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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

EUGENE DIVISION

J.N., et al,

Plaintiffs,

v.

OREGON DEPARTMENT OF EDUCATION, et al,

Defendants.

Case No. 6:19-CV-00096-AA

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page(s)**

STATUTES

INTRODUCTION

This case seeks to remedy the State of Oregon's ongoing failure to ensure that all students with disabilities in Oregon receive a free appropriate public education (FAPE) without discrimination. As Plaintiffs allege, the Named Plaintiffs and hundreds of other Oregon students with disabilities (Plaintiff class) have been unnecessarily subjected to shortened school days due to Defendants' actions and inactions. Compl. ¶¶ 1, 12 (ECF No. 1). Due to their failure to effectively address this systemic problem, Defendants Oregon Department of Education, Director Colt Gill, and Governor Katherine Brown (the State) have "deprived the Plaintiff class of the educational services to which they are entitled by federal law, subjected them to disability-based discrimination, and increased their risk of being subjected to such harms in the future." *Id.* ¶ 36. Defendants thus have violated the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, Americans with Disabilities Act (ADA), 42 U.S.C. § 12131 *et seq.*, and Section 504 of the Rehabilitation Act (Section 504), 29 U.S.C. § 794.

Because Defendants have moved to dismiss based only on their claim that Plaintiffs lack constitutional standing, the Court must assume the legal merits of Plaintiffs' claims. *See infra* pp. 6-7. But contrary to Defendants' assertions, Plaintiffs' claims are neither "novel" nor "implausible." Defs.' Mot. to Dismiss (Mot.) at 14 (ECF No. 33). A significant body of case law confirms the State is "ultimately responsible" for providing all students with disabilities in the state a FAPE, *Gadsby v. Grasmick*, 109 F.3d 940, 953 (4th Cir. 1997), even though "different agencies may, in fact, deliver services," *John T. ex rel. Robert T. v. Iowa Dep't of Educ.*, 258 F.3d 860, 864 (8th Cir. 2001) (internal citations omitted). *See Corey H. v. Bd. of Educ. of City of Chicago*, 995 F. Supp. 900, 913-14 (N.D. Ill. 1998) (describing a "plethora of case law" holding

that "the state educational agency is responsible for a local school district's systematic failure to comply with an IDEA mandate.").

At least four courts of appeals and multiple district courts have held that states can be held liable if they "shirk their responsibility" to "ensure[] FAPE by monitoring, investigating and enforcing the IDEA." *Morgan Hill Concerned Parents Assoc. v. Cal. Dep't of Educ.*, No. 2:11-cv-3471, 2013 WL 1326301, at *7, 10 (E.D. Cal. Mar. 29, 2013). *Accord John T.*, 258 F.3d at 864-66; *St. Tammany Par. Sch. Bd. v. State of La.*, 142 F.3d 776, 784 (5th Cir. 1998); *Gadsby*, 109 F.3d at 953; *Kruelle v. New Castle Cty. Sch. Dist.*, 642 F.2d 687, 696-97 (3d Cir. 1981); *Jackson v. Pine Bluff Sch. Dist.*, No. 4:16CV00301, 2017 WL 2296896, at *5-7 (E.D. Ark. May 12, 2017); *T.B. v. Bryan Indep. Sch. Dist.*, No. H-07-00168, 2007 WL 922215, at *2-3 (S.D. Tex. Mar. 22, 2007); *Corey H.*, 995 F. Supp. at 913-15; *Cordero v. Penn. Dep't of Educ.*, 795 F. Supp. 1352, 1361-63 (M.D. Pa. 1992). FAPE is a "demanding" and "ambitious" educational standard that must give students the chance to meet "challenging objectives." *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1000 (2017). The State cannot ensure FAPE that meets this high standard simply by "providing funds, promulgating regulations and reviewing individual complaints," as "the state's role amounts to more than creating and publishing some procedures and then waiting for the phone to ring." *Cordero*, 795 F. Supp. at 1361-62.

States are also responsible under the ADA and Section 504 for ensuring that students are free from disability-based discrimination. Compl. ¶¶ 42-47. Among other duties, the State must take "affirmative action to investigate, monitor and correct the 'systemic and discriminatory' violations [that] result[] in continued segregation of students with severe disabilities [and] depriv[e] them of a FAPE . . . ." *Jackson*, 2017 WL 2296896, at *12. *See J.S., III ex rel. J.S. Jr. v. Houston Cty. Bd. of Educ.*, 877 F.3d 979, 986-87 (11th Cir. 2017) (holding that the integration

mandate under the ADA recognized in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999) applies to the context of unnecessary classroom removals).

