IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

Eugene Division

J.N., et al., Plaintiff, vs. OREGON DEPARTMENT OF EDUCATION, et al., Defendant.	)	No. 6:19-cv-00096-AA

BE IT REMEMBERED THAT on the 10th day of July, 2019, the above-entitled matter came on for hearing before the HONORABLE ANN AIKEN, District Court Judge.

DEBORAH COOK, RPR, CSR
OFFICIAL COURT REPORTER
405 East 8th Avenue
Suite 2130
Eugene, Oregon 97401
(541) 431-4162
deb@cookcourtreporting.com
Deborah_Cook@ord.uscourts.gov

A P P E A R A N C E S

For the Plaintiff:

ALICE ABROKWA
SETH GALANTER
National Center for Youth Law
1313 L. Street, NW, Ste. 130
Washington, DC 2005-4141
202.868.4786
Aabrokwa@youthlaw.org

JOEL GREENBERG
Disability Rights Oregon
511 SW 10th Avenue, Ste. 200
Portland, Oregon 97205
503.243.2081
Jgreenberg@droregon.org

For the Defendant:

BETH ANDREWS
DARSEE STALEY
Oregon Department of Justice
100 SW Market Street
Portland Oregon 97201
971.673.5022
Beth.andrews@doj.state.or.us
Darsee.staley@doj.state.or.us

PROCEEDINGS

Wednesday, July 10, 2019, at 2:09 p.m.

THE COURT: Please be seated.

COURT CLERK: Now is the time set for civil case 19-96, N, et al. versus Oregon Department of Education, et al., for oral argument.

THE COURT: Good afternoon. If I could ask people to introduce themselves, I would appreciate it, starting at one end of the table.

MS. STALEY: Darsee Staley for the defendants, Your Honor.

MS. ANDREWS: Beth Andrews for the defendants.

MS. ABROKWA: Alice Abrokwa for the plaintiffs.

MR. GREENBERG: Joel Greenberg for the plaintiffs.

MR. GALANTER: And Seth Galanter, also for the plaintiffs.

THE COURT: Counsel, I appreciate your briefings and I got a supplemental briefing last night -- this morning, a copy of the case that we're all aware of. But I don't know if there's going to precipitate any additional need for further briefings, but I would sure entertain that if people made the ask to do that. I will just put that out there at the beginning.

MS. STALEY: Thank you, Your Honor. The defendants

are prepared to address that case, and don't require additional written briefing. Thank you.

THE COURT: I am happy to hear -- go ahead and begin with your arguments.

MS. ANDREWS: May it please the Court -- and I have instructions from the court reporter to remain seated and close to the microphone.

THE COURT: Our microphone system is problematic when you stand, so it's just as easy to do it that way for the court reporter.

MS. ANDREWS: May it please the Court, Beth Andrews for the Oregon Department of Justice representing the State defendants. And I would like to reserve some time for rebuttal after the plaintiffs make their argument.

THE COURT: We don't work that way. This is not an Appellate Court so people can take as much time as they want. So you can argue and then come back and argue afterward. I don't have any problem.

MS. ANDREWS: Okay. Perfect. We're here on defendants' motion to dismiss. I would like to do three main things with my time. First, I will start with an overview of the statutory of the IDEA. Then I will discuss the shortened school day issues, since that's the meat of the case here. And both of those will provide context for my standing analysis, which will help me explain why the plaintiffs don't

have standing to bring this case.

So first, the structure of the IDEA. The purpose of the IDEA is to ensure that local education agencies provide eligible students with Free Appropriate Public Education, FAPE. The local education agencies directly provide educational services, but the IDEA does require that the State educational agency ensure that eligible students receive FAPE.

And the local education agencies provide FAPE in large part by creating Individualized Education Programs, otherwise known as IEP --

THE COURT: IEP.

MS. ANDREWS: Exactly. And an IEP is a written plan that includes information about the student's current level of performance, performance goals for the next year, and plan for achieving those goals. An IEP is written by the IEP team, which includes teachers, administrators, and the student's parents or guardian.

