No. 24-2080

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

J.N., et al.,

Plaintiffs-Appellants,

v.

OREGON DEPARTMENT OF EDUCATION, ET AL.

Defendants-Appellants.

Appeal from the United States District Court
for the District of Oregon
Case No. 6:19-cv–00096-AA

PLAINTIFFS-APPELLANTS' OPENING BRIEF

Thomas Stenson
Joel Greenberg
DISABILITY RIGHTS OREGON
511 SW 10th Avenue, Suite, 200,
Portland, Oregon 97205
(503) 243-0281
tstenson@droregon.com
jgreenberg@droregon.com

Richard D. Salgado
Jordan A. Kazlow
MCDERMOTT WILL & EMERY LLP
2501 North Harwood Street, Suite 1900
Dallas, Texas 75201
(214) 210-2797
richard.salgado@mwe.com
jkazlow@mwe.com

Counsel for Plaintiffs-Appellants
(Additional Counsel on Inside Cover)

Hannah Benton Eidsath
Nina Monfredo
NATIONAL CENTER FOR YOUTH LAW
818 Connecticut Avenue NW, Suite 425
Washington, DC 2006
(202) 868-4781
hbenton@youthlaw.org
nmonfredo@youthlaw.org

Selene Almazan-Altobelli
COUNCIL OF PARENT ATTORNEYS AND ADVOCATES
PO Box 6767
Baltimore, Maryland 21285
(844) 426-7724 ext. 702
selene@copaa.org

Lewis Bossing
BAZELON CENTER FOR MENTAL HEALTH LAW
1090 Vermont Avenue NW, Suite 220
Washington, DC 20005
(202) 467-5730
lewisb@bazelon.org

DISCLOSURE STATEMENT

Council of Parent Attorneys and Advocates, Inc. ("COPAA"), is a 501(c)(3) non-profit organization. Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, COPAA, by and through its undersigned counsel, hereby certifies that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

/s/ *Richard D. Salgado*
Richard D. Salgado

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331 because the action arose under federal law—specifically, the Individuals with Disabilities Education Act, the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act. This Court has jurisdiction under 28 U.S.C. § 1291 because this is an appeal from a United States district court's final judgment that disposed of all parties' claims. In compliance with Federal Rule of Appellate Procedure 4(a)(1)(A), the Notice of Appeal was filed on March 29, 2024, less than 30 days after the district court entered its order of dismissal.

ISSUES PRESENTED

1. For years, the use of shortened school days in Oregon has violated federal law by depriving students with disabilities of a free appropriate public education in the least restrictive environment and of access to education free from discrimination. A case "becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." Did Oregon's enactment of legislation to remedy only some—but not all—of the alleged harms render the case moot?
2. Oregon's state education agency tacitly conceded that the new legislation fails to remedy all the harms caused by shortened school days by instead relying on a patchwork of legislation plus its own voluntary adoption of policies. Under this Court's precedent, a defendant cannot moot a case by voluntarily ceasing its unlawful conduct. Does the agency's voluntary adoption of policies that it could change at any time render the case moot?

STATEMENT OF THE CASE

This case has special importance for the rights of students with disabilities, but its constitutional implications are much broader. If let stand, the district court's decision distorts the mootness test in the Ninth Circuit from an exacting standard that applies only when it would be impossible for the court to award any relief to a plaintiff to a far looser standard that would permit dismissal of cases in which the defendant remedies any portion of alleged harms.

For years, the Oregon Department of Education ("ODE") and its co-defendants[1] (collectively, "the State") have violated federal law by failing to provide students with disabilities a free appropriate public education in the least restrictive environment and access to education free from discrimination.[2] Because the newly enacted legislation remedies only

---

[1] ODE Director Charlene Williams, and Oregon's Governor and Superintendent of Public Instruction Tina Kotek.

[2] Class Action Allegation Complaint for Equitable Relief under the Individuals with Disabilities Act, Americans with Disabilities Act, and Section 504 of the Rehabilitation Act (the "Complaint"); 3-ER-585–87; 20 U.S.C. § 1400 et seq., 29 U.S.C. § 794; 42 USC §§ 12131 et seq.

some—but not all—of the alleged harms, the district court erred by finding that it nonetheless mooted the case in its entirety.

When Appellants[3] filed this case, Oregon already had laws in place designed to regulate the use of shortened school days, but those laws were ineffective due to systemic failures in the implementation and enforcement of the laws and gaps in the laws themselves. Importantly, Appellants never challenged the legality of these state laws, but rather the State's systemic violations of federal law through its incomplete and ineffective regulation of shortened school days.

The illegal use of shortened school days for disability-related behaviors deprives hundreds of Oregon students of the effective behavioral supports that would let them remain in their classrooms for the entire school day like their non-disabled peers. These students typically receive little to no education outside of school and only one to two hours—or even less—of in-school instruction each day. Some removals happen when the school calls a parent to take a child home

[3] Appellants are (1) a class of Oregon school children with disabilities who have been or are at risk of being excluded from school through shortened school days, and (2) Council of Parent Attorneys and Advocates ("COPAA").

early; others happen when the school removes the student to a "personal education environment"—such as a desk in the hallway. Sometimes schools formally document these shortened school days on a student's Individual Education Program ("IEP"), but other times students are removed for hours each day through "informal removals" without any documentation. 3-ER-597.

After years of litigation, including receipt of a report by a neutral expert hired by the State that confirmed nearly all of Appellants' allegations, Oregon enacted a new law, Senate Bill ("S.B.") 819, that provided—at most—a partial remedy to Appellants' claims. S.B. 819, 2023 Leg. Assem. Reg. Sess. (Or. 2023); 2-ER-118. The new legislation and the ODE's adoption of new policies are positive steps, but are incomplete. They do not come close to remedying all the systemic failures alleged in the Complaint. While the State extols the relief provided by the new statute and the ODE's new policies, at least hundreds of Oregon students continue to be discriminated against and subjected to shortened school days that deprive them of the support and services that they are entitled to and that would enable them to attend a full school day. Federal law requires that the ODE establish systems to ensure that this

does not happen. 3-ER-544–45. Even though the new statute and the ODE's new policies have failed to remedy all the harms alleged, the State argues that they have mooted the case in its entirety. 2-ER-114–15. The district court agreed with the State and dismissed the case. 1-ER-27.

