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*. JOHN WHITE, *et al.*, *Defendants*.	Civil Case No. 2:10-cv-04049 Section A Judge Jay C. Zainey Magistrate Judge Karen Wells Roby

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR
RENEWED MOTION FOR CLASS CERTIFICATION

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ABBREVIATIONS

The following abbreviations are used in this brief:

ADA	Americans with Disabilities Act
BESE	Louisiana Board of Elementary and Secondary Education
BIP	Behavioral Intervention Plan
CAP	Corrective Action Plan
FBA	Functional Behavioral Assessment
FAPE	Free Appropriate Public Education
ICAP	Intensive Corrective Action Plan
IDEA	Individuals with Disabilities Education Improvement Act of 2004
IEP	Individualized Education Program
LDOE	Louisiana Department of Education
LEA	Local Educational Agency
MDR	Manifestation Determination Review
OPSB	Orleans Parish School Board
OSEP	Office of Special Education Programs
RSD	Recovery School District
SEA	State Educational Agency

PRELIMINARY STATEMENT

In the aftermath of Hurricane Katrina, the Louisiana Department of Education has conducted the most expansive experiment with public education ever executed. New Orleans' traditional public school system has been dismantled and replaced with a wholly decentralized network of 62 separate school districts, without any single local administrative entity having direct control over all of the city's schools.[1] This transformation, orchestrated by the State Defendants, has made the New Orleans public education system unlike any other Louisiana school district—indeed, unlike any other in the United States. But over the course of the past eight years, these changes to the basic delivery of public education have yet to benefit New Orleans students with disabilities.

The system for providing special education in New Orleans is thoroughly broken. The State Defendants are responsible for this system, and for ensuring that children with disabilities are afforded their right to a free appropriate public education. But the State Defendants are failing to comply with their statutorily imposed duties to monitor, supervise, and remediate known problems with special education in New Orleans, and to ensure compliance with federal prohibitions against the discrimination of students with disabilities.

As a result of the State Defendants' unlawful policies and failures to fulfill their statutory duties, New Orleans students with disabilities are not receiving mandatory evaluations for special education; are being disciplined without regard for their procedural protections; are being denied access to important related services; and are experiencing discrimination and exclusion from public schools. Plaintiffs can no longer wait to realize the same educational opportunities

[1] The number of LEAs and the number of charter schools operating in New Orleans have grown annually since the filing of the complaint. (Compl. ¶¶ 32-35.) The numbers cited in this brief are based on the numbers for the 2012-2013 school year. *See* Declaration of Eden B. Heilman Ex. 1 (hereinafter "Ex. _").

afforded to their peers who lack disabilities, and they can no longer wait to seek an end to the State Defendants' neglect and inaction.

The breadth and extent of the State Defendants' violations of the rights of students with disabilities is reflected in Plaintiffs' seven proposed subclasses. Each subclass contends that a single policy or practice of the State Defendants has resulted in widespread violations of rights guaranteed by the IDEA, Section 504, or Title II. Plaintiffs respectfully request that the Court certify their proposed subclasses.

PROCEDURAL POSTURE

Plaintiffs commenced this action nearly three years ago under the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA"), 20 U.S.C. § 1400 *et seq.*, Section 504 of the Rehabilitation Act ("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*. Plaintiffs originally moved to certify a class on October 26, 2010. (D.E. 2). That motion was dismissed on November 3, 2010 because "no defendant [had] made an appearance, and issue [had] not been joined." (D.E. 6). Following Defendants' appearances, Plaintiffs reasserted their motion for class certification on January 25, 2011. (D.E. 64). On August 16, 2011 Defendants filed an opposition to class certification. (D.E. 106-1). The case was stayed for settlement purposes and the ruling on the motion was held in abeyance. (D.E. 118, 119). Following the lifting of that stay and extensive subsequent discovery, Plaintiffs now renew their motion for class certification.

LEGAL STANDARDS

Plaintiffs' complaint initially requested that this Court certify a class of approximately 4500 "present and future New Orleans students who are identified or should be identified as students with disabilities" pursuant to the IDEA, Section 504 of the Rehabilitation Act, and Title

II of the Americans with Disabilities Act. (Compl. ¶ 26.) Pursuant to recent jurisprudence regarding Rule 23 class action requirements, Plaintiffs now seek certification of seven subclasses of children, five bringing claims under the IDEA, and two under Section 504 and Title II of the ADA. To be certified, each subclass must meet all of the requirements of Rule 23(a) and one of the standards set forth in Rule 23(b). *See* Fed. R. Civ. P. 23(a) & (b).

A. Class Certification

Pursuant to Rule 23(a), a party seeking class certification must demonstrate that:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). *See also Funeral Consumers Alliance, Inc. v. Serv. Corp. Int'l*, 695 F.3d 330, 345 (5th Cir. 2012). The district court has "wide discretion" in determining whether to certify a class. *Allard v. Anderson,* 260 F. App'x 711, 716 (5th Cir. 2007). When certifying a class, the Court must "look beyond the pleadings to understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues.'" *M.D. ex. rel Stukenberg v. Perry*, 675 F.3d 832, 837 (5th Cir. 2012) (quotation omitted). However, "Rule 23 grants courts no license to engage in free-ranging merits inquires at the certification stage. Merits questions may be considered to the extent—but only to the extent —that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1194-95 (2013). Furthermore, "an evaluation of the probable outcome on the merits is not properly part of the certification decision." *Id.* (quotation omitted).

1. Numerosity

"In order to satisfy Rule 23(a)(1)'s numerosity requirement, the mover typically must

show that joinder is impracticable through some evidence or reasonable estimate of the number of purported class members." *In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico*, 910 F. Supp. 2d 891, 911 (E.D. La. 2012). While there is no set number at which joinder becomes impracticable, typically a class numbering more than forty "should raise a presumption that joinder is impracticable." *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999) (quotation omitted). Plaintiffs need not establish the precise number of members of a proposed class, and "the court may make common sense assumptions to support a finding of numerosity." *Susan J. v. Riley*, 254 F.R.D. 439, 458 (M.D. Ala. 2008) (internal quotations omitted). Where exact size of the class is within defendant's control, it is "permissible for the plaintiffs to rely on reasonable inferences drawn from the available facts." *German v. Fed. Home Loan Mortg. Corp.*, 885 F. Supp. 537, 552-553 (S.D.N.Y. 1995).

Specific features of a proposed class also affect the practicability of joinder. First, the inclusion of future, unknown class members will make joinder impracticable. *Jack v. Am. Linen Supply Co.*, 498 F.2d 122, 124 (5th Cir. 1974) (per curiam); *see also Jones v. Diamond*, 519 F.2d 1090, 1100 (5th Cir. 1975). Second, classes with revolving membership render joinder impracticable. *J.D. v. Nagin*, 255 F.R.D. 406, 414 (E.D. La. 2009); *see also Ray M. by Juana D. v. Bd. of Educ. of City Sch. Dist. of City of N.Y.*, 884 F. Supp. 696, 705 (E.D.N.Y. 1995).

2. Commonality

"Rule 23(a)(2) requires that all of the class members' claims depend on a common issue of law or fact whose resolution 'will resolve an issue that is central to the validity of each one of the claims in one stroke.'" *M.D.*, 675 F.3d at 840 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011)). Commonality requires that class claims arise from the same type of injury and "depend upon a common contention," but even "a single common question" will satisfy commonality under Rule 23(a). *Wal-Mart*, 131 S. Ct. at 2551, 2556.

Under *Wal-Mart*, the commonality inquiry focuses on the uniformity of the defendant's actions or inactions. 131 S. Ct. at 2551. In cases involving the rights of individuals with disabilities, commonality is demonstrated where the defendant acts or fails to act in a way uniformly affecting the entire class, regardless of inevitable variations in the types and severity of disability among class members. *See, e.g.*, *Lane v. Kitzhaber*, 283 F.R.D. 587, 597 (D. Or. 2012) (differences in the needs of individuals with disabilities does not preclude certification); *Chester Upland Sch. Dist. v. Pennsylvania*, 2012 WL 1473969, at *4 (E.D. Pa. Apr. 25, 2012) (finding that IEPs do not preclude certification of a class when claims are directed to practices that result in the denial of FAPE to the entire class); *Gray v. Golden Gate Nat'l Recreation Area*, 279 F.R.D. 501, 508-10 (N.D. Cal. 2011) (commonality met by general policies and practices of failing to address access barriers in ADA case, despite differing types and levels of disabilities of class members).

3. Typicality

"The test for typicality . . . is not demanding." *Lightbourn v. Cnty. of El Paso, Tex.*, 118 F.3d 421, 426 (5th Cir. 1997). A named plaintiff's claims are typical of the class when they "arise from the same event or practice or course of conduct" as the other proposed class members, and are "based on the same legal theory." *Baby Neal for & by Kanter v. Casey*, 43 F.3d 48, 58 (3d Cir. 1994); *see also M.A. ex rel. E.S. v. Newark Pub. Schs*, 2009 WL 4799291, at *8 (D.N.J. Dec. 7, 2009) ("[T]he jurisprudence is clear that such factual differences in how the alleged systemic delay affected any particular student, including the named plaintiffs does not defeat typicality. It remains that their claims all derive from the same allegedly unlawful and systemic non-compliance with the IDEA's child find . . . obligations.").

4. Adequacy of Representation

To demonstrate adequacy of representation, a plaintiff must show that plaintiff's counsel

has "the zeal and competence" to represent the class, that the proposed class representative demonstrates "the willingness and ability" to take an active role in and control the litigation, and that no "conflicts of interest [exist] between the named plaintiffs and the class they seek to represent." *Feder v. Elec. Data Sys. Corp.*, 429 F.3d 125, 130 (5th Cir. 2005); *see also Berger v. Compaq Computer Corp.*, 257 F.3d 475, 479 (5th Cir. 2001). Differences between named plaintiffs and class members are relevant only if "those differences create conflicts between the named plaintiffs' and the class members' interests." *Id.* at 480.

5. Rule 23(b)(2)

Rule 23(b)(2)'s "focus on injunctive and declaratory relief presumes a class best described as a homogenous and cohesive group with few conflicting interests among its members." *Rodriguez v. Countrywide Home Loans, Inc.*, 695 F.3d 360, 365 (5th Cir. 2012) (quotation omitted). Certification of a Rule (b)(2) class "centers on the defendants' alleged unlawful conduct, not on individual injury." *Id.* The Fifth Circuit has stated that the 23(b)(2) class "is an effective weapon for an across-the-board attack against systemic abuse." *Jones v. Diamond*, 519 F.2d 1090, 1100 (5th Cir. 1975), *disapproved in part on other grounds by Gardner v. Westinghouse Bd. Co.*, 437 U.S. 478 (1978). "The court may certify a class under Rule 23(b)(2) if 'the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.'" *Bolin v. Sears, Roebuck & Co.,* 231 F.3d 970, 975 (5th Cir. 2000). Civil rights cases, such as this one, "against parties charged with unlawful, class-based discrimination are prime examples" of Rule 23(b)(2) class actions. *Amchem Prods. v. Windsor*, 521 U.S. 591, 614 (1997).

B. Meeting the Class Certification Standard through Subclasses

Following the Supreme Court's decision in *Wal-Mart*, the Fifth Circuit addressed the

issue of class certification, specifically commonality, for a proposed class of 12,000 children alleging systemic failures and structural deficiencies in Texas' foster care system. *M.D.*, 675 F.3d 832. While the Fifth Circuit denied certification of what it described as the plaintiffs' "'amorphous' super-claim," the court expressed approval for certification through the use of subclasses, expressly adopting the approach followed by the Second Circuit in *Marisol A. v. Giuliani*, 126 F.3d 372 (2d Cir. 1997). *See M.D.*, 675 F.3d at 848-49. In that case, the Second Circuit explained that where the overall class presents a "super-claim," certification through the use of subclasses reflecting commonality of circumstances, type of harm suffered, and particular systemic failures that have occurred is proper. *Marisol A.*, 126 F.3d at 377; *see also Buus v. WAMA Pension Plan*, 251 F.R.D. 578, 581 (W.D. Wash. 2008) ("If each subclass meets Rule 23's requirements, the matter may proceed in a consolidated action even if the matter could not have been certified as a single, all-inclusive class under the rule.").