The IEP describes how the student's needs and goals are going to be met, including any accommodation, such as placing the student on a shortened school day program. And an IEP must be reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.

So an IEP is inherently a very individualized

document. Each one is created with a particular student's needs and goals and abilities in mind. And parents have a major role in the creation of the IEP. Of course, they are a member of the IEP team, but they don't have ultimate control over the content of the IEP.

So the IDEA does provide administrative procedures to allow parents to challenge an IEP that they feel is inappropriate. So if a parent wants to contest the contents of an IEP or feels an IEP isn't being appropriately implemented, then they can go through that administrative review process.

And IDEA actually requires the State educational agency to establish two distinct administrative review processes. And the first is the due process hearing, which is the more formal adversarial process that provides for a hearing conducted by an independent hearings officer.

And then there's the State complaint procedure, which is also known in some states as the Complaint Resolution Procedure. And that's the more informal process where the State educational agency itself investigates grievance allegations.

And then after exhausting the administrative processes, if the parent still isn't satisfied with how the IEP is working or being implemented, then the IDEA does provide a right to appeal to District Court.

And I would note that the plaintiffs in this case don't challenge these administrative processes. In fact, multiple of the named plaintiffs went through those administrative processes. For example, JN's mother filed an administrative complaint through the State complaint process, and ODE investigated the complaint and determined that the local education agency had not provided FAPE for JN. So ordered for that to be resolved.

And after the resolution of that complaint, the local education agency increased the length of JN's school day, and he now attends a full day of school. And while the administrative review processes are a major part of ODE's efforts to ensure that students are receiving FAPE, ODE also acts and monitors the local education agencies to ensure compliance. The local education agencies report regularly to ODE, and ODE goes and conducts compliance visits.

So that's kind of the overall structure of the IDEA, and then to provide context for the standing issue, we also need to discuss shortened school days and how those work in the 9th Circuit.

So plaintiffs in this case allege that Oregon lacks adequate State level policies to ensure compliance with the IDEA, because Oregon's policies allegedly fail to completely prevent unlawful use of shortened school days. And the named plaintiffs in this case are students who either are, or have

in the past, been placed on shortened school day programs.

But the 9th Circuit has held that a shortened school day by itself is not a per se denial of FAPE, even if the shortened school day is because of disability-related behavior. So a student could have a shortened school day specified in their IEP as part of that student's educational program designed to help ensure that they are receiving FAPE.

And with that allegation that that shortened school day is actually inappropriate for a particular student, there's no IDEA violation. And notably only one named plaintiff in this case alleges that he currently receives a shortened school day.

So moving on to the standing argument, defendants move to dismiss plaintiffs' claims because plaintiffs lack standing to bring those claims, and so this Court lacks jurisdiction to hear them. Of course, standing requires three elements. Those elements are injury in fact, causation, and redressability.

In this case plaintiffs failed to prove any of those elements, but it's important to remember that standing requires the existence of all three elements. So failure to prove even one is fatal to standing.

First, and most fundamentally, the plaintiffs have not established an injury in fact. An injury in fact, for the establishing purposes, has to be actual and imminent, not

conjectural or hypothetical.

The alleged injury the plaintiffs are claiming in this case is the risk of a student being placed on an unlawful shortened school day. So the alleged injury is the risk, not the actual placement on a shortened school day program.

And that part makes sense, because as I have already noted, being placed on a shortened school day in and of itself does not constitute a denial of FAPE, or a violation of the IDEA, even if due to disability-related behaviors.

And in this case, none of the named plaintiffs allege that they are currently receiving an unlawful shortened school day. Plaintiffs do allege that EO is currently receiving a school day that is shortened by 30 minutes, but they don't allege that the shortened school day that EO is receiving is inappropriate for him, or that he's being denied FAPE as a result.

The injury they are alleging for EO is not that he currently has a shortened school day, but that there's a risk of it being shortened even more.