Although Defendants briefly acknowledge their statutory duty to ensure the Plaintiff class receives an education that complies with these laws, the Motion attempts to deflect responsibility onto local school districts and parents. Mot. at 3, 14. Defendants also repeatedly misstate the Complaint's allegations, such as by asserting that Plaintiff E.O. "does not allege that he has been inappropriately placed on a shortened school day," *id.* at 14, when he made precisely that allegation, *contra* Compl. ¶¶ 18, 76-78.

Accepting the allegations as true, Plaintiffs have suffered the requisite "injury in fact" that is "fairly traceable" to the State's conduct and "likely to be redressed" by a favorable decision. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). *First*, Plaintiffs are injured because they are currently subjected or at substantial risk of being subjected to unnecessary shortened school days, denying them FAPE and subjecting them to discrimination. Compl. ¶¶ 48-54, 65-66, 76-78, 90, 103-04. *Second*, these harms are causally connected to the State's "continued inaction and ineffective policies and procedures," *id.* ¶ 129, because the State lacks needed policies and practices, *id.* ¶¶ 116-18, 123-25; fails to ensure compliance with existing laws, policies, and procedures, *id.* ¶ 119-22; and heightens the risk of harm, for example, through inadequate guidance to districts and a funding formula that incentivizes the use of shortened school days, *id.* ¶¶ 53-54. *Third*, the Court could redress the harms by declaring the State's duty to Plaintiffs and ordering it to take "effective action to identify the districts engaged in this practice, correct violations of federal law, and provide technical assistance and resources." *Id.* ¶ 127. The Named Plaintiffs thus have Article III standing.

Plaintiff Council of Parent Attorneys and Advocates, Inc. (COPAA) has associational standing because its members include parents, attorneys, and advocates of the Named Plaintiffs and Plaintiff class. *Id.* ¶¶ 15, 131. The members would have standing to sue on their own, their participation is not required, and COPAA's interest is germane to its mission to protect and enforce the rights of students with disabilities and their families. *Id.* ¶ 21. Defendants' Motion should thus be denied in its entirety. Alternatively, Plaintiffs should be granted leave to amend.

BACKGROUND FACTS

The Named Plaintiffs and Plaintiff class are "students with disabilities aged 3 to 21 residing in Oregon who are eligible for special education and related services under the IDEA and are currently being subjected to a shortened school day or are at substantial risk of being subjected to a shortened school day due to their disability-related behaviors." *Id.* ¶ 31. Due to their disabilities, they are often limited to "one or two hours of instruction per day" instead of the full day typically lasting six hours. *Id.* ¶ 3. Some students receive as little as half an hour of daily instruction. *Id.* ¶¶ 3, 20, 97. For instance, within weeks of starting school, Plaintiff J.N. was limited to just 15 minutes of reading instruction and 15 minutes of math instruction a day. *Id.* ¶ 59. Some children, like B.M., are eventually denied any instruction at all. *Id.* ¶¶ 3, 20, 103-04. Many students are denied instructional time informally; for instance, J.V.'s mother received near-daily calls to pick up J.V. early from his mere two-hour school day, and E.O.'s half-day was not documented in his individualized education plan (IEP). *Id.* ¶¶ 48, 74, 83. As each Named Plaintiff has experienced, the limited instruction that students receive during a shortened school day is often provided at home or in a separate space at school, "where they learn alone or solely with other students with disabilities, rather than in a general education classroom where students . . . are far more likely to enjoy academic and social success." *Id.* ¶ 4. *See id.* ¶¶ 59, 75, 84, 97.

Although a very small group of students may need a shortened school day, *id.* ¶ 2, "[t]he vast majority of children with disability-related behavioral challenges can learn in general education classrooms along with their nondisabled peers if given the appropriate and legally required services and supports," *id.* ¶ 6.[1] Yet, as the Named Plaintiffs' experiences illustrate, Oregon school districts frequently impose shortened school days "without first developing, implementing, and revising as needed plans to provide academic and behavioral interventions that will support the students' needs," and thus do so unnecessarily. *Id.* ¶ 50. *See id.* ¶¶ 61, 77, 83, 97-99. These students are denied their rights to FAPE and to nondiscrimination. *Id.* ¶ 7.

Without "the academic, social, and emotional benefits of attending school for a full day," students "frequently fall behind academically and miss out on critical social opportunities in which they can practice appropriate behaviors." *Id.* ¶ 5. As a result of "being deemed unfit to learn alongside their peers," *id.* ¶ 4, they suffer stigma, emotional trauma, humiliation, and shame, *id.* ¶¶ 4, 51. Students face myriad, long-lasting harms from being subjected to shortened school days instead of receiving the services and supports they need. *Id.* ¶ 52. Without such services and supports, students lack academic and behavioral interventions that would help them learn productively, and any return to a full school day is often short-lived. *Id.* ¶ 50. As their needs remain unmet, some children's exclusion from school evolves into further exclusion from the community through residential placement, institutionalization, or court-involvement, *id.* ¶ 52.

