No. 24-2080

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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, Sarah Kaplansky; B. M., by and through his next friend, Traci Modugno; on behalf of themselves and all others similarly situated; COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC.,

Plaintiffs-Appellants,

v.

OREGON DEPARTMENT OF EDUCATION; CHARLENE WILLIAMS, Dr.; in her official capacities as Director of Oregon Department of Education and Deputy Superintendent of Public Instruction for the State of Oregon; TINA KOTEK, in her official capacities as Governor and Superintendent of Public Instruction for the State of Oregon,

Defendants-Appellees.

APPELLEES' BRIEF

Appeal from the United States District Court
for the District of Oregon

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Constitutional and Statutory Provisions

Administrative Rules

Other Authorities

APPELLEES' BRIEF

INTRODUCTION

Plaintiffs brought this class-action lawsuit against the Oregon Department of Education (ODE), ODE's Director, and the Oregon Governor as Superintendent of Public Instruction, alleging "systemic" deficiencies in ODE's state-level policies and practices for the use of shortened school days (SSDs). Plaintiffs specifically contended that ODE's policies on data collection, monitoring, enforcement, and technical assistance for local districts put class members at risk of being placed inappropriately on an SSD, violating their rights under the Individuals with Disabilities Education Act (IDEA), Title II of the Americans with Disabilities Act (ADA), and Section 504 of the Rehabilitation Act (RA).

During that litigation, ODE undertook significant policy reforms regarding SSD data collection and technical assistance, and the Oregon legislature, in response to this lawsuit, passed a new state law, SB 819, which enacted new data collection, monitoring, and enforcement policies for SSDs. Because those policy reforms resolved plaintiffs' systemic concerns about ODE's state-level policies for data collection, monitoring, enforcement, and technical assistance, the district court correctly dismissed plaintiffs' lawsuit as moot.

JURISDICTIONAL STATEMENT

Appellees accept plaintiffs' jurisdictional statement. Circuit Rule 28-2.2.

STATEMENT OF THE ISSUE

Did the district court correctly conclude that the Oregon legislature's enactment of SB 819 and ODE's own policy reforms mooted plaintiffs' claims alleging systemic deficiencies in ODE's state-level SSD policies?

STATEMENT OF THE CASE

A. Under the IDEA, ODE serves a general supervisory role to ensure that the IDEA's requirements are met.

The IDEA, 20 U.S.C. §§ 1400 to 1482, makes federal funding available to states that "provide a [free appropriate public education] to all children with qualifying disabilities through the provision of special education services." *Rachel H. v. Dept. of Educ. of Hawaii*, 868 F.3d 1085, 1088 (9th Cir. 2017) (citing 20 U.S.C. § 1412(a)(1)). A student's particular special education services are outlined in an "individualized education program" (IEP), which is "the centerpiece of the [IDEA's] education delivery system." *Rachel H.*, 868 F.3d at 1088 (quoting *Endrew F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017)).

An IEP is inherently individualized to each student: "[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."

Endrew F., 137 S. Ct. at 999, 1001. "Each IEP is crafted by a team of the individuals most critical to a child's success, including parents, teachers, and school officials." *Rachel H.*, 868 F.3d at 1088 (citing 20 U.S.C. § 1414(d)(1)(B)).

Under the IDEA framework, the specifics of an IEP—and the inherently-individualized "free appropriate public education" (FAPE) it must outline—are identified and carried out by "local educational agencies" (LEAs) like schools and school districts. *Id.* The "state educational agency" (SEA)—here, ODE—is responsible for "general supervision" of education programs throughout the state and for ensuring that the IDEA's requirements are met. 20 U.S.C. § 1412(a)(11); 20 U.S.C. § 1416(a)(1) and 34 C.F.R. § 300.149.

