ORAL ARGUMENT SCHEDULED JANUARY 10, 2013

Nos. 11-7153 and 12-7042

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

D.L., et al.,
Plaintiffs-Appellees,

v.

DISTRICT OF COLUMBIA, et al.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR AMICI CURIAE AARP, THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW, THE COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE NATIONAL DISABILITY RIGHTS NETWORK, THE NATIONAL HEALTH LAW PROGRAM, THE NATIONAL FEDERATION OF THE BLIND, AND UNIVERSITY LEGAL SERVICES PROTECTION & ADVOCACY PROGRAM IN SUPPORT OF PLAINTIFFS-APPELLEES

IRA A. BURNIM
JUDGE BAZELON CENTER FOR MENTAL HEALTH LAW
1101 15th Street, NW, Suite 1212
Washington, DC 20005
(202) 467-5730

JOSEPH B. ESPO
SHARON KREVOR-WEISBAUM
(admission pending)
BROWN, GOLDSTEIN & LEVY, LLP
120 E. Baltimore St., Suite 1700
Baltimore, MD 21202
(410) 962-1030

KELLY BAGBY
Counsel of Record
DANIEL KOHRMAN
AARP FOUNDATION LITIGATION

MICHAEL SCHUSTER
AARP

601 E Street, NW
Washington, DC 20049
(202) 434-2060

Counsel for Amici

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), undersigned counsel certifies that:

(A) Parties and Amici: Except for the following, all parties and amici appearing before the district court and those that have filed an appearance or notice in this court are listed in the Brief for Plaintiffs-Appellees and Defendants-Appellants: AARP, The Judge David L. Bazelon Center For Mental Health Law, The Council Of Parent Attorneys And Advocates, The Lawyers' Committee For Civil Rights Under Law, The National Disability Rights Network, The National Health Law Program, The National Federation Of The Blind, And University Legal Services Protection & Advocacy Program.

(B) Rulings Under Review: References to the rulings at issue appear in the Brief for Defendants-Appellees.

(C) Related Cases: This case was never previously before this Court, or any other court, other than the District Court from which this case has been appealed.

Dated: November 9, 2012

/s/ Kelly Bagby
Kelly Bagby
Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Rules of the Court of Appeals for the District of Columbia Circuit, Amicus Curiae AARP hereby certifies that:

(1) AARP does not have a parent corporation, and

(2) AARP does not issue stock.

Dated: November 9, 2012

/s/ Kelly Bagby
Kelly Bagby
Counsel for Amicus Curiae AARP

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Dated: November 9, 2012

/s/ Kelly Bagby
Kelly Bagby
Counsel for *Amicus Curiae*
The Judge David L. Bazelon Center
for Mental Health Law

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Dated: November 9, 2012

/s/ Kelly Bagby
Kelly Bagby
Counsel for Amicus Curiae
The Council of Parent Attorneys and Advocates

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Dated: November 9, 2012

/s/ Kelly Bagby
Kelly Bagby
Counsel for Amicus Curiae
The Lawyers' Committee for Civil Rights Under Law

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Dated: November 9, 2012

/s/ Kelly Bagby
Kelly Bagby
Counsel for Amicus Curiae
The National Disability Rights Network

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Dated: November 9, 2012

/s/ Kelly Bagby
Kelly Bagby
Counsel for Amicus Curiae
The National Health Law Program

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Rules of the Court of Appeals for the District of Columbia Circuit, Amicus Curiae The National Federation of the Blind hereby certifies that:

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Dated: November 9, 2012

/s/ Kelly Bagby
Kelly Bagby
Counsel for Amicus Curiae
The National Federation of the Blind

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Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Rules of the Court of Appeals for the District of Columbia Circuit, Amicus Curiae University Legal Services Protection and Advocacy Program hereby certifies that:

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Dated: November 9, 2012

/s/ Kelly Bagby
Kelly Bagby
Counsel for Amicus Curiae
University Legal Services Protection
& Advocacy Program

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GLOSSARY

ADA	American with Disabilities Act
DCPS	District of Columbia Public Schools
DOJ	United States Department of Justice
EHA	Education for All Handicapped Children Act
FAPE	Free Appropriate Public Education
IDEA	Individuals with Disabilities Education Act
OSEP	Office of Special Education Programs
OSSE	District of Columbia Office of the State Superintendent of Education

INTEREST OF AMICI CURIAE[1]

AARP, the National Federation of the Blind ("NFB"), the National Disability Rights Network ("NDRN"), the Council of Parent Attorneys and Advocates ("COPAA"), The Judge David L. Bazelon Center for Mental Health Law ("Bazelon Center"), The National Health Law Program ("NHeLP"), University Legal Services Protection and Advocacy Program ("ULS-P&A"), and the Lawyers' Committee for Civil Rights Under Law ("LCCR") respectfully submit this brief as amici curiae in support of plaintiffs-appellees. This case is of particular interest to amici because each organization advocates on behalf of individuals with disabilities to enforce their rights under federal anti-discrimination statutes. In *D.L.*, amici support children seeking to ensure they receive the free appropriate public education ("FAPE") that they are guaranteed under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* (2006). A statement of interest for each of the amici organizations is included in the appendix to this brief.

[1] Pursuant to Fed. R. App. P. 29, amici certify that all parties have consented to the filing of this brief and that the Court granted amici leave to file a brief in its October 5, 2012 order. Amici further certify that all parties have consented to the filing of this brief; no party or party's counsel authored this brief in whole or in part; and no person other than amici contributed money intended to fund the brief's preparation or submission.

Amici urge the court to affirm the decisions of the District Court and reject attempts to erode enforcement of federal statutes through the mechanism of class litigation.

For these reasons, amici curiae respectfully submit this brief in support of plaintiffs-appellees.

SUMMARY OF ARGUMENT

At the heart of this litigation are systemic failures in the District's Child Find system and the impact that these failures have on children with developmental delays or disabilities in the District of Columbia. As the district court noted, an effective Child Find system is essential to the functioning of the District's early intervention and special education systems. The district court identified specific deficiencies in the District's Child Find system and crafted injunctive relief tailored to remedying these deficiencies.

