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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' MOTION FOR CLASS CERTIFICATION AND MEMORANDUM IN SUPPORT

Request for Oral Argument

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CERTIFICATION OF COMPLIANCE WITH LOCAL RULE 7.1

In compliance with Local Rule 7.1, the parties conferred in good faith through counsel by telephone and e-mail to resolve the dispute regarding this Motion and have been unable to do so.

MOTION

Plaintiffs hereby move the Court to certify this case as a class action pursuant to Federal Rule of Civil Procedure 23(b)(2). Plaintiffs ask the Court to certify a class of: All students with disabilities aged 3 to 21 residing in Oregon who are eligible for special education and related services under the Individuals with Disabilities Education Act ("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. Certification of this class will allow Plaintiffs to seek relief from Defendants' statewide policies, practices, and procedures that result in systemic denials of a free appropriate public education in the least restrictive environment and disability-based discrimination.

MEMORANDUM OF LAW

I. INTRODUCTION

As detailed in the Complaint ("Compl.") (Dkt. No. 1), this matter challenges the ongoing failure by Defendants Oregon Department of Education ("ODE"), ODE Director Colt Gill, and Governor Katherine Brown (collectively, "the State") to effectively address the systemic practice among Oregon school districts of shortening the length of students' school day due to their disability-related behaviors. Under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, the State must ensure that all eligible students receive a free appropriate public education ("FAPE") in the least restrictive environment ("LRE"). Under the 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, the State may not discriminate against children on the basis of their disabilities when administering educational services, programs, or activities.

When Congress enacted the IDEA, it found that "[s]tate educational agencies, in partnership with local educational agencies, parents of children with disabilities, and other individuals and organizations, are in the best position to improve education for children with disabilities and to address their special needs." 20 U.S.C. § 1450(3). Accordingly, the Ninth Circuit has explained that "the state educational agency, in this case the ODE, has the ultimate responsibility for assuring that all handicapped children have the right to a free appropriate public education." *Kerr Ctr. Parents Ass'n v. Charles*, 897 F.2d 1463, 1470 (9th Cir. 1990) (analyzing ODE's duties under predecessor statute to the IDEA); *see Morgan Hill Concerned Parents Ass'n. v. Cal. Dep't of Educ.*, No. 2:11-cv-3471-KJM-AC, 2013 WL 1326301, at *8 (E.D. Cal. Mar. 29, 2013) (holding that a state educational agency "is subject to statutory monitoring, investigation and enforcement obligations, and ultimately is responsible for ensuring the provision of FAPE."). This duty requires Defendants to effectively monitor and supervise compliance by local school districts. *See*, *e.g.*, 20 U.S.C. § 1416(a)(1)(C), (a)(3); 34 C.F.R. § 300.600. Yet, under the State's current lax supervision, Oregon school districts routinely subject students with disability-related behaviors to shortened school days unnecessarily, denying these students the education that Defendants must guarantee them. *See generally* Compl.

Plaintiffs J.N., E.O., J.V., and B.M. ("Named Plaintiffs") are Oregon students who are each currently being subjected to or are at substantial risk of being subjected to a shortened school day because of their disability-related behaviors. Each Named Plaintiff is a student with a disability eligible for special education and related services under the IDEA and an individual

with a disability within the meaning of the ADA and Section 504. Compl. ¶¶ 17-20. The Named Plaintiffs seek to represent a class of similarly-situated students in order to obtain systemic relief, including an order declaring that the State's general supervision system is unlawful and requiring Defendants to implement policies and procedures necessary to effectively identify the districts engaged in the misuse of shortened school days, correct violations of federal law, and provide needed technical assistance and resources. Rather than challenging individual decisions about the services and supports provided to specific students, Named Plaintiffs challenge system-wide defects that pose a common risk of harm to them and all putative class members. As detailed in this memorandum, the proposed class satisfies Federal Rule of Civil Procedure 23.

II. BACKGROUND FACTS

The Named Plaintiffs and putative class members are Oregon students with disabilities who 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. Compl. ¶ 31. In Oregon, many 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. Though the full school day in Oregon typically lasts six hours, the children in the class often receive significantly shorter school days, *id.* ¶ 3; for instance, E.O. has received a school day half as long as that of his peers, *id.* ¶ 74, and J.N., J.V., and B.M. have received school days as short as thirty minutes, one hour, or two hours of school a day, *id.* ¶¶ 17, 20, 83, 97. Some students remain on shortened school days for prolonged or indefinite periods of time, *id.* ¶¶ 50-51; *see*, *e.g.*, *id.* ¶¶ 83-89, and some are eventually denied instruction altogether, *id.* ¶¶ 3; *see*, *e.g.*, *id.* ¶¶ 20, 52, 103-04. Students on shortened school day schedules routinely receive their instruction 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 . . . ." *Id.* ¶ 4; *see id.* ¶¶ 59, 75, 84, 97.

Because of their limited instructional time, these students "frequently fall behind academically and miss out on critical social opportunities in which they can practice appropriate behaviors." *Id.* ¶ 5. Furthermore, as a result of their exclusion from school, they suffer stigma, emotional trauma, humiliation, and shame. *Id.* ¶¶ 4, 51. These harms are unnecessary because 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." *Id.* ¶ 50; *see*, *e.g.*, *id.* ¶¶ 61, 77, 83, 97-99. "The 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. As a result of the misuse of shortened school days, these students are denied their rights to FAPE in the LRE and to nondiscrimination. *See id.* ¶¶ 7, 114.

