

STRANGER THAN FICTION: THE EXPERIENCES OF STUDENTS WITH DISABILITIES IN THE POST-KATRINA NEW ORLEANS SCHOOL SYSTEM

*Eden B. Heilman**

I. INTRODUCTION	355
II. NEW ORLEANS' EDUCATIONAL GOVERNANCE FRAMEWORK.....	357
III. THE EFFECTS OF NEW ORLEANS' EDUCATIONAL REFORMS ON STUDENTS WITH DISABILITIES	360
A. THE EXCLUSION OF CHILDREN WITH DISABILITIES	362
B. THE FAILURE TO IMPLEMENT "CHILD FIND"	367
C. THE FAILURE TO PROVIDE RELATED SERVICES AND SPECIALLY DESIGNED INSTRUCTION IN THE LEAST RESTRICTIVE ENVIRONMENT.....	370
D. FAILURE TO ABIDE BY THE DISCIPLINARY PROTECTIONS OF THE IDEA.....	375
IV. CONCLUSION	380

I. INTRODUCTION

In the wake of Hurricane Katrina, New Orleans has been the subject of a massive educational transformation wherein nearly all of the city's traditional public schools have been replaced with charter schools. Almost eighty percent of all public school students in New Orleans currently attend charter schools—the highest percentage of any American city.¹ Several national

* Senior Staff Attorney, Southern Poverty Law Center. B.A., University of Florida; M.S.W., Tulane University; J.D., Loyola University New Orleans College of Law. Special thanks to my colleagues Jerri Katzerman, Katie Schwartzmann, and Jennifer Coco at the Southern Poverty Law Center for their assistance with this Article.

1. COWEN INST. FOR PUB. EDUC. INITIATIVES, THE STATE OF PUBLIC EDUCATION IN NEW ORLEANS: 2012 REPORT 8, 11 (2012), *available at*

reports have documented the success of New Orleans' school reform efforts,² citing substantial gains in reading and math by New Orleans' charter school students when compared to their traditional public school peers.³ And while many policy makers and researchers have publicized the success of these reforms for the general student population, few have taken an in-depth look at the effect of the reforms on students with disabilities and their families.

Early research about the origin of these reforms indicated that the educational needs of students with disabilities were at best an "afterthought" in the educational planning for New Orleans' public schools, particularly in charter schools.⁴ This problem continues today, and is illustrated by the day-to-day experiences of students with disabilities and their families as they navigate the complicated maze and patchwork that is the

<http://www.coweninstitute.com/wp-content/uploads/2012/07/SPENO-20121.pdf>
[hereinafter COWEN 2012 REPORT].

2. For purposes of this Article, New Orleans school reform refers to the creation of the state-run Recovery School District (RSD) and the subsequent expansion of state-authorized charter schools in New Orleans. See discussion *infra* Section II.

3. See, e.g., CTR. FOR RESEARCH ON EDUC. OUTCOMES, CHARTER SCHOOL PERFORMANCE IN LOUISIANA 4 (2009), available at http://credo.stanford.edu/reports/LA_CHARTE%20SCHOOL%20REPORT_CREDO_2009.pdf. Interestingly, this same study found that "Special Education students in charter schools in Louisiana receive no significant benefit from charter school attendance compared to their counterparts in traditional public schools in reading or math." *Id.* at 7. See generally Michael Schwam-Baird & Laura Mogg, *Is Education Reform in New Orleans Working?: A Few Facts Swimming in a Sea of Unknowns*, 11 LOY. J. PUB. INT. L. 163, 190-214 (2010).

4. Mark C. Weber, *Special Education from the (Damp) Ground Up: Children with Disabilities in a Charter School-Dependent Educational System*, 11 LOY. J. PUB. INT. L. 217, 219 (2010). See also Sarah Carr, *Charter Schools Struggle to Meet Special Education Needs*, TIMES-PICAYUNE (Jan. 5, 2008, 9:30 PM), available at http://www.nola.com/news/index.ssf/2008/01/charter_schools_struggle_to_me.html; Paul T. O'Neill & Renita K. Thukral, *The Unique System of Charter Schools in New Orleans After Hurricane Katrina: Distinctive Structure, Familiar Challenges*, 11 LOY. J. PUB. INT. L. 319, 342 (2010). The Louisiana legislature and governor acted extraordinarily quickly in the aftermath of Hurricane Katrina by enacting the legislative framework that resulted in New Orleans' current decentralized educational structure. See Schwam-Baird & Mogg, *supra* note 3, at 169 (describing the changes to New Orleans' public school system as occurring "overnight"); Stanley J. Bordelon, Comment, *Making the Grade? A Report Card on Special Education, New Orleans Charter Schools, and the Louisiana Charter Schools Law*, 11 LOY. J. PUB. INT. L. 441, 444-45 (2010) ("Sensing both the urgency and the opportunity of the situation, the Louisiana state legislature and governor hastily expanded the Recovery School District Act to allow the state to take over not only failing schools, but allow the state to take over entire school districts 'in academic crisis.'").

New Orleans public education system.

This Article will specifically examine the impact of New Orleans' educational reforms on students with disabilities from the perspective of a legal practitioner representing children and families in New Orleans.⁵ The stories and examples in this Article are derived from the experiences of our clients in New Orleans over the past five years. Names and identifying information have been changed to protect our clients' confidentiality.

II. NEW ORLEANS' EDUCATIONAL GOVERNANCE FRAMEWORK

Prior to Hurricane Katrina, New Orleans consistently ranked among the worst performing school systems in the country.⁶ In addition to the poor academic performance of students, New Orleans faced insurmountable administrative crises, including criminal indictments of school board employees and contractors, and potential bankruptcy as a result of having over \$200 million in debt.⁷

In 2003 and 2004, the Louisiana legislature responded to the public education crisis in New Orleans by creating the Recovery School District (RSD).⁸ The formation of the RSD permitted the

5. The Southern Poverty Law Center (SPLC) is a nonprofit civil rights organization founded in 1971 in Montgomery, Alabama. *Who We Are*, S. POVERTY LAW CTR., <http://www.splcenter.org/who-we-are> (last visited July 27, 2013). SPLC opened an office in New Orleans in July 2007, in part to address Louisiana's alarming rates of school discipline and school-based arrests, particularly for children of color and children with disabilities. See S. POVERTY LAW CTR., 2007 ANNUAL REPORT 8 (2007), available at http://www.splcenter.org/sites/default/files/legacy/pdf/static/SPLC_AR07.pdf. The author has been with SPLC's New Orleans office since its opening in 2007, and has represented hundreds of children and parents across Louisiana in actions against school districts and the Louisiana Department of Education. The author is also lead counsel in the litigation of *P.B. v. Pastorek*, No. 2:10-cv-04049 (E.D. La. Oct. 26, 2010), available at http://www.katrinaresearch.org/projects/Federal_Class_Action_Suit_for_New_Orleans_Special_Education_Students.pdf (now *P.B., et al. v. White*), a putative class action on behalf of 10 named students with disabilities in New Orleans against the Louisiana Department of Education for violations of the IDEA, § 504 of the Rehabilitation Act, and Title II of the Americans with Disabilities Act.

6. RECOVERY SCHOOL DISTRICT LEGISLATIVELY REQUIRED PLAN 8 (2006), available at <http://www.louisianaschools.net/lde/uploads/8932.doc>.

7. *Id.* at 9.