Neither the Individuals with Disabilities Act (IDEA) nor the decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557-58 (2011), stands at odds with the district court's decision to allow this case to proceed as a class action. Indeed, this case demonstrates that class action litigation under IDEA can be an efficient tool for remedying systemic deficiencies affecting large numbers of children with disabilities.

ARGUMENT

I. THE DISTRICT'S CHILD FIND POLICIES AND PROCEDURES SUFFER FROM SYSTEMIC DEFICIENCIES

A. The IDEA and the Child Find Mandate

This case concerns the District of Columbia's obligations to provide services to children between ages three and five who have developmental delays or disabilities, "some of our most vulnerable citizens." Doc297,p1. IDEA requires the District to provide these children "early intervention" services, 20 U.S.C. § 1419(f)(5) (2006), and to have policies and procedures to ensure that such children are "identified, located, and evaluated." 34 C.F.R. 300.111(a)(1) (2012); 20 U.S.C. 1412(a)(3)(A) (2006). Collectively, these policies and procedures make up the District's "Child Find" system for children between the ages of three and five. As explained by Dr. Carl J. Dunst, an expert in the field, "[C]hild Find is essential and important because it ensures that *all eligible children* who need early intervention . . . are identified and served in a timely manner and that no children are missed and no children go without needed services." (Carl Test. [209-1] 7, Mar. 16, 2011) (emphasis added).[2]

[2] Early intervention services are highly effective. "Somewhere in the neighborhood of 75 to 80 percent of the disabled children who are found in the community and served by quality early intervention programs will go on to kindergarten alongside every other ordinary five-year-old—without needing further supplemental special education." (Carl Test. [209-1] 7, Mar. 16, 2011).

While the IDEA does not mandate specific policies to implement Child Find, a functioning Child Find system must include:

> (1) clear definitions of the children that are eligible for special education;
>
> (2) public awareness activities to inform parents, professionals (*e.g.*, physicians), and programs and organizations (hospitals, child care programs, rehabilitation programs, etc.) that serve special needs young children about available services and who is eligible for those services;
>
> (3) referral and intake procedures that facilitate timely identification and referral of eligible children;
>
> (4) screening and evaluation practices to determine children who might be eligible for preschool special education;
>
> (5) a clearly articulated eligibility determination process;
>
> (6) a tracking system to ensure children who are referred are screened, evaluated, and served and to determine which children are receiving what services; and
>
> (7) interagency collaboration to ensure that referral mechanisms are maintained and that services are provided to children that need them in a timely manner.

Id. at 4.

The district court found that the District's Child Find system lacked these essential elements. Doc294,pp 13-14 (¶¶ 46-49). That system did not clearly define the children who are eligible for services, have adequate informational programs, including a reliable processes for referral, intake, and eligibility determination, or contain adequate tracking mechanisms. *Id.* The district court

found that a core reason for these systemic failures was "a general lack of consistent oversight, training and monitoring," manifested in "an entrenched level of . . . misunderstanding of the District's Child Find-related obligations *among all levels of the staff and leadership*." *Id.* at 19 (¶ 67) (emphasis added).

B. The District Court Identified Systemic Deficiencies in the District's Child Find Policies and Practices

Relying on extensive evidence presented at trial, the district court found that the District's Child Find system was "inadequately designed, supported, and implemented," *id.* at 13 (¶ 46), resulting in gross failures in identifying, evaluating, and serving eligible preschool children. The District has not, in its appeal, contested these factual findings.

i. The District Lags Far Behind the Rest of the Nation in its Identification and Provision of FAPE to Preschool Children.

The district court found that the District "lags behind most other states in identifying and providing a FAPE to preschool-age children." *Id.* at 9 (¶ 28), 10 (¶ 31). In 2008, for example, the District identified and provided services to a mere 2.72% of children ages three through five, "which was the lowest rate in the country" and in stark contrast to the approximately 5.68% of children ages three to five nationwide receiving services. *Id.* at 8 (¶¶ 25-25). Moreover, the district court found, it was likely that 8.5% of preschool-age children in the District were eligible for services. *Id.* at 10 (¶ 31). Relying on these findings, the district court

enjoined the District to increase the number of preschool children receiving special education services to bring the this number more in line with projected need. *Id.* at 37 (¶ 147).

ii. The District Failed to Implement Effective Practices to Provide Preschool Age Children with Timely Evaluations, Eligibility Determinations, and Transitions.

The district court found the District's procedures for identifying potentially eligible children "unreliable, informal, unstructured" and lacking "the conditions necessary to identify . . . preschool-age children for . . . services." *Id.* at 14 (¶ 49). The district court found that the District's "ineffective . . . practices" prevented timely initial evaluations, timely eligibility determinations, and timely transitions to regular school programs. *Id.* at 14 (¶47).

In 2008, for example, the District failed to conduct timely eligibility determinations for 58.56% of preschool-age children. *Id.* at 11-12 (¶ 38). In 2010, the percentage was 44.77%. *Id.* In 2007, 43% of children exiting early intervention services were not timely transitioned and in 2010, the percentage was 59.75%. *Id.* at 12-13 (¶ 42).

To remedy these deficiencies, the district court enjoined the District to ensure that a targeted number of preschool children receive timely evaluations and eligibility determinations and smooth transitions when they entered school. *Id.* at 37-39 (¶¶ 148-50).

iii. The District Failed to Implement Effective Public Awareness and Outreach Efforts and to Provide Professional Development Training.

The district court found the District's public awareness and outreach efforts and its professional development and training severely lacking, and that the District sent "mixed messages" to potential referral sources, which likely accounted for the low rate of identification of eligible three to five year olds. *Id.* at 14 (¶ 48). To remedy the systemic failings related to public awareness and outreach efforts, the district court required the District to keep in contact with and develop printed materials for referral sources and parents, as well as assign case managers to families. *Id.* at 39-40 (¶¶ 151-56).