Plaintiffs' legal claims, which all members of the class share, center on the State's limited and ineffectual responses to this statewide problem, which has persisted for years. *Id.* ¶¶ 1, 7, 48, 54, 105-11. Defendants have failed to ensure FAPE in the LRE and nondiscrimination for the Named Plaintiffs and putative class members due to at least three systemic deficiencies: (1) the lack of state-level policies or procedures to identify the districts that unlawfully impose shortened school days and thus need further supervision and monitoring, *id.* ¶¶ 115-18; (2) the State's failure to proactively monitor districts' legal compliance and correct any noncompliance beyond simply operating its administrative complaint system, *id.* ¶¶ 115, 119-22; and (3) the State's failure to provide needed resources, technical assistance, and training to help districts support students effectively for the full school day, *id.* ¶¶ 101, 115, 123-26. Plaintiffs allege that

these systemic deficiencies have subjected the Named Plaintiffs and at least hundreds of similarly-situated children to harm and the substantial risk of future harm. *Id.* ¶¶ 31-36.

III. STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 23(a), certification is appropriate if: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). Plaintiffs must also satisfy one of Rule 23(b)'s sub-provisions; the Named Plaintiffs seek to certify this proposed class pursuant to Rule 23(b)(2), under which certification is proper when the defendant "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole[.]" Fed. R. Civ. P. 23(b)(2).

A class action to enforce the rights of individuals with disabilities is "precisely the sort of civil rights class action contemplated by Rule 23(b)(2)." *Californians for Disability Rights, Inc. v. Cal. Dep't of Transp.*, 249 F.R.D. 334, 349 (N.D. Cal. 2008) (holding that disability rights groups and two individuals with disabilities satisfied Rule 23(b)(2)). *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997) ("Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of class actions permitted by Rule 23(b)(2)) (internal citations omitted); *Parsons v. Ryan*, 754 F.3d 657, 686 (9th Cir. 2014) (explaining that "the primary role of [23(b)(2)] has always been the certification of civil rights class actions" since civil rights cases "generally involve an allegation of discrimination against a group as well as the violation of rights of particular individuals.") (internal citations omitted).

IV. ARGUMENT

As discussed below, courts have routinely granted class certification pursuant to Federal Rule of Civil Procedure 23(b)(2) in systemic cases concerning the rights of students with disabilities under the IDEA, ADA, and/or Section 504. Certification is likewise warranted here.

A. The Class is so Numerous that Joinder of All Members is Impractical.

Under Rule 23, the numerosity requirement is met if "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). To determine whether joinder is impracticable, courts evaluate two relevant factors: (1) the size of the class; and (2) the difficulty or inconvenience of joining all members of the class. *See Chastain v. Cam*, No. 3:13-cv-01802-SI, 2016 WL 1572542, at *5 (D. Or. Apr. 19, 2016).

First, although courts consider the estimated class size when evaluating numerosity, "[t]he numerosity prerequisite does not impose an absolute requirement on the number of individuals comprising the class." *Fox-Quamme v. Health Net Health Plan of Or., Inc.*, No. 3:15-cv-01248-BR, 2017 WL 1034202, at *6 (D. Or. Mar. 9, 2017). There is no minimum number or bright-line test. *See A.F. ex rel Legaard v. Providence Health Plan*, 300 F.R.D. 474, 480 (D. Or. 2013). However, in this judicial district, "there is a 'rough rule of thumb' that 40 class members is sufficient to meet the numerosity requirement." *Id.* (citing *Giles v. St. Charles Health Sys., Inc.*, 294 F.R.D. 585, 590 (D. Or. 2013)).

The number of putative class members in this case far exceeds that "rule of thumb" because the estimated class size consists of at least hundreds of students with disability-related behaviors throughout Oregon who are currently harmed due to being placed on a shortened school day schedule or at substantial risk of future harm. Compl. ¶¶ 1, 32. One advocacy organization that supports Oregon families of students with disabilities reports that 70

unduplicated families of students with disabilities who need behavioral supports complained about shortened school days from July to December 2018, a total that alone exceeds the rule of thumb. *See* Declaration of Thomas Stenson ¶¶ 14-16 ("Stenson Decl."); *see* Stenson Decl. Ex. 1.

Based on the evidence of 70 complaints regarding shortened school days in just six months of the last school year—alone sufficient to establish numerosity—the court can reasonably infer that the class of affected children numbers at least in the hundreds given the vast number of Oregon students who have disabilities that may impact their behaviors.[1] *Cf. Shields v. Walt Disney Parks & Resorts US, Inc*., 279 F.R.D. 529, 546 (C.D. Cal. 2011) (relying on the inference that "the number of . . . complaints to address a particular topic represents only a fraction of the number of potential class members affected by that issue" to find that twelve complaints from blind theme park patrons regarding inaccessible signage made the subclass sufficiently numerous under Rule 23).

This inference is supported by Plaintiffs' expert Dr. Albert Greenwood, a clinical child psychologist who has consulted for Oregon school districts and families for over 35 years. Declaration of Albert William Greenwood ¶ 2 ("Greenwood Decl."). Dr. Greenwood has opined that "there are at least hundreds of students with significant behavior support needs in Oregon public schools," and that "[m]any have been placed on shortened school days before their schools implemented the methods" described in the report enclosed with his declaration. *Id.* ¶ 4(h). This evidence additionally demonstrates that the number of known and unknown

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[1] *See* ODE, *Oregon Statewide Report Card 2018-2019*, at 73 (2019), https://www.oregon.gov/ode/schools-and-districts/reportcards/Documents/rptcard2019.pdf (reporting that there were 80,436 special education students under the IDEA in the 2018-2019 school year, 5,331 of whom were students with Emotional Disturbance) (Declaration of Alice Y. Abrokwa ("Abrokwa Decl.") Ex. 1).

members is sufficient to make joinder impracticable.[2]

Second, in addition to the number of class members, the Court may consider several factors relating to the "difficulty or inconvenience of joining all members of the class," consistent with the principle that "[i]mpracticability does not mean impossibility." *J.R. v. Oxnard Sch. Dist.*, No. LA CV17-04304 JAK (FFMx), 2018 WL 6133412, at *10 (C.D. Cal. June 6, 2018) (citing *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964)). These factors include: "the geographical spread of class members;" "the ease of identifying and contacting class members;" and "the ability and willingness of individual members to bring claims, as affected by their financial resources, the size of the claims, and their fear of retaliation in light of an ongoing relationship with the defendant." *Chastain*, 2016 WL 1572542, at *5 (internal citations omitted).

