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

E.H., by and through his next friend, Lula Henry; J.P., by and through his next friend, Joe Nemeka Paige; and R.T., by and through his next friend, Dawn Traxler; on behalf of themselves and all similarly situated students, Plaintiffs, v. MISSISSIPPI DEPARTMENT OF EDUCATION, Defendant.	Case No. 3:12cv00474-DPJ-FKB

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

I. INTRODUCTION

Plaintiffs E.H., J.P., and R.T., on behalf of themselves and hundreds of similarly situated special education students in the Jackson Public School District ("JPS"), have filed a class action complaint seeking declaratory and injunctive relief under the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA"), 20 U.S.C. § 1400 *et seq*. to compel the Defendant Mississippi Department of Education ("MDE") to comply with its statutory duty to ensure that they receive a free appropriate public education ("FAPE"). Plaintiffs seek to represent a class defined as:

> All JPS students with disabilities who were included as class members in the September 2010 IDEA administrative complaint styled as *A.M. v. Jackson Public Schools,* or who would currently meet the definition of a class member as established in that administrative matter, which consists of IDEA eligible students with emotional disabilities and IDEA eligible students who manifested behavior

> issues and were subjected to three or more disciplinary removals[1] from JPS and/or placement in an alternative school setting in JPS during the course of a single school year.

Am. Compl. ¶17. Rule 23(c)(1) of the Federal Rules of Civil Procedure states that the court shall determine whether the action is to be maintained as a class action "at an early practicable time" after the commencement of an action. *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.,* 487 F.3d 261, 267 (5th Cir. 2007), *abrogated on other grounds by Erica P. John Fund, Inc. v. Halliburton Co.,* 131 S. Ct. 2179, 2186 (2011). Plaintiffs respectfully submit this memorandum in support of their Motion for Class Certification.

This case is ideally suited to proceed as a class action because the Plaintiffs and the entire class are similarly aggrieved by Defendant's failure to ensure the implementation of policies and procedures within JPS that are a necessary prerequisite for them to receive the FAPE they are entitled to receive under the IDEA. Courts recognize that class actions are particularly appropriate in cases such as this that seek systemic reform of a governmental agency's standardized policies and practices. *See Jones v. Diamond,* 519 F.2d 1090, 1100 (5th Cir. 1975) ("[T]he 23(b)(2) class action is an effective weapon for an across-the-board attack against systematic abuse."), *disapproved in part on other grounds by Gardner v. Westinghouse Broad. Co.,* 437 U.S. 478 (1978). Plaintiffs do not seek any individual relief, and instead seek permanent injunctive relief and corresponding declaratory relief to remedy Defendant's wholesale abdication of its responsibility to ensure that JPS has the necessary infrastructure in place to deliver FAPE to Plaintiffs and the class. Granting Plaintiffs' motion for class certification will resolve this suit with speed, consistency and fairness to all parties.

[1] Disciplinary removals are defined as in-school suspension, out-of-school suspension, and undocumented illegal removals from school.

II. STATEMENT OF FACTS

On September 8, 2010, Plaintiff E.H.[2] and a class of similarly situated students eligible for services under the IDEA filed a systemic state administrative complaint with MDE against JPS pursuant to 34 C.F.R. § 300.151-153. *See* Exhibit 1, Systemic State Administrative Complaint against JPS 1-2, Sept. 8, 2010 (hereinafter "Administrative Complaint"). The Administrative Complaint was filed on behalf of a class of students that included IDEA eligible students with emotional disabilities and IDEA eligible students who manifested behavior issues and were subjected to three or more disciplinary removals from JPS and/or placement in an alternative school setting in JPS during the course of a single school year. *Id.* Plaintiff E.H. and the other named petitioners[3] filed the Administrative Complaint to address individual and systemic violations of the IDEA by JPS which resulted in the denial of FAPE to Plaintiff E.H., the petitioners and all similarly situated students. *Id.* at 5-41. The Administrative Complaint alleged the following individual and systemic violations of the IDEA by JPS:

a) Denial of FAPE by failing to provide petitioners and similarly situated students with appropriate levels of related services;

b) Denial of FAPE by failing to comply with the IDEA's discipline regulations with regard to functional behavioral assessments ("FBA"), behavior intervention plans ("BIP"), and manifestation determination reviews ("MDR");

c) Denial of FAPE by failing to confer meaningful educational benefit;

[2] The September 8, 2010 Administrative Complaint included several other named petitioners, who have moved, left the District or are not otherwise named in this case.

