Pages 1 - 70

UNITED STATES DISTRICT COURT - DISTRICT OF OREGON

EUGENE DIVISION

Before the Honorable Ann L. Aiken, Judge

J.N., by and through his next friend, Cheryl Cisneros, E.O.; by and through his next friend, Alisha Overstreet; J.V., by and through his next friend, Traci Modugno; on behalf of themselves and all others similarly situated, and COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC.,	CASE NO. 6:19-cv-00096-AA
Plaintiffs, v.	TELEPHONIC MOTION HEARING
OREGON DEPARTMENT OF EDUCATION, COLT GILL, in his official capacities as Director of Oregon department of education and Deputy Superintendent of Public Instruction for the State of Oregon; and KATHERINE BROWN, in her official capacities as Governor and Superintendent of Public Instruction for the State of Oregon,	NOVEMBER 16, 2020
Defendants. _____/	

OFFICIAL TRANSCRIPT OF COURT PROCEEDINGS

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MONDAY, NOVEMBER 16, 2020 **2:04 P.M.**

P R O C E E D I N G S

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COURTROOM DEPUTY: Now is the time set for Civil Case Number 19-96, J.N., et al., versus Oregon Department of Education, et al., for oral argument.

If you could please introduce yourselves for the record, beginning with plaintiff.

MS. ABROKWA: Speaking for plaintiffs, I'm Alice Abrokwa.

MS. ALMAZAN: Good afternoon, Judge. This is Selene Almazan, from the Council of Parent Attorneys and Advocates, for plaintiffs.

MR. STENSON: This is Tom Stenson for Disability Rights of Oregon.

MR. GREENBERG: And this is Joel Greenberg for Disability Rights of Oregon, for plaintiffs.

MR. FOLGER: And you have Michael Folger, here, for plaintiffs.

MR. BOSSING: This is Lewis Bossing, from the Bazelon Center for Mental Health Law, for plaintiffs.

MR. GALANTER: And this is Seth Galanter, from the National Center for Youth Law, for plaintiffs.

And I believe I'm the last plaintiff attorney that's on the line.

MS. STALEY: Good afternoon, Your Honor. Darsee Staley

for the defendants.

MS. ENGLANDER: Good afternoon. Nina Englander for the defendants.

And I'm the last attorney for defendants.

THE COURT: Oh, all right. Thank you.

I've had a chance to read everything that people have submitted. I'm happy to have -- and we talked a little bit at the last status conference on Friday -- (indiscernible) Friday, that -- when asked about some of the issues and questions, and so I gave you the broad question of commonality.

But basically I'm going to have you walk through this case, and I have a number of questions for both sides.

So I would treat this as you're educating me from the beginning. So don't miss the opportunity to understand that I want to hear, from your vantage point, from beginning to end.

So let's start with the plaintiffs, and then I'll ask questions periodically.

MS. ABROKWA: Thank you, Your Honor.

This is Alice Abrokwa, again, speaking for the plaintiffs.

Plaintiff seeks to certify the following class under Rule 23(b)(2): All students with disabilities age 3 to 21 residing in Oregon who are eligible for special education and related services under the Individuals with Disabilities Education Act and are currently being subjected to a shortened school day or

are at substantial risk of being subjected to a shortened school day due to their disability-related behaviors.

We allege that the defendants' statewide policies, practices, and procedures fail to effectively address the systemic misuse of shortened school days for children in the putative class in violation of the State's ultimate duty to ensure these children receive a free appropriate public education -- or FAPE -- without discrimination based on disability.

I've begun with that summary of what this case is about because, in opposing plaintiffs' motion to certify the class, defendants describe this lawsuit as a narrow challenge, the use of abbreviated school days, as applied to individual student's IEP.

This is incorrect.

As we state on page 3 of our motion, rather than challenging individual decisions about the services and supports provided to specific students, the named plaintiffs challenge systemwide defects that pose a common risk of harm to them and to all putative class members.

Plaintiffs have satisfied all of the Rule 23 requirements.

The defendants mainly challenge commonality, typicality, and Rule 23(b)(2).

I'll walk through each Rule 23 requirement in turn,

though I understand commonality is of particular interest.

I'll start with numerosity. This factor is not in serious dispute, since defendants only make the passing argument in a single footnote; so I'll be brief.

Our evidence of the class size from, in fact, Oregon's data and Dr. Greenwood's observations, exceeds the rough rule of thumb in this jurisdiction of 40 members, and we've submitted ample evidence of the difficulty and inconvenience of joinder in this case due to the geographical spread of the class members, the difficulty of reaching those who attend schools in small and rural districts, families' limited resources, and various barriers to parents' advocacy, including the scarcity of counsel, and the fact that joinder of those who may be harmed in the future is inherently impractical.

Plaintiffs have met the numerosity requirement.

I'll turn next to commonality, which has been the crux of the parties' focus.

Under *Wal-Mart*, commonality requires only a single significant question of law or fact such that this Court can resolve an issue central to the validity of our claims in one stroke.

As this Court held in *Giles*, that threshold requirement is not high, and it's construed permissibly.

As the Ninth Circuit explained in *Parson* and *B.K.*, commonality can be satisfied by a common risk of a future

violation that flows from the same statewide policy or practice.

In those cases and the case law they relied on, the policies and practices that established a common risk included a failure to provide access to specialists, a failure to hire enough staff, ineffective coordination and monitoring of services, and the lack of agency-wide monitoring policies and practices.

This Court can also look to *J.R. v. Oxnard School District* for an example of a case under the IDEA, the ADA, and section 504 that applies *Parsons* and finds commonality, because the class claims there challenge specific policies and procedures of general applicability, including an alleged wait-and-see approach to the defendants' duties.

In *J.R.*, the plaintiffs allege that those policies and procedures posed a risk to all school children subject to them.

Plaintiffs allege that the same types of statewide policies or practices that establish commonality in each of those cases place the children in this putative class at substantial risk of future harm, and the same conclusions that commonality is met is warranted here.

In resolving standing, this Court found our allegations of the risk of imminent future harm sufficient due to the allegations that J.N., J.C., and B.M. lacked the supports they needed and that their previously noncompliant districts are not

being monitored.

We have further supported those allegations through Dr. Greenwood's report that it's common, in his experience, for Oregon districts to lack the necessary support -- as did the districts for all four plaintiffs -- and are evidence that no districts are being proactively monitored by the State regarding their use of shortened school days beyond the resolution of administrative complaints, and, through Dr. Musgrove's report, that without effective use of all of the essential components of a general supervision system, like targeted technical assistance and data-informed monitoring, states place their students at risk of being denied FAPE and discriminated against.

Plaintiffs' well-supported allegations of statewide policies, practices, and procedures that place all members at significant risk of harm establish commonality under *B.K.*

The defendants' evidence appears to be offered simply to state their disagreement with the merits of plaintiffs' case, but the point of the commonality analysis is to determine whether a finding on the merits about the alleged deficiencies would result in the same answer for each member of the class.

The answer here is yes.

To paraphrase *Parson*, either each of the statewide policies and practices is unlawful as to every member or it is not. We obviously intend to prove that they are unlawful, but

that's a merits inquiry beyond what the Court needs to decide in order to resolve this motion to certify the class.

Rather, the undermining commonality, the limited evidence from defendants, confirms what plaintiffs' evidence shows.

There are common issues of fact and law flowing from state-level policies and practices.

For example, there are state-level decisions being made about the steps that ODE's 16 county contacts like Lisa Bateman do or do not take to help Oregon's nearly 200 districts implement the uniform policies in Senate Bill 263 and about the resources that ODE makes available to those county contacts as noted by Elliot Field.

Dr. Candace Pelt, the State's special education director, disagrees with Dr. Musgrove that discipline data is irrelevant to abbreviated school days. Her declaration confirms that ODE leadership would make these uniformed decisions about what data to collect concerning the children in the putative class, and that the agency has chosen not to prioritize the issue of reduced instructional time in setting the goals for its state performance plan.

When you look at their briefs and their materials, defendants aren't really disputing that uniform state-level policies and practices exist; they just disagree on the merits of whether those policies and practices satisfy their legal duties. But that's no bar to commonality.

Let me turn to the specific common questions plaintiffs identified.

The first question is whether the State must ensure the class members receive FAPE in the least restrictive environment -- or LRE, and freedom from disability-based discrimination.