The State has been aware for years that "many of its school districts, often rural and small school districts, deny children with disability-related behaviors a full day of school—or the chance to attend school at all—in lieu of providing them with needed services." *Id.* ¶ 12. *See id.*

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[1] The proposed Plaintiff class does not include students with medical needs unrelated to their behaviors or youth who choose a partial school day in order to work. Compl. ¶ 31 n.5.

¶¶ 105-11 (describing various forms of notice to the State). The State's belated and limited responses to this ongoing problem—such as a 2016 written policy on instructional time and a law the Governor signed in 2017 mandating new procedures for shortened school days—have fallen far short of the State's responsibilities to the Plaintiff class. *See generally id.* ¶¶ 112-29. Despite the State's inadequate efforts, children with disabilities in the Plaintiff class continue to be denied FAPE and subjected to discrimination. *Id.* ¶¶ 127, 129.

Defendants do not satisfy their obligations to "ensure" FAPE and nondiscrimination as required by the IDEA, ADA, and Section 504 due to at least three systemic deficiencies. *Id.* ¶¶ 114-15. First, Defendants have no policies or procedures in place to identify those districts that unlawfully impose shortened school days and need further supervision and monitoring. *Id.* ¶¶ 115-18. Second, Defendants do not proactively monitor districts' compliance despite ample evidence that simply making its administrative complaint mechanism available does not and cannot fully satisfy the State's duty to correct violations when they occur. *Id.* ¶¶ 115, 119-22. Third, Defendants do not provide needed resources, technical assistance, or training—even when asked for help—that would help districts support students effectively for the full school day. *Id.* ¶¶ 101, 115, 123-26. The essence of the Complaint is that, where the State fails to correct these critical deficiencies despite a known, longstanding, and systemic practice among Oregon school districts of unnecessarily denying students with disability-related behaviors the opportunity to attend a full day of school, then the State has failed to ensure FAPE and nondiscrimination.

STANDARD OF REVIEW

A jurisdictional challenge under Federal Rule 12(b)(1) may be facial or factual. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). Because Defendants have not "converted the motion to dismiss into a factual motion by presenting affidavits or other evidence," the Court must treat

the Motion as a facial attack and assess only whether "the allegations contained in [the] complaint are insufficient on their face to invoke federal jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). The Court must "assume [the] allegations to be true and draw all reasonable inferences in [Plaintiffs'] favor." *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). "The purpose of the standing doctrine is to ensure that the plaintiff has a concrete dispute with the defendant, not that the plaintiff will ultimately prevail . . . ." *Hall v. Norton*, 266 F.3d 969, 976 (9th Cir. 2001). Thus, "[t]he Supreme Court has made clear that when considering whether a plaintiff has Article III standing, a federal court must assume *arguendo* the merits of his or her legal claim." *Zeiger v. WellPet LLC*, 304 F. Supp. 3d 837, 843 (N.D. Cal. 2018) (internal citations omitted). *See Equity Lifestyle Props., Inc. v. Cty. of San Luis Obispo*, 548 F.3d 1184, 1189 n.10 (9th Cir. 2008) ("Standing 'in no way depends on the merits . . .'") (internal citations omitted); *see also Parker v. D.C.*, 478 F.3d 370, 377 (D.C. Cir. 2007).

ARGUMENT

I. Named Plaintiffs E.O., J.N., J.V., and B.M. Have Article III Standing

To establish jurisdiction, the Court need only find that at least one plaintiff has Article III standing. *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017); *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007). Under Article III, a plaintiff must allege an "injury in fact" that is "fairly traceable" to the defendant's actions and "likely to be redressed" by the relief. *Spokeo*, 136 S. Ct. at 1547. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (internal citations omitted). In similar cases asserting that a state has failed to meet its duties under the IDEA,

ADA, or Section 504, multiple courts have easily found Article III satisfied at the pleading stage. *See, e.g.*, *Jackson*, 2017 WL 2296896, at *14-15; *Morgan Hill*, 2013 WL 1326301, at *8; *Bryan Indep. Sch. Dist.*, 2007 WL 922215, at *4-5. Plaintiffs likewise have established standing.

