

No. 24-2080

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*In the*  
**United States Court of Appeals**  
*For the*  
**Ninth Circuit**

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J.N., *et al.*,

*Plaintiffs-Appellants,*

v.

OREGON DEPARTMENT OF EDUCATION, *et al.*,

*Defendants-Appellees.*

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*Appeal from a Decision of the United States District Court for the District of Oregon,  
No. 6:19-cv-00096-AA · Honorable Ann L. Aiken*

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**BRIEF OF AMICI CURIAE THE DISABILITY RIGHTS  
EDUCATION AND DEFENSE FUND, THE EAST BAY  
COMMUNITY LAW CENTER, ET AL.  
IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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## CORPORATE DISCLOSURE STATEMENT

Amici each state that they do not have parent corporations. No publicly held corporation owns 10 percent or more of any stake or stock in any Amicus.

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## IDENTITY AND INTEREST OF AMICI CURIAE<sup>1</sup>

**The Disability Rights Education & Defense Fund** (“DREDF”), based in Berkeley, California, is a national nonprofit law and policy center dedicated to protecting and advancing the civil and human rights of people with disabilities. Founded in 1979 by people with disabilities and parents of children with disabilities, DREDF remains board- and staff-led by members of the communities for whom we advocate. DREDF pursues its mission through education, advocacy and law reform efforts. DREDF is nationally recognized for its expertise in the interpretation of federal disability civil rights laws and has participated as amicus in numerous high court matters involving those laws. As part of its mission, DREDF works to ensure that people with disabilities have the legal protections, including broad legal remedies, necessary to vindicate their right to be free from discrimination.

**The East Bay Community Law Center** (“EBCLC”) is a nonprofit legal organization and the largest provider of free legal services to low-income individuals in the East Bay of the San Francisco Bay Area. The Education Justice Clinic (“EJC”) and the Youth Defender Clinic (“YDC”), two of eight legal aid programs at EBCLC,

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<sup>1</sup> Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), Amici state that no counsel for a party authored this brief in whole or in part, and no party or party’s counsel made a monetary contribution intended to fund its preparation or submission. No person other than Amici, their members, and their counsel made a contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

directly serve youth, many of whom are students of color with learning disabilities. EJC and YDC represent school-age youth in juvenile delinquency, special education, and school discipline proceedings as well as provide social work to implement their holistic advocacy model. Staff work to support youth impacted by school exclusions and disabilities in school by advocating for their rights to fully access their education under federal and state disability and school discipline laws. Staff also engage in policy work aimed to uphold and ensure the rights of students to access their education, particularly for students of color with disabilities, as part of their mission to abolish the school-to-prison pipeline. EBCLC attorneys have extensive experience and expertise in navigating and activating federal disability laws impacting youth, including the Individuals with Disabilities Act and Section 504 of the Rehabilitation Act. EBCLC thus has abiding interest in, and knowledge of, the issues presented in this matter.

**The Advocacy Institute** is a Washington, D.C.-based national non-profit organization that works to improve the lives of children, youth, and adults with disabilities through a variety of activities including policy, advocacy, and education. Much of our work is focused on the more than seven million students who are eligible under the Individuals with Disabilities Education Act.

**Advocates for Children of New York** (“AFC”) has worked for more than fifty years with low-income families to secure quality public education services for

their children, including children with disabilities. AFC provides a range of direct services, and also pursues institutional reform of educational policies and practices through advocacy and impact litigation, including class actions involving discipline and exclusion of students with disabilities such as *D.S. v. New York City Dep't of Educ.*, 700 F. Supp. 2d 510 (S.D.N.Y. 2010), and *E.B. v. New York City Dep't of Educ.*, 255 F.R.D. 59 (E.D.N.Y. 2008). AFC therefore has a strong interest in the rights of children with disabilities to receive a Free Appropriate Public Education under the IDEA and Section 504 of the Rehabilitation Act.

**The Coelho Center for Disability Law, Policy and Innovation** collaborates with the disability community to cultivate leadership and advocate systemic approaches to advance the lives of people with disabilities. The Coelho Center envisions a world in which people with disabilities belong and are valued, and their rights are upheld. The Coelho Center was founded in 2018 by former Congressman Anthony “Tony” Coelho, original sponsor of the Americans with Disabilities Act.

**Disability Law Colorado (“DLC”)** is a nonprofit organization designated by the Governor of the state of Colorado as that state’s federally mandated Protection and Advocacy System. DLC works to protect the rights of people with disabilities in facilities and in the community through direct advocacy, systemic litigation, and policy development. DLC works with individuals with all types of disabilities from birth through death on issues including, but not limited to, abuse, neglect, and

discrimination in a variety of settings. DLC is part of a nation-wide system of Protection and Advocacy Systems.

**Disability Rights Arizona** (“DRAZ”) is a non-profit public interest law firm, dedicated to protecting the rights of Arizonans with a wide range of physical, mental, psychiatric, sensory, and cognitive disabilities. As part of the nationwide protection and advocacy system, DRAZ is authorized to “pursue administrative, legal, and other appropriate remedies” to ensure the protection of, and advocacy for, individuals with mental illness (42 U.S.C. § 10805(1)(B)) and individuals with developmental disabilities (42 U.S.C. § 15043(2)(A)(i)). DRAZ provides outreach and training to individuals with disabilities about their rights; development and dissemination of self-advocacy resources; representation in negotiation, administrative proceedings before enforcement agencies, mediation, and other alternative dispute resolution, and in selected cases, litigation and appeals, including as *amicus curiae*.