That's a pure legal question this Court can answer in one stroke and, indeed, has already addressed in the opinion on the motion to dismiss by confirming that the State is ultimately responsible for ensuring that all children with disabilities receive a FAPE.

That answer to a core legal question is the same for every class member.

The second question is whether that legal obligation requires the State to effectively identify the districts that impose shortened school days unlawfully, correct their legal violations, and provide technical assistance and resources to prevent future noncompliance.

This Court has held that Oregon has an affirmative duty to monitor, investigate, enforce, and assist districts, citing *Cordero*, which held that the duty amounts to more than creating and publishing some procedures and then waiting for the phone to ring.

Dr. Musgrove explains how Oregon can fulfill those affirmative duties to address systemic noncompliance such as by

collecting, validating, and publicly reporting data on the use of shortened school days.

This Court's decision on whether Oregon's legal duties to the class require (indiscernible) exact or any other specific action will necessarily be the same for all members of the class.

The third question is whether the states have the policy, procedure, or systemic practice of failing to take certain action.

Each member's claims share common facts that ODE's agency-wide actions and inactions --

Just like in *Parsons* and in the *D.G.* case that it cited, which also involved allegations that agency-wide monitoring policies and practices or lack thereof.

-- create a risk of harm shared by the entire class.

As an example, either ODE's statewide practice of not collecting any data specifically about the use of shortened school days violates its monitoring duties as to every member or not.

But, again, the answer will be the same for all in the class.

Lastly, the fourth and fifth question asks whether certain statewide policies, procedures, and practices violate the member's legal rights.

Again, these are questions the Court can answer in one

stroke. There's one answer to whether ODE's alleged passive model for enforcing district compliance is legally sufficient, just as there was one answer in *J.R.* as to whether that defendant's alleged wait-and-see approach to the student was sufficient.

In the complaint determination we included as Abrokwa Exhibit 8, ODE found multiple students in one district were denied FAPE due to shortened school days but said it was unaware, until the complaints were filed, and that little, if any, of the data it obtained through its monitoring and supervision processes yields information that could have put it on notice.

The question of whether those agency-wide processes are legally sufficient will necessarily have the same answer for each class member.

Before I turn to typicality, I want to address an argument the State makes that's rejected in several of the cases we cited, including in *Chester Upland*, where the defendants there said the IDEA requires individualized fact-finding that's inappropriate for class treatment.

The Court held just because special education involves individualized education plans, that does not preclude certification where the allegations are directed, the practices that result in injury to the entire class, and the Court noted that the plaintiffs were not seeking individualized

determinations.

In this case, this Court does not need to review the context of each member's IEP or make any individualized assessments about whether they should be on a shortened school day in order to decide if ODE must prioritize monitoring shortened school days or collect data on this issue or provide specific types of guidance and resources.

The statewide policies, practices, and procedures are the glue that binds the class together. Each one is either unlawful or lawful but as to every class member, and this Court can resolve the core questions in one stroke at the merits stage.

For those reasons, plaintiffs have established commonality.

Unless the Court has questions at this point about commonality, I'll turn to typicality.

THE COURT: Go ahead. Move on.

MS. ABROKWA: Sure.

So the purpose of the typicality requirement is to assure that the class representatives' interest aligns the classes' interest, and, as with commonality, the threshold requirement is not high for this permissive requirement.

Every foster child in *B.K.*, and every individual who was incarcerated in *Parsons*, had different individual needs. The courts looked at the -- it's the nature of the representative

claims -- is it reasonably coextensive with those of the class members -- and not at the specific facts from which they arose.

Here, the named plaintiffs are typical of the rest of the class because the claims are based on the same uniform actions and inactions of these defendants in operating their general supervision system.

That agency-wide conduct is not (indiscernible) to just these four children. So individual differences in the facts of how each child has experienced shortened school days do not defeat the totality.

Dr. Greenwood identified several similarities among the named plaintiffs and in how their districts struggled to develop appropriate and effective support.

Based on his decades of experience, it's Dr. Greenwood's opinion there are at least hundreds of students who need the same level of support he found each of the named plaintiffs needed, and he concluded that these plaintiffs are representative of other students with highly-challenging behaviors and significant behavioral-support needs in Oregon.

All four children are eligible for special education and were placed on shortened school days due to their disability-related behavior without timely and effective functional-behavior assessments and behavior-intervention plans, none received an adequate plan to help them return to a full day, and all were denied an appropriate education as a

result of their shortened school days, the classroom and school staff for each student who needed additional training, and should have been able to consult with persons with the necessary expertise, and he found that all four plaintiffs are at significant risk for shortened school days and the related harm in the future due to the lack of effective supports, among other reasons.

Defendants don't rebut those findings or identify any reason why these four children would be at any different risk than the other children in the class.

Contrary to the defendants' suggestion, just because special education involved IEPs, that does not preclude the finding of typicality.

This Court might find the *M.B. v. Corsi* case that we cited on page 20 of our opening brief helpful because the court there found typicality where the plaintiffs were not litigating whether the named plaintiffs should have been administered psychotropic medications but rather whether the defendants were obligated to provide additional safeguards against the improper administration of those medications.

To conclude this point, there are no issues unique to these four children that makes them atypical of the rest of the class, and each next friend has attested to the representative interest in holding the State accountable on behalf of the class.

Plaintiffs have thus satisfied typicality.

Adequacy is the last Rule 23(a) requirement.

The defendants don't challenge this requirement, but we've established, through the declarations of the next friends and counsel, that there are no conflicts of interest and that class counsel would be qualified and competent to represent the class.

Belatedly, defendants also don't challenge the appointment of plaintiffs' counsel as class counsel, and we've established, through our declarations, that counsel has done considerable work on this matter and has the needed experience, knowledge, and resources to represent the class under Rule 23(g).

Finally, plaintiffs have also met the requirements of Rule 23(b)(2). This requirement is unquestionably satisfied when the class seeks uniform injunctive or declaratory relief from policies or practices that apply generally to the class as a whole because the single indivisible injunction would provide relief to each member.

This is not the kind of case where each member would need their own injunction. For example, Dr. Pelt's declaration says that ODE is in the process of revising its differentiated monitoring system.

As Dr. Musgrove indicates, the Court could order ODE to make shortened school days a monitoring priority in that

system.

Exhibit 9 to Lisa Bateman's declaration acknowledges that the State's school funding formula equates one hour of tutoring with a full day of school. The Court could order the State to change that to (indiscernible) to use shortened school days similar to the reform in Mississippi that Dr. Musgrove describes in her declaration.

Exhibit 3 to Ms. Bateman's declaration identifies several solutions that could improve students' educational experiences, including the development of a statewide student information and IEP system, multi-tiered systems of support -- which Dr. Musgrove described -- and updated ODE guidance and regulation on various topics.

If the Court finds for plaintiff on the merits that ODE's practices -- for example, around data collections and targeted technical assistance and professional development -- are deficient with respect to shortened school days, it could order ODE to take those kinds of actions to remedy the harms for the class as a whole.

Those aren't individualized remedies, and they're also not a general injunction to follow the law. They're examples of specific class-wide remedies.

As *Parsons* put it, the remedy is not focused on specific services for specific class members but the level of care and resources would be raised for all.

The requirement is met in this case.

Just to quickly conclude, consistent with the case law of this jurisdiction and with *Wal-Mart*, plaintiffs have established all the Rule 23 requirements, the detailed allegations and supporting evidence, we thus respectfully ask the Court to certify the class, to name the named plaintiffs as class representative, and to name plaintiffs' counsel as class counsel.

I'm happy to answer any questions the Court may have.

Thank you.

THE COURT: Thank you. I didn't want to interrupt. I appreciate very much just having an overview and a look, from your vantage point, of what you presented. So thank you very much. That was excellent.

I would like you to do me a favor, and I would like you to walk through the elements of your case in chief for your IDEA, ADA, and section 504 claims and how they apply here.

Just -- could you walk me through that information?

(Discussion off the record re: audio interference.)

THE COURT: Go ahead.

MS. ABROKWA: Sure. So the principle liability for the State under the IDEA is the statutory obligation for (indiscernible) that all students with disabilities receive FAPE.

And so an important element for that claim is that the

class members are eligible for special education and related services, that they're eligible to receive services under the IDEA and thus entitled to FAPE, and that the State has failed to ensure that they actually receive FAPE.

