: And I think just to say globally that
25 there's noncompliance isn't fair. There has been noncomplince

1 in some, and there has been improvement, and finally the
2 compliance now in certain areas.

3 THE COURT: Sure. Okay. When we talk about -- I don't
4 know these answers, okay, so, you know, that's why I'm asking
5 the questions of you.

6 When we're talking about noncompliance, which again we
7 don't know the specific areas of noncompliance, and we further
8 don't know if these specific areas of noncompliance refers
9 specifically to New Orleans, which is what this lawsuit is all
10 about. If there's a problem in Webster Parish, that's not
11 before this Court. We're all on the same page there, okay.

12 When we're talking about the issue of noncompliance,
13 do you admit that that would be a systemic violation issue as
14 opposed to an individual rights issue?

15 MS. SNEED: Only if it -- I would admit that it was
16 systemic if it were structural and I wanted to hear more about
17 it or if it somehow affected the due process procedurals, and,
18 you know, there's some cases that there were allegations about
19 -- I don't remember about the qualifications of the hearing
20 officer, but something about the hearing officer. Clearly
21 that's systemic, but we don't have allegations like that here.
22 So I would need to think further and look at what the
23 noncompliance issue you is. By the way, in terms of how OSEP
24 looks at this noncompliance is very interesting..

25 THE COURT: OSEP?

1 MS. SNEED: The Office of Special Education Programs.

2 THE COURT: OSEP, Okay.

3 MS. SNEED: OSEP, yeah, I'm sorry. That's an acronym.

4 The Federal Special Ed group up there.

5 They set actually a very high compliance rate to be in
6 compliance and that's what states are doing. In some places
7 they set a 95 percent compliance. In some places 100 percent
8 compliance, which is, of course, almost impossible because you're
9 dealing with kids and the school systems and people, but they
10 set very high rates.

11 THE COURT: Do we know what the compliance rate is in
12 New Orleans.

13 MS. SNEED: I don't know off the top of my head. I
14 just was trying to give a little flavor of compliance and how
15 the law and how it's interpreted by OSEP as it works with
16 states.

17 THE COURT: Okay. Thank you.

18 Do you have a response?

19 MS. SHUAM: I do, Your Honor.

20 First of all, I want to clarify that in 2009 and the
21 2010 report that I am referring to is very specific to New
22 Orleans, so the federal government does, in fact, require the
23 states to provide Statewide data, and like I said in terms of
24 the reporting process, the federal government did find the State
25 of Louisiana out of compliance in certain areas statewide.

1 THE COURT: Now, what about the areas that are raised
2 in this complaint?

3 MS. SHUAM: Absolutely. I think that that's critical.
4 In 2000 and '09 when the State looked specifically at New
5 Orleans, it found two major areas of noncompliance, what it
6 calls systemic noncompliance. One, was transitional services
7 where students were 15 years old or older.

8 THE COURT: Okay. I thought I heard counsel argue that
9 out of your 10 plaintiffs no one had those.

10 MS. SHUAM: That's inaccurate. That's inaccurate,
11 Your Honor.

12 THE COURT: I thought I read it in the complaint
13 somewhere, but I've read so much in this case.

14 MS. SHUAM: Yes. And one of my colleagues can actually
15 find the paragraph in the complaint for you.

16 THE COURT: I wish she would.

17 MS. SHUAM: You know, the failure for the individual
18 education plan to provide meaningful transition plans and
19 transitional services is absolutely an allegation that is a part
20 --

21 THE COURT: I thought that it was, but counsel for the
22 defense said that it wasn't. I don't have the complaint in
23 front of me. Yes, I do, actually.

24 MS. SHUAM: It's paragraph 187, Your Honor.

25 THE COURT: Paragraph 185?

1 MS. SHUAM: 187, Your Honor.

2 THE COURT: Wait. Hold on one second.

3 I'm looking at the complaint. It's 60 pages long, 185.

4 MS. SHUAM: It's page 56, Your Honor. And I believe
5 the plaintiff is L.W. I stand corrected.

6 THE COURT: I see. Paragraph 187, page 56. "Finally,
7 L. W. Has been denied the necessary and appropriate transition
8 services that will prepare him for employment, postsecondary
9 education, vocational training, and independent living. L.W.'S
10 IEP's have lacked a transition plan or transition services so
11 that he may achieve his post secondary goals".

12 Okay. Go ahead.

13 MS. SHUAM: Thank you, Your Honor.

14 THE COURT: And so L. P. would be the class
15 representative for any of the 4500 special ed kids in New
16 Orleans that may or may not have transition issues.

17 MS. SHUAM: Correct, Your Honor.

18 And in addition, in 2009, the State documented systemic
19 noncompliance in the IEP development review and implementation
20 process. And again, this is specific to the schools, both
21 charter schools and direct on RSD schools in New Orleans, and
22 was based on a random sample of student files and have nothing
23 to do with the named plaintiffs in this case.

24 Essentially the named plaintiffs and their unfortunates
25 experiences essentially confirm what the State's own monitoring

1 demonstrated. And in 2010, in addition to ongoing noncompliance
2 in the areas of IEP development, the State on its own in
3 addition to that documented noncompliance in both the charter
4 schools and the public RSD traditional run schools in the school
5 disciplines, policies and procedures.

6 And again, we would assert that all of these are
7 fundamental and to a child's ability to receive a free
8 appropriate public education, and they implicate the entire
9 special education system in New Orleans.

10 Essentially, what defense counsel has said this morning
11 is that there are policies and procedures in place. And, Your
12 Honor, we -- I think that the circumstances of these 10 kids
13 alone demonstrates that the policies and procedures are now
14 working in New Orleans and something has to be done.

