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

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| E.H., et al.<br>Plaintiffs,<br>v.<br>MISSISSIPPI DEPARTMENT OF EDUCATION,<br>Defendant. | ) | Case No. 3:12cv00474-DPJ-FKB |

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

## 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[1] 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"). Amended Complaint, filed Sept. 17, 2012, ECF No. 7. Over two years ago, MDE investigated JPS' special education program and thereafter determined that JPS failed to comply with numerous provisions of the

[1] 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 from JPS and/or placement in an alternative school setting in JPS during the course of a single school year.

*See* Plaintiffs' Memorandum of Law in Support of Motion for Class Certification 1-2, filed Oct. 4, 2012, ECF No. 12.

IDEA and denied FAPE to E.H. and all other similarly situated students, including putative class members. Despite having the authority and obligation under federal law to ensure the correction of these violations in a timely fashion, MDE has abdicated its statutory responsibility and has permitted individual and systemic violations of the IDEA to persist, resulting in the ongoing denial of FAPE to Plaintiffs and hundreds of other special needs students.

As determined by MDE, Plaintiffs have already lost years of educational opportunities. Many class members are at a critical learning stage and cannot risk the loss of yet another year of academic instruction. Plaintiffs are therefore compelled to seek preliminary injunctive relief from this Court that will require Defendant MDE to properly exercise its monitoring and enforcement authority to bring JPS into prompt and full compliance with the IDEA, including the appointment of an independent administrator to oversee the provision of special education services to students with disabilities within Jackson Public Schools.[2] Plaintiffs easily satisfy the requirements for a preliminary injunction. This Court should therefore grant Plaintiffs' Motion.

## II. STATUTORY AND LEGAL FRAMEWORK

In 1975, Congress enacted what is now called the IDEA to end the longstanding failure of schools to meet the educational needs of students with disabilities. 20 U.S.C. § 1400(c)(2). The statute is aimed at correcting the historic exclusion of students with disabilities from the classroom, and ensuring the provision of an appropriate education to all students with disabilities. 20 U.S.C. § 1400(d). To achieve this goal, state educational agencies ("SEA") such as MDE must ensure that local educational agencies ("LEA") have policies and procedures in

[2] Upon information and belief, Jackson Public Schools and the Defendant have recently entered into a memorandum of understanding that purports to begin to address some of the areas of non-compliance identified in 2010. Given JPS' long history of defiance and the Defendant's demonstrated failure to follow through with prescribed corrective action, the current efforts are insufficient to fully ameliorate Plaintiffs' claims.

place to ensure that students with disabilities receive a free appropriate public education. 20 U.S.C. § 1412(a)(1)(A)[3]; 34 C.F.R. § 300.101(a).[4]

The IDEA establishes a system of procedural and substantive requirements to which the SEA must adhere to ensure that each child with a disability receives a free appropriate public education. The SEA must ensure that all eligible students receive an IEP that is developed, reviewed and revised to confer meaningful educational benefit. 20 U.S.C. § 1412(a)(4); 20 U.S.C. § 1414(d). The IEP must include, among other things, a statement of the child's present levels of academic achievement and functional performance, a statement of measurable annual goals, a statement of the special education and related services, and supplementary aids and services to be provided to the child to help him/her participate in the general curriculum and make progress in the general curriculum and toward achieving his/her annual goals. 20 U.S.C. § 1414(d)(1)(A)(i). The IDEA requires that for children 14 years of age and older, their IEP includes a transition plan that identifies the child's post-secondary goals and identifies the services needed to assist the child in reaching those goals. 34 C.F.R. § 300.320(b); State Policies Regarding Children with Disabilities under the Individuals with Disabilities Education Act

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[3] 20 U.S.C. § 1412(a)(1)(A) states:

> A State is eligible for assistance under this subchapter for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets each of the following conditions:
>
> (1) Free appropriate public education
>
> (A) In general
>
> A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.

[4] 34 C.F.R. §300.101(a) states:

> General. A free appropriate public education must be available to all children residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school, as provided for in § 300.530(d).

Amendments of 2004, State Board Policy 7219, § 300.320(b). The SEA must also ensure that extended school year services ("ESY") are available and provided to those children deemed eligible for ESY services. 34 C.F.R. § 300.106; State Policies Regarding Children with Disabilities under the Individuals with Disabilities Education Act Amendments of 2004, State Board Policy 7219, § 300.106; State Board of Education Policy 7212. The child's IEP team is required to review the child's IEP periodically to determine whether the annual goals for the child are achieved and revise the IEP as appropriate to address any lack of progress toward annual goals and in the general curriculum. 20 U.S.C. § 1414(d)(4). The SEA is also obligated to ensure that children with disabilities are provided with the necessary supplementary aids and services to allow them to be educated in their least restrictive environment ("LRE"), meaning that children with disabilities should receive services in a setting where they are able to interact with nondisabled children to the maximum extent appropriate. 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a).

The SEA must ensure that children with disabilities are afforded the procedural safeguards described by the IDEA when disciplinary action is contemplated. Prior to being subject to a disciplinary removal lasting more than ten days, a district must convene a manifestation determination review ("MDR") to review all relevant information in the student's file, including the IEP, teacher observations and information provided by the parent/guardian to determine if the conduct in question was caused by, or had a direct and substantial relationship to the child's disability or if the conduct in question was the direct result of the school's failure to implement the IEP. If it is determined that the behavior is a result of the school's failure to implement the IEP, immediate action must be taken to remedy any deficiencies with the school's implementation of the IEP. 20 U.S.C. § 1415(k)(1)(E); 34 C.F.R. § 300.530(e). Children who

are subject to disciplinary removals that amount to more than ten days for behavior that is a manifestation of their disability must also receive a functional behavioral assessment ("FBA"), behavior intervention plan ("BIP") and modifications to address the behavior violation so that it does not recur. 20 U.S.C. § 1415(k)(1)(D)(ii). The SEA must ensure that IEPs include consideration of positive behavioral interventions and supports for students who exhibit behavior problems that impede their learning or that of others. 20 U.S.C. § 1414(d)(3). Finally, the IDEA also requires the state to examine data from local school districts to determine if significant discrepancies exist in the rates of suspensions and expulsions of children with disabilities. If discrepancies exist, the state must review and revise its policies, procedures and practices relating to the development of IEPs, the use of positive behavioral interventions and supports, and procedural safeguards to ensure that the state is in compliance with the IDEA. 20 U.S.C. § 1412(a)(22); 34 C.F.R. § 300.170.

As the SEA, MDE is ultimately 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). The SEA must establish procedures for individuals to file complaints with the SEA regarding individual and systemic violations of the IDEA by an LEA. 34 C.F.R. § 300.151(a). The SEA is required to investigate these complaints, and, if noncompliance is found, must ensure that appropriate corrective action is taken to redress both individual and systemic IDEA violations and ensure that appropriate services are provided to children with disabilities thereafter. 34 C.F.R. §§ 300.151-153, § 600(e). 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). The SEA is also responsible for providing FAPE directly to students when an LEA is unable to establish and

maintain programs of FAPE in compliance with the IDEA. 20 U.S.C. § 1413(g); 34 C.F.R. § 300.227(a)(1)(ii).