Oregon's IDEA framework is set out in Or. Rev. Stat. chapter 343 and Or. Admin. R. chapter 581, division 15. *See* Or. Admin. R. § 581-015-2015. Oregon LEAs must comply with a detailed process for developing an IEP that includes parent participation, regular ongoing review and revision, and more. Or. Admin. R. § 581-015-2190 to 581-015-2225. Each student's IEP must describe the student's current educational plan and annual goals, identify special educational services or other needed aids, and address placement in the least restrictive appropriate setting for receiving instruction. Or. Admin. R.

§ 581-015-2200. Parents must be notified of any change in services that amounts to a change in placement. Or. Admin. R. § 581-015-2310.

A parent may challenge procedural or substantive violations of the IEP process, including an inappropriate SSD placement. 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"); *Christopher S. v. Stanislau County Office of Educ.*, 384 F.3d 1205, 1210 (9th Cir. 2004) (describing procedural safeguards). The IDEA requires states to establish two distinct mechanisms for administrative review of IEP decisions. First, the IDEA mandates a hearing procedure to be conducted by an independent hearings officer, commonly called a "due process hearing." 20 U.S.C. § 1415(f); *Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1300 (9th Cir. 1992). Second, federal regulations 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 to 300.153.[1]

[1] The ADA and RA both prohibit discrimination on the basis of disability and require reasonable modifications to policies, practices, or procedures when necessary. 29 U.S.C. § 794(a); 42 U.S.C. § 12132; 28 C.F.R. § 35.130(b)(7); *see also Vinson v. Thomas*, 288 F.3d 1145, 1152 n.7 (9th Cir. 2002) (ADA and RA claims are analytically identical). Although the ADA and RA reach more broadly than the IDEA, in this case plaintiffs' ADA and RA claims are derivative of their IDEA claim, because the core of each claim is plaintiffs' allegation that state-level policy puts class members at risk of a denial of FAPE.

Footnote continued…

B. Plaintiffs brought this class-action lawsuit alleging systemic deficiencies in ODE's state-level SSD policy regarding data collection, monitoring, enforcement, and technical assistance.

Plaintiffs brought this class-action lawsuit against ODE claiming that a lack of state-level data collection, monitoring, enforcement, and assistance for LEAs had led to a statewide pattern among LEAs of misusing SSDs for students with disability-related behavioral issues. (*See* 3-ER-616 (plaintiffs' complaint, alleging that ODE's policies and procedures are deficient regarding data collection, monitoring and enforcement, and technical assistance); *see also* Appellants' Br. 6-7 (identifying those same alleged policy deficiencies)). That is, plaintiffs did not seek to challenge any individually-faulty IEPs, but rather to challenge "uniformly-applicable state practices that they allege expose them and all class members to a risk of being placed unnecessarily on a shortened school day[.]" (3-ER-486 (district court's opinion granting plaintiffs' motion for class certification)); *see also Martinez v. Newsom*, 46 F.4th 965, 974 (9th Cir. 2022) (noting that "systemic" IDEA claims are directed at an SEA's "decision, regulation, or other binding policy"); Fed. R. Civ. P. 23(b)(2)

(…continued)
See Fed. R. Civ. P. 23(b)(2) (grounds for class-action lawsuit include where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunction relief . . . is appropriate respecting the class as a whole").

(grounds for class-action relief include where opposing party's challenged conduct applies to class as a whole).

More specifically, plaintiffs alleged four deficiencies in ODE's state-level SSD policies:

- ODE's alleged omission "to implement policies and procedures requiring the systemic collection of reliable data on students with shortened school days";
- ODE's alleged omission "to implement policies and procedures that would require [ODE] to systemically and effectively monitor individual school districts' compliance with both federal and state statutes";
- ODE's alleged omission "to provide districts with 'adequate resources, technical assistance, and training to prevent the unnecessary use of shortened school days'";
- ODE's alleged "implement[ation of] an education funding formula that 'rewards school districts that impose [SSDs] by paying them the same amount for providing a student with one hour of tutoring as it would if the student had received a full day of instruction in school."

(Appellant's Br. 6-7).