A. Plaintiffs Have Suffered an Injury in Fact

An "injury in fact" must be "concrete and particularized" and "actual or imminent." *Lujan*, 504 U.S. at 560. Defendants concede the former. Mot. at 11. Defendants argue instead that there is no actual or imminent injury because state law "prohibits unilateral use of an abbreviated school day program" and "plaintiffs are protected from imminent harm by the IDEA's 'stay put' provision . . . ." *Id.* at 12. However, Defendants' argument that these procedural safeguards *should* protect Plaintiffs from harm is no answer to Plaintiffs' specific allegations that they are in fact denied the education that federal law guarantees them *despite* their rights under the law. Compl. ¶¶ 1-12, 48-52. Instead of accepting the allegations as true, Defendants ask this Court to hold that the harms are implausible based on Defendants' own assumption that school districts do and will comply with their legal requirements, an assumption directly contradicted by Plaintiffs' allegations. *See id.* ¶¶ 1, 48-52, 63, 74-77, 83, 102. At this posture, Defendants' contrary factual assumptions have no bearing on the relevant inquiry.

First, the Complaint alleges that Plaintiff E.O. is *currently* subjected to shortened school days unnecessarily due to his disabilities, and is thus denied FAPE and subjected to discrimination. Defendants twice misstate the allegations by claiming the Complaint alleges that "E.O. is receiving a lawful abbreviated school day," and that "Plaintiff E.O. . . . does not allege that he has been inappropriately placed on a shortened school day." Mot. at 9, 14. Defendants are incorrect. Plaintiffs allege that "E.O. currently receives a shortened school day," Compl. ¶ 18, that is unnecessary because his school district has not adequately considered "whether he

could successfully remain at school for the full day with additional or different services and supports," *id.* ¶ 77, or provided him with any such services and supports, *id.* ¶ 76. Plaintiffs also allege that E.O.'s shortened school day was not documented in his IEP and that his shortened school day has continued over his mother's objection, *id.* ¶¶ 74, 76, both violations of the state procedures that Defendants do not adequately enforce, *id.* ¶¶ 13, 117, 119.

The Complaint specifically alleges that "[b]eing unnecessarily denied the opportunity to attend a full day of school along with his classmates has caused and continues to cause E.O. significant harm," *id.* ¶ 78, including gaps in his learning and social isolation, *id.* ¶¶ 15, 75, 78. As Plaintiffs allege, *id.* ¶ 7, and as courts have held in similar cases, such a denial of FAPE and disability-based discrimination are actual injuries in fact. *See Jackson*, 2017 WL 2296896, at *14; *Morgan Hill*, 2013 WL 1326301, at *8; *Bryan Indep. Sch. Dist.*, 2007 WL 922215, at *4.

Second, Plaintiffs allege that even students with disability-related behaviors who do not currently receive shortened school days face a substantial risk of being subjected to shortened school days unnecessarily in the future. Compl. ¶¶ 53-54. "A future injury need not be 'literally certain'" to occur or recur. *Nw. Requirements Utils. v. F.E.R.C.*, 798 F.3d 796, 805 (9th Cir. 2015) (internal citations omitted). It is enough to show that "there is a substantial risk that the harm will occur." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (internal quotation marks and citations omitted). Past wrongs do not suffice alone, but they are "evidence bearing on whether there is a real and immediate threat of repeated injury." *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 967 (9th Cir. 2018) (internal citations omitted). A plaintiff may also show that a threatened injury is substantially likely if the harm stems from a written policy or is "part of a 'pattern of officially sanctioned . . . behavior'" violating their rights. *Armstrong v. Davis*, 275 F.3d 849, 861 (9th Cir. 2001) (abrogated on other grounds) (internal

citations omitted). In addition to establishing that E.O. suffers ongoing harm, the Complaint establishes that J.V., J.N., and B.M. face a substantial risk of future harm.

Plaintiffs allege that students in the Plaintiff class face a substantial risk of harm even if they currently attend school for the full day because the State has "exacerbated" and "enabled the districts' continued reliance on shortened school days" as a response to student behaviors. Compl. ¶¶ 53, 54. For example, although the State passed a law requiring data that would allow it to monitor whether districts are using shortened school days inappropriately, this law does not deter the practice because "the State has not actually collected or reviewed any such data." *Id.* ¶ 53. Instead, the State "expressly authoriz[es]" shortened school days for some students in a written policy that does not "effectively clarify the limited circumstances under which such shortened days may be permissible," *id.*, and "critically omits any reference to the nondiscrimination requirements of the ADA and Section 504," *id.* ¶ 123. Even when asked directly for help, *id.* ¶ 125, the State fails to provide supports "to help school districts educate students with behavioral needs for a full school day," *id.* ¶ 53. This failure compounds the risk of harm since, if students do not receive the services and supports that they need, any return to a full school day is often short-lived. *Id.* ¶ 50. Furthermore, Defendants' school funding formula "creat[es] a financial incentive" to rely on shortened school days. *Id.* ¶ 53. These many allegations of the State's systemic failures establish a substantial risk of harm for students who do not currently have shortened school days.