II. SYSTEMIC, CLASS-WIDE INJUNCTIVE RELIEF IS AUTHORIZED BY THE IDEA

The Individuals with Disabilities Education Act ("IDEA") guarantees children with disabilities a free appropriate public education. 20 U.S.C. § 1400, *et seq.* (2006). To ensure that children with disabilities get appropriate services, parents by law may participate in their child's educational planning and may pursue administrative remedies if they believe the local education agency ("LEA") is failing to provide needed services and supports. 20 U.S.C. § 1415 (2006). In most instances, the administrative process results in a resolution of the dispute. If it does not, the parents may seek judicial relief and as expressly authorized by Congress, a court may grant "such relief as [it] determines is appropriate,"

including class-wide and systemic litigation. 20 U.S.C. § 1415(i)(2)(c)(iii)(2006); *see also Burlington Sch. Comm. v. Dep't. of Educ.*, 471 U.S. 359, 369 (1985). Courts enforcing the IDEA have clearly and repeatedly found that class-wide and systemic injunctive relief is appropriate under this civil rights statute. *Id.*

The district court efficiently and judiciously remedied systemic deficiencies in the District of Columbia's Child Find system through the class action mechanism. To permit such deficiencies and the resulting deprivation of services to go unaddressed could not have been what Congress contemplated under the broad authority established by 20 U.S.C. §1415(i)(3)(c)(iii).

A. The IDEA Itself, Supreme Court Precedent, and Legislative History Confirm the Availability of Systemic Relief for Systemic IDEA Violations

Appellants state – without citing any authority – that "Congress did not contemplate class-based relief" under the IDEA (Appellants' Br. at 48). This assertion is belied by the language of the IDEA itself, well-established judicial precedent, and the Act's legislative history.

That Congress did not explicitly provide for class-based relief under the IDEA is of no consequence. An express provision was not needed because "like the rest of the Federal Rules of Civil Procedure, Rule 23 *automatically* applies 'in all civil actions and proceedings in the United States district courts.'" *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1438 (2010)

(citing Fed. R. Civ. P. 1 and *Califano v. Yamasaki*, 442 U.S. 682, 699-700, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979)); *id.* at 1442 ("Rule 23 unambiguously authorizes *any* plaintiff, in *any* federal civil proceeding, to maintain a class action if the Rule's prerequisites are met."); *id.* at 1438 ("Congress . . . has ultimate authority over the Federal Rules of Civil Procedure; it can create exceptions to an individual rule as it sees fit—either by directly amending the rule or by enacting a separate statute overriding it in certain instances.").

Where Congress intends to create an exception to Rule 23, it has done so explicitly. *See, e.g.*, 8 U.S.C. § 1252(e) (provision of the Immigration and Nationality Act under which "*no court may [] certify a class under Rule 23*… in any action for which judicial review is authorized under a subsequent paragraph of this subsection") (emphasis added). No such exception exists in the IDEA, allowing plaintiffs to maintain a class action under the IDEA provided they meet the requirements of Rule 23.

Moreover, Congress has repeatedly reauthorized the IDEA knowing that courts have long recognized the availability of class-wide and systemic injunctive relief under the Act, as well as the right of plaintiffs to challenge systemic violations of IDEA through class actions.[3] Indeed, this Court has heard IDEA

[3] *See, e.g.*, the following cases in which courts have certified class actions under the IDEA: *J.G. ex rel F.B. v. Mills*, 2010 WL 5621274, *1, 5 (E.D.N.Y. Dec. 28, 2010), report and recommendation adopted, 2011 WL 239821 (E.D.N.Y. Jan.

class actions and never suggested that class relief was unavailable under the IDEA. *See e.g.*, *Petties v. D.C.*, 662 F.3d 564 (D.C. Cir. 2011) (injunction issued in class action remanded for further inquiry).

With full knowledge of the long tradition of courts issuing systemic relief in class actions brought under the IDEA, Congress has reauthorized the statute numerous times, including with significant amendments.[4] Although it could have done so, Congress did not amend the IDEA to prohibit courts from entertaining

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24, 2011); *L.M.P. ex rel. E.P. v. Sch. Bd*, 516 F. Supp. 2d 1294, 1304 (S.D. Fla. 2007) (denying motion to dismiss class claims and noting "claims of generalized violations of the IDEA lend themselves well to class action treatment"); *Barr-Rhoderick v. Bd. of Educ.*, 2006 U.S. Dist. LEXIS 72527 (D.N.M. Apr. 11, 2006); *J.S. v. Attica Cent. Schs.*, 2006 U.S. Dist. LEXIS 12827, 2006 WL 581187 (W.D.N.Y. Mar. 7, 2006); *LV v. N.Y. City Dep't of Educ.*, 2005 U.S. Dist. LEXIS 20672 (S.D.N.Y. Sept. 15, 2005); *D.D. v. N.Y. City Bd. of Educ.*, 2004 U.S. Dist. LEXIS 5189 (E.D.N.Y. Mar. 30, 2004) *rev'd in part on other grounds by* 465 F.3d at 515; *Blackman v. District of Columbia*, 328 F. Supp. 2d 36 (D.D.C. 2004); *Corey H. ex rel. Shirley P. v. Bd. of Educ.*, 995 F. Supp. 900 (N.D. Ill. 1998); *Gaskin v. Pennsylvania*, 1995 U.S. Dist. LEXIS 8136, 1995 WL 355346 (E.D. Pa. June 12, 1995); *Petties v. District of Columbia*, 881 F. Supp. 63 (D.D.C. 1995); *Jones v. Schneider*, 896 F. Supp. 488 (D.V.I. 1995); *Reusch v. Fountain*¸ 1994 WL 794754 (D. Md. Dec. 29, 1994); *Evans v. Evans*, 818 F. Supp. 1215 (N.D. Ind. 1993); *Cordero v. Pennsylvania Dep't of Educ.*, 795 F. Supp. 1352 (M.D. Pa. 1992); *Louis M. v. Ambach*, 113 F.R.D. 133 (N.D.N.Y. 1986); *Andre H. v. Ambach*, 104 F.R.D. 606 (S.D.N.Y. 1985).