15 One of the other things that I would mention is that as
16 early as 2008, there was an independent survey, it's referred to
17 as the ESF Survey and is referenced specifically in the
18 complaint. That survey only looked at charter schools. It
19 actually didn't look at anything other than charter. I think
20 there were 23 schools and some of them were OSPB charters, so
21 are not subject to this complaint, but that survey documented
22 concerns that the schools in New Orleans did not understand
23 fully their obligation to child finds. So again, another --

24 THE COURT: Has that been addressed in these past
25 two-and-a-half, three years?

1 MS. SHUAM: Has that been addressed? I think that was
2 the only thing -- that was an independent survey, and the State
3 has actually not conducted monitoring with respect to that
4 measurement specifically, but I could say, Your Honor, that
5 based on the stories that our plaintiffs have articulated in
6 great detail in their complaint, that there is ongoing failure
7 to child find, and I think that is important for the Court to
8 understand that child find is actually an affirmative
9 obligation. It's a duty that the State is ultimately
10 responsible to meet to identify and locate these specific
11 disabilities to guarantee that they have access to the
12 procedural protection and the substantive rights that they're
13 entitled to under federal law. So it's not up to the students
14 or the parents to somehow make themselves known to a school or a
15 school district.

16 THE COURT: But the State has to take affirmative
17 steps.

18 MS. SHUAM: Absolutely. And what's so complicated
19 about the child find procedure that the State is relying on in
20 New Orleans is that the child find policy that the defendants
21 are referencing was developed with a traditional school system
22 in mind where essentially you have a state educational agency.
23 You have a number of local school districts who are responsible
24 for a number of individual schools within that school district.

25 When the State made the decision to dismantle that

1 traditional structure in New Orleans it had two options at that
2 point. It had the ability to either directly implement child
3 finds for every single student within New Orleans or it had to
4 insure that the individuals, the 51 LEA's, local education
5 agencies, in New Orleans, that each of those individual schools
6 had the capacity and the competency to implement child finds in
7 an appropriate way. And what's difficult, what's uniquely
8 challenging about the circumstances in New Orleans is that for a
9 charter school their obligation to a student begins and ends
10 with that student's enrollment in their school. They actually
11 don't have any, in their minds, responsibility to a child who
12 might live in the neighborhood, but obviously doesn't attend
13 their school. So essentially there are a number of students
14 with disabilities in New Orleans who's right to child finds to
15 be identified doesn't exist in a meaningful way, and that's a
16 direct consequence of the fact that the policies and procedures
17 again do not map on appropriately in the structure and the
18 framework that exists in New Orleans.

19 THE COURT: Okay. Any response?

20 MS. SNEED: Sure.

21 THE COURT: Before it's all over with, let me make some
22 suggestions of how these issues can be addressed.

23 MS. SNEED: Well, first of all, I know there was a
24 reference to this ESF survey or study about some independent
25 vetted survey, which it is not, I'm not saying it's invalid,

1 it's just that it doesn't have independence in the sense that --

2 THE COURT: Has the State conducted its own survey that
3 would refute what this ESF --

4 MS. SNEED: It has not, because it's been carrying out
5 it's obligations through other means. I wanted to also --

6 THE COURT: Through what other means?

7 MS. SNEED: Well, through its monitoring process
8 technical assistance, the work that it does to assist the
9 schools, all of the schools.

10 THE COURT: Would it be of any interest to the State to
11 look at this ESF to see whether or not it's valid?

12 MS. SNEED: Well, there may be -- have been some
13 informal looking at it. What I was responding to, I don't know
14 that there has been some formal looking to look at every finding
15 in that study to see if it was correct or not.

16 THE COURT: Do you think that it would be -- and you
17 can't speak for your client.

18 MS. SNEED: Right.

19 THE COURT: -- but you are representing your client --
20 do you think it would be a good idea for someone in the know
21 with the State, since the State is in charge of Superintendent
22 Pastorek, in particular, is in charge of overseeing and
23 implementing the law? So do you not think that maybe it would
24 be a good idea that they might, after looking at it, say it's
25 hogwash, okay. But do you not think that it would be worth

1 looking at and studying and then being able to say that it's not
2 worth the paper that it's written on or, hey, maybe it does have
3 some good ideas, and then if anything, this will enable us to
4 assist in our monitoring or implementing what was supposed to be
5 done under the law?

6 MS. SNEED: Yeah, I understand your point. The problem
7 is, I don't -- they may have done that and knowing educators as
8 I know educators they can take in lots of information, but I
9 just can't answer one way or the other about -- I don't want to
10 say they haven't done it.

11 THE COURT: It would be a good idea.

12 MS. SNEED: Yeah. And just decide whether it has any
13 validity, whether these people really have the skills necessary
14 -- you know, what their purpose was doing it, doing, because I
15 understand we're now doing business with the charter schools, so
16 did it relate to wanting to get some work or whatever.

17 One thing, Your Honor, I wanted to point out is that
18 there were due process requests filed for the plaintiffs and
19 then those were withdrawn prior to the filing of this lawsuit.
20 So I wanted to be clear about that.

21 And as to the child find process, it's not like these
22 kids are falling through the cracks. The kids are all in
23 school, and the staff at those schools are looking to see how
24 they are doing and doing an evaluation to determine, if, in
25 fact, they do need IDEA support. Some of them do, and some of

1 them have been identified.

2 THE COURT: Well, it seems to me that child find, those
3 kids that are in schools have been found, but are there kids out
4 there that haven't been found that needs to be found? Isn't
5 that what child find is all about?

6 MS. SNEED: That are wandering the streets that aren't
7 enrolled in school?

8 THE COURT: Sure.

9 MS. SNEED: Well, that's a different -- but if they're
10 in school, then -- and the State does have an obligation to make
11 sure that kids are in school, and so once they're in school,
12 then the staff can look to see and make recommendations if the
13 parents think that they want to have -- their kid needs special
14 ed services, and let's assume that the school refuses, well,
15 then, that would go to due process, you see. I want my child to
16 be evaluated.