[3] Use of the term petitioner is intended to refer to the individual students who filed the original Administrative Complaint on September 8, 2010 on behalf of themselves and all similarly situated students.

d) Denial of FAPE by failing to comply with the substantive and procedural requirements governing the development and implementation of individualized education programs ("IEP");

e) Denial of FAPE by failing to provide educational services for petitioners and similarly situated students in the least restrictive environment;

f) Denial of FAPE by failing to provide petitioners and similarly situated students with necessary and appropriate transition services;

g) Denial of FAPE by failing to provide petitioners and similarly situated students with necessary and appropriate extended school year ("ESY") services.

Id. at 5. Plaintiff E.H., the other petitioners and a class of similarly situated students alleged that these violations resulted in a cycle of unlawful removals from the classroom environment and punishment for behaviors related to their disabilities, and deprived them of the ability to make positive academic gains. *Id.* at 6-7.

As required by the IDEA under 34 C.F.R. § 300.152, MDE investigated the Administrative Complaint and issued a report with its findings and decision on November 22, 2010. *See* Exhibit 2, MDE Office of Special Education, Findings and Decision with Regards to the State Administrative Complaint Against JPS, Nov. 22, 2010 (hereinafter "Findings and Decision"). MDE's investigation substantiated each of the violations alleged by E.H. and the other petitioners, and confirmed that the violations were systemic throughout JPS, resulting in the denial of FAPE to E.H. and similarly situated students. *Id.* at 3, 6-13, 16-20, 24, 25. MDE ordered JPS to submit a corrective action plan ("CAP") to MDE within 30 days, and provided JPS with a technical advisor to assist JPS with developing an appropriate CAP. *See* Exhibit 3, Letter from T. Bradley, Bureau Director, MDE Office of Special Education, to C. Cockrell,

Attorney, Southern Poverty Law Center and L. Edwards, Superintendent, JPS (Nov. 22, 2010). MDE made it clear that JPS must take both individual and systemic corrective action to correct the individual and systemic violations identified by MDE in its investigation. *See* Exhibit 2, Findings and Decision at 3-5, 8-12, 14, 15, 17-19, 21-24, 26.

Despite MDE's directive that JPS consult with the technical advisor in developing a CAP, JPS refused to work with the technical advisor and deliberately excluded the technical advisor from the majority of the corrective actions listed in the CAP that JPS submitted to MDE on December 21, 2010. Am. Compl. ¶ 37. JPS' CAP suffered from several glaring deficiencies and failed to address several of MDE's findings. Am. Compl. ¶ 38. Despite these deficiencies, MDE took no corrective action against JPS and allowed JPS to proceed under a deficient CAP for several months. Am. Compl. ¶¶ 39-40. JPS' open defiance to MDE escalated, and JPS refused to grant the technical advisor access to JPS' premises to conduct a follow-up monitoring visit on April 18, 2011. Am. Compl. ¶ 42. MDE acquiesced to this defiance, and rescheduled the monitoring visit for late May 2011 – six months after MDE issued its initial Findings and Decision. Am. Compl. ¶¶ 42, 43.

MDE again allowed six months to elapse and waited until mid-November 2011 to schedule another follow-up monitoring visit. Am. Compl. ¶ 46. MDE then waited until January 13, 2012 – two months after the deadline for JPS to correct all areas of noncompliance – to issue its follow-up monitoring report. Am. Compl. ¶ 46. The monitoring report detailed the same individual and systemic violations identified in the November 22, 2010 Findings and Decision. *See* Exhibit 4, Letter from T. Bradley, Bureau Director, MDE Office of Special Education, to Dr. J. Sargent, Superintendent, JPS (Jan. 13, 2012); Exhibit 5, MDE, *Follow-up Monitoring Evaluation Report on Services for Students with Disabilities* 3-18 (Nov. 15-16, 2011)

(hereinafter *November Follow-up Monitoring Report*). In over one year, JPS had failed to correct a single area of noncompliance. *See* Exhibit 5, *November Follow-up Monitoring Report* 3-18.

MDE conducted another follow-up monitoring visit on April 18-20, 2012, and issued a report on May 15, 2012. MDE acknowledged that JPS had made a minor effort to develop policies and procedures and provide training to staff. *See* Exhibit 6, Letter from T. Bradley, Bureau Director, MDE Office of Special Education, to Dr. J. Sargent, Superintendent, JPS (May 15, 2012). However, a review of student files indicated that JPS had completely failed to implement the newly promulgated policies and procedures. *See* Exhibit 6, Letter from T. Bradley to Dr. J. Sargent (May 15, 2012); Exhibit 7, MDE, *Follow-up Monitoring Evaluation Report on Services for Students with Disabilities* (Apr. 18-20, 2012) (hereinafter *April Follow-up Monitoring Report*). As a result, JPS still had not resolved the original violations dating back to November 2010. *Id.* Rather than taking meaningful corrective action to address JPS' ongoing defiance and noncompliance, MDE requested more of the same by simply ordering JPS to submit yet another CAP, even though JPS has consistently produced deficient CAPs. *See* Exhibit 6, Letter from T. Bradley to Dr. J. Sargent (May 15, 2012).

