No. 24-2080

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

J.N., et al.,

Appellants,

v.

OREGON DEPARTMENT OF EDUCATION, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON | Case No. 6:19-cv-00096-AA

BRIEF OF *AMICI CURIAE* PUBLIC COUNSEL, EDUCATION LAW CENTER, NATIONAL DISABILITY RIGHTS NETWORK, NATIONAL DOWN SYNDROME CONGRESS, STEPHANIE SMITH LEE, MADELEINE WILL, MICHAEL YUDIN, AND ROBERT PASTERNACK IN SUPPORT OF APPELLANTS

DLA PIPER LLP (US)

Alberto J. Corona
4365 Executive Drive
Suite 1100
San Diego, CA 92121-2133
Tel: (858) 677-1400
alberto.corona@us.dlapiper.com

Andrew Sacks
701 Fifth Avenue
Suite 6900
Seattle, WA 9810
Tel: (206) 839-4890
andrew.sacks@us.dlapiper.com

Counsel for *Amici Curiae*

Emily Marshall
1201 West Peachtree Street
Suite 2800
Atlanta, GA 30309
Tel: (404) 736-7800
emily.marshall@us.dlapiper.com

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CORPORATE DISCLOSURE STATEMENT

Amici Curiae Public Counsel, Education Law Center, the National Disability Rights Network, and the National Down Syndrome Congress are non-profit organizations and do not have a parent corporation nor are they publicly traded.

STATEMENTS OF INTEREST

1. Public Counsel

Public Counsel is a non-profit public interest law firm dedicated to advancing civil rights and racial and economic justice, as well as to amplifying the power of clients through comprehensive legal advocacy. Founded on and strengthened by a pro bono legal service model, Public Counsel staff and volunteers seek justice through direct legal services, promote healthy and resilient communities through education and outreach, and support community-led efforts to transform unjust systems through litigation and policy advocacy in and beyond Los Angeles. Public Counsel has long advocated for students with disabilities to receive Free Appropriate Public Education (FAPE), including advocating for students with disabilities to receive full days of instruction. Ensuring that all students are able to access their education and to be educated with their

peers without disabilities to the maximum extent possible is one of Public Counsel's core priorities.

2. Education Law Center

Founded in 1973, Education Law Center (ELC) is a non-profit legal defense fund that pursues justice and equity for public school students by enforcing their right to a high-quality education in safe, equitable, non-discriminatory, integrated, and well-funded learning environments. ELC has served as counsel in special education cases in the Third Circuit Court of Appeals, the District of New Jersey and Eastern District of Michigan, and has participated as *amicus curiae* in special education cases before the United States Supreme Court and the Third and Sixth Circuit Courts of Appeals. Over the past twenty-five years, ELC has developed substantial interest and expertise in the legal rights of students with disabilities and ensuring that those rights are protected under IDEA and other applicable civil rights and non-discrimination laws.

3. National Disability Rights Network

The National Disability Rights Network (NDRN) is the non-profit membership organization for the federally mandated Protection and Advocacy (P&A) and Client Assistance Program (CAP) agencies for

individuals with disabilities. The P&A and CAP agencies were established by the United States Congress to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education. There are P&As and CAPs in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Territories (American Samoa, Guam, Northern Mariana Islands, and the US Virgin Islands), and there is a P&A and CAP affiliated with the Native American Consortium which includes the Hopi, Navajo and San Juan Southern Paiute Nations in the Four Corners region of the Southwest. Collectively, the P&A and CAP agencies are the largest provider of legally based advocacy services to people with disabilities in the United States. The use of shortened school days and other forms of discrimination against students with disabilities constitute a significant proportion of P&A legal work.

4. National Down Syndrome Congress

The National Down Syndrome Congress (NDSC) is the country's oldest national organization for people with Down syndrome, their families, and the professionals who work with them. NDSC provides information, advocacy and support concerning all aspects of life for individuals with Down syndrome, and work to create a national climate

in which all people will recognize and embrace the value and dignity of people with Down syndrome.

5. Former United States Department of Education Officials Responsible for Special Education Policy

Amicus Stephanie Smith Lee served as the Director of the Office of Special Education Programs under President George W. Bush from 2002 to 2005. She has more than 40 years of experience in disability, education, and employment policy, including serving in senior legislative staff positions for Members of the U.S. House of Representatives and the U.S. Senate, and for the U.S. Senate Health, Education, Labor, and Pensions Committee. She has served as a Senate Majority Leader appointee to the Ticket to Work and Work Incentives Advisory Panel and as a member of a number of state and federal commissions and task forces. Since her daughter, Laura, was born with Down syndrome in 1982, Ms. Lee has organized and led many successful bipartisan, collaborative efforts to improve special education and disability policy in Virginia and nationally. She is currently the Senior Policy Advisor to the National Down Syndrome Congress and serves as Past Chair of the National Coordinating Center Accreditation Workgroup, a congressionally mandated workgroup that is developing model

accreditation program standards for higher education programs for students with intellectual disabilities.