**Disability Rights California** (“DRC”) is a non-profit protection and advocacy mandated under federal law to advance the rights of individuals with disabilities in California. Established in 1978, DRC is the largest disability rights group in the nation. As part of its mission, DRC works to ensure that youth with disabilities have access to a free and appropriate public education in the least restrictive environment under the Individuals with Disabilities Education Act

(IDEA) and are free from disability-based discrimination under the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act through direct representation, impact litigation in state and federal courts, and legislative advocacy.

**Disability Rights Maryland** (“DRM”), a nonprofit legal services organization, is the federally mandated Protection and Advocacy agency for the State of Maryland, charged with defending and advancing the rights of persons with disabilities within the state. A leader in Maryland’s educational advocacy community, DRM provides legal advocacy on issues of illegal school removal and enforcement of the rights of students with disabilities to a free appropriate public education (FAPE) as mandated by federal law. DRM has significant experience representing students with disabilities statewide who have been illegally removed from school or provided with inadequate educational services.

**The Education Law and Policy Institute** at Loyola University Chicago School of Law seeks to improve access to educational opportunity and serve the educational needs of children through the law. The Institute offers a specialized curriculum, advocacy resources, and research related to education law and policy and is housed within the Civitas ChildLaw Center, a nationally recognized program that prepares law students and lawyers to be ethical and effective advocates for children, their families, and communities. For over 10 years, the Institute has operated an educational advocacy project that provides information, resources, and

representation to parents and students in school discipline, bullying, and special education matters. The Institute has an interest in addressing and remedying barriers to educational achievement for students with disabilities and ensuring school districts comply with the requirements of the Individuals with Disabilities Education Act (IDEA).

**The Education Law Center-PA (“ELC-PA”)** is a statewide non-profit, legal advocacy organization dedicated to ensuring that all children in Pennsylvania have access to a quality public education. Through individual representation, impact litigation, community engagement, and policy advocacy, ELC-PA works to eliminate systemic inequities that lead to disparate educational outcomes based on the intersection of race, disability, gender, gender identity/expression, sexual orientation, and national origin. During its forty-nine-year history, ELC-PA has been at the forefront of seminal litigation involving students with disabilities in the Third Circuit Court of Appeals and throughout Pennsylvania to obtain necessary compensatory remedies to address denials of educational access.

**Georgia Educators for Equity and Justice Incorporated (GAEEJ Inc.)** is committed to restoring prestige to the teaching profession by advocating for safe and supportive environments for Black educators and their students. We strive to elevate the teaching profession through comprehensive advocacy, professional

development, and community engagement, ensuring that every Black educator and student can thrive in an equitable and just educational landscape.

**Lives in the Balance** (“LITB”) is a national, private, nonprofit organization, advocating against punitive, exclusionary disciplinary practices in schools, families, and treatment facilities, and advocates for interventions that are effective, compassionate, proactive, and collaborative. LITB provides public education, promotes public policies, and delivers training to caretakers supportive of vulnerable youth who are disproportionately students with disabilities and students of color. LITB is founded on the belief that “kids do well if they can.”

**The Native American Disability Law Center** (“Law Center”), a private nonprofit organization, is a federally mandated protection and advocacy organization for Native Americans with disabilities in the Four Corners. The Law Center’s mission is to ensure that Native Americans with disabilities have access to justice and are empowered and equal members of their communities and nations. Law Center advocates and attorneys provide information, legal advice, and representation to children and families to enforce their educational rights under IDEA and Section 504 of the Rehabilitation Act. In its work with families in both state public schools and those run by the Bureau of Indian Education, the Law Center recognizes and works to address the problematic practices of shortened school day



and informal removal of students with disabilities, particularly as these practices often disproportionately impact Native American students.

**Public Advocacy for Kids (PAK)** is a D.C.-based organization devoted to federal and national education and child advocacy policy with a focus on low-income and special needs children and families. The group has a deep involvement and knowledge of ESEA, IDEA, teacher preparation, parent information centers, civic education, before and after school programs, integrated services, positive school climate, and the federal budget. You will find PAK working with Congress, federal agencies, school districts and community-based organizations where it contends that policy must be shaped and crafted with maximum involvement of those at the local level, and that community and parent/family/caretaker engagement is the key to sustained equity, opportunity, and inclusion.

**The Youth Justice Education Clinic (“YJEC”)** at Loyola Law School's Center for Juvenile Law and Policy represents system-involved young people with disabilities in special education and school discipline proceedings in Los Angeles County. Many of YJEC's clients, who are primarily Black and Latinx, are subjected to exclusionary discipline, both formal and informal, when they are actually in need of positive, therapeutic, and restorative supports that will support their youth development. YJEC frequently advocates for the use of alternative means of correction, such as restorative or transformative justice, positive behavioral

interventions and strategies, and evidence-based behavioral interventions in lieu of harmful exclusionary discipline. YJEC has argued extensively on behalf of clients and through policy initiatives to keep young people in school and obtain the appropriate support they need to thrive educationally. As a law school clinic, YJEC also teaches law students and provides trainings to a variety of audiences about the substantive and procedural rights of students with disabilities under state and federal laws. YJEC has a strong interest in ensuring that students with disabilities can meaningfully access their education by upholding the protections afforded to them under the Individuals with Disabilities Education Act, Americans with Disabilities Act, and Section 504 of the Rehabilitation Act.