Dr. Musgrove's report is probably the best direction that I can give you in terms of what a state has to do to ensure FAPE. If any of those eight puzzle pieces to a state supervision system are not working, or they're not working together, the state has failed its legal duties to ensure FAPE.

Similarly, for the ADA and the section 504 claims, which are nondiscrimination statutes, we need to establish that our plaintiffs are eligible due to disabilities.

That's the (indiscernible) the class definition in this case.

But parallel to the obligations under the IDEA, under the ADA and section 504, states have a responsibility to ensure that the educational services they administer through their programs don't exclude children by these and other disability, or deny them the services, programs, or activities of that program, or otherwise subject them to discrimination.

I'd also note that one theory of disability discrimination that's distinct is the theory under the *Olmstead* case that we note in the complaint, which is unnecessarily segregating people with disabilities who could be in inclusive integrated settings.

To that point, I would direct you both to Dr. Musgrave and Dr. Greenwood's report which both explain the ways in which students with disabilities can be included and integrated into the traditional public school settings for a full day if they have the appropriate services and support, and so the unnecessary segregation and isolation of their students by virtue of their shortened school days is also dependent on the fact that their exclusion is not warranted -- it's unnecessary -- if they have the appropriate support.

THE COURT: So just again, this may be obvious, but tell me how shortened school days violate each of those laws.

MS. ABROKWA: So the use of shortened school days would violate those laws if they are unnecessary to the point I made about the ADA and section 504.

Unnecessarily segregating someone who could be in their classroom for the full school day is a distinct form of discrimination because it signals that they're unworthy or incapable of being part of the traditional school context.

So that theory of disability discrimination is based on the unnecessary exclusion.

But the primary point I would make here is that when students are subjected to shortened school days they are missing instructional time that they actually need, and so that's where the FAPE denials come in.

Students who are entitled to FAPE are entitled to special

education and related services.

So if you are getting one hour instead of seven hours, you are missing academic time that's part of the special education related services, you're missing social and emotional support that are part of those related services, and there's also a violation of the requirement under the IDEA to educate all children in their least restrictive environment.

This is really the IDEA parallel of what the ADA says, that you need to educate all children in their most integrated setting. The exclusion denies children their right to be educated in the least restrictive environment.

And so that's also a distinct violation if students who are subjected to shortened school days aren't getting the educational services that they're entitled to, and the services that they do get are in more restrictive settings than is required and is appropriate for their needs.

THE COURT: So essentially the argument is that shortened school days can and most likely violate these laws when used to respond to a student's disability-related behaviors, not that they're always a violation when used in that way. Because they are the rare exception.

That's -- the intent of the law is that there -- it's a sort of continuum of responses, with an anchor to maintain the child, to the best of everyone's ability, in the classroom; correct?

MS. ABROKWA: That's correct, Your Honor. Both Dr. Musgrove and Dr. Greenwood make the point that shortened school days for students with disability-related behaviors are rarely necessary if you have the appropriate support, through services in place, like effective functional behavior assessments and behavior intervention plans, and, even when they are used, they should be used minimally -- for days or weeks, not months or years -- because the intention of all of the federal laws that we filed under is to ensure that children are in their most inclusive setting possible.

THE COURT: So looking -- I was looking at your definition. So the class, as you define in -- as follows, quote, risk of being subject -- subjected to a shortened school days due to disability-related behaviors, under your theory of this case, then, aren't all IDEA-eligible students in Oregon, who have significant behavioral needs, exposed to this risk?

MS. ABROKWA: We would say that all students in the putative class are exposed to the risk of shortened school days, yes. I'm not sure if I've fully understood your question, though.

THE COURT: Well, I've been looking at your definition, and so it's -- (indiscernible) we're looking at maybe rewriting it, but I'm sort of thinking that through.

So I guess that what I see in your situation is the risk here seems to have two layers of risk. First, at the state

level, policies enable the statewide practice among school days equal risk of shortening school days; and, second, exposure to shortened school days equal a risk of statutory violation.

Or do the two risks collapse into one, and do you have evidence to support that assertion?

MS. ABROKWA: So the class, as we've defined it, is defined by the substantial risk of being subjected to shortened school days, and our evidence -- from Dr. Musgrove in particular -- is that shortened school days are likely to deny students FAPE in the LRE when they're used in response to students' disability-related behaviors because they generally aren't necessary, except in the rare instance, and, even when they are used, as I noted, they should be used in quite limited circumstances for short periods of time.

So, you know, we're happy to kind of take direction from the Court if there's a way to further clarify that so that the legal violation is being denied, FAPE and the LRE and subjective information under the ADA and Title IV, and it occurs for those children who are at risk of being subjected to shortened school days.

THE COURT: Your evidence of widespread practice of the shortened school days in school districts across the school districts seems minimal.

Will you walk me through the evidence that you have and why you think that's sufficient to support your claim and tell

me why this is enough at this stage?

MS. ABROKWA: Sure. So, you know, Dr. Musgrove has opined that there's a significant risk of the harms -- the FAPE denial and discrimination -- if states don't effectively use those components, those eight essential components.

I can give you an example of one of the components that we've alleged is sufficient, and that's in data collection and analysis.

We've submitted evidence that ODE doesn't collect data on shortened school days. Even against the recommendation of its own advisory committee and after the passage of Senate Bill 263, that it doesn't generally track how districts respond to student behaviors, and that a complaint process is really the only way in which it is finding out the students who experience shortened school days are being denied FAPE.

All of those practices towards data collections are inconsistent with what Dr. Musgrove reported -- that states need to collect all relevant data concerning the issues that impact students in their FAPE even beyond the requirements of federal data reporting requirements.

So the deficiencies in the State's collection of relevant data are leading to Oregon's really not having one way of knowing -- one way or the other of knowing if students who are in the class are receiving FAPE.

Our evidence from the reports of (indiscernible) practice

is occurring on a statewide basis in school districts throughout the state, regardless of how many of those result in complaints being sent to ODE.

I'll give another example. Plaintiffs allege statewide deficiencies in the provision of targeted technical assistance and professional development.

Dr. Greenwood has consulted with school districts across the state of Oregon for decades, and he found that the school districts for all of these plaintiffs lack knowledge about how to implement the kinds of behavior intervention that would have prevented the need to use shortened school days.

He also can opine, based on his experience, that that lack of knowledge in these districts is common and that many Oregon school districts have a lack of adequate training and staff support.

Without those needed resources and knowledge, it is Dr. Greenwood's opinion that all of the students are at a significant risk for shortened school days in the future.

But Dr. Musgrove explained that it's not enough for a state to simply tell districts they're doing the wrong thing and imposing sanctions after there's been a complaint, that they have to actually make sure districts have the professional development and technical assistance that they need.

Our motion details even more supporting evidence regarding our allegations of defendants' deficiencies and makes

clear that, without all of those components working effectively, all of the children in the class are at risk.

I also just want to note here that even the defendants' own evidence helps support there is commonality in this case.

So the evidence that we have from the defendants includes information about the use of county contacts.

Whether or not those county contacts provide the types and levels of technical assistance and support and consultation that Dr. Greenwood says is appropriate, that's the common question.

Are there enough of the county contacts? Are they trained appropriately? Are they actually providing the kind of detailed support and guidance that Dr. Greenwood says is appropriate?

The existence of that state-level practice of using the county contacts to provide supports and consultation to school districts is, itself, a common fact, and this Court can resolve whether or not the State's actions around providing consultation are legally sufficient in one stroke; there is one answer to whether the State's approach to monitoring and support and supervision is adequate under the law.

THE COURT: I'm going to go back to something.

So tell me what evidence you provide that supports your allegation that the State practice is relying exclusively or primarily on administrative complaints to identify and correct

violations of federal law.

MS. ABROKWA: Well, for that I think we can use the State's own words. This is why we directed the Court to Abrokwa Exhibit 8 -- I believe -- which is one of the complaint determinations involving shortened school days.

In that complaint determination, what ODE said is that little of the data that it collects could actually notify it of a problem concerning shortened school days unless and until someone files a complaint.

That's an acknowledgment that they don't have a way, through their existing data system, of learning if there are compliance issues with respect to shortened school days, and, instead, because those data processes don't allow them to determine if there are FAPE violations, they learn about them when someone files a complaint.

That's a passive approach to supervision and monitoring similar to the wait-and-see approach that was a common policy or practice in the *J.R.* case.

THE COURT: So how do the abbreviated -- how does the abbreviated school day law and the ODE's Executive Memorandum on Reduced School Days create a risk of statutory violations, and what evidence do you have that supports that theory?

