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

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

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

TABLE OF CONTENTS

Page

Preliminary Statement **1**

Factual Background **4**

I. The Decentralization of New Orleans Schools is Causing Irreparable Harm to Students with Disabilities **4**

II. Children with Disabilities Are Being Refused Admission to Public Schools **5**

III. Children with Disabilities Are Not Being Identified and Evaluated **6**

IV. Children with Disabilities Are Subject to Unlawful Disciplinary Procedures **8**

Argument **8**

I. Plaintiffs Should be Granted Preliminary Relief **8**

A. Federal Law Requires Defendants to Locate and Identify Children With Disabilities, Prohibits Discrimination Based on Disability, and Guarantees Procedural Safeguards Before a Child is Subjected to Discipline **9**

1. Section 504 and Title II Prohibit Discrimination Based on Disability **10**
2. The IDEA Requires Effective "Child Find" Policies and Practices **11**
3. The IDEA Guarantees Procedural Safeguards Before Students with Disabilities Are Subjected to Discipline **11**

B. Plaintiffs Are Likely to Succeed on the Merits **12**

1. Violations of Section 504 and Title II by Denying Access **13**
2. Violations of the IDEA by Failing to Establish Adequate Child Find Policies and Programs **15**
3. Violations of the IDEA by Failing to Ensure That Procedural Protections Related to Discipline Are Afforded **16**

C. Plaintiffs Will Suffer Irreparable Harm in the Absence of a Preliminary Injunction **18**

D. The Remedies Sought by Plaintiffs Will Begin Addressing This Harm **19**

E. Balance of Hardship Weighs in Plaintiffs' Favor **21**

F. The Public Interest Favors Preliminary Injunctive Relief **22**

II. The Court Should Order Expedited Discovery **23**

Conclusion **24**

TABLE OF AUTHORITIES

Page(s)

CASES

d of d c of nd c d on C nı c ı o y,
458 U.S. 176 (1982).....11

o n d of d c,
347 U.S. 483 (1954).....18

C n A ı of C y,
489 F.2d 567 (5th Cir. 1974).....9

C W W d Cnıy,
957 F. Supp. 847 (W.D. Tex. 1997).....13

Co y d of d c of C c,
995 F. Supp. 900 (N.D. Ill. 1998).....9

A L ı A o ı nd c ı,
716 F. Supp. 2d 603 (S.D. Tex. 2009), *ff d*, 629 F.3d 450 (5th Cir. 2010).....13

Co m y An ı W y n on c ı,
746 F. Supp. 2d 1132 (C.D. Cal. 2010).....18, 22

d d ı Co c nı f c Co ı nc,
599 F. Supp. 1084 (D. Minn.), *ff d n ı d n ı on o ı o nd*, 746 F.2d 429 (8th Cir. 1984).....23

o ı A oc nc nı d ı ı,
917 F. Supp. 841 (D.D.C. 1996).....23

no ı o,
520 F. Supp. 905 (S.D. Tex. 1981).....22

non Cnıy d of d c,
941 F.2d 402 (6th Cir. 1991).....19

on o
484 U.S. 305 (1988).....11

c,
519 F. Supp. 2d 870 (E.D. Wis. 2007).....15

o n nn y n,
No. 98-CV-5781, 2000 WL 558582 (E.D. Pa. May 8, 2000).....21, 22

L C rnc n oto Co ,

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

PRELIMINARY STATEMENT

The Defendants' pervasive violations of three federal statutes – the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA"), 20 U.S.C. § 1400 *et seq.*, Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794, and Title II of the Americans with Disabilities Act ("Title II"), 42 U.S.C. § 12101, *et seq.* – have denied New Orleans students with disabilities access to a public education and subjected them to irreparable harm. As a result of the State's abdication of its responsibility to ensure that the multiple, independent entities charged with administering public education in the city of New Orleans comply with federal law, students are denied adequate [illegible]

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

After Hurricane Katrina, and at the Defendants' directive, New Orleans' public school system was eliminated and replaced with a decentralized system in which 51 separate school districts (local educational agencies or "LEAs") are responsible for providing public education in the city of New Orleans. But as part of their creation of a decentralized system, the Defendants left out a mechanism to provide the necessary oversight to ensure compliance with federal laws protecting students with disabilities. As a result, students with disabilities in New Orleans are falling through the cracks. Indeed, the Defendants' agents have recognized the possibility of this result. As noted in 2008 by outgoing Recovery School District Superintendent Paul Vallas, New Orleans schools must "adhere to special education mandates. If they don't, we're going to be

significant difficulty trying to enroll in school b

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

FACTUAL BACKGROUND

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

In a traditional school system, an LEA exercises control over all of the schools located in the municipality; however, in New Orleans, public education is entirely decentralized. Fifty-one LEAs operate the City's 88 schools.[1] Robert Garda, *Policy of decision for Louisiana*

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

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

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

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

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

III. Children with Disabilities Are Not Being Identified and Evaluated

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

The Defendants' existing statewide Child Find policy simply cannot be implemented in New Orleans. The present policy presumes the existence of a centralized agency with jurisdiction and responsibility for students residing in a single geographic area. Specifically, Louisiana regulations require each LEA to ensure that "[a]ll students with exceptionalities residing in the district, including students with exceptionalities who are homeless children or who are wards of the state, and students with exceptionalities attending private schools . . . and who are in need of special education and related services, are identified, located, and evaluated."