Because S.B. 819 does not remedy all the harms alleged in Appellants' Complaint, Appellants' claims are not moot.

STATEMENT OF FACTS

I. Appellants Bring This Action on Behalf of at Least Hundreds of Students with Disabilities Across Oregon Subjected to Shortened School Days.

As detailed in Appellants' Complaint five years ago, the State's abdication of its responsibilities and its inaction have inflicted shortened school days on hundreds of students with disabilities across Oregon. The Complaint alleges that the State:

(1) fails to implement policies and procedures requiring the systemic collection of reliable data on students with shortened school days, 3-ER-616–17, ¶¶ 115–17;

(2) fails to implement policies and procedures that would require the ODE to systemically and effectively monitor individual school districts' compliance with both federal and state statutes; 3-ER-618–19, ¶¶ 119–122;

(3) fails to provide districts with "adequate resources, technical assistance, and training to prevent the unnecessary use of shortened school days;" 3-ER-620, ¶ 123; and

(4) implements an education funding formula that "rewards school districts that impose shortened school days by paying them the same amount for providing a student with one hour of tutoring as it would if the student had received a full day of instruction in school." 3-ER-599, ¶ 53.

These deficiencies combine to cause a statewide, systemic failure of the ODE to ensure that Oregon students are provided the free appropriate public education, free from discrimination, that federal law guarantees them.

Before Appellants sued, Oregon had policies and regulations in place that ostensibly addressed concerns that school districts were violating students' rights by unnecessarily relying on shortened school days to address behavioral difficulties. 3-ER-585–86, ¶ 13. But those policies failed to prevent the continued misuse of shortened school days for hundreds of Oregon school children with disabilities. They included an Executive Memorandum in January 2016 generally discouraging the use of shortened school days, and a law passed in 2017—S.B. 263[4] — establishing each student's "presumptive right" to the same hours of

[4] During the legislature's public hearings on S.B. 263, shortened school days were described as "vexing and longstanding," happening at "unprecedented rates," and a "widespread problem for Oregon students with disabilities." 2-ER-281.

instruction as other children and prohibiting school districts from unilaterally shortening a student's school day. *See* Oregon Dep't of Ed., Executive Numbered Memorandum 009-2015-16 Reduced School Days (Jan. 27, 2016), *available at* https://www.oregon.gov/ode/rules-and-policies/StateRules/Documents/Executive%20Numbered%20Memorandum%20009-2015-16%20-%20Reduced%20School%20Days.pdf; ORS 343.161(4)(a)(C)(2). S.B. 263 provided some procedural protections, including requiring schools to obtain a signed acknowledgement form from parents when placing students on abbreviated school day programs and to include a written statement explaining the reasons for the abbreviated school day program in the student's IEP. *Id.* § 343.161(4).

The gravamen of Appellants' Complaint was never that a state law did not exist nor that the existing state law itself violated federal requirements. Instead, the problem was that the ODE, despite the issuance of guidance and enactment of laws intended to curtail the use of shortened school days, failed to meet its federal obligations to ensure that Oregon students with disabilities were allowed to attend full school days that provided them a free appropriate public education free from discrimination. *See, e.g.*, 3-ER-586, 616, 622, 624–26, ¶¶ 14, 115, 133,

138, 145. Accordingly, Appellants asked the court to order the ODE to develop, adopt, and implement policies and practices that (1) would ensure that Oregon school districts provide a free appropriate public education in the least restrictive environment to all eligible children in the state, including by providing access to a full school day and (2) would not discriminate against students on the basis of disability, including by unnecessarily excluding children with disability-related behaviors from a full school day. 3-ER-627–28.

At the outset, the State insisted otherwise and moved to dismiss, arguing in part that S.B. 263 provided sufficient safeguards against unlawfully shortened school days. 3-ER-565–569; 3-ER-524, 3-ER-527–28. The district court denied the motion, agreeing with Appellants that "the State cannot simply point to administrative remedies when those remedies have proved inadequate." 3-ER-531–32. The district court also rejected the State's argument that the relief requested by the Complaint was too broad, recognizing that "[t]he ultimate scope of the remedy involves determinations that can only be made after all parties have presented their evidence at trial." 3-ER-535.

II. Federal Law Requires the ODE to Ensure Appellants' Rights to a Free Appropriate Public Education in the Least Restrictive Environment, Free from Discrimination.

The State's systemic deficiencies violate the IDEA, ADA, and Section 504. 3-ER-584–87, ¶¶ 8–11, 15–16; *see e.g.*, *Christopher S. ex. Rel. Rita S. v. Stanislaus Cty. Office of Educ.*, 384 F.3d 1205, 1212 (9th Cir. 2004) (recognizing that "[t]he United States Department of Education, Office of Civil Rights . . . has repeatedly held that a blanket policy of shortened school days for disabled students violates section 504 . . . and the ADA.").

A. IDEA

The Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et seq., is a comprehensive statute to ensure that all children with disabilities have access to "a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). The IDEA tasks the state educational agency, here, the ODE, as the party "primarily responsible" with providing a free appropriate public education in the least restrictive environment "to all children with disabilities residing in the State between the ages of 3 and 21, inclusive." 20 U.S.C. §§ 1401(32),

1412(a)(1)(A), 1412(a)(5). "The IDEA demands more [than *de minimis* progress from year to year for students with disabilities]. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1001 (2017); 20 U.S.C. § 1414(d).

The standard is a "demanding" one: students with disabilities must receive an "appropriately ambitious" educational program that gives them "the chance to meet challenging objectives." *Endrew*, 137 S. Ct. at 1000.

B. The ADA and Section 504

Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131 et seq., and Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794, are federal anti-discrimination laws that prohibit public entities, and programs and activities that receive federal financial assistance, from discriminating on the basis of disability. 42 U.S.C. § 12132; 29 U.S.C. § 794(a). Both statutes prohibit the denial of equal educational opportunities and have been interpreted to require the implementation of "reasonable modifications" to ensure access to such

opportunities. *See A.G. v. Paradise Valley Unified Sch. Dist. No. 69*, 815 F.3d 1195, 1206 (9th Cir. 2016) (stating elements of a claim under Title II or Section 504 and applying to public education).