MS. ABROKWA: Sure. So Senate Bill 263 -- I think the primary point about Senate Bill 263 is that the State of Oregon --

THE COURT: May I interrupt you for just a second? I was headed there next.

MS. ABROKWA: Sure.

THE COURT: I would really like you to talk about -- a little bit -- the history of Senate Bill 263, the impetus and emphasis of that legislation.

I've looked at the legislative history somewhat, and I would like you to talk about what was the -- why it was introduced and what it was attempting to solve and how -- now that that was passed and is in a roll-out phase, how does that work when there's this class action litigation now pending?

MS. ABROKWA: Sure. So -- I'm sorry. Was there a -- I cut you off a little bit.

THE COURT: No. No. I didn't artfully ask the question, but I'm really curious about -- because it seems to me -- I have a thought about this -- but it seems to me that the essence of the legislation -- which I want you to talk about -- sort of lays the groundwork about what needed to occur, and this litigation -- I think there was an expectation that this litigation wouldn't have needed to exist because it was intended to have been solved with 263. Maybe I'm wrong.

But I want to see how that legislation, the roll-out, anticipated implementation, didn't satisfy what the goals of the -- or the needs of these particular plaintiffs and the

ongoing violations and necessitated this class action.

MS. ABROKWA: Senate Bill 263 is the product of a lot of hard work by advocates in Oregon for many, many years, including Disability Rights Oregon and other local advocates, to encourage, to prompt, to press the State to take action about this practice that advocates were seeing in school districts all throughout the state.

And so it was -- it took effect in 2017, and it's intended to document the use of shortened school days.

When a student is placed on shortened school days, that information needs to be in the IEP. There's a process for getting parents' consent, and so, you know, the intention of the bill was really to shed light on the practice.

The difficulties that, as Dr. Musgrove explains, just having the policies on paper isn't actually fulfilling your duties to ensure FAPE. FAPE actually has to implement appropriate policies and procedures.

And so the fact that Senate Bill 263 is followed would create data that would let the department of education know which students are getting shortened school days, in which districts, for what disabilities, for how long; what was the reason given for it in the IEP.

That information would be plain from the face of IEP; it would be plain from consent forms -- whether or not parents were giving consent to the use of shortened school days; it

would be evidence just from the fact of those consent forms.

But ODE isn't actually collecting any information from districts about the implementation of Senate Bill 263, despite the fact that its advisory committee has asked that it do so.

So, you know, the state of affairs that we have now is that before Senate Bill 263 and before the Executive Memorandum on Reduced School Days -- which is a short guidance document -- there was this systemic practice of shortened school days, and after Senate Bill 236 and the executive memorandum, there is still this practice going on and nothing has changed at ODE's level in terms of how it monitors compliance with those policies or procedures.

You know, if you were a school district and you were to look at the executive memorandum which advises districts to consider putting in place functional behavior assessments and behavior intervention plans before using shortened school days, you actually need to have the appropriate expertise on how to do that, and what Dr. Greenwood's report is is that districts continue, throughout the state, not to know how to actually follow the guidance that's in the executive memorandum.

This is where the State's failure with respect to those two policy lies.

You have to have affirmative steps to implement the policies and procedures that you have, and just having them in some paper doesn't satisfy your duties.

I want to note just one example, that E.O. is an example of someone who was placed on shortened school days. He had half days after Senate Bill 263 took effect without documentation in his IEP, and the State didn't have a way of learning about that noncompliance issue because it doesn't have a systematic way of implementing these particular policies.

So this is how we've come to be at this particular lawsuit.

THE COURT: So can you tell me, from your vantage point, why the department of education isn't happy to join in this effort to collect the data and have it readily available to be able to deploy solutions and/or correct misinformation or to address a hot spot? Why they aren't, frankly, without a lawsuit, putting together a statewide data system?

What am I missing?

MS. ABROKWA: So I think the State can probably best address that. But one problem --

THE COURT: I know that, but I want your answer. I want your answer.

MS. ABROKWA: Sure. I think one issue might be not recognizing that they're actually required to do something proactive and not wait for the phone to ring.

There's an approach to supervision and monitoring that is "We will make some presentations. We'll mention shortened school days in our PowerPoints. If people have questions, they

can come to us." But none of that is consistent with the proactive level of supervision and oversight that states have to have if they're actually going to enforce the IDEA and the ADA and Title IV and actually going to ensure that FAPE is provided.

Ensuring that FAPE is provided involves more than waiting for people to file complaints and resolving those, and I think the disconnect here is the difference in the State's understanding that their approach, waiting for complaints to come to them, is not consistent and not compatible with their obligation to affirmatively ensure the district has the oversight and the resources that they (indiscernible).

That strong (indiscernible) is in the text of the IDEA itself, which is why we put that language in our brief.

But the IDEA contemplates that states are in the best position -- even as compared to school districts or to parents or to advocates -- but states are in that best position to ensure that FAPE is provided, and so that's the reason why they're responsible rather than just hoisting that responsibility onto local school districts.

That duty, that obligation, lies in the State's hands; and that's by design, that's intentional in the statute itself, and we think that the State hasn't recognized that core aspect of their responsibilities.

THE COURT: So assuming that there is a -- the class is

certified moving on, and assuming that there's a discovery request to obtain what data is collected, am I correct in my reading of the experts and the papers that you've filed that the individual -- I think they're the educational service districts and/or the individual districts have that information?

MS. ABROKWA: That's correct. If they're following Senate Bill 263, there will be information on a district level of who's getting shortened school days and why.

The State isn't collecting that data at the moment, but that information does exist.

THE COURT: So at the discovery phase, when you ask for that data, and I hopefully order it to be provided, they'll have to go through a process of pulling that data together in a systems review.

In other words, they'll have the capability of having it at a systems level, at the state level, and that will be provided to you in its highest and best form for your discovery purposes; correct?

MS. ABROKWA: That's right.

THE COURT: And so in this day and age, when data analytics are where we're moving to document issues and problems and where that information can be accumulated -- which was the intent of Senate Bill 263 -- and there are ways to implement it and make that information available, wouldn't it

be advantageous for a department of education to want to be able, with a click of a mouse, to pull up and make sure that they don't have an outlier district that is making a mistake that might impede a student's education or, shall we say, a cluster of problems around, and that they are constantly looking at where they need to do updated targeted improvements for the benefit of the students? Wouldn't that be an advantage?

MS. ABROKWA: That's right, and I think that's one reason why, in the materials attached to Lisa Bateman's declaration -- this is Exhibit 3; I think page 97 of that declaration -- the State there identifies having a statewide student information and IEP system would be an important way to ensure that students are actually getting FAPE, and there are vendors that work with FAPE to create those systems so that states' department of education can do proactive monitoring as they need to before an independence of people coming to them with complaints or lawsuits.

THE COURT: It would be a state of the art system, which was the desire of Senate Bill 263, to improve outcomes for children; right?

MS. ABROKWA: It would, and there are other states that rely on similar systems, and so, you know, the parties wouldn't have to kind of start from scratch in figuring out what that system would look like and how it would operate at the remedies

stage of this case.

THE COURT: So let me give you an old example that I lived through, see if it's a comparator.

So I was a juvenile judge a long time ago, and it was interesting to me that there was no system -- state computerized data system that -- when we looked at children who were in the delinquency system, that we could track whether they had been in the dependency side, they'd had a dependency case. There was no data collected.

And as decisions have moved forward, and there is now a data system that was put in place -- and it was designated, I believe, by legislative direction -- finally in place, it now is able to begin the process of talking about tracking kids who end up in the dependency system who are likely to end up in the delinquency system, and then also in the adult system, as a way to start providing more thoughtful intervention at the dependency level to keep kids from going into the juvenile-level system and on into adult system.

And back in the day I can name the PhD candidate who had to go, by file, every delinquency file and go back and track it.

And it was a -- the correlation was -- anecdotally, I can tell you, I have lots of experience in that; so I can anecdotally tell you that.

But the data was incredibly powerful when the

dissertation was completed, and the correlation was almost, you know, almost a hundred percent.

So wouldn't that be helpful to the department of education to know where to deploy or where to meet what the governor says in her direction that -- to make sure every student graduates from high school with competencies and has a plan to move forward in their life?