17 THE COURT: Sure. Is it not the State's responsibility
18 under the law to find the kids that are not in the school system
19 or is it merely the law that once they're in the school system
20 to determine whether or not they qualify for special ed?

21 MS. SNEED: Well, I think it's both, but we don't have
22 any evidence to show that there are kids just wandering the
23 streets. So I'm sure, you know, like in every school district
24 there's some truant kids or kids who aren't enrolled and aren't
25 in compliance with mandatory enrollment.

1 THE COURT: So what is the State doing about those?
2 Is that not the State's responsibility to be proactive?

3 MS. SNEED: And I don't know what the procedures are,
4 but I just assume that they are doing something, and, for
5 example, knowing Mr. Vallas, as I do, I'm sure he's out there
6 looking and trying to make sure that all the needs are met
7 because I know him personally and he's such an advocate for
8 children.

9 THE COURT: Oh, he's great, but he's only been on the
10 job for what a month? How long has been on the job?

11 MS. SNEED: Oh, Mr. Vallas, he's been here for four
12 years.

13 THE COURT: For four years.
14 Who's the new person?

15 MS. SNEED: Mr. White. Who hasn't started yet. I
16 believe he starts on May 8th.

17 THE COURT: So we're losing Mr. Vallas?

18 MS. SNEED: We are losing Mr. Vallas.

19 THE COURT: I got the names confused.

20 MS. SNEED: But I understand there's some changes going
21 on, but we just don't have any evidence to show that kids are
22 wandering the streets and that the State or the school
23 districts, or the LEA's are not carrying out their
24 responsibility to get children in school.

25 THE COURT: All right. Thanks.

1 I find as it relates to the exhaustion issue that the
2 exception to the requirement of exhausting State administrative
3 remedies applies, and that it would be futile or inadequate when
4 systemic or IDEA failures are involved.

5 Let's look at the second issue raised by the
6 defendants, the second argument.

7 The relief that plaintiffs seek is unavailable as a
8 matter of law. Now, I know that the defendants have argued that
9 when judicial review is available under the IDEA it is only
10 available to redress particular injuries to a particular child.

11 You also argue that the relief that plaintiffs seek is
12 already in place because the defendants have already adopted
13 extensive regulations and policies addressing requirements under
14 the IDEA, and that the plaintiffs have not identified any flaw
15 or legal failure in them.

16 I'd ask you this, you know, 10 minutes ago. You know,
17 I think we all agree that, you know, the law is the law is the
18 law, and we all agree that there are extensive regulations and
19 policies, but what the plaintiffs are alleging is that these
20 policies or these regulations, the law, the IDEA in particular
21 as well as Section 504 ADA. That it's not being implemented by
22 the superintendent or the Department of Education. You do agree
23 that the superintendent is responsible for carrying on the
24 policies. How has he done so beyond what you've already argued?
25 Is there anything additional besides what you've already said?

1 I mean, what you've basically told me and you've done a
2 very good job of telling me all of the procedures that are
3 involved, all the regulations. All of the rules, that's all
4 fine and dandy, but rules are only as good as they are
5 effective, and they're only as effective as they are implemented
6 by the superintendent and the people working for the department
7 of education, so how has he done so? Give me, not the procedure
8 that we can about in all the books, but the actual compliance
9 with the procedure by Superintendent Pastorek and the other
10 folks who are charged with this responsibility.

11 MS. SNEED: Well, in addition to carrying out the
12 monitoring that they are required to under federal law,
13 providing training, which they've done. I know they've done
14 summer training, in addition to providing technical assistance,
15 both formal and informal.

16 THE COURT: What if a person -- let's talk about
17 training. And we might be going off track, but just educate me
18 because we're all trying to learn everything as we go.

19 Let's say that a person, a teacher can't be trained or
20 refuses to allow herself to be trained or himself to be trained,
21 what safeguards are there if this -- and let's say this teacher
22 is a tenure teacher -- what does the superintendent do in those
23 instances, not what is the policy, but what has he in fact done
24 with people who they merely look upon this as a job and not a
25 vocation and they can sit in like lawyers can sit in a CLE or

1 continuing education training all they want, that doesn't mean
2 they're being trained, okay. So what, number one, policy and
3 procedure, so that you can educate me, but two, what
4 implementation or overseeing does the superintendent do to make
5 sure that not only is training taking place, but that is
6 effective, not effective training, but effective from the
7 teacher's end, that not only do they have the opportunity to
8 learn. In other words, how are the bad ones weeded out, if they
9 can be, and if they can't be is that part of the system, a
10 problem of the system, but should the victims of the system be
11 the special kids.

12 MS. SNEED: Well, of course, the bad teachers, whatever
13 that means, can be meted out through the personnel process, but
14 that then is the that would be dealt with by the school district
15 or the LEA in particular. They have authority to do that, and I
16 don't have examples. I can't tell you specifically here. I
17 could tell you in other school districts, but I don't know here
18 where people have been shown the door where they did not do what
19 was required. I don't want to mention -- one comes to mind
20 right now where I know people have been dismissed when they have
21 been found to violate IDEA procedures and polices, but I can't
22 give you an example here. I assume that that may have happened
23 here typhically with personnel issues that are bigger issues.
24 So that clearly is one of the things that can be done.

25 In terms of training, the State people are -- they do

1 provide technical assistance and support. The principals get
2 trained, so that the State can tell, for example, if there's a
3 principal that keeps out and questions about a particular issue
4 maybe that didn't take for that principal, so he needs to
5 provide additional help. I can't cite a school, but I would
6 assume that that in fact happens.

7 There are people at the State level both for charters
8 and special ed that their paths are following up, and they take
9 this very seriously, so I don't want you to take away that
10 they're sitting in Baton Rouge not caring about what's happened.
11 They very much want this system to work and to work for all kids
12 and to make sure they're in compliance with federal and State
13 law.