An analysis of these factors further illustrates the impracticability of joinder in this case. For example, given the statewide nature of the allegations in this matter, the putative class members are spread geographically throughout Oregon. *See* Compl. ¶¶ 32, 108. In addition, many potential class members attend school in rural and small school districts, *see id.* ¶¶ 12, 50; Stenson Decl. ¶¶ 22-24[3]—areas where contacting members is more difficult. *See Perez-Benites v. Candy Brand, LLC*, 267 F.R.D. 242, 247 (W.D. Ark. 2010) (joinder of all class members

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[2] *See also Sueoka v. United States*, 101 F.App'x 649, 653 (9th Cir. 2004) ("[B]ecause plaintiffs seek injunctive and declaratory relief, the numerosity requirement is relaxed and plaintiffs may rely on the reasonable inference arising from plaintiffs' other evidence that the number of unknown and future members . . . is sufficient to make joinder impracticable.").

[3] *See also* ODE, *Oregon Educator Network*, https://www oregon gov/ode/educator-resources/Pages/Oregon-Educator-Network aspx (last visited Jan. 30, 2020) ("In Oregon, one-room schoolhouses are not a thing of the past. Out of 197 school districts in Oregon, 110 have fewer than 1000 students, and 27 have fewer than 100 students!") (Abrokwa Decl. Ex. 2); Chalkboard Project et al., *Rural Education in Oregon: Overcoming the Challenges of Income and Distance*, 2 (2016), https://chalkboardproject org/sites/default/files/Rural Education Report Final_0 pdf ("38 percent of Oregon students attend rural schools.") (Abrokwa Decl. Ex. 3).

"highly impracticable" because "Plaintiffs state that most members of both classes come from rural, isolated areas . . . ."). Furthermore, comparatively few families are able to pursue individual lawsuits alleging harms from the State's systemic policies and practices due to limitations on their economic resources[4] and on the availability of counsel.[5] *See* Stenson Decl. ¶¶ 19-21. Additional barriers to advocacy by the parents of individual students include lack of knowledge, difficulty navigating the unique jargon of special education, and an intimidating process. *See* Declaration of Melody Musgrove ¶ 63 ("Musgrove Decl.").[6] In any event, the class definition includes students who are at substantial risk of future harm, and "[j]oinder in the

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[4] *See* Secretary of State Audit Report, *The Oregon Department of Education Should Take Further Steps to Help Districts and High School Increase Oregon's Graduation Rate*, 16-17 (2017), https://olis.leg.state.or.us/liz/2019R1/Downloads/CommitteeMeetingDocument/161509 ("More than half of Oregon's students are classified as economically disadvantaged," and "[i]n Oregon, nearly one in five school-aged children lives in poverty . . . .") (Abrokwa Decl. Ex. 4); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE (GAO), *IDEA Dispute Resolution Activity in Selected States Varied Based on School Districts' Characteristics*, GAO-20-22, at 20 (Nov. 2019), https://www.gao.gov/assets/710/702514.pdf ("[S]takeholders consistently told us the cost of attorneys and expert witnesses was a significant barrier to parents' ability to use the due process complaint option in particular—especially low-income parents.") (Abrokwa Decl. Ex. 5).

[5] According to ODE, there were only 11 special education attorneys in the entire state, in addition to Plaintiffs' counsel Disability Rights Oregon, available to represent families in 2018. *See* ODE, *Attorneys in Oregon Who Represent Parents and Children in Special Education Disputes*, https://www.oregon.gov/ode/rules-and-policies/Documents/attorneyscurrent.pdf (Abrokwa Decl. Ex. 6); *see also* GAO, *supra* note 4, at 21 ("The availability of attorneys can also be a challenge. According to stakeholders we interviewed, some areas, particularly rural ones, may have fewer available attorneys.").

[6] *See* GAO, *supra* note 4, at 22 ("[T]he area of special education in general and the federal law, IDEA, are complicated, and parents often do not understand the IDEA dispute resolution process"; "many parents feel they are at a disadvantage in a conflict with the school district due to an imbalance of power"; "some parents who live in less populated and more rural areas may be reluctant to initiate dispute resolution out of concern for their privacy and because, for example, in these communities they and their children are more likely to see the teachers, principals, and district officials at the grocery store or at church, which may be awkward"; "parents may fear the school district will retaliate against their children or them if the parents initiate a dispute"; "some parents face other challenges, such as language barriers, difficulty obtaining time off from work, transportation, or internet access . . .").

class of persons who may be injured in the future has been held impracticable." *Smith v. Heckler*, 595 F. Supp. 1173, 1186 (E.D. Cal. 1984) (citing *Newberg on Class Actions*); *see Inland Empire—Immigrant Youth Collective v. Nielsen*, No. EDCV 17-2048 PSG (SHKx), 2018 WL 1061408, at *7 (C.D. Cal. Feb. 26, 2018) ("[T]he presence of future class members renders joinder inherently impractical, thus satisfying the numerosity requirement's fundamental purpose."). For each of these reasons, the class is so numerous that joinder is impracticable.