Although the above general allegations suffice, Plaintiffs have also specifically alleged that J.N., J.V., and B.M. are at substantial risk of harm.[2] J.N. is now allowed to attend school for

[2] Plaintiffs also allege that, without additional services and supports, E.O. "is at significant risk of being subjected to an even shorter school day in the future." Compl. ¶ 78.

the full day, but he has yet to receive effective behavioral interventions and the district has continued to use strategies that failed earlier. *Id.* ¶¶ 65-66. He misses hours of instruction a day even while at school due to medication he takes to manage his behaviors. *Id.* ¶ 65. J.N. was also banned from joining his peers on a field trip this school year due to his behaviors, increasing the risk that he likewise will be excluded from the full school day again. *Id.* ¶ 66. Plaintiff J.V. currently attends a full day of school, but he is at heightened risk of harm "given his school district's decision last school year to continue J.V. on a shortened school day despite indicating earlier that he would attend school for the full day." *Id.* ¶ 90. Lastly, "[d]espite his continued eligibility for services under the IDEA," B.M.'s school district "is currently failing to provide him with any instruction or other services," and "expressly prohibit[ed] B.M. from attending school" at all due to his behavioral needs. *Id.* ¶¶ 103-04. The State is no longer monitoring whether B.M. is receiving a FAPE, nor has it ordered the district to take further corrective action. *Id.* ¶ 104. These Named Plaintiffs, like other children in the Plaintiff class who are not currently subjected to a shortened school day, are at substantial risk of suffering this harm in the future.

Due both to E.O.'s ongoing harms and the threatened harms that J.N., J.V., and B.M. face, each of the Named Plaintiffs has established an injury in fact.

B. Plaintiffs' Injuries are Fairly Traceable to Defendants' Acts and Omissions

Article III requires "a causal connection between the injury and the conduct complained of," such that the injury is "fairly . . . trace[able]" to the defendant's actions. *Lujan*, 504 U.S. at 560 (alteration in original) (internal citations and quotation marks omitted). The line of causation must be "more than 'attenuated.'" *Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011) (internal citations omitted). However, the defendant need not be the "sole source" of harm, nor must a plaintiff "eliminate any other contributing causes to establish its standing."

Barnum Timber Co. v. E.P.A., 633 F.3d 894, 901 (9th Cir. 2011). *See Maya*, 658 F.3d at 1070 (defendant need not be the "proximate cause"); *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 860 (9th Cir. 2005) (causal link was not "tenuous or abstract," even though "other factors may also cause" the alleged harms).

Defendants primarily argue that the Complaint does not establish causation because "[t]he chain of causation here depends on two independent parties: the [local educational agency] responsible for [a] plaintiff's IEP and [the] plaintiff's parent or advocate." Mot. at 14. The Ninth Circuit rejected a similar argument in *Oregon Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1105 (9th Cir. 2003), where the plaintiffs alleged that a state mental hospital refused to timely accept mentally-incapacitated criminal defendants for treatment. The hospital claimed the causal connection was too weak, arguing that it did not cause the harms from delayed treatment because "[i]f the county jails were providing adequate treatment, then incapacitated criminal defendants . . . would not suffer any injury or adverse effect." *Id.* at 1114. The Ninth Circuit rejected that argument, finding causation because the hospital had a duty under Oregon law to accept and treat the defendants; given this statutory obligation, the harms were causally linked to the hospital's acts and omissions. *Id.* at 1115-16. Given the State's statutory obligations to ensure the Plaintiff class receives FAPE without discrimination, the same reasoning establishes causation here.

Plaintiffs allege that they have been denied instruction and services that they need and unnecessarily excluded because the State does not adequately supervise and monitor school districts or enforce federal laws. Compl. ¶¶ 41, 47, 112-29. As in *Mink*, the State's failures to ensure Plaintiffs receive the services that it legally must guarantee them establishes a causal connection between Plaintiffs' harms and Defendants' acts and omissions. 322 F.3d at 1114-16. Despite Defendants' efforts to deflect their statutory duties onto others, the line of causation is

plainly sufficient under Article III. *See Cordero*, 795 F. Supp. at 1362 (deciding on the merits that, "with regard to the state's liability," the state's assertion "that local agencies are not performing up to par or that parents are not fulfilling their duties becomes irrelevant.").