14 THE COURT: Please educate me again as it would relate
15 to the makeup of the Louisiana Department of Education.

16 We have Superintendent Pastorek and all that. Is there
17 in Baton Rouge a set superintendent of special education or an
18 assistant superintendent? I mean, how does the hierarchy work.

19 MS. SNEED: I'm going to let Ms. Hunt comment and
20 describe to you, since you live there, to describe a little bit
21 about the structure, because then I won't be speculating. I
22 know some titles, but I think it will give you some information
23 that might be helpful.

24 THE COURT: Great. Thank you.

25 MS. SNEED: So explain the structure and the support

1 and the titles of people that support special ed.

2 MS. HUNT: Sure. Absolutely.

3 And also I wanted to mention too. We've also ins -- we
4 have a hotline in place that we started back in December, I
5 believe, particularly for special ed -- particularly for New
6 Orleans and particularly for special education issues, and so
7 when we get calls, we have people at the department who are
8 trained to take those calls and we up follow on them, everyone
9 of them.

10 THE COURT: Is it the State's requirement to be
11 proactive as opposed to being reactive? I mean, it's nice to
12 have to this hotline, okay. How are parents of kids with
13 special needs, how are they advised of that? Is it a bulletin
14 that goes out? Is there any State wide bulletins that are sent
15 out just to special ed kids families saying what their rights
16 are, for example, what remedies they have? And not merely due
17 process remedies, okay, but just their rights in general and
18 information concerning hotlines. I mean, the State can have
19 all these wonderful things, but if people are not made aware of
20 them, then they're no good. So the question I have is, what has
21 the State done in implementing what it already has in place to
22 educate the folks of things that are available to them?

23 MS. HUNT: Right. And we do have the pamphlets. We
24 have it in English. We have it in Vietnamese. We have it in
25 Spanish.

1 THE COURT: What about parents who can't read?

2 MS. HUNT: Well, it could be read to them.

3 THE COURT: How would they know about it?

4 MS. HUNT: How would they know about it?

5 THE COURT: Yeah. How would they know about these
6 pamphlets?

7 MS. HUNT: Well, they're available through the school
8 -- if you're asking about the ones that are not yet in school,
9 how they would know about it?

10 THE COURT: I mean, I hear about what you're saying
11 about this hotline. This is what triggered this question that I
12 have. The hotline is reactive, we have a problem, we report the
13 problem. What does the State have in place besides monitoring,
14 which I still haven't figured out what that is at this point?
15 What is the State doing proactively to avoid people needing to
16 use the hotline? It's great to have the hotline, and thank you
17 for that on behalf of these families, but the question is what
18 is the state doing to implement what it is required to implement
19 under the law and not just merely monitor? I guess that's what
20 I mean what. What is the definition of monitoring?

21 MS. HUNT: Okay. Well, you know, most of your child
22 finds is not just, you know, waiting for something to happen. I
23 mean, we're being proactive in going out, and --

24 THE COURT: Tell me what child find you're doing, the
25 State is doing.

1 MS. HUNT: I'm probably not the one to answer that
2 question, special ed isn't, but I know that we go into districts
3 and there's advertising done. It's done on television. It's
4 done on radio, you know, that sort of thing, so even if parents
5 couldn't read --

6 THE COURT: I watch TV, but I've never seen anything
7 about that. I mean, I'm just curious.

8 MS. HUNT: Yeah, well, I don't have a television
9 myself, so I haven't seen it either.

10 THE COURT: I've never heard it on radio, maybe I'm
11 listening to the wrong channels. But if that is an obligation
12 of the State to the families of kids with special needs, child
13 finds, since that was a major issue that was raised, how is it
14 implemented? I mean, you say radio. I think they're doing a
15 good job. I've never heard it. TV, I've never seen that on it
16 at all, so what else is the State doing for child time for
17 example? I mean, you give me two examples, which I can identify
18 which I haven't seen. So give me some other examples.

19 MS. HUNT: Okay. I know we work with DEFS.

20 THE COURT: What is that?

21 MS. HUNT: The Department of Child and Family Services.
22 It used to be DSS, the Department of Social of Services.

23 THE COURT: Okay.

24 MS. HUNT: And with the Department of Health and
25 Hospitals, DHH to identify children early on like in preschool

1 or in other settings where they give us and we exchange
2 information amongst the departments. So they may have
3 information with Health and Hospitals, you know which
4 children --

5 THE COURT: Okay. So what does the State -- and if you
6 don't know, you don't know, okay -- what does the State
7 proactively do? Let's say that they have identified a kid who's
8 received its early intervention, services, whatever they
9 receive, and, so they're identified by another State agency,
10 okay.

11 MS. HUNT: Uh-huh.

12 THE COURT: And let's say that the other State agency
13 does what its supposed to do, and apparently what you're telling
14 me what they're supposed to do is DHH, and I'm getting all of
15 these acronyms confused, there's so many out there -- and let's
16 say that DHH -- well, let me ask you this: Is there a procedure
17 involved that DHH notifies the Louisiana Department of Education
18 of say it's 50-2 year olds, or 3 year olds or 4 year olds, or --
19 and I say 50. I'm sure there's 500, unfortunately, you know.
20 2500, okay. But when children are identified as having special
21 needs, they're not identified necessarily by -- I'm not talking
22 about what you have to do to identify them, I'm talking DHH
23 identifies these kids.

24 MS. HUNT: Uh-huh.

25 THE COURT: Okay. As part of what you have called

1 child find, does DHH contact the Department of Education and say
2 we have a group, we have just identified 500 new kids with
3 special needs, so is there that procedure takes place?

4 MS. HUNT: Yes.

5 THE COURT: So now let's say that the Louisiana
6 Department of Education has now learned of 500 new kids with
7 special needs in New Orleans from DHH, what then does the
8 Louisiana Department of Education do?