[4] The predecessor to the IDEA, the Education for All Handicapped Children Act, was enacted in 1975. *See* Education for all Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773; Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, 104 Stat. 1103; Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37; Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (2004).

class actions. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239-40 (2009) (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)) (holding that when Congress reauthorized IDEA and did not alter the text of a provision that a court had previously interpreted, Congress is presumed to have adopted the court's statutory interpretation).

The legislative history of the IDEA further confirms that Congress intended that class-wide and systemic injunctive relief would be available to enforce the Act. For example, with respect to IDEA's administrative remedies, the statute's original supporters declared that the IDEA does not "require each member of the class to exhaust such procedures in any class action brought to redress an alleged violation of the statute." 121 Cong. Rec. S20, 433 (Nov. 19, 1975) (statement of Sen. Williams) (also stating that exhaustion is not required for individual or class plaintiffs when it would be "futile as a legal or practical matter"). *See* H.R. Rep. No. 99-296 at 7 (1985) (exhaustion of administrative remedies not required when agency has adopted an illegal policy or practice of general applicability).

III. THE SUPREME COURT IN *WAL-MART* REAFFIRMED THAT CLASS CERTIFICATION IS APPROPRIATE IN CIVIL RIGHTS CASES LIKE THIS ONE, WHERE PLAINTIFFS SEEK INJUNCTIVE RELIEF BASED ON COMMON CONTENTIONS OF LAW AND FACT CAPABLE OF CLASS-WIDE RESOLUTION.

There is no merit to the District's suggestion that *Wal-Mart* drastically alters the historic role of class actions in addressing blatant, systemic civil rights violations by public officials. To the contrary, *Wal-Mart* reaffirmed that class certification is appropriate in civil rights cases like this one, where plaintiffs seek injunctive relief based on common contentions of law and fact capable of class-wide resolution. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557-58 (2011).

A. The Supreme Court Made Clear in *Wal-Mart* That A Class May Show Commonality Based on "Significant Proof" That A Defendant Followed a "General Policy of Discrimination."

In *Wal-Mart*, a unique case involving "one of the most expansive class actions ever," the one-million-plus plaintiffs were current and former store employees allegedly paid too little and/or not promoted, among other injuries, based on their gender. *Id.* at 2547. They complained of quite diverse intentional violations of Title VII, including biased hiring practices and retaliation. *Id.* at 2548.

Wal-Mart followed settled authority articulating proof standards for Rule 23(a) commonality first established in employment discrimination decisions. In particular, the Supreme Court relied on *General Telephone Co. of the Southwest v.*

Falcon, 457 U.S. 147 (1982). The Court recognized that to "bridg[e]" the "conceptual gap" between individual discrimination claims and assertions of common, class-wide injury, a plaintiff class must present "significant proof" that defendants "operated under a general policy of discrimination." *Wal-Mart*, 131 S. Ct. at 2553 (quoting *Falcon*, 457 U.S. at 159 n.15). The Court also stated that the *Wal-Mart* plaintiffs' institution-wide discrimination claim "necessarily overlaps with [their] merits contention that Wal-Mart engage[d] in a *pattern or practice* of discrimination," *Id.* at 2552, whereby plaintiffs' task was to "establish by a preponderance of the evidence that . . . discrimination was the [defendants'] standard operating procedure[,] the regular rather than the unusual practice," *id.* at n.7 (quoting *Teamsters* v. *United States*, 431 U.S. 324, 358 (1977)(emphasis in original). The Court concluded that the *Wal-Mart* plaintiffs could not meet the commonality requirement of Rule 23 because there was no institution-wide discriminatory policy or practice satisfying Title VII's proof requirements—no "glue" holding the class together—and the plaintiffs' allegations could not be uniformly adjudicated in ways applicable to the entire class. *Id.* at 2548-52.

By contrast, this case hinges on District-wide policies and practices that violate the IDEA and the Rehabilitation Act. The core of plaintiffs' case is this single claim of system-wide malfeasance, not, as in *Wal-Mart*, simply an amalgam of individualized violations. Also in contrast to *Wal-Mart*, whether Defendant, a

single municipality, *intends* to discriminate against the class is not at issue in this case; the applicable statutes do not require intent. Rather, the "glue" holding the class together is the systemic default of Defendants' Child Find system– an injury that could be remedied with "a single injunction or declaratory judgment." *Id*. at 2554, 2557. In other words, the *D.L.* plaintiffs' contention is "of such an nature" that it is capable of class-wide resolution –which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 131 S.Ct. at 2552. *See also* Doc297pp38, 45-46 (finding that "the violations of IDEA, Section 504 of the Rehabilitation Act and District of Columbia law have resulted in irreparable injury to all eligible children between the ages of three and five years old . . . whom Defendants did not identify, locate, evaluate, or offer special education and related services [to].").

The District Court here correctly distinguished *Wal-Mart* when it refused to decertify the class. Doc297pp10-13, *D.L.*, 277 F.R.D. at 45-46. The court reasoned that *Wal-Mart* "involved a Title VII claim, the 'crux' of which was 'the reason for the *particular* employment decision.'" *Id.* at 12 (emphasis added). Indeed, the crux of *Wal-Mart* was "literally millions of employment decisions" that plaintiffs sought to adjudicate "at once." 131 S. Ct. at 2552. By contrast, the District's liability under the IDEA does not hinge on the validity of diverse student-specific decisions, but instead, on a determination of whether "[a]ll of the

class members have suffered the same injury" by virtue of the District's system-wide failure to implement Child Find, an injury which the plaintiffs have amply demonstrated. Doc297pp10-13, *D.L.*, 277 F.R.D. at 45-46.

Many other courts have interpreted *Wal-Mart* in the same manner. For example, in *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012), the Seventh Circuit reversed an order denying class certification in a race discrimination in an employment case involving claims that two company-wide policies had a disparate impact on black investment brokers. The Court of Appeals noted that in *Wal-Mart* "there was no company-wide policy to challenge." *McReynolds*, 672 F.3d at 488. By contrast, it said the policies challenged by plaintiffs were "practices of Merrill Lynch," and "employment decision[s] by top management." *Id.* at 489-90. Such practices "enabling . . . racial discrimination," so long as "a discriminatory effect was proved," would justify a class action and "would not be controlled by *Wal-Mart*." *Id.* at 489. In other words, "where intent is irrelevant"—as in a disparate impact case, "challenging those policies in a class action is not forbidden by the *Wal-Mart* decision." *Id.* at 490.