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

Similarly, the Defendants' statewide Child Find policy also assumes that each LEA has sufficient training to recognize when a student should be referred for an evaluation, and that each LEA employs certified pupil appraisal personnel such as certain diagnosticians, psychologists, social workers, and speech or language pathologists

IV. Children with Disabilities Are Subject to Unlawful Disciplinary Procedures

In addition to their failure to ensure equal access for students with disabilities and the identification of students with disabilities, the Defendants have also failed to ensure that children with disabilities in New Orleans are afforded the procedural safeguards mandated by the IDEA. For example, the IDEA provides that schools must address behavioral problems that are the manifestation of disabilities by creating behavioral intervention plans rather than resorting to disciplinary actions. 20 U.S.C. §§ 1414(d)(3)(B)(i), 1415(k)(1)(F); 34 C.F.R. §§ 300.324(a)(2)(i), 300.530(f).

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

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

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The Defendants are ultimately responsible for ensuring that all children with disabilities in New Orleans receive the full protections and services guaranteed by federal law. *Co y d. of d. c of C c* , 995 F. Supp. 900, 904 (N.D. Ill. 1998) ("[C]ongress placed the ultimate responsibility of [IDEA] compliance with the state educational agency"); *t ny c d Lo n* , 142 F.3d 776, 784 (5th Cir. 1998) ("IDEA places primary responsibility on the state educational agency").

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

Section 504 and Title II[2] prohibit public entities from discriminating against individuals with disabilities and prohibit public schools from excluding students with disabilities from participating in or receiving the benefits of a school's programs, activities, and benefits. 29 U.S.C. § 794(a); 42 U.S.C. § 12132. Each student with a disability must be provided access to all programs provided to non-disabled students. 29 U.S.C. § 794(a); 42 U.S.C. § 12132. Further, reasonable accommodations and modifications must be provided to ensure meaningful

accommodations. Further, students with disabilities must receive certain procedural protections before they are suspended for more than ten cumulat

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

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

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

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

Plaintiffs and proposed class members will be able to demonstrate that Defendants have failed to ensure that each LEA in New Orleans offers equal access to the same educational a

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

As a result of the Defendants' failures, several of the Plaintiffs have been oedf110.9756(l4e)3.15789(n)9

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

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

Not only have the Defendants created a structure th

tenth day of suspension, do not receive functional behavioral assessments and behavior intervention plans, and are not provided manifestation determination reviews before being disciplined. *d.* The monitoring reports also document the consequences of this system in which

q *ıo* *co*, 353 F.3d 108 (1st Cir. 2003) (injunction in favor of hearing impaired student affirmed).

Absent an injunction, the Defendants will continue to allow overt acts of discrimination against students with disabilities in New Orleans, such as named Plaintiffs P.B., N.F., and M.M., causing additional students to be denied access to New Orleans public schools. Children with disabilities who are out of school will face an increased risk of academic failure, exposure to the juvenile justice system, and adult incarceration. Complaint ¶ 173. Further, the Defendants will continue to disregard the use of aggressive and highly disproportionate disciplinary practices rather than special education accommodations for children with disabilities, which will cause these students to experience emotional and psycholo

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

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

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

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

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The balance of hardships in this case tips overwhelmingly in favor of Plaintiffs and proposed class members. In the absence of an injunction, Plaintiffs and proposed class members will suffer a daily worsening of the irreparable harm of not being provided a free appropriate public education and discrimination on the basis of their disability. *o n* , 927 F. Supp. 622, 639 (S.D.N.Y. 1995 678(o)-0.956417(v)-0.956417(i)-2.53658()-0.47N76985( )-0.478208(1)-3.15789

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

[illegible]

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

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

Accordingly, the public interest favors granting a preliminary injunction.

II. The Court Should Order Expedited Discovery

This Court has the authority, pursuant to Rule 34 of the Federal Rules of Civil Procedure, to direct the parties to engage in expedited discovery in connection with Plaintiffs' preliminary injunction motion. [illegible], No. 06-CV-285, 2007 WL 2241492 (E.D. Tex. Aug. 03, 2007) (granting plaintiff's and counter-defendant's applications for preliminary injunction and motion to compel expedited discovery); [illegible]

CONCLUSION

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