Accordingly, courts have easily found that "causation is satisfied as to [the state] because of its alleged violations of its statutory duty to monitor, investigate and enforce violations of the IDEA, and its ultimate responsibility to ensure that, as long as [the plaintiff] is a student in [the state], she is provided with an appropriate FAPE which complies with the law." *Jackson*, 2017 WL 2296896, at *14. *See Morgan Hill*, 2013 WL 1326301, at *8; *Bryan Indep. Sch. Dist.*, 2007 WL 922215, at *4-5. *See also Bitsilly v. Bureau of Indian Affairs*, 253 F. Supp. 2d 1257, 1263-64 (D.N.M. 2003) (finding traceability where "Plaintiffs allege that their injuries flow *directly* from Defendants' policy of inaction"). This analysis applies with equal force to Plaintiffs' ADA and Section 504 claims, Compl. ¶¶ 11, 15, 139, as Plaintiffs allege that the State fails to meet its "ongoing obligation to ensure that . . . [the Plaintiff class is] free from disability-based discrimination under the Rehabilitation Act and the ADA." *Jackson*, 2017 WL 2296896, at *14.

Defendants also argue that Plaintiffs' injuries are "not fairly traceable to the alleged lack of a prophylactic statewide policy" because "the complaint demonstrates that the existing policies are effective." Mot. at 13-14. But Defendants fail to assume as true Plaintiffs' specific allegations that the State's policies and procedures have *not* been effective, Compl. ¶¶ 53-54, 112-15, and they misstate the allegations that E.O. suffers ongoing harm because the existing policies do not work, *compare* Mot. at 14, *with* Compl. ¶¶ 18, 76-78. The unnecessary use of shortened school days has impacted the Named Plaintiffs and COPAA members across the State of Oregon, *id.* ¶ 48, because "the State's acquiescence to this ongoing and statewide practice" has enabled and worsened the problem, *id.* ¶¶ 53, 54. Defendants' apparent disagreement with

these allegations does not alter the limited scope of the standing inquiry, which must assess only whether the allegations are facially sufficient to invoke jurisdiction. *Meyer*, 373 F.3d at 1039.

Further, the State's policies rely on parents to bring violations to its attention, a passive approach to supervision that Plaintiffs allege does not satisfy the State's duty to ensure FAPE and nondiscrimination. Compl. at ¶¶ 118-20. Because the State has affirmative duties to detect and redress violations proactively, rather than simply "waiting for the phone to ring," shifting that duty onto parents is itself injury caused by the State. *Cordero*, 795 F. Supp. at 1362. The State argues there is no causation "to the extent that plaintiffs' theory of liability depends on a novel interpretation of the IDEA" to require it to prevent any instance of an unlawful shortened school day. Mot. at 14. Defendants not only mischaracterize the allegations, *see* Compl. ¶¶ 14, 36, 115, but they also confuse the purpose of the standing doctrine by disputing the legal merits of Plaintiffs' claims.[3] As in similar cases, Plaintiffs sufficiently establish a causal connection.

C. Plaintiffs' Injuries are Redressable

"[R]edressability analyzes the connection between the alleged injury and requested judicial relief." *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1146 (9th Cir. 2013). To show redressability, a plaintiff has a "relatively modest," *Renee v. Duncan*, 686 F.3d 1002, 1013 (9th Cir. 2012), and "undemanding" burden, *Ocean*, 402 F.3d at 861. It "does not require certainty, but only a substantial likelihood that the injury will be redressed by a favorable . . . decision." *Bellon*, 732 F.3d at 1146. *See Massachusetts v. E.P.A.*, 549 U.S. 497, 525-26 (2007) (remedy would "slow or reduce" harms); *Juliana v. United States*, 217 F. Supp. 3d 1224, 1247 (D. Or.

[3] While Plaintiffs are more than prepared to explain how their theories of liability are supported by the law at the proper stage, the only relevant inquiry here is whether they have a "concrete dispute" with Defendants. *Hall*, 266 F.3d at 976. The legal merits of the claims are assumed. *See Zeiger*, 304 F. Supp. 3d at 843; *Schnitzler v. United States*, 761 F.3d 33, 40 (D.C. Cir. 2014).

2016). "In deciding whether a plaintiff's injury is redressable, courts assume that plaintiff's claim has legal merit." *Bonnichsen v. United States*, 367 F.3d 864, 873 (9th Cir. 2004).

Defendants first suggest that redress hinges on the actions of third parties. *See* Mot. at 15. To the extent Defendants argue that the injuries are not redressable because the remedies depend on the actions of local school districts, Defendants have again missed the point. "[T]he question is whether the injury *caused by the defendant* can be redressed." *Juliana*, 217 F. Supp. 3d at 1247 (emphasis in original). Here, as in similar cases, "the injury is redressable because the [State's] abdication of responsibility is alleged to be ongoing, and the injunctive relief requested could cause those children currently denied FAPE to be provided FAPE in the future." *Morgan Hill*, 2013 WL 1326301, at *8. *See Jackson*, 2017 WL 2296896, at *15; *Bryan Indep. Sch. Dist.*, 2007 WL 922215, at *5.[4] Plaintiffs' injuries would likely be redressed if this Court ordered the State to correct the systemic deficiencies identified in the Complaint. Compl. ¶ 127.