Similarly, in *Ross v. RBS Citizens, N.A.*, 667 F.3d 900 (7th Cir. 2012), the court affirmed certification of two classes of employees under the Illinois Minimum Wage Law, 820 I.L.C.S. § 105/1, *et seq.*, which like other state wage

and hour laws, "requires no proof of . . . discriminatory intent." *Ross*, 667 F.3d at 909. Thus, the Court of Appeals rejected "efforts to fit the present case into the [*Wal-Mart v.*] *Dukes* mold," and the related suggestion – like the District's here – that the case required "an examination of the subjective intent behind [a great many] individual employment decisions." *Id.* (quoting *Youngblood v. Family Dollar Stores, Inc.*, No. 09 Civ. 3176 (RMB), 2011 U.S. Dist LEXIS 115389, at *13 (S.D.N.Y. Oct. 4, 2011) (discussing New York's wage and hour law).

Similar cases further demonstrate that each class member need not share the exact disabilities, needs, and circumstances for class-wide adjudication to be appropriate and class-wide relief to be essential. The recent decision in *Lane v. Kitzhaber*, No. 3:12-cv-00138-ST, 2012 WL 3322680 (D. Or. Aug. 6. 2012), – decided just months ago – also informs the present dispute. There, named plaintiffs sought to certify a class of those "'who are in, or who have been referred to, sheltered workshops' and 'who are qualified for supported employment services.'" *Lane* at *1. As here, Oregon officials argued that *Wal-Mart* changed the landscape for civil rights class actions such that commonality was lacking because the case called for individualized inquiries about class members' disabilities and accommodations. *Id.* at *7. The court disagreed, concluding that common questions regarding the overall legitimacy of the state's practices predominated, including "whether defendants have failed to plan, administer,

operate and fund a system that provides employment services that allow persons with disabilities to work in the most integrated setting." *Id.* at *10. The court went on to conclude that "[a]s required by *Wal–Mart*, this class action can be resolved 'in one stroke' with an appropriate injunction applicable to all class members." *Id.* at *15. Similarly, in *Pashby v. Cansler*, 279 F.R.D. 347 (E.D.N.C. 2011), the court certified a class of plaintiffs with disabilities who challenged the State's termination of in-home personal care services via implementation of more restrictive eligibility rules. *Id.* at 351, 354. The court concluded that plaintiffs had shown a common contention that "will resolve the claims of all potential plaintiffs, irrespective of their particular factual circumstances." *Id.* at 353. *See also Henderson v. Thomas*, No. 2:11CV224–MHT WO, 2012 WL 3777146, at *5 (M.D. Ala. Aug. 30, 2012) ("[T]he named plaintiffs' legal claim – that the defendants are engaged in disability discrimination in violation of the ADA and Rehabilitation Act – is identical to the class's claims."); *Ligas v. Maram*, No. 05 C 4331 (N.D. Ill., Mar. 7, 2006), 2006 WL 644474, at *3 (reasoning that individual's knowledge of programs or readiness for transition does not affect commonality when "the proposed class is challenging the defendants' failure to enact policies regarding community placement. . . .").

For disability rights cases, *Wal-Mart* did not significantly alter the class certification analysis. In *Colbert v. Blagojevich*, No. 07 C 4737, 2008 WL

4442597 (N.D. Ill., Sept. 29, 2008), a class of Medicaid beneficiaries with disabilities in nursing homes claimed that despite the fact they could live in their own homes, the state failed to provide them necessary services in a more integrated setting. The class consisted of "all Medicaid-eligible adults with disabilities in Cook County, Illinois, who are being, or may in the future be, unnecessarily confined to nursing facilities and who, with appropriate supports and services, may be able to live in a community setting." *Id.* at *2. The consent decree ordered defendants to develop sufficient services to transition people into the community. Consent Decree § V, Aug. 29, 2011. The fact that class members with various needs would require individualized remedial plans was contemplated throughout the litigation and addressed by both parties in the consent order and did not undermine, much less preclude, class certification.

Likewise, in *Chambers v. San Francisco*, No. C 06-06346, (N.D. Cal., July 12, 2007), the court certified a class of Medicaid beneficiaries residing in a public nursing facility who sought appropriate community-based placements in accordance with the Americans with Disabilities Act. *Chambers* at *1, 3-4. The court found commonality despite the fact that "whether defendant is handling each class member's situation appropriately *may* need to be evaluated on a case by case basis." *Id.* at 6 (emphasis in original). Instead, commonality turned on whether the defendant was violating federal and state discrimination provisions with respect

to class members generally, not on how such a systemic violation manifested itself in regard to each individual class member. *Id.*

Despite this ample precedent, the District has misconstrued *Wal-Mart's* discussion of the Rule 23(a) commonality requirement to argue that the class in this case should not have been certified and that injunctive relief cannot be granted on a class-wide basis because of the differing individual remedial needs of class members. Yet, the fact that each plaintiff may *also* require some measure of individualized relief, in addition to class-wide relief, does not change the fact that the District's violation of the IDEA and Rehabilitation Act has injured every class member in the same manner. *Wal-Mart* plainly states that commonality is established, and a case may proceed as a class action, when at least one major question being litigated by the class can productively be resolved for all class members at once. 131 S. Ct. at 2550-52. Where liability turns on issues common to all plaintiffs – here, the system-wide default of the District's "Child Find" program, and the need for systemic relief to cure such failure – Rule 23(a) commonality is demonstrated. This is so even if individual plaintiffs may also be entitled to some measure of student-specific relief.

B. Since *Wal-Mart*, Courts Have Approved Class Actions Based on Proof of Systemic Civil Rights Violations, Including Proof of Delegated Discretionary Judgments In Accordance with Discriminatory Policies and Practices.