So again, the alleged injury is the risk of being placed on an unlawful shortened school day. But that alleged injury doesn't meet the bar required to establish standing. Because an injury in fact has to be imminent and nonhypothetical, whereas here plaintiff's alleged injury is

nonimminent and speculative.

And that's because there are safeguards under both Oregon State law and the IDEA that protect against the unlawful use of a shortened school day. In Oregon, there's a State law that was passed in 2017 that explicitly prohibits the unilateral use of a shortened school day. It also requires that the IEP team document that they have considered at least one other option before deciding to place a student on a shortened school day.

And I would note that many of the allegations in the complaint occurred before the 2017 statute went into effect. And that Oregon State law explicitly states that each student has the presumptive right to receive the same number of hours of instruction as other students in their grade, and requires that the local education agency provide a written reminder of that presumptive right to the parent of any student who is placed on a shortened school day.

And finally, there's a stay put provision under IDEA. Under that provision if a parent challenges a change in placement, including, for example, placing a student on a shortened school day, then the student must stay in the existing placement pending review, all the way through judicial review and any appeals.

So again, parents don't have ultimate control over the process of creating that IEP. And that's why the IDEA

provides for these administrative processes, so that if a parent wants to contest the IEP nothing will happen until a Court decides the IEP is lawful and appropriate. And that's a mechanism the IDEA gives to ensure that parents have a voice in this process.

So there are many layers of safeguards that make a student's placement on an unlawful shortened school day both nonimminent and speculative. Even if the local education agency and IEP team violate the IDEA, the parent still has the power to stop the process and prevent any changes from going into effect until the parent has an opportunity to fully challenge those changes.

The organizational plaintiff in this case, COPAA, has also not alleged injury in fact sufficient to establish associational standing. Because associational standing requires that the organization prove that at least one of its members would otherwise have standing to sue in their own right.

And plaintiff in this case argued that COPAA has associational standing because the complaint alleges that COPAA's members include parents 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.

And so plaintiffs' argument as to COPAA and

associational standing fails for the same reason that it fails as to the named plaintiffs. Because allegations in the complaint would only establish a denial of FAPE and a violation of the IDEA if placement on a shortened school day or risk of being placed on a shortened school day was by itself a per se denial of FAPE. But that's not what plaintiffs are alleging in this case.

The second element of standing, of course, is causation. Plaintiffs have also failed to establish causation, because they fail to show that the alleged lack of statewide prophylactic policy is causing a substantial threat of imminent use of an unlawful shortened school day on any named plaintiff.

And the chain of causation is too attenuated in this case, because it depends on independent third parties not before the Court, and those are the local education agencies and the parents.

As I have discussed, a student can only be placed on an unlawful shortened school day if the local education agency and the IEP team violate the IDEA, and the parent then failed to contest their child's placement on the shortened school day.

Plaintiffs generally allege that local education agencies have violated the law in the past and, therefore, may do so in the future. But that's insufficient to

establish an imminent risk of actual injury to the named plaintiffs.

And that is the difference between this case and the census case that was mentioned in the supplemental briefing, because in that case the plaintiffs established through significant and sufficient facts, that there would be a -- the recipients of the census would be unlikely to fill it out if there was a citizenship question on the census. And that level of proof -- or that level of allegation is not present in this complaint.

Finally, the plaintiffs have failed to establish redressability. The element of redressability requires a showing that a favorable decision by the Court is likely to redress the alleged injury. But the viability of any relief depends on that chain of causation that I mentioned before.

And redressability and causation overlap to some extent. They are two facets of that single causation requirement. But it's the local education agencies, not ODE, that provide those direct educational services. And the law mandates compliance with the IDEA.

So again, establishing standing requires the plaintiffs prove injury, causation, and redressability, all three elements. Defendants argue that plaintiffs have not successfully established any of those elements, but again, failure to prove even one is fatal for lack of standing.

Therefore, plaintiffs lack standing, and defendants request that this case be dismissed for lack of jurisdiction. Unless the Court has any questions.

THE COURT: Thank you. Counsel.