## INTRODUCTION

Through this case, Plaintiffs-Appellants challenge the Oregon Department of Education’s practice of needlessly implementing shortened school days for children with disability-related behavioral challenges. Plaintiffs-Appellants allege that Oregon has violated the Individuals with Disabilities Education Act (“IDEA”), Title II of the Americans with Disabilities Act (“ADA”), and Section 504 of the Rehabilitation Act through its misuse of that practice. In the proceedings below, a neutral expert confirmed that Oregon’s use of shortened school days is inappropriate and causes harm. *See* Report of the Neutral Factfinder, 2-ER-339–45. As the expert observed, there are many ways in which Oregon can and should overhaul its approach to avoid the misuse of shortened school days. *Id.*, 3-ER-347–57.

Amici seek through this brief to underscore two points.

First, shortened school days harm students with disabilities by excluding them from the classroom. Decades of research shows that lost instructional time, like that resulting from shortened school days, can cause significant, long-term social, emotional, and academic harm to children who experience it. These harms include, among others, lost educational opportunities, lost opportunities for social development, an increased risk of dropping out of school, and an increased risk of becoming involved in the criminal justice system.

Second, these negative lasting impacts of lost instructional time can and should be prevented. There are many effective behavioral supports that schools can implement to avoid excluding students from the classroom, achieve improved academic and behavioral outcomes for those students, and maintain safe classrooms and schools for all. As explained in this brief, schools must strive to keep students with disabilities in the general education classroom. Where that is not possible, schools must pursue and implement alternative placements and additional interventions to address students' disability-related behavioral challenges. With the right planning, tools, and training for school personnel, schools can place students with disabilities in the least restrictive learning environment, not shorten their school days.

## **ARGUMENT**

### **I. Federal Law Requires a Free Appropriate Public Education for Children with Disabilities that Manifest in Behavioral Problems**

When Congress passed the IDEA, it found that public schools were failing to educate “millions of children with disabilities,” many of whom had been “excluded entirely from the public school system and from being educated with their peers.” 20 U.S.C. § 1400(c)(2)(B). To address this injustice, the IDEA requires school districts that receive federal funding to provide a “free appropriate public education” to children with disabilities, consisting of “special education and related services,” meaning both “specially designated instruction” and various “supportive services”

as required for a student to benefit from that instruction. *Id.* §§ 1401(9), (26), (29), 1412(a)(1).

School districts must provide a free appropriate public education in the “[l]east restrictive environment.” *Id.* § 1412(a)(5). That means a student with a disability must be included in a school’s general classes to “the maximum extent appropriate” using “supplementary aids and services.” *Id.* Consistent with the IDEA’s status as a civil rights statute, Congress permanently authorized funding for this purpose and declined to subject it to a sunset provision. *Id.* § 1411(i).

To provide a free appropriate public education, the IDEA requires school districts to formulate and implement an “individualized education program,” or “IEP,” for each eligible student. *Id.* §§ 1401(9), 1414(d). IEPs are developed by an “IEP Team” of teachers, district officials, and the student’s parents or guardians based on a “careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994, 999 (2017). The elements of an IEP vary, but at a minimum the document must contain “appropriately ambitious” goals and an educational plan “reasonably calculated” to help the student meet “challenging objectives.” *Id.* at 1000.

The IDEA also establishes general procedures for addressing the link between academic achievement and behavior. If a student’s behavior impedes their learning

or the learning of others, the IEP Team must consider—and, when necessary, include in the IEP—“positive behavioral interventions and supports, and other strategies, to address that behavior.” 20 U.S.C. § 1414(d)(3)(B)(i). If, for example, the IEP Team determines the behavior was a manifestation of the student’s disability, then the school must “conduct a functional behavioral assessment, and implement a behavioral intervention plan,” or modify any existing plan to address the behavior. *Id.* § 1415(k)(1)(F)(i). The IDEA also requires school districts to (1) monitor IEPs for effectiveness, *id.* § 1414(d)(4)(A)(i)-(ii), and (2) ensure that school personnel responsible for implementing the above procedures “are appropriately and adequately prepared and trained” to carry out the Act’s mandates, *id.* § 1412(a)(14)(A).

Alongside the IDEA, other provisions of federal law provide additional, often overlapping protections for students with disabilities. Section 504 of the Rehabilitation Act bans discrimination against individuals with disabilities at institutions receiving federal funding. 29 U.S.C. § 794. Title II of the ADA extends the same prohibition against discrimination to all state and local government services, programs, and activities (including public schools), regardless of their size or whether they receive any federal funding, *see id.* § 12132. Both statutes require reasonable accommodations for individuals with disabilities, *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 749 (2017), and that individuals with disabilities receive

integrated services, *J.S. v. Houston Cty. Bd. of Educ.*, 877 F.3d 979, 986–87 (11th Cir. 2017) (citing and discussing *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 599–601 (1999)).

## **II. Lost Instructional Time, Including Time Lost Due to Shortened School Days, Can Cause Significant and Irreparable Harm**

Extensive research and data lead to one unsurprising conclusion: lost instructional time harms children. As Plaintiffs-Appellants have explained, the degree of lost instructional time caused by Oregon’s misuse of shortened school days in this case is stark. Oregonian children affected by the practice often receive only one or two hours per day of in-school instructional time—if that—with little to no education outside of school. *See* Plaintiffs-Appellants’ Opening Br., Dkt. No. 16-1, at 4. This practice is unlawful, *see infra* Part III, and highly likely to cause significant, irreparable harm to children affected by it.