B. The Class Members Share Common Questions of Law or Fact.

Under Rule 23(a)(2), "commonality requires that the class members' claims 'depend upon a common contention' such that 'determination of its truth or falsity will resolve an issue that is central to the validity of each [claim] in one stroke.'" *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 588 (9th Cir. 2012) (citing *Wal-Mart v. Dukes*, 564 U.S. 338, 350 (2011)). The proceedings must be capable of "generat[ing] common answers to common questions of law or fact that are apt to drive the resolution of the litigation." *Id.* (internal quotation marks and citations omitted). "This does not, however, mean that *every* question of law or fact must be common to the class," *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 957 (9th Cir. 2013), as "commonality only requires a single significant question of law or fact," *Mazza*, 666 F.3d at 589. The plaintiff need not show "even a preponderance" of common questions, nor must common issues predominate over individual issues in Rule 23(b)(2) cases. *Parsons*, 754 F.3d at 675, 688 (internal quotation marks and citations omitted).

"The threshold requiremen[t] of commonality [is] not high," and "[t]his provision has been construed permissively," *Giles*, 294 F.R.D. at 590 (internal quotation marks and citations omitted). *See Mazza*, 666 F.3d at 589 (describing commonality as a "limited burden"). "The existence of shared legal issues with divergent factual predicates is sufficient, as is a common

core of salient facts coupled with disparate legal remedies within the class." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998) (cited in *Giles*, 294 F.R.D. at 590).

Following the Supreme Court's decision in *Wal-Mart*, the Ninth Circuit confirmed that, in civil rights cases seeking injunctive or declaratory relief, "the commonality requirement can be satisfied by proof of the existence of systemic policies and practices that allegedly expose [class members] to a substantial risk of harm." *Parsons*, 754 F.3d at 681. In *Parsons v. Ryan*, the plaintiffs alleged that statewide policies and practices regarding health care and conditions of confinement exposed all individuals incarcerated in Arizona's prison system to a substantial risk of serious harm to which prison officials were deliberately indifferent. *See id.* at 662-64. Plaintiffs sought declaratory and injunctive relief to remedy the systemic deficiencies resulting from those policies and practices. *Id.* at 663.

Upon reviewing the nature of the underlying claims, the Court found commonality satisfied because "every inmate suffers exactly the same constitutional injury when he is exposed to a single statewide . . . policy or practice that creates a substantial risk of serious harm," meaning that the truth or falsity of the allegations about specific policies and practices can be determined "in one stroke." *Id.* at 678. In finding commonality, the Ninth Circuit relied on analogous case law involving allegations that "agency-wide monitoring policies and practices, or lack thereof, create a risk of harm shared by the entire class," and that "specific and overarching systemic deficiencies . . . place children at risk of harm." *Id.* at 682 (internal quotation marks and citations omitted). Such exposure to the risk of harm due to "systemic and centralized policies or practices" will suffice—even if some members experience different injuries or none at all—because "these policies and practices are the 'glue' that holds together the putative class . . . ." *Id.* at 678, 684. *See Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001) (abrogated on

other grounds) ("[C]ommonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members.").

In cases specifically involving the rights of individuals with disabilities, the Ninth Circuit has held both before and after *Wal-Mart* that any differences among class members' needs "do not in any way bear on or disrupt what they allegedly have in common," namely, a common exposure to the defendant's policies and procedures "that constitutes the core factual predicate of their shared legal claim." *Parsons*, 754 F.3d at 680 n.23. *See Armstrong*, 275 F.3d at 868.

Furthermore, in analogous cases involving students' educational rights under the IDEA, ADA, and/or Section 504, courts have routinely found commonality satisfied. *See, e.g.*, *D.L. v. District of Columbia*, 860 F.3d 713, 724-25 (D.C. Cir. 2017) (common questions of whether students suffered denials of FAPE, lack of timely eligibility determinations, and lack of timely transition services under the IDEA due to deficient and poorly-implemented state policies and practices); *V.W. v. Conway*, 236 F. Supp. 3d 554, 574-76 (N.D.N.Y. 2017) (common question of whether district policy of not providing direct instruction to incarcerated youth amounts to systemic deprivation of special education services in violation of the IDEA); *G.F. v. Contra Costa Cty.*, No. 13-cv-03667-MEJ, 2015 WL 4606078, at *9-10 (N.D. Cal. July 30, 2015) (common questions concerning the special education services provided to detained youth and whether defendants' practices violate the IDEA, ADA, and Section 504); *Chester Upland Sch. Dist. v. Pennsylvania*, No. 12-132, 2012 WL 1473969, at *3-4 (E.D. Pa. Apr. 25, 2012) (common questions of whether school closures or reduction of funding will cause students with disabilities to be denied FAPE under the IDEA or other special education services required by federal law, including Section 504); *C.G. v. Commonwealth of Pa. Dep't of Educ.*, No. 1:06-cv-1523, 2009 WL 3182599, at *5-6 (M.D. Pa. Sept. 29, 2009) (common question of whether state

special education funding formula impedes students' special education in violation of the IDEA, ADA, Section 504 and Fourteenth Amendment).

In this case, Plaintiffs raise several common questions of fact and law, including:

a) Whether the State must ensure the class members receive FAPE in the LRE and freedom from disability-based discrimination;

b) Whether the State's legal obligation to ensure that the class members receive FAPE in the LRE without discrimination requires it to take effective action to identify the school districts that impose shortened school days unlawfully, correct legal violations, and provide technical assistance and resources to prevent future noncompliance;

c) Whether the State has a policy, procedure, or systemic practice of failing to:

   1. implement a statewide data collection and monitoring system that would enable it to proactively identify violations of the class members' rights;
   2. investigate, monitor, or correct violations of the class members' rights under federal law absent an administrative complaint;
   3. investigate, monitor, or correct violations of its own laws and policies concerning reduced school days and instructional time; and
   4. provide needed technical assistance and resources to local school districts to prevent future noncompliance;

d) Whether the State's policies, procedures, and systemic practices for supervising school districts—including, but not limited to, the absence of relevant data collection and monitoring by ODE; ODE's passive model for enforcing districts' compliance; ODE's written policy concerning reduced school days; and ODE's administration of the State's

school funding formula—place class members at substantial future risk of being denied FAPE in the LRE; and

e) Whether the State's policies, procedures, and systemic practices for supervising school districts—including, but not limited to, the absence of relevant data collection and monitoring by ODE; ODE's passive model for enforcing districts' compliance; ODE's written policy concerning reduced school days; and ODE's administration of the State's school funding formula—place class members at substantial future risk of being subjected to disability-based discrimination, including being unnecessarily segregated from their peers without disabilities.