The ADA also prohibits the unnecessary segregation of students with disabilities and requires that public entities administer their services, programs, and activities to those students in the most integrated setting appropriate to the needs of the student. *See Olmstead v. L.C.*, 527 U.S. 581, 599–600 (1999) (interpreting the ADA); *see also* 28 C.F.R. § 35.130(d).

Section 504 similarly requires that entities receiving federal financial assistance provide aids, benefits, and services to individuals with disabilities in the most integrated setting appropriate to their needs. 34 C.F.R. § 104.4(b)(2). Section 504 additionally specifies that a free appropriate public education provides special education and related aids and services that "are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met." 34 C.F.R. § 104.33(b)(1).

III. The District Court Certified a Class Recognizing That Arguments as to Implementation and Enforcement of Pre-Existing State Law and Policy Are Fact Questions to Be Determined on the Merits.

On February 5, 2021, the district court—over the State's objection—certified a class of students 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." 3-ER-508. The district court again rejected arguments from the State that its existing policies and procedures were sufficient to meet its obligations under federal law.

In so holding, the district court credited the expert report of Dr. Albert William Greenwood, a licensed child psychologist with over three decades' experience working with schools and families in Oregon to support children with disabilities:

> Dr. Greenwood's report shows that staff in the named plaintiffs' districts seemed to lack the knowledge and skills needed to properly evaluate the named plaintiffs' challenging behaviors and develop and implement plans for addressing those behaviors in a school setting and did not make use of experts to help them in the evaluation, development and implementation process. . . . Dr. Greenwood's report demonstrates that there is more than simply a lack of state-level resources, it suggests that there is an implementation gap between the state and local level. That is, the report also suggests that the school districts are not making effective use

> of the available resources or that the existing resources are not adequate.

3-ER-496–97. And:

> Dr. Greenwood's report provides evidence that named plaintiffs' districts repeatedly imposed shortened school days on named plaintiffs, without proper preparation or implementation, for extended periods of time. In other words, he found a pattern of misuse among named plaintiffs' school districts. Standing alone, this pattern could be nothing more than four separate anecdotes, outliers among the rest of the state's districts. But plaintiffs offer other evidence to support their position that the practice is widespread, both geographically and numerically . . . Together, this evidence demonstrates that the risk that a class member will be placed on an unnecessarily shortened school day due to their disability-related behaviors is significant.

3-ER-498–99. The district court granted certification finding that questions such as whether the aspects of Oregon's system already in place "measure up" to federal requirements and whether the state "properly implements" the protections to which it points were "merits issues for another stage." 3-ER-500–01. And the district court recognized that, as to Complaint's requested relief, "[w]hat the precise policies and practices are that fall within each order can be given greater specificity at later stages of litigation" and that the Complaint's requested relief adequately "described the general contours of an injunction that would provide relief to the whole class." 3-ER-507.

IV. A Neutral Expert Confirmed the Harm Caused by Widespread, Inappropriate Use of Shortened School Days and Recommended Remedies to Ensure a Free Appropriate Public Education for Oregon Students with Disabilities.

On August 16, 2021, the parties entered into an Interim Settlement Agreement through which they selected Dr. David Bateman as a neutral expert to investigate the use of shortened school days statewide and to make recommendations regarding the "precise policies and practices" referred to in the Class Certification Order that would be needed to ensure that Oregon students with disabilities receive the public education to which they are entitled. 2-ER-289; 2-ER-277.

Dr. Bateman's findings and recommendations confirmed the harm to the Class described in the Complaint. 3-ER-339–45. Dr. Bateman also confirmed that the State's monitoring system "did not allow for appropriate data gathering and monitoring of the use of shorten[ed] school days." 2-ER-302. And Dr. Bateman confirmed that local school districts failed to follow the requirements of S.B. 263 and that local school districts needed support and resources from the State for students with intense behavioral needs. 3-ER-337, 3-ER-355, 3-ER-358, 3-ER-383.

Dr. Bateman concluded that the State needed to take system-wide coordinated action to "follow through with [its] general supervisory

responsibility" and enforce class members' "right to attend the same amount of time [at school] as typically developing students." 3-ER-346, 3-ER-362. Dr. Bateman recommended that the State overhaul its approach to shortened school days, including by:

- Issuing guidance on "informal removal" shortened school days;
- Mandating reporting of both formally documented and informal removal shortened school days;
- Providing training, support, and corrective actions to local school districts based on reported data;
- Establishing a statewide program to increase the number of school district staff trained to provide behavioral supports;
- Creating and funding regional intensive interagency support teams to provide training, consultation, and coaching to districts in addressing behavioral needs;
- Reducing funding provided to districts for any student placed on shortened school days for more than 30 days; and
- Requiring compensatory education for any student placed on a shortened school day for more than 30 days.

3-ER-347–57. Importantly, to ensure that the needed systemic overhaul would be implemented effectively and to ensure compliance, Dr. Bateman additionally recommended the appointment of a Special Master and panel of advisors to oversee implementation. 3-ER-357.

V. The ODE Adopted a Patchwork of Voluntary Policy Changes and a New Rule and the State Legislature Enacted a Statute Which Adopted Some of Dr. Bateman's Recommendations and Neglected Others.

After Dr. Bateman's report, the ODE described itself as having prioritized monitoring of shortened school days during the 2022–2023 school year, in part through a new state level administrative rule which expanded its general supervisory authority, Or. Admin. R. 581-015-2015 (2022). 2-ER-133. But this new state rule did not *require* the State to take any action and the ODE could rescind it at any time.

Dr. Wells, the director of IDEA programs at the ODE and State Director of Special Education for Oregon, confirmed that the State did not intend to enact rules to implement Dr. Bateman's recommendations. 2-ER-194–96. The State adopted guidance for school districts, yet in doing so still failed to address many of Dr. Bateman's recommendations, including that the State should issue guidance explaining (1) how to properly document the educational setting for students on shortened school days to ensure that school districts are accurately reporting data regarding these students; (2) how to document informal removal shortened school days; and (3) how to support students with behavioral

needs through functional behavioral assessments and behavioral intervention plans. *See* 3-ER-348, 3-ER-353, 3-ER-356.