JPS remains in noncompliance with MDE's November 22, 2010 Findings and Decision, even though the deadline for correcting all areas of noncompliance passed almost one year ago. MDE is ultimately responsible for ensuring that Plaintiffs and the class receive FAPE. 20 U.S.C. § 1412(a)(1), (11)(A). However, MDE's monitoring and enforcement continues to be insufficient and inadequate, and Plaintiffs and the class continue to suffer the denial of FAPE as a result of MDE's failure to enforce its November 22, 2010 Findings and Decision. Am. Compl. ¶¶ 50, 54.

III. THE PROPOSED CLASS MEETS THE STANDARD FOR CLASS CERTIFICATION.

A class should be certified under Rule 23(a) of the Federal Rules of Civil Procedure when:

> (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.

These requirements are generally referred to as "numerosity, commonality, typicality, and adequacy." *DeLeon-Grandaos v. Eller and Sons Trees, Inc.,* 497 F.3d 1214, 1220 (11th Cir. 2007) (quoting *Piazza v. Ebsco Indus., Inc.*, 273 F.3d 1341, 1346 (11th Cir. 2001)).

Plaintiffs seeking class certification must establish all of the elements of Rule 23(a), as well as at least one element of Rule 23(b). *See M.D. ex rel. Stukenberg v. Perry,* 675 F.3d 832, 837 (5th Cir. 2012). Rule 23(b)(2) permits class certification in cases where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." As set forth below, Plaintiffs here have satisfied all of the requirements of Rule 23(a) and have established that this case is appropriate for certification under Rule 23(b)(2).

A. The Class is so Numerous that Joinder of All Members is Impracticable.

Rule 23(a) requires the assessment of two components: the number of class members and the practicability of joining all members of the class. *Phillips v. Joint Legislative Comm.,* 637 F.2d 1014, 1022 (5th Cir. 1981) ("The proper focus is not on numbers alone, but on whether joinder of all members is practicable in view of the numerosity of the class and all other relevant factors.") In order to satisfy the first component, there is no set number above or below which a class is considered sufficiently numerous to make joinder impracticable. *See Mullen v. Treasure*

Chest Casino, LLC, 186 F.3d 620, 624-25 (5th Cir. 1999) ("[T]he number of members in a proposed class is not determinative of whether joinder is impracticable . . . ."). However, the Fifth Circuit has found that a class numbering between 100 and 150 members "is within the range that generally satisfies the numerosity requirement." *Id.* Typically, a class numbering more than forty members "should raise a presumption that joinder is impracticable." *Id.* (quoting 1 Newberg on Class Actions § 3.05, at 3-25 (3d ed. 1992)). *See also Jones*, 519 F.2d 1090, 1100, n. 18 (5th Cir. 1975) (class of 48 members may be appropriate for certification); *Jack v. Am. Linen Supply Co.,* 498 F.2d 122, 124 (5th Cir. 1974) (per curiam) (class of 51 members may be appropriate for certification); *R.P.-K. ex rel. C.K. v. Dep't of Educ., Hawaii,* 272 F.R.D. 541, 547 (D. Hawaii, Mar. 15, 2011) (finding class of "several hundred students" with disabilities sufficient to satisfy numerosity requirement).

The class in this case is sufficiently numerous to make joinder impracticable. According to Defendant's own data, JPS enrolled 2,871 IDEA eligible students with disabilities during the 2011-2012 school year. *See* Exhibit 8, MDE, *District Data Profile Report for JPS* 1 (Jan. 20, 2012), *available at* http://www.mde.k12.ms.us/docs/sped-11-12-district-data-profiles/jacksonpublic_2520.pdf?sfvrsn=3. Approximately 240 of these students are eligible for special education services due to an emotional disturbance, making them members of the proposed class. *Id.* The class is further enlarged by the hundreds of students with disabilities who have received three or more disciplinary removals and/or placement in an alternative school setting during the course of a single school year. Am. Compl. ¶ 18. During the 2009-2010 school year, over 200 students with disabilities in JPS were expelled or received ten or more days of out-of-school suspension. *See* Exhibit 9, JPS, *The Children's First 2009-2010 Annual Report* 1 (2010), *available at* http://www.jackson.k12.ms.us/about/2011_testscores/mde_dashboard.pdf. Since then, JPS has

suspended students with disabilities at even higher rates, adding more students to the proposed class. Am. Compl. ¶ 18. *See also* Exhibit 7, *April Follow-up Monitoring Report* at 16-17 (showing that in 2010-2011, 3.1% of students with disabilities at the middle school level received 10 or more days of out-of-school suspension, and in 2011-2012, this percentage jumped to 11.1% of students with disabilities.) The class in this case therefore consists of more than 300 students – a size sufficient to make joinder presumptively impracticable.