Appellants imply that this case resembles *Wal-Mart* in challenging discretionary actions by multiple independent decision-makers. The *Wal-Mart* decision and its progeny make clear that this is not so. The *Wal-Mart* Plaintiffs' challenge to discretionary decision-making at the store level amounted to disputing millions of discrete pay and promotion decisions made by thousands of store managers on an individual basis. *Id.* Here, in contrast, plaintiffs do not charge that delegated discretion was abused by a myriad of ground-level managers.

The District "confuse[s] the exercise of judgment in implementing a centralized policy with the exercise of discretion in formulating a local store policy or practice." *Floyd v. City of New York*, No. 08 Civ. 1034 (SAS), 2012 U.S. Dist. LEXIS 68676, *54 (S.D.N.Y., May 16, 2012). The latter, but not the former are governed by *Wal-Mart*. *See Chen-Oster v. Goldman, Sachs & Co.*, 2012 U.S. Dist. LEXIS 99270, *7 (describing *Wal-Mart's* approach as "fragmented discretion untethered to any companywide policy and procedure").

The *McReynolds* plaintiffs, like the *D.L* plaintiffs, opposed specific policies they believed produced unequal results for a protected class. *McReynolds*, 672 F.3d at 488; Doc297p2; *D.L.*, 277 F.R.D. at 41. In both cases, implementation depended on actions of many employees below top administrators. *McReynolds*,

672 F.3d at 488; Doc297pp10-13; *D.L.*, 277 F.R.D. at 45-46. But neither demonstrates lack of commonality sufficient to preclude class certification. *McReynolds*, 672 F.3d at 489; Doc297pp10-13; *D.L.*, 277 F.R.D. at 45-46.

McReynolds was one of 700 blacks among 15,000 Merrill Lynch brokers who reported to 135 Directors who in turn supervised several of the firm's 600 branch offices. *McReynolds*, 672 F.3d at 488. Brokers themselves "exercise[d] a good deal of autonomy, though only within a framework established by the company." *Id.* The McReynolds plaintiffs challenged the firm's "teaming" and its "account distribution" policies. *Id.* Under the former, brokers could form teams and share clients. *Id.* The latter awarded clients of departing brokers to the most successful remaining brokers. *Id.* at 488-89. Plaintiffs asserted that the first policy limited their prospects and the latter reinforced their lesser earning potential, because black brokers had greater difficulty joining successful teams. *Id.* at 488-90. Judge Posner, writing for a unanimous panel, rejected Merrill Lynch's contention that "any discrimination here would result from local, highly-individualized implementation of policies rather than the policies themselves." *Id.* at 490. The rejected argument mirrors Appellants' stance: "resolution of [Appellees'] claims . . . would require highly individualized inquiries into multitudinous actions by multiple decision-makers." Appellants' Br. At 20. The Seventh Circuit disagreed with this reasoning:

> company-wide policies authorizing broker-initiated teaming and basing account distribution on past success [could] increase the amount of discrimination and [t]he incremental causal effect . . . of those company-wide policies . . . could be most efficiently determined on a class-wide basis.

McReynolds, 672 F.3d at 490. *Accord Chen-Oster*, 2012 U.S. Dist. LEXIS 99270, **6-7 (stating, in a sex bias class action by senior female financial services employees in the New York office, that while "an individual manager's decision [regarding compensation, promotion or performance evaluation] might be more or less discretionary, . . . this, as the Supreme Court made clear in [*Wal-Mart v.*] *Dukes*, does not doom a class, since this discretion would have been exercised under the rubric of a company-wide employment practice"); *Calibuso v. Bank of America Corp.*, No. 10-CV-1413(JFB)(ETB), 2012 U.S. Dist. LEXIS 139606, *4, 43 (S.D.N.Y. Sept. 27, 2012) (denying motion to dismiss and strike class claims in Title VII equal pay case; acknowledging that implementing company-wide compensation criteria (alleged to systematically favor male employees) "may involve some level of discretion by managers; yet declaring that this does not automatically preclude such class claims under Rule 23(a)(2)" and [*Wal-Mart v.*]*Dukes*; and concluding that, as in *McReynolds*, arguably "it is the criteria used by supervisors or managers that leads to the [discrimination], not only [as in *Wal-Mart*] the discretion afforded to lower level supervisors*")*; *Ellis v. Costco Wholesale Corp.*, No. C-04-3341 EMC, 2012 U.S. Dist. LEXIS 137418, *81-82 (N.D. Cal. Sept. 25, 2012) ("Even under *Dukes*, the fact that some degree of

discretion is exercised among managers does not in and of itself preclude class certification. In fact, under the *Teamsters* pattern or practice method of proof, a prima facie case of a pattern or practice of discrimination is established by evidence that 'racial discrimination was the company's standard operating procedure — the regular rather than the unusual practice.' *Cooper* [*v. Federal Reserve Bank of Richmond*], 467 U.S. [867,] 876 [1984](quoting [*Int'l Broth. of*] *Teamsters [v. United States]*, 431 U.S. [324,] 336 [1977]). Thus, Plaintiffs need not prove absolute uniformity, but only a 'regular' practice.").

C. Plaintiffs Satisfied Their Burden to Show "Significant Proof" That Defendants Followed a "General Policy" of Violating Their Civil Rights.

Appellants dismiss Appellees' extensive proof and the District Court's careful findings of discriminatory policies and practices as no more than "unspecified 'systemic failures'" and "amorphous claims of . . . widespread misconduct." Appellants' Br. at 22, 34. They claim *Wal-Mart* forbids commonality in this case as plaintiffs – and apparently the District Court – supposedly have provided only "cursory explanations" and "no specific [discriminatory] practice" that is "central to the validity" of the claims of class members. *Id.* at 39. This characterization of plaintiffs' evidence and the District Court's analysis is unsupportable.