While this litigation was pending, Oregon's legislature considered new legislation, S.B. 819, to address the problem of shortened school days and the State's ongoing failure to implement the existing state law, S.B. 263. 2-ER-281. During a legislative hearing on S.B. 819, bill sponsor Senator Gesler Blouin explained how the legislature had previously "tried to fix this problem" with S.B. 263, but it "[did] not fix[] the problem." 2-ER-47. Appellants' local counsel Disability Rights Oregon testified in support of the bill as a step towards holding the ODE accountable for frequent and long-term shortened school days. And Disability Rights Oregon expressed hope that the new law would prompt the ODE to adopt a new understanding of its role as the agency entrusted to oversee a comprehensive educational system and to exercise its general supervisory authority to ensure that every Oregon student with a disability receives free appropriate public education. The Oregon legislature enacted S.B. 819 in July 2023. 2-ER-69–70.

S.B. 819 established policies and procedures broadly aimed at limiting school districts' use of shortened school days and requiring the

ODE to collect some data regarding the use of shortened school days. These policies and procedures are steps toward addressing the harms to students with disabilities described in Appellants' Complaint. But many critical needs that Dr. Bateman noted and Plaintiffs complained about were left unaddressed:

- S.B. 819 does not address how shortened school days are related to the requirements of the IDEA, the ADA, and Section 504 (3-ER-622–24, 3-ER-626–27 ¶¶ 133, 138, 145);
- S.B. 819 does not require the ODE to provide additional resources to school districts to ensure that school districts are not unnecessarily resorting to shortened school days (3-ER-620, ¶ 123);
- S.B. 819 requires the ODE to reduce the funding for school districts when they have placed students on shortened school days without parental consent and violated the ODE's order to return these students to full day education, but does not require a reduction in funding for school districts under any other circumstances (3-ER-598–99, ¶ 53);
- S.B. 819 does not require data collection or monitoring regarding shortened school days in the form of informal removals (3-ER-597, 3-ER-616–17, ¶¶ 48, 116);
- S.B. 819 requires the ODE to investigate a student's shortened school day if the student's parent does not consent or withdraws consent to a shortened school day. However, it does not otherwise trigger increased Department enforcement or any *systemic* monitoring or investigation of trends that would allow the ODE to be aware of illegal usage of shortened school days by districts absent parent complaints (3-ER-622–23, ¶ 133).

2023 Or. Laws Ch. 290 (S.B. 819) §§ 2, 3, 5; 2-ER-120–23, 2-ER-125–27.

VI. Without Systemic Measures to Guarantee Free Appropriate Public Education Without Discrimination, Students Across Oregon Remain on Shortened School Days or at Significant Risk of Being Placed on Shortened School Days.

The State's incomplete remedies have not cured the systemic harm shortened school days cause Oregon students with disabilities.

As of October 3, 2023—several months after S.B. 819 was signed into law—a partially complete report discussed during a meeting of the ODE's Data Collection Committee showed at least 738 students with disabilities on shortened school days. 2-ER-46. During that meeting, the ODE officials charged with collecting this data noted that "we expected a lot more than that" and implied that the number was less than expected not because the ODE's efforts had been successful at meaningfully reducing the number of students on shortened school days, but because the data submission was incomplete. *Id.* Moreover, these numbers fail to account at all for informal removals that occur, for instance, when school districts compel parents to take students home early or remove students to a desk in the hallway for many hours per day. S.B. 819 does not require reporting these or other informal removals that effectively subject many students to shortened school days without any

documentation. Preliminary reports indicate that these informal removals continue. *See, e.g.*, 2-ER-38–42 (showing extensive problems involving shortened school days, informal removals, and misuse of suspensions in the Central School District); 2-ER-31–35 (showing ongoing misuse of informal removals in the North Clackamas School District).

Nevertheless, on February 29, 2024, the district court granted the State's Motion to Dismiss for Lack of Jurisdiction by finding that S.B. 819 mooted the case by providing Appellants the relief sought in the Complaint. 1-ER-27–28.

SUMMARY OF THE ARGUMENT

The district court applies an expansive and fundamentally incorrect approach to mootness. Simply put, a case is not moot if there is any remaining relief whatsoever that a court could grant. Here, the new legislation failed to address many of the alleged harms. Accordingly, there are still live disputes to be resolved on the merits. By focusing only on what S.B. 819 could potentially provide—and ignoring the many ways that it actually fell short of providing the relief requested—the district court erred in dismissing Appellants' claims as moot.

Appellants alleged that the State's policies and procedures were deficient and in violation of federal law in at least four ways:

(1) by not requiring the systemic collection of reliable data on students with shortened school days (3-ER-616–17, ¶¶ 115–17);

(2) by not implementing policies and procedures that require the State to systemically monitor individual school districts' and its own compliance with both federal and state law (3-ER-618–19, ¶¶ 119–22);

(3) by failing to provide districts with "adequate resources, technical assistance, and training to help prevent the unnecessary use of shortened school days" (3-ER–620, ¶ 123); and

(4) by implementing an education funding formula that rewards use of shortened school days by paying districts the same for one hour of tutoring as for providing a full day of in-school instruction (3-ER-598–99, ¶ 53).

If *any* one of these systemic violations remains unremedied, Appellant's claims are not moot. Yet the district court dismissed the case even though *all four deficiencies continue to contribute to the widespread use of shortened school days across Oregon*. Neither S.B. 819 nor the State's voluntary actions remedy the harm alleged in the Complaint. Accordingly, the Court need not reach the question of voluntary cessation. Nonetheless, to the extent that some of the policies on which the State has relied to argue mootness are not the subject of legislation

and are instead entirely voluntary, those policies cannot moot Appellant's claims under the voluntary cessation doctrine.

Because S.B. 819 has critical deficiencies that render it ineffective to solve the systemic issues which have led to Appellants' harm, Appellants' claims are not moot.

STANDARD OF REVIEW

This court reviews de novo a dismissal for lack of subject matter jurisdiction. *Zubkis v. Shasky*, 7 F. App'x 603, 604 (9th Cir. 2001) (citing *Crum v. Circus Circus Eners.*, 231 F.3d 1129, 1130 (9th Cir. 2000)).

ARGUMENT

A defendant remedying only some of the harms alleged—while leaving other harms unaddressed—does not render the whole case moot. Yet that is what the district court held below. While Oregon's new legislation addressed some of the alleged harms, it indisputably ignored others. Because (under Supreme Court and this Court's precedent) a partial remedy does not moot a claim, the district court erred by dismissing this case.