In accordance with the Fifth Circuit's guidance in *M.D.*, this motion proposes the certification of seven discrete subclasses of New Orleans students with disabilities. Each subclass asserts basic, common deficiencies in the State Defendants' policies and practices that harm New Orleans students with disabilities. Specifically Plaintiffs request, pursuant to Rule 23(c)(5), that this Court certify the following subclasses:

SUBCLASS 1: Present and future New Orleans students who have requested a special education evaluation at a New Orleans LEA, and whose request has not or will not be completed because the student is no longer at that particular LEA.
Representative Plaintiffs: P.B., D.T., and A.J.

SUBCLASS 2: Present and future New Orleans students who have requested but not been provided with a special education evaluation because they have not completed a "Response to Intervention" program.
Representative Plaintiffs: P.B. and A.J.

SUBCLASS 3: Present and future New Orleans students who have requested but not been provided with a special education evaluation and instead given a Section 504 Plan.
Representative Plaintiffs: P.B., A.J., D.T., and K.J.

SUBCLASS 4: Present and future New Orleans students with disabilities attending RSD direct-run or Type 5 charter schools who have been or will be removed for more than 10 days in a school year without the timely provision of the disciplinary safeguards required by the IDEA.
Representative Plaintiffs: D.B., L.M., and L.W.

SUBCLASS 5: Present and future New Orleans students with disabilities who have not or will not be provided a related service that is contained in their Individualized Education Programs (IEPs).
Representative Plaintiffs: N.F. and L.M.

SUBCLASS 6: Present and future New Orleans students with disabilities who have been or will be denied admission or instructed not to apply to a public school in New Orleans on the basis of their disabilities.
Representative Plaintiffs: P.B., N.F., and M.M.

SUBCLASS 7: Present and future New Orleans students with mobility impairments who have been or will be denied access to the programs and services of a New Orleans LEA as a result of structural or architectural barriers.
Representative Plaintiff: M.M.

ARGUMENT

I. THE COURT SHOULD CERTIFY PLAINTIFFS' THREE PROPOSED CHILD FIND SUBCLASSES

Under the IDEA, the State Defendants have an affirmative obligation, known as "Child Find," to identify, locate, and evaluate any child suspected of having a disability. 20 U.S.C. § 1412(a)(3)(A). Child Find is not discretionary and this mandate is far-reaching, obligating all State Educational Agencies ("SEAs") to find children "who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade," including "[h]ighly mobile children." 34 C.F.R. § 300.111(c). This obligation "extends to all children *suspected* of having a disability, not merely to those students who are ultimately determined to be disabled." *Integrated Design & Elec. Acad. Pub. Charter Sch. v. McKinley*,

570 F. Supp. 2d 28, 34-35 (D.D.C. 2008). Moreover, it is well-established that parents have a cause of action to enforce this obligation under the IDEA. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 245 (2009).

While SEAs typically delegate the execution of specific Child Find activities to local educational agencies ("LEAs"), this does not relieve the State Defendants of the ultimate statutory responsibility to ensure that Child Find is implemented. *See Forest Grove Sch. Dist.,* 557 U.S. at 245 (2009) (quoting 20 U.S.C. § 1412(a)); *Schaffer v. Weast*, 546 U.S. 49, 53 (2005); *Hawkins ex rel. D.C. v. District of Columbia*, 539 F. Supp. 2d 108, 113-14 (D.D.C. 2008).

The State Defendants have abdicated their affirmative Child Find responsibilities for New Orleans students in three ways: (1) by failing to implement a comprehensive Child Find policy that ensures that a single New Orleans entity is responsible for identifying and evaluating students transitioning between schools or are not enrolled in a school; (2) by enforcing a policy, in contravention of the IDEA, requiring students to complete a "Response to Intervention" program before being evaluated for special education eligibility; and (3) by documenting and disregarding evidence that New Orleans LEAs provide "Section 504 Plans" instead of conducting IDEA evaluations. Plaintiffs propose three Child Find subclasses corresponding to these three distinct unlawful Child Find policies and practices.

A. "Students in Transition" Subclass

Plaintiffs request that this Court certify a subclass of *present and future New Orleans students who have requested a special education evaluation at a New Orleans LEA, and whose request has not or will not be completed because the student is no longer at that particular LEA*. Plaintiffs P.B., D.T., and A.J. are the named representatives for this proposed subclass. The claim common to all putative subclass members is the State Defendants' failure to implement a comprehensive Child Find policy covering all of New Orleans, which has resulted in the putative

subclass not being identified, located, and evaluated in accordance with the IDEA. Classwide adjudication is appropriate because the subclass's claims "depend upon [this] common contention" that is "capable of classwide resolution." *Wal-Mart*, 131 S. Ct. at 2551; *M.D.*, 675 F.3d at 838, 840.

In a traditional school system, a single LEA (a school district) has jurisdiction and responsibility for conducting Child Find activities within a defined geographic area, including for those children who are not currently enrolled in a public school. La. Bulletin 1706, § 230(A). It follows that if a child is referred for an evaluation but changes schools within the LEA's geographic area, the LEA maintains responsibility for tracking the student, maintaining the open referral for evaluation, and ensuring the evaluation takes place. Louisiana's Child Find regulations follow this traditional arrangement, requiring each Louisiana LEA to "identify, locate, and evaluate each student suspected of having a disability (regardless of the severity of the disability) . . . residing within its jurisdiction." *Id.*

In the aftermath of Hurricane Katrina, New Orleans' school system has been transformed from a single LEA (the Orleans Parish School Board) to 62 LEAs, 60 of which are single-school charter LEAs. These single-school LEAs' Child Find responsibilities are geographically limited to "the boundary of the educational facility." *Id.* at § 230(D)(4). This means that 60 of New Orleans' 62 LEAs have no Child Find jurisdiction beyond their schoolhouse doors. *Id.*; *see also* Ex. 2, Hicks Dep. 108:11-20. The remaining two LEAs—the RSD and OPSB—have no clearly defined geographical boundaries and no clear division of Child Find responsibilities outside of their own direct-run schools, leaving a void of responsibility for students transitioning between schools or not enrolled in school. Ex. 3, Cook 30(b)(6) Dep. 130:11-22, 134:1-8; Ex. 4, Bendily 30(b)(6) Dep. 174:19-175:4; *see also* Ex. 14, Howarth Exp. Rpt. at 34-38; Ex. 15, Mead Exp.

Rpt. at 34-40.

This failure to assign Child Find responsibilities for those children transitioning between schools or not enrolled in a school is particularly problematic in New Orleans' choice-based school system, in which both students and school operators are in constant flux. *See* Ex. 5-7. With no entity assuming Child Find responsibility for students moving among the 62 different New Orleans LEAs, many of these children simply fall through the cracks. (Compl. ¶¶ 66, 118, 131-132, 139.) And when children request special education evaluations but subsequently leave the school before completion, their requests are left unaddressed. Ex. 2, Hicks Dep. 158:7-15, 159:10-15.

The experiences of the named Plaintiffs exemplify how the State Defendants' failure to develop and implement a comprehensive Child Find policy for New Orleans has harmed the proposed subclass of students in transition:

- Plaintiff P.B. has attended three different LEAs since 2010. His mother repeatedly requested that P.B. be evaluated for special education services at each LEA, including at least two formal requests in writing. But P.B. was removed from each LEA before any evaluation was completed. P.B. still has not been evaluated under the IDEA. (Ex. 8 at nos. 5, 10, 13; Ex. 64 at no. 19).

- Over the course of three years, Plaintiff D.T.'s mother requested a special education evaluation at a charter-school LEA, a direct-run RSD school, and a different charter-school LEA. D.T. did not receive timely evaluations at the first two schools, and each time D.T. changed schools, he was forced to begin the evaluation referral process anew. (Ex. 9 at nos. 9-10.)

- Plaintiff A.J.'s mother requested a special education evaluation in winter 2010 and completed the pre-evaluation process, but A.J.'s school closed before the evaluation was completed. A.J. moved to a new LEA, which informed him that he would need to begin the evaluation process all over again. (Compl. ¶ 131; Ex. 10 at no. 9)

For years, the State Defendants have had actual knowledge of ongoing Child Find violations occurring in New Orleans' decentralized system:

- In one internal report, LDOE recognizes that the Child Find failures in New Orleans are

"systemic," stating: "For some charter schools, the requirements under Federal and State law concerning the location and identification of students with disabilities are not being conducted… While some problems appear to be isolated … others appear to be more systemic, such as failure to conduct identification and location services by the charter schools.…" Ex. 11.

- Susan Batson, the Director of LDOE's Division of Special Populations, stated in an email, "I would submit that some schools, particularly charters, are not identifying and evaluating students for disabling conditions . . . as before the hurricanes." Ex. 12.

- In an email from Margaret Lang, Director of Intervention Services for the RSD, to State Superintendent Pastorek, Ms. Lang refers to Louisiana's Child Find and evaluation policies contained in Bulletin 1508 and states, "It should be noted that in the Charter Special Education report, the authors rightfully question the extent to which Bulletin 1508 is being followed and that there is limited knowledge around this process in the Charters." Ex. 13.

Despite its knowledge of the problem, the State Defendants have failed to rectify known Child Find failures occurring within New Orleans' decentralized education system. *See generally* Ex. 14, Howarth Exp. Rpt. at 37-41; Ex. 15, Mead Exp. Rpt. at 33-38.

1. Numerosity

The State Defendants do not collect and report data on the number of students requesting special education evaluations. Ex. 3, Cook 30(b)(6) Dep. 132:3-18, 140:17-141:5; Ex. 2, Hicks Dep. 116:20-117:17. However, based on the "reasonable inferences drawn from the available facts," *German,* 885 F. Supp. at 552, this subclass is sufficiently numerous to make joinder impracticable.

First, the rates of identified students with disabilities in New Orleans demonstrate that children have been grossly under-identified for IDEA eligibility. Ex. 14, Howarth Exp. Rpt. at 42; Ex. 16, Cowan Exp. Rpt.at ¶ 27. As of February 1, 2011, the Louisiana statewide rate of IDEA-eligible students was 11.4%; in New Orleans, the rate is only 9.4%. Ex. 17-18. One would expect to see a higher percentage of identified students in New Orleans, based on the economic, social, and environmental challenges the city has faced, especially post-Katrina. Ex.

14, Howarth Exp. Rep. at 42. The State Defendants have stated that "any counts that vary a lot from these [statewide identification] percentages are worrisome to us." Ex. 12. Thus, the lower rate of New Orleans students with disabilities supports an inference that special education under-identification is occurring, and affecting a sizeable population of students.

Additionally, students in New Orleans transition between LEAs at very high rates. Ex. 19 at 17.[2] Overall, 25 LEAs saw at least 20% of their student population transition out between the 2011-2012 and the 2012-2013 school years, meaning that they either enrolled in a new LEA or were simply not enrolled in a New Orleans public school. Some schools reported particularly high transition numbers. For example, at John McDonogh Charter School, approximately 240 students (62%) did not reenroll, and, at Joseph S. Clark Charter School, approximately 240 students (63%) did not re-enroll. *Id.* at H140-141, H156-H157. Based on the number of unidentified students in New Orleans and the number of children who transfer between LEAs, the "common sense assumption" is that this subclass is sufficiently numerous to satisfy Rule 23(a)(1). *See Susan J.*, 254 F.R.D. at 458; *R.P.-K. ex rel. C.K. v. Dep't of Educ. of Hawaii*, 272 F.R.D. 541, 547-48 (D. Hawaii 2011).

Furthermore, the present subclass includes future, unknown students, and by its nature involves a rotating membership as students cycle in and out of New Orleans LEAs. Both of these features of the subclass render joinder impracticable under Rule 23(a). *See, e.g.*, *Jack*, 498 F.2d at 124 (5th Cir. 1974) (per curiam); *J.D. v. Nagin*, 255 F.R.D. at 414.

