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Attorneys for Defendants Oregon Department of Education, Colt Gill and Katherine Brown

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

J.N., by and through his next friend, T.S.; E.O., by and through his next friend, Alisha Overstreet; J.V., by and through his next friend, Sarah Kaplansky; B.M. 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.,

Plaintiffs,

v.

OREGON DEPARTMENT OF EDUCATION,

COLT GILL, in his official capacities as Director of Oregon Department of Education and Deputy Superintendent of Public Instructions for the State of Oregon, and

KATHERINE BROWN, in her official capacities as Governor and Superintendent of Public Instruction for the State of Oregon,

Defendants.

Case No. 6:19-cv-00096-AA

MOTION TO DISMISS AND MEMORANDUM IN SUPPORT

(ORAL ARGUMENT REQUESTED)

Certificate of Compliance with Local Rule 7-1

The parties have made a good faith effort to resolve this dispute through email and telephonic conferral and have been unable to do so.

Motion to Dismiss

Defendants Oregon Department of Education (ODE), Colt Gill, and Katherine Brown (collectively "the State") respectfully move to dismiss the complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) on the grounds that plaintiffs lack standing. In support of this Motion, the State relies upon the Federal Rules of Civil Procedure, the Individuals with Disabilities Education Act (IDEA), the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973 (collectively "the ADA"),[1] the files and record of this case, and the following Memorandum in Support.

Memorandum in Support

I. INTRODUCTION

The complaint asserts that Oregon public schools—which are not named as defendants in this case—have inappropriately used "shortened" or "abbreviated" school day programs for students with disabilities, and thereby denied those students a free appropriate public education (FAPE) as required under the IDEA. The complaint also claims that the schools' conduct is discriminatory in violation of the ADA. The complaint attributes the schools' alleged conduct to the absence of adequate statewide policies that would prevent unlawful use of abbreviated school day programs or, alternatively, to the State's failure to supervise and coordinate or to monitor and enforce the requirements of federal law to the same end.

Plaintiffs' legal theory, that the State is required to prevent schools from violating these federal statutes, is not supported by existing precedent. Even if this novel interpretation were plausible, plaintiffs lack standing to ask the Court to mandate additional prophylactic regulations

[1] These two federal discrimination statutes are generally analyzed together because "there is no significant difference in the analysis of rights and obligations created by the two Acts." *K.M. ex rel. Bright v. Tustin Unified School Dist.*, 725 F.3d 1088, 1098 (9th Cir. 2013) (quoting *Vinson v. Thomas*, 288 F.3d 1145, 1152 n.7 (9th Cir. 2002)).

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directed at abbreviated school day programs in the absence of factual allegations showing that plaintiffs are presently and actually injured by the existing state-wide policies. Plaintiffs do not allege that they are currently receiving an unlawful abbreviated school day program and their assertion that they are at imminent risk of being placed on an inappropriate abbreviated school day program in the future is not plausible. Nor does the complaint assert a cognizable theory of causation or redressability. Therefore, plaintiffs lack standing.

II. LEGAL FRAMEWORK

Oregon accepts federal funding for special education under the IDEA. In exchange, federal law requires the state education agency (SEA), here ODE, to ensure that eligible students receive a FAPE from their local education agency (LEA). Individualized assessment of the appropriate FAPE for each eligible student is the foundation of the IDEA.

Oregon complies with the IDEA through an extensive framework of substantive and procedural provisions designed to ensure delivery of a FAPE. The LEAs deliver the services and are required to tailor an individualized education program (IEP) to meet the specific needs of each student. Dual administrative review processes required by the IDEA and its implementing regulations ensure that a student's IEP is appropriate and appropriately implemented.

The ADA prohibits a public entity from discriminating on the basis of disability and requires reasonable modifications to policies, practices or procedures when necessary. The ADA claims here are based on the same allegations as the IDEA claim and seek the same relief.

A. The IDEA requires states to offer a FAPE and procedural safeguards.

Under the IDEA framework, the SEA is responsible for "general supervision" of education programs throughout the state and is "responsible for ensuring that" the IDEA requirements are met. 20 U.S.C. § 1412 (a) (11); *see also* 20 U.S.C. § 1416 (a) (1) and 34 C.F.R. 300.149. The SEA fulfills this responsibility by, among other things, engaging in rulemaking to ensure that state rules, regulations, and policies for special education conform to the requirements of the IDEA. 20 U.S.C. § 1407. The IDEA framework requires the states to provide "assurances to the Secretary [of Education] that the State has in effect policies and

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procedures to ensure that the State meets" specific conditions. 20 U.S.C. § 1412 (a). One such condition is that "[a] free appropriate public education is available to all children with disabilities residing in the State between ages 3 and 21." 20 U.S.C. § 1412 (a) (1).