I. A Case Is Only Moot When No Relief Can Possibly Be Granted.

Mootness is not a rare or novel doctrine. To the contrary, it is a fundamental legal principle that this Court and others have addressed many times, leaving no ambiguity as to what it means.

To start with first principles, Article III of the U.S. Constitution ("Article III") requires that a legal dispute must retain an actual controversy "through all stages of the litigation." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (cleaned up). "A case become moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Id.* (cleaned up). Therefore, the core consideration when determining mootness is whether there is a present controversy as to which effective relief can be granted. *Nw. Env't Def. Ctr. v. Gordon*, 849 F.2d 1241, 1244 (9th Cir. 1988). If so, the case isn't moot. *Id.*

The threshold to find mootness is very high: An action "becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 862 (9th Cir. 2017) (citing *Chafin v. Chafin*, 568 U.S. 165

(2013)). A case does not become moot unless "it loses its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law. The question is not whether the precise relief sought [at the time the case was filed] is still available. The question is whether there can be any effective relief." *Earth Island Inst. v. U. S. Forest Serv.*, 442 F.3d 1147, 1157 (9th Cir. 2006) *abrogated on other grounds by Winter v. Natural Res. Def. Council, Inc.*, 55 U.S. 7 (2008) (cleaned up).

"Mootness must be 'determined on a claim-by-claim basis.'" *Pac. Nw. Generating Co-op v. Brown*, 822 F. Supp. 1479, 1506 (D. Or. 1993), aff'd 38 F.3d 1058 (9th Cir. 1994) (citing *Headwaters, Inc. v. Bureau of Land Management*, 893 F.2d 1012, 1015–16 (9th Cir. 1989) (separately addressing mootness issue as to injunctive relief and declaratory relief)). The party asserting mootness must shoulder the "heavy" burden of establishing that there is no effective relief a court can offer. *Forest Guardians v. Johanns*, 450 F.3d 455, 461 (9th Cir. 2006); *see also N.D. v. Reykdal*, 102 F.4th 982, 990 (9th Cir. 2024) ("The party asserting mootness bears the burden of establishing that there is no effective relief remaining that the court could provide.") (citing *Already*, 568 U.S. at 91).

Even when this high standard is met, however, an otherwise moot case may still be judiciable "where defendant voluntarily ceased the challenged practice . . . ." *San Luis & Delta-Mendota Water Auth. v. U.S. Dep't of the Interior*, 870 F. Supp. 2d 943, 953 (E.D. Cal. 2012). Under the voluntary cessation exception, "a defendant cannot automatically moot a case simply by ending its unlawful conduct once sued." *Brach v. Newsom*, 38 F.4th 6, 12 (9th Cir. 2022).

II. Appellants' Claims Are Not Moot: The State's Incomplete Voluntary Policies and Legislation Neither Remedy All the Harm Complained of Nor Offer Appellants All That They Demanded.

In dismissing, the district court relied on *Board of Trustees Glazing Health & Welfare Trust v. Chambers* for the proposition that the court "should assume that a legislative body is acting in good faith in repealing or amending a *challenged legislative provision*, or in allowing it to expire." 941 F.3d 1195, 1199 (9th Cir. 2019) (emphasis added). But *Chambers* is inapposite where, as here, the Complaint never challenged a legislative provision. Appellants' challenge was not to S.B. 263 (which S.B. 819 repealed) as violative of the IDEA, ADA, or Section 504. Instead, Appellants challenged the State's systemic failure—through its practices and procedures—to abide by its obligations under federal law. To be

clear, Appellants never alleged that S.B. 263 violated federal law—rather, Appellants alleged that S.B. 263 was insufficient to ensure their rights under federal law both because of gaps in the legislation and because the ODE was not implementing it. Passing new state legislation that is also incomplete and that the ODE still may not follow does not remedy that harm.[5]

The steps the State has taken with S.B. 819 and new policies to address misuse of shortened school days are positive. But they are also

---

[5] Even where an action *does* challenge the adequacy of a law, the mere passage of new legislation does not moot pending actions. The U.S. Supreme Court has recognized, "if that were the rule, a defendant could moot a case by repealing the challenged statute and replacing it with one that differs in some insignificant respect." *N.E. Fl. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993); *see also Assoc. Gen. Contractors of Am., San Diego Chapter, Inc. v. Cal. Dept. of Transp.*, 713 F.3d 1187, 1194 (9th Cir. 2013) (recognizing that when a new law disadvantages plaintiffs in the same way there is "not merely a *risk* that the government would repeat the challenged conduct" it has already done so."); *Cuviello v. City of Vallejo*, 944 F.3d 816, 824 (9th Cir. 2019) (case not moot where new legislation "threatens to harm a plaintiff in the same fundamental way" as previous legislation); *Mont. Green Party v. Jacobsen*, 17 F.4th 919, 922 (9th Cir. 2021) (amendments to Montana election laws did not moot a challenge to those laws because "[t]he amendments do not fundamentally change either the challenged provisions or the applicable legal analysis"). As discussed above, however, Appellants' Complaint did not challenge the legality of S.B. 263 or other Oregon law.

incomplete and do not remediate the harm to the class. As a result, students across Oregon and members of the Class continue to be harmed by the State's conduct. Each harm alleged in the Complaint remains live for examination on the merits and appropriate, complete, remedy:

Harm alleged in the Complaint	**S.B. 819**	**Continuing harm after enactment of SB 819 and voluntary policy changes**
The State has failed to implement policies and procedures requiring the systemic collection of data on students with shortened school days. 3-ER-616–17, ¶¶ 115–17.	S.B. 819 requires collection of data and information as to *formal* shortened school days.	SB 819's requirement changes nothing as to *informal* shortened school days. Further, there is no mechanism to prevent school districts from providing incomplete data about formal removals as they did under SB 263.
The State has failed to implement policies and procedures that would require the State to systemically monitor individual school districts and its own compliance with both federal and state statutes. 3-ER-618–19, ¶¶ 119–22.	S.B. 819 requires the ODE to initiate an investigation and inform the school district of any noncompliance with two discrete provisions (unilaterally placing student with disability on abbreviated school	S.B. 819 does not require investigation in any circumstance other than a violation of parental consent for a shortened school day. There is still no requirement for the State to routinely monitor the aggregate use of formal or informal shortened