On the second part of the Rule 23(a) inquiry, "[p]racticability of joinder depends on size of the class, ease of identifying its members and determining their addresses, facility of making service on them if joined and their geographic dispersion." *Garcia v. Gloor,* 618 F.2d 264, 267 (5th Cir. 1980). In particular, the inclusion of future, unknown class members will make joinder impracticable. *Jack,* 498 F.2d at 124 (where class includes "unnamed, unknown future" class members "joinder of unknown individuals is certainly impracticable.") *See also Jones,* 519 F.2d at 1100 ("Smaller classes are less objectionable where . . . the plaintiff is seeking injunctive relief on behalf of future class members as well as past and present members.")

The class here most definitely includes future, unknown students, thus rendering joinder impracticable. Throughout the school year, students in JPS may become eligible for IDEA services due to an emotional disturbance, and students with an emotional disturbance may transfer into the District. Further, students already identified as eligible for IDEA services may join the class if they experience three or more disciplinary removals and/or placement in JPS' alternative school. The proposed class therefore consists of future, unknown members, making joinder in this case particularly impracticable. The class therefore satisfies the requirement of Rule 23(a)(1).

B. The Class Shares Common Questions of Law and Fact.

To satisfy Rule 23(a)(2), Plaintiffs must establish that "there is at least one issue, the resolution of which will affect all or a significant number of the putative class members." *Lightbourn v. County of El Paso,* 118 F.3d 421, 426 (5th Cir. 1997). More specifically, the class members' claims "must depend upon a common contention . . . . [that] must be of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes,* 131 S. Ct. 2541, 2551 (2011). *See also M.D.*, 675 F.3d at 840. A class representative must further demonstrate that the class members "have suffered the same injury." *Wal-Mart Stores,* 131 S. Ct. at 2551 (quoting *Gen. Tel. Co. of Sw. v. Falcon,* 457 U.S. 147, 157 (1982)).

Commonality is easily met in cases such as this that seek only declaratory and injunctive relief to remedy a defendant's standardized course of conduct. *Baby Neal for & by Kanter v. Casey,* 43 F.3d 48, 57 (3d Cir. 1994). *See also McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 488-92 (7th Cir. 2012) (reversing denial of class certification in disparate impact case and finding class treatment appropriate because claims implicated company-wide policies); *Corey H. v. Bd. of Educ. of City of Chicago*, 92 C 3409, 2012 WL 2953217, at *7 (N.D. Ill. July 19, 2012) (declining to decertify class in IDEA case noting that commonality is met because plaintiffs "have attacked only systemic failures and district-wide policies that apply to every member of the certified class . . . ."); *N.B. ex rel. Buchanan v. Hamos*, 11 C 6866, 2012 WL 1953146, at *9 (N.D. Ill. May 30, 2012) (commonality met "where discrimination results from a defendant's standardized conduct toward proposed class members, such as generalized policies that affect all class members the same way.") (quoting *Ligas ex rel.*

Foster v. Maram, No. 05 C 4331, 2006 WL 644474, at *3 (N.D. Ill. Mar. 7, 2006); *Anderson v. Dep't of Pub. Welfare*, 1 F. Supp. 2d 456, 461-462 (E.D. Pa. 1998) ("commonality is easily established in cases seeking injunctive relief."); 7A Charles A. Wright, Federal Practice and Procedures. 1763, 226 (3d ed. 2005) ("class suits for injunctive and declaratory relief by their very nature often present common questions satisfying Rule 23(a)(2).").

The requirement that the class representatives establish questions of law or fact common to the class as a whole does not mean that individual differences among class members will defeat commonality. The inquiry should focus on the uniformity of the defendant's actions or inactions. *See Lightbourn*, 118 F.3d at 426 (class of individuals with different disabilities requiring different accommodations satisfied commonality requirement because all were impacted by the same governmental inaction); *Lane v. Kitzhaber*, 3:12-CV-00138-ST, 2012 WL 3322680, at *10 (D. Or. Aug. 6, 2012) (differences in the needs of individuals with disabilities does not preclude certification); *Chester Upland Sch. Dist. v. Pennsylvania,* CIV A 12-132, 2012 WL 1473969, at *4 (E.D. Pa. Apr. 25, 2012) (finding that individualized education plans 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). Similarly, Rule 23(a)(2) does not require that class members' injuries stem from an identical reason or cause. *D.L. v. Dist. of Columbia,* 277 F.R.D. 38, 45-46 (D. D.C. 2011) (rejecting defendants' claim that *Wal-Mart* requires that class members' injury must stem from a common cause and finding denial of FAPE to constitute a sufficiently common injury to certify a class of IDEA eligible students). Class treatment is appropriate when plaintiffs challenge systemic

practices that cause systemic harm. *McReynolds,* 672 F.3d at 488-92 (class certification appropriate even if individual employee decisions may also be a factor.)