Providing a FAPE is necessarily carried out directly by LEAs, typically schools or school districts. The specifics of a FAPE are set out in the IEP. 20 U.S.C. §§ 1401(9)(D). The creation of an IEP, as well as its substantive content, is unique to a specific student and must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. v. Douglas Co. School Dist. RE-1*, 137 S. Ct. 988, 1001 (2017). The process is inherently individualized – "[a] focus on the particular child is at the core of the IDEA," and "[t]he adequacy of a given IEP turns on the unique circumstances of the child for whom it was created." *Id.* at 999, 1001. As the Ninth Circuit has explained, the "IEP is a written program of educational goals and services, tailored to meet the child's unique needs, that is developed at an IEP meeting according to the proper procedures." *Doe by Gonzales v. Maher*, 793 F.2d 1470, 1479-1480 (9th Cir. 1986), *affirmed as modified sub nom Honig v. Doe*, 484 U.S. 305 (1988).

A FAPE includes both "special education" and "related services." 20 U.S.C. § 1401 (9). Special education is "specially designed instruction * * * to meet the unique needs of a child with a disability." 20 U.S.C. § 1401 (29). Related services are "supportive services * * * as may be required to assist a child with a disability to benefit from special education." 20 U.S.C. § 1401 (26). Each student's IEP must describe the student's current educational status and annual goals, specifically identify special educational services or other aids that are needed, and address placement in the least restrictive appropriate setting for receiving instruction. 20 U.S.C. § 1414 (d) (1) (A).

The IEP team includes teachers, school officials, and the student's parents or guardians. 20 U.S.C. § 1414 (d) (1) (B). Parents play a critical role in the IEP process. Indeed, a key motivation for the original enactment of the IDEA was to prevent unilateral action by schools without notice to parents. *Honig*, 484 U.S. at 311 (noting that "Congress repeatedly emphasized

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throughout the Act the importance and indeed the necessity of parental participation"). Parents must be afforded an opportunity to participate in the creation of the IEP, annual reviews, and any meetings involving potential modifications. 20 U.S.C. §§ 1414 (a) – (d). LEAs must give parents notice if a change in services occurs amounting to a change in "placement"—which may include placing the student on an abbreviated school day program. 20 U.S.C. §§ 1414 (d) (1) (B) – 1415(f).

A parent may challenge a substantive or procedural violation of the IEP process, such as use of an inappropriate abbreviated school day program or lack of notice. 20 U.S.C. § 1415 (b) (6) (parent may dispute "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child"); *see also Christopher S. v. Stanislau County Office/Educ.*, 384 F.3d 1205, 1210 (9th Cir. 2004) (describing procedural safeguards). The IDEA requires the states to establish two distinct mechanisms for administrative review of IEP decisions, whether substantive or procedural, and other grievances related to special education. The IDEA mandates a hearing procedure to be conducted by an independent hearings officer. 20 U.S.C. § 1415 (f). This process is commonly referred to as the "due process hearing" procedure. *See Hoeft v. Tucson Unified School Dist.*, 967 F.2d 1298, 1300 (9th Cir. 1992). The Secretary's rules also require the SEA to conduct its own administrative review of grievances by investigating allegations and promptly reporting the results. 34 C.F.R. §§ 300.151 – 300.153. To differentiate between the two processes, many cases use the acronym CRP (Complaint Resolution Procedure) for the latter complaint system. The CRP process is available for systemic complaints and is not necessarily adversarial. *See Christopher S,* 384 F.3d at 1210-11 (discussing exhaustion of systemic claims); *Everett H. ex rel. Havey v. Dry Creek Joint Elem.*, 5 F. Supp. 3d 1184, 1188 (E.D. Cal. 2014) (describing the CRP as "more informal, and less adversarial" than a due process proceeding).