	day program, or noncompliance with parent consent requirements) within 30 calendar days of receiving the complaint or having cause to believe the school district is not in compliance (§ 5(2)(a)); 2-ER-126.	school days to determine whether its policies have been effective or if more intervention is required. Further, there are no mechanisms to ensure that the State holds itself accountable for enforcement of SB 819 which is of particular concern as the State had previously failed to hold itself accountable for enforcement of SB 263.
The State has failed to provide districts with "adequate resources, technical assistance, and training to prevent the unnecessary use of shortened school days." 3-ER-620, ¶ 123.	S.B. 819 appropriates $3,140,320 for the implementation of the act. (§ 12); 2-ER-129.	SB 819 fails to mandate the provision of *any* resources, technical assistance, or training. The voluntary policies and guidance that the State has adopted are incomplete and fail to address many of the neutral expert's recommendations.
The State has implemented an education funding formula which "rewards school districts that impose shortened school days	S.B. 819 contemplates that if the school fails to comply with certain corrective actions ordered by the ODE within 10 days, the Superintendent of	The same funding problem remains: Districts that place students on shortened school days will—so long as the school complies with

by paying them the same amount for providing a student with one hour of tutoring as it would if the student had received a full day of instruction in school." 3-ER-599, ¶ 53.	Public Instruction must immediately withhold State School Funds based on the weighted average daily membership attributable to the students subject to the order and the percentage of the school year that the students were placed on an abbreviated school day program (§ 5(2)(c)(C)); 2-ER-126–27.	procedural requirements—receive full funding even for students who receive as little as one hour of instruction services per day.

For each of these continuing harms, the district court could still award relief. That means the case is not moot.

Even if the State's actions may ultimately *improve* upon some of the harm raised in the Complaint, a partial solution does not render a claim moot. *See, e.g.*, *City of Jacksonville*, 508 U.S. at 662 (a case is not moot where a new law disadvantages plaintiffs in the same fundamental way even if to a "lesser degree" than before). On their face, the State's actions increase regulation of just a subset of shortened school days on a *student-by-student* basis. Critically, the measures fail entirely to account for shortened school days from informal removals. Moreover, they fall short

of concrete measures that would hold the State accountable for monitoring and addressing the harm of shortened school days on a systemic basis. This is the core allegation of the Complaint. For the reasons discussed in greater detail below, Appellant's claims are not moot.

A. Neither Senate Bill 819 nor the ODE's Voluntary Policies Include Appropriate Mechanisms to Ensure the State Collects and Analyzes Complete Data.

Specific to data collection, the Complaint alleges that the State's policies and procedures are defective in at least two ways: (1) by failing to collect much readily available information about students who are denied access to full school days (3-ER-616–17, ¶ 116); and (2) by failing to *review* the limited data that it does collect to ensure that students receive a free appropriate public education in accordance with federal law (3-ER-617, ¶ 117). On its face, Senate Bill 819 offers only a partial solution to the first deficiency.

The primary action of S.B. 819 is the establishment of additional procedural requirements that local school districts must meet to place students on shortened school days through their IEPs. The new procedures include a requirement that the local school district document

the "specific provisions of the abbreviated school day program," the number of hours of instruction and educational services to be provided while the student is on shortened school days, how the student's progress will be measured, and the date the student is expected to return to full day schooling. S.B. 819 § 3; 2-ER-122–23. S.B. 819 provides that school districts will provide this documentation to the State every 30 days. To support implementation of S.B. 819, the State has developed forms and other guidance to which school districts may refer in completing the required documentation. 2-ER-108. If implemented correctly, S.B. 819's increased data collection regarding formal shortened school days may partially moot this aspect of Appellant's Complaint.

But critically, S.B. 819 omits from its ambit any requirement to collect data that would capture the use of *informal* removal shortened school days. Such removals can occur in many ways, often due to the same disability-related behaviors that may cause a school to place a student on a formal shortened school day program. 2-ER-344. When a school repeatedly informally removes a student from the classroom due to behaviors related to the student's disability, the effect is the same as a shortened school day formally documented on a student's IEP. By

failing to document informal removals, the State receives, at best, an incomplete picture of a school district's use of shortened school days.

Further, S.B. 819 lacks any procedural mechanism to ensure on a systemic level that schools accurately complete the required documentation and otherwise fully comply with the new procedural requirements. Instead, S.B. 819 only requires the State to investigate when it receives a complaint "or otherwise has cause to believe a school district is not in compliance [with specific provisions of S.B. 819 related to parental consent]." § 5(2)(a). There are no proactive checks or procedures that would identify noncompliance with state or federal law absent a complaint.

That schools may not complete required documentation—or that an ad hoc complaint system may not be adequate to capture these failures—are not mere hypotheticals. Districts have a history of failing to provide accurate data and the Complaint specifically describes both the failure of school districts to adequately document shortened school day placements under S.B. 263 and the inefficacy of the State's ad hoc complaint process to remedy that failing. S.B. 819 is subject to the very same systemic

flaws which led to Appellants' harm and that have not been remedied as it relates to data collection.

B. Neither Senate Bill 819 nor the State's Voluntary Policies Require the State to Systemically Monitor School Districts and its Own Compliance with State and Federal Law.

The Complaint also alleges that the State has failed to ensure free appropriate public education at a system-wide level by failing to adequately monitor school districts (including by reviewing the available data). S.B. 819 purports to fix this failure in two ways that sidestep the core problem: by (1) requiring a school to obtain informed and written consent from a parent or foster parent before placing a student on a shortened school day program (S.B. 819 § 1; 2-ER-109); and by (2) requiring the State to promptly (within 30 days) investigate complaints (S.B. 819 § 5(2)(a)). However, S.B. 819 does not require that the State review the data it receives from districts at any level of frequency, let alone at the level of frequency that would be needed to proactively identify violations of S.B. 819's procedural protections or substantive failures to provide a free appropriate public education that occur when students with disabilities are subjected to unnecessary and unlawful shortened school days. Nor is there any requirement that the State

review the aggregated data at a district or state level to determine whether, in spite of the State's remedial efforts, systemic noncompliance with federal law in the use of shortened school days and informal removals continue.