Amicus Madeleine Will served as the Assistant Secretary of the Office of Special Education and Rehabilitative Services under President Ronald Reagan. Ms. Will has more than 35 years of experience advocating for individuals with intellectual disabilities and their families and developing partnerships of parents and professionals involved in creating and expanding high-quality education and other opportunities for individuals with disabilities. Since her adult son, Jonathan, was born with Down syndrome, she has been involved in disability policy efforts at the local, state, and federal levels. Ms. Will founded the Collaboration to Promote Self-Determination, a network of national disability organizations pursuing modernization of services and supports for persons with intellectual and developmental disabilities, so that they can become employed, live independently in an inclusive community, and rise out of poverty. She has also served as Vice President of the National Down Syndrome Society and Chair of the President's Committee for People with Intellectual Disabilities. She is currently a member of the Think College National Coordinating Center's Accreditation Workgroup.

Amicus Michael K. Yudin served as the Assistant Secretary for Special Education and Rehabilitative Services and acting Assistant Secretary for Elementary and Secondary Education under President Barack Obama. In these roles, Mr. Yudin led the Department of Education's efforts to administer federal disability grant programs designed to improve the educational and employment outcomes of children and adults with disabilities. He also helped guide the implementation of policy designed to ensure equal opportunity and access to education and employment for individuals with disabilities. Prior to joining the Department, Michael served as a U.S. Senate staffer. Working for senior members of the HELP Committee, Michael helped draft, negotiate, and pass various pieces of legislation, including the No Child Left Behind Act of 2001, the Individuals with Disabilities Education Act, the Higher Education Opportunity Act, the Carl D. Perkins Career and Technical Education Act of 2006, and reauthorization of the Head Start Act.

Amicus Dr. Robert Pasternack currently serves as the Chief Executive Officer for Ensenar Educational Services, Inc., providing consultation to School Districts, State Departments of Education, and an

array of companies serving students with disabilities across country. Dr. Pasternack served as the Assistant Secretary for the Office of Special Education and Rehabilitative Services under President George W. Bush and in that capacity worked on the 2004 Reauthorization of the Individuals with Disabilities Education Act. He served on the President's Commission on Excellence in Special Education and the President's Mental Health Commission; and he led the Federal Interagency Coordinating Committee during his tenure. During his 45 years in education, Dr. Pasternack has been a classroom teacher, Superintendent, and State Director of Special Education. As the guardian for his brother with Down syndrome, he has been an advocate for improving outcomes and results for students with disabilities and their families. Dr. Pasternack is a Nationally Certified School Psychologist, certified teacher, administrator, and educational diagnostician.

As former senior officials in the U.S. Department of Education, responsible for overseeing IDEA implementation, *Amici* Lee, Will, Yudin, and Pasternack remain invested in ensuring that IDEA is faithfully implemented and students with disabilities receive the free appropriate

public education in the least restrictive environment to which they are entitled.

STATEMENT OF AUTHORSHIP, FINANCIAL SUPPORT, AND CONSENT TO FILE

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* hereby certify that this brief was authored solely by *amici* and their counsel, and that no person other than *amici* contributed money that was intended to fund preparing or submitting this brief. Counsel for *amici* note, however, that in crafting this brief they have been informed by, inter alia, pre-existing legal research and written arguments on the subjects referenced herein. The Directors of Public Counsel, Education Law Center, the National Disability Rights Network, and the National Down Syndrome Congress, who have the requisite authority, authorized the filing of this brief. All parties have consented to the filing of this *amici curiae* brief pursuant to Fed. R. App. P 29(a).

Pursuant to Federal Rule of Appellate Procedure 29, Public Counsel, Education Law Center, the National Disability Rights Network, the National Down Syndrome Congress, Stephanie Smith Lee, Madeleine Will, Michael Yudin, and Robert Pasternack respectfully submit this Brief of *Amici Curiae* in support of Appellants' request for reversal of the District Court's opinion. This brief discusses the legal obligations of the State of Oregon under relevant Federal law and compares the requirements under the newly enacted Oregon law, SB 819 (S.B. 819, 2023 Leg. Assem. Reg. Sess. (Or. 2023)), at issue in this appeal.