MS. ABROKWA: May it please the Court, I am Alice Abrokwa speaking for the plaintiffs.

First, I will address the named plaintiffs' standing, and then I will address the standing of COPAA. The defendants have limited their motion to the issue of whether plaintiffs have adequately alleged Constitutional standing. Accepting the allegations as true, all the plaintiffs have standing, although only one needs to have standing for this case to proceed.

I will start first by addressing the named plaintiffs' injury in fact. Each named plaintiff has an injury in fact because they are currently or at potential risk of being subjected to a shortened school day unnecessarily due to their disability-related behavior.

Plaintiffs allege that when appropriate and legally required services are in place, shortened school days are unnecessary for these students. Because the students have less access to the classroom, or they are less likely to make academic and social progress. And because they have less instructional time, they frequently fall behind and struggle to catch up.

What the Supreme Court said in the Endrew F. case is that FAPE is a demanding standard, that it requires giving children the chance to be challenged. Plaintiffs have alleged that these students are not getting an education that meets that standard. They are unnecessary limitations that not only impedes their progress, but it leads to stigma, humiliation and trauma and shame.

As their behavioral needs remain unmet, some of these students end up out of school entirely in residential facilities, institutions or even in the criminal legal system.

Plaintiffs allege that they are denied FAPE in the least restrictive environment and they are discriminated against because of their disabilities. The defendants concede that those are concrete and particularized harms. The dispute is whether they are actual or imminent.

Plaintiffs have established both. First, although the defendants have stated otherwise, including today, I want to be clear that EO alleges actual injury, because he's currently subjected to a shortened school day that he does not need. Either actual or imminent injury would suffice for the injury in fact requirement, but we allege both. And with respect to EO, he alleges an actual injury.

The defendants focus on the amount of time that EO's school day was shortened at the time the complaint was filed,

but this misses the point. It's fact that students are unnecessarily denied what they are owed, and what they need, and unnecessarily segregated from other children that denies them FAPE, and results in discrimination.

And the harms that EO alleges are substantial. Losing 30 minutes of instruction a day for no good reason may not seem egregious to the State, to use their term, but those losses add up.

For a student who is denied 30 minutes of instruction every day, that amounts to almost three weeks of school lost by the end of the school your. EO alleges that this lost time and educational opportunity causes him harm, and if the plaintiffs are permitted to proceed to the merits, we will show that EO is harmed.

But for standing purposes, this Court needs to accept those allegations about EO's actual harm.

EO also alleges that he faces discrimination by virtue of his unnecessary exclusion from the classroom. Every day that EO is made to leave the classroom while his peers are allowed to stay signals unjustly that he isn't welcome and he isn't worthy of learning with other children.

No doubt the defendants would recognize the significance of that discrimination if school districts were needlessly excluding black students or female students for 30 minutes every day.

What the Supreme Court said in the Olmstead decision is unnecessarily excluding people with disabilities from public life is likewise a cognizable form of discrimination.

So EO has alleged actual harms that are concrete and particularized. That would be enough to establish injury in fact, but the defendants also allege that JN, JV, and BM are at substantial risk of future harm.

With respect to risk of future harm, the Armstrong decision says the plaintiff can show substantial risk by pointing to a written policy, or to a pattern of officially sanctioned conduct.

In this case, Oregon tells school districts in a written policy that the practice of using shortened school days for these students is sometimes permissible, but it doesn't proactively investigate whether districts are using shortened school days legally or illegally.

It rewards them through the full funding formula for using shortened schooling days, and it declines to help districts avoid the practice by providing needed assistance and resources.

Those acts and omissions impact all children under plaintiffs' class and they are more than enough under Armstrong to show a substantial risk. Oregon not only fails to improve the problem, but it is actively making the problem worse.

While those general allegations suffice, the complaint also includes more specific allegations about each plaintiff, including their past history of harms. The Davidson case says, speaks to the risks that the harms will recur in the future.

JN's school district continues to use behavioral strategies that have already proved ineffective for him, and excluded him from at least one school activity during the past school year because of his behavior.