2. Commonality

The commonality requirement is met because the State Defendants have promulgated a

[2] The New Orleans Parents' Guide, attached as Ex. 19, is based on information provided by LDOE, OPSB, and the RSD. The Guide's "Student Stability" measure is defined as "the percent of students eligible to re-enroll who chose to return to the school for another year."

statewide Child Find regulatory scheme that, on its face, violates the rights of unenrolled and transitioning students in the decentralized New Orleans system. The representative Plaintiffs' claims raise the following common contentions that are capable of classwide resolution:

(1) Whether the State Defendants have failed to promulgate and enforce a Child Find policy to ensure that every child with a disability in New Orleans who is not in school or who is transitioning between LEAs is identified, located, and evaluated.

(2) Whether the State Defendants' failure to promulgate and enforce a uniform Child Find policy has resulted in the subclass members being denied the opportunity to be identified, located, and evaluated.

The State Defendants' failure to promulgate a comprehensive Child Find policy for New Orleans' unique decentralized structure is the "glue" uniting the subclass's factual and legal claims. *See Wal-Mart*, 131 S. Ct. at 2552; *see also M.D.*, 675 F.3d at 847 (holding that "a pattern or practice of agency action or inaction – including a failure to correct a structural deficiency within the agency" is sufficient to generate a common class claim).

Furthermore, resolution of these common contentions does not require individualized determinations about the Plaintiffs' eligibility for special education. Rather, the proposed class members have all suffered the same injury: they have been deprived of the very opportunity to be identified and evaluated after making such a request, because no one entity ensures that this occurs. This injury can be remedied through a single injunction ordering the State Defendants to develop a comprehensive Child Find policy ensuring that at least one entity has responsibility to identify and evaluate children in New Orleans who are transitioning between schools or are not enrolled in a school. (Compl. at 59.)

3. Typicality

Plaintiff representatives P.B., D.T., and A.J.'s claims are typical of those of the subclass because they have all suffered the same injury: deprivation of the opportunity to be identified and evaluated for special education services in accordance with the IDEA. Moreover, this

common injury is directly traceable to the same course of conduct: the State Defendants' failure to implement a Child Find policy compatible with New Orleans' decentralized network of LEAs. Plaintiffs' claims and the claims of the proposed subclass therefore have the same characteristics and are based on the same legal theory, and thus satisfy the typicality requirement.

4. Adequacy of Representation

Plaintiffs and undersigned counsel will fairly and adequately protect the interests of the subclass. Plaintiffs and the subclass possess an identical interest in the State Defendants developing and implementing a Parish-wide Child Find policy to ensure that children who are transitioning between schools are identified, located, and evaluated. Further, no conflicts exist between the Plaintiffs and the class, and they do not have any antagonistic or divergent interests. (Compl. ¶¶ 30-31.) Plaintiffs are committed to active participation in this litigation, and are committed to protecting their interests and the interests of unnamed class members. *Id.*

Finally, Plaintiffs' counsel is fully qualified and prepared to pursue this action on behalf of the class. *See* Declaration of Eden B. Heilman ¶ 3. Plaintiffs' counsel are experienced in complex civil actions and class action litigation, and have sufficient financial and human resources to litigate this matter. *Id.*

5. 23(b)(2)

Plaintiffs seek injunctive and corresponding declaratory relief to compel the State Defendants to develop an IDEA-compliant Child Find policy for New Orleans that addresses the city's unique decentralized school system. This relief focuses on the State Defendants' failure to act, which is generally applicable to the proposed subclass. (Compl. at 59.) Furthermore, certification under Rule 23(b)(2) is appropriate because Plaintiffs and the proposed subclass do not seek monetary damages or individualized relief, but rather the development and implementation of a Parish-wide Child Find policy ensuring that children with disabilities who

transition among LEAs are located and evaluated. *See Lane*, 283 F.R.D. at 602.

B. "Response to Intervention" Subclass

Plaintiffs request that this Court certify a subclass of *present and future New Orleans students who have requested but not been provided with a special education evaluation because they have not completed a "Response to Intervention" program.* Plaintiffs P.B. and A.J. are the named representatives for this subclass. The claim common to the subclass is that the State Defendants have promulgated a policy, in contravention of the IDEA, requiring students to complete a "Response to Intervention" ("RTI") program before receiving an evaluation for special education eligibility. This policy prevents New Orleans students from receiving the special education evaluations to which they are entitled under the IDEA.

RTI is a general education program to provide research-based interventions for struggling students who are failing to respond to traditional classroom instruction. *See generally Michael P. v. Dep't of Educ.*, 656 F.3d 1057, 1061 (9th Cir. 2011). Most RTI models involve three "tiers" of increasingly intensive interventions, from Tier I to Tier III. *See M.M. v. Lafayette Sch. Dist.*, 2012 WL 398773, at *14 (N.D. Cal. Feb. 7, 2012).

The U.S. Department of Education's Office of Special Education Programs ("OSEP") has issued guidance unequivocally stating that RTI "cannot be used to delay or deny the provision of a full and individual evaluation . . . to a child suspected of having a disability . . . ." Ex. 20. According to OSEP, "[i]t would be inconsistent with the evaluation provisions [of the IDEA's implementing regulations] for an LEA to reject a referral and delay provision of an initial evaluation on the basis that a child has not participated in an RTI framework." *Id.* This guidance mirrors the case law. *See El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918, 946 (W.D. Texas 2008) ("In those instances where [an intervention committee] impedes the exercise of rights guaranteed by federal law, those practices violate the IDEA").

Despite the IDEA's clear Child Find mandate and OSEP's guidance to the contrary,[3] Louisiana has a policy explicitly requiring students to participate in the RTI process before receiving an initial evaluation for special education. La. Bulletin 1508, § 305(A)(1). Specifically, Louisiana's policy states that each LEA "shall identify a student . . . as suspected of having a disability *only after* the student has participated in an RTI process that produces sufficient data for the [School Building Level Committee] to recommend that a comprehensive individual evaluation be conducted . . . ." La. Bulletin 1508, § 305(A)(1) (emphasis added).[4] The effect of this policy is that New Orleans students with disabling conditions often languish for months, if not years, in the RTI process without being evaluated in accordance with the IDEA—and have their requests for IDEA evaluations denied while this process runs its course.

LDOE enforces, and New Orleans LEAs implement, this unlawful policy:

- A March 2011 LDOE newsletter to school districts states that LDOE "ha[s] received many inquiries from parents whose children have medical diagnosis [sic] and the school districts refuse to evaluate until the students have progressed through all tiers of interventions." The newsletter simply advises LEAs to more fully engage in RTI "as some students show limited response and progress through the process." In tacit acknowledgement of the policy's conflict with the IDEA, LDOE explains that "fully engaged parents are highly unlikely to move against districts for failure to comply with the IDEA." Ex. 21, at 40.

- LDOE's RTI Coordinator stated in an e-mail that "we are in agreement that it would be inappropriate to waive the RTI process requirement . . . unless the [school building level committee] team has strong evidence to indicate that the student has a low incidence disability." Ex. 22.

- The RSD's RTI policy states that after "interventions have been implemented with integrity for the prescribed period of time . . . without effective results, the team may

[3] When OSEP promulgated its guidance about unlawful RTI policies, Bernell Cook, LDOE's Director of NCLB & IDEA programs, forwarded it to other LDOE section leaders with the explanation that the policy guidance was "an interesting memo" and to "share [it] as you deem necessary." Ex. 20.

[4] Louisiana's policy relaxes the RTI mandate only for "low incidence disabilities," like hearing and visual impairments or traumatic brain injuries, by permitting, but not requiring, an immediate evaluation. La. Bulletin 1508, § 307(B).

> examine the appropriateness of referring the student for an evaluation for special education services." Ex. 23 at DEF00083897. As a result, 45% of the RSD's students languish in the most intensive tier of RTI, Tier III – despite the RSD's recognition that the ideal rate is of students in Tier III no more than 5%. Ex. 24 at DEF00284804.

Compounding the harm to children in the proposed subclass, RTI is not properly implemented in New Orleans, as evidenced by a report from the Louisiana Special Education Cooperative to an LDOE Assistant Superintendent, stating:

> The majority of charters have not created effective School Building Level Teams or implemented Child Find procedures. In a number of schools, uninformed leaders charge the special education coordinator with the additional responsibility of convening School Building Level Teams. Without adequate time to manage the Team, and in the absence of secondary scientifically-based remedial tools, an estimated 50% or more of LA COOP charter schools are not adequately documenting the required Response to Interventions (RTI).

Ex. 25 at DEF00179095-096. As a result of the State Defendants' unlawful policy, children in New Orleans in need of special education find themselves in an interminable cycle of interventions in lieu of being referred for an evaluation, as evidenced by the named Plaintiffs:

- Plaintiff P.B.'s mother informed his LEA that the RTI interventions were not working and made multiple requests at "Best Practice Intervention Team" meetings that P.B. be evaluated for special education. An evaluation was never provided and P.B. stayed in the RTI process. (Ex. 8 at no. 10.)

- Plaintiff A.J.'s mother requested an initial evaluation but was informed that A.J. would have to undergo the school's pre-referral process prior to evaluation. (Ex. 10 at no. 9).

1. Numerosity

The State Defendants do not collect and report data on the number of New Orleans students who have requested special education evaluations or are in the RTI process. Ex. 3, Cook 30(b)(6) Dep. 132:19-23, 133:4-12, 137:9-22. But in 2012, the Louisiana Special Education Cooperative surveyed 35 New Orleans charter schools and determined that close to 900 New

Orleans students will be referred to the RTI process.[5] Ex. 26 at 22. And as noted above, 45% of RSD students in the RTI process are in Tier III, and best practice indicates that the Tier III students are those most likely in need of an IDEA evaluation.[6] Thus, a "common sense assumption" is that of the many hundreds of New Orleans students in RTI, including those languishing in Tier III without an IDEA referral, well over 40 students are entitled to, but have not received, a special education evaluation. *See Susan J.*, 254 F.R.D. at 458; *R.P.-K. ex rel. C.K.*, 272 F.R.D. at 547-48. Moreover, the proposed subclass includes future, unknown students making joinder impracticable. *See Jack*, 498 F.2d at 124; *Jones*, 519 F.2d at 1100.

2. Commonality

Commonality is easily established for the proposed subclass based on the State Defendants' RTI regulations, which clearly conflict with federal Child Find requirements. Specifically, the State Defendants' policy requires every student to participate in the RTI process before being referred for an IDEA evaluation, even if a parent or teacher has requested an evaluation. La. Bulletin 1508, § 305(A)(1). Plaintiffs in the proposed subclass share the common contention that the State Defendants' policy requiring students to complete RTI prior to a special education evaluation facially violates the IDEA by unlawfully preventing timely evaluations for children suspected of having a disability. The resolution of this contention will "generate common *answers* apt to drive the resolution of the litigation" for this subclass, and the subclass's common injury may be addressed "in one stroke" through an injunction and corresponding declaratory relief ordering the State Defendants to remove the RTI mandate from

[5] Considering that this estimate reflects RTI referrals at less than half of New Orleans schools, the actual number of New Orleans students in the RTI process is likely well over one thousand.

[6] Torin D. Togut & Jennifer E. Nix, *The Helter Skelter World of IDEA Eligibility for Specific Learning Disability: The Clash of Response-to-Intervention and Child Find Requirements*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 568, 582 (2012).

its IDEA evaluation policy. *Wal-Mart*, 131 S. Ct. at 2551.

3. Typicality

The claims of the representative Plaintiffs P.B. and A.J. are typical of the proposed subclass, in that all have been similarly denied a special education evaluation while they are required to complete the RTI process. This injury stems from a single policy, and thus the claims of the putative subclass and named representatives have the same characteristics and are based on an identical legal theory.

4. Adequacy of Representation

For the reasons stated at *supra* p. 15, the Plaintiffs and undersigned counsel will fairly and adequately protect the interests of the subclass. Plaintiffs and the subclass possess an identical interest in the removal of the RTI mandate from the State Defendants' Child Find policy.

5. 23(b)(2)

Class certification of the proposed subclass is appropriate under Rule 23(b)(2). The State Defendants enforce an illegal Child Find policy that is applicable to all members of the subclass, and the proposed subclass has been harmed by the policy in the same manner.