I. INTRODUCTION

Children with disabilities are failed when they are removed from school. They lose access to hours of instruction as well as supports and services they are legally entitled to receive. They lose valuable time with peers. They learn they are not worthy of receiving the education the other students are receiving. Beyond the harm to the individual child, the use of shortened school days[1] is also indicative of the failure of the

[1] The United States Department of Education defines a shortened school day as a type of "informal removal" wherein "a child's school day is reduced by school personnel, outside of the IEP Team and placement process, in response to the child's behavior." *See* U.S. Dep't. of Educ., Office of Special Education and Rehabilitative Resources, "Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions" (July 19, 2022), *available at* Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions. July 19, 2022 (PDF) (last visited Aug. 26, 2024).

educational system to provide appropriate services when the children are in school. Children with disabilities should receive the supports and services they need to obtain a full day of education and should not be punished for behaviors relating to their disabilities.

Congress originally enacted and has continued to reauthorize the Individuals with Disabilities Education Act (IDEA) to make sure that children with all disabilities, regardless of the severity of their disability, have access to public education.[2] IDEA specifically protects students with disabilities from being improperly excluded from public school. *Board of Educ. v. Rowley,* 458 U.S. 176, 179 (1982) (discussing EAHCA); *see also* H.R. Rep. No. 94-332, at p.2 (1975). "In responding to these problems, Congress did not content itself with passage of a simple funding statute. Rather, the [IDEA] confers upon disabled students an enforceable right to public education…" *Honig v. Doe*, 484 U.S. 305, 310 (1988) (discussing a separate predecessor to IDEA, the Education of the Handicapped Act). Under IDEA, every state education agency (SEA) that accepts federal funding is ultimately accountable for ensuring that school districts comply with IDEA, which requires that children with disabilities receive

[2] IDEA's predecessor, the Education for All Handicapped Children Act (EAHCA), also known as Public Law 94-142, was enacted by Congress in 1975, as amended 20 U.S.C. § 1401, et. seq.

a free appropriate public education (FAPE) in the least restrictive environment (LRE). 20 U.S.C. §§ 1412(a)(1)(A) and (a)(1)(B)(5). Providing a FAPE requires offering, at no cost to the parents or students, a school placement that includes specially designed instruction as well as related services in conformance with the student's individualized education program (IEP), which are designed to meet the unique needs of the student with a disability, and which meet the standards of the SEA. 20 U.S.C. §1401(9).

The "basic floor of opportunity" guaranteed by IDEA "consists of access to specialized instruction and related services which are individually designed to provide educational benefit" to the student with a disability. *Rowley,* 458 U.S. at 201. "To meet its substantive obligation under IDEA, a school must offer an IEP that is reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances" both academically and functionally. *Endrew F. ex rel. v. Douglas Cty. Sch. Dist. RE-1*, 580 U.S. 386, 387 (2017). Under IDEA, "every child should have the chance to meet challenging objectives." *Id.* at 388.

Appropriate progress is a standard that carries weight in the Ninth Circuit. "Congress did not intend that school system could discharge its

duty under the [IDEA] by providing a program that produces some minimal academic advancement, no matter how trivial." *Amanda J. ex. rel. Annette J. v. Clark Cty. Sch. Dist.* 267 F.3d 877, 890 (9th Cir. 2001) (quoting *Hall v. Vance Cty. Bd. Of Educ.*, 774 F.2d 629, 636 (4th Cir. 1985)). To the maximum extent appropriate, all students with disabilities between the ages of 3 and 21 are to be educated in the LRE – that is, with age-appropriate peers, both with and without disabilities. 20 U.S.C. § 1412(a)(5). Children who have been removed from school, by definition, lose the opportunity to be educated with their peers in the LRE. Very simply, SEAs have the primary responsibility to ensure implementation of IDEA and the provision of FAPE.

By definition and structure, SEAs have clear responsibility and control of local educational agencies (LEAs) or school districts to assure compliance with IDEA for all students with disabilities. 20 U.S.C. §1412(a). Importantly, SEAs must ensure that students with disabilities are not subject to improper exclusion from public schools, including taking necessary actions to end the use of unreported shortened school days which run afoul of IDEA, as well as the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (Section 504).

The Oregon Department of Education (ODE) cannot insulate itself from necessary actions required by federal law to ensure provision of education to students with disabilities by passively relying on state law. Such reliance is particularly misplaced where, as here, ODE knows of evidence of widespread practices placing students with disabilities on unnecessarily shortened school days due to behaviors related to their disabilities in violation of state law protections. *See, e.g.*, 3-ER-616-17, ¶¶ 115-17; 3-ER-618-19, ¶¶ 119-122; 3-ER-620, ¶ 123; 3-ER-599, ¶ 53.