Defendants also argue that Plaintiffs would not benefit from declaratory relief and that the requested injunctive relief is broader than Plaintiffs' injuries. Mot. at 15-16. Both arguments are unavailing. First, a plaintiff is "entitled to a presumption of redressability" where they seek a

[4] Defendants cite *Bitsilly v. Bureau of Indian Affairs* to suggest that harms caused by a state's failure to monitor and ensure compliance do not confer standing unless it is a "foregone conclusion" that schools will not comply with the law. Mot. at 11. This argument is unpersuasive. The plaintiffs in *Bitsilly* lacked standing because they did not allege that they wished to re-enroll in the schools where they might suffer repeat injuries, 253 F. Supp. 2d at 1269, but Plaintiffs allege that E.O., J.N., and J.V. remain in districts where they face an ongoing harm or substantial risk of harm, Compl. ¶¶ 65-66, 76-77, 90. B.M. remains eligible for services and "is expected to receive educational services from another school district," where he faces a significant risk of unnecessary shortened school days due to the State's failures. *Id.* ¶¶ 20, 104. Moreover, to the extent the court in *Bitsilly* required plaintiffs to show that future harms were a "foregone conclusion," this holding is inconsistent with the Ninth Circuit's direction that a future harm "need not be 'literally certain.'" *F.E.R.C.*, 798 F.3d at 805 (internal citations omitted).

declaration that the conduct causing their harms is illegal. *Mayfield v. United States*, 599 F.3d 964, 971 (9th Cir. 2010). The relief will have a "direct consequence" on the plaintiff, and thus establish redressability, if the defendant will be required to act in a way "that will redress [the plaintiff's] past injuries or prevent likely future injuries." *Id.* at 972. A declaration stating that the State must proactively monitor school districts and that its passive approach is unlawful will "settl[e] . . . some dispute which affects the behavior of the defendant towards the plaintiff." *Hewitt v. Helms*, 107 S. Ct. 2672, 2676 (1987). Further, since the State must give assurances that it "has in effect policies and procedures to ensure" that it provides FAPE, Mot. at 3-4, a declaration stating that Defendants lack such policies is substantially likely to result in corrective action. Such relief would directly benefit Plaintiffs, who are at substantial risk of future harm. *See Microsoft Corp. v. U.S. Dep't of Justice*, 233 F. Supp. 3d 887, 903 (W.D. Wash. 2017) (finding redressability due to plaintiff's allegations of substantial likelihood of future harm).

Second, Defendants' argument that Plaintiffs seek injunctive relief beyond the scope of their harms fails because Defendants have again disregarded the allegations. The Complaint alleges that Defendants are responsible for systemic and statewide FAPE denials and discrimination because the State has in place specific policies and procedures that are inadequate or that worsen the problem, Compl. ¶¶ 13-14, 53, 113-14, and because it lacks other needed policies and procedures, *see, e.g.*, *id.* ¶¶ 116-18, 123-25. In calling for systemic relief, Plaintiffs allege widespread harms that impact at least hundreds of Oregon children in school districts throughout the state. *Id.* ¶¶ 1, 14, 48, 54, 108, 120, 126. Plaintiffs thus seek redress for systemic

injuries that warrant systemic injunctive relief.[5] In any event, because the Court "may enter any injunction it deems appropriate," the precise demand made in the complaint is not controlling when assessing redressability. *Kirola v. City & Cty. of San Francisco*, 860 F.3d 1164, 1176 (9th Cir. 2017). Plaintiffs' injuries are redressable.

Since each of the Named Plaintiffs has established injury, causation, and redressability—though only one plaintiff must do so—Defendants' Motion to dismiss their claims for lack of standing should be denied.

II. Plaintiff COPAA Has Associational Standing

The Complaint also establishes that Plaintiff COPAA has standing to sue on behalf of its members. "An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) (citing *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)). A plaintiff asserting associational standing need only show that "at least one" of its members has standing. *United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 555 (1996).

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[5] *Lewis v. Casey* does not support Defendants' argument, as *Lewis* considered whether the "inadequacy [was] widespread enough to justify systemwide relief" when the case was "beyond the pleading stage." 518 U.S. 343, 357, 359 (1996). While *Lewis* held that "[t]he remedy must of course be limited to the inadequacy that produced the injury," the Court acknowledged that "[t]he general allegations of the complaint . . . may well have sufficed to claim injury by named plaintiffs, and hence standing to demand remediation." *Id.* at 357. Plaintiffs' claims of redressability in *Lewis* failed only upon review of the evidence produced at trial. *Id.* at 358.