Lost instructional time can be devastating to a child’s academic prospects. For example, a study following more than 25,000 three- and four-year-olds served by Chicago Public Schools shows a clear correlation between lost classroom time and lowered performance in math, letter recognition, and social-emotional development.<sup>2</sup> This correlation was especially strong for students who entered

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<sup>2</sup> STACY B. EHRLICH, PRESCHOOL ATTENDANCE IN CHICAGO PUBLIC SCHOOLS: RELATIONSHIPS WITH LEARNING OUTCOMES AND REASONS FOR ABSENCES (University of Chicago Consortium on Chicago School Research: Research Report

school with lower-to-average prior skills.<sup>3</sup> The same is true in Oregon: classroom absence in early grades there has been clearly linked to lower academic achievement.<sup>4</sup>

This correlation only becomes stronger over time. By middle school, the relationship between a student’s absence from the classroom and the likelihood that the student will not graduate on time becomes even stronger.<sup>5</sup> The harm is further exacerbated during high school.<sup>6</sup> In short, time spent out of school is one of the best predictors of later school drop-out, even more so than low grades or test scores.<sup>7</sup>

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May 2014), <https://consortium.uchicago.edu/sites/default/files/2018-10/Pre-K%20Attendance%20Report.pdf>.

<sup>3</sup> *Id.* at 22.

<sup>4</sup> MELANIE HART BUEHLER ET AL., WHY BEING IN SCHOOL MATTERS: CHRONIC ABSENTEEISM IN OREGON PUBLIC SCHOOLS 2–3 (2012), <https://www.attendanceworks.org/wp-content/uploads/2017/08/Oregon-Research-Brief.pdf>

<sup>5</sup> *See, e.g.*, M. J. KIEFFER ET AL., THE MIDDLE GRADES STUDENT TRANSITIONS STUDY: NAVIGATING THE MIDDLE GRADES AND PREPARING STUDENTS FOR HIGH SCHOOL GRADUATION 9 (The Research Alliance for New York City Schools, Baltimore Education Research Consortium (“BERC”), 2011); BERC, DESTINATION GRADUATION: SIXTH GRADE EARLY WARNING INDICATORS FOR BALTIMORE CITY SCHOOLS: THEIR PREVALENCE AND IMPACT 2–3 (2011).

<sup>6</sup> UNIVERSITY OF CHICAGO CONSORTIUM ON SCHOOL RESEARCH, WHAT MATTERS FOR STAYING ON-TRACK AND GRADUATING IN CHICAGO PUBLIC SCHOOLS 6–9 (2007).

<sup>7</sup> Michael A. Gottfried, *Chronic Absenteeism and Its Effects on Students’ Academic and Socioemotional Outcomes*, 19(2) J. EDUC. FOR STUDENTS PLACED AT RISK 53 (2014).



Data from the disciplinary and suspension context, where students similarly suffer lost instruction time, is also instructive. Exclusionary school discipline practices can cost our society greatly in the long run, to the tune of hundreds of millions or even billions in fiscal costs to taxpayers and social costs over the lifetime of affected students.<sup>8</sup> These practices can also lead to lowered academic proficiencies among students who are not directly on the receiving end of them, even after controlling for other factors such as demographics, school funding, and socioeconomic status.<sup>9</sup> Data collected by the Department of Education makes clear that students with disabilities are impacted at greater rates than their peers without disabilities.<sup>10</sup>

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<sup>8</sup> CALIFORNIA DROPOUT RESEARCH PROJECT AND THE CENTER FOR CIVIL RIGHTS REMEDIES AT THE CIVIL RIGHTS PROJECT/PROYECTO DERECHOS CIVILES, THE HIDDEN COSTS OF CALIFORNIA'S HARSH SCHOOL DISCIPLINE: AND THE LOCALIZED ECONOMIC BENEFITS FROM SUSPENDING FEWER HIGH SCHOOL STUDENTS 14 (2017). These costs include, for example, costs associated with increased crime and increased rates of adult incarceration, and costs associated with nongraduates' lower earnings, the lower state and federal tax revenues resulting from those lower earnings, and higher health and welfare costs for nongraduates. *Id.* at 3.

<sup>9</sup> See Brea L. Perry & Edward W. Morris, *Suspending Progress: Collateral Consequences of Exclusionary Punishment in Public Schools*, 79 AM. SOC. REV. 1067 (2014); M. Karega Rausch & Russell Skiba, *Unplanned Outcomes: Suspensions and Expulsions in Indiana*, 2(2) CTR. FOR EVALUATION & EDUC. POL'Y: EDUC. POL'Y BRIEFS 1, 6 (2004), <https://bit.ly/3vFikVG>.

<sup>10</sup> U.S. DEP'T OF EDUC., OFFICE OF CIVIL RIGHTS, 2017-18 STATE AND NATIONAL ESTIMATIONS, <https://bit.ly/3ChilQV>.