## III. STATEMENT OF FACTS

### A. History of the Administrative Complaint.

On September 8, 2010, Plaintiff E.H.[5] and a class of similarly situated students filed a systemic state administrative complaint with MDE against JPS pursuant to the IDEA. 34 C.F.R. § 300.151-153. *See* Exhibit 1, Systemic State Administrative Complaint against JPS (Sept. 8, 2010) (hereinafter "Administrative Complaint"). The Administrative Complaint was filed on behalf of a class of IDEA eligible students with emotional disabilities, as well as 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.* at 1-2. Plaintiff E.H. and the other named petitioners[6] 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[7];

[5] 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.

[6] 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.

[7] Related services are defined in the IDEA and include:

b) Denial of FAPE by failing to comply with the IDEA's discipline regulations with regard to FBAs, BIPs, and MDRs;

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

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 meaningful academic and/or behavioral gains. *Id.* at 6-7.

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> [T]ransportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

20 U.S.C. § 1401(26)(A).

**B. MDE's Findings and Decision.**

As required by the IDEA, MDE's Office of Special Education conducted an onsite investigation at JPS on October 14, 15, 20, and 22, 2010. *See* Exhibit 2, MDE Office of Special Education, Findings and Decision with Regards to the State Administrative Complaint Against JPS at 2 (Nov. 22, 2010) (hereinafter "Findings and Decision"). The investigation involved a review of each petitioners' records for the 2009-2010 and 2010-2011 school terms, a review of the records of seventeen randomly selected students with disabilities who received three or more discipline removals and/or who were placed in the District's alternative school during the 2009-2010 school term. *Id.* 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. In particular, MDE noted the following violations:

a) JPS failed to provide petitioners and similarly situated students with appropriate related services. *Id.* at 3. MDE noted that all of the petitioners "presented with a previous history of behavioral concerns. However, given their ongoing behavior concerns, a remarkable number of case files revealed little or no evidence of direct Related Services to address the students' specific behavioral and/or emotional concerns." *Id.* MDE found that none of the named petitioners received any related services. *Id.* Only one student of the seventeen randomly selected cases had received related services, and in that case the level of related services was inadequate. *Id.* MDE concluded that "it is evident that JPSS has failed to address the ongoing pattern of behavioral and/or emotional concerns of the student cases reviewed by not providing these students with meaningful and direct

Related Services. JPSS has denied a FAPE to the Petitioners as evidenced by their failure to provide appropriate levels of related services." *Id.*

b) JPS denied a FAPE to petitioners and similarly situated students by failing to comply with the IDEA discipline regulations. *Id.* at 8. In particular, MDE noted that none of the petitioners' or randomly selected FBAs included "meaningful and quantifiable data that would accurately describe the students' present levels of behavioral performance . . ." making it impossible to determine if "behavior improvements were realized after the implementation of a BSP." *Id.* at 6. MDE documented several other flaws with FBAs, and noted that JPS failed to conduct FBAs prior to placing students at the alternative school, despite "patterns of misconduct that would have warranted an FBA prior to the disciplinary infractions leading to placement in [the alternative school.]" *Id.* at 6-7. MDE also stated that the behavioral support plans[8] ("BSP") of petitioners and similarly situated students were wholly ineffective, JPS lacked documentation to prove that BSPs were actually implemented, and JPS continued to rely on removing students from instruction and/or school to address behavioral concerns, rather than utilizing the strategies outlined in the student BSPs. *Id.* at 8-9.

c) JPS denied FAPE to petitioners and similarly situated students by failing to meaningfully and appropriately update and revise IEPs. *Id.* at 11. MDE noted that a review of all petitioners' and randomly selected files revealed that JPS failed to "frequently gather, summarize and review meaningful data necessary for effectively monitoring student behavioral progress during intervention . . . prior to continued misconduct/discipline removals." *Id.* at 10. Instead, JPS convened IEP committee meetings simply to consider

[8] The terms "Behavioral Support Plans" and "Behavioral Intervention Plans" are used interchangeably throughout.

and approve a student's removal to the alternative school. *Id.* MDE concluded that "such practices question the validity as to whether the students' IEPs had been effectively implemented, as there are no data to evaluate student progress and/or whether planned behavioral supports were, in fact, implemented as designed." *Id.* at 11.

d) JPS denied FAPE to petitioners and similarly situated students by failing to conduct MDRs in conformance with IDEA mandates. *Id.* at 12. In particular, MDE noted that the MDR documentation revealed that JPS failed to consider whether a student's BSP had been implemented with fidelity prior to changing the student's placement. *Id.* at 11. MDE also noted that JPS' failure to provide related services "rais[ed] questions as to whether student conduct would have been in question if the students had previously received adequate and necessary Related Services supports." *Id.* at 12.

e) JPS failed to provide petitioners and similarly situated students with meaningful educational benefits and in turn denied them FAPE. *Id.* at 14. In particular, MDE noted that JPS failed to obtain data on students' basic reading, math and writing skills, and therefore had no accurate assessment of students' present levels of performance. *Id.* at 13. JPS relied inappropriately on classroom grades, even in cases where students failed one or more academic subjects. *Id.* MDE noted that "[t]hese data alone are highly suggestive that these students are not realizing a measure of meaningful educational (academic) benefits. Furthermore, when considering this pattern of continued failure among cases reviewed, coupled with the fact that many of these students have academic skills well below expected levels for their age and grade placement, such a combination is highly predictive that such students will likely continue to struggle and may be placed in more restrictive, self-contained settings and will ultimately likely fail to receive a

meaningful educational outcome." *Id.* at 13. MDE also noted that JPS failed to provide students with appropriate remedial or compensatory academic interventions to address their lack of academic progress, and failed to demonstrate that students obtained any benefit from their BSPs. *Id.* at 14.

f) JPS "denied FAPE by failing to comply with the requirements for developing and implementing IEPs, specifically by failing to properly align student academic goals and objectives with actual levels of student performance." *Id.* at 17. In particular, MDE noted that "although many students continued to experience academic failure, there was no evidence that JPSS increased academic supports necessary to increase the likelihood of academic success . . . and/or adjust the curriculum expectations to be consistent with the students' present functioning levels . . . ." *Id.* at 16. MDE also noted that JPS' failure to properly align student goals with their levels of performance likely exacerbated students' behavioral challenges. *Id.* at 16-17.

g) JPS denied FAPE to petitioners and similarly situated students by "failing to comply with the requirements for developing and implementing IEPs, specifically by failing to consider positive behavioral interventions and supports." *Id.* at 18. Although JPS included some positive recommendations in student BSPs, "there was either limited or no evidence available to consistently monitor student progress in response to intervention and/or no data or documentation evident to validate that such strategies were implemented as planned and with adequate levels of fidelity." *Id.*

h) JPS denied FAPE to petitioners and similarly situated students by "failing to comply with the requirements for developing and implementing IEPs, specifically by failing to convene IEP Committee meetings and revise Petitioners' and other defined Class

members' IEPs to address a lack of academic/behavioral progress." *Id.* at 19. MDE noted that student files contained no meaningful data that IEP committees could use to measure behavioral or academic progress, and then revise IEPs as necessary to address that lack of progress. *Id.*

i) JPS denied FAPE to petitioners and similarly situated students by failing "to provide appropriate levels of supports necessary for ensuring services in the students' LRE." *Id.* at 20-21. In particular, MDE noted that district-wide data demonstrated a disparity in class members "being disproportionally placed in more restrictive settings." *Id.* at 20. MDE also acknowledged that "Related Services, behavioral supports and supplemental and/or intensive academic remediation are vital components of individualized educational programming for students with disabilities to minimize the need for restrictive placements." *Id.*

j) JPS denied FAPE to petitioners and similarly situated students "by their failure to provide adequate and meaningful transition planning and supports." *Id.* at 24. In particular, MDE noted that "in 100% of cases, there was insufficient and/or non-meaningful transition plans evident in student IEPs that would predict a clear course of action necessary for successful school to work/community transitions." *Id.*

k) JPS denied FAPE to petitioners and similarly situated students by failing to "consistently gather pertinent data necessary for accurately determining the need for ESY and/or failure to provide ESY services." *Id.* at 25.

