



201 St. Charles Avenue, Suite 2000  
New Orleans, LA 70170  
T 504.486.8982 F 504.486.8947  
www.splcenter.org

TO: Dale Bailey, Ken Swindol, William Swindol, *Independent Monitors*

FROM: Jasmine Bolton, Neil Ranu and Victor Jones  
*Counsel for Plaintiff Class*

DATE: May 20, 2019

RE: Review of Independent Monitor's Draft Status Report Dated April 29, 2019

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As an initial matter, we would like to express our sincere appreciation to the Independent Monitors ("IMs") for preparing the April 29, 2019 Draft Status Report and Appendices ("Draft Report"), and for the opportunity to provide feedback on the same. We appreciate your continued efforts and look forward to continuing to work with you and all parties to improve special education for children in Orleans Parish.

**I. Introduction and summary**

Plaintiffs would like to raise two main points of concern, described in detail below. First, in Section II, Plaintiffs continue to raise their objection to the IMs' findings that the State Defendants and Defendant-Intervenor (collectively "the Defendants") achieved "substantial compliance" with the Consent Judgment ("the CJ") during the 2016-2017 school year and maintained "substantial compliance" for the first of two required years during the 2017-2018 school year. Further, Plaintiffs extend this objection to the IMs' finding that the Defendants maintained "substantial compliance" for the second of two required years during the 2018-2019 school year. As discussed in detail below, the interpretation of "substantial compliance" used in the Draft Report would allow the Defendants to exit the CJ: (1) without actually achieving compliance with the IDEA and the terms of the CJ and (2) while there are outstanding corrective actions. As the Plaintiffs have previously noted, the CJ mandates that Defendants require noncompliant Local Education Agencies ("LEAs" and singularly "LEA") to *actually remedy* systemic noncompliance with the IDEA. To the extent that Defendants have not fulfilled this obligation, the IMs' findings of "substantial compliance" continue to be premature.

In Section III, Plaintiffs request further monitoring of the proactive efforts taken by the Defendants to address the high rates of systemic noncompliance among LEAs selected for initial monitoring. At the request of the Court, the Defendants provided information regarding proactive monitoring

and support systems put in place for all LEAs, rather than the select few monitored in accordance with the CJ. Plaintiffs commend the Defendants on the development of the requested programs and procedures over the past school year. However, as most of these programs and procedures are relatively new, Plaintiffs encourage the IMs to continue to monitor these efforts in order to ensure that the improvement is truly reflective of a parish wide trend and to suggest improvements where they may be necessary.

Finally, in Section IV, Plaintiffs express their appreciation to the IMs for addressing many of the concerns Plaintiffs have raised in prior letters and Plaintiffs summarize the concerns which have been addressed and those that remain outstanding.

If Plaintiffs can provide any additional information or clarification on the comments below, please do not hesitate to contact us.

**II. Defendants have not achieved substantial compliance with the CJ because systemic noncompliance is ongoing and has been identified in each and every year of targeted monitoring**

As in our previous letters, Plaintiffs again urge the IMs to reconsider the finding that the Defendants established Substantial Compliance during the 2016-2017 school year and successfully completed the initial year of maintenance of substantial compliance during the 2017-2018 school year. Having reviewed the Draft Report, Plaintiffs now urge the IMs to also reconsider the finding that the Defendants have successfully maintained a second year of substantial compliance during the 2018-2019 school year.

*a. Substantial compliance cannot yet be determined for the 2018-2019 school year*

The CJ mandates that the Defendants “require *each* LEA with validated noncompliance to undertake corrective actions sufficient to remedy the noncompliance and to reasonably ensure that such noncompliance does not reoccur.” CJ §§ A.3, B.2, C.5, & D.7 (emphasis added). As stated in our past letters, the CJ does not merely require the issuance of corrective action that may or may not remedy noncompliance for each LEA with identified noncompliance. It requires that the actions taken be “*sufficient to remedy*” the identified noncompliance *and* reasonably ensure that it does not reoccur. As such, neither the sufficiency of the corrective actions nor the ability to reasonably ensure that the noncompliance does not reoccur can be determined at the time the corrective actions are issued. Rather, such a determination can only be made once the *outcomes* of the corrective actions are known. Only then can it be said whether the corrective action sufficiently remedied the identified noncompliance or reasonably ensured that the noncompliance would not reoccur.

The LEAs selected for targeted monitoring in Spring 2016 provide a prime example of why the sufficiency of the corrective action required by the Defendants, and thus the Defendants’ compliance with the CJ, can only be judged once the outcome of the corrective action is known. Of the eleven LEAs selected for targeted monitoring in Spring 2016, all eleven were placed on Corrective Action Plans (“CAPs”) for the 2016-2017 school year. However, after those LEAs were

monitored for the 2016-2017 school year, only five of those LEAs had rectified their noncompliance with the IDEA. Thus, more than half of the corrective actions required by the Defendants were *insufficient* to remedy the identified noncompliance. As a result of this insufficiency, the Defendants could not have achieved or maintained substantial compliance during that school year. As noted in the August 9, 2018 Status Report, Intensive Corrective Action Plans (“ICAPs”) issued by the Defendants for the 2017-2018 school year ultimately proved sufficient to remedy the identified noncompliance in each of these six LEAs. However, prior to the completion of the 2017-2018 school year, the sufficiency of these ICAPs was not known. The Defendants could not have achieved substantial compliance prior to these findings.