Consistent with the above case law, these common questions satisfy Rule 23(a)(2).

In support of this Motion, Plaintiffs have submitted an expert declaration from Dr. Melody Musgrove. Based on decades of experience "at the classroom, school, school district, state, and federal levels," Dr. Musgrove explains that in order to ensure that students receive FAPE in the LRE without discrimination, states must operate a general supervision system that relies on eight essential components. Musgrove Decl. ¶¶ 36, 74. In addition to describing common harms associated with shortened school days for students needing behavior supports, *id.* ¶¶ 22-33, Dr. Musgrove concludes that a state can detect, redress, and prevent violations by districts—including the unnecessary use of shortened school days—by effectively operating a general supervision system with these components. *See id.* ¶¶ 35, 37-38, 71-74. However, "[w]ithout the effective use of these components, states place their students at significant risk of being denied FAPE in the LRE and discriminated against based on disability." *Id.* ¶ 71.

Plaintiffs allege statewide deficiencies in several of the components, including: collection and analysis of data on processes and results, *compare* Musgrove Decl. ¶¶ 54-59, *with* Compl.

¶¶ 116-18; integrated monitoring activities, *compare* Musgrove Decl. ¶¶ 46-51, *with* Compl. ¶¶ 53, 109, 113-16; the issuance and effective implementation of appropriate policies and procedures, *compare* Musgrove Decl. ¶¶ 44-45, *with* Compl. ¶¶ 13-14, 53, 112-15; improvement, correction, incentives, and sanctions, *compare* Musgrove Decl. ¶ 60, *with* Compl. ¶¶ 119-22; and targeted technical assistance and professional development, *compare* Musgrove Decl. ¶¶ 66-70, *with* Compl. ¶¶ 123-25. As the above case law demonstrates, *supra* pp. 10-13, these allegations that systemic deficiencies in the State's general supervision system commonly harm all class members or expose them to a substantial risk of harm in violation of the IDEA, ADA, and Section 504 are sufficient to establish commonality.

Plaintiffs have submitted ample evidence to support their allegations that "specific and overarching systemic deficiencies [by the State] place children at risk of harm," including the allegations that "agency-wide monitoring policies and practices, or lack thereof, create a risk of harm shared by the entire class." *Parsons*, 754 F.3d at 682 (citing *DG v. Devaughn*, 594 F.3d 1188, 1196 (10th Cir. 2010) and *Connor B. ex rel. Vigurs v. Patrick*, 278 F.R.D. 30, 34 (D. Mass 2011)) (internal quotation marks omitted). For example, Defendant Gill admits the State does not track how its school districts generally respond to student behaviors in practice, Compl. ¶ 116; Abrokwa Decl. Ex. 7, and the State has acknowledged in administrative proceedings that little, if any, of the data that it obtains through its monitoring and supervision processes yields information that could inform it of ongoing compliance issues regarding individual students absent a written complaint, Compl. ¶ 109; Abrokwa Decl. Ex. 8 at 9. State law requires districts to include information about the rationale for imposing a shortened school day in students' individualized education programs, O.R.S. § 343.161(4)(c), but the State does not collect this data, *see* Compl. ¶ 117; Abrokwa Decl. Ex. 9 at 11, Ex. 10. Plaintiffs allege that, due to the

State's failure to collect and analyze all relevant data and to use that data to identify monitoring priorities, the State cannot effectively implement, monitor, and enforce its own law, much less federal laws. Compl. ¶¶ 117, 119-22. *See* Musgrove Decl. ¶¶ 44-51, 54-60 (describing general supervisory requirements regarding data, monitoring, policies and procedures, and correction).

Plaintiffs have further alleged that the State's deficient policies, practices, and procedures for providing districts with needed technical assistance and professional development expose all class members to a substantial risk of harm. For instance, despite its awareness of the longstanding and statewide nature of this problem, *see* Compl. ¶¶ 105-11, ODE has a written policy on Reduced School Days that fails to even mention districts' nondiscrimination obligations under the ADA and Section 504 and provides only minimal guidance to districts on how they can educate students with behavioral needs without resorting to shortened school days, *see id.* ¶ 53; Abrokwa Decl. Ex. 11. Plaintiffs allege that the deficiencies in this statewide policy are exacerbated by the State's failure to provide needed resources, technical assistance, and training to districts. Compl. ¶¶ 53, 123-26. *See* Musgrove Decl. ¶¶ 66-70 (describing general supervisory requirements for targeted technical assistance and professional development). Any limited technical assistance that the State does provide to discourage the use of shortened school days is undermined by its statewide school funding formula, which rewards districts financially for providing limited instruction through home tutoring rather than through a full day of classroom instruction, *see* Compl. ¶ 53; O.A.R. 581-023-0006(7)(b)(D). *Cf.* Musgrove Decl. ¶ 70 (explaining that Mississippi changed its school funding structure because the prior formula created a perverse incentivize for districts to place students in segregated educational settings).