MDE ordered JPS to submit a corrective action plan ("CAP") within 30 days, and provided JPS with a technical advisor, Fluency Plus, to assist JPS with implementing the corrective actions and compensatory services ordered in MDE's Findings and Decision. *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 was required to take both individual and systemic corrective action to remedy 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. MDE also notified JPS that federal regulations require the correction of all deficiencies within twelve months of initial notification, and that JPS must correct all areas of noncompliance no later than November 22, 2011. *See* Exhibit 3, Letter from T. Bradley to C. Cockrell and L. Edwards.

**C. MDE's Failure to Ensure Correction of Individual and Systemic Violations.**

JPS submitted a CAP to MDE on December 21, 2010. *See* Exhibit 4, JPS, MDE OSE Monitoring Visit/Corrective Action Plan, Systemic State Administrative Complaint/IDEA of 2004, 2010-2011 (Dec. 21, 2010) (hereinafter "December 2010 CAP"). Despite MDE's directive to work collaboratively with Fluency Plus "to assist JPSS with implementation of the Corrective Actions and Compensatory Services required by the Decision," *see* Exhibit 3, Letter from T. Bradley to C. Cockrell and L. Edwards, JPS excluded Fluency Plus from *all* of the corrective actions listed in the CAP. *See generally* Exhibit 4, December 2010 CAP (Fluency Plus is not listed once in the column marked "Person(s) Responsible/Resources"). JPS also defiantly mischaracterized MDE's substantiated findings as mere "allegations" throughout the CAP, *id.,* and outright refused to take some of the corrective actions required by MDE. *See, e.g., id.* at 4-5 ("The Jackson Public School District takes issue with requirement to provide Compensatory Related Services. Compensatory Related Services will be considered on an individual basis . . . . Compensatory Related Services will be provided as determined by the IEP Committee and in compliance with the requirements under IDEA."). JPS also limited much of

the corrective action to the provision of additional training, and designated its own personnel to provide the training – the same personnel responsible for the systemic violations documented in MDE's Findings and Decision. *See generally* Exhibit 4, December 2010 CAP.

MDE disregarded the obvious deficiencies with JPS' December 2010 CAP. MDE did not provide JPS with any written feedback on its CAP, nor did MDE require JPS to revise its CAP. Rather, MDE permitted JPS to proceed under a deficient CAP for several months. Exhibit 5, Testimony of Dr. Ken Swindol, *In Re Jackson Public School District Show Cause Hearing, Commission on School Accreditation* 165:2-9 (Apr. 26, 2011) (hereinafter "Swindol Testimony") ("We were hired by the State Department of Education on November 22, 2010 to do a records review for the Jackson Public Schools. So we did that. We compiled a report. And at that point we really didn't hear anything. And we went back to the Jackson Public Schools on January 25th."). Although MDE and Fluency Plus held a meeting with JPS on January 25, 2011, *see* Exhibit 6, MDE, Updated Timeline for Jackson Public School District (Apr. 5, 2012), MDE waited until September 2011 to request a revised CAP from JPS, and waited until late September 2011 to provide JPS with written feedback on the CAP from Fluency Plus. *See* Exhibit 7, JPS, Systemic State Administrative Complaint/IDEA of 2004, 2010-2011 – Revised September 9, 2011 (Sept. 9, 2011) (hereinafter "September 9, 2011 Revised CAP"); Exhibit 8, MDE, Summary of MDE/OSE Review of JPS' Revised Improvement Plan (Sept. 26, 2011).

Despite ongoing deficiencies with JPS' September 9, 2011 Revised CAP,[9] MDE did not call upon Fluency Plus to provide JPS with technical assistance to ensure prompt correction of

[9] In its September 26, 2011 Review of JPS' September Revised CAP, MDE documented significant deficiencies with the corrective actions proposed by JPS for each area of noncompliance. *See* Exhibit 8, Summary of MDE/OSE Review of JPS' Revised Improvement Plan at 1("[T]he revised Improvement Plan does not include any explanation of the types of data or how the District will gather and report the data to ensure accountability and/or to monitor progress toward resolving" the failure to provide appropriate levels of related services. ); at 2 ("[T]here are no clear procedures included in the revised Improvement Plan specifically describing how the District will ensure ongoing fidelity and accountability for FBA/BIP development and/or implementation, as well as, how and what data will be

all identified IDEA violations. *See* Exhibit 5, Swindol Testimony at 199:4-8 ("And when we offered our September 26th response for an improvement plan . . . we never heard anything back. So we weren't called again, except to do another file review, not provide technical assistance."). With less than two months remaining for JPS to correct all of the individual and systemic violations, MDE permitted JPS to continue to operate under a CAP that MDE knew to be incapable of correcting the individual and systemic violations identified in MDE's Findings and Decision.

In addition to ignoring the deficiencies in JPS' original December 2010 CAP, MDE also failed to ensure that JPS actually received and benefitted from Fluency Plus' technical assistance. Although the IDEA includes technical assistance as one of an SEA's enforcement mechanisms, 34 C.F.R. § 300.600(a)(3), § 300.604(a)(1), MDE limited Fluency Plus' role to conducting periodic, rote file reviews that did not result in the provision of actual technical assistance to JPS. *See* Exhibit 5, Swindol Testimony at 168:10-13 (testifying that Fluency Plus never really worked with JPS); at 181:18-20 ("we never got the baseline data that we . . . wanted to get . . . ."); at 189:12-14 ("we really have had no contact in terms of providing technical assistance."); at 199:4-8 ("And when we offered our September 26th response for an improvement plan . . . we never heard anything back. So we weren't called again, except to do another file review, not provide technical assistance."); at 208:19-24 (testifying that MDE never called Fluency Plus

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gathered and evaluated to determine whether progress has been made toward resolving this area of noncompliance."); 3 ("[T]he revised Improvement Plan fails to include specifically how and what data will be gathered internally to ensure that MDRs are conducted appropriately and how data may be used to measure ongoing progress toward resolving this area of noncompliance."); at 4 ("The revised Improvement Plan does not address previous corrective actions mandated by MDE/OSE in the November 22, 2010 Findings and Decision. Specifically, MDE/OSE mandated Compensatory/Remedial Services . . . ."); at 5 ("[T]here are no provisions in the revised Improvement Plan of what data to collect and how the data will be systematically gathered to ensure FAPE."); at 6 ("[T]he revised Improvement Plan fails to indicate data sources that are used for ensuring students with disabilities receive FAPE in the LRE and/or monitoring progress toward resolving the current status of this area of noncompliance."); at 7 ([T]here is no specific mention of what data will be collected and how it will be collected and maintained to ensure appropriate transition planning . . . .").

back to JPS and that Fluency Plus would have returned to provide technical assistance had MDE requested it); Exhibit 9, Testimony of Dr. Tawny McCleon, *In Re Jackson Public School District Show Cause Hearing, Commission on School Accreditation* 35:1-4 (May 21, 2012) (hereinafter "McCleon Testimony") (testifying that Fluency Plus did not achieve its purpose of providing technical assistance to JPS). MDE was fully aware that JPS resisted working with Fluency Plus. *See* Exhibit 10, Letter from A. Moore, Associate State Superintendent, MDE, to Dr. J. Sargent, Superintendent, JPS 2 (Sept. 26, 2011).[10] Despite this open defiance, MDE waited until September 2011 to remind JPS of its responsibility to work with Fluency Plus, and even then MDE failed to follow through to ensure that JPS received any technical assistance. *Id.* Consequently, two years have elapsed without JPS actually receiving the technical assistance necessary to correct the individual and systemic violations identified by MDE in its November 2010 Findings and Decision.