C. "504 Plan" Subclass

Plaintiffs request that this Court certify a subclass of *present and future New Orleans students who have requested but not been provided with a special education evaluation and have instead been given a Section 504 Plan.* Named Plaintiffs P.B., A.J., D.T., and K.J. are the representatives for this subclass. Members of this subclass have not been evaluated for special education because the State Defendants have abdicated their monitoring and compliance responsibilities, despite being on notice that New Orleans LEAs disproportionately provide "Section 504 Plans" in lieu of evaluating students for eligibility under the IDEA.

The IDEA and Section 504 are complementary statutes in that they both set obligations upon public schools for students with disabilities. However, the key difference is that IDEA eligibility extends to students whose disabilities adversely affect their academic performance; Section 504 sets no such standard. Furthermore, the statutes have different goals, and different substantive and procedural requirements. As described *infra* at p. 41, Section 504 is an anti-discrimination statute with the principal objective of ensuring that individuals with disabilities receive the same treatment as those without disabilities, free of the "prejudiced attitudes or ignorance of others." *School Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 284 (1987). *See also* 29 U.S.C. § 794; *Traynor v. Turnage*, 485 U.S. 535, 548 (1988); *Chandler v. City of Dallas*, 2 F.3d 1385, 1389-90 (5th Cir. 1993). Section 504 does not affirmatively require a certain level of services, but rather a comparison between the treatment of a child with a disability to a nondisabled child. *See Mark H. v. Lemahieu*, 513 F.3d 922, 936-37 (9th Cir. 2008).

Section 504-eligible students are typically provided with a "504 Plan" or an "Individualized Accommodation Plan" ("IAP"). A 504 Plan or IAP is not comparable to an "Individualized Education Program" ("IEP") under the IDEA: IAPs are optional documents identifying the accommodations to be provided, and is only "intended to meet the [student's] educational needs *to the same degree* that the needs of nondisabled students are met, not more." *Mark H. v. Lemahieu*, 513 F.3d 922, 936-37 (2008) (emphasis added). Possible accommodations include wheelchair ramps, blood sugar monitoring, a peanut-free lunch environment, or extra time on tests.

If a student is suspected of having an IDEA-eligible disability, providing the student with a 504 Plan in lieu of conducting an IDEA evaluation is "not an adequate substitute." *Muller v. Comm. on Special Educ. E. Islip Union Free Sch. Dist.*, 145 F.3d 95, 105 (2d Cir.1998). "Under

the statutory scheme, the school district is not free to choose which statute it prefers . . . If a student is eligible under IDEA, appropriate services . . . shall be provided." *Yankton Sch. Dist. v. Schramm*, 93 F.3d 1369, 1376 (8th Cir. 1996). The SEA bears ultimate responsibility for ensuring that LEAs are complying with the IDEA's Child Find requirements, which includes ensuring that LEAs are not disregarding these obligations in favor of the less rigorous and lower-cost Section 504 eligibility process. Ex. 28, Batson Dep. 227:16-20.

The State Defendants have wholly abdicated their monitoring and compliance responsibilities with respect to the proposed subclass. The State Defendants only monitor the timeliness with which LEAs complete special education evaluations; they do not monitor whether students with disabilities are ever identified or located in the first place. Ex. 3, Cook 30(b)(6) Dep. 132:3-18, 133:4-12, 141:20-143:22; Ex. 27, Boulton 30(b)(6) Dep. 77:8-25, 79:20-80:10.

The State Defendants have long been on notice that New Orleans LEAs systemically over-rely on Section 504 Plans to avoid providing required special education evaluations:

- A 2008 report by the Educational Support Systems on 23 New Orleans charter schools found that "an astonishing number of 504 plans" had been developed in the Parish as compared to other jurisdictions. Special education coordinators at several schools "estimated that at least 30% of students with 504 plans would qualify for special education eligibility." Ex. 29 at 33; *see also* Compl. ¶¶ 61-62.

- In 2011, LDOE compiled percentages of students with Section 504 plans in 48 Louisiana LEAs at the request of the U.S. Department of Education. LDOE reported that over 7% of students in New Orleans LEAs have Section 504 plans, compared to 1.26% of students in East Baton Rouge Parish and 2.94% of students in Caddo Parish.[7] Ex. 30 at 2-3. At individual New Orleans LEAs, the numbers are even higher. One New Orleans LEA identified 22.8% of its students as eligible under Section 504, and another LEA identified

[7] In 2008, researchers conducted a national survey to calculate the approximate rate of Section 504-only eligible children. Rachel A. Holler & Perry A. Zirkel, *Section 504 and Public Schools: A National Survey Concerning "Section 504-Only" Students,* 92 NAT'L ASS'N OF SECONDARY SCH. PRINCIPALS 19, 24 (2008). Researchers concluded that nationally, 1.2% of students were Section 504-only students. *Id.* at 27.

an astounding 41.2% of its students. LDOE recognized that "[t]here appears to be a large [number] of RSD schools with very high numbers." *Id.* at 1-3.

Plaintiffs' expert Dr. Howarth concluded that this improper over-reliance by New Orleans LEAs on Section 504 plans contributes to the systematic under-identification of New Orleans children under the IDEA. Ex. 14, Howarth Exp. Rpt. at 43. The experiences of the named Plaintiff representatives illustrate the problem:

- Multiple LEAs gave Plaintiff P.B. a 504 Plan for a learning disability, oppositional defiant disorder, and bipolar disorder despite parental requests for an IDEA evaluation. P.B. continued to suffer academic and behavioral deficits and repeated the seventh grade three times. (Compl. ¶ 114; Ex. 8 at no. 8).

- Plaintiff A.J. was provided a 504 Plan by two separate LEAs for dyslexia and ADHD, despite his mother's specific requests for an IDEA evaluation for special education. (Compl. ¶ 131; Ex. 10 at no. 8).

- Plaintiff D.T. was provided a 504 Plan by multiple LEAs for an emotional disability despite multiple parental requests for an IDEA evaluation. Without the protections of the IDEA, he was subjected to highly punitive disciplinary actions. (Compl. ¶¶ 137, 141-142; Ex. 9 at no. 6).

- Plaintiff K.J. was provided with a 504 Plan for dyslexia and ADHD despite ongoing behavioral and academic challenges and requests from his mother for a special education evaluation. (Compl. ¶¶ 121,125; Ex. 31 at no. 6).

Despite the State Defendants' ongoing knowledge of the New Orleans LEAs' systemic and improper use of Section 504 plans in lieu of evaluating students for IDEA eligibility, the State Defendants have failed to take any meaningful action.

1. Numerosity

This subclass is sufficiently numerous to make joinder impracticable. Over 2700 New Orleans students have been provided Section 504 Plans. Ex. 32. The Educational Support Systems report, discussed above, "estimated that at least 30% of students with 504 plans would qualify for special education eligibility." Ex. 29 at 33; *see* Compl. ¶ 61. Based on this estimate, this subclass would consist of at least 853 students and would also include future, unknown

members, making joinder presumptively impracticable.

2. Commonality

The proposed subclass satisfies the commonality requirement because its claims share a common contention: the State Defendants have failed to monitor or otherwise correct the New Orleans LEAs despite being on notice that New Orleans LEAs were inappropriately relying on Section 504 plans in lieu of conducting IDEA evaluations. This inaction violates the State Defendants' explicit obligation to ensure that students with disabilities are identified, located, and evaluated. *See supra* p. 8. "[C]ommon issues arise where 'defendants have acted, or failed to act, uniformly toward the proposed class based on their policies and lack of policies in place." *N.B. ex rel. Buchanan v. Hamos*, 2012 WL 1953146, at *9 (N.D. Ill. May 30, 2012).

LDOE's failure to monitor and correct the systemic misuse of Section 504 Plans in New Orleans and to ensure compliance with IDEA's Child Find mandates provides the "glue" uniting Plaintiffs' factual and legal claims. *See Wal-Mart*, 131 S. Ct. at 2552. The subclass's claims will also generate a common answer: with a single injunction, this Court can require the State Defendants to monitor New Orleans LEAs' use of Section 504 Plans and ensure that Section 504 Plans are not used as a substitute for conducting more rigorous IDEA evaluations.

3. Typicality

Typicality is satisfied because the representative Plaintiffs P.B., A.J., D.T., and K.J. "possess the same interest and [have] suffer[ed] the same injury." *Gen Tel. Co. of SW.*, 457 U.S. at 156. As described above, the Plaintiffs representatives' claims arise from the same course of conduct by the State Defendants, and are based on the same legal theory. Any factual differences in how the State Defendants' failures affect any particular student, including the named Plaintiffs, do not defeat typicality. *See, e.g.*, *M.A. ex rel. E.S.*, 2009 WL 4799291, at *8.

4. Adequacy of Representation

For the reasons stated at *supra* p. 15, the Plaintiffs and undersigned counsel will fairly and adequately protect the interests of the subclass. Plaintiffs and the subclass possess an identical interest in the State Defendants monitoring New Orleans LEAs for their use of Section 504 Plans and ensuring they have not been substituted for conducting IDEA evaluations.

5. 23(b)(2)

Courts recognize that class treatment under Rule 23(b)(2) is particularly appropriate in cases such as this one that seek systemic reform of a governmental agency's policies and practices. *See Jones v. Diamond*, 519 F.2d 1090, 1100 (5th Cir. 1975). As described above, Plaintiffs in the proposed subclass seek injunctive and declaratory relief, and no individualized inquiries are necessary.

II. THE COURT SHOULD CERTIFY THE PLAINTIFFS' PROPOSED "DISCIPLINE" SUBCLASS

Plaintiffs request that this Court certify a subclass of *present and future New Orleans students with disabilities attending RSD direct-run or Type 5 charter schools who have been or will be removed for more than 10 days in a school year without the timely provision of the disciplinary safeguards required by the IDEA.* The named Plaintiff representatives are D.B., L.M., and L.W. The claim common to all subclass members is that the State Defendants have failed to correct systemic violations of IDEA's disciplinary safeguards in the RSD direct-run and Type 5 charter schools. As a result, members of the proposed subclass are denied the procedural protections to which they are entitled—to receive accommodations for behavioral manifestations of their disabilities and educational services if removed the classroom.

A central feature of the IDEA is its robust protections for students with disabilities experiencing disciplinary removals from school—typically, suspensions and expulsions.

Schools have historically used the disciplinary process to exclude or push out students for behavioral manifestations of their disabilities. *See Honig v. Doe*, 484 U.S. 305, 324 (1988). To rectify this, the IDEA imposes a series of very specific requirements[8] obligating public schools to remediate, not punish, students whose disabilities include disruptive behaviors.

First, students with disabilities exhibiting disruptive behaviors should be provided a *Functional Behavioral Assessment ("FBA")*, "designed to address the behavior violation so that it does not occur." 20 U.S.C. § 1415(k)(1)(D); *see also* La. Bulletin 1508, § 513(A)(11). Second, the FBA's determinations are implemented in a *Behavior Intervention Plan ("BIP")*, providing behavioral intervention services and modifications to proactively accommodate the disruptive behavior. 20 U.S.C. §§ 1415(k)(1)(D), (F).

Third, if a student is removed ten or more days in a school year for disciplinary violations, the school must conduct a *Manifestation Determination Review ("MDR")* to determine whether the conduct precipitating the removal was a manifestation of the student's disability. 20 U.S.C. § 1415(k)(1)(E). If the conduct was caused by the child's disability or was the direct result of the LEA's failure to implement the IEP, then the student cannot be removed, and the school must redress its failures to accommodate the student's behavioral manifestations by creating or revisiting the FBA and BIP. 20 U.S.C. § 1415(k)(1)(F). Fourth, even if the conduct was not a manifestation, the student must continue to receive educational services if removed from school. 20 U.S.C. § 1415(k)(1)(D).