8. LA. REV. STAT. ANN. § 17:1990 (2011). The Recovery School District is an arm of the state. It is a "special state school district . . . to be administered by the LDE

Louisiana Department of Education to declare an entire district or local educational agency to be “academically in crisis,” assume control over failing schools within the district, and directly control the operations of those schools.⁹ Prior to August 2005, the Louisiana Department of Education used the RSD framework to take over five Orleans Parish schools.¹⁰

In the aftermath of Hurricane Katrina, then-Governor Kathleen Blanco worked with the Louisiana legislature and the Louisiana Department of Education to enact emergency legislation expanding the definition by which schools would become eligible for RSD takeover.¹¹ The state’s goal was to explicitly define the statute’s terms in such a way that would authorize the Louisiana Department of Education to directly assume control of nearly all of New Orleans’ public schools.¹² As a result of this legislation, the state assumed control over 107 schools and transferred those schools to the jurisdiction of the RSD;¹³ only a select few high-performing or selective admission

and subject to the authority of the Louisiana Board of Elementary and Secondary Education (BESE).” RECOVERY SCHOOL DISTRICT LEGISLATIVELY REQUIRED PLAN, *supra* note 6, at 12. The Louisiana Department of Education (LDE) is the agency through which the state administers public education and the functions of the superintendent of education and the Board of Elementary and Secondary Education. LA. REV. STAT. ANN. § 36:642(B) (2012).

9. LA. REV. STAT. ANN. §§ 17:10.5, 17:1990. *See also* LA. REV. STAT. ANN. § 17:10.6 (2011) (defining “academically in crisis”). *See also* Laura Maggi, *Panel backs state takeover of failing schools Orleans’ struggle motivates senators*, TIMES-PICAYUNE, April 10, 2003, available at 2003 WLNR 2050094 (“The plan for [BESE] . . . to assume control of some schools from local school districts . . . [is] fueled in large part by frustration with the struggling Orleans Parish schools.”).

10. COWEN INST. FOR PUB. EDUC. INITIATIVES, RECOVERY SCHOOL DISTRICT OF LOUISIANA 16 (2010), available at <http://www.coweninstitute.com/wp-content/uploads/2010/03/SPELA-RSD.pdf>.

11. 2005 La. Sess. Law Serv. 1st Ex. Sess. Act 35 § 1 (codified at LA. REV. STAT. ANN. § 17:10.7 (2008)).

12. Laura Maggi, *Blanco backs state takeover of N.O. schools: Who would run them is another question*, TIMES-PICAYUNE, Nov. 2, 2005, <http://www.nola.com/katrina/pages/110205/1102A11.pdf> (“I’m determined to seize this opportunity to start anew,’ [Gov.] Blanco said . . . ‘I propose that the state step in and assume responsibility for that city’s failing schools, using, among other things, the charter school model as one of the tools in our recovery efforts.”); *see also* Laura Maggi, *State to run Orleans schools: Local board loses authority over 102*, TIMES-PICAYUNE, Nov. 23, 2005, available at 2005 WLNR 18934995.

13. RECOVERY SCHOOL DISTRICT LEGISLATIVELY REQUIRED PLAN, *supra* note 6, at 12. *See also* Danielle Holley-Walker, *The Accountability Cycle: The Recovery School District Act and New Orleans’ Charter Schools*, 40 CONN. L. REV. 125, 136-37 (2007) (describing the impact of Hurricane Katrina on New Orleans’ public school system); Robert A. Garda, Jr., *The Politics of Education Reform: Lessons from New*

2013] **Students with Disabilities in Post-Katrina** 359

schools remained under the control of the Orleans Parish School Board.¹⁴

Since 2005, the educational landscape of New Orleans has become even more complex. The vast majority of the traditional public schools taken over by the RSD have been converted into Type 5 charter schools.¹⁵ A Type 5 charter school is a charter school that is authorized by the Louisiana Board of Elementary and Secondary Education (BESE) and is subject to the oversight of the RSD.¹⁶ Although the RSD maintains a general monitoring and supervisory function for these schools, each Type 5 charter school operates as its own independent, local educational agency (LEA) or school district under Louisiana law.¹⁷ New Orleans also has Type 2 charter schools. These charter schools are also authorized by BESE, but they are not subject to the oversight of the RSD.¹⁸ Like the Type 5 charter schools, each Type 2 charter school is its own LEA or school district under the law.¹⁹ The result of each Type 2 and Type 5 charter school being defined as its own LEA or school district is that each school is directly accountable to the state and federal government—not to a more localized district body—for carrying out district-level responsibilities, including those related to the provision of special education.²⁰

Thus, the current educational landscape of New Orleans is a

Orleans, 40 J.L. & EDUC. 57, 72 (2011) (describing the political landscape surrounding the re-structuring of the New Orleans education system following Hurricane Katrina).

14. See RECOVERY SCHOOL DISTRICT LEGISLATIVELY REQUIRED PLAN, *supra* note 6, at 12.

15. See COWEN 2012 REPORT, *supra* note 1, at 11-12 (describing and graphically demonstrating the transformation of RSD direct-run schools into charter schools since 2007).

16. See RECOVERY SCHOOL DISTRICT LEGISLATIVELY REQUIRED PLAN, *supra* note 6, at 12. See also LA. REV. STAT. ANN. § 17:3973(2)(b)(v)(aa) (2012).

17. LA. REV. STAT. ANN. § 17:3996(C) (2012).

18. See LA. REV. STAT. ANN. § 17:3973(2)(b)(ii); RECOVERY SCHOOL DISTRICT LEGISLATIVELY REQUIRED PLAN, *supra* note 6, at 13.

19. LA. REV. STAT. ANN. § 17:3996(C).

20. See 34 C.F.R. § 300.33 (2009); see generally Weber, *supra* note 4, at 236-37 (discussing the fact that the IDEA defines “public agency” to include “nonprofit public charter schools that are not otherwise included as LEAs . . .”); Robert A. Garda, Jr., *Culture Clash: Special Education in Charter Schools*, 90 N.C. L. REV. 655, 665 (2012) (explaining that charter schools acting as their own LEA are “treated the same under . . . federal law as school districts that usually contain numerous schools”).

wholly decentralized system whereby no single administrative entity has direct control over all of the public schools operating in New Orleans.²¹ Instead, the New Orleans public school system is a patchwork of various entities consisting of: (1) the Orleans Parish School Board, which serves as the LEA for eighteen schools; (2) the Recovery School District, which serves as the LEA for twelve direct-run schools; (3) fifty-six Type 5 charter schools, each acting as its own LEA; and (4) four Type 2 charter schools, each acting as its own LEA.²² The result is sixty-two distinct LEAs in New Orleans, controlling ninety schools.

III. THE EFFECTS OF NEW ORLEANS' EDUCATIONAL REFORMS ON STUDENTS WITH DISABILITIES

Much of the research and reporting around New Orleans' educational reforms recognized that these laws and policies were enacted without consideration of their effects on students with disabilities.²³ Specifically, the lack of a centralized education authority for the city of New Orleans—as well as the responsibility of each single-school LEA to carry out district-level tasks—has resulted in direct harm to students with disabilities in New Orleans. Sixty small, independent charter schools with limited staff, scarce resources, and little institutional knowledge of federal education law are now each required to provide the full range of substantive and procedural rights afforded to students with disabilities—rights typically provided by a larger school district with better resources.²⁴ Frequently, these independent charter schools are unable to satisfy their responsibilities, and students with disabilities may be denied their substantive and

21. Garda, Jr., *supra* note 13, at 75-76.

22. See COWEN INST. FOR PUB. EDUC. INITIATIVES, GOVERNANCE STRUCTURE: 2012-2013 SCHOOL YEAR (2012), available at <http://www.coweninstitute.com/wp-content/uploads/2012/10/Governance-Chart-2012-13.pdf>.

23. See Weber, *supra* note 4, at 219; Sarah Carr, *Charter Schools Struggle to Meet Special Education Needs*, TIMES-PICAYUNE (Jan. 5, 2008, 9:30 PM), http://www.nola.com/news/index.ssf/2008/01/charter_schools_struggle_to_me.html; O'Neill & Thukral, *supra* note 4, at 342.