MDE also permitted substantial periods of time to elapse before it made any arrangements for Fluency Plus to return to JPS to monitor JPS' implementation of the CAP. *See* Exhibit 6, Updated Timeline (showing that MDE waited until April 18, 2011 to schedule an on-site follow-up visit). Even then, JPS interrupted the monitoring visit on the first day and instructed Fluency Plus to cease reviewing student files and leave JPS' premises. *See id.* ("District asked the team to leave on day one"); Exhibit 5, Swindol Testimony at 172:5-8 ("We were doing the file request. We had been through some of the records. And then we were called

[10] In this letter, MDE noted:

> For the past several months the Fluency Plus team has met with resistance from JPS staff members when the team has been present in the District to conduct follow-up visits and assist with writing the Improvement Plan. This lack of cooperation from JPS staff members has put the District in a precarious situation for correcting the noncompliance within the twelve month timeframe allowed by IDEA.

Exhibit 10, Letter from A. Moore to Dr. J. Sargent at 2.

into the office, and they said that they didn't want us to look at any more records."). MDE acquiesced to this defiance and rescheduled its monitoring visit for May 25-27, 2011 – six months after MDE initially issued its Findings and Decision. *See* Exhibit 6, Updated Timeline.

Following the May 25-27, 2011 follow-up monitoring visit, Fluency Plus submitted a lengthy report to MDE documenting numerous ongoing IDEA violations for all of the named petitioners, including E.H. Once again, MDE did absolutely nothing to facilitate the provision of technical assistance to JPS to correct the individual and systemic violations documented again in May 2011. *See* Exhibit 5, Swindol testimony at 173:8-12 ("And then on 5/25, we went in with those protocols and did the actual review that was halted the first time. And then after that we weren't in the District.").

MDE again allowed six months to elapse and waited until mid-November 2011 to schedule another follow-up monitoring visit. *See* Exhibit 6, MDE, Updated Timeline (showing that MDE conducted an on-site follow-up visit on November 15-16, 2011). This follow-up visit revealed that JPS had failed to implement any of the necessary corrective actions, and had failed to correct the individual violations for a single one of the original nine petitioners. *See* Exhibit 11, Letter from T. Bradley, Bureau Director, MDE Office of Special Education, to Dr. J. Sargent, Superintendent, JPS (Jan. 13, 2012) ("Despite the District's recent efforts of developing policies and procedures and providing the required training sessions, the implementation outcomes have not been achieved to resolve the noncompliance identified fifteen months ago in the Findings and Decision."); Exhibit 9, McCleon Testimony at 30:19-31:14 (testifying that none of the original petitioners had been cleared of noncompliance at the time of the November follow-up monitoring visit). 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. *See* Exhibit

11, Letter from T. Bradley to Dr. J. Sargent, Superintendent; Exhibit 12, MDE, Follow-up Monitoring Evaluation Report on Services for Students with Disabilities 3-18 (Nov. 15-16, 2011) (hereinafter "November Follow-up Monitoring Report"). Once again, MDE did not direct Fluency Plus to provide JPS with any technical assistance to respond to the violations identified during the November 2011 follow-up monitoring visit. *See* Exhibit 5, Swindol Testimony at 173:17-20 ("Then we were called on 11/15 to do another file review. And then we were recently called last week to do another file review on 4/18.").

Instead, MDE permitted JPS to remain in noncompliance, and permitted the original petitioners and similarly situated students to be denied FAPE for over one year. 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 13, 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 made absolutely no improvement since November 2011 because it had still completely failed to implement any of the required corrective actions. *Id.* ("[W]hile much time and effort have been exerted by District personnel to develop policies and procedures and to provide the various training sessions, the missing component in almost every area of noncompliance is directly related to a lack of policy/procedure implementation of the District's own policies and procedures or a failure to document evidence confirming implementation."); Exhibit 14, 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 individual and systemic violations dating back to November 2010. *See* Exhibit 13, Letter from T. Bradley to Dr. J. Sargent.

Additionally, the April Follow-up Monitoring Report documented that JPS was suspending students with disabilities at increasingly disproportionate rates and that the disproportionality was actually greater than it was at the time of the filing of the September 2010 Administrative Complaint. *See* Exhibit 14, 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.) Once again, MDE failed to take meaningful corrective action to remedy JPS' ongoing noncompliance and simply ordered JPS to submit yet another CAP, despite JPS' demonstrated failure for over one year to draft and implement an adequate CAP. *See* Exhibit 13, Letter from T. Bradley to J. Sargent.

**D. Accreditation Proceedings.**

In January 2012, MDE reported JPS to the Office of Accreditation for accreditation sanctions – an action that did absolutely nothing to ensure the provision of FAPE to the original petitioners and similarly situated students. On April 26 and May 21, 2012, the Commission on School Accreditation held a hearing to determine JPS' accreditation status, and decided to grant JPS an extension until November 1, 2012 to correct all of the violations and come into full compliance with the IDEA or lose its accreditation. *See* Exhibit 15, Mississippi Commission on School Accreditation, Notice of Commission Action (May 31, 2012). The Commission made this decision despite testimony from Fluency Plus that JPS' violations are so systemic and JPS is so far behind in implementing appropriate corrective action that it will take JPS at least a year, if not more, to come into full compliance. *See* Exhibit 5, Swindol Testimony at 182:3-5 (stating that it will take JPS a minimum of three years to obtain full compliance); Exhibit 9, McCleon Testimony at 34:19-21 (stating that JPS could come into compliance within one year "if

everyone is on the same page and committed to doing that."). Despite this testimony, MDE made no further demands on JPS and made no further provision for additional technical assistance and/or oversight of JPS' implementation of corrective action.

Following MDE's decision to grant JPS an extension on its accreditation status, JPS has undertaken several purported corrective actions that will actually exacerbate JPS' systemic violations. For instance, despite repeated admonishment from MDE that removing students with disabilities from the classroom and placing them in restrictive segregated settings violates the IDEA, JPS proposed creating two new segregated settings for students with disabilities in the 2012-2013 school year. *See* Exhibit 16, Memorandum from Dr. F. Addison, Interim Director, Office of Exceptional Education Services, JPS, to A. Moore, Director, Office of Special Education, MDE 1-2 (June 4, 2012). One such segregated setting is a day treatment program, isolated from other mainstream schools within JPS that would serve only students with emotional disabilities. *Id.*at 1. Students in this day treatment program would not even have the benefit of receiving live instruction and would not have a real, much less a highly qualified, teacher in their classroom. *Id.* Instead, JPS proposed providing some of its most academically vulnerable students with instruction via video streaming from other classrooms. *Id.*

JPS has also proposed creating a separate alternative school program to serve only students with disabilities. *Id.* at 1-2. Further, JPS informed MDE that it plans to place full time psychologists and behavioral support specialists in the alternative school and day treatment program to provide students with disabilities with more intensive behavioral interventions. *Id.* at 1. However, JPS has not taken any action to make these vital services and the increased staffing available to students in regular education classrooms and regular neighborhood school settings to prevent their removal to more restrictive settings. Rather than implementing measures to

improve student behavior and reduce the need for segregated placements, JPS has merely expanded the array of segregated settings it may use, and has thus further incentivized the exclusion of students with disabilities from the classroom. This is evidence of MDE's ongoing failure to follow through to ensure that JPS complies with the IDEA.