Excluding children from the classroom can have other life-long consequences. There is a well-established link between education levels and health.<sup>11</sup> Research also shows a clear link between absence from the classroom and an increased likelihood of entry into the criminal justice system, substance abuse, and other risky behaviors.<sup>12</sup> The risk of incarceration is particularly acute for students with disability-related behavioral challenges who are pushed out of school: nearly two-thirds of youth with emotional disabilities who drop out are arrested within five years.<sup>13</sup>

These data show, rather conclusively, that keeping children out of the classroom can have irreparable, life-long consequences. That practice should therefore be avoided at all costs. For students with disability-related behavioral challenges, shortened school days keeping them away from the classroom and

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<sup>11</sup> David M. Cutler & Adriana Lleras-Muney, *Education and Health: Evaluating Theories and Evidence* (Nat'l Bureau of Econ. Rsch., Working Paper No. 12352, 2006), 11, 12 J. EDUC. AND LEARNING 1, [https://www.nber.org/system/files/working\\_papers/w12352/w12352.pdf](https://www.nber.org/system/files/working_papers/w12352/w12352.pdf) (observing correlation between lower levels of education and higher rates of chronic disease, higher levels of unhealthy behaviors, and lower levels of preventative care).

<sup>12</sup> K. L. Henry & T. P. Thornberry, *Truancy and Escalation of Substance Use During Adolescence*, 71(1) J. STUDIES ON ALCOHOL AND DRUGS 115, 120–23 (2009).

<sup>13</sup> See U.S. COMM'N ON CIVIL RIGHTS, BEYOND SUSPENSIONS: EXAMINING SCHOOL DISCIPLINE POLICIES AND CONNECTIONS TO THE SCHOOL-TO-PRISON PIPELINE FOR STUDENTS OF COLOR WITH DISABILITIES 37 (2019), <https://bit.ly/3MlzcGZ>.

depriving them of instructional time at school should be a last resort. As the next section of this brief explains, there are many other proven paths that school districts must take to avoid the kind of misuse of shortened school days that has given rise to this lawsuit.

### **III. Schools Must Implement Behavioral Supports that Keep Students in the Classroom, not Shorten their School Days**

When a school district believes that a student with a disability is disrupting the classroom, the school should address their behavior by supporting them with evidence-based behavioral interventions. They should also ensure school personnel have the training and resources to meet their needs.<sup>14</sup> The presumption is that students should remain in the general education classroom, as explained below. *See infra* Part III.A.1. If that is not possible, federal law requires schools to consider a full continuum of environments where students with disabilities can receive an education. *See* 34 C.F.R. § 300.115. What schools may not do is rob children of their education by simply sending them home.

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<sup>14</sup> *See* Letter from Sue Swenson, Acting Assistant Secretary, Special Education and Rehabilitative Services, and Ruth E. Ryder, Acting Director, Office of Special Education Programs, to Colleague (Aug. 1, 2016) at 6, <https://sites.ed.gov/idea/files/dcl-on-pbis-in-ieps-08-01-2016.pdf> (“2016 DOE Dear Colleague Letter”).

**A. Schools must place students with disabilities in the least restrictive learning environment, not shorten their school days**

Under the IDEA, students with disabilities have the right to be educated “in the least restrictive environment,” learning alongside their peers without disabilities “[t]o the maximum extent appropriate.” *D.R. ex. rel. R.R. v. Redondo Beach Unified Sch. Dist.*, 56 F.4th 636, 641 (9th Cir. 2022) (quoting 20 U.S.C. § 1412(a)(5)(A)). “Congress imposed the least restrictive environment requirement because it found that children with disabilities were ‘often excluded entirely from the public school system.’” *Id.* (quoting 20 U.S.C. § 1400(c)(2)(B)).

This means that schools should presumptively strive to keep students in the general education classroom. *See infra* Part III.A.1. When that is not possible, IDEA compliance requires schools to consider a continuum of placements to ensure that a student is educated in the least restrictive environment. *See Bd. of Educ., Sacramento City Unified Sch. Dist. v. Holland ex rel. Holland*, 786 F. Supp. 874, 882 n.9 (E.D. Cal. 1992), *aff’d sub nom. Sacramento City Unified Sch. Dist., Bd. of Educ. v. Rachel H. ex rel. Holland*, 14 F.3d 1398 (9th Cir. 1994). This continuum will vary from one student to the next, *id.*, and includes “special classes, special schools, home instruction, and instruction in hospitals and institutions.” *N.D. ex rel. parents acting as guardians ad litem v. Hawaii Dep’t of Educ.*, 600 F.3d 1104, 1115 (9th Cir. 2010) (quoting 34 C.F.R. § 300.115(b)(1)); *see also* Or. Admin. R. 581-015-2245(1).

Notably—and as discussed in more detail below—the continuum does not include shortened school days.<sup>15</sup>

Students cannot be moved away from the general education classroom and along the IDEA’s continuum unless their IEP team decides that an alternative placement is necessary for their education.<sup>16</sup> Likewise, “it is inappropriate to remove a child from the regular education classroom”—or from any point along the continuum, for that matter—“for reasons unrelated to the provision of special education and related services.” *Id.* Put simply, a student “should not be placed in a more restrictive setting ‘solely due to [their] behavior.’” 2016 DOE Dear Colleague Letter at 7 (citing 34 C.F.R. §§ 300.114–300.116).

**1. The general education classroom is the presumptive placement for all students**

In every case, educating students with disabilities together with students without disabilities “is the starting point and presumption. [Any other] placement . . . is a fall-back choice made only after it is determined that placement in regular

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<sup>15</sup> For avoidance of doubt, Amici note that home instruction placement is not at all like shortened school days; in the former, students are receiving far more than the one or two hours per day of learning students who are placed on shortened school days receive (like the student plaintiffs in this case).