A change in a student's IEP "placement" triggers available options for review and remedy and the placement cannot be changed while review is pending. 20 U.S.C. § 1415 (j) (commonly referred to as the "stay put" provision); *Burlington School Comm. v. Mass. Dept. of*

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Ed., 471 U.S. 359, 373 (1985) ("We think at least one purpose of [the stay put provision] was to prevent school officials from removing a child from the regular public school classroom over the parents' objection pending completion of the review proceedings."). The stay put provision protects the student's right to continuation of the current IEP placement during administrative review, appeal to a trial court, and further appellate review in the judicial system. *See Honig*, 484 U.S. at 323 (concluding that IDEA stay put provision "is unequivocal" and "states plainly that during the pendency of any proceedings initiated under the Act [absent agreement of all parties] 'the child *shall* remain in the then current educational placement'" (emphasis in original)).

B. Oregon law conforms to the IDEA and specifically addresses abbreviated school day programs.

Oregon's IDEA framework is primarily set forth in Oregon Revised Statutes Chapter 343 and Oregon Administrative Rules Chapter 581, Division 15. Oregon LEAs must comply with a detailed process for developing an IEP, including parent participation, team considerations and special factors, review and revision, and much more. *See* OR. ADMIN. R. §§ 581-015-2190 through 581-015-2225. As required by the IDEA, Oregon LEAs must provide parents with an opportunity to participate in the creation of the IEP, the annual IEP review, and any subsequent meetings to modify the IEP. OR. ADMIN. R. §§ 581-015-2190 through 581-015-2195. Each student's IEP must describe the student's current educational status and annual goals, specifically identify special educational services or other aids that are needed, and address placement in the least restrictive appropriate setting for receiving instruction. OR. ADMIN. R. § 581-015-2200. State rules also implement the notice requirement for a change in services amounting to a change in placement. OR. ADMIN. R. § 581-015-2310.

Parents who believe their child's IEP is substantively or procedurally defective may use the review processes described above. The formal "due process" hearing includes the right to counsel and the right to "present evidence and confront, cross-exam, and compel attendance of witnesses." OR. ADMIN. R. §§ 581-015-2360. The Oregon Office of Administration Hearings

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(OAH) is an independent agency that conducts due process hearings through an impartial Administrative Law Judge (ALJ). OR. ADMIN. R. §§ 581-015-2340 and 137-003-0501; *see also* OR. REV. STAT. § 183.605 (establishing OAH); and OR. ADMIN. R. § 581-015-2365 (criteria for ALJ).

The CRP is known in Oregon as the "state complaint process." OR. ADMIN. R. § 581-015-2030. The state complaint process, conducted by ODE, is available for any type of complaint. ODE uses a contract investigator to review the complaint, collect evidence and issue a proposed determination. The Assistant Superintendent in the Office of Learning—Student Services issues the final order on behalf of ODE. This procedure is not an adversarial proceeding and is not a substitute for a due process hearing. *See Hoeft*, 967 F.2d at 1308 ("complementary"); *Lucht v. Molalla River School Dist.*, 225 F.3d 1023, 1028 (9th Cir. 2000) ("alternative" method to address an IDEA complaint).

Among the policies and procedures enforced by the State is the abbreviated school day statute passed by the Oregon Legislative Assembly in 2017. That statute unambiguously prohibits LEAs from using abbreviated school days unilaterally. OR. REV. STAT. § 343.161 (2) ("A school district may not unilaterally place a student on an abbreviated school day program, regardless of the age of the student."). It otherwise permits use of abbreviated school days, but "only if the student's individualized education program team:

> (a) Determines that the student should be placed on an abbreviated school day program:
>
> (A) Based on the student's needs; and
>
> (B) After the opportunity for the student's parents to meaningfully participate in a meeting to discuss the placement; and
>
> (b) Documents that the team considered at least one option that included appropriate supports for the student and that could enable the student to access the same number of hours of instruction or educational services that are provided to students who are in the same grade within the same school."

OR. REV. STAT. § 343.161 (3).

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C. The ADA prohibits discrimination on the basis of disability in public facilities and federally funded programs.