Outside the requirements of S.B. 819, in its Motion to Dismiss, the State described that it was "in the process" of hiring a "Research Analyst" to "work with data submitted" and Administrative Specialists to "support analysis of the data submissions." 2-ER-94–95. These staff may help the State identify problems with school district formal shortened school day data. But even these voluntary implementing policies fail to describe with any specificity a systemic undertaking to monitor the data the State is collecting under S.B. 819. Absent reliable results to indicate that such efforts are actually eliminating the harms caused by shortened school days, they cannot meet the burden that is required by mootness jurisprudence.

Moreover, while S.B. 819 describes enforcement tools the State can use in some instances when school districts place students on shortened school days without parental consent, including withholding a portion of funding (§ 5(2)(c)(C)), it is toothless as to the State itself. It provides no

tools or mechanisms (such as an independent monitor) that could hold the *State* accountable in the event that it fails to enforce S.B. 819. Under S.B. 819, the State's historic failure to hold itself accountable, including its failure to hold itself accountable to enforce the pre-existing law under S.B. 263, remains entirely unaddressed.

To this end, the parties' neutral expert recommended that the State appoint a panel of advisors, including at least one parent, to review data and make recommendations to a special master in charge of implementation. 3-ER-357. The State failed to do so and instead places the onus entirely on the *parent* or foster parent to ensure that a student receives free access to public education by either refusing to provide consent, revoking consent, or reporting a non-compliant school district.

C. Neither Senate Bill 819 Nor the State's Voluntary Policies Ensure That the State Will Provide Districts with "Adequate Resources, Technical Assistance, and Training to Prevent the Unnecessary Use of Shortened School Days."

The Complaint additionally identifies the State's failure to provide districts with adequate resources, technical assistance, and training to prevent the unnecessary use of shortened school days as causing the State to systemically fail to provide free appropriate public education in

violation of federal law. S.B. 819 does not contemplate *any* remedy of this deficiency beyond a modest, one-time appropriation of funds for unspecified "implementation" of the law. The state offers no evidence that the size of the one-time appropriation is in any way proportional to the need either as to how many districts may need help, the type of help they may need, or the number of students affected. Instead, the State has addressed its failure to provide the needed resources, technical assistance, and training entirely through voluntary action and rulemaking. The State's dogged failure to recognize, measure, or address the harms caused by the pervasive use of shortened school days and informal removals makes clear that such voluntary remedies have and will continue to fall well short of the action necessary to bring the State into compliance with federal law.

Specifically, the State has focused its voluntary efforts on developing the Regional Special Education Support Networks and establishing a Statewide Technical Assistance Center. The Regional Support Networks are each operated by a provider that the State anticipates will be trained on focus areas relating to addressing disability-related behavior effectively. 2-ER-96. There is no guarantee

of any funding that will ensure these services continue past initial implementation of S.B. 819. However, the need for resources will continue to exist long after S.B. 819 is fully "rolled out." *Cf.* 3-ER-349–50 (report of neutral expert Dr. Bateman recommending incentivizing staffing for a period of five years.).

Further, there is no mechanism that would ensure that these regional networks are effective in getting needed supports to schools, for example by automating certain resources where students are placed on shortened school days for longer than 30 days or otherwise mandating regular trainings. *See, e.g.*, 3-ER-353. By failing to implement regular and mandatory training at the individual school level—a key remedy recommended by the neutral expert—there is no guarantee that school districts will actually receive the tools necessary to ensure that they develop the capacity to support students' behavioral needs rather than relying on inappropriate shortened school days. 2-ER-302; 3-ER-347. The State contemplates that the Statewide Technical Assistance Center will provide "ongoing coaching and capacity building" to schools (2-ER-97) but does not offer any specifics on what this means or how those centers will provide such capacity.

D. Neither Senate Bill 819 Nor the State's Voluntary Policies Fix the State's Flawed Education Funding Formula.

Finally, the Complaint alleges that the State's funding formula *encourages* the use of shortened school days, contributing to the system-wide overreliance on removal to correct disruptive behavior. 3-ER-598–599, ¶ 53. Specifically, because the number of students on shortened school days is not factored into the amount of funding a school receives, school districts are incentivized to rely on shortened school days because they will receive the same funding for fewer educational hours provided. Neither S.B. 819 nor any other corrective measure the State has taken even tries to fix this problem.

The neutral expert recommended that the State reduce a district's IDEA and state funding proportionally for *any* student placed on shortened school days for more than 30 days during a calendar year. *See* 3-ER-354. Under the proposed policy, funding would be reduced to reflect the actual percentage of time each day the student receives live instruction from a certified teacher and would be restored incrementally as the student is returned to school. Instead, S.B. 819 includes a provision requiring that the State withhold a portion of funding if, after

a complaint is filed and the State investigates, the State determines that the district has failed to comply with the parental consent provisions of S.B. 819 *and* the State orders compliance but the district continues to fail to comply. § 5(c)(C). This does not meaningfully change the previously flawed incentive structure. The neutral expert's recommendation would encourage schools to limit the use of shortened school days and return students to school as quickly as possible to avoid losing funding. Under the current law (as "fixed" by S.B. 819), however, it is still the case that—as long as procedural requirements are followed—schools will receive the same funding regardless of the number of students on shortened school days or the length of time those students spend on shortened school days. The State's wholesale failure to address this alleged deficiency alone prevents a finding of mootness.

For all these reasons, Appellants continue to suffer many of the same harms alleged in the Complaint even after the passage of S.B. 819 and implementing policies.

III. To the Extent That the State Relies on *Policy* to Claim That it Has Remedied Concerns Not Addressed by Senate Bill 819, the State's Voluntary Conduct Does Not Moot Appellant's Claims.

Because Appellants' claims are not fully remedied by the State's new initiatives—regardless of whether those initiatives are memorialized in legislation or voluntary policy action—the Court need not even reach the question of voluntary cessation to determine that the action is not moot. But to the extent that the State relies on its rulemaking and implementation policies to argue that it has remedied the harm alleged in the Complaint, its voluntary actions fail to moot Appellant's claims.

In its motion to dismiss below, the State tacitly conceded that S.B. 819 does not, on its face, remedy all the harm alleged. As set out above, it is only by pointing to a patchwork of legislative action, rule-making, and vague "implementation policy" that the State claims a comprehensive remedy to the allegations in the Complaint. 2-ER-105–06. S.B. 819, for example, fails even to address providing school districts with *any* additional resources or training. The voluntary cessation exception applies to all the changed practices outside of those required

by S.B. 819 upon which the State premises its mootness arguments. These include:

- The hiring of a single research analyst supported by four administrative specialists to analyze data submissions;
- Voluntary training on the implementation of SB 819 and documentation of shortened school days;
- The development of regional special education support networks;
- The training of regional special education support network staff to provide guidance on effective responses to disability-related behavioral problems; and
- The development of a statewide technical assistance center to provide "ongoing coaching" to school districts.