And so wouldn't having that data to know where the gaps are in this system and to have it readily available to fine-tune best practices and best monitoring, best implementation, best intervention if some people just have a mistake and/or misunderstanding, isn't that what the underlying intent of Senate Bill 263 and that special commission that was established that, under this prong of their analysis, was supported 70 percent by the commission members that this was an important factor to keep the statewide data?

Am I missing something?

MS. ABROKWA: No, I think that's all right. You know, having the data exist and ensuring, on a state level, the State is actually making sure that school districts input that data and that they know how to do that correctly, that has a number of benefits, you know.

I think this is why Dr. Musgrove says sunshine is the best disinfectant. You know, it both lets the state know where there are problems, but, also, having that data be publicly

reported and validated, incentivizes districts that can say "We make sure that our students are included for the full school day. Here's how we're making sure that students have an equal educational opportunity."

But, you know, one point that I want to stress again here is the State has to not just create the system that's (indiscernible), they have to make sure that districts know how to input data and that they have guidance.

For example, if you have a shortened school day, and it's a two-hour school day, maybe for that two-hour school day you spend 30 minutes in your general education classroom and the rest in a separate classroom that's only for students with disabilities. Districts need to know how to categorize what least restrictive environment category that day falls into, and they should know that it's different than if the child had an eight-hour school day.

There are differences in how the data should be analyzed, interpreted, and the districts will all need support and guidance from the State in order to figure out is the data we're collecting useful, is it valuable, is it telling us something about if these students are receiving FAPE.

And so we think that that's key and would really just stress the importance of the State taking the leadership in that work as the statute contemplates that it would.

THE COURT: Well, it comports with evidence-based

practice models that say you put things -- you put it -- the intent is to put a data collection system together that gives information that can help underlie the particular goals of the reason people collect the data and, at the same time, continue to fine-tune how best to gather that data and how to narrow the question.

But that's -- that's a process. We have to start somewhere. And just simply having it stored with the district or with a special district is not going to help anybody understand, across the state of Oregon, whether the statewide goals are being met or if there are particular problems that are going to, again, affect a child's ability to get an education, an appropriate and promised education, under the IDEA.

I think I understand this case. I'm just sort of surprised. I know there was a settlement conference before we got started very far. I'm just simply surprised because I think -- you know, I could -- I would be very interested to see why a settlement conference at this stage, when litigation is so expensive, and it's already clear that people have spent a lot of time, and it's probably going to continue, why that wouldn't be of some interest.

So I'm just planting that seed, and unless you have something more and any other comments that you want, I think I understand the issues, and I appreciate, very much, your

targeting the question that I left for you on Friday.

So thank you.

MS. ABROKWA: Thank you.

THE COURT: Ms. Staley or Ms. Englander, I'm happy to hear what you have to say.

MS. STALEY: Thank you, Your Honor. Good afternoon. May it please the Court. My name is Darsee Staley. I'm a senior assistant attorney general for Oregon, and I represent the defendants.

The motion -- I guess with Your Honor's permission I'll start with some of my prepared remarks, and then I'll try to just sort of jump into some of the questions that you posed with plaintiffs' counsel and, obviously, whatever questions you have specific for the defendants.

But focusing in more on just the motion for class certification to start, the defendants submit that the motion should be denied because the Supreme Court's decision in *Wal-Mart* is controlling.

The motion fails to meet the requirements of Rule 23 under the applicable methodology, which includes the requirement for evidence, not allegations; rigorous examination of the issues; and scrutiny of the merits, where necessary.

It's clear from what has transpired so far, Your Honor, that you've got that down to a T.

The focus of defendants' argument, then, is on

commonality, because it's foundational.

Only numerous common claims count for numerosity, and typicality would be compared to the common claims.

So are there common claims on which a common question -- the answer, in fact, to a common question is going to aid the Court in formulating a class-wide remedy.

On the issue of commonality, *Wal-Mart* affirms longstanding Supreme Court precedence that it requires plaintiff to demonstrate that the class members have suffered the same injury or -- because risk is sort of an alternate rubric that the plaintiffs are using here.

I'm not discounting that, but I may not remember to say it every time.

But the commonality is about have the class members suffered the same injury or are they at risk of suffering an identical injury.

Here, the alleged injury or risk of injury to the putative class members cannot be determined or remedied without consideration of each class members' -- that is, each student's -- circumstances because the alleged injury arises as the consequence of an abbreviated school day program that is not appropriate.

Indeed, the injury occurs only if the student is subjected to an abbreviated school day that is so harmful to that student that it amounts to a denial of FAPE.

Wal-Mart makes clear that commonality is not a low bar. The court quoted a *Law Review* article with approval, saying that cataloguing common questions, even in droves, does not establish commonality for purposes of Rule 23.

A class-actionable common question must be central to the validity of each class member's claim, a claim that comprises duty, breach, causation, and damages.

A question is common for purposes of commonality if it matters to class certification, meaning does the answer facilitate a class-wide resolution which, in turn, may require examination of the dissimilarities among the claims and class members.

The claims in *Wal-Mart* are analogous to the putative class claims here in certain fundamental ways.

The decisions at issue in *Wal-Mart* -- I'm sorry. Let me start again.

The decisions at issue in *Wal-Mart* were not made by the defendant but rather by the local Walmart stores.

This was a gender-discrimination class action.

The *Wal-Mart* class plaintiffs did not allege an express policy of discrimination but rather that the defendant was aware of multiple instances of discrimination by local stores and failed to act.

The validity of class members' claims under Title VII in *Wal-Mart*, like the IDEA claims here, turned on the reason for a

local decision-maker's decision.

The plaintiffs' proposed common questions here address duty, and they address breach, and they address remedy, but they don't address causation, and they don't address injury.

At the common -- at the core of the common injury is that an IDEA-eligible student is receiving services that are not specifically tailored to deliver FAPE to that student.

The IDEA itself rests on a process to develop such IEPs tailored to each student that will deliver the opportunity for the student to meet challenging objectives consistent with the student's circumstances and abilities.

Applying the label "systemic" to plaintiffs' claims doesn't satisfy the rigorous analysis that *Wal-Mart* requires. The Court must conclude that the claim is systemic and therefore must identify the policy at issue.

Unlike the claim in *Christopher S.,* for example, which, in fact, involved a blanket policy, the complaint here does not allege a policy to impose abbreviated school days based on categorical tests such as a diagnosis or another status that would be applied irrespective of the individual circumstances of the student.

The identified policies which Your Honor and counsel have discussed -- Senate Bill 263 and the executive memo -- are, in fact, legally compliant with the IDEA. Thus, plaintiffs' complaint is that the local school districts are violating the

IDEA by imposing abbreviated school days that are so egregious that they amount to a denial of FAPE.

Those claims are individualized, and those claims, under the IDEA, must be exhaust- -- must -- can only come to court after the student has exhausted his or her administrative remedy.

Since abbreviated school days are not per se unlawful, a blanket policy cannot simply prohibit abbreviated school days, or a multitude of various policies that would engender data collection for the purpose of reducing or preventing the misuse of abbreviated school days is not a blanket policy that is applied without respect to individual circumstances.

Importantly, the IDEA requires local districts -- and so does state law -- to update IEPs as warranted by circumstances and no less than once a year. Therefore, a blanket policy or prohibition would undermine the intent and the very nature of the IDEA individual mandates.

As a question of evidence, plaintiffs' declarants, Dr. Musgrove and Dr. Greenwood, do not address the existence of the state (indiscernible) policy that is on point. In fact, Dr. Musgrove disclaims any knowledge of any Oregon policy.

Because the common injury here is, in fact, denial of FAPE through the misuse of one element of some students' IEPs, or the risk of the misuse of this element is inherently and legally an individualized question, thus the *Wal-Mart* analysis

is directly on point.

Plaintiffs clearly assert that the injury common to the class is denial of FAPE and is not the statewide policy to lack data collection that is causing that injury and no common question proposed by the plaintiffs will answer the question of whether that is causing an injury.

The causation of the injury is the misuse of an abbreviated school day within the context of a tailored individual education plan that has to be made based on the circumstances of a particular student.

Plaintiffs have not identified any statewide policy that permits abbreviated school days, and the cases that plaintiffs point to are not analogous.

Wal-Mart -- in *Wal-Mart,* the Supreme Court concluded that the assessment of commonality overlapped with the merits because the crux of the injury was a reason for the harmful employment decision as to each plaintiff or putative class member.