The ADA applies more broadly than the IDEA and prohibits discrimination in public programs and places of public accommodation. *See* 29 U.S.C. § 794 (a) ("[n]o otherwise qualified individual with a disability * * * shall, solely by reason of her or his disability, * * * be subjected to discrimination under any program or activity receiving Federal financial assistance"); 42 U.S.C. § 12132 ("no qualified individual with a disability shall, by reason of such disability, be excluded from * * *services, programs, or activities of a public entity"); *Gabel ex rel. L.G. v. Bd. of Educ. of Hyde Park*, 368 F. Supp. 2d 313, 333-334 (S.D. N.Y. 2005) (explaining that "denial of *access* to an appropriate educational program on the basis of a disability is a Section 504 issue, whereas dissatisfaction with the *content* of an IEP would fall within the purview of the IDEA" (emphasis in original)). The ADA requires public entities to make certain "reasonable" modifications to existing policies, practices, and procedures when necessary to avoid discrimination on the basis of disability. *See* 28 C.F.R. § 35.130 (b) (7); *Fry v. Napoleon Community Schools*, 137 S. Ct. 743, 749 (2017) (quoting *Alexander v. Choate*, 469 U.S. 287, 299-300 (1985)).

III. SUMMARY OF CLAIMS AND ARGUMENT

The complaint is brought by four named student-plaintiffs and the Council of Parent Attorneys and Advocates, Inc. (COPAA). The complaint alleges that the student-plaintiffs qualify for special education (ECF #1 ¶¶ 17-20) and that COPAA's members represent eligible students (ECF #1 ¶ 23). The gravamen of the complaint is that Oregon LEAs allegedly are inappropriately placing eligible students on "shortened" or "abbreviated" school day programs "without first adequately considering and developing services and supports that would allow the students to successfully attend school for the full day, as required by law." ECF #1 ¶¶ 1, 108.

Plaintiffs' claims appear to depend on the assertion that Oregon lacks state-level policies sufficient to eliminate all risk that LEAs will inappropriately place a student on an abbreviated school day program. According to the complaint, plaintiffs J.N. and J.V. are receiving a full

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school day but are "at significant risk" of being placed on an inappropriate abbreviated school day program (ECF #1 ¶¶ 65, 90); plaintiff B.M. has been placed in a facility for residential treatment and so is not currently accessing any educational services (ECF #1 ¶ 104); and plaintiff E.O. is receiving a lawful abbreviated school day, but is at risk of receiving a further shortened day that would be inappropriate (ECF #1 ¶ 78). Plaintiff COPAA has unnamed members in Oregon whose children are either on shortened school days or at "substantial risk" thereof (ECF #1 ¶ 23).

The complaint alleges that the State has been aware of the inappropriate use of abbreviated school day programs in the past, while acknowledging that the State has taken steps to address the issue, including implementing monitoring procedures and enacting the abbreviated school day program statute (*see e.g.*, ECF #1 ¶¶ 105-113). However, the complaint asserts that the steps taken thus far are "inadequate" because ODE has failed to completely prevent inappropriate use of abbreviated school day programs (ECF #1 ¶¶ 114-115).

The complaint lacks factual allegations showing how plaintiffs are at imminent risk of actual injury from an unlawful abbreviated school day program caused by a lack of a statewide policy. Both the State's abbreviated school day statute and the IDEA's procedural safeguards protect plaintiffs from a change in placement amounting to an unlawful abbreviated school day program. Although the complaint alleges that Oregon's existing policies are "inadequate," the complaint does not demonstrate how the State's existing policies are a cause-in-fact of a significant risk of injury to plaintiffs. Nor does the complaint make it plain how a declaration or injunction to develop another policy is likely to provide redress to these plaintiffs who are not experiencing an unlawful abbreviated school day program.

IV. LEGAL STANDARDS

To establish Article III standing, the plaintiff bears the burden of establishing: (1) an injury in fact; (2) causation; and (3) redressability. *Sprint Communications Co. v. APCC*, 554 U.S. 269, 273-74 (2008). Where, as here, the complaint seeks solely declaratory and injunctive relief, plaintiffs must additionally show a very significant possibility of future harm

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and demonstrate that they personally are realistically threatened by a repetition of the injury. *Montana Shooting Sports Ass'n v. Holder*, 727 F.3d 975, 979 (9th Cir. 2013); *Melendres v. Arpaio*, 695 F.3d 990, 997 (9th Cir. 2012). The existence of standing is a threshold issue, and "[t]he jurisdictional question of standing precedes, and does not require, analysis of the merits." *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 1997).

An organization may seek to establish standing under a theory of "representational standing," as a representative of its members, or a theory of "organizational standing," as an organization in its own right. *See Smith v. Pacific Properties and Development Corp.*, 358 F.3d 1097, 1101 (9th Cir. 2004). Here, COPAA seeks representational standing, sometimes also referred to as "associational standing." *See, e.g.*, *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).[2] To establish representational standing, an organization must demonstrate that "its members would otherwise have standing to sue in their own right." *Smith*, 358 F.3d at 1101-1102.