24. See Lauren Morando Rhim & Margaret McLaughlin, *Students with Disabilities in Charter Schools: What We Now Know*, 39 FOCUS ON EXCEPTIONAL CHILDREN 1, 6-7 (2007) (discussing how charter schools that operate special education programs as autonomous LEAs often have limited understanding of their responsibilities). See also Julie F. Mead, *Determining Charter Schools' Responsibilities for Children with Disabilities: A Guide Through the Legal Labyrinth*, 11 B.U. PUB. INT. L.J. 167, 180 (2002) ("These independent charter schools have the same obligations . . . as larger school districts that serve as LEAs.").

2013] **Students with Disabilities in Post-Katrina** 361

procedural rights as a result.

The practical realities of the educational reforms in New Orleans are that children with disabilities are often denied access to schools.²⁵ They go unidentified and unevaluated, or if they are identified and evaluated, they may not receive the special education instruction and related services to which they are entitled.²⁶ Most are provided a “one-size-fits-all” education program in the regular education setting, without regard to the unique instructional and behavioral needs of each student.²⁷ And when, as a result of their disabilities, the behavior of these students does not comport with the school’s rigid rules and expectations, the students are suspended or expelled from school without the procedural protections guaranteed by federal law.²⁸

25. See Katy Reckdahl, *Parents, advocates fear that New Orleans charter schools have rejected students with disabilities*, TIMES-PICAYUNE (June 5, 2010, 9:18 PM), http://www.nola.com/education/index.ssf/2010/06/parents_advocates_fear_that_ne.html (reporting that about 100 parents and advocates met with the federal education department’s Office for Civil Rights claiming that New Orleans’ charter schools have rejected students with disabilities); Sarah Carr, *Charter Schools face unique challenges educating children with special needs*, TIMES-PICAYUNE (Apr. 18, 2010, 9:30 AM), http://www.nola.com/education/index.ssf/2010/04/charter_schools_face_unique_ch.html (providing one parent’s complaint that her son with autism was kept at home because the charter and traditional schools had “said they could not take him”); Steve Ritea, *LEFT BEHIND? Some accuse New Orleans’ east bank charter schools of turning away students with special needs*, TIMES-PICAYUNE, Apr. 30, 2007, available at 2007 WLNR 8136414 (explaining one parent’s experience attempting to enroll her son with autism in several of New Orleans’ charter schools when none of the schools were “able to tell her whether they would even offer special education programs”).

26. See Weber, *supra* note 4, at 228-29. See also Carr, *supra* note 4; Carr, *supra* note 25.

27. See Bordelon, *supra* note 4, at 455-56. See generally Garda, Jr., *supra* note 20, at 690 (discussing how “[c]harter schools often adopt a school-wide inclusion policy for special education students—that is not tailored to their unique needs”); Rebekah Gleason, *Charter Schools and Special Education: Part of the Solution or Part of the Problem?*, 9 U. D.C. L. REV. 145, 157 (2007) (explaining “charter schools are required to write an individualized education program (IEP) that addresses the student’s individual needs, instead of an IEP based on what the school can provide”).

28. See Brentin Mock, *The Problem with New Orleans’s Charter Schools*, THE DAILY BEAST (Oct. 6, 2010, 4:00 PM), <http://www.thedailybeast.com/newsweek/2010/10/06/new-orleans-accused-of-failing-disabled-students.html>; S. POVERTY LAW CTR., ACCESS DENIED: NEW ORLEANS STUDENTS AND PARENTS IDENTIFY BARRIERS TO PUBLIC EDUCATION 10-13 (2010) available at http://www.splcenter.org/sites/default/files/downloads/publication/SPLC_report_Access_Denied.pdf [hereinafter ACCESS DENIED]. See generally FAMILIES AND FRIENDS OF LOUISIANA’S INCARCERATED CHILDREN, PUSHED OUT: HARSH DISCIPLINE IN LOUISIANA SCHOOLS DENIES THE RIGHT TO EDUCATION 9-16 (2010), available at <http://dev.fflic.org/wp-content/uploads/>

Section A of this Article describes how the complicated structure affects the ability of parents of children with disabilities to navigate New Orleans' education system in an attempt to find appropriate school placements for their children. Section B explains this structure's impact on the ability of parents to have their children identified and evaluated for special education and related services. Section C discusses the structure in light of the issues parents face in New Orleans when attempting to ensure that their children with disabilities are receiving appropriate related services, specially designed instruction, and placement in the least restrictive environment with supplemental aids and supports. Finally, Section D describes the challenges of this structure for children with disabilities who cannot control their behavior to meet the demands of the rigid disciplinary programs established by schools, especially the lack of statutorily mandated procedural protections.

A. THE EXCLUSION OF CHILDREN WITH DISABILITIES

Federal law explicitly forbids discrimination on the basis of disability. Specifically, § 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act require that each student with a disability be provided access to the same programs and activities available to nondisabled students.²⁹ Further, these federal laws require that each student with a disability be provided reasonable accommodations and modifications designed to provide meaningful access to education, as necessary to avoid discrimination on the basis of disability.³⁰ Therefore, when a charter school provides inadequate services to a student with a disability, or steers children with disabilities away from the school and toward a different charter school or a traditional public school, that charter school is violating the law.³¹ Yet, the structure of the education system in New Orleans and the dearth

2010/06/Pushed_Out_Report.pdf (discussing the astonishing suspension and expulsion rates of New Orleans' schools); COWEN 2012 REPORT, *supra* note 1, at 36 (explaining "without a citywide, coordinated discipline and expulsion policy it is often unclear who is responsible for the education of a child expelled from a school"); Sarah Carr, *RSD is Taking a Stern Look at Discipline Tactic: Each School Decides Suspension Policy*, TIMES-PICAYUNE, May 14, 2012; Sarah Carr, *School officials examine how students get expelled: N.O. campus policies are all over the map*, TIMES-PICAYUNE, Dec. 20, 2008, available at 2008 WLNR 24434283.

29. See 42 U.S.C. § 12132 (1990); 29 U.S.C. § 794 (2002).

30. See 34 C.F.R. § 104.33 (2000); 28 C.F.R. § 35.130(b)(7) (2011).

31. Weber, *supra* note 4, at 234.

2013] **Students with Disabilities in Post-Katrina** 363

of oversight by the Louisiana Department of Education have permitted these types of violations to flourish.

Unlike more traditional districts where students are assigned to schools based on geography, no New Orleans student has a right to attend any particular school. There is currently no centralized authority tasked with ensuring that all New Orleans' students have a seat in a classroom.³² In fact, prior to the 2012–2013 school year, New Orleans' post-Katrina public school system lacked any semblance of a combined, organized enrollment process.³³ The burden was on parents to go door-to-door, submitting applications to multiple schools with the hope that their child would be accepted to one of the schools.³⁴ In addition to the large administrative burden this placed on all parents—many of whom have limited financial and social resources—this process permitted schools to explicitly or implicitly steer children with disabilities away from their doors.³⁵

Take the example of Paul Henry. Paul is a nine-year-old student with multiple disabilities. When his parents moved from Texas to New Orleans in the middle of the 2010–2011 school year, they became overwhelmed with the maze of schools and districts that comprised the New Orleans education system. Intent on finding Paul a seat at a school that could accommodate his

32. See COWEN 2012 REPORT, *supra* note 1, at 23 (“Due to New Orleans’ decentralized governance system, no single entity is responsible for managing the enrollment process, assigning students to schools, overseeing lotteries and waitlists, or providing information to parents.”).

33. See COWEN INST. FOR PUB. EDUC. INITIATIVES, SPOTLIGHT ON CHOICE: PARENT OPINIONS ON SCHOOL SELECTION IN NEW ORLEANS 8 (2013), available at <http://www.coweninstitute.com/wp-content/uploads/2013/01/Choice-Focus-Groups-FINAL-small.pdf> [hereinafter SPOTLIGHT ON CHOICE]; Sarah Carr, *Charter Schools Face Unique Challenges Educating Children with Special Needs*, TIMES-PICAYUNE (Apr. 18, 2010, 9:30 AM), http://www.nola.com/education/index.ssf/2010/04/charter_schools_face_unique_ch.html; Sarah Carr, *RSD Changes Enrollment Step: Go Straight to Schools, N.O. Families Told*, TIMES-PICAYUNE, July 22, 2009, available at 2009 WLNR 13942328.