JV still lacks needed behavioral support, and his school district has a history of saying that he will be permitted to attend school for a full day, and then reversing course.

And BM is currently excluded entirely from his education due to his behavior. And there's a heightened risk that he will be receiving less than a full day when instruction resumes for him, because he's never had a full day of school in his district.

The defendants argue that the future risk is impossible, because there are procedural safeguards under the Oregon law, and the IDEA stay put provision. But accepting the plaintiffs' allegations as true, this practice is, in fact, happening and neither of those provisions protects the plaintiffs from harm.

First with respect to the Oregon law, the defendant

states in their reply brief that all but one of these alleged instances occurred before the 2017 State statute, but this is incorrect. The law that defendants say minimizes the substantial risk of future harm took effect July 1st of 2017.

JN's shortened school day was imposed unnecessarily in late September of 2017, and it continued through spring of 2018. JV was on a shortened school day unnecessarily for the entire '17-'18 school year, which is the first full school year after this law took effect.

BM was only allowed to attend school once during the '18-'19 school year, which is the second school year after this law took effect. And EO, who also alleges ongoing harms, was placed on half days unilaterally, and without the documentation required by the law by December 2017.

So contrary to the defendant's assertions, the complaint establishes that school districts didn't suddenly stop using shortened school days unnecessarily, just because this law took effect.

And the stay put provision under the IDEA doesn't prevent the harms either. For example, BM has never had a full day of school, so the stay put provision would simply freeze in place his denial of instructional time.

We're not asking this Court to speculate as to whether a hypothetical harm that has never occurred before will happen in the future. What we're alleging is that it is

happening now to EO, that it's happened in the past to all of the named plaintiffs, and that it is substantially likely to recur in the future.

Plaintiffs have shown not only an actual injury for EO, but the substantial risk of future injury for the remaining plaintiffs.

I will turn next to causation. The complaint establishes causation, because in this case, as in Morgan Hill, Jackson and Bryan, the State is alleged to be violating it's ongoing legal duty to ensure FAPE and nondiscrimination, to monitor, to investigate and to enforce Federal law. We allege the State shirks these responsibilities.

The defendants attempt to distinguish these cases is unavailing. The defendants here acknowledge, as they must, that they have a legal duty to the plaintiffs as I've described it. What the defendants point to is the fact that school districts also have a duty with respect to FAPE under the IDEA.

But the question isn't whether someone else also owes the plaintiff the duty. Here, as in Mink, the defendants have their own legal duty to the plaintiffs that never shifts elsewhere. And you don't need to reach this because the merits are assumed here but we have cited several cases in our brief confirming that states are properly held liable if students are denied FAPE, and subjected to

discrimination.

Despite their ultimate responsibilities under the law, the defendants argue that the real cause of plaintiffs harms are school districts that impose shortened school days unlawfully, and even the parents of plaintiffs for apparently not complaining about it loudly enough, in the State's view.

We cited the Cordero case in our brief, which rejected both of those arguments on their merits. But critically doesn't require plaintiff to eliminate any contributing causes, or to show that the defendant is the sole or even the proximate cause of the plaintiff's harms.

No matter how much the State would prefer this case were against the school districts or schools, the only question is whether the harms here are fairly traceable to these defendants. And the cases we have cited establish traceability.

The defendants also argue that standing is harder to prove under the Lujan case, because the claims rely on the defendant's regulation or failure to regulate third parties. This argument is unavailing.

Firstly, in the Lujan case, one Federal agency was legally required to help other agencies ensure that they didn't endanger protected species and habitat. Here, the State itself is legally required to ensure FAPE. The defendants say in their brief that the State is like an air

traffic controller that doesn't actually fly the planes.

But the state has to guarantee FAPE to the point that the statute even says that the State itself has to provide services if the school districts can't or won't. In other words, the State does sometimes fly the plane. That's a much more extensive legal duty here.

And in Morgan Hill, in Jackson, and in Bryan, cases considering that very legal duty, the courts each found causation.