V. ARGUMENT

The complaint should be dismissed for lack of subject matter jurisdiction because plaintiffs lack standing for the relief they seek. *See, e.g. Fleck and Associates v. Phoenix, City*, 471 F.3d 1100, 1102 (9th Cir. 2006). Standing must be established "separately for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv.*, Inc., 528 U.S. 167, 185 (2000).

A. The complaint does not allege sufficient facts to establish injury in fact.

The first element of standing is "injury in fact." The Supreme Court has defined injury in fact as "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504

[2] An organization may assert "organizational standing" to protect against injury to its own interests. *See Smith*, 358 F.3d at 1101; *see also e.g.*, *American Federation of Government v. Stone*, 502 F.3d 1027, 1032 (9th Cir. 2007) (union had organizational standing where defendant's actions interfered with union's ability to solicit members and communicate its message). Here, COPAA bases its standing allegations exclusively on alleged harm to its members. *See* ECF #1 ¶ 24 (alleging that COPAA's *members* "have expended time and resources" responding to requests for assistance relating to inappropriate use of shortened school days). Therefore, the complaint does not allege organizational standing for COPAA.

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U.S. 555, 560–561 (1992) (citations omitted). The complaint alleges that the student-plaintiffs qualify for special education (ECF #1 ¶¶ 17-20). The complaint also alleges that COPAA's members represent eligible students (ECF #1 ¶ 23). The State acknowledges that plaintiffs allege an interest protected by the IDEA and the ADA, but the complaint lacks facts to show actual or imminent injury to that interest (ECF #1 ¶¶ 15, 31, 34, 36, 53, 54, 66, 78, 90). Additionally, in cases where the alleged injury "arises from the government's allegedly unlawful regulation (or lack of regulation)" of a third party, "much more is needed." *Lujan*, 504 U.S. at 562; *see also Bitsilly v. Bureau of Indian Affairs*, 253 F. Supp. 2d 1257, 1269 (D. N.M. 2003) (plaintiffs failed to establish likelihood of future injury because "despite [the SEA's] failure to monitor and assure compliance with the IDEA, it is not a foregone conclusion that the *schools* will not comply with the IDEA if Plaintiffs were to return to them" (emphasis in original)).

1. The complaint does not demonstrate injury to any student-plaintiff.

Plaintiffs do not assert definitely that any and all use of abbreviated school day programs constitutes a per se violation of the IDEA or the ADA.[3] That is, an LEA does not deny a FAPE to a student in every instance where a properly developed and implemented IEP calls for an abbreviated school day program. Moreover, the case law does not support a theory that a shortened school day due to disability—in and of itself—is a legally cognizable injury under the IDEA. *See, e.g.*, *Adams v. State of Oregon*, 195 F.3d 1141, 1150 (9th Cir. 1999) (determining that a reduction in educational service hours, "even when based upon misconduct arising from a child's disability, does not necessarily violate the IDEA"); *Christopher M. v. Corpus Christi Ind. School Dist.*, 933 F.2d 1285, 1291 (5th Cir. 1991) ("[T]o presume that every child's school day should be of uniform length is at odds with the conception of individually tailored education," and the IDEA's preference for mainstreaming "does not imply any presumption in favor of the generally-administered length of programming."). Thus, plaintiffs' alleged harm is some risk that they will be placed on an inappropriate abbreviated school day program.

[3] Sometimes, for example in paragraph 114, the complaint alleges that "to *ensure*" FAPE, a student must receive a "full school day." However, the complaint also concedes that an abbreviated school day program is appropriate for some students. *See* ECF #1 ¶ 2.

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The allegations in the complaint, however, are insufficient to establish an imminent and non-conjectural risk of the alleged harm. Both state law and the IDEA protect plaintiffs from a change in placement amounting to an unlawful abbreviated school day program. First, the abbreviated school day program statute prohibits unilateral use of an abbreviated school day program. OR. REV. STAT. § 343.161 (2). Second, plaintiffs are protected from imminent harm by the IDEA's "stay put" provision, which mandates continuation of the placement established by the student's IEP pending review—both administrative and judicial—of an allegation of unlawful change in placement. *See Maher*, 793 F.2d at 1491 ("Before the school may effect a reduction in schedule or any other change in placement contemplated by the IEP, it must notify the child's parents of their right to review, and otherwise afford them the safeguards to which they are entitled."). Therefore, the complaint does not plausibly allege an imminent risk of actual harm to any plaintiff.