Plaintiffs easily satisfy the commonality requirement because their claims share the following common contentions that are capable of classwide resolution:

1) Whether Defendant is ultimately responsible for ensuring the provision of FAPE to Plaintiffs and the class;
2) Whether Defendant has failed to properly execute its general supervisory responsibilities, including its monitoring and enforcement obligations, as set forth in the IDEA, and;
3) Whether Defendant's failure to properly execute its general supervisory responsibilities and enforce its November 22, 2010 Findings and Decision has violated Plaintiffs' right under the IDEA to receive a free appropriate public education.

Resolution of these questions will produce a "common answer" because these contentions all arise from a standardized course of conduct: MDE's complete failure to enforce its November 22, 2010 Findings and Decision finding that JPS denied FAPE to E.H. and all similarly situated students – the very same students that compose the class here.

As the state educational agency ("SEA"), MDE is responsible for ensuring that JPS follows the mandates of the IDEA and provides all eligible students with FAPE. 20 U.S.C. § 1412(a)(1), (11)(A); Am. Compl. ¶¶ 5, 31. MDE is responsible for implementing policies and procedures to ensure that local educational agencies ("LEA") like JPS are monitored for implementation and compliance with the IDEA. 20 U.S.C. §1412(a)(11). When the SEA identifies areas of noncompliance, it must ensure that noncompliance is corrected as soon as

possible, and in no case later than one year after the State's identification of noncompliance. 34 C.F.R. § 300.600(e). MDE has assured the U.S. Department of Education that it is capable of ensuring that LEAs like JPS are in compliance with the IDEA, and that eligible students receive FAPE. *See* Exhibit 10, MDE, Annual State Application Under Part B of the IDEA for Federal Fiscal Year 2012, *available at* http://www.mde.k12.ms.us/docs/sped-information-page/2012_State_Application.doc?sfvrsn=2. (hereinafter "Part B Application"). MDE has further assured the U.S. Department of Education that it is capable of enforcing administrative decisions like the one it rendered on November 22, 2010. *See id.*

MDE has completely abrogated this duty with respect to the proposed class. By MDE's own admission, JPS has failed to provide FAPE to the exact same class that is seeking certification in this matter.[4] MDE made this determination on November 22, 2010, and had no difficulty treating the Administrative Complaint as a class complaint, and ordered JPS to undertake classwide relief in the form of a systemic CAP. *See generally* Exhibit 2, Findings and Decision. According to MDE's own reports, JPS remains in violation of the IDEA by failing to provide FAPE to the class. *See* Exhibit 7, *April Follow-up Monitoring Report*. Significantly, MDE noted that the ongoing denial of FAPE to the class is the result of JPS' failure to implement corrective policies and procedures. *See* Exhibit 6, Letter from T. Bradley to Dr. J. Sargent (May 15, 2012). MDE's own monitoring reports demonstrate that JPS does not have the requisite infrastructure to ensure the provision of FAPE on a classwide basis. *See* Exhibit 4, Letter from T. Bradley, to Dr. J. Sargent, (Jan. 13, 2012); Exhibit 5, *November Follow-up*

[4] The original Administrative Complaint filed on September 8, 2010 was filed on behalf of: "A.M., A.L., and a Class of All Similarly Situated and Treated Students with Emotional Disabilities as well as on behalf of E.H., T.A., P.A., C.O., and a Class of All Similarly Situated Special Education Students who manifest behavioral issues and are subject to three or more disciplinary removals (either In-School Suspensions, Out-of-School Suspensions and undocumented, illegal removals from school – 'cool off removals') and/or placement in an alternative school setting in the Jackson Public School System (JPSS)." Exhibit 1, Administrative Complaint at 1-2.