Defendants do not dispute that COPAA's interests are germane to its purpose or contend that participation of individual COPAA members is required.[6] *See generally* Mot. at 10-16. Defendants challenge COPAA's standing on the ground that the Complaint does not identify by name a member who suffers injury. *Id*. at 12-13. However, the Ninth Circuit does not require a plaintiff to identify any member by name in the complaint "[w]here it is relatively clear . . . that one or more members have been or will be adversely affected by a defendant's action, and where the defendant need not know the identity of a particular member to understand and respond to an organization's claim of injury." *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015). *See League of Women Voters of Cal. v. Kelly*, No. 17-CV-02665-LB, 2017 WL 3670786, at *8 (N.D. Cal. Aug. 25, 2017) ("A plaintiff does not need to plead its evidence; it needs only to allege a claim plausibly. The court cannot discern why—at the pleadings stage—the identity of particular members is required for fair notice of the claims."). A plaintiff must identify a member who has suffered harm *at summary judgment*, but need only allege generally that it has such a member at the pleadings stage. *Cf. Assoc. Gen. Contractors of Am., San Diego Chapter, Inc. v. Cal. Dep't of Transp.*, 713 F.3d 1187, 1194 (9th Cir. 2013) ("on summary judgment," the plaintiff "was required to submit competent evidence, not mere allegations, to

[6] Nonetheless, COPAA easily satisfies both factors. The germaneness test is "undemanding." *Presidio Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153, 1159 (9th Cir. 1998). This litigation is germane to COPAA's mission "to protect and enforce the legal and civil rights of students with disabilities and their families," including securing "appropriate educational services for children with disabilities in accordance with federal laws." Compl. ¶ 21; *see Council of Parent Attorneys and Advocates, Inc. v. DeVos*, No. 18-cv-1636, 2019 WL 1082162, at *12 (D.D.C. Mar. 7, 2019) (*COPAA*). The third prong is a "prudential, as opposed to constitutional, requirement of standing." *Mink*, 322 F.3d at 1113 (internal citations omitted). "[T]he declaratory and injunctive relief requested . . . is clearly not of a type that requires the participation of any individual member." *COPAA*, 2019 WL 1082162, at *12 (internal citations omitted). *See also Morgan Hill*, 2013 WL 1326301, at *8 (holding that parent associations had standing under *Hunt*).

demonstrate that at least one of its members had standing").[7] Defendants' reliance on *Assoc. Gen. Contractors*, Mot. at 12, a case that evaluated the plaintiff's standing at the summary judgment stage, is thus misplaced.

Plaintiffs allege that "COPAA's members include parents, attorneys, and advocates of the Named Plaintiffs and members of the Plaintiff class," Compl. ¶ 131, and that members encounter the problem of unlawful shortened school days statewide, *id.* ¶ 48.[8] As Plaintiffs have explained, *see supra* p. 5, the Complaint alleges that Defendants have caused the Named Plaintiffs and Plaintiff class to suffer FAPE denials and discrimination. Defendants do not dispute that "[d]enial of FAPE to a child is also an injury to the parent," *Morgan Hill*, 2013 WL 1326301, at *8, or that a parent is harmed when their child is needlessly segregated on the basis of disability, *see Blanchard v. Morton Sch. Dist.*, 509 F.3d 934, 938 (9th Cir. 2007). Thus, Plaintiffs have shown at a minimum that COPAA's parent members have an injury in fact.[9] Compl. ¶¶ 23, 25. It is clear that Defendants do not need to know the identity of any members to respond to the alleged harms given their recognition that Plaintiffs assert a cognizable interest, Mot. at 11, and in light of the participation of the Named Plaintiffs. Plaintiff COPAA has associational standing.

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[7] Plaintiffs are prepared to identify members on whose behalf COPAA has standing by name at summary judgment or, if the Court so orders, in an amended complaint.
[8] Defendants claim the Complaint contains no allegations that COPAA members have been "inappropriately placed on a shortened school day." Mot. at 14. This is incorrect. Compl. ¶ 48.
[9] The Complaint also alleges that COPAA's attorney and advocate members have suffered a frustration of mission and diversion of resources due to Defendants' inadequate system. Compl. ¶ 24. The Court need not decide if these members also would have standing to sue sufficient to confer standing on COPAA since COPAA has standing on behalf of its parent members.

CONCLUSION

For the above reasons, Plaintiffs respectfully request that the Court deny the Motion to Dismiss in its entirety. In the alternative, Plaintiffs ask that the Court grant leave to amend.

Respectfully submitted,

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