Since issuing its May 31, 2012 accreditation decision, MDE has continued in its pattern of permitting JPS to resist technical assistance and evade compliance with the IDEA. MDE approved a new CAP from JPS, even though JPS developed the CAP without the assistance of Fluency Plus and the CAP contains several substantial deficiencies. Similar to previous CAPs, the July 2012 CAP fails to include corrective actions to address all of the original areas of noncompliance,[11] and also marginalizes the role of Fluency Plus, includes insufficient training and technical assistance, fails to actively involve an MDE technical advisor who will constantly monitor the implementation and effectiveness of the CAP, and fails to adequately address the systemic nature of the IDEA violations identified by MDE in its investigations and follow up reports for the past twenty months. *See* Exhibit 17, JPS, Corrective Action Plan (July 18, 2012) (hereinafter "July 2012 CAP"). Once again, MDE has permitted JPS to move forward with a CAP that is incapable of correcting the individual and systemic violations documented almost two years ago, and that is incapable of ensuring the provision of FAPE to Plaintiffs and the class. Now, nearly two years after the filing of the original administrative complaint, JPS and MDE have reluctantly entered into a memorandum of understanding that only purports to address some of Plaintiffs' concerns and offers no direct relief to the affected students. *See* http://mpbonline.org/News/article/737jackson_public_school_board_makes_deal_to_keep_accre

[11] For instance, the July 2012 CAP fails to include corrective actions to address JPS' failure to ensure that students receive appropriate levels of related services. *Compare* Exhibit 17, July 2012 CAP *with* Exhibit 2, MDE Findings and Decision at 3-6.

ditation. (last accessed Oct. 31, 2012). This gesture provides Plaintiffs with absolutely no assurance that they will finally receive the education they are entitled to receive by federal law.

## IV. ARGUMENT

In the Fifth Circuit, a party must establish the following four elements to receive a preliminary injunction: "(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest." *Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011). The "determination as to whether a set of circumstances warrant such relief rest[s] in the discretion of the district court." *Taylor v. Corinth Pub. Sch. Dist.*, 917 F. Supp. 464, 467 (N.D. Miss. 1996) (citing *Canal Authority of State of Florida v. Callaway,* 489 F.2d 567, 572 (5th Cir.1974)). Plaintiffs easily satisfy all four of these requirements.

### A. There is a Substantial Likelihood that Plaintiffs will Prevail on the Merits.

To satisfy the first element – "a substantial likelihood of success on the merits" – a plaintiff "is not required to prove entitlement to summary judgment." *Byrum v. Landreth,* 566 F.3d 442, 446 (5th Cir. 2009). Instead, in making its determination about the likelihood of success on the merits, a court will evaluate "standards provided by the substantive law." *Roho, Inc. v. Marquis,* 902 F.2d 356, 358 (5th Cir.1990). When a plaintiff seeks a preliminary injunction with IDEA serving as the underlying source of substantive law, the plaintiff must make a "necessary showing of a justiciable issue presented under the IDEA." *Schares v. Katy Indep. Sch. Dist.*, 252 F. Supp. 2d 364, 366 (S.D. Tex. 2003). A plaintiff must also provide something "more than [a] bare allegation" of a violation of an IDEA provision in order to

establish a substantial likelihood of success on the merits. *Comb v. Benji's Special Educ. Acad., Inc.*, 745 F. Supp. 2d 755, 771 (S.D. Tex. 2010).

Plaintiffs will easily prevail on their claim that MDE has violated their rights under the IDEA by failing to ensure that they receive FAPE. Indeed, MDE has already conceded that Plaintiffs and the proposed class have been denied FAPE for two years. *See* Exhibit 2, Findings and Decision; Exhibit 12, November Follow-up Monitoring Report; Exhibit 14, April Follow-up Monitoring Report; Defendant's Memorandum of Authorities Supporting Response in Opposition to Motion for Class Certification 4, filed Oct. 25, 2012, ECF No. 15 ("[MDE] substantiated all of the findings in the administrative complaint."). As discussed in section III *supra,* MDE determined in November 2010 that JPS had violated the IDEA and denied FAPE to Plaintiff E.H. and similarly situated students – the very same students that constitute the proposed class here – by failing to comply with numerous procedural and substantive requirements of the IDEA. According to MDE's most recent follow-up monitoring report released in May 2012, JPS has failed to correct the individual and systemic violations of the IDEA identified by MDE almost two years earlier. Consequently, Plaintiffs and the proposed class continue to suffer the denial of FAPE in violation of the IDEA.

The IDEA also makes it clear that MDE is now legally liable for this ongoing denial of FAPE to Plaintiffs and the class. *See St. Tammany Parish Sch. Bd. v. State of La.,,* 142 F.3d 776, 784 (5th Cir. 1998) (The IDEA "places primary responsibility on the state educational agency" to ensure that the IDEA is carried out and eligible students receive FAPE.); *Doe v. Maher*, 793 F. 2d 1470, 1492 (9th Cir. 1986) (SEA responsible for providing FAPE if LEA fails to do so); *Kruelle v. New Castle County Sch. Dist.,* 642 F.2d 687, 696 (3d Cir. 1981) (SEA has "primary responsibility" to ensure that children receive FAPE); *Corey H. v. Bd. of Educ. of City of*

*Chicago*, 995 F. Supp. 900, 910 (N.D. Ill. 1998) (SEA liable for LEAs failure to comply with the LRE mandate of the IDEA). The plain language of the IDEA states that an SEA is responsible for ensuring that LEAs follow the mandates of the IDEA and provide all IDEA eligible students with FAPE. *See* 20 U.S.C. § 1412(a)(1), (11); § 1413 (g), (h)(1); *Corey H.,* 995 F. Supp. at 905 ("[T]he provisions of the IDEA delegate to the SEAs the responsibility for compliance as well as the supervisory power to implement policies and procedures to make certain that LEAs have complied with the Act."). MDE is responsible for implementing policies and procedures to ensure that LEAs are monitored for implementation and compliance with the IDEA. 20 U.S.C. §1412(a)(11); §1416. 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) (emphasis added). The SEA is also responsible for providing FAPE directly to students when an LEA is unable to establish and maintain programs of FAPE in compliance with the IDEA. 20 U.S.C. § 1413(g); 34 C.F.R. §300.227(a)(1)(ii).