Oregon SB 819 (SB 819) does not ensure ODE's compliance with federal law. S.B. 819, 2023 Leg. Assem. Reg. Sess. (Or. 2023); 2-ER-118. For example, by relying on districts to self-report shortened school days, SB 819 falls short of requiring independent action by ODE necessary to ensure compliance with federal law, such as active data collection and compliance monitoring required by IDEA. Of particular significance, SB 819 fails to account for the informal, undocumented shortening of students' school days. More significantly, SB 819 fails to address the requirement that the SEA must provide the resources, technical assistance and training to ensure that school districts provide students with disabilities the support and services that enable them to receive a full school day.

In the "Family Circus" comic strip, the late cartoonist Bil Keane would occasionally include a ghost by the name of "Not Me" as the "person" responsible when things went wrong. Not surprisingly, "Not Me" was rarely held accountable for his actions, and for the most part, problems were left unresolved. For children with disabilities, the stakes could not be any higher. By failing to meet its obligations under IDEA and other laws, ODE is allowing districts to push students with disabilities out of schoolhouse doors. Hours of instruction matter – learning academic material requires time. The opportunity to interact with other students, including students without disabilities, matters – learning social skills and developing friends takes time. ODE is accountable for the provision of FAPE throughout the state, and "not me" is not an option.

II. ARGUMENT

A. ODE Is Responsible for Ensuring That Any Use of Shortened School Days for Students with Disabilities Complies with IDEA, Section 504, and the ADA.

1. States are Required to Ensure Compliance with IDEA.

By virtue of receiving IDEA federal funding, SEAs and LEAs must (1) identify, locate, and evaluate all children residing in their jurisdictions who may have qualifying disabilities to determine which children are eligible for special education and related services, 20 U.S.C.

§ 1412(a)(3); (2), convene a team, which includes the parents of each eligible child with a disability, to develop an IEP spelling out the specific special education and related services to be provided to that child to ensure a FAPE, 20 U.S.C. § 1414(d)(1), in the LRE, 20 U.S.C. § 1412(a)(5); and (3) implement procedural safeguards for children with disabilities and their parents, including disciplinary safeguards that restrict school removals and a right to an administrative hearing to challenge eligibility determinations and educational placements, with the ability to appeal the ruling to federal court, 20 U.S.C. § 1415.

B. The Buck Stops with the States.

IDEA "offers federal funds to States in exchange for a commitment: to furnish a 'free appropriate public education'—more concisely known as a FAPE—to all children with certain physical or intellectual disabilities." *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 748 (2017) (citing 20 U.S.C. §§ 1401(3)(A)(i) and 1412(a)(1)(A)). SEAs "have primary responsibility for ensuring that local educational agencies comply with the requirements of the IDEA." *Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1303 (9th Cir. 1992); *see also* 20 U.S.C. § 1412(a)(11)(A) ("The State educational agency is responsible for ensuring that . . . the

requirements of this subchapter are met[.]")[3] This reflects Congress's concern that there be "a single line of responsibility" regarding the education of children with disabilities. *John T. ex rel. Robert T. v. Iowa Dep't of Educ.*, 258 F.3d 860, 864 (8th Cir. 2001). IDEA provides that all educational programs for children with disabilities in the state must meet the educational standards of the SEA. 20 U.S.C. § 1412(a)(11)(A). As such, the SEA is in the best position to ensure that statewide educational standards are met for children with disabilities. *Casey K. v. St. Anne Cmty. High Sch. Dist. No. 302*, 400 F.3d 508, 511-12 (7th Cir. 2005).

In drafting the predecessor statute to IDEA, Congress emphasized the importance of centralizing "the state's primary responsibility to provide a publicly supported education for all children" with the SEA:

> Without this requirement, there is an abdication of responsibility for the education of handicapped children. Presently, in many States, responsibility is divided, depending upon the age of the handicapped child, sources of funding, and type of services delivered. While the committee understands that different agencies may, in fact, deliver services, the responsibility must remain in a central agency overseeing the education of handicapped children, so that

[3] Notably, IDEA even provides for "[d]irect services by the State educational agency," stating that the SEA "shall use the payments that would otherwise have been available to a local educational agency or to a State agency to provide special education and related services directly to children with disabilities" if that LEA or SEA is unable or unwilling to do so. 20 U.S.C. § 1413(g)(1).

> failure to deliver services or the violation of the rights of handicapped children is squarely the responsibility of one agency.

S. Rep. No. 94-168, at 1448 (1975); *see also Kruelle v. New Castle Cnty. Sch. Dist.*, 642 F.2d 687, 697 (3d Cir. 1981) (The SEA is not solely a supervisory agency, but is rather the "central point of accountability" for ensuring students receive FAPE; and holding that "the burden for coordinating efforts and financial arrangements" for an IDEA plaintiff's education lies with the SEA).