34. See generally SPOTLIGHT ON CHOICE, *supra* note 33 (explaining the application process and parents’ opinions on this process); Sarah Carr, *The Challenge of Choice: Complicated Admissions Process filled with Frustration*, TIMES-PICAYUNE, Nov. 10, 2009, available at 2009 WLNR 22480575; Sarah Carr, *The Challenge of Choice: Deadlines, job schedule limit opportunities*, TIMES-PICAYUNE, Nov. 11, 2009, available at 2009 WLNR 22645139 (describing a working grandmother’s struggles to enroll her granddaughter in a New Orleans public school).

35. See Sarah Carr, *The Challenge of Choice: Selecting a School Can Be a Real Test for New Orleans Parents*, TIMES-PICAYUNE, Nov. 8, 2009, available at 2009 WLNR 22358421; Reckdahl, *supra* note 25; Ritea, *supra* note 25.

disabilities, Paul's parents visited seven different Type 5 charter schools. Each time they visited a school, they received one of two responses: either the school was full due to its enrollment cap³⁶ or the school was unable to accommodate Paul's multiple disabilities because of limited staffing and expertise. Frustrated by the lack of information and the explicit rejection from multiple charter schools, Paul's parents finally placed Paul in a RSD traditional public school, often referred to by parents as the "schools of last resort" due to their zero-reject mandate.³⁷

Take also the example of Alexa Higgins. Alexa is a seven-year-old gifted student with an orthopedic impairment that requires the use of a wheelchair. When Alexa's parents relocated to New Orleans from a neighboring Louisiana parish during the 2011–2012 school year, they visited multiple schools, attempting to find a school that could accommodate Alexa's disability and could provide her with gifted programming. After visiting several charter schools that were not physically accessible for students with mobility impairments, Alexa's parents were forced to enroll her in a physically accessible, RSD traditional public school that lacked the gifted programming she needed.³⁸

Paul and Alexa's experiences are not uncommon; RSD's enrollment rates of students with disabilities, specifically

36. Louisiana law permits each charter school to cap its enrollment. The charter school may enroll up to 120% of the student population identified in its charter agreement. *See* LA. REV. STAT. ANN. § 17:3991(C)(1)(c)(iv) (2012).

37. While charter schools are permitted to implement enrollment caps, RSD schools are zero-reject schools because they are "required to take all who come—from the new student who moves to the city mid-year to the student expelled from another public school operator." COWEN INST. FOR PUB. EDUC. INITIATIVES, THE STATE OF PUBLIC EDUCATION IN NEW ORLEANS: 2008 REPORT 16 (2008) *available at* <http://www.coweninstitute.com/wp-content/uploads/2010/03/SPENO2008.pdf> [hereinafter COWEN 2008 REPORT].

38. Many of New Orleans' charter schools are inaccessible for students with physical disabilities. *See* NEW ORLEANS PARENT ORGANIZING NETWORK, NEW ORLEANS PARENTS' GUIDE TO PUBLIC SCHOOLS: SPRING 2013 EDITION (2013), *available at* <http://www.neworleansparentsguide.org/files/New%20Orleans%20Parents%20Guide%202013.pdf> (providing indications of which schools are accessible for physical disabilities) [hereinafter NEW ORLEANS PARENTS' GUIDE]. The lack of accessibility excludes those students with ambulatory needs and also possibly eliminates children whose parents are required to use a wheelchair. This fact could implicate violations of § 504 of the Rehabilitation Act and the Americans with Disabilities Act (ADA). *See generally* Jay P. Heubert, *Schools Without Rules? Charter Schools, Federal Disability Law, and the Paradoxes of Deregulation*, 32 HARV. C.R.-C.L. L. REV. 301, 338-39 (1997) (discussing the legal implications of accessing facilities).

2013] **Students with Disabilities in Post-Katrina** 365

students with more severe disabilities, are and have been consistently higher than those of the city's charter schools.³⁹ Yet, as the number of RSD traditional public schools continues to decrease annually—as a result of the RSD schools' conversion to Type 5 charter schools—students with disabilities will have access to fewer schools of last resort.

Recent changes have done little for the plight of students with disabilities, continuing to show the lack of consideration for students with disabilities in current reforms. For the 2012–2013 school year, RSD and Type 5 charter schools began participating in an enrollment process known as the OneApp.⁴⁰ Through the OneApp system, parents can rank their choices of RSD traditional public schools or Type 5 charter schools.⁴¹ Although parents are not guaranteed their preferred school, they have an opportunity to be matched with a school on their list.⁴² While the OneApp system consolidates the application process for students applying to an RSD traditional public school or a Type 5 charter school, the OneApp system excludes the Orleans Parish School Board schools and the Type 2 charter schools.⁴³ The exclusion of

39. Enrollment data released by the Louisiana Department of Education in February 2011 indicates that the RSD traditional schools enrolled 11.8% students with disabilities on average, while the Type 5 charter schools enrolled 9.4% students with disabilities, and the Type 2 charter schools enrolled 4.1% students with disabilities. LOUISIANA DEP'T OF EDUC., FEBRUARY 2011 MFP COUNT BY SCHOOL BY DISABILITY (2011), <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CC8QFjAA&url=http%3A%2F%2Feducatenow.net%2Fwp-content%2Fuploads%2F2011%2F04%2FNO-schools-Students-with-Disabilities-2.1.11-rev.xls&ei=rgD0UejOLYS49gSkoYD4Aw&usg=AFQjCNE0rwabRQ-sPIyyoGLKCEte55wrmQ&sig2=3lCa9WT-nfiTN0gQV8svYQ&bvm=bv.49784469,d.eWU>. When excluding speech-only disabilities, the RSD traditional schools enrolled 9.4% students with disabilities on average, the Type 5 charter schools enrolled 6.7% students with disabilities, and the Type 2 charter schools enrolled 1.9% students with disabilities. *Id.*

40. See Andrew Vanacore, *Recovery School District's New Application is Expected to Make School Search Easier*, TIMES-PICAYUNE (Feb. 6, 2012, 9:30 PM), http://www.nola.com/education/index.ssf/2012/02/recovery_school_districts_unif.html. An overview of the OneApp public school enrollment process is available at <http://enrollnola.org>.

41. SPOTLIGHT ON CHOICE, *supra* note 33, at 8.

42. *Frequently Asked Questions*, ONEAPP, <http://enrollnola.org> (last visited June 29, 2013) (providing an overview of the OneApp public school enrollment process).

43. SPOTLIGHT ON CHOICE, *supra* note 33, at 8. See also Kari Dequine Harden, *Orleans Parish School Board, RSD Launch OneApp Program*, THE ADVOCATE, Jan. 16, 2013, available at 2013 WLNR 1192926 (“While all direct-run OPSB schools are participating for the first time this year, the district's charter schools, and some run directly by the state, have elected not to participate.”).

these schools perpetuates a fragmented system whereby parents will continue to be required to apply through multiple processes to attain enrollment for their child in a New Orleans school.

Further, parents of students with disabilities continue to struggle with a lack of available information about special education services and accommodations at each school. Although they may have an opportunity to participate in the OneApp process for a certain number of schools, they are still forced to go door-to-door to ascertain whether the particular school to which they are seeking admission is able to accommodate their child.⁴⁴ This continues to perpetuate the cycle of discrimination, whereby schools may informally suggest that the child would be better served elsewhere.⁴⁵

For example, Sean King is a student with a moderate mental disability. While working on the OneApp for his son, Sean's father tried to get more information about which schools could best accommodate his son's disability. Thus, he contacted the RSD to determine if they had information about the special education services and service providers at each school. However, the RSD was unable to provide him with any information, and so he then set out to visit several of the schools he was considering for his son. Two of these schools told him that they did not have a teacher certified in providing instruction to children with moderate-to-severe intellectual impairments. Another school informed him that although the school contracted with a local organization for the provision of some related services, the related services on his son's individualized education program (IEP)⁴⁶

44. SPOTLIGHT ON CHOICE, *supra* note 33, at 14 (noting, “[p]arents of students with special education needs . . . said they visited numerous schools prior to the application process to find out if schools could serve their child”).