The declaration and accompanying report of Dr. Albert Greenwood further support Plaintiffs' allegations that the State's failure to provide districts with needed technical assistance

and professional development has exposed all putative class members to common harms. *See generally* Greenwood Decl. Dr. Greenwood evaluated the educational services of the Named Plaintiffs, and, although none attend school in the same district, Compl. ¶ 48, Dr. Greenwood found "consistent similarities," Greenwood Decl. ¶ 4, in how each student's district "struggled to develop appropriate and effective supports,"[7] consistent with the Complaint allegations and with his "experience consulting with other Oregon school districts over the years," Greenwood Decl. Ex. 2 at 8. According to Dr. Greenwood, the extended use of shortened school days "carries inherent risks," including changing the "basic expectation that attending school means attending for a full day," and giving students a sense of being unwanted or rejected, which can lead to "additional problematic social behavior, not improved behavior." *Id.* at 6-7. Yet "[e]ach of the students' school districts shortened the student's day without first employing effective school-based behavioral supports . . . ." Greenwood Decl. ¶ 4(c).

Dr. Greenwood found that "[a]ll four children were denied an appropriate education and educational opportunities enjoyed by their peers without disabilities because they were placed on shortened school days for extended periods of time." *Id.* ¶ 4(g). Dr. Greenwood specifically found that, "[i]n all four cases, the school district teams appeared to lack knowledge or resources" to meet the students' needs, *id.* ¶ 4(d), and that, "[d]ue to the lack of effective supports and the length of their shortened days," the students "are all at significant risk for shortened school days in the future, and the related harms of disengagement and alienation from

[7] For example, Dr. Greenwood found the following key deficiencies in common: "[l]ack of clear, data-based rationales for a shortened school day placement"; "[p]roblems with identification of skill deficiencies associated with the need for a shortened day"; "[i]nadequate behavior support before resorting to a shortened day"; "[m]inimal to no consultation with outside specialists with expertise"; "[l]ack of planning and implementation of strategies to address the students' deficits while on a shortened school day; and [a]bsence of planning and implementation of strategies for the student's return to school for a full school day." Greenwood Decl. Ex. 2 at 44-45.

school." *Id.* ¶ 4(g). Dr. Greenwood's findings about the students' risk of future harm are consistent with Dr. Musgrove's general experience. *See* Musgrove Decl. ¶ 51 ("In my experience, when states direct school districts to correct one exclusionary practice (e.g. restraints and seclusion) without providing them the guidance, technical assistance and professional development that local personnel need to effectively support students in the classroom, those personnel often engage in other exclusionary practices instead (e.g., suspensions, expulsions, or shortened school days).").

Dr. Greenwood is familiar with the particularly limited resources and expertise available in Oregon's small and rural districts, Greenwood Decl. Ex. 2 at 30, and has found that a lack of awareness as to the need for "very detailed and intensive preparation and implementation" of behavioral interventions "is a common occurrence in many school districts that [he] consult[s] with," *id.* at 44. In Dr. Greenwood's view, the "lack of effective support has little to do with staff motivation or regard for students," but "reflects a problem shared by many Oregon school districts: a lack of adequate training and staff support to develop and maintain an array of interventions that are essential for school districts" to meet these students' needs. *Id.* at 47. These findings of common harms due to the lack of needed guidance and support for local school districts further illustrate that all students in the putative class are at significant risk of unnecessary exclusion through shortened school days.

If this Court found a deficiency in these or any other component of the State's general supervision system on the merits, such a finding would establish that, as Plaintiffs have alleged, all class members are commonly harmed or at substantial risk of harm "as a matter of formal policy and systemic practice." *Parsons*, 754 F.3d at 680. *See also Willis v. City of Seattle*, 943 F.3d 882, 887 (9th Cir. 2019) (plaintiff may establish commonality by "identify[ing] how any

alleged deficiency resulted in a common injury to the constitutional or statutory rights of all class members."). As with the Named Plaintiffs, every class member "suffers exactly the same [statutory] injury" when exposed to statewide policies or practices that "create[] a substantial risk of serious harm," namely the denial of FAPE in the LRE and disability-based discrimination. *Parsons*, 754 F.3d. at 678. *See D.L.*, 860 F.3d at 724 (affirming certification where, among other harms, plaintiffs alleged the common harm of FAPE denials under IDEA due to deficient and poorly-implemented state policies). Whether the above "common core" of facts violates the State's duties to the class members under the IDEA, ADA, and Section 504 presents common legal questions that this Court can resolve in one stroke because, as the Ninth Circuit made clear in *Parsons*, "either each of the policies and practices is unlawful as to every [class member] or it is not." 754 F.3d at 678. For these reasons, the commonality requirement is satisfied.

C. The Named Plaintiffs' Claims are Typical of the Class.

"The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). "Like commonality, '[t]he threshold requiremen[t] of typicality [is] not high.'" *Giles*, 294 F.R.D. at 591 (alterations in original) (internal citations omitted). "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020. Thus, "[w]hen assessing typicality, the court examines 'the nature of the claim or defense of the class representative, and not . . . the specific facts from which it arose or the relief sought.'" *Giles*, 294 F.R.D. at 591 (citing *Hanon*). "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not

unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Hanon*, 976 F.2d at 508 (internal quotation marks and citations omitted).

Consistent with these principles, courts have held that "[d]iffering factual scenarios resulting in a claim of the same nature as other class members do[] not defeat typicality." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 n.9 (9th Cir. 2011) (decided post-*Wal-Mart*). *See Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010) (particular characteristics of class representative or class member do not impact the resolution of a general statutory question and thus cannot render the class representative's claim atypical); *Armstrong*, 275 F.3d at 869 ("Although there are minor differences in the nature of the specific injuries suffered by the various class members, the differences are insufficient to defeat typicality."). *See also M.B. ex rel. Eggemeyer v. Corsi*, 327 F.R.D. 271, 281 (W.D. Mo. 2018) (finding typicality where plaintiffs were not litigating "whether the named Plaintiffs should have been administered psychotropic drugs," but "whether Defendants are obligated to provide additional safeguards against the improper administration of psychotropic medications to children in foster care . . . .").