The District Court's MOFFCL serves as an important supplement to the District Court's "Memorandum Opinion (Class Action Issues)" issued the same day identifying numerous policies and practices of the District that explain its systemic failures to find, evaluate, and serve children with disabilities in need of special education services. Doc294p14 (¶ 48); Doc297p11); D.L. 277 F.R.D. at 45-56. The MOFFCL belies the District's contention that plaintiffs' claims of systemic malfeasance are "amorphous." Doc294p13 (¶ 46). The District Court found the District's "special education policies and practices [a]re inadequately designed, supported and implemented." *Id*. For instance, the District Court identified very specific deficiencies in the District's "public awareness and outreach efforts and professional development and training" activities and concluded that these defaults undermined "identification, placement and tracking" of children in both Part C and Part B Child Find programs. *Id.* at 14 (¶ 48). The District Court also identified deficiencies in "intake and screening procedures," *id.* at 14-15 (¶¶ 48-51), compliance with directives from federal special education enforcement officials, *id.* at 15-17 (¶¶ 52-59), and insufficient efforts "to maintain, analyze and provide reliable data" regarding children receiving or needing special education services, *id.* at 21 (¶¶ 73-74). The recitation of recommended relief reflects these and other defects identified in the District's special education policies and practices. *Id.* at 23-26 (¶¶ 83-97).

The District Court's findings regarding systemic deficiencies in the District's Child Find program, and the failures of District leadership to remedy these deficiencies years after the start of this lawsuit, *see id.* at 19-20 (¶¶ 65-69), are at least as detailed, if not far more specific than, those deemed sufficiently specific descriptions of policies resulting in racial inequity in *Ross*, 667 F.3d at 909. Likewise, in *Chen-Oster*, the court was concise in explaining: "[w]hat was missing in [*Wal-Mart v.] Dukes*, but is present here, are 'specific employment practice[s]' . . . that 'tie[] all [of Plaintiffs'] claims together.'" *Chen-Oster*, 2012 U.S. Dist. LEXIS 9927010, *6-7 ("Plaintiffs have identified a number of specific, companywide 'employment practices' and 'testing procedure[s].' These include the '360-degree review' process, the forced-quartile ranking of employees, and the 'tap on the shoulder' system for selecting employees for promotion.").

While the District concedes – in a profound understatement – that its Child Find program is "poorly managed," it insists that "there was no proof, let alone significant proof, and no finding of any illegal policy," that is, "child-find *policies* that violated the IDEA." Appellants' Br. At 37-39 (emphasis in original). Showing "merely ineffective" policies, the District contends, cannot meet *Wal-Mart*'s, and *Falcon*'s requirement of a "general policy of discrimination." *Id.* But Plaintiffs have provided "significant proof" demonstrating a "general policy of discrimination" as described above and including "[t]op management's

involvement," *Ellis*, 2012 U.S. Dist. LEXIS 137418, *54-60, in the institution-wide discriminatory actions and inactions challenged in this case. Doc294pp19-20 (¶¶ 65-69); s*ee McReynolds*, 672 F.3d at 489. Moreover, the District misconstrues plaintiffs' burden suggesting plaintiffs must demonstrated intent to discriminate and evidence expressly discriminatory policies. No such showing of intent or an express policy of discrimination is required under the IDEA. Doc297pp10-13; *D.L.*, 277 F.R.D. at 45-46. Therefore, contrary to the District's logic, policies which fail to comply with the IDEA, and the resulting unlawful treatment of children with disabilities, are illegal policies. This fact is consistent with post-*Wal-Mart* decisions upholding class certification in cases where plaintiffs, as here, had no duty to show intentional civil rights violations to satisfy *Wal-Mart*.

CONCLUSION

For the foregoing reasons, Amici urge the court to affirm the decisions of the District Court.

Respectfully submitted,

/s/ Kelly Bagby

KELLY BAGBY Bar #462390
Counsel of Record
DANIEL KOHRMAN
AARP FOUNDATION LITIGATION

MICHAEL SCHUSTER
AARP

601 E Street, NW
Washington, DC 20049
(202) 434-2060

IRA A. BURNIM
JUDGE BAZELON CENTER FOR MENTAL HEALTH LAW
1101 15th Street, NW, Suite 1212
Washington, DC 20005
(202) 467-5730 ext. 320

JOSEPH B. ESPO
SHARON KREVOR-WEISBAUM
(admission pending)
BROWN, GOLDSTEIN & LEVY, LLP
120 E. Baltimore St., Suite 1700
Baltimore, MD 21202
(410) 962-1030 ext. 1312

MEHGAN SIDHU (admission pending)
NATIONAL FEDERATION FOR THE BLIND
200 E. Wells Street
Baltimore, MD 21230
(410) 659-9314, ext. 2314

Jon Greenbaum
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Avenue, NW, Suite 400
Washington, DC 20005
(202) 662-8315

Counsel for Amici

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: this brief contains 6,003 words, excluding the parts of the brief exempted by Fed. R. Ap. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because: this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in Times New Roman 14-point font.

/s/ Kelly Bagby
Kelly Bagby
Counsel for Amici Curiae

Dated: November 9, 2012

CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2012, the foregoing brief was filed via the CM/ECF system with the Court and served via the CM/ECF system to the following counsel of record:

Bruce J. Terris
Lane M. Liu
Michael L. Huang
Terris, Pravlik & Millian, LLP
1121 12th Street, NW
Washington, DC 20005-4632

Margaret A. Kohn
619 Pennsylvania Avenue, SE, 2nd Floor
Washington, DC 20003

Jeffrey S. Gutman
The George Washington University Law School
2000 G Street, NW
Washington, DC 20052

Cyrus Mehri
Mehri & Skalet, PLLC
1250 Connecticut Avenue, NW, Suite 300
Washington, DC 20036

Counsel for the Appellees

Todd S. Kim
Donna M. Murasky
Office of the Solicitor General
Office of the Attorney General
for the District of Columbia
441 Fourth Street, NW, Suite 600S
Washington, DC 20001

Counsel for the Appellants

/s/ Kelly Bagby
Kelly Bagby
Counsel for Amici Curiae

APPENDIX

INTERESTS OF AMICI CURAIE

AARP, the National Federation of the Blind ("NFB"), the National Disability Rights Network ("NDRN"), the Council of Parent Attorneys and Advocates ("COPAA"), The Judge David L. Bazelon Center for Mental Health Law ("Bazelon Center"), The National Health Law Program ("NHeLP"), University Legal Services Protection and Advocacy Program ("ULS-P&A"), and the Lawyers' Committee for Civil Rights Under Law ("LCCR") respectfully submit the attached brief as amici curiae in support of plaintiffs-appellees.