45. *See id.* at 25, 29.

46. Under the Individuals with Disabilities Education Improvement Act (IDEA), a child has been found eligible to receive special education and related services, the child is provided with an individualized education program (IEP). *See* 20 U.S.C. § 1414(d) (2005). The IEP is a written statement for each child with a disability that contains a statement of the child's present level of academic achievement and functional performance; a statement of measurable annual goals; a description of how the child's goals will be measured; a statement of the special education and related services and supplementary aids and services to be provided to the child; an explanation of the extent to which the child will not participate with nondisabled children in the regular classroom; and a statement of the individual accommodations the child will be provided, among other requirements. *Id.* § 1414(d)(1)(A)(i). *See also* 34 C.F.R. § 300.320(a) (2013).

2013] **Students with Disabilities in Post-Katrina** 367

were not covered under the school's contract with the local organization. Dismayed, Sean's father was left wondering whether his son's educational needs could be met at the schools he visited or whether Sean would be better served elsewhere.

While the vast majority of the schools in New Orleans, including Type 5 charter schools, are open admission schools,⁴⁷ many of these schools struggle to meet the needs of every student with a disability that walks through the door. Yet, federal and state law require Type 5 charter schools to assume the same responsibilities for serving students with disabilities as a larger, more centralized school district.⁴⁸ This means that even in spite of limited staffing, resources, and general knowledge of special education laws, these schools must serve all students with disabilities.

B. THE FAILURE TO IMPLEMENT "CHILD FIND"

Federal law requires that students with disabilities be found, identified, and evaluated to determine their eligibility for special education and related services.⁴⁹ The Individuals with Disabilities Education Improvement Act (IDEA) refers to this location, identification, and evaluation process as "child find."⁵⁰ Under the IDEA, the state educational agency (SEA) has the ultimate responsibility to ensure that each school district or LEA is locating, identifying, and evaluating all children who are suspected of having a disability.⁵¹

The governance structure of the New Orleans public school

47. Louisiana's charter school law requires Type 5 charter schools to be open admission schools without any admission requirements. See LA. REV. STAT. ANN. § 17:3973(2)(b)(v)(aa)-(bb) (2012).

48. Under Louisiana law, each Type 5 charter school is its own local educational agency (LEA) for purposes of special education funding and statutory definitions. LA. REV. STAT. ANN. § 17:3996(C) (2012). As its own LEA, each Type 5 charter school is principally responsible for fulfilling the responsibilities under the IDEA. See 20 U.S.C. § 1413(a)(1). See also Garda, Jr., *supra* note 20, at 670-71 (explaining that independent charter schools that are LEAs have sole responsibility for compliance with the IDEA).

49. 20 U.S.C. § 1412(a)(3)(A) (2005).

50. *Id.* § 1412(a)(3); 34 C.F.R. § 300.111 (2006).

51. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111 (2006). See also Schaffer v. Weast, 546 U.S. 49, 53 (2005) ("State educational authorities must identify and evaluate disabled children . . ."); *St. Tammany Parish Sch. Bd. v. Louisiana*, 142 F.3d 776, 784 (5th Cir. 1998) ("IDEA places primary responsibility on the state educational agency . . .").

system presents inherent challenges in the implementation of the child find mandate of the IDEA. Specifically, Louisiana law requires that “[e]ach LEA shall identify, locate, and evaluate each student suspected of having a disability . . . residing within its jurisdiction.”⁵² For an independent charter school acting as its own LEA, the law defines this jurisdiction as “the boundary of the educational facility,”⁵³ or in other words, the four walls of the school building. In a centralized school district with a handful of charters, and thus only a handful of LEAs, this does not present a problem. But in New Orleans, where there are sixty-two LEAs for one city, successful execution of the child find mandate throughout the city becomes a highly convoluted, if not impossible, process.

New Orleans is the only geographical region in Louisiana where students suspected of having disabilities cannot be found and evaluated until they are actually admitted and enrolled in public schools.⁵⁴ Because there is no centralized entity or authority responsible for child find across the city, children who are homeless, migrant, or simply not enrolled in schools are not being found and evaluated in accordance with federal law.⁵⁵

Take the example of Terrence Samuel. Terrence is a ten-year-old child who has received multiple medical diagnoses indicating that he suffers from a developmental delay and attention deficit hyperactivity disorder. Despite previous indications that Terrence’s diagnosed impairments may be adversely affecting his educational performance, Terrence has never been evaluated for special education services under the IDEA. Terrence and his mother are homeless, and they have moved multiple times over the course of the past two years. Terrence’s mother suffers from medical and mental health issues, and she frequently moves Terrence from school to school and

52. Bulletin 1706, LA. ADMIN. CODE, tit. 28 pt. XLIII, § 230(A) (2013).

53. *Id.* § 230(D)(4).

54. *See id.* § 230(D). New Orleans has sixty-two LEAs, sixty of which are independent LEA charter schools with geographic boundaries consisting only of the school walls. There is no law or policy to indicate which educational entity is responsible for conducting child find in New Orleans for children who are not enrolled in one of the sixty independent LEA charter schools, in an OPSB school, or in an RSD school. *See generally* Complaint-Class Action at 21-22, P.B. v. Pastorek, No. 2:10-cv-04049 (E.D. La. Oct. 26, 2010), *available at* http://www.katrinaresearch.org/projects/Federal_Class_Action_Suit_for_New_Orleans_Special_Education_Students.pdf.

55. *See generally id.*; ACCESS DENIED, *supra* note 28, at 10-13.

2013] **Students with Disabilities in Post-Katrina** 369

sometimes withdraws him from school all together. As a result of the structure of the New Orleans' education system, there is no single local entity that has responsibility for finding and evaluating Terrence. The responsibility passes from school to school as Terrence's enrollment changes, and no single entity has the responsibility for child find when Terrence is not enrolled in school at all.

Further, the governance structure of New Orleans' schools and the enrollment of children in those schools are constantly shifting, which adds an additional barrier to the evaluation requirement of the child find process. Every year, RSD traditional schools are converted to Type 5 charter schools, Type 5 charter schools are passed from one operator to another, and children move from one school to another.⁵⁶ The result of this persistently fluid environment is that children with disabilities may go unevaluated for months if not years.

Take the example of Patrick Wood. Patrick began the 2009–2010 school year at a RSD traditional school, where his mother requested that he be evaluated for special education. She signed a parental consent form for an evaluation midway through the school year, but as the end of the school year approached, she received notice that the school would be closed by the RSD. Patrick began the 2010–2011 school year at a Type 5 charter school. When his mother explained to the school that she had already signed a parental consent form for an evaluation, the school responded that it had not received any records on Patrick from his previous school and that Patrick would have to undergo the pre-referral process again. Before Patrick's mother could sign another parental consent form for an evaluation, Patrick was expelled from the Type 5 charter school and placed at an RSD-run alternative school. Again, Patrick's mother signed a parental consent form for an evaluation, but before the evaluation was completed, Patrick was released from the alternative school and

56. See Sarah Carr, *Change a Constant as RSD Schools Face the Chopping Block: Parents, Students Decry the Instability*, TIMES-PICAYUNE, July 4, 2011, available at 2011 WLNR 13207295; Danielle Dreilinger, *More Charter Schools Coming to New Orleans*, TIMES-PICAYUNE (May 16, 2013, 5:55 PM), http://www.nola.com/education/index.ssf/2013/05/more_charters_coming_to_new_or.html; Sarah Carr, *What Happens When Charter Schools Close?*, TIMES-PICAYUNE (Mar. 24, 2012, 9:57 PM), http://www.nola.com/education/index.ssf/2012/03/what_happens_when_charter_scho.html.

placed at a different Type 5 charter school. At his new Type 5 charter school, Patrick underwent the pre-referral process again, and again his mother signed a parental consent form for an evaluation. Patrick was not evaluated for special education until the conclusion of the 2011–2012 school year—almost three years after his mother first requested an evaluation.