At most, the complaint alleges that plaintiffs' attorneys have heard of LEAs shortening school days for some students (ECF #1 ¶¶ 32, 48, 106). Oregon's abbreviated school day statute requires LEAs to satisfy significant substantive and procedural requirements before placing a student on an abbreviated school day program. *See* OR. REV. STAT. § 343.161. Because realization of the alleged risk would require third parties—the LEAs—to violate state law, the alleged risk is diminished. *Cf. Honig*, 484 U.S. at 322 (discussing mootness and determining that unilateral exclusion of a student for misconduct when exclusion was *not* "at odds with state policy" was alleged misconduct capable of repetition yet evading review). In that context, as the Supreme Court stated in *Lujan*, "much more is needed." 504 U.S. at 562.

2. The complaint does not demonstrate injury to any COPAA member.

The complaint additionally fails to demonstrate injury to COPAA because it does not allege "that at least one *identified member* ha[s] suffered or [will] suffer harm." *Assoc. Gen. Contractors v. Dept. of Transp.*, 713 F.3d 1187, 1194 (9th Cir. 2013) (emphasis added by Ninth Circuit to quote from *Summers v. Earth Island Institute*, 555 U.S. 488, 498 (2009)). The complaint alleges that COPAA is a national not-for-profit membership organization of parents of

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children with disabilities, their attorneys, and their advocates (ECF #1 ¶ 21) with 2,100 members across the country, including an unspecified number of "active members in Oregon, including parents of children who are eligible for special education and related services under the IDEA and are currently being subjected, and are at substantial risk of being subjected, to shortened school days due to their behaviors" (ECF #1 ¶ 23).

These generalized allegations do not meet COPAA's burden to show injury-in-fact. As the Supreme Court has emphasized, an organizational plaintiff must show, "through specific facts that one or more of its members" will "be directly affected by the allegedly illegal activity." *Summers v. Earth Island Institute*, 555 U.S. 488, 498 (2009) (citation and internal quotation marks omitted). In *Summers*¸ the Court rejected the proposition that an organization can show injury by demonstrating that "there is a statistical probability that some of those members are threatened with concrete injury." *Id.* at 497; *see also id.* at 498-499 (noting that "[t]his requirement of naming the affected members" is dispensed of "only where *all* the members of the organization are affected by the challenged activity"). COPAA's generalized allegations of harm fail to show injury to any identified member and, as a result, fail to meet its burden to establish standing.

B. The complaint does not allege sufficient facts to establish causation.

To establish standing, a plaintiff also must allege facts demonstrating that something that the defendant did or failed to do is fairly traceable to the alleged injury. *See Lujan*, 504 U.S. at 560-561. A causal chain may have multiple links, but if it "involves numerous third parties whose independent decisions collectively have a significant effect on plaintiffs' injuries * * * the causal chain is too weak to support standing." *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 867 (9th Cir. 2012) (citations, quotes, and bracket omitted).

The alleged injury—the use or risk of inappropriate abbreviated school day programs—is not fairly traceable to the alleged lack of a prophylactic statewide policy. Indeed, the complaint

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demonstrates that the existing policies are effective. Plaintiffs J.N., J.V., and B.M.[4] obtained relief from inappropriate use of an abbreviated school day program pursuant to the State's existing—IDEA-mandated—policies and procedures. Plaintiff E.O., who does not allege that he has been inappropriately placed on a shortened school day, has not attempted to seek relief through the existing policies and procedures.[5] The complaint similarly contains no such allegations with respect to any COPAA member.

Consequently, the complaint fails to show that a lack of state-wide policy threatens significant and imminent risk of an LEA imposing an inappropriate abbreviated school day program on one or more plaintiffs. The chain of causation here depends on two independent parties: the LEA responsible for plaintiff's IEP and plaintiff's parent or advocate. Before any plaintiff may be placed on an unlawful abbreviated school day program, the LEA must violate state and federal law. In addition, plaintiff's parent or advocate must fail to invoke the existing process for remedy. The chain of causation from a lack of policy to actual harm is too attenuated to satisfy the standing requirement.