AARP

AARP is a nonpartisan, nonprofit organization with a membership dedicated to addressing the needs and interests of people age fifty and older in ways beneficial and affordable to them and to society as a whole. Through education, advocacy and service, AARP seeks to enhance the quality of life for older persons and all Americans by promoting independence, dignity, and purpose. Advocacy by AARP attorneys often involves class or collective action litigation on behalf of groups of employees, or consumers of healthcare, housing or other essential services or products. Thus, AARP supports statutes, rules and policies designed to protect the rights of people to band together to obtain legal redress when they have

been victims of illegal discrimination, neglect or abuse in violation of federal or state law.

National Federation of the Blind

NFB is the largest and most influential membership organization of blind people in the United States. With more than 50,000 members, and affiliates in all fifty states, in the District of Columbia, and in Puerto Rico, and over 700 local chapters in most major cities, the ultimate purpose of the NFB is the complete integration of the blind into society on an equal basis. Since its founding in 1948, the NFB has devoted significant resources toward advocacy, education, research, and development of programs to ensure that children and students who are blind or have low-vision receive an equal and appropriate public education. The NFB was actively involved in the passage of the Individuals with Disabilities in Education Act (IDEA) and continues to be involved in legislative and programmatic efforts to improve the education of blind children. The NFB actively engages in litigation on behalf of blind children throughout the country to ensure that they receive the educational services to which they are entitled and to address systemic barriers.

National Disability Rights Network

NDRN is the membership association of protection and advocacy (P&A) agencies that are located in all fifty states, the District of Columbia, Puerto Rico, and the territories. P&As are authorized under various federal statutes to provide

legal representation and related advocacy services on behalf of persons with all types of disabilities in a variety of settings. The P&A network comprises the nation's largest provider of legally based advocacy services for persons with disabilities. P&A lawyers often represent or assist parents of children with disabilities in the impartial due process hearings authorized under the IDEA. They realize many of those cases result from systemic failures for which due process hearings offer little relief, and for which a class action may be the most efficient and effective way to remedy the underlying systemic issues.

Council of Parent Attorneys and Advocates

COPAA is an independent, nonprofit organization of attorneys, advocates, and parents in forty-three states and the District of Columbia who are routinely involved in special education due process hearings throughout the country. The primary goal of COPAA is to secure appropriate educational services for children with disabilities, echoing a Congressional finding that "[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. § 1400(c)(1) (2008). Children with severe disabilities are among the most vulnerable in our society, and COPAA is particularly concerned with assuring a free appropriate

public education ("FAPE") as the IDEA requires. They realize many of those cases result from systemic failures for which due process hearings offer little relief.

Judge David L. Bazelon Center for Mental Health Law

The Bazelon Center has been a leader in the field of mental disability law since its founding in 1972. Over the course of its history, much of the Center's work has focused on the needs of children with mental disabilities. The Center was instrumental in the passage of the IDEA. Among other things, it brought a landmark case, *Mills v. Bd. Of Education of D.C.*, 348 F. Supp. 866 (D.D.C. 1972), which helped lay the groundwork for the IDEA's passage. Since the IDEA became law, the Center has litigated groundbreaking actions seeking to improve educational and health services for children with mental disabilities, including *Blackman-Jones v. District of Columbia*, Civil Action No. 97–1629 (D.D.C.). The Center has also released a variety of publications on these issues, including *Way to Go: School Success for Children with Mental Health Care Needs* and *Teaming Up: Using the IDEA and Medicaid to Secure Comprehensive Mental Health Services for Children and Youth.* As a result of this expertise in the needs of children with mental disabilities, the Center is well-positioned to advise the Court on the key issues of law raised in the instant matter regarding systemic relief.

National Health Law Program

NHeLP is a 40-year-old public interest law firm working to advance access to quality health care and protect the legal rights of lower-income people, people with disabilities and children. As such the NHeLP works extensively with the IDEA and its interplay with the Medicaid program, particularly Medicaid Early and Periodic Screening, Diagnostic and Treatment services for children and youth under age 21. NHeLP works to advance access to health care through education, policy analysis, class action and individual litigation, and administrative advocacy.

University Legal Services Protection and Advocacy Program

ULS-P&A is a private, non-profit organization that serves as the federally mandated protection and advocacy program for people with disabilities in the District of Columbia. ULS-P&A advocates for the human and civil rights of people with disabilities, including the right to self-determination, to be free from harm, to be afforded due process, to develop physically, emotionally, and intellectually, and to be included in community life with the opportunities and choices these rights imply through activities such as monitoring, individual advocacy, and systemic litigation. ULS-P&A is plaintiffs' counsel in several class actions and has represented scores of children and youth in need of special education services. ULS-P&A is well aware of the systemic problems that people with disabilities have accessing the services to which they are entitled by federal

and state law, including the ability of students with disabilities to access special education services. The individual relief that can be sought in a special education due process hearing cannot resolve the larger, systemic failures for which a class action may be the most effective and efficient remedy.

Lawyers' Committee For Civil Rights Under Law (National Office)

LCCRUL is a tax exempt, nonprofit civil rights legal organization founded in 1963 by the leaders of the American bar at the request of President Kennedy to provide legal representation to the victims of civil rights violations. Its members include former presidents of national Bar Associations, law school professors, and many of the nation's leading lawyers. For almost fifty years, the Lawyers' Committee and its independent local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Francisco and Washington, D.C. have represented members of minority groups and others in hundreds of civil rights cases across the country. Among the essential interests of the Lawyers' Committee is the proper construction and implementation of the laws and programs intended to provide equal access to educational opportunities for students with disabilities. The Lawyers' Committee currently represents a putative class of students with disabilities in *PB v. White*, Civil Case No. 2:10-cv004049 in the Eastern District of Louisiana, who challenge systemic failures in the special education delivery

system in New Orleans, including Child Find. The Lawyers' Committee therefore has an interest in the issues raised by this case.