LDOE itself has documented the failures of the RSD direct-run schools and Type 5

[8] These requirements are listed in 20 U.S.C. § 1415(k), describing "Procedural safeguards" for "placement in alternative educational settings" because of "violations of the code of student conduct." We refer to these requirements collectively as "disciplinary safeguards."

charter schools[9] to provide these four disciplinary safeguards, but LDOE has failed to take meaningful remedial action. As the result of on-site IDEA monitoring visits, LDOE cited the RSD direct-run schools for systemic[10] non-compliance with the IDEA in the following areas:

- In 2010, for failing to: write FBAs; develop, write, or implement BIPs; write MDRs; or provide educational services to students with disabilities removed from school for more than ten days (Ex. 33 at 2, 4, 7);

- In 2011, for failing to provide educational services to students with disabilities removed from school for more than ten days (Ex. 34 at 10); and

- In 2012, for failing to develop FBAs; develop or implement BIPs; conduct MDRs; or provide educational services to students with disabilities removed from school for more than ten days (Ex. 35 at 9).

And LDOE cited New Orleans Type 5 charter schools for systemic non-compliance with the IDEA in the following areas:

- In 2010, for failing to develop, write, or implement BIPs or provide educational services to students with disabilities removed from school for more than ten days (Ex. 33 at 11, 13);

- In 2011, for failing to provide educational services to students with disabilities removed from school for more than ten days (Ex. 34 at 3); and

- In 2012, for failing to: develop FBAs; develop or implement BIPs; conduct MDRs; or provide educational services to students with disabilities removed from school for more than ten days (Ex. 35 at 9).

The reported 2012 findings of systemic non-compliance reflect only a portion of violations actually observed. The New Orleans IDEA monitoring team leader wrote LDOE staff: "I will tell you that the monitoring team gave every benefit of the doubt to the charter schools and *was*

[9] The RSD direct-runs (which fall under a single LEA) and the Type 5 charter LEAs reflect about 91% of New Orleans LEAs: 57 of the 62 total in the Parish. Ex. 1.

[10] In response to an RSD request for clarification, LDOE stated that its systemic findings of non-compliance meant LDOE had "conclude[d] that these issues exist" with regard to students "that meet the [removed over 10 days] criteria, even those that were not reviewed during the on-site monitoring, which leads to a systemic finding of noncompliance." Ex. 65 at 3; *see also*, Ex. 37, McElwee Dep. 154:13-17 ("systemic" findings are those that are "happening across a number of schools.").

more than generous in not noting non-compliance." Ex. 39 (emphasis added). At deposition, LDOE admitted this was improper. Ex. 37, McElwee Dep. 117:1-13.

The State Defendants required the RSD direct-run and Type 5 charter schools to implement three consecutive corrective action plans to address their widespread non-compliance with the IDEA's disciplinary safeguards, but these LEAs continually failed to demonstrate improvement.[11] *See* Ex. 33-35; *see also* Ex. 14, Howarth Exp. Rpt. at 53-58. In fact, in February 2012, LDOE noted, "Little progress has been made by [Type 5 charters] in addressing citations noted during the last two on-site monitoring visits. The same types of concerns were noted in this most recent visit as well as some additional concerns." Ex. 36 at DEF00474950. In March 2012, LDOE informed RSD that all six monitored RSD direct-run schools and twelve of fourteen monitored Type 5 charter schools continued to violate the IDEA's disciplinary safeguards. Ex. 38 at 1.

In 2013, LDOE changed course. After years of documenting systemic and worsening violations of the IDEA's disciplinary safeguards, LDOE determined that the RSD direct-run and Type 5 charter schools were no longer in non-compliance with the IDEA's disciplinary safeguards, "cleared" the New Orleans ICAPs midstream, and ceased its monitoring of New Orleans schools on disciplinary issues. Ex. 37, McElwee Dep. 210:22-212:15; Ex. 35 at 3. As summarized below and described in detail in Dr. Howarth's expert report, the methods utilized by LDOE to make these determinations were wholly inadequate to support its findings. *See* Ex. 14 at 21-29, 58-61.

Specifically, rather than increase their compliance and enforcement efforts in light of the

[11] Pursuant to federal and state law, SEAs like the State Defendants address LEA non-compliance in a corrective action plan (CAP), and must resolve it within one year. 34 C.F.R. § 300.600(a); La. Bulletin 1922, § 107(c). If non-compliance persists, the SEA addresses the continued LEA non-compliance in an intensive corrective action plan (ICAP). La. Bulletin 1922, § 130(F).

RSD direct-run and Type 5 charters' ongoing systemic noncompliance, the State Defendants drastically scaled back their IDEA monitoring activities and compliance measures. First, LDOE reduced the scope of the Type 5 charters' ICAP. Originally, the ICAP applied to all Type 5 charters in New Orleans. Ex. 37, McElwee Dep. 138:3-17, 184:9-17, 187:7-16. But in 2012, high-ranking LDOE officials simply decided, unilaterally and without discussion, that the ICAP would now apply only to the dozen individual charters that LDOE monitored on-site and cited for non-compliance. Ex. 37, McElwee Dep. 186:9-187:21, 188:5-189:4. This act removed over 40 New Orleans LEAs from the scope of the intensive corrective action plan.

Second, in the 2012-2013 school year, LDOE stopped its on-site IDEA monitoring program altogether, and now relies solely on paper-based reviews known as "desk audits" to satisfy its IDEA monitoring obligations. Ex. 37, McElwee Dep. 180:3-24; Ex. 40, Osborn Dep. 68:16-69:7. This newly adopted policy is in direct conflict with state regulations on IDEA compliance monitoring.[12] A desk audit provides no evidence that procedural safeguards are actually implemented. Ex. 37, McElwee Dep. 166:12-167:2; 167:13-22; Ex. 14, Howarth Exp. Rpt. at 58-60. In switching to a desk audit system, LDOE special education staff noted that a benefit of removing on-site monitoring was to "alleviate a high volume of LEAs from going under CAPs." Ex. 41 at 2.

Using a desk audit, LDOE cleared the RSD disciplinary ICAPS. Ex. 37, McElwee Dep. 192:8-18. This desk audit was conducted by a single person, and consisted of looking only at student records, with no interviews of staff, parents, or students, and no classroom observations. *Id.* at 165:5-167:2, 167:13-168:19. By contrast, the prior year's on-site monitoring visits, in which LDOE noted continued and worsening violations, were facilitated by a team of about eight

[12] *See* La. Bulletin 1922, §§ 101(D)(1), 301(B), 307, 311, and 315(D).

people, and included 70 staff interviews, 14 central office interviews, and 26 classroom observations. Ex. 42 at 54, 56-57. As Dr. Howarth has concluded, the results of this audit and LDOE's "clearing" of the New Orleans ICAPs do not stand as evidence that systemic violations of disciplinary safeguards have ceased in New Orleans schools, or that State Defendants have complied with their monitoring and compliance obligations. Ex. 14 at 49-50, 58-61.

These widespread problems with the provision of disciplinary safeguards have impacted the named Plaintiffs in the following ways:

- Plaintiff D.B. was removed from school for at least fifteen days in a single year, but his school never conducted a MDR to determine if his behavioral violation was a manifestation of his disability. While he had a BIP on file, the school did not implement it. Additionally, after the tenth day of removal, D.B. did not receive any educational services. (Ex. 66 at nos. 11, 13; Compl. ¶¶ 106, 159, 162.)

- Plaintiff L.M. was removed from school for over thirty days and ultimately expelled during the 2009-10 school year. His school never conducted an FBA; wrote or implemented a BIP; or conducted MDRs to determine if his behavioral was a manifestation of his disability. During the 2008-09 school year, L.M. was suspended for over forty days and ultimately expelled, but never received any MDRs. (Ex. 67 at no. 14; Compl. ¶¶ 108, 170, 171.)

- Plaintiff L.W. was frequently disciplined at his school during the 2009-10 school year, yet L.W. never received an FBA or BIP despite the fact that behavioral manifestations of his disability, ADHD, routinely interfered with his academic progress. (Ex. 68 at no. 14; Compl. ¶¶ 184, 186.)

Despite longstanding knowledge of the pervasive disciplinary violations occurring in New Orleans, the State Defendants have increasingly disengaged from their monitoring and compliance responsibilities to ensure that New Orleans LEAs provide students with disabilities with the IDEA's disciplinary safeguards.

1. Numerosity

The proposed subclass easily satisfies the Rule 23 numerosity requirement. The State Defendants have repeatedly determined that there are systemic violations of students'

disciplinary safeguards amongst RSD direct-run and Type 5 charter LEAs. For instance, the RSD direct-run and Type 5 charter LEAs implicated in the 2012-13 ICAP removed 244 students with disabilities through out-of-school suspensions during the 2010-11 school year. Ex. 43. And in determining ongoing non-compliance in February 2012, LDOE relied upon 69 student records and cited over one hundred student violations based on those records. Ex. 36, DEF00474939-950. Thus, the proposed subclass, which includes unknown future members, is sufficiently numerous to render joinder impracticable.

2. Commonality

The proposed subclass likewise satisfies the commonality requirement because its members share a common contention that is capable of classwide resolution. Specifically, the State Defendants' own monitoring has established a lengthy record of the RSD direct run and Type 5 charter schools' pervasive violations of IDEA's disciplinary safeguards for students with disabilities. The State Defendants improperly "cleared" these violations without remotely adequate evidence, and based on that determination adopted an unlawful policy of inaction in the face of continued LEA noncompliance. This "pattern or practice of agency . . . inaction" is sufficient to generate a common class claim. *See M.D.*, 675 F.3d at 847. As a result of the State Defendants' failure to ensure that the New Orleans LEAs comply with IDEA's disciplinary safeguards, the proposed subclass suffers a common injury: the denial of educational services and interventions to accommodate the behavioral manifestations of their disabilities. Moreover, the subclass's claims can be remedied "in one stroke" through a single injunction ordering LDOE to adequately monitor and correct the systemic violations of IDEA's disciplinary safeguards that it has documented.

The proposed subclass is limited to students with disabilities who did not or will not receive the IDEA's disciplinary safeguards. Those safeguards are equally applicable to any

student with a disability who has been removed more than ten days in a school year, and thus resolution of the subclass's claim does not require individualized determinations.

3. Typicality

The proposed subclass satisfies the typicality requirement because named Plaintiffs D.B., L.M., and L.W. have suffered the same injury as the proposed subclass—deprivation of the IDEA's disciplinary safeguards—and share a common interest in ensuring that the State Defendants comply with their duty to rectify the systemic failures to provide such safeguards in the RSD direct-run and Type 5 charter schools. Plaintiffs' claims and the claims of the putative subclass therefore have the same essential characteristics and share the same legal theories.

4. Adequacy of Representation

For the reasons stated at *supra* p. 15, the Plaintiffs and undersigned counsel will fairly and adequately protect the interests of the subclass. Plaintiffs and the subclass possess an identical interest in the State Defendants ensuring that New Orleans LEAs abide by the IDEA's disciplinary safeguards for students with disabilities.

5. 23(b)(2)

Finally, the proposed subclass satisfies the requirements of Rule 23(b)(2). All members of the proposed subclass have suffered the same harm: they are entitled to, but have not received, the protections afforded by the IDEA disciplinary safeguards triggered once they are removed more than 10 days in a school year. This subclass seeks only injunctive and related declaratory relief requiring LDOE to implement adequate corrective measures to address the systemic discipline violations occurring in the RSD direct-run and Type 5 charter LEAs, and to adequately monitor their practices and procedures until the systemic violations have been remedied.

III. THE COURT SHOULD CERTIFY THE PLAINTIFFS' PROPOSED "RELATED SERVICES" SUBCLASS

Plaintiffs request that this Court certify a subclass of *present and future New Orleans students with disabilities who have not or will not be provided a related service that is contained in their Individualized Education Programs (IEPs)*. The representative Plaintiffs for this subclass are N.F. and L.M. The claim common to all putative subclass members is that the State Defendants have not fulfilled their statutory responsibility to provide related services to New Orleans students with disabilities despite determining that New Orleans LEAs are unable to provide such services. As a result, the putative subclass members are denied the critical related services contained in their IEPs—services necessary for them to benefit from special education.

Under the IDEA, students with disabilities are entitled to receive related services, which include "transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education." 20 U.S.C. § 1401(26)(a). These services include such things as speech-language pathology, interpreting services, medical services, physical therapy, and counseling, among others. *Id.*; *see also* 34 C.F.R. § 300.34. An IEP team has the responsibility and authority to determine which related services are necessary to provide a free appropriate public education to the student, and once committed to the IEP, the services must be provided. *Todd D. v. Andrews*, 933 F.2d 1576, 1581 (11th Cir. 1991).