9 MS. HUNT: Okay. It's my understanding, and like I
10 said, this isn't -- I'm not winning here.

11 THE COURT: I mean, if we're talking about child find, I
12 think this is important, don't you?

13 MS. HUNT: I agree. I agree.

14 THE COURT: Okay. All right.

15 MS. HUNT: And it's my understanding when we get that
16 information, then we have contact with the parents to tell them
17 what they're --

18 THE COURT: How? Not by radio or TV, because I haven't
19 seen it.

20 MS. HUNT: No, No, no. That would be directly to them,
21 because at that point we have a particular child and we know who
22 they are and who their parents are and we can contact the
23 parents.

24 THE COURT: How are they contacted, to your knowledge,
25 if you know?

1 MS. HUNT: I don't know. I would have to get that
2 information for you.

3 THE COURT: Okay. I mean, I'm just curious because
4 child find is an issue.

5 MS. HUNT: Yes.

6 THE COURT: All right. Thank you very much.

7 MS. HUNT: Did you want to know more about
8 the organization?

9 THE COURT: Yes. Please, go ahead and tell me anything
10 you want to tell me.

11 MS. HUNT: Well, actually recently we reorganized the
12 Department so that instead of working in silos before there was
13 like the special ed and, you know, each side was in their own
14 little area, so that everybody is cross trained so it goes
15 across all areas and we have one of our goal offices that
16 contains federal programs and the office of parental options.
17 It used to be just charter schools and now the office of
18 parental options is much broader than that, and so those folks
19 all work together. The people at the charter schools. The
20 people who work with the traditional LEA's and traditional
21 schools and the special education and the other federal programs
22 as well. So that everybody is -- so nobody is getting left out
23 is what we're trying to do.

24 THE COURT: Okay. Go ahead. Great. Thank you very
25 much.

1 MS. HUNT: Okay. Thank you.

2 THE COURT: Let me ask plaintiff counsel.

3 So the second argument raised by defendants is the
4 relief that plaintiffs seek is unavailable, as a matter of law.
5 Obviously you disagree with that? Respond.

6 MS. SHUAM: Absolutely, Your Honor. I think that it's
7 very clear in the case law that students are entitled to pursue
8 systemic remedies to address systemic violations of an education
9 system.

10 There's numerous cases that are cited in the plaintiffs
11 brief. I realize that the Court has already made a decision on
12 the first issue and moved on, but I want to make a couple of
13 corrections to my statements and to a couple of comments that
14 were made earlier.

15 THE COURT: Okay.

16 MS. SHUAM: First of all, Your Honor, I misspoke when I
17 indicated that none of the OSBP schools are actually
18 incorporated in our complaint, because, in fact, it is a
19 complaint that is directing the failure of the State to meet its
20 obligation with respect to all of the schools in New Orleans.
21 So that is a correction I want to make on my own behalf.

22 I also want to be very clear that students are in fact
23 being denied access to schools and educational opportunities on
24 the basis of their disability.

25 We have a alleged in paragraphs 56, 57, 58, and 59 --

1 THE COURT: Now, is this going to the ADA in Section
2 504, because we haven't --

3 MS. SHUAM: Yes, please take a look at our complaint --

4 THE COURT: We haven't gotten to that yet though.

5 That's the fourth argument as it relates to the ADA in
6 Section 504. I mean, we can address it now if you'd like.

7 MS. SHUAM: No, Your Honor. I'm actually trying to
8 address the fact that there are students out of school. At the
9 time this complaint was filed, the titled named plaintiff, P.B.
10 was actually not in school, and in addition --

11 THE COURT: All right. Tell me where that is again in
12 the complaint.

13 MS. SHUAM: I believe it is paragraph 57, page 18, Your
14 Honor.

15 THE COURT: Paragraph 56, page 18. "Had LDE
16 investigated the exclusion of students with disabilities at
17 Pierre A. Capdau Charter School it would have uncovered the
18 plight of students like Plaintiff P.B., who is identified as a
19 student with a disability under Section 504. On October 3,
20 2010, a school administrator told his mother P.B. was no longer
21 welcome to return to school because of a manifestation of his
22 disability. Since that time, P.B.'s mother has attempted to
23 locate a New Orleans public school that will enroll him. Every
24 school has turned her away and P.B. remains out of school to
25 this day." Okay.

1 MS. SHAUM: That was at the time of the filing of this
2 complaint.

3 In addition, the circumstances of plaintiff, T.J. are
4 described in paragraph 57.

5 THE COURT: "Plaintiff T.J., a student with dyslexia
6 and ADHD, has also been denied admission to a number of schools
7 that post low enrollment rates for students with disabilities.
8 T.J.'s mother attempted to enroll him in A.P. Tureaud Elementary
9 School, Nelson Elementary School, Abramson Science and
10 Technology Charter School, Sarah T. Reed Elementary School, and
11 Gentilly Terrace Charter School. All five schools refused to
12 enroll T.J. because of his disability. He is currently not a
13 attending school."

14 Okay. This lawsuit was filed on October 26, 2010, and
15 we're now in late April. That's six months ago this was filed.
16 Is T.J. in school today?

17 MS. SHAUM: Your Honor, T. J. Is actually enrolled in
18 school.

19 THE COURT: Okay.

20 MS. SHUAM: I think that what the Court needs to decide
21 is whether the facts which are alleged in the complaint and
22 describe the circumstances of these individual plaintiffs at
23 that time are sufficient to state a claim to which they are
24 entitled to relief under law.

25 I would also add that there's been a lot of discussion

1 about changed circumstances both on the individual plaintiffs
2 level as well as in terms of what the State is implementing in
3 terms of its policies and procedures, but what I would note for
4 the Court's information, since we have sort of gone beyond the
5 actual complaint itself, is that many of the circumstances
6 continue to evolve from these students, so even since the filing
7 of the complaint some of the plaintiffs since then have been
8 excluded from school again, so things are very much in
9 transition.