Unfortunately, Patrick and Terrence’s experiences are not unique. Without the adoption of a coordinated and comprehensive approach to child find, and without a way to ensure that the timelines and processes for evaluating a child transcend school closures, takeovers, and frequent transfers of students, many students with disabilities in New Orleans will continue to go unidentified and unevaluated.

C. THE FAILURE TO PROVIDE RELATED SERVICES AND SPECIALLY DESIGNED INSTRUCTION IN THE LEAST RESTRICTIVE ENVIRONMENT

The IDEA requires that students with disabilities be provided a free, appropriate public education, including special education and related services,⁵⁷ detailed in each student’s individualized education program (IEP).⁵⁸ Special education is “specially designed instruction . . . to meet the unique needs of a child with a disability,”⁵⁹ and related services are “transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education.”⁶⁰ Moreover, the IDEA requires that children with disabilities be provided instruction and services in the least restrictive environment, to the maximum extent appropriate.⁶¹

The current framework of the New Orleans education system

57. 20 U.S.C. § 1412(a)(1) (2005); 34 C.F.R. § 300.101 (2006).

58. 20 U.S.C. § 1412(a)(4).

59. 20 U.S.C. § 1401(29) (2010); 34 C.F.R. § 300.39(a)(1) (2006).

60. 20 U.S.C. § 1401(26)(A); 34 C.F.R. § 300.34(a) (2006). Related services include, for example, speech language therapy, interpreting services, psychological services, physical and occupational therapy, social work services, counseling services, orientation and mobility services, and medical services. 20 U.S.C. § 1401(26)(A).

61. 34 C.F.R. § 300.114(a)(1)-(2) (2006). The least restrictive environment (LRE) provisions of the IDEA require that children with disabilities be educated with children who are nondisabled, to the maximum extent appropriate. *Id.* § 300.114(a)(1). Special classes, separate schooling, or other removal should only occur if the nature or severity of the disability is such that education in the regular classroom setting, with supplemental aids and supports, cannot be satisfactorily achieved. *Id.* § 300.114(a)(2).

2013] **Students with Disabilities in Post-Katrina** 371

has produced multiple barriers to children with disabilities receiving: (1) related services; (2) specially designed instruction; and (3) instruction and services in the least restrictive environment.

First, under the current structure, each of the sixty independent charter schools with limited staff and sparse resources must be able to provide related services and specialized instruction for any student with a disability who enrolls on any given day.⁶² A traditional, more centralized district may benefit from economies of scale.⁶³ For example, a larger district may already have four school psychologists, one orientation and mobility specialist, one physical therapist, and ten social workers on staff to serve students with disabilities throughout forty schools. In New Orleans however, as each independent charter school acts as its own district, it must be able to provide this same access to all possible related services without the size and resources of a larger district.⁶⁴ This frequently proves very difficult for most of these schools, and as a result, children with disabilities may either be dissuaded from enrolling or may be enrolled and inadequately served in accordance with their IEP.⁶⁵

David Reed is a six-year-old student with a visual impairment. When David began the 2010–2011 school year at a Type 5 charter school, his mother provided the school with a copy of David’s IEP, which requires that David receive one hour a week of orientation and mobility services to help him learn how to navigate his surroundings and travel safely through his environment. A student with a visual impairment had never attended the school before, and the school did not have staff already trained in providing orientation and mobility services.

62. Weber, *supra* note 4, at 236-37 (describing the responsibility of public charter schools that are their own LEAs to provide services and otherwise serve children with disabilities just as any traditional LEA must do).

63. See Garda, Jr., *supra* note 20, at 695 (stating “independent charter schools cannot benefit from the economies of scale found in large school districts”); Weber, *supra* note 4, at 244 (explaining the problems of charters not being able to capture any economies of scale by sharing a special education teacher or a therapist among several children); Mead, *supra* note 24, at 172 (explaining “a freestanding charter school lacks the economy of scale that provides the necessary impetus and cost savings for establishing programs and hiring staff in anticipation of students”).

64. See generally Garda, Jr., *supra* note 20, at 670 (discussing that the IDEA presumes the existence of a district with sufficient size to capitalize on economies of scale to provide services to students with disabilities).

65. See Bordelon, *supra* note 4, at 460-61.

Thus, the school sought to employ or otherwise contract with a provider who could provide David with these services. The school's modest resources and its inability to locate a service provider resulted in David going almost an entire school year without receiving the services required by his IEP.

While New Orleans has seen the creation of several new companies that offer a range of related services on a contractual basis, these companies do not offer every related service available under the IDEA.⁶⁶ Furthermore, contracts with these companies can be costly for schools that only have one or two students with related service needs.⁶⁷ Similarly, a special education cooperative has been developed in New Orleans, but the cooperative does not directly offer related services.⁶⁸ Instead, it serves as a professional development and technical assistance resource with the goal of building capacity in New Orleans' charter schools.⁶⁹

Second, this lack of flexibility to be able to aid students with disabilities in many of New Orleans' independent charter schools extends to specially designed instruction as well. Specially designed instruction means adapting the content, methodology, or

66. See Sarah Carr, *Schools Relying More on Private Groups: Fractured Services Shift Traditional Roles*, TIMES-PICAYUNE, Nov. 29, 2007, available at 2007 WLNR 23549900; Sarah Carr, *Special Ed Services Offered to Schools: Nonprofit Center Targets Unmet Needs*, TIMES-PICAYUNE, Feb. 28, 2008, available at 2008 WLNR 3877556.

67. See Weber, *supra* note 4, at 244; Bordelon, *supra* note 4, at 460-61.

68. The Louisiana Special Education Cooperative is a membership-based organization, who "recruits and brokers" with potential related service providers on behalf of its members, but does not itself directly provide related services. See *Our Work*, LA. SPECIAL EDUC. COOP., <http://www.la-cooperative.org/ourwork.php> (last visited July 27, 2013).

69. See LOUISIANA SPECIAL EDUCATION COOPERATIVE, <http://www.la-cooperative.org/index.php> (last visited July 27, 2013). The basic purpose of a special education cooperative is to pool resources to better leverage and coordinate services. ALLISON GANDHI ET AL., CHARTER SCHOOL SPECIAL EDUCATION COOPERATIVES 4-5 (2011), available at http://www.charterschoolcenter.org/sites/default/files/AIR%20Special_Education_Charter_Cooperatives_FINAL%202-2011_0.pdf. In practice, a cooperative allows schools to join together to purchase services or equipment to help students with similar needs across several school sites, creating economies of scale. *Id.* at 5. Often times, cooperatives have in-house staff who are capable of providing physical therapy, occupational therapy, speech and language therapy, and nursing services directly to students in the member schools. *Id.* at 19. While the Louisiana Special Education Cooperative may provide valuable professional development and technical assistance, it does not employ staff to provide direct services to its member schools. See *id.* at 14; see *Clinical Support*, LA. SPECIAL EDUC. COOP., <http://www.la-cooperative.org/clinicalsupport.php> (last visited July 27, 2013).

2013] **Students with Disabilities in Post-Katrina** 373

delivery of instruction to address a child's unique disability-related needs.⁷⁰ Many of New Orleans' charter schools struggle with this requirement, likely as a result of the predetermined educational missions and instructional programs offered by the charter schools.⁷¹ For example, the vast majority of Type 5 charter schools are college preparatory programs with curriculum and instruction geared toward students interested in pursuing a college education.⁷² But for students with severe cognitive disabilities who need instruction centered on functional skills or independent living skills, a one-size-fits-all college preparatory curriculum may be inappropriate.