In the *Corey H.* case, which is similar to the one at hand, the Northern District of Illinois held the Illinois SEA liable for its failure to correct a local school district's violations of the LRE mandate of the IDEA. *Corey H.,* 995 F. Supp. at 909-12. The court described the SEA's responsibilities under the IDEA as follows: "the SEA must identify LRE violations by local districts [LEAs] *and* follow through to ensure that such violations are corrected."[12] *Id.* at 910. The Court emphasized that the Illinois SEA's monitoring of the Chicago LEA was inadequate to ensure compliance because the SEA did not take appropriate steps to ensure that the LEA took

[12] The *Corey H.* decision also cited with approval the following decisions: *Kruelle,* 642 F. 2d 687; *Jose P. v. Ambach,* 669 F.2d 865, 870-71 (2d Cir. 1982); *Cordero ex rel. Bates v. Penn. Dep't of Educ.*, 795 F. Supp. 1352, 1362 (M.D. Pa. 1992), which imposed distinct responsibility and liability upon SEAs for failure to ensure that the IDEA's statutory requirements were carried out by LEAs.

corrective action to remedy identified IDEA violations. *Id.* at 916 ("Thus while the [SEA] may correctly identify some LRE violations, it does not direct the school district [LEA] to take any effective corrective action . . . . This clearly violates the [SEA's] responsibility under IDEA to ensure LRE compliance by the local district.")

The *Corey H.* decision has direct applicability in the present case because in both situations "the evidence demonstrates that the State [MDE] took few if any actions to 'ensure' that these failures [FAPE denials] were corrected, and in fact consciously allowed [JPS] to continue violating the [IDEA] mandate." *Id.* at 910. As discussed in Section III, *supra* MDE permitted JPS to use a blatantly deficient CAP for close to one year before requesting that JPS make necessary revisions to the CAP, and MDE approved another deficient CAP as recently as July 2012. MDE also made no effort to follow through to ensure that JPS actually received meaningful technical assistance from Fluency Plus, and has allowed two years to elapse without JPS receiving any technical assistance to correct the individual and systemic violations. *See Cordero,* 795 F. Supp. at 1362 ("As defined by the IDEA, the state's role amounts to more than creating and publishing some procedures and then waiting for the phone to ring. The IDEA imposes on the state an overarching responsibility to ensure that the rights created by statute are protected, regardless of the actions of local school districts."). Consequently, JPS remains in violation of the IDEA, and Plaintiffs and the proposed class continue to suffer the denial of FAPE.

Plaintiffs have satisfied all of the elements necessary to prevail on their claim that MDE is liable for denying them the substantive guarantee to FAPE under the IDEA. MDE's own reports have established that Plaintiffs and the class have been denied FAPE, and MDE's failure to ensure the correction of these violations after two years makes MDE liable for the ongoing

deprivation of FAPE to Plaintiffs and the class. Plaintiffs have presented substantially more than a "bare allegation" that MDE has violated its duties under the IDEA. *Comb,* 745 F. Supp. 2d at 771. Accordingly, Plaintiffs satisfy the first element required for a preliminary injunction.

**B. Plaintiffs will Suffer Irreparable Harm in the Absence of a Preliminary Injunction.**

In order to grant a motion for preliminary injunction, a Court must find that the plaintiff will likely suffer irreparable harm in the absence of the preliminary injunction. *United States v. Emerson*, 270 F.3d 203, 262 (5th Cir. 2001). The plaintiff must also show "a significant threat of injury from the impending action, that the injury is imminent, and that money damages would not fully repair the harm." *Humana, Inc. v. Avram A. Jacobson, M.D., P.A.*, 804 F.2d 1390, 1394 (5th Cir. 1986) (internal citations omitted).

It is well established that the denial of a free appropriate public education to a child eligible for services under the IDEA constitutes irreparable harm. *See N.D. ex rel. parents acting as guardians ad litem v. Haw. Dep't of Educ.,* 600 F.3d 1104, 1112-13 (9th Cir. 2010) (finding that behavioral regression resulting from deprivation of educational services constitutes irreparable harm); *D.D. ex rel. V.D. v. New York City Bd. of Educ.*, CV-03-2489, 2004 WL 633222, at *25 (E.D.N.Y. Mar. 30, 2004) (holding that failure to provide special education services to class members in a timely manner satisfies the irreparable harm standard); *Blackman v. Dist. of Columbia,* 277 F. Supp. 2d 71, 78 (D.D.C. 2003) (holding that failure to provide timely due process hearings results in the denial of FAPE and constitutes irreparable harm); *Cosgrove v. Bd. of Educ. of Niskayuna Cent. Sch. Dist.,* 175 F. Supp. 2d 375, 392-93 (N.D.N.Y. 2001) (holding that it is "almost beyond dispute" that the denial of FAPE constitutes irreparable harm); *Borough of Palmyra Bd. of Educ. v. F.C. ex rel. R.C.*, 2 F. Supp. 2d 637, 645 (D.N.J. 1998) (holding that loss of FAPE constitutes irreparable harm); *Skelly v. Brookfield Lagrange*

*Park Sch. Dist. 95,* 968 F. Supp. 385, 395-96 (N.D. Ill. 1997) (finding irreparable harm where denial of necessary transportation services would force student into restrictive homebound placement); *Paul Y. ex rel. Kathy Y. v. Singletary,* 979 F. Supp. 1422, 1427 (S.D. Fla. 1997) (finding "irreparable injury will be and has been suffered, since [plaintiff] has been deprived of, and continues to be deprived of, the education he and his parents allegedly desire for him."); *J.B. v. Killingly Bd. of Educ.*, 990 F. Supp. 57, 72 (D. Conn. 1997) (holding that prolonged denial of FAPE constitutes irreparable harm); *Howard S. v. Friendswood Indep. Sch. Dist.,* 454 F. Supp. 634, 641 (S.D. Tex. 1978) (continued denial of FAPE will cause irreparable harm).

The denial of FAPE constitutes clear irreparable harm because the denial of FAPE results in educational deficits, and these deficits cannot be remedied through monetary damages. *A.T. v. New York State Educ. Dep't*, 98-CV-4166-JG, 1998 WL 765371, at *10 (E.D.N.Y. Aug. 4, 1998) ("[Plaintiff's] injury is actual and imminent because she is currently being deprived of the free appropriate public education to which she is entitled under IDEA. . . . In the absence of an injunction, [plaintiff] faces further damage to her development. This type of injury cannot be remedied by an award of monetary damages, which of course would not provide [plaintiffs] with the free and appropriate education that she has been denied."). *See also D.D.*, 2004 WL 633222, at *25 ("[A]ny developmental delays suffered as a result of further placement delays cannot be fully remedied by monetary damages.").

Plaintiffs easily satisfy the irreparable harm standard. First, Defendant has already conceded that JPS has denied and continues to deny Plaintiffs and similarly situated students the free appropriate public education they are entitled to receive under the IDEA. As discussed in Section III, *supra* Defendant has documented numerous violations of the IDEA resulting in the denial of FAPE to Plaintiffs and the proposed class. Among other violations, Plaintiffs and the

proposed class have been denied necessary related services and behavioral interventions, resulting in their disproportionate removal from the classroom and their placement in restrictive settings. *See, e.g.,* Exhibit 2, Findings and Decision at 12 (There is "no evidence that the students had a history of receiving meaningful Related Services, raising questions as to whether student conduct would have been in question if the students had previously received adequate and necessary Related Services supports."). Plaintiffs and the class have also been denied necessary instruction and remedial interventions to address their learning disabilities, resulting in an alarming lack of academic progress.[13] *See id.* at 14 ("[T]here was no evidence of sensitive academic skill measures (i.e., Curriculum-based Measures) administered to measure students' basic Reading, Math, and Writing Skills. . . . [N]o cases reviewed revealed evidence that students with academic skill deficits received direct, intensive academic skill remediation beyond the core curriculum during the 2009-2010 school term and/or who are currently receiving intensive academic interventions necessary for improving basic Reading, Math, and/or Writing skills."); at 17 ("[A]lthough many students continued to experience academic failure, there was no evidence that JPSS increased academic supports necessary to increase the likelihood of academic success . . . and/or adjust the curriculum expectations to be consistent with the students' present functioning levels . . . ."). MDE unequivocally stated that "it is apparent that meaningful educational benefits have not been realized for the vast majority of cases reviewed." *Id*. at 14.