10 THE COURT: Let me ask you this, counsel for the
11 defense, if you can answer that.

12 I'm assuming for the purpose of the motion to dismiss
13 that all of the allegations contained herein are true because
14 obviously we have to determine if there's a cause of action
15 under federal law, etcetera. Okay. So for the purpose of
16 today's hearing, I believe everything that's written. Now, it's
17 going to be a matter of proof some time in the future. Is it
18 really fair for this family of T.J. to go to five different
19 schools to be continued to be turned away. Is that what the
20 system is all about? I mean, now, let's assume this is true, is
21 this proper procedure? Or if there was a proper procedure,
22 would this have been avoided? I don't know the answer, I need
23 to be educated.

24 MS. SNEED: And I don't know that to be true.
25 Obviously that will be developed.

1 THE COURT: Let's assume that this is true for purposes
2 of -- again, you want to kick the plaintiffs out of court today,
3 motion to dismiss. You're out of here. Okay. So in so doing,
4 we have to look at this complaint, and I have to determine if
5 there is a cause of action. I have to determine if, you know,
6 the administrative remedies, you know, the whole deal, or is the
7 remedies a matter of law, you know, which is what we're on now.

8 Let's assume for the time being, they might not be able
9 to prove it, they lose down the road, but today, motion to
10 dismiss, is this following proper procedure that a student
11 turned away for these reasons, let's assume that they're true
12 that they have to go to grabble, they have to go to five
13 different schools, and then finally, six months later they're
14 enrolled in school, that's great, okay, but is this what the law
15 was set out to accomplish, that families have to do this.

16 MS. SNEED: Well, whether or not it's what the law was
17 set out to accomplish, obviously I think all of us want the kids
18 to be in school.

19 THE COURT: This appropriate implementation of the law
20 by Supereminent Pastroek?

21 MS. SNEED: If, in fact, that was true, obviously I
22 think we all as human beings would have issue with it.

23 THE COURT: Okay. Now, if this was true, in this case
24 and perhaps in other cases of this punitive class, would you
25 feel that this is a systemic violation of the IDEA or of Section

1 504 or of ADA?

2 MS. SNEED: I would not.

3 THE COURT: You would not. Why not?

4 MS. SNNED: Because I would think that that's something
5 that could be addressed through the process.

6 THE COURT: How much more addressing do they need to
7 do? He's been kicked out of five schools. Did the process
8 work, I mean, or was it futile?

9 MS. SNEED: He's now enrolled in school.

10 THE COURT: Six months later, after grabbling. After
11 going to five different schools.

12 MS. SNEED: Well, I don't know that he was grabbling.

13 THE COURT: Okay. Bad choice of term, but it's not a
14 bad choice of term. Momma, he's kicked out of school. He's got
15 to go to another school. Let my son in. Kicked out of that
16 school, another school, another school. That might not be your
17 definition of grabbling; that's my definition of grabbling.

18 MS. SNEED: Yeah, it's hard to respond hypothetically
19 to that, Your Honor.

20 THE COURT: No, no, this isn't a hypothetical. This
21 is a fact that I must under the law deem as true for purposes of
22 your motion to dismiss.

23 MS. SNEED: But there's no right that any kids have any
24 particular school.

25 THE COURT: Agreed.

1 MS. SNEED: Whether it's, you know --

2 THE COURT: Agreed. Agreed. He's got a right to --

3 MS. SNEED: To go to a school.

4 THE COURT: A school. Now, you're telling me it's the
5 obligation of the family of this person to go from school to
6 school, public school to public school until a school finally
7 accepts this child; is that what you're telling me the law
8 requires?

9 MS. SNEED: Well, I'm saying that that's a part how
10 choice works that parents make application, parents choose to
11 go, the schools maybe full.

12 THE COURT: As I read this he's been kicked out. He's
13 been refused enrollment.

14 MS. SNEED: I don't think he was kicked out. He was
15 refused enrollment.

16 THE COURT: Okay. That's worse. What's worse? They
17 didn't even give him a chance to go, if this is true.

18 MS. SNEED: That assumes that's true. That assumes
19 it's true.

20 THE COURT: Okay. The second defense argument is the
21 relief that plaintiff seeks is unavailable as a matter of law, I
22 disagree with and is not grounds for dismissal at this juncture.

23 The third ground by defense, the IDEA claims are not
24 supported supported by sufficient factual allegations.

25 Well, again I have read this in great detail, this 60

1 page complaint, and again for purposes of this motion to
2 dismiss, I have to take what is included in this as true. It
3 might turn out not to be true later on, plaintiffs lose, okay.
4 But today I have to consider this to be true. Okay. How do you
5 argue that the IDEA claims are not supported by sufficient
6 factual allegations?

7 And why don't we do this to save time.

8 Your fourth argument is that Section 504 ADA claims are
9 not supported by factual allegations as well. Again, in reading
10 this, I tend to disagree with the State's argument on this
11 point, but convince me what I'm missing somewhere because these
12 facts as stated are pretty obvious to me, but go ahead, please.

13 MS. SNEED: Well, on the argument about they're not
14 supported by insufficient factual allegations, Your Honor, for
15 example, as we state in our brief, P.B. is a 504 kid, that --
16 and bipolar is not an IDEA. ADHD is under other health
17 impairment if it results in limited or where alertness with
18 respect to educational environment and adversely affects the
19 child's performance, what we have are generalized allegations
20 about educational setbacks, but we don't have a causal
21 connection between ADHD and the setback.

22 THE COURT: And I think that the plaintiffs have
23 clarified this issue. In their briefs they clarify this Section
24 504, and ADA their claims are limited to students with
25 disabilities being denied enrollment in educational programs

1 solely on the basis of a disability. So they're admitting that
2 this Section 504 ADA claims do not apply to all members of the
3 class; is that accurate, plaintiffs?