Since *Kruelle*, this Court has joined the Third Circuit in holding that a SEA is ultimately responsible for providing students with a FAPE. *See, e.g.*, *Student A v. S.F. Unified Sch. Dist.*, 9 F.4th 1079, 1085 (9th Cir. 2021); *Orange Cty. Dep't of Educ. v. Cal. Dep't of Educ.*, 668 F.3d 1052, 1058 (9th Cir. 2011); *Doe by Gonzales v. Maher*, 793 F.2d 1470, 1492 (9th Cir. 1986).[4]

C. States Have Specific Obligations to Monitor and Enforce IDEA Compliance.

"The state is not merely a pass-through entity that can disburse funds to LEAs 'and then wait for the phone to ring.'" *L.L. By and Through*

[4] *Accord*, *Pachl v. Seagren*, 453 F.3d 1064, 1070 (8th Cir. 2006); *Ullmo ex rel. Ullmo v. Gilmour Acad.*, 273 F.3d 671, 679 (6th Cir. 2001); *St. Tammany Parish Sch. Bd. v. State of Louisiana*, 142 F.3d 776, 784 (5th Cir. 1998); *Corey H. v. Bd. of Educ.*, 995 F. Supp. 900, 913-914 (N.D. Ill. 1998).

B.L. v. Tennessee Dep't of Educ., 2019 WL 653079, at *4 (M.D. Tenn. Feb. 15, 2019) (quoting *Cordero by Bates v. Penn. Dep't of Educ.*, 795 F. Supp. 1352, 1362 (M.D. Pa. 1992)). SEAs have an "overarching responsibility to ensure that the rights created by the statute are protected, regardless of the actions of local school districts." *Cordero by Bates*, 795 F. Supp. at 1362. The U.S. Department of Education holds SEAs responsible for ensuring compliance with IDEA for "each educational program for children with disabilities administered within the state, including each program administered by any other state or local agency." 34 C.F.R. § 300.149(a); see 20 U.S.C. § 1412(a)(11); 20 U.S.C. § 1416.

By accepting federal funding, "states assure…that they have in effect policies, procedures, and practices that are consistent with the IDEA statutory and regulatory requirements." *State General Supervision Responsibilities Under Parts B and C of the IDEA*, U.S. Dep't. of Educ. (July 24, 2023). Furthermore, as discussed below, where a LEA engages in illegal conduct and practices, SEAs are not mere passive observers, but rather obligated to implement specified monitoring protocols and utilize specific enforcement tools.

1. IDEA Requires States to Monitor and Collect Information Regarding Shortened School Days.

IDEA encompasses information-collecting and monitoring requirements, such as annual reporting on the progress of performance goals and indicators, 20 U.S.C. § 1412(a)(15)(C), and requires that all children with disabilities are included in all state and districtwide assessment programs, 20 U.S.C. § 1412(a)(16)(A). For example, under IDEA's implementing regulations, the state must "[m]onitor the implementation" of the regulatory mandates and "[m]ake determinations annually about the performance of each LEA." 34 C.F.R. § 300.600(a)(1)-(2). In completing its monitoring duties, the state must use "quantifiable indicators" as well as "such qualitative indicators as are needed to adequately measure performance" in "priority areas" including the provision of FAPE in the LER and state exercise of supervision of various IDEA requirements. *Id*. § 300.600(d). The state is also obligated to "[r]eport annually on the performance of the state and of each LEA." *Id*. § 300.600(a)(4).

SEAs must also evaluate data involving long-term suspensions and expulsions of children with disabilities to determine if there are significant discrepancies in those rates among LEAs or compared to children with no disabilities within those LEAs. 20 U.S.C. §§ 1412(a)(22)(A)(i) and (ii). If discrepancies are identified, a SEA must

review and, if appropriate, revise, or require an LEA to revise, its policies, procedures, and practices relating to the development and implementation of IEPs, the use of positive behavioral interventions and supports, and procedural safeguards, to ensure compliance with IDEA. 20 U.S.C. § 1412(a)(22)(B).

The U.S. Department of Education has found not only that shortened school days may result in the denial of a FAPE, but when they are continuously implemented, they may rise to the level of a suspension under IDEA and should be reported:

> …[W]hen school personnel regularly require a child with a disability to leave school early and miss instructional time due to their behavior, it is likely that the child's opportunity to be involved in and make progress in the general education curriculum has been significantly impeded; in such circumstances, sending the child home early would constitute a disciplinary removal from the current placement… To the extent that schools implement exclusionary disciplinary measures in a manner tantamount to a suspension – or other removal from the child's current placement – they are required to fulfill their statutory obligation to report such removals, and act within the authority of school personnel provided under [IDEA].