Third, New Orleans' charter schools face similar challenges in terms of providing students with disabilities with instruction and services in the least restrictive environment. While the least restrictive environment provisions of the IDEA are designed to ensure that children with disabilities are not unnecessarily removed from the regular classroom or isolated from their nondisabled peers,⁷³ the IDEA also requires that placement decisions for a child with a disability be made by the child's IEP team in an individualized determination.⁷⁴ Placement decisions should take into account the child's unique learning needs and the setting most likely to help the child achieve personal goals.⁷⁵ While there is a very strong preference for placement in the regular educational setting with supplemental aids and supports, the IDEA specifically requires that the LEA provide a full continuum of alternative placements including separate classes, small group instruction, separate school placements, homebound

70. 34 C.F.R. § 300.39(b)(3) (2006).

71. Type 2 charter schools are permitted to have admission requirements "consistent with the school's role, scope and mission." LA. REV. STAT. ANN. § 17:3991(B)(3) (2012). Louisiana law does not permit Type 5 charter schools to have admission requirements, *Id.* § 3991(B)(1)(d), but many Type 5 charters implement college preparatory programs. O'Neill & Thukral, *supra* note 4, at 329; *See generally* Mead, *supra* note 24, at 172 (stating "since charter schools have considerable autonomy in designing programs, care must be taken in the development of programming such that students are not excluded either by design or by default").

72. O'Neill & Thukral, *supra* note 4, at 329.

73. 20 U.S.C. § 1412(a)(5)(A) (2005) ("To the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and . . . removal of children with disabilities from the regular education environment occurs only when . . . education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.").

74. *See id.* § 1414(d)(1)(A)(i)(IV)(cc)-(V).

75. *See* 34 C.F.R. § 300.116 (2006).

instruction, or hospital-based instruction as needed.⁷⁶

This continuum of alternative placements may be easy for a larger, well-resourced school district to provide, but this offering proves difficult when required of each independent charter school LEA in New Orleans.⁷⁷ Just as with the challenge of providing related services, single-school LEAs in New Orleans frequently find it too costly—or are otherwise unable to provide a continuum of alternative placements—and so they simply place every child in the regular educational setting without regard to the child’s unique educational needs.⁷⁸ While the vast majority of these schools admirably market themselves as using an “inclusion model,”⁷⁹ in actuality the school is making a one-size-fits-all placement decision for each child without considering the child’s individualized needs. Without access to the staff and resources necessary to provide supplemental aids and services in the regular education setting, this approach is not an “inclusion model” but rather a model of dumping students in the regular classroom and hoping that they are able to fend for themselves.⁸⁰

Darren Smith is a child with autism who was attending a Type 5 charter school in New Orleans. Darren gets extremely agitated and frightened by loud noises and other distracting auditory and visual stimuli, and reacts with behavioral outbursts. In an effort to reduce the frequency of Darren’s behavioral outbursts and to increase his ability to make academic progress, Darren’s mother requested that his IEP team consider providing Darren with some instructional time in a smaller, more intimate classroom setting with fewer students, more teacher support, and fewer auditory distractions. When she raised this issue at the IEP meeting, school personnel on the IEP team acknowledged

76. See 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.115 (2006).

77. See Garda, Jr., *supra* note 20, at 690 (discussing that charter schools struggle to fulfill the “continuum of services” obligation and frequently use a full inclusion method of placement, incorrectly believing that this fulfills their LRE duties).

78. See ACCESS DENIED, *supra* note 28, at 12-13 (recounting the story of a child who was placed in a regular classroom and left to fend for himself without the aids and supports to accommodate his individual needs).

79. See NEW ORLEANS PARENTS’ GUIDE, *supra* note 38. When asked to describe their special education model, the vast majority of the schools in the guide listed their model as “inclusion.” See *id.* Only a handful of schools describe their model as “services provided according to IEP.” See generally Gleason, *supra* note 27, at 163 (discussing how most schools describe their method of providing special education as “inclusion” while “few, if any, utilize a true inclusion model”).

80. See Weber, *supra* note 4, at 228-29.

2013] **Students with Disabilities in Post-Katrina** 375

that a smaller setting would be more beneficial for Darren, but they told her that the school was an “inclusion-only” model, and as such, they could not provide a smaller setting for Darren. Frustrated by the school’s inability to provide for Darren’s unique needs, his mother began searching for another school.

Similarly, Marcus Lawson was a fourteen-year-old student with emotional disturbance attending a Type 5 charter school in New Orleans. Marcus exhibits frequent emotional and behavioral meltdowns, sometimes leading to self-injurious behavior. During the 2011–2012 school year, Marcus’ behavior began to escalate, such that he presented a danger to himself and others. Marcus’s IEP team convened an emergency meeting to discuss his placement. The team agreed that Marcus was in need of a more restrictive setting and recommended that Marcus be placed in a therapeutic educational setting where he could receive mental health support and educational instruction. However, the Type 5 charter school did not have access to such an alternative placement. As a result, Marcus was simply told to stay at home and was provided some community-based activities, such as volunteering to rebuild homes.

The practical realities of New Orleans’ current educational structure are that many independent charter schools struggle to provide appropriate related services and individualized instruction for students with disabilities. Further, the one-size-fits-all placement decisions and the lack of access to a continuum of alternative placements are irreconcilable with the requirements of the IDEA that each child’s educational program and placement decision be individualized. Without rectifying these problems, children with disabilities in New Orleans will continue to be denied a free, appropriate public education.

D. FAILURE TO ABIDE BY THE DISCIPLINARY PROTECTIONS OF THE IDEA

Perhaps one of the most disturbing trends to emerge in the post-Katrina education system is the over-reliance on punitive disciplinary practices for students with disabilities, without the procedural safeguards mandated by the IDEA. In order to ensure that each child with a disability is provided a free, appropriate public education, the IDEA establishes a number of procedural protections that must be provided to a student with a disability

who is subject to disciplinary removals.⁸¹ After a child with a disability is removed from educational placement for more than ten cumulative school days in a school year, procedural protections and services must be provided to the student.⁸² For example, a school cannot impose a long-term suspension or expel a child if the behavior for which the child is being disciplined is a “manifestation” of the child’s disability, as determined by the LEA, the parent, and certain members of the IEP team.⁸³ If the child’s behavior is determined to be a manifestation, the child must be permitted to return or remain at the current school placement and be provided with behavioral supports, including a functional behavior assessment (FBA) to determine the function or cause of the child’s behavior and a behavior intervention plan (BIP) to support and reinforce the child’s positive behavior.⁸⁴

In the New Orleans schools, children with disabilities are punished and excluded from the classroom at rates that are among the highest in the state. The most recent public data available from the Louisiana Department of Education is for the 2010–2011 school year, during which the statewide average percentage of students with disabilities subjected to out-of-school suspension was 14.2%.⁸⁵ During that school year, a large number of Type 5 charter schools in New Orleans dramatically exceeded the already high statewide average, some with rates that are double or even triple the statewide average. For example, New Orleans College Preparatory Charter School had an out-of-school suspension rate for children with disabilities of 48.1%.⁸⁶ Langston Hughes Academy had an out-of-school suspension rate for children with disabilities of 39.6%.⁸⁷ Benjamin E. Mays Charter School had an out-of-school suspension rate for children with disabilities of 37.5%.⁸⁸ And Sci Academy Charter School had an out-of-school suspension rate for children with disabilities of

81. 20 U.S.C. § 1415(a) (2005).

82. *Id.* § 1415(k)(1)(B)-(C).

83. *Id.* § 1415(k)(1)(C),(E).

84. *Id.* § 1415(k)(1)(F).

85. LA. DEP’T OF EDUC., SPECIAL EDUCATION PERFORMANCE PROFILES 2010-2011, available at <http://www.louisianabelieves.com/docs/academics/2010-11-performance-profile-with-state-performance-plan-indicators.pdf?sfvrsn=2> [hereinafter SPECIAL EDUCATION PERFORMANCE PROFILES].