Monitoring Report; Exhibit 6, Letter from T. Bradley to Dr. J. Sargent (May 15, 2012); Exhibit 7, *April Follow-up Monitoring Report*. However, despite having the authority and responsibility under the IDEA to take the action that JPS has failed to take, MDE has allowed the systemic denial of FAPE to persist for close to two years. Am. Compl. ¶¶ 2, 5, 22, 50, 51, 54. MDE has failed to ensure that JPS implements the policies and procedures necessary to remedy the denial of FAPE to Plaintiffs and the entire class. *Id.* MDE is therefore liable for the denial of FAPE experienced by the Plaintiffs and the proposed class. *See St. Tammany Parish Sch. Bd. v. Louisiana*, 142 F.3d 776, 784 (5th Cir. 1998) (finding that SEA is ultimately responsible for the provision of FAPE and may be held liable for failing to do so.)

MDE's failure to enforce a decision finding that JPS denied FAPE to E.H. and the proposed class provides the "glue" that unites Plaintiffs' factual and legal claims and furnishes a common answer to why Plaintiffs continue to suffer the denial of FAPE. *See Wal-Mart,* 131 S. Ct. at 2552 ("Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to . . . produce a common answer to the crucial question . . . .") (emphasis in original); *D.L.,* 277 F.R.D. at 46 ("[P]laintiffs have presented significant proof or 'glue' binding together the various reasons why individual class members were denied a FAPE – namely, 'systemic failures' within defendants' education system.") (internal citation omitted). Unlike the plaintiffs in *Wal-Mart* who could not attribute the alleged discrimination to any particular corporate policy or practice, *Wal-Mart,* 131 S. Ct. at 2556, the Plaintiffs here can very clearly trace their continued denial of FAPE to MDE's failure to take action to enforce its November 22, 2010 Findings and Decision. As the Fifth Circuit stated in *M.D.*, "a pattern or practice of agency action or inaction – including a failure to correct a structural deficiency within the agency . . . ." can be sufficient to generate a common class claim. 675 F.3d at 847. This is precisely the issue

here. Plaintiffs need MDE to ensure that the proper infrastructure exists within JPS so that Plaintiffs and the class have the opportunity to receive FAPE. Unless and until MDE reverses its internal policy of inaction with respect to JPS, Plaintiffs and the class will continue to suffer the denial of FAPE.

Plaintiffs have also alleged a common injury: the unremedied denial of the free appropriate public education guaranteed to them by the IDEA caused by MDE's failure to enforce its own decision. Am. Compl. ¶¶ 6-8, 19, 20, 56, 63, 65, 73, 75, 82, 87. While the *Wal-Mart* decision "further defined the contours" of the class certification analysis, *M.D.,* 675 F.3d at 837, cases alleging systemic violations of the IDEA resulting in the denial of FAPE remain appropriate for class certification. *See, e.g. D.L.,* 277 F.R.D. at 45-46 (certification appropriate in case alleging systemic denial of FAPE); *Chester Upland Sch. Dist.,* 2012 WL 1473969 at *4 (same). Here, Plaintiffs satisfy the commonality requirement because all of the Plaintiffs have suffered the same injury, and this injury is attributable to Defendants' across-the-board failure to enforce its November 22, 2010 Findings and Decision. Am. Compl. ¶¶ 19, 20, 56, 65, 75, 87.

Plaintiffs' common contention that they have been denied FAPE due to MDE's failure to enforce its November 22, 2010 Findings and Decision is susceptible to class wide resolution and may be addressed "in one stroke." *Wal-Mart,* 131 S. Ct. at 2551. Plaintiffs do not need, and do not request, individualized relief to satisfy the claims presented in this case. The class' injuries will be remedied in this case through MDE's enforcement of its November 22, 2010 Findings and Decision, in which MDE ordered systemic relief. This may be achieved through a single injunction from this Court ordering MDE to correct the systemic violations of the IDEA identified in the November 22, 2010 Findings and Decision. As discussed above, MDE has assured the U.S. Department of Education that it is capable of ensuring the provision of FAPE to

all students with disabilities, and that it is capable of enforcing the IDEA and correcting noncompliance identified in LEAs within one year. *See* Exhibit 10, Part B Application. MDE's own prescription of systemic relief in its November 22, 2010 Findings and Decision is further evidence that this case is appropriate for class treatment and the claims are amenable to classwide relief. *See, e.g.,* Exhibit 2, Findings and Decision at 3 ("JPSS shall develop specific strategies and procedures for ensuring [the provision of related services] . . . ."), at 4 ("JPSS shall develop and implement consistent, district-wide behavioral procedures for gathering data . . . ."), at 10 ("JPSS shall develop and implement written strategies for consistently monitoring student behavioral progress . . . ."). MDE is therefore capable of delivering the injunctive relief requested by Plaintiffs, and this injunctive relief will be responsive to all of Plaintiffs' contentions.