<sup>16</sup> See OREGON DEPARTMENT OF EDUCATION, SPECIAL EDUCATION PLACEMENT DETERMINATIONS 6 (last accessed Aug. 13, 2024), <https://www.oregon.gov/ode/students-and-family/SpecialEducation/publications/Documents/Educational%20Placements%20SDI%20and%20LRE%20Considerations.pdf>.

classes will be unsuccessful.” *Holland*, 786 F. Supp. at 882 n.9. To make this presumption a reality, schools have a wide range of tools at their disposal.

As described in more detail below, schools have a full range of behavioral tools they can use in the regular classroom to address perceived misbehavior. *See infra* Part III.C.<sup>17</sup> Schools can also introduce extra help into the classroom, allowing special education instructors, psychologists, social workers, or occupational therapists to lend a hand.<sup>18</sup> As particularly relevant in this case, Oregon teachers have pointed to the need for such supports to keep students with disabilities in the general education classroom. *See A Crisis of Disrupted Learning* at 6, 12.

A student can only be moved from a general education classroom if their school has tried these supports and determined that the student cannot receive an appropriate education there. *See Holland*, 786 F. Supp. At 879 (citing *Roncker ex rel. Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983)). As Defendants-Appellees themselves have put it, “children are to be removed from the regular class

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<sup>17</sup> *See also What Sorts of Things May I Ask for in the Way of Supplementary Aids and Services to Assist My Child in the Regular Classroom?*, DISABILITY RIGHTS CALIFORNIA (last visited Aug. 13, 2024), <https://serr.disabilityrightsca.org/serr-manual/chapter-7-information-on-least-restrictive-environment/7-8-what-sorts-of-things-may-i-ask-for-in-the-way-of-supplementary-aids-and-services-to-assist-my-child-in-the-regular-classroom/>.

<sup>18</sup> *See also id.*; *A Crisis of Disrupted Learning*, OREGON EDUCATION ASSOCIATION 12 (Jan. 2019), <https://oregoned.org/student-success/schools-students-deserve/crisis-disrupted-learning> (“A Crisis of Disrupted Learning”).

setting **only when** general education and supplementary aids and services are not sufficient to enable their successful education in that setting.”<sup>19</sup>

## 2. The IDEA emphasizes in-school placements

Even when a regular classroom is not the best fit for a student, the IDEA prioritizes keeping them in school. The next point on the continuum is a specialized classroom for students with disabilities, where some students might spend part of their days and others might spend their entire days. *See* 300 C.F.R. § 300.115(b)(1).<sup>20</sup> No matter how long students spend in a specialized classroom, all of them have the right to participate in extracurriculars and activities outside the classroom, from lunch and recess to clubs and sports teams. *See* 34 C.F.R. §§ 300.107, 300.117.

The IDEA likewise emphasizes in-school instruction at this next point on the continuum. For students who require more support than they can receive in a specialized classroom or a traditional school, a specialized school that educates only children with disabilities might be the best fit. *See* 34 C.F.R. § 300.115(b)(1); *see also* Or. Admin. R. 581-015-2245(1).

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<sup>19</sup> *See* OREGON DEPARTMENT OF EDUCATION, *supra* note 17, at 5 (emphasis in original).

<sup>20</sup> *See also* DISABILITY RIGHTS OREGON, SPECIAL EDUCATION: A GUIDE FOR PARENTS AND ADVOCATES 26-27 (2012), <https://static1.squarespace.com/static/6387d767fc8a755e41aa5844/t/643f0b87fcb9ff0db5849ce4/1681853320479/DRO-Special-Ed-Guide-2012-English.pdf>.

Only at the far end of the continuum are students educated outside of school. Some students benefit from learning at home, while others might find their least restrictive environment in a hospital or facility for minors with disabilities. *See* 34 C.F.R. § 300.115(b)(1); *see also* Or. Admin. R. 581-015-2245(1). In all cases, though, educating students outside of school is the “last resort.” Report of the Neutral Factfinder, 3-ER-450.

### **3. Shortened school days are not on the continuum of placements**

Cutting a student’s education short and simply sending them home without instruction “should never be seen as a placement option on the . . . continuum[.]” Report of the Neutral Factfinder at 157. Rather than a point on the continuum, shortened school days “should be seen and used as a temporary and emergency tool to help a student acquire the skills they need to attend a full-day and to help school staff and administrators receive training, secure additional supports, and make changes that are needed for the student to return to a full day within 30 school days.” *Id.* at 45.<sup>21</sup> Shortened school days should *never* be viewed as a permanent solution. *Id.*

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<sup>21</sup> *See also See SACRAMENTO COUNTY UNIFIED SCHOOL DISTRICT 3, SHORTENED DAY GUIDELINES,* [https://selpa.scusd.edu/sites/main/files/file-attachments/scusd\\_procedural\\_guide\\_\\_shortened\\_day\\_guidelines.docx\\_.pdf](https://selpa.scusd.edu/sites/main/files/file-attachments/scusd_procedural_guide__shortened_day_guidelines.docx_.pdf). Sacramento County Unified School District at 3.