The *D.L.* case illustrates how plaintiffs' claims here are more like *Wal-Mart* than like any of the cases cited by plaintiff.

In the first *D.L.* case --

Well, sorry, Your Honor.

There's two *D.L.* cases, and the defendants have cited the first *D.L.* case, and the plaintiffs rely on the second *D.L.*

case.

And like the first *D.L.* case, plaintiffs have not identified a policy that harms every plaintiff and every putative class member in the same way or at all.

The discussion of policy is all about a policy that would have a prophylactic effect at some point in the future if data was collected and if conclusions were drawn and if additional things happened.

As the Ninth Circuit held in the 2019 *B.K.* case, a factual finding for class certification purposes is needed to support a conclusion that every class member is being subjected to an identical significant risk of a future violation.

Because abbreviated school days are not per se unlawful, and because no policy has been identified that mandates the imposition of a wrongful component of any student's IEP, there is no commonality in the class members' assertion of a harmful, causal, unlawful use of abbreviated school days.

Unlike the second *D.L.* case, plaintiffs' class definition here does not address a policy failure but rather a failure of many different IEP teams who are subjecting students to an improper abbreviated school-day program or to its substantial risk.

The second *D.L.* case concerned an identified policy, the child-signed process, and the deadlines that that process imposed.

In the second *D.L.* case on which plaintiffs rely, the class members were not alleged to have been denied FAPE because a specific element of each student's IEP could be found to be sufficiently erroneous as to constitute a denial of FAPE, the situation here.

In the second *D.L.* case, the classes were, first -- there were four subclasses. The first was disabled 3- to 5-year olds whom the district failed to identify and no services would be offered at all. That was a systemic failure.

The second subclass was disabled 3- to 5-year-olds whom the district identified but then failed to give an initial evaluation within 120 days.

Again, that was a defined systematic failure to comply with a bright-line test at that district level.

The third subclass was similar. It was the failure to make an eligibility determination within 120 days of being referred.

So, basically, they said the students in the class are those who meet this criteria, not all students who are at risk of being -- of being subjected to a failure to make this eligibility determination.

And then the fourth subclass was all children who transitioned from early intervention to preschool programs whom the district denied a smooth transition by age of 3.

These certified classes did not depend on determining

whether a particular element of the student's IEP was not appropriate for that student. Therefore, the second *D.L.* case does not speak to the circumstances before the Court today.

Other cases cited by plaintiffs include *V.W.* from New York, which involved entities that were responsible for the direct provision of services -- which is the vast majority of the case law in this area, and the alleged systemic failure in the *V.W.* case was deprivation of individualized services -- essentially, IEPs -- for incarcerated youth.

V.W. did not concern just one element of a suite of services that, as to some students, might, depending on the circumstances and severity, amount to a denial of FAPE.

G.F. is another case, a California case. It involved -- it also, unlike the case we have here, *G.F.* involved the entity that was responsible for delivering services to detained youth.

The case before Your Honor would be comparable to *G.F.* if the class were all students in the district and the defendant was the district and the issue was a policy to put all of those students on abbreviated school days.

But that's not the claim here.

The *Chester* case -- which was mentioned in argument -- from Pennsylvania, was likewise a class of all students in the district, and the courts distinguished a prior case where class certification was denied because the class claims involved services to be delivered under IEPs.

In *Chester*, the alleged harm was not that a particular service or element of an IEP would be harmful but that the students were at risk of being denied all services due to the alleged imminent closure of all schools.

Wal-Mart -- Wal-Mart demands that the district court consider the merits where substantive questions overlap with the standards for class certification, and defendants are not suggesting that it requires a substantive ruling, only that the merits be considered, as Your Honor has been discussing.

But the Court has to conclude that there is sufficient evidence to support the existence of a common claim, including causation and injury among class members, that is capable of a one-stroke resolution, and defendants submit that an order requiring the defendant to collect a certain amount of data provides no direct remedy to any student who may be subjected, by an erroneous decision of an IEP team, to an abbreviated school day that is so egregious that it amounts to a denial of FAPE.

I think I'll pause there, Your Honor, and see whether you wanted to direct some questioning or would like me to engage in a little bit of rebuttal of some of the notes I took when your discussion with plaintiff's attorney.

THE COURT: So do you know how many students are unnecessarily receiving shortened school days or even how many students are receiving shortened school days?

MS. STALEY: No. The IEPs are not collected on a statewide basis. The IEPs are delivered and maintained by the districts.

There is a monitoring and supervision system that is and has been in force for decades which applies certain metrics and is discussed in the evidence that you've seen, Your Honor, and the data would be collected, for example, when a random-bas- -- I don't know if it's a random basis, but there are selected districts that get a closer look in each monitoring season, and that rotates. So there would be -- there would be a touchstone there.

And I might just jump in, Your Honor. One thing that I did want to comment on, but with respect to Exhibit 8 to the Abrokwa declaration, which the plaintiffs used to suggest that the defendants are conceding that, you know, they can't find out about abbreviated school days except through the complaint process -- which is not strictly true because there are many avenues for folks to reach out, including the RO reaching out to the department, FAP reaching out to people, contacting the county contact.

However, there is one well-known situation where the administrative complaint process did exactly what it is designed to do, which is four complaints in a certain district came in with complaints of abbreviated school days, and the department did appreciate that, made those connections, and

took that and dealt with it as a systemic, if you will, issue at the district level.

It wasn't a systemic claim against the State, which is the disclaimer that the plaintiffs point to. But the important point is that the State found and concluded that this district had -- if not a policy, had a pattern of imposing improper abbreviated school days, and that situation was corrected with targeted technical assistance with an order that required that, and so it's an example of the way the IDEA-mandated administrative function -- functions, and how it has, in fact, been successful in the state.

THE COURT: This case is -- wouldn't you agree it's much more analogous to the foster care reform cases?

The *Wal-Mart,* you know, and the -- the invention that this case concerns many failures of the IEP team is not a State failure but, in the foster care cases, you could say that the injuries were caused by the failures of many different case workers.

How is commonality for those claims against the State met there and you'd argued they weren't met here?

Because I notice on remand in *B.K.* the district court found commonality for the Medicaid Act claim, and I'd like you to tell me how it's distinguishable in this instance.

MS. STALEY: Yeah. In the *B.K.* case, you -- the defendant was the entity that was delivering the services, and

under the IEP -- or, I'm sorry -- under the IDEA the State has that obligation if the district is unwilling or unable to fulfill that role, and it also, I think -- don't quote me on this, Your Honor -- but, in some situations, like incarcerated youth or facilities that are run by state departments, there is that direct provision of services, and that was the situation, and that was the entities that were being sued in *B.K.*

And, in addition, the Medicare Act -- the Medicaid -- Medicaid Act at issue in *B.K.* was specifying, with a much higher level of specificity, that these class of services you had to provide dental services, and that wasn't happening.

Here, the IEP is individually tailored -- the State submits -- in a different way.

THE COURT: So --

MS. STALEY: And *B.K.* did -- in fact, the Ninth Circuit -- sorry. Go ahead.

THE COURT: No, no. I interrupted you. Go ahead.

MS. STALEY: It was the Ninth Circuit in *B.K.* that said that that factual finding has to be that those harms are identical, even the significant-risk harm has to be identical.

So these were children who were being denied dental care; not this child was denied a cavity filling and there's a pattern of not filling cavities as opposed to not delivering the care that they're entitled to.

That would be the analogy that I would offer, Your Honor.

THE COURT: So in looking at what the intent of Senate Bill 236 and what its intent was that initiated the legislation, and then looking at the commission that was established to help with the implementation, why isn't the best practices and the goal of the department of education to gather the data as opposed to waiting for someone to file a claim when there may be a misuse of those noneducational days inappropriately done, and you're counting on it -- as I was listening, you're counting on a random check on various school districts to sort of spot-check if they are getting it right?

It seems to me, in this -- what the intent of the legislation is, you're either asking for somebody to come back the next session and be more specific, or you're missing the point of what it appears 236 was trying to get at, and that is what is happening with the use of those days that people can get ahead of by being proactive?

And it seems to me that the information is at the district level, and that, as an education system, you would benefit from and be proactive in implementing the intent of that law by being able to survey that data -- have it input and surveyed, and see where you have a hot spot or you have a place that is -- there's an overrepresentation of the use of those days that may or may not be appropriate, and you don't have to go down to the IEP level to figure that out.