Federal and state laws unambiguously make the SEA responsible for providing related services when an LEA is unable to provide them. 20 U.S.C. § 1413(g)(1)(b); *see also* La. Bulletin 1706 at §§ 175 and 227. It is well established that when an LEA is unable to "establish and maintain programs in compliance with IDEA, the [SEA] is responsible for directly providing the services." *St. Tammany Parish Sch. Bd. v. St. of La.*, 142 F.3d 776, 784 (5th Cir. 1998); *see*

also Doe v. Maher, 793 F.2d 1470 (9th Cir. 1986); *Todd D.,* 933 F.2d 1582.

In this case, the State Defendants have orchestrated the creation of 62 independent LEAs in a compact urban area, leaving each LEA fully responsible to directly provide all related services contemplated under the law. *See Kruelle v. New Castle Cnty. Sch. Dist.*, 642 F.2d 687, 695-96 (3d Cir. 1981). A typical school district benefits from economies of scale, spreading costs and organizing services across multiple schools. *See* Robert A. Garda, *Culture Clash: Special Education in Charter Schools*, 90 N.C. L. Rev. 655, 670 (March 2012). However, each individual New Orleans LEA, with limited staff and resources, must be able to provide the full array of related services for any student with a disability who enrolls on any given day. Garda, 90 N.C. L. Rev. at 677. State Defendants are fully aware that the delivery and availability of related services in the New Orleans LEAs presents a significant problem:

- In 2007, an expert consultant for the State Defendants informed them that "during focus groups, nearly all principals voiced their concern that there are not sufficient numbers of special educators and paraprofessionals to support students with disabilities…" The consultant also reported that "behavior health providers recognize that there is an inconsistency of services between the schools …" Ex. 45 at DEF00459364.

- In a 2008 report on New Orleans charter schools, Educational Support Systems found that "the lack of resources … and staff affects the quality of education for [students with disabilities] and underscores the need for collective planning and collaboration to cultivate cost-effective and high quality specialized programs." Furthermore, the report found that "one school was still attempting to engage related service providers but was unable to find clinicians willing to serve their students due to the very low number of students …" Ex. 29, at 25, 26.

- After the filing of this litigation in 2010, the State Defendants drafted an internal report in which they stated, "LDOE does recognize that there are problems with service delivery" and that "accessibility to services has not been comprehensively addressed." LDOE report stated that "some RSD charter schools as well as Type 2 schools may lack sufficient numbers of students with disabilities to make employment of staff feasible." Lastly, the report stated that these "problems are complicated by the autonomy of schools." Ex. 11, at 1-3.

- In April 2012, the State Defendants received a draft "Special Education Needs Assessment" from the Louisiana Special Education Cooperative, which found "a number

of challenges to serving high needs students, including lack of clinical providers, lack of specialized teachers, insufficient funding, lack of appropriate space and resources, lack of knowledge, and lack of school leader understanding of program issues and resources needed." Ex. 26 at 23-24.

- In 2013, the Cowen Institute released its annual "State of Public Education in New Orleans" and found that "comprehensive and coordinated special education remains a major problem across public schools in New Orleans," and that "small schools often lack the economies of scale to fully serve the wide range of student needs in their buildings." Ex. 46 at 24.

See also Ex. 28, Batson Dep. 149:6-150:11 195:25-197:5; Ex. 44, Lang Dep. 90:2-9.

On multiple occasions, the State Defendants have acknowledged their responsibility to coordinate the provision of related services in New Orleans, concluding that LDOE should create an entity from which charters would be required to obtain related services, and suggesting the creation of a state consortium or cooperative. Ex. 11 at 3; Ex. 47. However, the State Defendants have taken no steps to follow through on their own recommendations. Ex. 28, Batson Dep. 192:13-194:10. While a private group called the Louisiana Special Education Cooperative offers fee-based membership to charter schools, this entity offers technical assistance, not direct services, and it is not affiliated with the State Defendants. Ex. 40, Osborn Dep. 256:23-257:11; Ex. 28, Batson Dep. 197:6-200:2. Lastly, several private service providers offer contractual services for New Orleans LEAs, but combined they do not offer all the related services contemplated under the IDEA. Ex. 44, Lang Dep. 53:5-55:6.

As a result, New Orleans LEAs are unable to provide the full array of related services to which students with disabilities are entitled. Thus, a student's IEP team may determine that specific services are necessary, but find that the LEA is unable to provide those services because the LEA lacks the funding, is unable to secure staffing, or lacks the economy of scale and sufficient number of students to make service provision feasible. Ex. 28, Batson Dep. 154:21-156:24, 195:25-197:5; Ex. 44, Lang Dep. 122:8-18; 145:11-20; *see also infra* at 43. Plaintiffs

N.F. and L.M. have experienced these problems:

- Plaintiff N.F.'s IEP called for orientation and mobility services and a dedicated paraprofessional to accommodate his total vision impairment/blindness and autism. Yet his school stated it could not provide him with those related services because it was too short-staffed. As a result, N.F.'s mother attended school with N.F. each day as a substitute for a qualified service provider. (Ex. 57 at no. 12; Compl. ¶¶ 15, 85.)

- Plaintiff L.M.'s IEP called for speech and language therapy as a related service. Yet, his school had trouble securing a service provider, and L.M. went without speech and language therapy for several months. (Compl.¶ 177.)

1. Numerosity

The State Defendants do not collect any information regarding the types of related services available at each New Orleans LEA or the staffing arrangements made to provide those services. Ex. 3, Cook 30(b)(6) Dep. 151:19-152:19; Ex. 44, Lang Dep. 95:5-99:3. Reasonable inferences based on available information suggests the proposed subclass consists of several hundred students with disabilities not receiving related services. In April 2012, the Louisiana Special Education Cooperative audited the number of New Orleans students with disabilities receiving related services, and estimated a total of 3,391 students with disabilities were receiving services. Ex. 26 at 5. However, according to the Cowen Institute's "State of Public Education in New Orleans: 2013 Report," approximately 10% of 42,637 New Orleans students are eligible for special education—or, 4,263 students with disabilities. Ex. 46 at 4, 10. The difference between these two figures is over 800 students. In light of the State Defendants' repeated findings that "there are problems with service delivery" and "accessibility to services has not been comprehensively addressed," the Court can make a reasonable inference that a sufficiently large number of students were not provided the related services on their IEPs because the services were unavailable. Ex. 11 at 1-2.

Given that certain disability types are highly likely to require specific related services,

additional inferences can be drawn by comparing the Louisiana Special Education Cooperative's estimates of specific service provisions to the population of New Orleans students with a related disability. For instance, in 2010 there were 51 students identified with a hearing-impairment disability in New Orleans, but the Cooperative estimated that only 29 students with disabilities were receiving hearing-related services. Ex. 26; Ex. 48.

Furthermore, the present subclass includes future, unknown students, rendering joinder impracticable under Rule 23(a). *See, e.g.*, *Jack*, 498 F.2d at 124 (5th Cir. 1974).

2. Commonality

The State Defendants have an affirmative obligation to provide related services where it has determined that an LEA is unable to provide such services. Despite their acknowledgement that "there are problems with service delivery" and "accessibility to services has not been comprehensively addressed," State Defendants have failed to take action to ensure the provision of related services for students with disabilities in New Orleans. Ex. 11 at 1-2. This "pattern or practice of agency . . . inaction" is sufficient to generate a common class claim. *See M.D.*, 675 F.3d at 847. The representative Plaintiffs' claims raise the following common contentions that are capable of classwide resolution:

(1) Whether the State Defendants have failed to provide related services to students with disabilities in New Orleans when it determines that an LEA is unable to provide such services.

(2) Whether the State Defendants' failure to provide related services has resulted in the subclass members being denied the related services on their IEP.

Resolution of these contentions will produce a common answer because they arise from a single course of conduct: the State Defendants' inaction with regard to its responsibility to directly provide related services when it determines an LEA is unable to do so. As a result, the proposed subclass suffers the common harm of not receiving related services on their IEPs.

The proposed subclass's claims do not require individualized determinations about the underlying need or appropriateness of related services, because the students' IEP teams have already made these determinations. *See Todd D. v. Andrews*, 933 F.2d 1576, 1581 (11th Cir. 1991) (finding that "the district court must pay great deference to the educators who develop the IEP" and that the lower court "overstepped its role" in ruling that an SEA's obligations could be met if the court changed the underlying IEP). Rather, the proposed class seeks uniform injunctive relief that will resolve a common harm: requiring the State Defendants to provide those related services that LEAs across New Orleans have failed to provide.

3. Typicality

The claims of representative Plaintiffs N.F. and L.M. are typical of the claims of the proposed subclass. The representative Plaintiffs' respective IEP teams determined that they each required a specific set of related services, but their respective LEAs were unable to provide those services. Echoing the experiences of the named Plaintiffs, the State Defendants have documented a systemic problem with the provision of the full array of related services across the decentralized network of 62 small New Orleans LEAs, due to prohibitive costs and staffing.

4. Adequacy of Representation

For the reasons stated at *supra* p. 15, the Plaintiffs and undersigned counsel will fairly and adequately protect the interests of the subclass. Plaintiffs and the subclass possess an identical interest in the State Defendants coordinating the delivery of related services throughout the New Orleans LEAs.

5. 23(b)(2)

Class certification of the proposed subclass is appropriate under Rule 23(b)(2). The State Defendants' inaction concerning the provision and coordination of related services delivery is applicable to all members of the proposed subclass. Each has been harmed in the same manner

by the Defendants' inaction: by not receiving one or more related services that their IEP team determined was necessary. As described above, Plaintiffs' requested injunctive and declaratory relief addresses the claims common to the subclass.

IV. THE COURT SHOULD CERTIFY PLAINTIFFS' TWO PROPOSED SECTION 504 / TITLE II SUBCLASSES

The State Defendants are statutorily responsible for ensuring compliance with Section 504 of the Rehabilitation Act and Title II of the ADA. 29 U.S.C. § 794; 42 U.S.C. § 12132. Section 504 and Title II have nearly identical anti-discrimination mandates in the context of public education,[13] and the Fifth Circuit has explained that case law interpreting one statute can be applied to the other.[14] *Pace v. Bogalusa City Sch. Bd.,* 403 F.3d 272, 287-88 (5th Cir. 2005).

To demonstrate violations of Section 504 and Title II, a plaintiff must show that (1) the plaintiff has a disability, as defined by the statutes; (2) the plaintiff is otherwise qualified to participate in school activities; (3) the school receives federal financial assistance; and (4) the plaintiff was excluded from participation in, denied benefits of, or subject to discrimination at school. *D.A. v. Houston Indep. Sch. Dist.*, 716 F. Supp. 2d 603, 618 (S.D. Tex 2009), *aff'd* 629 F.3d 450 (5th Cir. 2010); *see also Hills v. Lamar Cty. Sch. Dist.*, 2008 WL 427775, at *4 (S.D. Miss. Feb 13, 2008).

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[13] With a goal of "provid[ing] clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities," Title II dictates that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. §§ 12101(b)(2), 12132. Similarly, Section 504's implementing regulations state that "no qualified handicapped person shall … be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity that receives or benefits from federal financial assistance." 28 C.F.R. § 41.56

[14] "The only material difference between the two provisions lies in their respective causation requirements. Section 504 prohibits discrimination 'solely by reason' of a disability, whereas the ADA applies even if discrimination is not the 'sole reason' for the exclusion or denial of benefits." *Stewart v. Waco Indep. Sch. Dist.*, 711 F.3d 513, 518-19 (5th Cir. 2013).

A student with a disability can establish a claim under Section 504 and Title II in the educational context by showing that he has been denied "reasonable accommodations" necessary "to receive the full benefits of the school program." *Stewart*, 711 F.3d at 519. It is immaterial whether the public entity explicitly refused to make reasonable accommodations or simply engaged in "professionally unjustifiable conduct." *Id.* at 521. Such professionally unjustifiable conduct includes both affirmative acts and the failure to act. *Id.* at 526.