Finally, this case is readily distinguishable from a recent Seventh Circuit decision decertifying a class of special education students alleging violations of the IDEA's "child find" mandate. *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481 (7th Cir. 2012). The plaintiffs in *Jamie S.* attempted to bind together distinct and individual claims that had to be "answered separately for each child based on individualized questions of fact and law, and . . . [with] answers . . . unique to each child's particular situation." *Id.* at 498. In contrast, the Plaintiffs here "can show that they share some question of law or fact that can be answered *all at once* and that the *single answer* to that question will resolve a central issue in all class members' claims. *Id.* at 497 (emphasis in original). The denial of FAPE in this case is attributable to a single, readily-identifiable cause: MDE's failure to enforce its November 22, 2010 Findings and Decision. *Cf. N.B.*, 2012 WL 1953146, at *9 ("[T]he absence of standardized policies for implementing community placements required by the integration mandate may itself be actionable . . . .

[C]ommon issues arise where 'defendants have acted, or have failed to act, uniformly toward the proposed class based on their policies and lack of policies in place.'") (citing *Ligas,* 2006 WL 644474, at *3.) MDE has assured the U.S. Department of Education that it is capable of enforcing the IDEA on a systemic level, *see* Exhibit 10, Part B Application, and that is all the Plaintiffs ask them to do here.

Plaintiffs have satisfied the commonality requirement of Rule 23(a)(2) because they have identified common contentions, a common injury, and the common contentions are susceptible to classwide relief through a single injunction ordering MDE to enforce its November 22, 2010 Findings and Decision. The proposed class therefore satisfies the commonality requirement of Rule 23(a)(2).

C. The Claims of the Named Plaintiffs are Typical of the Class.

The test for typicality "is not demanding." *Mullen* 186 F.3d at 625. Typicality focuses on "whether the class representative's claims have the same essential characteristics of those of the putative class." *Sitrman v. Exxon Corp*., 280 F.3d 554, 562 (5th Cir. 2002) (quoting *James v. City of Dallas,* 254 F.3d 551, 571 (5th Cir. 2001). The test for typicality is not that the claims of the named individuals be identical to the claims of the other class members, but rather, that the class representatives must "possess the same interest and suffer the same injury." *Gen. Tel. Co. of Sw.,* 457 U.S. at 156 (citing *E. Tex. Motor Freight Sys. v. Rodriguez,* 431 U.S. 395, 403 (1977), quoting *Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208, 216 (1974)).

As explained more fully in *supra* section III (B), Plaintiffs' claims are typical of those of the class because they have all suffered the same injury: the unremedied denial of FAPE stemming from MDE's failure to enforce its November 22, 2010 Findings and Decision. Am. Compl. ¶¶ 6-8, 19, 20, 56, 63, 65, 73, 75, 82, 87. Moreover, this common injury is traceable to

the same cause – Defendant's failure to abide by its duty under the IDEA to ensure the provision of FAPE to the entire class. Plaintiffs' claims and the claims of the class therefore have the same characteristic. *See D.L.,* 277 F.R.D. at 46 (finding typicality where named plaintiffs' claims all relate to the common issues of defendants' violation of their right to FAPE.) The claims of the Plaintiffs and the class clearly share the same essential characteristics, and therefore satisfy the typicality requirement.

D. The Class Representatives and Counsel Fairly and Adequately Represent the Interests of the Class.

To determine adequacy of representation under Rule 23(a)(4), the Court should consider whether the named plaintiffs and the class possess the same interests. *See Mullen,* 186 F.3d at 625-26. The named plaintiffs are inadequate only if differences between the named plaintiffs and the class create conflicts of interest. *Id.* at 626. The Court should also consider "[1] the zeal and competence of the representative[s'] counsel and…[2] the willingness and ability of the representative[s] to take an active role in and control the litigation and to protect the interests of absentees." *Stirman,* 280 F.3d at 563 (quoting *Berger v. Compaq Computer Corp*., 257 F.3d 475, 479 (5th Cir. 2001)).

Plaintiffs and undersigned counsel will fairly and adequately protect the interests of the class. As explained more fully in *supra* Section III (B), Plaintiffs and the class possess an identical interest in MDE enforcing its November 22, 2010 Findings and Decision so that they may receive FAPE. Am. Compl. ¶¶ 1, 6-8, 22, 63, 73, 82, 87. Further, no conflicts exist between the Plaintiffs and the class, and they do not have any antagonistic or divergent interests. Compl. ¶ 21. 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* Exhibit

11, Declaration of Vanessa Carroll. The Southern Poverty Law Center, Disability Rights Mississippi, and the Southern Disability Law Center are experienced at litigating class action cases. *Id.* In addition, the Southern Poverty Law Center has sufficient financial and human resources to litigate this matter. *Id.* *See also* http://splcenter.org/who-we-are/financial-information (annual report and audited financial statement). For these reasons, the adequacy requirement of Rule 23(a)(4) is satisfied.