[13] Plaintiff E.H. is a tenth grade student who is reading at a second grade level. During the three year period from 2005-2008, Plaintiff E.H. only increased his reading skills by one grade level and his math skills actually regressed. Plaintiff J.P., a sixteen year old student who is entering ninth grade for the second time, is reading at a high third grade level. Plaintiff R.T. is a fifteen year old student, performing below grade level, with an expectation that he will achieve grade level benchmarks at a mere 60% proficiency rate. The named Plaintiffs' consistent lack of academic progress demonstrates the ongoing harm suffered as a result of MDE's failure to ensure compliance of the IDEA within JPS.

No amount of monetary damages will ever suffice to compensate Plaintiffs and the proposed class for the educational opportunities squandered by JPS and MDE over the past two years. The Plaintiffs' educational deficits are real and profound, and will become increasingly severe without immediate intervention. *See Sabatini v. Corning-Painted Post Area Sch. Dist.,* 78 F. Supp. 2d 138, 143 (W.D.N.Y. 1999) ("the longer [plaintiff] goes without receiving a FAPE, or compensatory education, the worse the situation gets. . . . The denial of a FAPE over an extended period does constitute harm, and the longer the denial continues, the more irreparable it becomes."); *Skelly,* 968 F. Supp. at 396 ("Such lost days could not be replaced in [plaintiff's] educational life."). Indeed, JPS' dismal graduation rate for students with disabilities[14] – less than 10% – illustrates the cumulative impact of the District's systemic violations, and foreshadows the grim academic future that awaits the Plaintiffs and the class if MDE permits the violations to continue unabated. MDE's failure to ensure the provision of FAPE to Plaintiffs and the class has undoubtedly resulted in irreparable harm. Plaintiffs therefore satisfy the second element required for a preliminary injunction.

**C. The Harm to Plaintiffs Outweighs the Potential Harm to the Defendant.**

In considering Plaintiffs' motion, the Court must weigh the harm to class members against any possible damage to the Defendant. *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas,* 335 F.3d 357, 363 (5th Cir. 2003); *Lindsay v. City of San Antonio*, 821 F.2d 1103, 1107 (5th Cir. 1987) (citations omitted). This is a mixed question of law and fact. *Lindsay*, 821 F. 2d at 1107. The Court must consider whether "the balance of equities tips" in the Plaintiffs' favor in determining whether to grant a preliminary injunction.

[14] *See* The Children's First 2009-2010 Annual Report 1 (2010), *available at* http://www.jackson.k12.ms.us/about/2011_testscores/mde_dashboard.pdf. (last accessed Oct. 31, 2012).

*Winter v. Natural Res. Def. Council, Inc*., 129 S. Ct. 365, 374 (2008). The decision to grant or deny a preliminary injunction is within the sound discretion of the district court and may be reversed only for a clear abuse of discretion. *Allied Mktg. Group, Inc. v. CDL Mktg., Inc.,* 878 F.2d 806, 809 (5th Cir. 1989).

The balance of equities strongly favors the Plaintiffs. The Plaintiffs are a class of students with significant disabilities who attend Jackson Public Schools who have been subjected to multiple disciplinary removals and who have been denied meaningful educational benefit from their IEPs. MDE has documented that for years, class members have been denied the educational and supportive services they need to achieve and have been forced into substandard segregated settings. As noted above, fewer than 10% of JPS' students with disabilities graduate, and Plaintiffs E.H., J.P., and R.T. have made very little academic progress over the course of many school years. The representative plaintiffs, and many others similarly situated, have suffered repeated suspensions and are at risk of removal from their neighborhood schools to self-contained classrooms and segregated day programs.[15]

The Defendant has long been aware of the problems in JPS, yet has abdicated its responsibility to correct them. As set forth in detail above, in September 2010, class members filed a state administrative complaint with MDE against JPS alleging various systemic violations of the IDEA. Following a thorough investigation, MDE substantiated all of the allegations contained in Plaintiffs' administrative complaint. In its November Follow-up Monitoring Report, MDE confirmed that the violations of the IDEA it had identified were systemic

[15] The importance of education is without question. As the Supreme Court noted, "education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all [and] has a fundamental role in maintaining the fabric of our society." *Plyler v. Doe*, 457 U.S. 202, 221 (1982). These considerations are all the more critical for students with disabilities who have been hampered by low expectations and social misconceptions. 20 U.S.C. §1400(c).

throughout JPS and had resulted in the denial of the students' rights to a free appropriate public education.[16] Despite having declared JPS to be in substantial violation of federal law, MDE has taken no meaningful action to redress the situation though clearly obligated to do so.

Thus, while class members are threatened with unlawful removals, exclusion, and deteriorating academic prospects, Defendant will suffer no harm from providing the preliminary relief Plaintiffs are requesting. As the state educational agency, the Defendant bears the ultimate responsibility for ensuring that JPS complies with the IDEA. 20 U.S.C. §1412(a). This includes monitoring JPS' compliance with the IDEA and ensuring that noncompliance is corrected as soon as possible. 20 U.S.C. §§1412(a)(11), 1413(d),(g); 34 C.F.R. §300.600(e). The Defendant receives considerable federal funding to implement these tasks. *See* http://www.mde.k12.ms.us/special-education/special-education-grants-and-funding (last accessed on October 31, 2012). Injunctive relief is sought to ensure that the Defendant appropriately performs its preexisting obligation to monitor and enforce the provisions of the IDEA. 20 U.S.C. §§1412(a)(11), 1413(d),(g); 34 C.F.R. §300.600(e).

The balance of hardships clearly favors Plaintiffs in this case. Hundreds of class members have already suffered years of educational deprivation. Many, like E.H., J.P., and R.T., are hanging on to their high school careers by the most slender of threads. Directing the Defendant to properly exercise its monitoring and enforcement authority falls squarely within the duties imposed upon the Defendants by the IDEA and for which it receives federal funding to perform. The harm to class members here clearly outweighs any harm to Defendants.

[16] Indeed, as recently as May 23, 2012, MDE confirmed that: "JPS has been found noncompliant with state and federal regulations in its Office of Special Education which includes failing to provide a free appropriate public education (FAPE) to students with disabilities. JPS has failed to correct the ten findings dealing with noncompliance with the Individuals with Disabilities Education Act."
http://www.jackson.k12.ms.us/content.aspx?url=/page/press&nid=1230 (last accessed on Oct. 31, 2012).

**D. The Public Interest Favors Granting Plaintiffs' Motion for Preliminary Injunction.**

In considering a preliminary injunction motion, the public interest is "an element that deserves separate attention in cases where the public interest may be affected." *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 974 (9th Cir. 2002). A preliminary injunction is appropriate where there is "a fit (or lack of friction) between the injunction and the public interest." *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 120 (1st Cir. 2003). *See also Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 623 (5th Cir. 1985) (the Court found the public interest was the central issue, the irreparable injury alleged was the adverse impact to the public interest, and therefore the irreparable injury and public interest analysis were intertwined). The Court's equitable powers are enhanced when the public interest is at stake. *Fed. Sav. & Loan Ins. Corp. v. Dixon*, 835 F.2d 554, 562 (5th Cir. 1987). In this case, the public interest would be well-served by requiring the Defendant to fulfill its obligations to children with disabilities attending Jackson Public Schools.