Secondly, in arguing that the school districts are ultimately to blame, the defendants say the causal link is too weak, because districts would have to break their own legal obligations.

We submitted the recent decision from the Supreme Court in the census case, and we have copies of the decision here if that would be useful for the Court. There, the Court unanimously held that the plaintiff can establish causation even when a third party is acting unlawfully, if the third party is reacting to the defendant's actions in some predictable way.

Whether that's the case here is ultimately a question for this Court to resolve at the merits. But for now, the Court must accept the allegations that Oregon districts are using this practice unnecessarily, and that's the predictable effect of the States's actions and inactions.

You can find causation following the path set forth in the analogous special education cases we cited, and in Mink, the recent census case confirmed causation.

Lastly, the defendants argue generally that what they are doing to address this issue is enough, and so they can't possibly be causing the plaintiffs any harm. But the plaintiff allege that the current system isn't enough, that Oregon has to do more than simply issue a policy or two and wait for complaints to roll in.

The Cordero case says as much. But that's a question to resolve with the benefits of discovery to flesh out fully how effective or ineffective the State system is. That's not part of the standing inquiry. There's causation because of the plaintiff's harms are fairly traceable to the State's acts and omissions.

Turning to redressability. The plaintiffs' harms are redressable because this Court could declare the State's duties to the plaintiff class, in order to correct its ongoing application of those duties. Redressability is about what the Court is capable of ordering should it find for the plaintiffs on the merits. 9th Circuit has said that's a relatively modest and undemanding burden, that it doesn't require certainty, and that even slowing or reducing the harms will suffice.

The defendants argue that the plaintiffs' injuries

aren't redressable because it's the school district that can really provide the remedy. But the inquiry is whether the harm caused by these defendants can be redressed. Whether it would at least slow or reduce the harms if this Court ordered Oregon to allocate better assistance and resources to the school district, or to target how it provides support and how it monitors districts by using data on shortened school days.

The answer to those questions is yes, and the requested injunctive relief is within the scope of the harms because the plaintiffs have alleged state-wide systemic harms. And in any case, this Court could always alter the scope of the injunctive relief after the plaintiffs prove the scale of the harms at the merits stage.

Regarding declaratory relief, defendants appear to believe that passive approach to supervision suffices, and they don't owe the plaintiffs any more proactive obligations than they are already doing. A declaration to the contrary by this Court would benefit the named plaintiffs who remain entitled to FAPE and nondiscrimination in the State of Oregon, and are at substantial risk of harm in the future.

We assume that Oregon has no intentions of being a scofflaw state if this Court were to declare that it's current system is illegal. Because the plaintiffs have injuries in fact that are fairly traceable to the defendants and likely to be redressed, they have Article 3 standing.

But I would like to touch on COPAA's associational standing. The defendants challenge only the first factor of the Hunt test for associational standing, arguing that COPAA doesn't identify any member by name who have standing in their own right. COPAA's members include parents of children in the plaintiff class and named plaintiffs.

Defendants don't dispute that parents are harmed when their children are denied FAPE and discriminated against based on disability. So parents have standing when their children are denied FAPE, and discriminated against.

COPAA members include parents of children denied FAPE and discriminated against. The case law says those allegations are enough at the pleading stage, because it's relatively clear that at least one COPAA member has or will be adversely affected, because the defendant concedes the remaining prongs of the associational standing test, COPAA has standing as well.

I will briefly conclude. The defendants have chosen to pursue a facial attack on Article 3 standing, so today's inquiry is confined to the four corners of the complaint. The complaint establishes that each of the plaintiffs have standing, although only one plaintiff needs to have standing for this case to proceed. For those reasons, plaintiffs ask that this Court deny the defendant's motion in its entirety. Thank you.

THE COURT: Anything further to add?

MS. ANDREWS: Yes, I do. Beth Andrews, again, for the State defendants.