U.S. Dep't. of Educ., Office of Special Education and Rehabilitative Services, "Dear Colleague" Letter at 13 (Aug. 1, 2016).

One problem lies with unreported shortened school days that are not reflected in a child's IEP and that do not otherwise qualify as a suspension. Under IDEA, SEAs are prohibited from distributing funds to LEAs when it will "result in placements that violate" LRE requirements; as well as when it will "result in the failure to provide a child with a disability a free appropriate public education according to the unique needs of the child as described in the child's IEP." 20 U.S.C. § 1412(a)(5)(B)(i). Without data regarding instances of informal shortened school days, there is no way for the SEA to know, much less assess, whether shortened school days are consistent with LRE or FAPE.

Failure to require reporting leads to other concerns related to the provision of FAPE in the LRE. Evidence in this matter demonstrates that schools are allowed to claim full funding regardless of the length of the school day provided to students with disabilities. 3-ER-598-99, ¶ 53. Thus, in contravention of 20 U.S.C. § 1412 (a)(5)(B)(i), ODE's policies incentivize providing minimal hours of instruction to students with disabilities because the LEA will be able to draw down the full dollars despite providing less than a full day of instruction. *Id.*; *see also* Pl. Opening Brief, Dkt. 16.1, p. 30. "It is the state's obligation to ensure that

the systems it put in place are running properly and that if they are not, to correct them." *Cordero by Bates*, 795 F. Supp. at 1362.

2. IDEA Requires States to Enforce Federal and State Law Against LEAs.

IDEA reflects a national commitment to provide education to all students, including students with disabilities. As recognized by the Ninth Circuit, academic literature and peer reviewed studies establish that "the vast majority of children with developmental disabilities perform better academically when they are educated in an inclusive general education environment as opposed to an isolated special education environment." *D.R. by and through R.R. v. Redondo Beach Unified Sch. Dist.*, 56 F.4th 636 (9th Cir. 2022) (internal citations omitted). IDEA includes a "strong preference in favor of disabled children attending regular classes with children who are not disabled," creating a "presumption in favor of public school placement." *M.M. v. Dist. 0001 Lancaster Cnty. Sch.*, 702 F.3d 479, 485 (8th Cir. 2012) (citation omitted); *see also Endrew F.*, 580 U.S. at 400 ("…IDEA requires that children with disabilities receive education in the regular classroom whenever possible." (citing *Rowley*, 458 U.S. at 202)); 20 U.S.C. § 1412(a)(5). The first consideration related to provision of FAPE is whether supplementary aids and services can be provided to support students with disabilities in regular classrooms. Importantly,

this Court has made plain "a child's reliance on supplementary aids and services to achieve a satisfactory education in the regular classroom cannot be used against him to justify a more restrictive placement." *D.R.*, 56 F.4th at 646. Children with disabilities have the right to more support when needed for FAPE, not less. Widespread practices of shortening instructional time and excluding children from school, formally or informally, contravene the requirements of IDEA.

IDEA and its regulations expressly direct SEAs to monitor an LEA's implementation of IDEA and authorize the state agency to use "appropriate enforcement mechanisms" against any local agency that is failing to comply with the statutory requirements. 20 U.S.C. § 1413(d); 34 C.F.R. § 300.600.[5] SEAs also have a responsibility to "[r]eview the [LEA's] justification for its actions and to "[a]ssist in planning and implementing any necessary corrective action." *Pachl*, 453 F.3d at 1070; *M.C. v. L.A.*

[5] IDEA provides concrete tools that the SEA must use to ensure LEA compliance and proper functioning of the State's special education system. These include the withholding of funds to noncompliant LEAs and provision of support in the form of improvement plans and technical assistance. 34 C.F.R. § 300.600(a)(3) (State is required to enforce IDEA's mandates "*using appropriate enforcement mechanisms, which must include*, if applicable, the enforcement mechanisms identified in § 300.604(a)(1) (technical assistance), (a)(3) (conditions on funding of an LEA), (b)(2)(i) (a corrective action plan or improvement plan), (b)(2)(v) (withholding funds, in whole or in part, by the SEA when intervention is needed), and (c)(2) (withholding funds, in whole or in part, by the SEA when substantial intervention is needed)" (emphasis added)).