The history and development of education programs for children with disabilities in the United States closely parallels the struggle of other minority groups to establish their civil right to participate equally in public education, which provides the primary preparation for economic and social participation in society. As the United States Supreme Court stated in *Brown v. Board of Education*:

> [Education] is a principal instrument awakening the child to cultural values, in preparing him for later training, and in helping him to adjust normally to his environment. It is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

*Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

Children with disabilities' right to equal educational opportunities was established when Congress enacted The Education for All Handicapped Children Act (later renamed the IDEA) in

1975. The IDEA was implemented with the express goals of "ensur[ing] that all children with disabilities have available to them a free appropriate public education" and guaranteeing that the rights of children with disabilities and parents of such children are protected. 20 U.S.C. §§ 1400(d)(1)(A), 1400(d)(1)(B). Prior to its implementation, a majority of the nation's almost 4 million children with disabilities were denied meaningful participation in public education. Nearly half of all children with disabilities were excluded entirely from public schools; the rest were either placed in grossly inadequate or segregated classrooms or in regular classrooms without meaningful support. H.R. Rep. No. 94-332, at 4 (1975). To remedy this history of discrimination and mistreatment, states accepting IDEA dollars must assume general responsibility for all educational programs that receive support under IDEA, including those conducted by local educational agencies. 20 U.S.C. § 1412(a)(11). When a state determines that a school district has failed to comply with a state or federal requirement for educating children with disabilities, it must take prompt action to ensure that the district comes into compliance. 20 U.S.C. § 1413(a).

In *Howard S. v. Friendswood Independent School District*, the District Court for the Southern District of Texas compared the value of an appropriate education for children with disabilities to the actual costs of non-compliance and granted the Plaintiffs' motion for preliminary injunction. *Howard S.,* 454 F. Supp. at 640 (a student receiving special education services was denied FAPE when he was constructively expelled for discipline problems without taking into consideration the student's disability). The Court determined "the public interest will be served by the entering of a preliminary injunction for the reason that such preliminary injunction will afford the plaintiffs their statutory and constitutional rights, and will encourage compliance with the law." *Id*. at 641. The Court further stated that "[r]eference to the legislative

history reveals that it was the judgment of the Congress that the apparently substantial expense of compliance with the Education for All Handicapped Children Act of 1975 (Public Law 94-142, 20 U.S.C. s 1401) is actually much less than the cost of life-long institutionalization." *Id.*

In the instant matter, issuing a preliminary injunction will serve the public interest by affording Plaintiffs and putative class members' their federally guaranteed right to the substantive and procedural benefits of the IDEA. Indeed, if the preliminary injunction is granted, it will address both the substantial threat of irreparable injury and serve, as opposed to disserve, the public interest. The public interest is served by ensuring that the Defendant, in its capacity as the state educational agency, remedies the systemic violations it identified through its own investigation of Jackson Public Schools. 20 U.S.C. §1412(a)(1)(11); 20 U.S.C. § 1413(g)(h)(1); 34 C.F.R. § 300.600(e); *see also St. Tammany Parish Sch. Bd.,* 142 F.3d at 784 (state and local educational agencies may be held liable under IDEA for the failure to provide a free appropriate public education). Further, the preliminary injunction will not harm the Defendant. Instead, it will merely compel the Defendant to fulfill its statutory obligations and thereby serve the public interest. Plaintiffs therefore satisfy the final element required for a preliminary injunction.

## V. PLAINTIFFS SHOULD NOT BE REQUIRED TO POST A SECURITY BOND AS A CONDITION OF THE PRELIMINARY INJUNCTION

The Plaintiffs should not be required to post a security bond if a preliminary injunction is issued. Although Fed. R. Civ. P. 65(c) permits courts to order the posting of a bond, they are not required to do so. *Kaepa, Inc. v. Achilles Corp.,* 76 F.3d 624, 628 (5th Cir. 1996). Several courts have waived the bond requirement in certain circumstances, such as in cases where plaintiffs seek to enforce important federal rights and serve the public interest. *See Temple Univ. v. White,* 941 F.2d 201, 219-20 (3d Cir. 1991). In determining whether a bond is required,

courts also consider the "equities of potential hardships," *id.,* and the strength of the plaintiff's claims. *See Moltan Co., v. Eagle-Picher Indus., Inc.,* 55 F.3d 1171, 1176 (6th Cir. 1995) (approving waiver of a bond given the strength of the case and "the strong public interest involved"); *Sluiter v. Blue Cross & Blue Shield,* 979 F. Supp. 1131, 1145 (E.D. Mich. 1997) ("Due to the strong likelihood of Plaintiffs' success on the merits and their demonstrated financial inability, the Court finds it would be improper to require any security in this matter.").

Here, several factors counsel in favor of waiver, including the strength of Plaintiffs' claims, the strong public interest involved, and the financial hardship a bond would place on Plaintiffs. This Court should therefore waive the bond requirement in this case.

## VI. CONCLUSION

For the reasons set forth above, Plaintiffs E.H., J.P., and R.T. on behalf of themselves and the proposed class, respectfully request that this Court issue a preliminary injunction to compel Defendant MDE to comply with its statutory obligation under the IDEA to correct the violations identified in its November 2010 Findings and Decision and ensure the provision of FAPE to Plaintiffs and the class, including the appointment of an independent administrator to oversee the provision of special education services to Plaintiffs and the proposed class.

RESPECTFULLY SUBMITTED, this the 1st day of November, 2012.

/s/ Vanessa J. Carroll
VANESSA J. CARROLL, MS Bar No. 102736
vanessa.carroll@splcenter.org
CORRIE COCKRELL, MS Bar No. 102376
corrie.cockrell@splcenter.org
JODY E. OWENS, II, MS Bar No. 102333
jody.owens@splcenter.org
Southern Poverty Law Center
111 E. Capitol St., Suite 280
Jackson, MS 39201
601-948-8882 (telephone)
601-948-8885 (fax)

JERRI KATZERMAN
AZ Bar No. 013895*
jerri.katzerman@splcenter.org
Southern Poverty Law Center
400 Washington Avenue
Montgomery, AL 36104
334-956-8320 (telephone)
334-956-8481 (fax)
*Admitted *pro hac vice*

JIM COMSTOCK-GALAGAN
LA Bar No. 05880*
jgalagan@sdlcenter.org
Southern Disability Law Center
4431 Canal St.
New Orleans, LA 70119
504-486-8982 (telephone)
504-486-8947 (fax)
*Admitted *pro hac vice*

WENDELL HUTCHINSON, MS Bar No. 99178
whutchinson@drms.ms
Disability Rights Mississippi
210 E. Capitol St., Suite 600
Jackson, MS 39201
601-968-0600 (telephone)
601-968-0665 (fax)

**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 1st day of November, 2012.

/s/Vanessa J. Carroll
VANESSA J. CARROLL, MSB # 102736
Southern Poverty Law Center
111 East Capitol Street, Suite 280
Jackson, MS 39201
Telephone: (601) 948-8882
Facsimile (601) 948-8885
vanessa.carroll@splcenter.org