E. This Action Meets the Requirements of Rule 23(b)(2).

Rule 23(b)(2) "applies only when a single injunction or declaratory judgment would provide relief to each member of the class." *Wal-Mart,* 131 S. Ct. at 2557. *See also M.D.*, 675 F.3d at 845 (holding that proposed class seeking "at least twelve broad, classwide injunctions" to be inappropriate for certification under Rule 23(b)(2)). The Fifth Circuit has interpreted the language of Rule 23(b)(2) to mean that "(1) the 'class members must have been harmed in essentially the same way' . . . and (2) 'the injunctive relief sought must be specific.'" *M.D.,* 675 F.3d at 845 (quoting *Maldonado v. Oschner Clinic Found.,* 493 F.3d 521, 524) (internal citations omitted).

This case is appropriate for certification under Rule 23(b)(2) because Plaintiffs are not seeking any form of individualized relief, but are instead seeking one injunction and corresponding declaratory relief to compel Defendant to enforce its November 22, 2010 Findings and Decision so that Plaintiffs and the class may receive FAPE. Am. Compl. ¶ 22. Unlike the plaintiffs in *Jamie S.*, the Plaintiffs and the class here do not seek individualized injunctive relief such as compensatory education services, and the relief requested by Plaintiffs will not "merely initiate a process through which highly individualized determinations of liability and remedy are made . . . ." *Jamie S.,* 668 F.3d at 499. Indeed, the Defendant has assured the U.S. Department

of Education of its ability to enforce the IDEA, *see* Exhibit 10, Part B Application. Moreover, Defendant's own November 22, 2010 Findings and Decision affirms the existence of systemic deficiencies within JPS causing a systemic denial of FAPE, and MDE has described and ordered a systemic remedy. *See* Exhibit 2, Findings and Decision. Plaintiffs are merely asking MDE to enforce its systemic decision and implement the policies and procedures that are necessary to ensure the provision of FAPE to Plaintiffs and the class. *See Lane,* 2012 WL 3322680, at *15 (Rule 23(b)(2) certification appropriate where injunctive relief "focuses on defendants' conduct . . . by modifying the way defendants fund, plan, and administer the existing . . . service system.") Accordingly, this Court can resolve Plaintiffs' claim with a "single stroke" by compelling MDE to comply with the IDEA and enforce its November 22, 2010 Findings and Decision.

Plaintiffs have also been harmed in the same way by Defendant's failure to correct already-identified systemic violations of the IDEA within JPS. The mere fact that Plaintiffs have individualized education plans does not preclude certification when, as is the case here, the claims are directed at practices that result in the denial of FAPE to the entire class. *See Chester Upland Sch. Dist.,* 2012 WL 1473969, at *4. Similar to the Plaintiffs in *Chester Upland Sch. Dist.,* "Plaintiffs are not seeking individualized determinations such as whether the District provided the exact services delineated under each child's IEP." *Id.* Rather, Plaintiffs are instead seeking correction of Defendant's unlawful policy and practice of failing to monitor JPS and enforce the IDEA so as to ensure the provision of FAPE to Plaintiffs and members of the class. *See M.D.,* 675 F.3d at 847 (rejecting defendants' argument that class may only be maintained if claims are based on a specific policy that uniformly affects all class members in the same way, and stating that "the class claims could conceivably be based on an allegation that the State

engages in a pattern or practice of agency action or inaction . . . ."). Certification of this class pursuant to Rule 23(b)(2) is therefore appropriate.

IV. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court certify a Plaintiff class consisting of all JPS students with disabilities who were included as class members in the September 2010 IDEA Administrative Complaint styled as *A.M. v. Jackson Public Schools,* or who would currently meet the definition of a class member as established in that administrative matter, which consists of IDEA eligible students with emotional disabilities and IDEA eligible students who manifested behavior issues and were subjected to three or more disciplinary removals from JPS and/or placement in an alternative school setting in JPS during the course of a single school year. In addition, the Plaintiffs respectfully request that this Court appoint the Southern Poverty Law Center, Disability Rights Mississippi, and the Southern Disability Law Center as co-class counsel in this action pursuant to Rule 23(g).

RESPECTFULLY SUBMITTED, this the 4th day of October, 2012.

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CERTIFICATE OF SERVICE

I, Vanessa Carroll, hereby certify that a true and correct copy of the foregoing document was filed electronically. Notice of this filing will be sent by electronic mail to all parties by the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

SO CERTIFIED, this 4th day of October, 2012.

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