When schools misuse shortened school days instead of relying on “appropriate behavioral interventions and supports” along the continuum of placements, they are effectively disciplining students by removing them from school. *See* 2016 DOE Dear Colleague Letter at 1, 13. Whether formal or informal, disciplining students for their disability-related behaviors constitutes disability discrimination. *See* 300 C.F.R. 530(e) (describing the necessary steps to discipline a student with a disability).<sup>22</sup>

**B. Appropriate planning, tools, and trained personnel allow for effective behavioral interventions along the continuum of placement for students with disabilities**

At every point on the continuum of placements, targeted behavioral interventions and well-trained personnel are both required by law. 2016 DOE Dear Colleague Letter at 7, 10 (Compliance with the IDEA includes the provision of “supplementary aids and services (e.g. behavioral supports) throughout the continuum [of placements].”) (emphasis added) (citing 34 C.F.R. §§ 300.114–300.116); 34 C.F.R. § 300.320(a)(4). With these targeted interventions and trained personnel in place, “for students with behavioral needs . . . shortened school days

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<sup>22</sup> Such a system of informal discipline likely falls hardest on students of color. In the 2019-20 school year, for instance, Black students accounted for roughly 17% of students with disabilities—but accounted for 43% of students with disabilities who were formally suspended or expelled. *See* Letter from Valerie C. Williams, of Special Education Programs, U.S. Dep’t of Educ., to Colleague (July 19, 2022) at 3, <https://sites.ed.gov/idea/files/dcl-implementation-of-idea-discipline-provisions.pdf> (“2022 DOE Dear Colleague Letter”).

are rarely necessary if effective behavioral supports are in place.” *See J.N. v. Or. Dept. Of Educ.*, 338 F.R.D. 256, 268 (2021) (citation omitted).

**1. Functional Behavioral Assessments and Behavioral Intervention Plans assist schools in providing students with disabilities effective, individualized behavioral support**

When a student manifests a disability through behaviors perceived by their school as disruptive, federal law requires their special education team to “conduct a functional behavioral assessment [‘FBA’] and implement a behavioral intervention plan [‘BIP’].”<sup>23</sup> 20 U.S.C. § 1415(k)(1)(F)(i); *J.N.*, 338 F.R.D. at 263. This process uses an individualized, data-driven assessment (the FBA) to identify underlying causes of behaviors and plan effective interventions in a BIP to address those behaviors.<sup>24</sup>

An FBA aims to identify causes and contributing factors to a student’s behaviors. It typically: (1) is individualized; (2) clearly defines the relevant behavior; (3) collects data on when the behavior does or does not occur;<sup>25</sup> and (4) analyzes the

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<sup>23</sup> If a student already has a BIP, their team must review the BIP and modify it as necessary to address the behavior. 20 U.S.C. § 1415(k)(1)(F)(ii).

<sup>24</sup> U.S. DEP’T OF EDUC., OFFICE OF SPECIAL EDUC. & REHAB. SERVS., OSEP POLICY SUPPORT 22-01, POSITIVE, PROACTIVE APPROACHES TO SUPPORTING CHILDREN WITH DISABILITIES: GUIDE FOR STAKEHOLDERS 8-9 (2022), <https://sites.ed.gov/idea/files/guide-positive-proactive-approaches-to-supporting-children-with-disabilities.pdf> (“2022 OSEP Guide”).

<sup>25</sup> Data collected on a behavior for an FBA ideally includes “frequency, duration, conditions, location, and individuals present” and “events or conditions that typically occur before and after.” 2022 OSEP Guide at 10.

data to hypothesize about root causes. Root causes may include “settings or events that may trigger [the behavior]” and “responses that perpetuate [the behavior].” 2022 OSEP Guide at 8–9. The FBA is then used to develop or revise a plan—a BIP—to assist the student in managing their behaviors at school. *Id.* BIPs include individualized, proactive, and preventative methods to address behaviors perceived as disruptive and triggers and plans to teach and reinforce replacement behaviors. *Id.* at 9. The FBA and BIP process, unlike an exclusionary response, only temporarily reduces perceived school disruption at the expense of a student with disabilities’ education, and allows that student to learn to successfully participate in their education in a least restrictive environment. *See J.N.*, 338 F.R.D. at 263 (citing 20 U.S.C. § 1415(k)(1)(D)(ii), (F)).

As a result, FBAs and BIPs also provide an effective path to re-entry for the rare students who must temporarily be placed on shortened school days. Shortened school days provide an emergency action schools may occasionally temporarily utilize to plan for a student’s safe return to an appropriate least restrictive placement. Report of the Neutral Factfinder, 3-ER-362. FBAs and the creation of BIPs provide a process to develop return-to-school plans. *J.N.*, 338 F.R.D. at 268 (citation omitted).

The FBA and BIP process at its best recognizes that when disabilities manifest in unwanted behavior, a student may not be able to correct the behavior on their own.

Instead, these students need support and education to do so, rather than only being informed their behavior is unwanted via an exclusionary response. *See id.* at 263. For some students with disabilities, the duty to provide education under the IDEA and Rehabilitation Act necessarily includes education and support with learning appropriate behaviors to safely and successfully attend school. 2022 OSEP Guide at 2 (citing 34 C.F.R. §§ 300.324(a)(2)(i), (b)(2) & 300.320(a)(4)).

**2. Using Positive Behavioral Interventions and Supports provided through a Multi-Tiered System of Supports allows students to remain at school**

To create a BIP, special education teams should use peer-reviewed, research-driven behavioral support tools such as positive behavioral interventions and supports (“PBIS”). 2016 DOE Dear Colleague Letter at 6; 34 C.F.R. § 300.320(a)(4). PBIS, implemented through a multi-tiered system of supports (“MTSS”), are common, effective behavioral support and intervention strategies. PBIS may include everything from clear rule setting and social-emotional learning in the classroom to individual mental health services. 2022 OSEP Guide at 4, 6–7; 2016 DOE Dear Colleague Letter at 6–7. Providing PBIS, among other strategies, is part of the IDEA obligation of public agencies to provide free and appropriate public education for students whose schools perceive their disability-related behavioral challenges as disrupting school. 2022 OSEP Guide at 2 (citing 34 C.F.R. §§ 300.324(a)(2)(i),

(b)(2) & 300.320(a)(4)); *J.N.*, 338 F.R.D. at 263 (citing 20 U.S.C. § 1414(d)(3)(B)); 2016 DOE Dear Colleague Letter at 6.