Typicality is satisfied here because the Named Plaintiffs each fall within the class definition, Compl. ¶¶ 17-20, and they share the same interests as other putative class members, Stenson Decl. ¶ 10; *see also* Declaration of Cheryl Cisneros ¶ 5 ("Cisneros Decl."); Declaration of Alisha Overstreet ¶¶ 2-3 ("Overstreet Decl."); Declaration of Sarah Kaplansky ¶¶ 2-4 ("Kaplansky Decl."); Declaration of Traci Modugno ¶¶ 2-3 ("Modugno Decl."). The Named Plaintiffs experience the same or similar injuries as other class members, *id.* ¶¶ 48-54, and, as students in districts subject to uniformly-applicable state policies, practices, and procedures, they assert the same systemic legal claims as any other member, *id.* ¶¶ 112-45; *see supra* pp. 10-14. *See also* Greenwood Decl. Ex. 2 at 1-3, 8-9, 41-44 (identifying similarities among students).

This is so notwithstanding any differences in the students' disabilities and individual behavioral needs. *See* Greenwood Decl. ¶ 4; Musgrove Decl. ¶ 6. As Dr. Greenwood explains, "[a]ll four students are children with disabilities who have been found eligible for special education, and who have significant behavior support and other learning needs." Greenwood Decl. ¶ 4(a). All were placed on a shortened school day schedule due to their disability-related behaviors, and two students currently remain on a shortened school day. *Id.* ¶ 4(b). "[T]hey are all at significant risk for shortened school days in the future . . . ." *Id.* ¶ 4(g).

Specifically, Dr. Greenwood found that each student was placed on a shortened school day without first receiving timely and effective Functional Behavioral Assessments ("FBAs")[8] or Behavior Intervention Plans ("BIPs")[9] that would have mitigated the need for and helped prevent the prolonged use of shortened school days. *See* Greenwood Decl. Ex. 2 at 1-3. None of the students received an adequate plan to help them return to a full day of school, *id.* at 9, and, "[i]n each of these cases, even if a shortened school day had been warranted, it should only have been for a brief period of a few days or weeks, not months or years," *id.* at 2. Consistent with what Dr. Greenwood has seen in other Oregon school districts, the classroom and school staff for these students "needed additional training and should have been able to consult with persons with the expertise needed" to effectively address the students' behaviors. *Id.* at 44. Based on these and other similarities, and his decades of consulting for districts and developing

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[8] Dr. Greenwood defines a FBA as "an assessment process to identify factors contributing to a student's challenging behavior(s)" that "identifies specific behaviors of concern," the "events occurring prior to a given behavior," and the "events after a behavior has occurred" to "generate working hypotheses about the function or purpose of a student's challenging behavior." Greenwood Decl. Ex. 2 at 4-5.

[9] Dr. Greenwood defines a BIP as "a plan to support behavior growth and change for the student and the student's environment" that uses information generated in the FBA to "identify replacement behaviors for target behaviors," among other information. Greenwood Decl. Ex. 2 at 5.

educational plans for hundreds of students with disabilities, Dr. Greenwood concluded that the Named Plaintiffs "are representative of other students with highly challenging behaviors and significant behavioral support needs in Oregon." *Id.* at 47. *See also id.* at 1-3, 8-9, 41-44 (describing common trends).

For the above reasons, the Named Plaintiffs meet Rule 23(a)(3)'s typicality requirement.

D. The Named Plaintiffs and Plaintiffs' Counsel will Fairly and Adequately Protect the Interests of the Class.

The adequacy requirement of Rule 23(a)(4) is met if "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "This factor requires: (1) that the proposed representative Plaintiffs do not have conflicts of interest with the proposed class, and (2) that Plaintiffs are represented by qualified and competent counsel." *Giles*, 294 F.R.D. at 592 (internal quotation marks and citations omitted). Where there are multiple proposed class representatives, the court need only find that one is an adequate class representative. *See Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 961 (9th Cir. 2009).

First, J.N., E.O., J.V., and B.M. will each fairly and adequately represent the class because their interests align, rather than conflict, with the interests of the class. *See* Stenson Decl. ¶ 10; Cisneros Decl.; Overstreet Decl.; Kaplansky Decl.; Modugno Decl. None of the Named Plaintiffs has any interest that is antagonistic to the interests of other class members. *See id.* To the contrary, the Named Plaintiffs have a personal interest in vindicating the rights of all Oregon students who have been harmed due to the State's actions and inactions regarding shortened school days. *See* Compl. ¶ 35.

Second, Plaintiffs are represented by qualified and competent counsel who have the professional skills, experience, and resources needed to vigorously pursue this case. Plaintiffs are represented by counsel from the Bazelon Center for Mental Health Law, Council of Parent

Attorneys and Advocates, Disability Rights Oregon, National Center for Youth Law, and pro bono counsel (collectively, "Plaintiffs' Counsel"). Plaintiffs' Counsel have considerable experience with federal class action litigation, including in cases against state agencies and systemic cases involving children's rights, disability discrimination, special education law, and civil rights. *See* Declaration of Ira A. Burnim ("Burnim Decl.); Declaration of Selene Almazan-Altobelli ("Almazan-Altobelli Decl."); Stenson Decl.; Declaration of Seth M. Galanter ("Galanter Decl."); Declaration of Peter Simshauser. Plaintiffs' Counsel will devote the necessary resources and have no conflicts that would impede their efforts to obtain a favorable outcome for the class. *Id*. Named Plaintiffs and Plaintiffs' Counsel thus satisfy Rule 23(a)(4).