The State Defendants have failed to comply with their responsibilities under Section 504 and Title II in two ways: (1) the State Defendants have failed to ensure that New Orleans schools comply with the anti-discrimination mandates of Section 504 and Title II in the school enrollment process; and (2) the State Defendants, who control the buildings and the land upon which the vast majority of New Orleans schools operate, have failed to remedy the systemic, structural barriers inhibiting students with mobility-related disabilities from accessing those educational opportunities available to other New Orleans students. Plaintiffs propose two subclasses corresponding to the State Defendants' unlawful practices.

A. "Enrollment Discrimination" Subclass

Plaintiffs propose an "enrollment discrimination" subclass consisting of all *present and future New Orleans students with disabilities who have been or will be denied admission or instructed not to apply to a public school in New Orleans on the basis of their disabilities*. The representative Plaintiffs for this subclass are P.B., N.F., and M.M. The claim common to all putative subclass members is that the State Defendants have perpetuated disability discrimination by: (1) failing to adequately monitor New Orleans LEAs' compliance with Section 504 and Title II to ensure that students with disabilities are not experiencing disability discrimination during enrollment; and (2) failing to promulgate and enforce policies and practices that ensure LEA compliance with Section 504 and Title II.

As a public recipient of federal funds, the State Defendants are responsible for ensuring compliance with the anti-discrimination mandates of both Section 504 and Title II, and can be held liable for perpetuating discrimination against the proposed subclass. Under Section 504's regulations, a recipient of federal funding may not discriminate on the basis of disability, either "directly or through contractual, licensing, or other arrangements." 34 C.F.R. § 104.4(b)(1). This includes aiding or perpetuating discrimination "by providing significant assistance to an agency, organization, or person" that discriminates on the basis of disability. 34 C.F.R. § 104.4(b)(1)(v).

A State does not satisfy its anti-discrimination obligations under Section 504 and Title II simply by delegating responsibilities to LEA sub-recipients. An agency administering a public program has both the authority and obligation under Section 504 and Title II to take appropriate steps to enforce all requirements that prohibit discrimination against individuals with disabilities, regardless of whether those services are delivered directly by a public entity or through a third party. *See Emma C. v Eastin*, 985 F. Supp. 940, 948 (N.D. Cal. 1997) (finding that because the state failed to monitor the district for compliance with Title II and Section 504, the State could be found liable for "perpetuat[ing] the discrimination"); *Jose P. v. Ambach.,* 669 F.2d 865, 871 (2d Cir. 1982) (finding SEA liable for failing "to ensure that programs in the state do not discriminate on the basis of handicap."); *see also Henrietta D. v. Bloomberg,* 331 F.3d 261 (2d Cir. 2003); *Hendricks v. Gilhool,* 709 F. Supp. 1362 (E.D. Pa. 1989).

In this case, the State Defendants have created a public education system in New Orleans that is uniquely prone to ongoing acts of discrimination against students with disabilities. In the wake of Hurricane Katrina, the State Defendants abolished school attendance zones in favor of citywide open enrollment. As a result, students can seek enrollment at any New Orleans LEA, regardless of their address. By embracing this system of open enrollment, the State Defendants

have authorized individual New Orleans charter-LEAs to make independent enrollment decisions, which in turn enables LEAs to deny or discourage students with disabilities from applying. Parents of students with disabilities are significantly disadvantaged by this system and are forced to visit multiple schools in order to find an LEA that is willing to accept and is capable of serving their child. Ex. 49.

The State Defendants have perpetuated the discrimination of New Orleans students with disabilities during the enrollment process by failing to monitor LEA compliance with Section 504 and Title II of the ADA. Ex. 3, Cook 30(b)(6) Dep. 147:24-151:9; 152:11-19. This failure to engage in comprehensive monitoring has continued despite the State Defendants' receipt of numerous complaints and reports of New Orleans LEAs discriminating against students with disabilities during enrollment. *See, e.g.*, Exs. 50-54. Furthermore, LDOE has acknowledged the problem on multiple occasions:

- One LDOE internal report explained, "There appear to be several major issues with special education in New Orleans. . .Unofficial reports allege that some charter schools and some direct run RSD schools counsel parents or students from enrolling or encourage them to move to another school if unable to provide the services needed by students . . ." Ex. 11 at 1.

- An email between LDOE employees describes the experience of one family of a student with disability who was "denied placements in the RSD." The parent had spoken with personnel at the RSD and was "given school sites to visit for services." But the parents "have been told that the child is not able to attend any of the schools visited . . . Mr. [X] and Mrs. [X] are very concerned about [their child] receiving appropriate services as quickly as possible. Their calls to the RSD for information/assistance have not been returned." Ex. 55.

- Another LDOE inter-staff email discusses disability discrimination against New Orleans students with disabilities, stating, "I get phone calls about this every August. It is disappointing to hear how families are traipsing around NOLA begging for a place for their children." Ex. 56 at 1.

Because LDOE has no adequate process for monitoring compliance with Section 504 and Title II, even reported instances of discriminatory enrollment are, at best, remedied on a case-by-

case basis, leaving the goal of parish-wide non-discriminatory enrollment unresolved. Plaintiffs' expert Dr. Howarth reviewed the record of enrollment discrimination complaints and State Defendants' actions, and concluded that New Orleans LEAs can turn away or discourage students from applying with impunity, because "by nature (and very likely by design), many instances of this type of discrimination go unreported." Ex. 14, Howarth Exp. Rpt. at 62.

Furthermore, the State Defendants perpetuate discriminatory enrollment practices by failing to ensure that New Orleans LEAs provide the same educational options to students with disabilities as are provided to general education students. Specifically, Plaintiffs' expert Dr. Julie Mead concluded that the State has failed to ensure uniformity in the availability of special education and related services, which increases incidents of LEA discriminatory enrollment practices. Ex. 15, Mead Exp. Rpt. at 41-43. Finding significance in the low charter enrollment of the most severely disabled children, Dr. Mead found a correlation with charter control over programming and the "patchwork of readily available services" in the New Orleans charter LEAs. *Id.* at 42-43. Parents seeking enrollment will discover that a New Orleans charter LEA does not have available the related services required for their children, which in turn causes the charter to inform inquiring parents they are not currently equipped to handle specific disabilities, thus "counseling out" those families from applying to the school. *Id.*

The experiences of the representative Plaintiffs illustrate how the State Defendants' failure to ensure compliance with Section 504 and Title II affects the proposed subclass:

- Plaintiff P.B.'s parent attempted to apply or enroll P.B. in over 30 schools in a one month period. She was repeatedly told that either the school could not accommodate P.B., or that the school no longer had any openings available because they had reached their enrollment cap. Repeated calls to the RSD central office went unanswered. P.B. sat out of school for over one month trying to find a school placement. (Ex. 8 at no. 15).

- Plaintiff N.F.'s parent tried to apply to five different schools. She was repeatedly told that the schools were not equipped to accommodate N.F.'s disabilities. (Ex. 57 at no. 13).

- Plaintiff M.M.'s parent attempted to apply or enroll M.M. in six different schools. She was informed multiple times that either the school could not accommodate M.M.'s disabilities or that the school was not wheelchair accessible. (Ex. 58 at no. 11).

While the State Defendants have engaged in recent efforts to coordinate enrollment activities across the city, the current enrollment process—called "OneApp"—excludes more than 22 New Orleans schools, and thus does not provide a uniform enrollment system. Ex. 59. In fact, eight of the ten top-performing New Orleans schools do not participate. Moreover, the existence of OneApp does not change the fact that parents of students with disabilities must still go school-to-school seeking information about available special education programs and services. As explained in a 2013 report, "[t]he complex system . . . places a unique burden on parents—particularly those with children with disabilities—as they try to navigate the complex system to find the best program for their child's specific needs." Ex. 46 at 5. In a 2012 parent survey, one parent of a child with a disability explained, "I checked out at least eight schools. I didn't officially apply to all of them because some of them when I walked in the door told me they wouldn't take my son." Ex. 49 at 14. In short, the State Defendants have failed to take the appropriate action that would stop individual schools from influencing the enrollment process and "counseling out" students with disabilities. Ex. 15, Mead Exp. Rpt. at 45.

1. Numerosity

This subclass is sufficiently numerous that joinder of all members is impracticable. As previously discussed, there are over 4,000 New Orleans public school students who are identified as students with disabilities, and there is strong evidence that students with disabilities in New Orleans are grossly under-identified. *See supra* pp. 12-13. Of the identified students with disabilities, many have reported enrollment discrimination to the State Defendants and the RSD. Moreover, the Plaintiffs' expert, Dr. Howarth, has concluded that the number of official

complaints is likely far less than the number of children who have actually experienced discrimination. Ex. 14, Howarth Exp. Rpt. at 62. Based on these numbers, a "common sense assumption" is that this subclass is sufficiently numerous to satisfy Rule 23(a)(1). *Susan J.*, 254 F.R.D. at 458.

Furthermore, joinder is impracticable because the proposed subclass includes an unknown number of future members and a rotating membership, as students must annually seek enrollment or re-enrollment in a New Orleans LEA. *See, e.g. Jack,* 498 F.2d at 124; *J.D. v. Nagin*, 255 F.R.D. at 414.

2. Commonality

The State Defendants have failed to adequately monitor New Orleans LEAs' compliance with Section 504 and Title II, and have failed to promulgate and enforce corresponding policies and practices to ensure LEA compliance. Thus, the State Defendants have engaged in "a pattern or practice of agency . . . inaction" sufficient to generate a common class claim. *See M.D.*, 675 F.3d at 847. The representative Plaintiffs' claims raise the following common contentions that are capable of classwide resolution:

(1) Whether the State Defendants have a policy or practice of failing to adequately monitor New Orleans LEAs for compliance with Section 504 and Title II.

(2) Whether the State Defendants' failure to promulgate and enforce policies and practices to ensure compliance with Section 504 and Title II has resulted in subclass members being denied admission to New Orleans public schools on the basis of disability.

Resolution of these contentions produces a common answer because they arise from a single course of conduct: the State Defendants' failure to monitor and enforce New Orleans LEAs' compliance with Section 504 and Title II. This failure to monitor and enforce compliance with Section 504 and Title II is the "glue" uniting Plaintiffs' factual and legal claims, and it furnishes a common answer to why the proposed subclass members experience ongoing disability

discrimination as they attempt to apply or enroll in New Orleans schools. *See Wal-Mart*, 131 S. Ct. at 2552.

3. Typicality

The claims of Plaintiffs P.B., N.F., and M.M. are typical of the subclass because they have suffered the same injury: denial of equal access to public education in New Orleans on the basis of disability. Students within this subclass can only attend the schools in New Orleans willing to enroll them. In fact, the named Plaintiffs' experiences mirror the complaints received by State Defendants from New Orleans families of students with disabilities. *See supra* p. 42.

4. Adequacy of Representation

For the reasons stated at *supra* p. 15, the Plaintiffs and undersigned counsel will fairly and adequately protect the interests of the subclass. Plaintiffs and the subclass possess an identical interest in the State Defendants ensuring that New Orleans LEAs maintain non-discriminatory enrollment practices.

5. 23(b)(2)

The State Defendants have acted on grounds generally applicable to the class, thereby making final injunctive and corresponding declaratory relief appropriate for the class as a whole. Plaintiffs and the proposed subclass do not seek monetary damages or individualized injunctive relief. Instead, Plaintiffs request that the Court order the State Defendants to develop a plan for monitoring and enforcing New Orleans LEA compliance with Section 504 and Title II.

B. "Physical Accessibility" Subclass

Plaintiffs request that this Court certify a subclass of *present and future New Orleans students with mobility impairments who have been or will be denied access to the programs and services of a New Orleans LEA as a result of structural or architectural barriers.* For purposes of class certification, students with mobility impairments are those students who use wheelchairs,

scooters, crutches, walkers, canes, or similar devices to assist in their navigation. The representative Plaintiff for this subclass is M.M. The claim common to all putative subclass members is that the State Defendants, who have centralized control over the vast majority of New Orleans public school buildings and facilities, have failed to ensure that those buildings are physically accessible, thus denying students with mobility impairments full and equal access to New Orleans LEAs' programs and services, in violation of Section 504 and Title II.