4 MS. SNEED: Yes.

5 THE COURT: I'm looking at plaintiffs.

6 MS. SNEED: Oh, I'm sorry.

7 SHAUM: Yes, Your Honor.

8 MS. SNEED: That's how it reads.

9 THE COURT: Okay. But beyond these now admissions made
10 by the plaintiffs in their briefs in preparing for today's
11 hearing, beyond that, I mean, I see some pretty clear-factual
12 allegations are pretty detailed to me.

13 MS. SNEED: Well, but for each of them --

14 THE COURT: You've got to prove it. It hasn't been
15 proven yet.

16 MS. SNEED: Well, for P.B., A.J., P.J., K.J., L.W., for
17 example, there has to be a casual connection between the
18 disability and the quote educational setbacks, and that hasn't
19 been proven.

20 THE COURT: Well, that's going to be their burden of
21 proof at their trial. I'm talking about factual allegations as
22 contained in the complaint.

23 MS. SNEED: Right. But I don't believe that saying
24 there were educational setbacks is sufficient, sufficient
25 factual allegations. And then with regard to the dismissal of

1 the 504 and Title II claims, you know, similar arguments, their
2 allegations just are too general and not specific enough to
3 support their claim.

4 THE COURT: Thanks. You want to respond briefly?

5 MS. SHUAM: Sure, Your Honor.

6 First of all, with respect to the IDEA claims.

7 What we clarified in our brief, I hope, is that the
8 fact that there are five plaintiffs who are essentially Section
9 504 plaintiff, and that are not designated as IDEA plaintiffs is
10 simply demonstrative of the harm which they're alleging, which
11 is that the State has failed to adequately implement these child
12 find causes and procedures.

13 And I want to take just a couple of minutes, if you'll
14 indulge me, to talk a little bit about child finds because I
15 know there was a lot of discussion about that earlier.

16 Essentially I was sort of overly merely focused on my
17 earlier comments about child find in speaking about it as though
18 it only applies to students who were not yet within the school
19 system or not yet found by the school system. That obligation
20 on the part of the State actually continues throughout a child's
21 education. So the fact that a student is identified as a
22 student with a disability that qualifies them for a Section 504
23 plan might, in fact, still require that the State and the local
24 educational agencies pay attention to ongoing failures or
25 academic difficulties that that child has and to make an

1 appropriate referral to special educational services if they
2 need more than a just accommodations of their disability. If
3 they, in fact, need specialized educational services and related
4 services in order to access their curriculum.

5 And in addition, I think that it's very clear from this
6 complaint, that plaintiffs are also being essentially subject to
7 inappropriate school discipline, school discipline procedures
8 that are in direct violation of federal law because the schools
9 have failed to appropriately identify them as students with a
10 disability and are punishing them essentially for manifestation
11 of their disability.

12 With respect to the -- essentially, the student
13 discrimination claim, Your Honor, it's very clear from the face
14 of the complaint that, for example, two of these plaintiffs N.F.
15 and M. M. who are multiply disabled children essentially denied
16 access to educational opportunities not just at one school, but
17 at multiple schools.

18 The Court asked a number of questions of defense
19 counsel about the implementation of special education in the
20 unique framework of public education in New Orleans, and one of
21 the things that it has an unintentionally devastating
22 consequence and has further isolated students with disabilities
23 and their families in New Orleans was the elimination of
24 essentially the enrollment process. Essentially what the Court
25 has picked up on is the fact that trying to enroll and register

1 your child in school basically for both general education, but
2 specifically for special education students is like a game of
3 musical chairs, and unfortunately far too often people with
4 disabilities and their families are not allowed to speak in a
5 classroom when the music stops playing, and that is absolutely
6 unacceptable.

7 THE COURT: All right. Thank you.

8 I'm denying the motion to dismiss filed by the
9 defendants.

10 We need to address a number of issues now.

11 The plaintiffs filed about 1:15 this morning
12 electrically a motion for preliminary injunction, which I have
13 not read. I'm sure counsel for the defendants have not yet read
14 this. I note that it is set for hearing on May 25th 2011. I'm
15 just talking procedurally now. We also have this outstanding
16 motion for class certification. I'm assuming, and correct me if
17 I'm wrong, but I'm assuming that you want to address this
18 preliminary injunction before you want to address the class cert
19 or not necessarily.

20 MR. CAVANAUGH: Not necessarily, Your Honor. We
21 essentially picked the May 25th date -- Bill Cavanaugh, Your
22 Honor. As simply a controlled date last night. We wanted to
23 have an opportunity to sit down with the State and with the
24 Court, as I mentioned last time, to come up with an expedited
25 discovery schedule where we can deal with class issues. We can

1 dal with the P.I.

2 THE COURT: Because now we have two issues. We have
3 the injunction issue, and we also have the class cert issue.
4 Where do you want to go with your discovery, class cert first or
5 injunction first or do you want to do them both?

6 MR. CAVANAUGH: Your Honor, I actually think we can do
7 them both. I don't think the class discovery is going to take
8 us beyond the scope of the PI. We've tried to focus on what's
9 really important here to start to begin to get some change here.

10 THE COURT: Give us some idea of what discovery you're
11 looking for.

12 MR. CAVANAUGH: Certainly, we'll want to take some
13 depositions of the senior people who are most responsible for
14 the monitoring, the technical assistance, and implementing child
15 finds. We'll want there -- I suspect, Your Honor, this subject
16 has been widely discussed among the defendants. They say they
17 set out these policies and procedures. They've been cited for
18 noncompliance. We're hearing wide spread-stories of
19 noncompliance. I suspect their internal documents will end up
20 telling us a great deal about what their short comings are as a
21 result of the structure that they've created.

22 THE COURT: Well, I don't see how you can possibly get
23 all this discovery done within a month.

24 MR. CAVANAUGH: No.

25 THE COURT: We have a hearing on May 25th.

1 MR. CAVANAUGH: No, Your Honor, we've made clear we're
2 looking for an evidentiary hearing and expedited discovery. I
3 didn't mean to suggest by the May 25th date that I thought that
4 we'd actually have an evidentiary hearing on that date, Your
5 Honor. I guess, I knew we were filing in in the middle the
6 night and I didn't want to suggest to the Court that I thought
7 the State or the Court would be prepared to talk about it today.