Unified Sch. Dist., 559 F. Supp. 3d 1112, 1121 (C.D. Cal. 2021); *see also* 34 C.F.R. § 300.600(d)(1) (requiring state to monitor the performance of the local educational agency in providing a "FAPE in the least restrictive environment"). IDEA tasks state agencies with delineating standards for educational programs and overseeing their implementation to ensure that they meet those standards, in accordance with IDEA requirements. *See* 20 U.S.C. § 1412(a)(11)(A).

In *Battle v. Pennsylvania*, the Third Circuit considered whether Pennsylvania's policy of limiting special education to no more than 180 days per year violated IDEA's predecessor statute. *Battle v. Pennsylvania*, 629 F.2d 269, 271 (3d Cir. 1980). The court found this policy to be "incompatible with the Act's emphasis on the individual…which may be wholly inappropriate to the child's educational objectives." *Id.* at 280. The *Battle* court remanded the case to the district court to fashion a form of relief which would accommodate the concerns of the plaintiffs. *Id.*

Here, the education system designed and implemented by ODE is insufficient and ignores an important subset of children with disabilities who are subject to unreported shortened school days. A state "cannot abrogate its responsibility to design and to provide funding" for a FAPE

"without being in violation of the assurances it has provided to the federal government in exchange for receiving funds under [IDEA]." *Kerr Center Parents Ass'n. v. Charles*, 572 F.Supp.448, 458 (D. Or. 1983). As in *Battle*, ODE's system "needs to be reworked" by making unreported shortened school days reportable, to ensure that all children with disabilities subject to shortened school days receive a FAPE.

3. IDEA Requires States to Provide LEAs with Needed Resources, Technical Assistance, and Training to Prevent Misusing Shortened School Days.

IDEA requires that funds paid to the state must be expended in accordance with all IDEA provisions and not used for any other purpose. 20 U.S.C. § 1412(a) (17-18). These federal dollars are properly utilized by SEAs to provide resources, technical assistance and training necessary to provide students with FAPE in the LRE. To that end, IDEA requires that "a State shall adopt a policy that includes a requirement that local educational agencies in the State take measurable steps to recruit, hire, train, and retain personnel who meet the applicable requirements described in this paragraph to provide special education and related services…to children with disabilities." 20 U.S.C. § 1412(a)(14)(D). Before a student's IEP Team determines that they need a shorter school day, the Team must have given full consideration to the incorporation of

appropriate modifications into the IEP that could ensure the student receives a FAPE in the LRE. These modifications must be based on the unique needs of the student. *Endrew F.*, 580 U.S. at 401.

In the absence of convening an IEP team to review information and recommend changes, ODE's practice of allowing informal and unreported shortened school days transgresses IDEA's requirement of providing a FAPE in the LRE. *Doe by Gonzales v. Maher*, 793 F.2d 1470, (9th Cir. 1986) (prohibiting any significant change of placement or services without first convening IEP team). Given the lack of documentation supporting informal shortened school days, ODE is unable to determine whether modification of a child's IEP to include "the use of supplementary aids and services" could have provided a student with disabilities with the opportunity to stay in school as opposed to being sent home. This violates IDEA. 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114. Without full information identifying districts and schools subjecting students to shortened days, ODE cannot target needed resources, technical assistance, and training needed to provide FAPE in the LRE and prevent misusing shortened school days.

D. States' Obligations Under Section 504 and ADA.

The use of unreported shortened school days also runs afoul of 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. Section 504 prohibits the exclusion of individuals with disabilities from participating in federally funded programs or activities because of their disability. 29 U.S.C. § 794(a). Similarly, the ADA prohibits the exclusion of a person with a disability from participation because of their disability, 42 U.S.C. § 12132; 28 C.F.R. § 35.130(a), including unnecessary classroom removals. *J.S., III ex rel. J.S. Jr. v. Houston Cty. Bd. of Educ.*, 877 F.3d 979, 986-87 (11th Cir. 2017).[6]

A shortened school day "is valid in principle if it is contemplated by the child's [IEP] and linked to his or her developmental goals" and unique needs. *Adams v. Oregon*, 195 F.3d 1141, 1150 (9th Cir. 1999). However, "a blanket policy of shortened school days for students with disabilities violates Section 504 [of] the Rehabilitation Act and the ADA." *Christopher S. ex rel. v. Stanislaus Cty. Office of Educ.*, 384 F.3d 1205,

[6] The ADA also requires schools that receive federal funding to make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the school can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity. 28 C.F.R. § 35.130(b)(7)(i). Additionally, schools may not utilize criteria or methods of administration that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability. 28 C.F.R. § 35.130(b)(3)(i).

1212 (9th Cir. 2004). IDEA requires that "[b]efore the school may effect a reduction in schedule or any other change in placement contemplated by the IEP, it must notify the child's parents of their right to review, and otherwise afford them the safeguards to which they are entitled." *Doe by Gonzales*, 793 F.2d at 1491.