Every round of targeted monitoring since Spring 2016 has identified systemic noncompliance requiring corrective action and follow-up monitoring. Systemic noncompliance was identified at ten of the twelve LEAs selected for initial monitoring during the 2017-2018 school year. Those ten LEAs were required to implement CAPs for the 2018-2019 school year. In addition, the Draft Report identified four more LEAs that will be required to implement CAPs during the 2019-2020 school year. Whether the corrective actions required of those fourteen LEAs will be “sufficient to remedy the noncompliance,” per the CJ mandate, remains to be seen. Only if, and when, these corrective actions prove effective can the Defendants be found in substantial compliance for the 2017-2018 and the 2018-2019 school years.

*b. The interpretation of substantial compliance in the Draft Report could strangely result in Defendants being released from the CJ while CAPs remain outstanding*

Based on Recommendation No. 1 of the Draft Report, Defendants could now be released from the CJ with the approval of the court even though CAPs remain outstanding. In terms of the CJ, this means that Defendants could be released while they have unfulfilled obligations to ensure that the required corrective actions have met the standard of effectiveness set forth in the CJ. Specifically, Defendants could be released from the CJ while identified systemic noncompliance remains outstanding at four schools identified during the 2018-2019 school year, as well as at ten schools identified during the 2017-2018 school year. If Defendants were released, they’d be released with neither the parties nor the Court knowing the status of corrective actions that were implemented as a result of the purported first and second years of the maintenance of substantial compliance. Thus, Plaintiffs reiterate their objection to the IMs’ interpretation of the CJ’s “substantial compliance” standard because it could result in the release of Defendants before they have satisfied all of their obligations.

*c. Defendants should not be given a finding of substantial compliance as long as there is evidence of systemic noncompliance, but if the IMs determine substantial compliance “round-by-round”, then based on this approach, Defendants first established substantial compliance after the 2017-2018 school year*

The intent of both Plaintiffs and Defendants in entering the CJ was to improve the actual delivery of educational services to disabled children in Orleans Parish and to build processes for better monitoring, oversight, and coordination.

The settlement notices that were attached as Exhibits B and C to the Joint Motion to Enter Consent Judgment explain that the Plaintiffs brought this lawsuit to remedy alleged violations of the legal rights of students with disabilities. (See Ex. B, Dkt No. 294-5 and Ex. C, Dkt. No. 294-6.) The Exhibits list the class-wide harms to students that would follow from these structural failures, including discrimination, school exclusion, discipline without required procedural safeguards, and, notably, denial of “the free appropriate public education and related services to which they are entitled.” (Ex. B at 2; Ex. C at 2.) It is clear that the CJ was designed for the purpose of actually improving the delivery of special education, related services, and free appropriate public education to students with disabilities across Orleans Parish. The CJ was not formulated as an administrative remedy. It is meant to have a real and demonstrated impact.

Because there has been ongoing and persistent systemic noncompliance for the entirety of the monitoring process, Plaintiffs would argue that the Defendants have yet to establish substantial compliance with the IDEA, and thus, with the CJ. However, if the IMs believe that the Defendants’ actions remedying noncompliance for LEAs monitored in one round, while noncompliance is simultaneously identified in LEAs monitored in a subsequent round, constitutes substantial compliance with the CJ, if not the IDEA, then Plaintiffs suggest that, because LEAs with validated noncompliance identified during the first two rounds of monitoring only remedied their noncompliance after the 2017-2018 school year, Defendants could have only *just* established substantial compliance as of the August 19, 2018 Status Report. Should the CAPs issued for the 2018-2019 school year prove sufficient for remedying the noncompliance identified in each of the ten LEAs subjected to corrective action after the 2017-2018 school year, Defendants will have maintained substantial compliance for the first year of the required two consecutive years of targeted monitoring. Finally, should the CAPs required for the four LEAs where systemic noncompliance was identified in the Draft Report sufficiently remedy the identified noncompliance after the 2019-2020 school year, then Defendants will have maintained substantial compliance for the second year of the required two consecutive years of targeted noncompliance.

### **III. Continued monitoring is necessary to ascertain the effectiveness of the Defendants’ proactive measures**

The Draft Report indicates that the Defendants have taken some successful actions to proactively address noncompliance on a parish wide level. Presumably, the actions described on pages 3 and 4 of the Draft Report contributed to the decrease of noncompliance among LEAs targeted for initial monitoring from 83% during the 2017-2018 school year to 33% during the 2018-2019 school year. These are encouraging improvements, and Plaintiffs commend the Defendants for their efforts. Because targeted monitoring cannot be expected to reach every LEA in the parish, and certainly not each of the four monitored subject areas at each LEA, Plaintiffs have consistently advocated for proactive action through the adoption of the recommendations compiled by the parties with the help of the IMs during the fall of 2017 and included in the February 22, 2018 Status Report.