8 THE COURT: Sure. Here's what I'd like for you all to
9 do because another issue that needs to be addressed is the
10 deadline for the opposition for defendants to file their
11 opposition to the class certification as well. I'm not trying
12 to jam anybody. I'm not going to jam defendants. I'm not going
13 to jam the plaintiffs. What I'm hearing you telling me,
14 counsel, for plaintiff is that you feel that this is going to
15 require an evidentiary hearing as opposed to a hearing on
16 briefs, is that what I'm hearing?

17 MR. CAVANAUGH: Absolutely, Your Honor.

18 THE COURT: Okay. Fine. Here's what I'd like for both
19 of the parties to do.

20 Y'all are going to know what y'all need to do to
21 properly prepare more than I do at this point, so I'm going to
22 want you all to prepare a proposed case management order. You
23 know how fast you want to move because obviously you want an
24 injunction.

25 MR. CAVANAUGH: Right.

1 THE COURT: Okay. But by the same token, I'm not going
2 to put this so close to now that it's going to prejudice the
3 State because the State has the opportunity and the right
4 obviously to prepare a proper defense to both the injunction as
5 well as to the class cert hearing, obviously, so the best thing
6 to do, instead of me being iron handed at this time -- I might
7 if you all can't agree, okay -- but at this time, I'm going to
8 leave to it up to you guys to prepare the deadlines within which
9 you all need to operate so that I can give you all a hearing
10 date. I might just give you all a hearing date sooner than
11 later. However, not so soon that the defendants are not going
12 to be able to be properly prepared to defend the allegations
13 that you guys will make.

14 MR. CAVANAUGH: As I said, Your Honor, we think we need
15 some discovery. I know they'll need some discovery. It will
16 take some time and that's why we want to work with them to come
17 up with something, an agreeable schedule and then if we can't
18 come up with an agreeable schedule, we'll present two proposals
19 to Your Honor.

20 THE COURT: Okay. What I would like for you to do, I'm
21 going to give you a deadline of -- I'm going to give you the
22 exact date -- but I'm going to give you the deadline of some
23 time in the middle of May just to get together to come up with a
24 proposed case management order. That will give you about three
25 weeks or so just to meet and talk about it. You know, tell the

1 defendants specifically what discovery you need. The defendants
2 will tell you specifically what discovery they need. Is that
3 fair enough?

4 Okay. Let's make it the deadline of Friday, May 20th,
5 to submit to the Court a proposed case management order. Now,
6 if you have not agreed to one I want to be notified no later
7 than May 20 and then the ball's going to be in my Court, and I'm
8 going to do what I need to do.

9 MR. CAVANAUGH: And, Your Honor, optimistically, we
10 can reach agreements on everything. If we can't on the 20th,
11 would the idea be that we would submit two prop -- we would say,
12 Your Honor, we haven't been able to agree on everything. I'm
13 sure we can agree on many things, but if there is a
14 disagreement, we can each submit a proposal and then, Your
15 Honor --

16 THE COURT: My job is to administer justice, okay.
17 Now, your job is to represent the plaintiffs. Well, not your
18 job, but what you want is a hearing date as soon as possible.

19 MR. CAVANAUGH: It's my vocation.

20 THE COURT: That's your vocation, and the defendants
21 have just as much right to be in court, and so that they're not
22 prejudiced, they have a right to do their discovery as well.
23 I'm all ears to what plaintiffs have to say and to what
24 defendants have to say. As much as you guys can agree to as
25 much as possible, we know you want your injunction hearing

1 yesterday as opposed to tomorrow.

2 MR. CAVANAUGH: Right.

3 THE COURT: But we know that they're getting with their
4 State Bureaucracy. They're going to have to get documents that
5 I suspect are going to be pretty cumulative, which is what I'm
6 hearing what you're telling me, and they're going to have the
7 opportunity to do that as well. So with that said -- let me do
8 this. Let me give you all until the end of May, because what
9 I'm thinking about it might be that much more difficult for you
10 all to come up with -- so May 31st come up with a proposed case
11 management order. Obviously, I would like to try the class cert
12 hearing and/or the motion for the preliminary hearing this year.
13 Okay. So keep that in mind when you prepare your proposed case
14 management order. You've both got to get together to decide
15 approximately how long you think this hearing will be. So
16 obviously what that's going entail is y'all coming up with as
17 many stipulations as you can possibly come up with.

18 You don't have to prepare the stipulations by the end
19 of May, but just communication, okay.

20 Let's go off the record now.

21 (OFF-THE-RECORD-DISCUSSION)

22 (ON THE RECORD)

23 MS. SNEED: Just one thing, Your Honor.

24 THE COURT: Sure.

25 MS. SNEED: We appreciate you knowing that the State

1 cares about the children; that's a very important thing.

2 THE COURT: And their families, sure.

3 MS. SNEED: All us as well. You know, we really want
4 what's best for the children.

5 THE COURT: I know that. I know that. We all do.

6 MR. CAVANAUGH: Thank you, Your Honor.

7 THE COURT: Thank you all very much.

8 THE MARSHAL: All rise.

9 THE DEPUTY CLERK: Court's in recess.

10 * * * * *

11 C E R T I F I C A T E

12
13 I, Victor D. Di Giorgio, Official United States Court
14 Reporter in and for the Eastern District of Louisiana, do hereby
15 certify that the foregoing proceedings were taken down by me in
16 shorthand at the time and place aforesaid, transcribed under my
17 personal direction and supervision, and that the preceding pages
18 represent a true and correct transcription, to the best of my
19 ability and understanding.

20

21

22

23

S/Victor D. Di Giorgio
Victor D. Di Giorgio, CCR
Official U.S. Court Reporter

24

25