Finally, the complaint does not establish causation to the extent that plaintiffs' theory of liability depends on a novel interpretation of the IDEA to require ODE to "prevent" any instance of inappropriate use of abbreviated school day programs. This interpretation is implausible because, *inter alia,* it would render superfluous the detailed and specific IDEA requirements for due process hearings and administrative review to address just such failures of IEP development or implementation by the student's LEA.

C. The complaint does not allege sufficient facts to establish redressability.

The third element of standing requires a showing that a favorable decision by the court is *likely* to redress the alleged injury. *Lujan,* 504 U.S. at 560-561. Just as analyzing causation can

[4] Plaintiff B.M. prevailed in the administrative complaint process, but allegedly is currently placed in a facility for residential treatment and is no longer eligible to receive educational services from his prior school district (ECF #1 ¶ 104).

[5] Plaintiff E.O. does allege that his LEA made a procedural error in his IEP by not explaining the reasons for an abbreviated school day program (ECF #1 ¶ 74).

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appear academic in the absence of a clearly articulated injury, redressability turns on the viability of the causal chain. *See, e.g.*, 33 Fed. Prac. & Proc. Judicial Review § 8342 (2d ed.) ("The causation and redressability prongs of constitutional standing often boil down to the same thing—i.e., where a certain action is causing a claimed injury, vacating that action will provide redress for that injury."). The Supreme Court has described the interrelation of injury, causation, and redressability by acknowledging that any "remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Lewis v. Casey*, 518 U.S. 343, 357 (1996). Ninth Circuit precedent requires a showing of a "substantial likelihood" that the relief sought would redress the injury. *Mayfield v. U.S.*, 599 F.3d 964, 971 (9th Cir. 2010). Where, as here, the conduct of third parties is involved, redressability "hinge[s] on the response of the regulated (or regulable) third party to the government action or inaction." *Lujan*, 504 U.S. at 562 (a plaintiff must "adduce facts showing that [third parties'] choices have been or will be made in such a manner as to * * * permit redressability of injury").

In this case, the first form of relief plaintiffs seek is a general declaration that the State violated the IDEA and/or the ADA in the past (ECF #1 Request for Relief (B)). This retrospective declaration would have no direct effect on plaintiffs. As such, plaintiffs lack standing as to this requested relief. *See Mayfield*, 599 F.3d at 971 (redressability requirement was not satisfied as to declaratory judgment).

Plaintiffs also request that the Court permanently enjoin the State from subjecting plaintiffs to the existence of unidentified "policies and practices that violate their rights" under the IDEA and the ADA (ECF #1 Request for Relief (C)). This type of injunction is overly broad and plaintiffs have not asserted any actual injury from specific policies. The Supreme Court rejected this approach in *Lewis*, where it observed that"[t]he actual-injury requirement would hardly serve the purpose * * * of preventing courts from undertaking tasks assigned to the political branches * * * if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy all inadequacies in that administration." 518 U.S. at 357.

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Lastly, plaintiffs ask the Court to order the State to "develop, adopt, and implement policies and practices that will ensure that the State of Oregon and its school districts provide a free appropriate public education in the least restrictive environment to *all eligible children in the state*, including by providing children whose disabilities lead to challenging classroom behaviors with the services and supports they need to access a full school day" (ECF #1 Request for Relief (D)) (emphasis added). This request goes well beyond the scope of any alleged injury to these plaintiffs and is inconsistent with a claim for protection against the possibility of being subjected to an inappropriate abbreviated school day program. Indeed, this relief simply repeats the IDEA requirement that a FAPE be delivered in the least restrictive environment through IEPs tailored to the individual needs of each student.[6]

[6] The requested relief under the ADA similarly exceeds the scope of any injury alleged in the complaint (ECF #1 Request for Relief (E) (requesting the court order the State to "develop, adopt, and implement policies and practices to ensure that the State of Oregon and its school districts do not discriminate against students on the basis of disability, including by unnecessarily excluding children with disability-related behaviors from a full school day")).

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VI. CONCLUSION

The complaint shows that Oregon's existing regulatory framework, which complies with the IDEA, functions as intended. Since 2008, more than 30 students—including three of the student-plaintiffs—sought relief and achieved a resolution of their claims through the existing IDEA-mandated administrative complaint process (ECF #1 ¶ 108). The fact that others allegedly have chosen not to seek relief does not establish either a violation of law or that a declaration or injunction will provide effective relief to these plaintiffs. Standing, and thus jurisdiction, are lacking and the complaint should be dismissed.

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Respectfully submitted,

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