Because the proposed class is sufficiently numerous, there are common questions of law or fact, the Named Plaintiffs' claims are typical of those of the class members, and the Named Plaintiffs and Plaintiffs' counsel will fairly and adequately represent the interests of the class, Plaintiffs have satisfied each of the requirements of Rule 23(a).[10]

E. Injunctive and Declaratory Relief are Appropriate because Defendants have Acted or Refused to Act on Grounds Generally Applicable to the Class.

Plaintiffs seek to certify this proposed class under Rule 23(b)(2), which applies when the defendant "has acted or refused to act on grounds that apply generally to the class, so that final

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[10] Some courts also require plaintiffs to show that "there is an 'administratively feasible' means of identifying absent class members," but the Ninth Circuit "ha[s] never interpreted Rule 23 to require such a showing" and declined to do so in a case under Rule 23(b)(3). *Briseno v. Conagra Foods, Inc.*, 844 F.3d 1121, 1123 (9th Cir. 2017). Instead, the Court has held that "[a] separate administrative feasibility prerequisite to class certification is not compatible with the language of Rule 23," *id.*, and later confirmed its holding that "there is no free-standing requirement above and beyond the requirements specifically articulated in Rule 23," *True Health Chiropractic, Inc. v. McKesson Corp.*, 896 F.3d 923, 929 (9th Cir. 2018) (citing *Briseno*). Likewise, "every other circuit to address the issue has concluded that the ascertainability requirement does not apply to Rule 23(b)(2) classes." *In re Yahoo Mail Litig.*, 308 F.R.D. 577, 597 (N.D. Cal. 2015). Even if such a requirement applied, the class members here would be readily identifiable based on a review of available district-level records. *See J.R.*, 2018 WL 6133412, at *14 n.4.

injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "[T]he primary role of this provision has always been the certification of civil rights class actions," *Parsons*, 754 F.3d at 686, which are "prime examples" of the type of class actions permitted by Rule 23(b)(2), *Amchem*, 521 U.S. at 614. The Ninth Circuit has held that Rule 23(b)(2) is "unquestionably satisfied when members of a putative class seek uniform injunctive or declaratory relief from policies or practices that are generally applicable to the class as a whole." *Parsons*, 754 F.3d at 688.

In this case, the proposed class is certifiable under Rule 23(b)(2) because Plaintiffs have alleged systemic civil rights violations and seek declaratory and injunctive relief from statewide policies and practices that harm the class members and place them at substantial risk of harm. "A single, indivisible injunction ordering state officials to abate those policies and practices 'would provide relief to each member of the class,' thus satisfying Rule 23(b)(2)." *B.K. ex rel. Tinsley v. Snyder*, 922 F.3d 957, 971 (9th Cir. 2019) (internal citations omitted). *See Parsons*, 754 F.3d at 687 (Rule 23(b)(2) satisfied where the remedy did not lie in specific services for specific class members, but where "the level of care and resources would be raised for all" class members). As detailed in Dr. Musgrove's declaration, there are essential components that every state must have in its general supervision system, and it is achievable for a state that effectively utilizes these components to ensure that all eligible students receive FAPE in the LRE without disability-based discrimination. *See* Musgrove Decl. ¶¶ 36-71. *See also* Greenwood Decl. Ex. 2 at 44-46 (commenting on actions ODE could take to support the class members' school districts). Yet Plaintiffs allege that the State has acted or refused to act in a manner that is inconsistent with those components when operating its general supervision system. *See supra* pp. 14-19. If this Court finds that, due to its actions and failures to act, the State has violated its legal duty to

ensure that the class members receive the education to which they are entitled, it can order Defendants to remedy any systemic deficiencies in the essential components, thereby benefitting the entire class. Certification is thus appropriate under Rule 23(b)(2).

F. Plaintiffs' Counsel Should be Appointed Class Counsel Under Rule 23(g).

Plaintiffs request that this Court appoint Plaintiffs' Counsel as class counsel pursuant to Rule 23(g). In appointing class counsel, the Court must consider: "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(A). Each of these factors establish that appointment of Plaintiffs' Counsel as class counsel is warranted.

Plaintiffs' Counsel has done considerable work to identify and investigate the relevant claims, including conducting extensive legal and factual research prior to filing suit. *See* Burnim Decl. ¶ 18; Almazan-Altobelli Decl. ¶ 14; Stenson Decl. ¶ 8; Galanter Decl. ¶ 7; Simshauser Decl. ¶ 5. Furthermore, Plaintiffs' Counsel has a wide breadth of experience in class action litigation, in addition to subject-matter knowledge and expertise litigating on behalf of students with disabilities under the IDEA, ADA, and Section 504. *See generally id.* Lastly, Plaintiffs' Counsel has committed substantial staff and resources to this matter and will continue to commit the resources needed to zealously pursue relief on behalf of the class. *See* Burnim Decl. ¶19; Almazan-Altobelli Decl. ¶ 15; Stenson Decl. ¶ 9; Galanter Decl. ¶ 8; Simshauser Decl. ¶¶ 6, 8. Plaintiffs' Counsel therefore satisfy the Rule 23(g) criteria for appointment as class counsel.

V. CONCLUSION

For the reasons stated herein, Plaintiffs respectfully request that the Court certify a plaintiff class pursuant to Fed. R. Civ. P. 23(b)(2) comprised of: All students with disabilities aged 3 to 21 residing in Oregon who are eligible for special education and related services under the Individuals with Disabilities Education Act ("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. Plaintiffs further request that the Court name the Named Plaintiffs as class representatives and appoint the undersigned counsel as class counsel.

Respectfully submitted,

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