In the absence of proper reporting, monitoring, and procedural safeguards, ODE's blanket use of informal, unreported shortened school days is discriminatory because it deprives students with disabilities of benefits that come from integrated learning environments in violation of Section 504 and the ADA. *See United States v. State of Georgia*, 461 F. Supp. 3d 1315, 1325 (N.D. Ga. 2020); *see also Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 748-49 (2017) (stating that states are responsible for ensuring that students with disabilities are free from disability-based discrimination).

E. Oregon Senate Bill 819 Fails to Ensure Oregon's Compliance with Federal Law

The problems inherent with SB 819 are illustrated by the district court's approach below. First, the court dismissed the evidence that shows the high number of students who are being removed from school after the passage of SB 819 concluding that whether individual students are not receiving FAPE is a student specific question. *J.N. v. Oregon Dept*

of Educ., 2024 WL 896364, *6 (D. Or. Feb. 29, 2024). In the next paragraph, the court found that plaintiffs had failed to provide any evidence that SB 819 had the same shortcoming as the law it replaced. *Id.* at *7. Yet it is the number of students who are not receiving a full day of services that demonstrates the failings of the ODE to ensure that these students are receiving the education they are entitled to receive.

Senate Bill 819 permits ODE to stand idle and passive, unless and until it receives a complaint alleging non-compliance with state or federal law.[7] Rather than vest the statutory monitoring required under 20 U.S.C. § 1416(a)(3)(A) with the state, the bill places this critical responsibility on local school districts. Moreover, under SB 819, Oregon must rely on each school district's reporting as to its own compliance with state and federal laws. Given the lack of documentation inherent in informally shortened school days, this compliance regime is entirely inadequate to ensure compliance with federal law.

What Oregon students are left with under SB 819 are baked-in

[7] SB 819 assumes compliance unless "the Department of Education receives a complaint or otherwise has cause to believe a school district is not in compliance with . . . this 2023 Act." § 5(2)(a). The law charges school district superintendents with review of abbreviated school day programs, and gives those local officials authority to "[f]ind that the abbreviated school day program placement is compliant with state and federal law. . . ." §4(3)(b).

systemic violations that affect students across the state. "[A] claim is 'systemic' if it… requires restructuring the education system itself in order to comply with the dictates of the Act . . ." *Doe By and Through Brockhuis v. Ariz. Dept of Educ.*, 111 F.3d 678, 682 (9th Cir. 1997); *see also Heldman v. Sobol*, 962 F.3d 148, 159 (2d Cir. 1992) (finding a claim systemic when the plaintiff alleged a state education regulation violated the mandate of IDEA in a challenge to the legitimacy of the hearing officers' authority).

The self-reporting mechanism under SB 819 leaves open a gap for school districts to continue to exploit informal abbreviated school days without compromising access to federal funds. As the Plaintiffs here alleged below, school districts modify "students' IEP or Section 504 plans to shorten their school days or *informally shorten students' daily schedules without documentation*." 3-ER-597, ¶ 48 (emphasis added). By shortening school days without proper documentation, local school districts are enabled to throw their hands up and say "Not Me."

SB 819 permits the SEA to assume all is well, without "cause to believe a school district is not in compliance" based solely on the absence of any documentation to the contrary—*see* § 5(2)(a)—in essence, waiting "for the phone to ring." *See L.L. By and Through B.L.*, 2019 WL 650379,

at *4. Without documentation from the LEAs as to these shortened days, Oregon cannot plausibly maintain its monitoring requirements for using "quantifiable indicators" under 20 U.S.C. § 1416(a)(3)(A). While SB 819 may have been well intentioned, its failure to require Oregon to ensure compliance with IDEA falls short of clear congressional intent and statutory language on SEA accountability.

III. CONCLUSION

For the foregoing reasons, the Court should reverse the district court's decision below.

Respectfully submitted,

Dated: August 27, 2024

DLA PIPER LLP (US)

/s/ Alberto J. Corona
Alberto J. Corona
Emily Marshall
Andrew Sacks

Attorneys for *Amici Curiae*

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I hereby certify that I electronically filed the foregoing Brief of *Amici Curiae* by Public Counsel, Education Law Center, National Disability Rights Network, National Down Syndrome Congress, Stephanie Smith Lee, Madeline Will, Michael Yudin, and Robert Pasternack with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 27, 2024.

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Dated this 27th day of August, 2024.

s/ Alberto J. Corona
Alberto J. Corona

Attorneys for Amici Curiae

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FOR THE NINTH CIRCUIT

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