86. *Id.*

87. *Id.*

88. *Id.*

2013] **Students with Disabilities in Post-Katrina** 377

37.2%.⁸⁹ The chart below includes a sampling of Type 5 charter schools that suspend students with disabilities at double or triple the statewide average:⁹⁰

School	% Students with Disabilities Suspended Out-of-School
New Orleans College Prep Charter	48.1%
Langston Hughes Academy	39.6%
Benjamin E. Mays Charter School	37.5%
Sci Academy Charter School	37.2%
FirstLine Charter Schools	34.5%
McDonogh 42 Charter School	34.4%
James M. Singleton Charter School	33.8%
ReNew Charter Schools	32.0%
Pride College Prep Charter School	31.8%
Success Prep Charter School	30.3%

There are several factors that likely contribute to these soaring averages. First, many Type 5 charter schools in New Orleans have rigid codes of conduct and behavior management models, including requirements that students sit silently at lunch, walk silently on taped lines in the hallway, and recite an oath or greeting every morning to administrators as they walk in the door.⁹¹ For children with disabilities who struggle with

89. SPECIAL EDUCATION PERFORMANCE PROFILES, *supra* note 85.

90. *Id.*

91. *See, e.g., Sci Academy Family Handbook 2012-2013*, COLLEGIATE ACADEMIES 16-17 (2012), *available at* [\[redacted\]](#)

behavioral challenges, these stringent requirements prove very difficult. When children with disabilities cannot conform their behavior to the school's requirements, they may be suspended or otherwise removed from school. Second, compounding the problem, charter schools are free from many of the existing state laws and regulations regarding discipline, and they operate with very little state oversight of their systems.⁹² Yet, these schools are still expected to comply with the federal laws regarding the discipline of students with disabilities.⁹³ Finally, school officials and administrators at some schools—faced with a host of other concerns—may lack knowledge of the technical requirements of the IDEA in terms of the provisions on disciplinary safeguards for students with disabilities.⁹⁴ All of this results in a disciplinary system that does too little to take into account the needs of students with disabilities.

Take the example of Marcus Lawson, previously discussed above. Despite the school's knowledge of Marcus' emotional and behavioral disabilities, during the 2008–2009 school year, Marcus received over forty days of out-of-school suspension for behaviors that were a manifestation of his disability, such as using profanity and disturbing the classroom environment. Yet, Marcus never received a manifestation determination review and was never provided continued educational services past the tenth

<http://rdschoolperformance.files.wordpress.com/2012/09/2012-09-19-sci-family-handbook-discipline-policies-2012-13.pdf>; *Cohen College Prep Middle School Family Handbook 2012-2013*, COHEN COLL. PREP MIDDLE SCH. 20, 23 (2012), available at <http://cohenms.nolacollegeprep.org/ourpages/auto/2012/4/24/45580287/Cohen%20College%20Prep%20Middle%20School%20Family%20Handbook%202012%20-%202013.pdf>.

92. See LA. REV. STAT. ANN. § 17:3996(B) (2012). Although charter schools are required to follow La. Rev. Stat. §§ 17:223-224 which simply permit the suspension and expulsion of students, charters are exempt from La. Rev. Stat. § 17:416 which describes the grounds for suspensions and expulsions of students and the procedural due process protections provided to students. See Bordelon, *supra* note 4, at 464 (discussing the lack of oversight in Louisiana to ensure charter schools are in compliance with federal disability laws).

93. See 34 C.F.R. § 300.209 (2013) (“Children with disabilities who attend public charter schools and their parents retain all rights under this part.”); See also Gleason, *supra* note 27, at 157-58 (describing how the discipline requirements of the IDEA apply to charter schools).

94. See Garda, Jr., *supra* note 20, at 696 (“Charter school personnel are often ignorant of their obligations to disabled students under complex federal laws and are unfamiliar with special education services in general.”); Bordelon, *supra* note 4, at 454-56 (explaining how “lack of knowledge or understanding of laws” is one of the reasons that charter schools violate federal disability laws).

2013] **Students with Disabilities in Post-Katrina** 379

day of removal. During the 2009–2010 school year, Marcus received thirty days of out-of-school suspension without a manifestation determination review or continued educational services past the tenth day of removal.

Kelly Roberts, a thirteen-year-old student with emotional disturbance attending a Type 5 charter school, received almost twenty days of out-of-school suspension during the 2011–2012 school year. Her school convened a manifestation determination review and determined that her behavior was related to her disability. Nevertheless, instead of returning Kelly to her current educational placement as required by the IDEA, the school assigned Kelly to receive educational instruction three hours per week in a public library.

Samantha Beach is a twelve-year-old student with emotional disturbance. During the 2010–2011 school year, Samantha began exhibiting self-injurious behavior as a result of her emotional disability and untreated mental health needs. Instead of increasing her supports and services, Samantha's school recommended that she be expelled from school. Threatening her parents with an expulsion that would be on her permanent record, the school coerced her parents to sign a withdrawal form that removed Samantha from the school.

For every school year from 2009–2010 through the present 2012–2013 school year, both RSD traditional schools and Type 5 charter schools in New Orleans have been cited for noncompliance with the IDEA's discipline requirements.⁹⁵ The Louisiana Department of Education has found various violations, including failure to provide educational services after ten days of suspension, failure to perform manifestation determination reviews, and failure to write appropriate FBAs.⁹⁶ Yet, these findings of noncompliance remain uncorrected and students with disabilities continue to be denied their rights as a result.

95. LA. DEP'T OF EDUC., COMPLIANCE MONITORING: SUMMARY OF FINDINGS (March 2010) (on file with author); LA. DEP'T OF EDUC., COMPLIANCE MONITORING: SUMMARY OF FINDINGS (April 2011) (on file with author); LOUISIANA DEPARTMENT OF EDUCATION, COMPLIANCE MONITORING: SUMMARY OF FINDINGS (March 2012) (on file with author).

96. LA. DEP'T OF EDUC., COMPLIANCE MONITORING: SUMMARY OF FINDINGS (March 2010) (on file with author); LA. DEP'T OF EDUC., COMPLIANCE MONITORING: SUMMARY OF FINDINGS (April 2011) (on file with author); LOUISIANA DEPARTMENT OF EDUCATION, COMPLIANCE MONITORING: SUMMARY OF FINDINGS (March 2012) (on file with author).

IV. CONCLUSION

For families of children with disabilities, the maze of schools and districts in New Orleans presents myriad challenges. First, navigating the complicated web of schools to find an appropriate placement for a child with a disability places an incredible burden on parents and families, many of which have limited resources. Often, when parents visit schools, they learn that the schools are ill equipped to serve their children, leaving some parents with restricted options in a choice-based system. Second, students suspected of having disabilities often wait months or years beyond the timeframe established by federal law to receive evaluations for special education services. And if a child is homeless, migrant, or simply not enrolled in a school, the child may not be identified or evaluated at all. Third, children with disabilities may wait months to receive related services on their IEPs or they may never receive them at all. Children may not receive specially designed instruction; instead, they may only be given the standard curriculum offered as a result of the school's targeted mission, or they may be placed in a regular classroom without supplemental supports and services and left to fend for themselves. Finally, children with disabilities are frequently punished when they are unable to fit their behavior into the rigid model established by the school. And when schools suspend or expel students with disabilities, they often do so without offering the procedural protections afforded by federal law.

While the educational reforms in New Orleans have brought about success for many students, they have also left some students behind—specifically, students with disabilities.

The stringent requirements of federal disability law frequently prove daunting in an educational structure as convoluted as the one that exists in New Orleans. And if lawmakers and policy makers continue to view children with disabilities as an afterthought in these ongoing reforms, children with disabilities will continue to struggle in violation of federal law. A true system of choice cannot be successful unless it includes and serves all students, including students with disabilities.