Why isn't that -- why isn't that something you -- in this

instance, why isn't it that you would welcome that information to better target your statewide resources?

MS. STALEY: Thank you, Your Honor.

I can't address, on behalf of the State, much of the policy concern that I hear within that question, because my focus is primarily --

THE COURT: It's the legislation. I mean, if the intent of the legislation was to accomplish tracking those days, and if data analytics in this 21st century is because it's a widespread use of data, now why is it that you would be fighting with the plaintiffs, in this instance, to pull that data together, to centralize it, and to work collaboratively with the various interest groups to get the best and earliest resolution of problems in particular districts or particular regions that are misunderstanding the implementation of the law?

It's not just in an IEP, it's not just in -- it's how it's implemented. I would think the State, under what they're attempting to do, would be welcoming the attempt and frankly saying "We don't have the resources; let's go get the list such that it will give us what we need to be able to track that data efficiently with some software or uploading of the information that's clearly being contained in the district -- in each district."

Why -- I mean, that's not a policy; that's what the

legislation was geared to do, it seems to me.

MS. STALEY: Yes and no. I'm afraid, Your Honor, that I do still -- don't -- do still perceive, you know, a policy component to that, starting with -- you know, the statute went as far as it did, and Your Honor is correct that maybe another legislative piece would drive this toward an analytic resolution.

But it's -- perhaps starting with -- I think Your Honor may have misunderstood my comments with respect to the monitoring piece that goes out.

The monitoring that's going out to data-check certain districts on a regular, although not annual, basis to make sure their reporting is happening in -- correctly, and that there's -- I don't think it rises to the level of an audit, but that there's a data-check or reality check is what is being provided to the State, is not for the purpose of determining whether each student's IEP is appropriate for that student but to look at the trends and the student outcomes.

And the monitoring -- as Candace Pelt's declaration indicates, the State's monitoring is absolutely moving in the direction of analyzing, through data, overarching data at the district level that is compiled by the State looking for outcomes, moving away -- as OSEP is moving away, from strictly looking at procedural compliance and instead focusing on improving outcomes, and each of the eight elements of that

monitoring provision in the IDEA that is laid out in Dr. Musgrove's declaration is in place in Oregon, and Dr. Pelt's declaration explains exactly how those are being met, and Dr. Musgrove does not opine that that system is not legally compliant with the IDEA.

So it comes back to, again, where -- where is that causation piece.

One -- you know, one example that I've -- that tends to come to my mind, when the plaintiffs are pointing out simply one element, and I believe there was a case that was cited in the motion to dismiss papers that I can't retrieve from random access memory, but it talked about the fact that one element of the system does not a systemic claims make.

So, for example, if the State were required to monitor -- this may be a significantly -- it may be; we don't know -- it may be a more significantly problematic issue. We don't know because we don't have the facts. But there are other elements of IEP plans, and if the State has to monitor for abbreviated school days legally, if that's a legal mandate, where does that stop? Would the State have to review every IEP to make sure FAPE is being delivered to every student in order to comply with the legal mandate which is to ensure the opportunity for FAPE?

And so it's that legal question that is of most concern to the State in defending this litigation.

THE COURT: I want to ask -- I'm going to interrupt and ask the plaintiffs' counsel.

You just heard that statement. Could you respond to that question? Because I think that -- would you respond, if you have something to answer to that?

MS. ABROKWA: I'm sorry. I had a slight audio issue, and so I don't know that I heard all of counsel's comments.

THE COURT: So I hate to do this.

Kelly, can you stop and read that back, that last paragraph back?

THE REPORTER: Yes. Hold on a second.

THE COURT: Thanks.

(Record read.)

THE COURT: Go ahead.

MS. ABROKWA: Thank you. Thank you for repeating that language.

So, you know, this isn't about one component of Oregon's special education system; this is about the entire way that ODE enforces special education.

What's more systemic than whether the state department of education has an effective means of overseeing the school districts under its supervision?

If you look at what Dr. Musgrove says in her report, the way she describes integrated monitoring activities is you identify your priorities, you monitor those, you take proactive

action to resolve those, and, when you have resolved them, you move onto a new issue.

And so if the state department of education makes shortened school days a monitoring priority and focuses its attention on that and the other key priorities, once those issues are resolved it moves on to the new priorities in its system.

That's the intention for a system of monitoring that focuses on key issues that are really denying children FAPE, resolves them, and then figures out what are our new priorities.

And so I don't think that there needs to be any worry about kind of a slippery slope here that, if they have to monitor shortened school days, what's next? They have to monitor everything that's denying students FAPE or places them at risk of that, and when they resolve shortened school days as a systemic issue that's impacting students, they can consider other issues that are also impacting students in their ability to access FAPE.

This isn't some sort of random element that we've asked them to do that's supplemental to their duties; it is a core part of their duties to ensure that all students receive FAPE no matter what the reasons are that are denying them FAPE in a particular context.

And so that iterative process, working with experts to do

this work, can help guide the State in how to develop its system to accomplish that goal and then to move on to new goals.

THE COURT: Thank you.

Go ahead. I interrupted your argument because I wanted to get a response. I sensed that slippery-slope argument sliding in, and I knew that that's not what -- my reading of everything that the plaintiff has submitted, I didn't see where that fit in, and I wanted them to have a chance to respond while it was on my mind.

So I guess I -- I guess I understand your argument.

Go ahead. I'm sorry.

MS. STALEY: Thank you, Your Honor.

Just in brief response to Ms. Abrokwa's response, in this case they're not alleging that the State's performance plan is inadequate or that the fulfillment of those obligations are -- that's not what this case is about. The plaintiffs are arguing that this case is about abbreviated school days, and I guess Your Honor -- Your Honor has the papers in front of you. You have what Dr. Musgrove says about the progressive monitoring and what Dr. Pelt has explained is the way that the State of Oregon is complying with that, and that's a different question than saying "You should be collecting data about one element that only appears within certain IEPs."

And looking at the Exhibit 2 to Ms. Bateman's

declaration, you know, absolutely an aspiration would be a statewide IEP system.

And that would require legislation, it would require money, but it is definitely an aspiration.

Does -- the question legally, though, is does the IDEA require that and would it -- is the lack of that a legal cause of a student being denied FAPE because their IEP team improperly imposed an abbreviated school day?

That's where defendants see a disconnect with the commonality.

Because under *Wal-Mart* and even the cases that the plaintiffs rely on, the common question has to go to a common claim, and the fact that all of those chil- -- it's not only common to students who have been subjected to abbreviated school days or are at risk of that because of behaviors who are, quote, subjected to the lack of data collection. I mean, even students who aren't receiving special education are subject to the lack of data collection.

Defendants just submit that that's -- that's not a legal policy within the meaning of the cases that have interpreted the IDEA to authorize a claim against a state agency at a systemic level. Those cases have been cases where there is either a lack of implementation -- like the Chicago cases, where the administrative complaint process was fundamentally deficient -- or there was no system at all. Cases like the

child-find cases, where children were not being found, the child-find policy and practice that was put into place at the state level was not adequate because children were not being identified as needing special education services.

THE COURT: Will you explain your exhaustion argument and why this -- what it has to do with the commonality and Rule 23(b)(2) inquiries? I'm not clear about that.

MS. STALEY: The exhaustion argument is a function of the nature of the claim being individualized. So if a class were certified for denial of FAPE, each of the class members would be subject to that same exhaustion requirement.

So going a little bit back into -- behind -- just the allegations of the complaint and looking at the nature of the claim, it's just an outgrowth of defendants' view that, because the injury is an individualized injury, that makes it an individualized claim, which requires -- which both the IDEA and section 504 require, before going to the federal court, that the claim be taken through the administrative process so that the expertise and personalized knowledge that's available at the local level could be brought to bear and a record made for the federal court to look at rather than the federal court, in the first instance, being sort of a fact finder on what is the appropriate supports or IEP elements for any particular child.

THE COURT: Anything else that you want me to -- or think I don't understand based on the argument that we've had this

afternoon?

Let me ask one more thing. You've sort of, in passing, mentioned standing, in your commonality argument. Are you challenging standing again at this stage?

I'm just asking about -- because it seems it's cropped into the argument, and I just wanted to ask that directly.

MS. STALEY: No, Your Honor. I'm not sure which arguments I made that sounded like were -- echoed the standing argument. But no, that is not an issue at this stage.

THE COURT: Okay.