MTSS includes universal strategies for all students, targeted strategies for certain students, and intensive strategies for higher-needs students. 2022 OSEP Guide at 4. Universal PBIS involves school-wide expectations that all students know and can practice with support and reinforcement from adults. *Id.* at 6; *see also* 2016 DOE Dear Colleague Letter at 6. Targeted PBIS programs can include social-emotional learning (such as social skills and self- and anger-management) and restorative justice programming focused on students who most need that support. 2022 OSEP Guide at 7; 2016 DOE Dear Colleague Letter at 6.

Both universal and targeted PBIS may reduce the need for more intensive, individualized PBIS. However, for students with higher needs, supports and interventions may include individual counseling, coaching, or mental health services; plans for students to access safe spaces or adults when triggered; and individualized methods for re-directing problem behaviors and learning or re-enforcing desired behaviors (often written into BIPs). 2022 OSEP Guide at 7; 2016 DOE Dear Colleague Letter at 7.

PBIS implemented through an MTSS is effective at reducing unwanted behaviors at school. Research has shown PBIS, and similar interventions, result in “significant reductions in inappropriate behavior[,] reduced use of exclusionary

discipline,” and increased academic engagement and achievement. 2022 OSEP Guide at 6; 2016 DOE Dear Colleague Letter at 5. This holds true, not only in the research, but also in the experience of educators in Oregon, where two rural special education directors stated they “could not think of any examples of students they were unable to serve with appropriate supplemental aids and services.” Report of the Neutral Factfinder, 3-ER-359. By comparison, “shortened days are not an effective or evidence-based behavioral intervention.” *J.N.*, 338 F.R.D. 268 (citation omitted).

**3. The effective implementation of behavioral intervention tools is dependent on ensuring appropriate personnel are hired and trained in their use**

As Oregon educators have noted, a “lack of appropriate training for educators” is a key challenge in managing perceived disruptive behaviors from students (including those with disabilities) in the classroom. A Crisis of Disrupted Learning at 6. Personnel must be trained or hired to implement FBAs, BIPs, and PBIS in an MTSS framework as alternatives to excluding students through shortened school days. Ensuring personnel can fully implement IEPs is required by law. This requires providing personnel with adequate training and tools to address the behavioral needs of particular students. 2016 DOE Dear Colleague Letter at 7, 12 (citing 34 C.F.R. §§ 300.156, 300.207, 300.320(a)(4)). It also includes hiring enough staff members to ensure these services exist and are correctly implemented. Training educators to use behavioral interventions will both reduce exclusionary responses to behavior and

ensure that students with disabilities receive the education they are entitled to by law. 2022 DOE Dear Colleague Letter at 3.

To effectively conduct an FBA and create a BIP, an individual must be “well-versed and trained in observation and data collection and analysis.” 2022 OSEP Guide at 9. Ideally, experts like board-certified behavioral analysts spearhead the creation of FBAs and BIPs. By contrast, an IEP team merely filling in a short template will not provide the individualized analysis which make these tools effective at planning to support a student with behavioral interventions and supports. *Compare* 2022 OSEP Guide at 8-9 (describing a highly individualized and data-driven process) *with* Report of the Neutral Factfinder, 3-ER-341 (“Most [FBAs] and [BIPs] were each one-page templates with spaces for IEP teams to fill in a few words or phrases.”).

Similarly, “[t]o effectively implement evidence-based practices such as . . . PBIS within an MTSS framework, educators should have specific knowledge and skills.” 2022 OSEP Guide at 11. Relevant training may include programs on trauma-informed practices, social-emotional learning, PBIS and de-escalation, restorative justice, and classroom management. *Id.* at 16; 2022 OSEP Guide at 9-10. Training could also cover racial bias and equity to ensure that students of color with disabilities receive equitable access to positive interventions and support over

exclusionary responses compared to white peers. *See* 2022 DOE Dear Colleague Letter at 3.<sup>26</sup>

## CONCLUSION

This Court should reverse the district court’s order of dismissal.

August 27, 2024

Respectfully submitted,

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<sup>26</sup> Children of color with disabilities face higher use of exclusionary practices, including shortened school days, compared to white peers. 2016 DOE Dear Colleague Letter at 2, 13; 2022 DOE Dear Colleague Letter at 2–3. This is caused in part by biases among educators. 2022 DOE Dear Colleague Letter at 3 (citing AMERICAN PSYCHOLOGICAL ASSOCIATION, ETHNIC AND RACIAL DISPARITIES IN EDUCATION (2012), <http://www.apa.org/ed/resources/racial-disparities.pdf> (“[D]iscipline disparities can be exacerbated by, or can be the result of, educators’ subjective evaluations of students’ actions rather than being the product of objective differences in student behavior.”)).



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## **CERTIFICATE OF SERVICE**

I hereby certify that, on August 27, 2024, I caused the foregoing document to be filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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Noah Brumfield