2-ER-106.

The Ninth Circuit applies a six-factor test in evaluating whether a public entity's voluntary changes in policy or practice moot a claim: (1) whether the changes are "evidenced by language that is broad and scope and unequivocal in tone"; (2) whether the changes "address[] all of the objectionable measure that [the Government] officials took against the plaintiffs in th[e] case"; (3) whether the underlying lawsuit was the "catalyst" for the changes"; (4) how long the changes have been in place at the time the court considers mootness; (5) whether the government has engaged in conduct similar to that challenged since the changes; and (6)

whether the changes "could be easily abandoned or altered in the future." *Rosebrock v. Mathis*, 745 F.3d 963, 972 (9th Cir. 2014) (quoting *White v. Lee*, 227 F. 3d 1214, 1242–44) (cleaned up). Here, five of the six factors show that the claims are not moot:

The policy changes are neither broad in scope nor unequivocal in tone. As discussed in greater detail above, the changes implemented by State fall well short of those Appellants identified as needed in the Complaint, as well as the overhaul recommended by the parties' jointly selected neutral expert to comply with federal requirements. The *vague* language used to describe the trainings, guidance, and other voluntary support that the State intends to provide should not be confused with *broad* language. The State retains significant discretion in implementation. *See Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 574 (2d Cir. 2003) (rejecting mootness claims because agency interpretation of code could change in new administration) *superseded by regulation on other grounds, Mhany Mgmt, Inc. v. County of Nassau*, 819 F.3d 581 (2d Cir. 2016). Further, few of the trainings and resources that the State has described that it plans to provide are *mandatory* for the school districts. Optional

trainings which are not well defined are not indicative of a change that is "unequivocal in tone."

The changes do not address all of the objectionable measures challenged. Even if the State's unvetted and sporadically collected data suggests that changes in its policies may have minimally reduced the number of formally documented shortened school days, at least hundreds of students are still unable to access full school days because of unmet behavioral needs. The State's changes in policy have also (1) failed to address many of the priority recommendations suggested by the neutral expert, and (2) failed to resolve procedural defects identified in the Complaint that allow or enable the pervasive illegal use of shortened school days and informal removals.

The changes are newly in place. At the time the district court considered the State's motion, the policy changes on which the State relied had either not yet been placed into effect or had been in place for a period of months. *Cf. Am. Diabetes Ass'n*, 938 F.33d at 1153 (finding that this factor was met via a policy which had been in place for at least two years).

The State has continued to engage in the same challenged conduct. Despite the State's newly adopted policies, the federal violations identified in the Complaint remain ongoing. As discussed above, *supra* Section II, despite the State's implementation of these new voluntary policies, at least hundreds of Oregon schoolchildren remain on formally documented shortened school days. This is unsurprising as the new policies contain many of the same defects as the old. Now, as before, there continues to be no data collection as to informal removals (Section II.A), no systemic monitoring of the data that *is* collected as to shortened school days (Section II.B), a lack of specific and mandatory training resources available to local school districts (Section II.C), and a funding formula that *incentivizes* school districts to rely on shortened school days (Section II.D).

The changes can be easily abandoned. The State has placed minimal checks on its discretion as to whether any of the implementing policies that it has established to respond to the pervasive harm caused by shortened school days will remain in place. *See Getman v. Or. Health & Sci. Univ.*, No. 3:21-cv-01408-SB, 2022 WL 17156760 at *4 (D. Or. Nov. 22, 2022) (The Ninth Circuit has recognized that a "lack of procedural

safeguards insulating the new state of affairs from arbitrary reversal can counsel against mootness."). Further, though the State ultimately took action, it insisted throughout the litigation that its pre-existing policies, including S.B. 263, adequately met federal requirements under the IDEA, ADA, and Section 504. The State's failure to independently concede that the serious flaws in its prior regime gave rise to the new actions casts doubt on its commitment to the more recent changes that it now relies upon to argue that the case is moot. *See Armster v. U.S. Dist. Ct.*, 806 F.2d 1347, 1359 (9th Cir. 1986) ("It has long been recognized that the likelihood of recurrence of challenged activity is more substantial when the cessation is not based upon a recognition of the initial illegality of that conduct.").

SB 819 and the State's additional voluntary policies fail on their face and as matter of fact to remedy the significant harms alleged in the Complaint. The district court erred in dismissing the Complaint.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed, and the case remanded for consideration of the claims on the merits.

Respectfully submitted, Dated: August 20, 2024

/s/ *Richard D. Salgado*

Richard D. Salgado
Jordan A. Kazlow
McDermott Will & Emery LLP
2501 North Harwood Street, Suite 1900
Dallas, Texas 75201
(214) 210-2797
richard.salgado@mwe.com
jkazlow@mwe.com

Thomas Stenson
Joel Greenberg
Disability Rights Oregon
511 SW 10th Avenue, Suite, 200, Portland, Oregon 97205
(503) 243-0281
tstenson@droregon.com
jgreenberg@droregon.com

Hannah Benton Eidsath
Nina Monfredo
National Center for Youth Law
818 Connecticut Avenue NW, Suite 425
Washington, DC 2006
(202) 868-4781
hbenton@youthlaw.org
nmonfredo@youthlaw.org

Lewis Bossing
Bazelon Center for Mental Health Law
1090 Vermont Avenue NW, Suite 220
Washington, DC 20005
(202) 467-5730
lewisb@bazelon.org

Selene Almazan-Altobelli
Council of Parent Attorneys and Advocates
PO Box 6767
Baltimore, Maryland 21285
(844) 426-7724 ext. 702
selene@copaa.org

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, the undersigned counsel for Appellants hereby states that I am unaware of any related cases currently pending in this court.

/s / *Richard D. Salgado*
Richard D. Salgado

CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitation of Circuit Rule 32-1 because this motion contains 8,895 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f).

2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

Dated: August 20, 2024

/s / *Richard D. Salgado*
Richard D. Salgado

Counsel for Plaintiffs-Appellants