- a. The rates of systemic noncompliance identified in targeted monitoring still indicate pervasive and ongoing structural issues in the parish despite the decrease in overall noncompliance*

Although Plaintiffs recognize that there was an overall decrease in noncompliance identified in the Fall 2018 initial targeted monitoring, they are concerned about the findings of noncompliance that were reported. As noted by the IMs in Recommendation No. 2, one of three LEAs demonstrated systemic noncompliance in the areas of both Child Find and Related Services and two of three LEAs demonstrated systemic noncompliance in the area of Enrollment. Because the CJ uses sampling to provide information about general conditions in the parish, Plaintiffs find these rates of systemic noncompliance problematic. They show that structural failures in IDEA compliance are still prevalent in schools across monitoring areas. As such, initial targeted monitoring continues to indicate that, though improved, noncompliance with the IDEA in the parish is an ongoing structural issue.

*b. The IMs should continue monitoring Defendants under the CJ to ensure that the proactive efforts taken by Defendants are sustained and effective*

Although the Defendants expressed reluctance to commit to prior recommendations, Plaintiffs appreciate the Defendants' efforts to develop a system of proactive monitoring activities and related support structures during the 2018-2019 school year. However, this was the first round of monitoring where the Defendants made such a concerted proactive effort to address noncompliance parish wide, rather than reactively addressing noncompliance as it was identified through the monitoring process, and most of the support structures referenced were only developed and implemented for the first time this past school year. Further, in spite of the Defendants' efforts, a third of LEAs selected for initial monitoring during the 2018-2019 school year still displayed systemic noncompliance with the IDEA and with the CJ. With this in mind, Plaintiffs suggest continuing to monitor these activities to determine whether the decrease in systemic noncompliance among LEAs selected for initial targeted monitoring is in fact part of a downward trend and whether these activities can be improved to further reduce incidence of noncompliance parish wide.

#### **IV. Plaintiffs appreciate the IMs' efforts to address their concerns, but critical recommendations have not been formally adopted**

Plaintiffs have appreciated the opportunity to present the IMs with responses to the draft status reports before they are formally filed with the Court. In some cases, the concerns Plaintiffs raised were addressed prior to the filing of the final status report. For example, the distinction between student-specific and systemic noncompliance raised in Plaintiff's August 1, 2018 Letter was one of these addressed concerns. Others have been addressed on an ongoing basis in subsequent reports, such as the request that the year Defendants initially achieved substantial compliance be expressly stated in each report, as raised in Plaintiffs' January 25, 2018 Letter, or requests for specificity regarding the Defendants' actions to correct noncompliance, as raised in Plaintiffs' August 1, 2018 Letter. Plaintiffs are grateful for the time the IMs have taken to consider and incorporate our concerns into their monitoring process.

Nevertheless, other concerns Plaintiffs have continually raised remain unresolved. In addition to the problematic implication of the IM's interpretation of substantial compliance and the high rates of systemic noncompliance among schools selected for initial monitoring, as already discussed in

this letter, Plaintiffs reiterate their disappointment that the recommendations agreed upon by all parties were not formally adopted or implemented as part of the CJ. This lawsuit was filed with the purpose of eliminating pervasive and systemic noncompliance with the IDEA across Orleans Parish, but years into a settlement agreement designed to achieve that goal, monitoring activities indicated that the Defendants' efforts had not resulted in parish wide change, as initially hoped. With that in mind, the parties and the IMs developed a set of recommendations that would have a broader reach. The Defendants have since expressed disagreement with the binding nature of those recommendations, and while they have taken some steps to proactively address pervasive noncompliance on a parish wide basis, the nature and scope of these recommendations remains unclear. It is also uncertain whether the actions ultimately taken by the Defendants will result in sustained and long-term improvements. Plaintiffs would like to see these actions and the agreed upon recommendations incorporated into the IM's monitoring process so that the Defendants efforts to address ongoing and systemic noncompliance across the parish can be properly evaluated. Further, as raised in Plaintiffs' January 25, 2018, May 22, 2018, and August 1, 2018 Letters, Plaintiffs continue to suggest that the IMs take an express and active role in assisting Defendants in the development and maintenance of policies, processes, and training requirements that address pervasive noncompliance observed during targeted monitoring.

#### **V. Conclusion**

The 2018-2019 initial monitoring yet again identified high rates of systemic noncompliance in the pool of schools not yet subject to the CJ's monitoring protocol. While the rate was lower than that of LEAs identified in past years, it remains clear that the purpose of the lawsuit and subsequent settlement agreement remains unsatisfied. To that end, it is imperative that the IMs both continue to monitor LEAs and assist in the development of policies and procedures aimed at addressing parish wide noncompliance. Plaintiffs continue to object to an interpretation of substantial compliance that would allow Defendants to move for termination while systemic noncompliance remains an issue at LEAs throughout the parish and the underlying purpose lawsuit remains unfulfilled.