The inability of students with mobility impairments to physically access educational opportunities available in New Orleans is exactly the type of injury that Section 504 and Title II were designed to prevent. *See Pace*, 403 F.3d at 291 ("Mandating physical accessibility and the removal and amelioration of architectural barriers is an important purpose of each statute."). Title II's regulations impose specific obligations on public entities with regard to physical accessibility, and delineate between existing facilities (i.e., structures built prior to the ADA), and new or altered facilities. For "existing facilities," the regulations require a public entity to "operate each service, program, and activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150(a). The regulations allow public entities to use a variety of methods to make existing facilities "readily accessible," including the "reassignment of services to accessible buildings" and "the alteration of existing facilities and construction of new facilities." *Id.* § 35.150(b)(1); *see also Tennessee v. Lane*, 541 U.S. 509, 532 (2004).

The DOJ's technical assistance manual for Title II provides explicit guidance on physical accessibility requirements for public schools. Specifically, the manual explains that a school system should provide wheelchair access at schools throughout its service area so that children who depend upon wheelchairs can attend school at locations comparable in convenience to those

available to other children. Ex. 69 at 13. The manual further states that where "schools offering different curricula or instruction techniques are available, the range of choice provided to students with disabilities must be comparable to that offered to other students." *Id.* Moreover, "the apparent lack of students with disabilities in a school district's service area does not excuse the school district from taking whatever appropriate steps are necessary to ensure that its programs, services, and activities are accessible to qualified individuals with disabilities." *Id.* at 21.

Here, the State Defendants have created a public education system in New Orleans in which over 60 schools serve as stand-alone, independent LEAs with no ascertainable geographic service area. (Compl. ¶¶ 32-35.) By abolishing a unitary school system to create a system of 60 independent LEAs, the State can no longer scatter wheelchair-accessible schools throughout a single New Orleans service area. The State Defendants have an affirmative obligation to ensure that each LEA in New Orleans is accessible by students with limited mobility.

Furthermore, the State Defendants authorized each of these independent LEAs to offer a unique educational program, with a variety of specialized curricula in areas such as science, technology, business, or the arts. By definition, these charter schools "have complete autonomy over their budget, the hiring and firing of staff, programs, curriculum, schedule and all other operations of the school." Ex. 60. Because these schools each offer "different curricula or instruction techniques," the State is obligated to ensure that "the range of choice provided to students with disabilities [is] comparable to that offered to other students." Ex. 69 at 13.

The State Defendants have centralized decision-making control with respect to the physical accessibility of most New Orleans school facilities. Not only have the State Defendants devised and implemented the current system, they also control the buildings and the land upon

which all schools in New Orleans, with the exception of the OPSB schools, operate. Under the state legislation which transferred the majority of OPSB schools to the state-run RSD, the State was given all rights and responsibility of ownership over the land, buildings, facilities and other property of the schools it took over.[15] The State was further empowered to lease, rebuild or renovate the school facilities as necessary.

Additionally, the State Defendants are recipients of federal financial assistance and assume an explicit obligation to ensure that New Orleans LEA services, programs, and activities, when viewed in their entirety, are readily accessible to and usable by students with mobility impairments. The State Defendants have wholly failed in this regard. In fact, the State Defendants have failed to act despite receiving parent complaints and notification of accessibility problems from the RSD:

- In February 2010, Margaret Lang, the RSD Director of Intervention Services, sent an email to LDOE officials with an accounting of the physical accessibility of all New Orleans schools. The email states that "this needs to be taken into account," as RSD direct-run schools have almost three times the number of students with orthopedic impairments and four times the number of students with multiple disabilities. Ex. 61 at 3-4.

- Ms. Lang emailed LDOE officials again in April 2011, stating that among New Orleans schools without enrollment caps, only four elementary schools and four highs school were wheelchair accessible. She further noted that "these schools also already have inordinate [numbers] of students [with] significant dis[abilities]." Ex. 62.

- In April 2011, LDOE received a parent complaint that stated their child's LEA refused to provide ramps to accommodate her child, who is physically disabled. The parent further complained that she requested an aide for the child, but the "[p]rincipal refuses because of cost." The parent concludes, "I feel the teachers, etc, are going to do what the principal says; she has said there is no money for my child." Ex. 63 at 2.

[15] *See* La. R.S. § 17:1990(B)(4)(b), transferring "all the rights and responsibilities of ownership regarding all land, buildings, facilities, and other property that is part of the school being transferred" when the RSD acquires control of schools pursuant to La. R.S. § 17:10.7; *see also Orleans Parish Sch. Bd. v. Lexington Ins. Co.*, 76 So. 3d 592, 594 (La. Ct. App. 2011) (finding that pursuant to these two statutes, the RSD had acquired ownership of 107 OPSB school facilities in its 2005 takeover).

Even a cursory look at the *New Orleans Parents' Guide to Public Schools: Spring 2013 Edition*, sponsored in part by LDOE and the RSD, illustrates the drastically limited school options for students with mobility impairments.[16] *See* Ex.19. According to the Guide, over half of the Type 5 charter schools in New Orleans, representing 30 LEAs, are inaccessible to students with mobility impairments, as are all Type 2 charter schools in the Parish. The Guide further indicates that there are no RSD direct-run schools (the only State-run schools in New Orleans without enrollment caps[17]) accessible to students with mobility impairments.

The experience of named Plaintiff M.M. provides a telling example of how the State Defendants' failures have affected the proposed class:

- Plaintiff M.M., identified under the IDEA as a student with "multiple disabilities," is non-ambulatory, requiring the use of wheelchair. M.M.'s mother visited six different schools that were near her home in an attempt to identify an accessible school. On multiple occasions, she was told that the school did not have any experience or was otherwise ill-equipped to serve M.M. At one school, Lafayette Academy, M.M.'s mother was told that the school was willing to serve M.M., but she was unable to apply because the school's facilities were not wheelchair-accessible. (Ex. 58 at nos. 6, 11).

Courts routinely hold that class certification is appropriate where the proposed class consists of people with disabilities affected by systemic access barriers. *See, e.g., Gray v. Golden Gate Nat'l Recreational Area*, 279 F.R.D. 501 (N.D. Cal. Aug. 30, 2011) (certifying a class of plaintiffs with mobility and/or vision disabilities seeking injunctive relief against the defendant park service for failing to provide adequate accommodations under Section 504); *Lopez v. San Francisco Unified Sch. Dist.*, 2003 WL 26114018 (N.D. Cal. Sept. 8, 2003); *Access Now, Inc. v. AHM CGH*, 2000 WL 1809979 (S.D. Fla. July 12, 2000).

[16] The Parents' Guide, using a wheelchair symbol on the top right hand corner of each school's profile, indicates whether the school is in an accessible building.

[17] *See* La. Rev. Stat. Ann. § 17:3991(C)(1)(c)(iv).

1. Numerosity

This subclass is sufficiently numerous to make joinder impracticable. According to the State Defendants' 2010 data, 86 students in New Orleans public schools were identified as students with "orthopedic impairments" under the IDEA, and an additional 60 students were identified as students with "multiple disabilities" under the IDEA, such as representative Plaintiff M.M.[18] Ex. 48. The putative class also includes students with physical impairments that do not adversely affect educational performance, thus qualifying them as students with disabilities under Section 504 but not under the IDEA, including children who use wheelchairs, walkers, or other assistive devices. Although the State Defendants do not report data on the number of students who would exclusively qualify under Section 504 for a mobility-related disability, the known number of IDEA-eligible students combined with the unknown number of Section 504-eligible students easily totals over forty, making joinder presumptively impracticable.

Moreover, the inclusion of future, unknown students makes joinder impracticable. Students with mobility impairments may move into the city, young students with physical disabilities may begin public school, or students who do not currently have a mobility-related disability may become impaired through, for example, accidents or disease.

2. Commonality

The State Defendants have engaged in "a pattern or practice of agency . . . inaction" by failing to ensure compliance with the physical accessibility requirements of Section 504 and Title II. *See M.D.*, 675 F.3d at 847. Specifically, the State Defendants have failed to ensure that New Orleans students with mobility impairments are not excluded from participation in or

[18] Multiple disabilities" includes students with linked impairments, such as mental-retardation-orthopedic impairment, "the combination of which causes severe educational needs that they cannot be accommodated in special education programs solely for one of the impairments." 34 C.F.R. § 300.8(c)(7).

denied the benefits of the services, programs, and activities of the New Orleans LEAs. The claims of the representative Plaintiff and the proposed subclass share the following common questions of law and fact capable of classwide resolution:

(1) Whether the State Defendants have taken appropriate steps to ensure that the programs, services, and activities available throughout the New Orleans LEAs are accessible to students with mobility impairments.

(2) Whether the State Defendants have provided New Orleans students with mobility impairments a range of school choice comparable to that offered to other students, including schools offering different curricula and instructional methodologies.

Resolution of these questions will produce a "common answer" because these contentions arise from a standardized course of conduct: the State Defendants' system-wide failure to assess and eliminate access barriers for New Orleans students with mobility impairments. The State Defendants' conduct has also subjected the representative Plaintiff and the putative subclass to a common injury: the inability to physically access the full array of services, programs, and activities available at the majority of New Orleans' LEAs, which in turn denies them the full range of choice offered to students without mobility impairments.

Moreover, Plaintiffs' common contention is susceptible to classwide resolution and may be addressed "in one stroke." *Wal-Mart,* 131 S. Ct. at 2551. "In cases brought under the ADA and section 504 where the allegations in the complaint stem from allegedly exclusionary policies and barriers, these barriers provide a common nucleus of operative fact from which to seek injunctive relief." *Lopez*, 2003 WL 26114018, at *3; *see also Gray*, 279 F.R.D. at 522 (holding that alleged accessibility violations under Section 504 may be remedied by a single injunction).

3. Typicality

Plaintiff M.M.'s claims are typical of those of the proposed subclass because they have suffered the same injury: the inability to physically access the services, programs, and activities at the majority of New Orleans' LEAs. Thus, the representative Plaintiff and the proposed

subclass are not provided a range of school choice comparable to that offered to New Orleans students without mobility impairments. Moreover, this common injury is directly traceable to the same course of conduct: the State Defendants' systemic failure to remedy access barriers or otherwise ensure that the range of school choice provided to students with mobility impairments is comparable to that offered to other students. "Indeed, in a public accommodations suit . . . where disabled persons challenge the legal permissibility of architectural design features, the interests, injuries and claims of the class members are, in truth, identical such that *any* class member could satisfy the typicality requirements for class representation." *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 450 (N.D. Cal. 1994).

Moreover, differences in the disabilities of the putative class members or of the structural barriers in the various New Orleans LEAs do not defeat typicality. *See, e.g., Gray,* 279 F.R.D. at 516; *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001); *Access Now, Inc.*, 2000 WL 1809979, at *3.

4. Adequacy of Representation

For the reasons stated at *supra* p. 15, the Plaintiffs and undersigned counsel will fairly and adequately protect the interests of the subclass. Plaintiffs and the subclass possess an identical interest in the State Defendants removing structural barriers from the New Orleans LEAs within its control.

5. 23(b)(2)

Plaintiff M.M. and the proposed subclass assert exactly the types of claims that Rule 23(b)(2) was designed to remedy. *See Baby Neal*, 43 F.3d at 58 (3rd Cir. 1994) (holding that Rule 23(b)(2) requirements are "almost automatically satisfied in actions primarily seeking injunctive relief."). Specifically, Plaintiff M.M. and the proposed subclass seek injunctive and corresponding declaratory relief to compel the State Defendants to eliminate structural barriers at

New Orleans LEAs rendering them inaccessible to students with mobility impairments. (Compl. ¶¶ 195-96; Prayer for Relief ¶ 4.) This relief applies to the subclass as a whole. *See Gray*, 279 F.R.D. at 521-22 (holding that multiple injunctions are not necessary to resolve plaintiffs' accessibility claims under Section 504, rather a single injunction "could be formulated that would be sufficiently specific and would resolve the class claims").

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion for class certification and certify the proposed subclasses pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure.

Dated: August 2, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2013, a true and correct copy of the foregoing Memorandum of Law in Support of Plaintiffs' Renewed Motion for Class Certification was filed electronically. Notice of this filing will be sent via email to all parties by the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

Dated: August 2, 2013

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