I would like to start by addressing EO. And again, I will note that a shortened school day is not in and of itself a per se violation in the 9th Circuit, and that's under the Adams case that we cite in our briefing. And the plaintiffs don't seem to argue that it is a per se violation.

And our interpretation of EO's claims as being -- that his claimed injury is a risk of a further shortened school day is based on the fact that EO has not alleged that he exhausted the administrative review processes. IDEA has an exhaustion requirement that is fairly strictly enforced. And if the claims is that EO's IEP is inappropriate, then the appropriate remedy is through those administrative review processes.

As for the other students, the past harms that plaintiffs allege as far as the previously shortened school day have already been redressed through the administrative review processes. Those students went through those processes, and by all accounts, it seems that they worked in the way that they were intended to work, and those students are now receiving full school days.

And plaintiffs allege a pattern of using shortened school days that ODE is ignoring, but a lot of the

plaintiffs' allegations on that point come from times that were pre 2017, and before that 2017 statute went into effect.

Plaintiffs also rely on a multitude of various cases from many District Courts across the country. But those cases are quite different from this case. For example, Cordero, in that case, there was a complete lack of services for months or even years as students waited for an appropriate, private school spot to open up for them.

And in Morgan Hill, that case alleged systemic noncompliance and alleged that the administrative review process itself was broken. So in that case, the avenue that the IDEA provides for parents to challenge an IEP was the problem. And so that is why that makes that case significantly different from the case here, because of course, the plaintiffs in this case are not alleging that the administrative review process in Oregon is broken.

And finally, plaintiffs note that the IDEA obviously requires -- requires the State to ensure that students receive FAPE to the extent that the State must step in and directly provide services when local education agencies are not able to do so. But that doesn't seem to be what plaintiffs are asking ODE to do in this case. They are not asking for ODE to step in and provide direct services for these students.

And requesting the Court to step in and micromanage

through the requested injunction is inappropriate in the context of the delivery of FAPE, which is inherently a very individualized process that needs to be determined specifically for each student. Unless the Court has any further questions.

THE COURT: No. Do you want to respond to the exhaustion issue?

MS. ABROKWA: Sure. So IDEA exhaustion isn't jurisdictional. It's an affirmative defense, which the defendants, if they chose to, could pursue in their answer. And the 9th Circuit has said it's generally best resolved at summary judgment.

The plaintiff actually doesn't need to address exhaustion at all in their complaint. That's because the exhaustion inquiry is separate from the standing inquiry. This Court can decide if plaintiff's injuries are actual or imminent and concrete and particularized. If those harms are fairly traceable to the defendant's actions, and if this Court can redress those harms without knowing one way or the other if the plaintiff has filed an administrative complaint, or if the excuses to the exhaustion requirement apply.

For that reason, all the cases we cited in our brief are able to conduct the standing analysis without regard to whether exhaustion applies or is excused.

Those are our responses to the exhaustion claims.

THE COURT: Anything else?

MS. ANDREWS: Briefly. Yes, there are -- exhaustion is an affirmative defense in the 9th Circuit for IDEA claims, and I only mentioned it because the exhaustion requirement greatly informs the way that defendants interpreted EO's alleged injuries.

Because there is the administrative process, the complaint seems to instead allege that the injury complained of was further shortening of the school day, rather than the existing 30-minute short -- 30-minute shorter school day that EO is currently receiving.

THE COURT: Anything else?

MS. ABROKWA: I would only respond, the complaint does allege actual harms for EO, and the allegations are particularly clear about that in paragraph 78, which indicates that being unnecessarily denied a full opportunity to attend school has caused, and continues to cause, EO harm. That's all for the plaintiffs.

THE COURT: So I am going to take this under advisement, and I know you know, I was going to do that. And especially to take a look, carefully, and do the opinion on standing.

But it really surprises me. I have had many cases on sort of the approach, and I think your comment provoked me to respond.

No one is interested in micromanaging anything. But I am surprised you haven't had a conversation about doing a settlement conference, because it appears to me this is one of those cases where Oregon has made -- if anybody did any research on my background, they know I have sat in on a number of special education and education, generally, that the challenges here may not -- the State may be taking a terrible affront that they are doing something terrible when, in fact, we're trying to do better work.