MS. STALEY: And if Your Honor were willing to take a short break, I would be grateful of an opportunity to take a quick look through my notes and just see if there were other things that I wanted to rebut.

THE COURT: That's fine. Can everybody just go on a hold for a moment, and we'll take a five-minute break?

MS. STALEY: Thank you, Your Honor.

THE COURT: Mm-hm.

(Recess taken.)

MS. ABROKWA: This is Alice Abrokwa. Plaintiffs are fine with proceeding.

THE COURT: Okay. So I guess I have a question that sort of nags at me I need to ask.

So, Ms. Staley, if the department of education does not track the students on a shortened day program or abbreviated

school program statewide, then how do you know whether or not there's a widespread practice or whether they're being used at rates too high or to suggest they're being overused generally across the state or in a given district? How do you know?

MS. STALEY: Because -- this is Darsee Staley, for the record.

Because the use of abbreviated school days is a component of the IEP, that is not directly tracked.

Similarly, the State doesn't know whether every student who would be better served by using Braille books rather than audio books is actually getting Braille books or whether that could come to be so ill-suited to that child that it amounts to a denial of FAPE.

And that's sort of -- the idea of drilling down to a particular component of an IEP, the State believes, is not required by the monitoring; and we don't believe that Dr. Musgrove had said that it is.

THE COURT: I need to interrupt. I haven't even suggested that. I'm looking at just simply keeping the data as requested in -- I think in the legislation, as well as what plaintiffs are about, is to figure out the use of the extraordinary remedy, about making a -- days out of class. And that does not seem to me to be needing to delve into the individual IEP; it's just a district keeps a notation on when that extraordinary remedy is used.

And I guess I want to -- I'm going to say this. I've kind of thought back to say this.

On my other hat that I wear in the court I do criminal work. I've been doing that for 40 years. Do you want to know how many kids who are in juvenile and in the -- adults who are in the prison were on IEPs or missed school or were kicked out of school and never went back? And wouldn't it be the goal of the department of education as well as this litigation that we -- in the Musgrove filing, he identifies the track of what -- this is a start of a pattern if kids are -- have disability issues that cause them or are a part of behavioral acting out, and then they're treated in a way that takes them out of an educational setting or in some ways can start having an emotional impact on kids, and it can be cumulative when it's overused, and it gets to the point where it diminishes a child's ability to move up in an educational setting, and, ultimately -- and I'm just speaking from my experience -- kids are out of school and gone by maybe the 8th grade or the 11th grade or somewhere in between because they have missed pieces of it and they've been on IEP?

I'm going to tell you, just in an anecdotal amount, I run a reentry court, people coming out of prison, coming back in. I've done it for 16 years. We've had over close to 200 people in that program. I think I've had 10 who have a high school diploma. The others didn't make it.

So isn't -- shouldn't the goal be, in this instance, to make sure that we are, early on, as you read in all the submissions, that we address this at a base -- you know, as early as possible, you know, when -- preschool, that we identify educational issues or learning disabilities, and then we work at a level of attempting to provide quality intervention and an IEP that the last resort is to have those days out of class?

So wouldn't it be to build a system that we would like to see happen in the state of Oregon to stop the education-to-prison pipeline? Wouldn't it be to start collecting the data of whether that is used -- those days out -- the extraordinary remedy is an aberration in a part of the district or part of the State or in a community to help guide better decision-making to deploy resources for the department of education?

And I say that because if you look across the information provided by the plaintiffs, the issues are in the smaller communities, often, where the resources are limited and the parents don't have any access to counsel and don't know that they need to make a complaint.

And so proactively having the data that's already being collected and looked at from the experts at the department of education, wouldn't that get everyone ahead and just eliminate the possibility or even the probability that students are being

deprived of an appropriate education pursuant to the goals of the IDEA?

MS. STALEY: I think that I can't -- I can't really speak for the department on whether that would be the best policy and the best way to eliminate those concerns that Your Honor has identified. There are many ways and many factors that are part of the differentiated monitoring system. Expulsion is dealt with. Dropout is dealt with. Improving outcomes for students with special education IEPs is the goal.

Legally does the IDEA say that the abbreviated school day is such a trigger that it ought to be prioritized over restraint, seclusion, or inclusiveness or any of these other more generalized categories?

I don't know. The State doesn't think so. I think that the -- both what Dr. Musgrove said and what Dr. Pelt said are consistent with what the law requires, and I guess if I had one -- one final thought to share it would be if this case is about the way in which differentiated monitoring is occurring, the State doesn't really feel like it's got notice of that. This is, as Your Honor says, about abbreviated school days. Is the abbreviated school days such a linchpin that it will solve all these problems? I don't know, and I don't know that the State, as a policy matter, has concluded that it would, and it seems that the IDEA doesn't -- doesn't say that either.

And, again, going back to the statute itself doesn't

require the state agency to ensure that each student has FAPE in real time; it requires the secretary to ensure that the State has a performance plan that is reasonably calculated to ensure that all children with disabilities have available to them a free, appropriate education, and if the challenge here is to that entire framework, then it seems like abbreviated school days might be irrelevant to what the plaintiffs are really after and the State would be entitled to notice that that is, in fact, what we are going to be litigating.

And the State disagrees that we're --

THE COURT: I think you're going far afield about what my question was about, but -- because I understand what the plaintiffs are asking for.

And for the plaintiffs, can I hear your response to sort of that last exchange?

MS. ABROKWA: Sure. This is Alice Abrokwa again.

So, you know, I think I'm struck by hearing counsel's response to an earlier question that you had calling having a statewide data system "aspirational." We don't think that it's aspirational. We think that it's essential because students are continuing to be harmed and having their rights violated and the State does not have an effective way of finding out about that until someone comes to them with a complaint.

That approach to monitoring, you know, we argue is a violation of the students to ensure FAPE consistent with

Cordero says.

But even in that exchange, defense counsel was really acknowledging that there is a common question, you know. That question of whether it's legally necessary for them to collect this data is, itself, a common question that unites the class.

Shortened school days are just one example of an approach to -- of the consequences of Oregon's approach to monitoring.

And so the deficiencies that we've pointed in its system for monitoring, they're going to see the manifestations of that for children in this class. But the remedies here are to fix the ways that it goes about overseeing school districts, too, and the illustration of the problems with this approach are clear in the harms that the class members have experienced.

THE COURT: Anything further, Ms. Staley?

MS. STALEY: Yes. Just one thing, Your Honor. Well, two things, actually.

First, defendants don't want to leave anybody with the impression that we -- that the defendant of education is doing what *Cordero*, in 1992, said was not appropriate, which was waiting for the phone to ring. That is simply not a fair or accurate representation of the monitoring system that the State has in place on any of these issues.

Secondly, Your Honor says that you're quite sure you know what the claim here is, and if either now or in your ruling, Your Honor, the State would certainly be helped in preparing

for its defense if that clarity could be brought out.

Thank you.

THE COURT: Anything -- rebuttal for the plaintiff?

MS. ABROKWA: I don't think so. I think you've kind of laid out our responses to some of the defendants' arguments -- for example, about exhaustion -- in our briefs, and so if the Court doesn't have further questions for us, I think we are happy to leave it there with our argument and with our pleadings.

THE COURT: Now, I think I've asked, you know, the questions, as artfully as I could, to try to understand both sides' positions and take a look at what the Court needs to do at this stage in the case.

I thank you very much for everyone taking the time and listening carefully and the preparation, both in the paperwork and the argument today, and we'll take this under advisement.

Is there anything else I can do to be helpful in this case, or you'll just -- we'll move to the next phase when I get the decision out?

And I'm not sure it will come out right away, just to know. You know, these cases take time and are -- you've done a lot of work, and we're thoughtful about it; so I'm not going to promise it immediately. Okay?

Again, thank you very much. We know, and we know that it's important to people to get -- move this case along; so

that's why I'm bearing that in mind as well.

Thank you very much for your time.

Kelly Polvi -- thank you -- is our court reporter. This was a difficult and long argument, and I thank you very much for your great professional courtesy and work ethic.

Thank you. We're in recess.

(Proceedings adjourned at 4:04 P.M.)

CERTIFICATION

I, Kelly Lee Polvi, certify that, pursuant to Section 753, Title 28, United States Code, the foregoing is a true and correct transcript of the stenographically-reported remote proceedings held in the above-entitled matter to the best of my ability, and I further certify that the transcript format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 27th day of November, 2020.

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