So it seems to me if I was on either side of this case, I would be looking for the best settlement person to have a discussion about how to provide a safety net and to help teach school districts and schools how best to handle Special Ed kids with high-risk needs that are handled in individual service delivery plans through an IEP, and how to provide those safeguards and how to make sure, across the State, everybody is handled in an appropriate fashion.

So it seems to me -- I suspect, and I'm going to tip my hand, that I don't know that this case is going to go away at this stage, and I suspect I am going to find standing in this particular instance, and we may proceed on.

But it will, again, be a litigation cost, and I am thinking that having a settlement conference and bringing somebody in to talk about what the complaints that have been raised, and the individuals that have been used as the

plaintiffs named in this particular case are, maybe, able to have a bigger view, given the nature of the plaintiffs' counsel to sit down and say, where they see some gaps and problems.

We may not be in a state that has denied students access in large amounts of time, but we may be able to do better. And we may be short -- there may be shortcomings that we need to address. And they are bringing what I often tell -- I remember vividly somebody in a context of a hearing saying to me they were so insulted they had been sued.

And I said, Well, sometimes you have to sue people to start a conversation, but that doesn't necessarily mean it has to end in the courtroom. It can end in a settlement discussion.

So I am going to suggest you go back to your respective decision-makers and suggest a settlement conference right now is a strong recommendation from the Court. I am happy to make the rulings in this particular case, and I'm not looking to micromanage anything. But I will do my job.

Is there anything else we need to take up this afternoon? If you need any help coming up with a name to recommend, I would be happy to provide some names.

MS. ABROKWA: We would take that, Your Honor, suggested names.

THE COURT: I will be happy to do that. I think there are folks, particularly, out there that -- for example, just off the top of my head, that's truly off the top of my head, Justice Susan Leeson, former Justice Susan Leeson, would be probably acceptable to both sides, and has an understanding of -- procedural understanding of where this case can go, and an educational understanding.

I think retired Justice David Brewer would be another excellent person, big systems person taking a look at these. They could either do it tandemly or they could do it individually.

Another one is retired Justice Mary Dietz, and I think she has an interest and has a broad look at some of these systems issues. All of those are judges who have handled complex litigation and systems issues, and particularly going down the list, I think the Department Of Justice would find any of the three of them satisfactory, would be my guess. But I think this calls for that.

I am not unmindful of all of these issues, stayed alert on many of them. And so maybe helping -- having a mediation to help you do better, is not a bad thing. And actually saves a lot of time and money for litigation down the road.

Anything else?

MS. ABROKWA: No, thank you.

THE COURT: Appreciate it. The arguments were excellent. I didn't really ask a lot of questions. Read everything, the submissions were great. And somebody reminded me upstairs, standing is a moving target these days, so I will give it my best shot and send my opinion out.

But I think you ought to take a look at the settlement process. If you need more discovery before you want to do that, that's fine with me, but I suspect sooner rather than later would be the call I would make. Thank you.

COURT CLERK: Court is in recess.

(Proceedings concluded at 2:51 p.m.)

STATE OF OREGON)
)ss
COUNTY OF YAMHILL)

I, Deborah L. Cook, RPR, Certified Shorthand Reporter in and for the State of Oregon, hereby certify that at said time and place I reported in stenotype all testimony adduced and other oral proceedings had in the foregoing hearing; that thereafter my notes were transcribed by computer-aided transcription by me personally; and that the foregoing transcript contains a full, true and correct record of such testimony adduced and other oral proceedings had, and of the whole thereof.

Witness my hand and seal at Dundee, Oregon, this 9th day of August, 2019.

/s/ Deborah L. Cook, RPR, CSR

_____
DEBORAH L. COOK, RPR
Certified Shorthand Reporter
OREGON CSR #04-0389
CALIFORNIA CSR #12886
WASHINGTON CSR #2992

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