During the litigation, the parties' entered an Interim Settlement Agreement. (2-ER-287-95). That agreement contemplated an investigation and report by a neutral factfinder regarding ODE's SSD policies and practices. (2-ER-289). That report (the "Bateman report") began by noting that "[t]he commitment of ODE staff and educators across the state to the work they do, the children they serve, their efforts to support students with disabilities and

those requiring intervention supports, and their desire to ensure these students are served appropriate was evident through their comments and earnest feedback." (2-ER-298). And it concluded that, generally, "[s]chool personnel across Oregon appear to understand conceptually how and when the use of [SSDs] may be appropriate." (3-ER-358).

The Bateman report also made seven recommendations for improving ODE policy and practices regarding SSDs: (1) issuance of additional ODE guidance to LEAs on the use of shortened school days; (2) increased staffing in rural areas and hard-to-fill positions across the state; (3) increased behavior support resources and training for teachers, administrators, and school staff; (4) increased monitoring, including the implementation of a statewide IEP system; (5) additional ODE guidance regarding the requirements of existing law, including the need for parental consent to an SSD; (6) additional ODE guidance on the use of functional behavior assessments (FBAs) and behavior intervention plans (BIPs); and (7) ODE guidance that students placed on SSDs must receive one hour of one-on-one home instruction for every two hours of school instruction missed. (3-ER-346-57).[2]

[2] The Bateman report also made an eighth recommendation that a special master be appointed to oversee the implementation of any final settlement agreement, but that recommendation was focused on this litigation rather than ODE SSD policy. (3-ER-357).

C. ODE integrated the Bateman report's findings into work already underway to redesign ODE's general supervision system.

Although the parties were unable to resolve the litigation, ODE took the Bateman report seriously and integrated its recommendations into ongoing work that ODE had already begun to redesign its general supervision system. ODE had contracted with WestEd, a research, development, and services agency that houses the National Center for Systemic Improvement, the national center funded by the U.S. Department of Education's Office of Special Education Programs to support SEA development, implementation, and improvement of general supervision systems. (2-SER-547). ODE contracted with those national experts to redesign its system of general supervision to ensure that it meets federal requirements and incorporates best practices, and it executed a separate agreement with WestEd's experts in organizational change management to facilitate implementation of that new system. (2-SER-547-48).

ODE had also promulgated a new regulation designed to bolster ODE's authority to investigate school districts outside of ODE's administrative complaint process and to strengthen ODE's enforcement for noncompliant districts. Or. Admin. R. § 581-015-2015. That rule empowers ODE to take action to correct local noncompliance with IDEA requirements, including withholding funding. *Id.* § 581-015-2015(12).

In addition to that work already underway, in response to the Bateman report ODE released new comprehensive guidance entitled "Abbreviated School Day Programs: Considerations for IEP Teams." (2-SER-481; 2-SER-489-542). That guidance addressed the Bateman report's first and sixth recommendations calling for additional ODE guidance regarding SSDs generally and the use of FBAs and BIPs specifically. (*See* 2-SER-504-12 (chapter on "Supporting Student Behavior through FBAs and BIPs")).

ODE also directed $5 million in state administration dollars from the IDEA to establish new regional and state-level support systems, consisting of Regional Technical Assistance Providers and a Statewide Technical Assistance Center. (2-SER-483). Those measures addressed the Bateman report's second recommendation calling for increased staffing support at the LEA level.

ODE also created an abbreviated school day action team comprised of a Director of IDEA Initiatives, a District Support Specialist lead, a research analyst, and an administrative support staff person to monitor and review data regarding SSDs and engage with local districts regarding areas of concern. (2-SER-484-85). ODE undertook to hire new positions to enhance its ability to effectively implement its system of general supervision, including a General Supervision Coordinator. (*Id.*).

With respect to monitoring and data collection, ODE designated SSDs as a monitoring priority and required LEAs to complete a self-assessment and thorough IEP review for every student on an SSD placement. (2-SER-554-56). ODE hired two new District Support Specialists to validate LEA data and identify noncompliance and needed corrective action. (*Id.*). ODE directed school districts to provide monthly data submissions regarding every student with a disability in the district who has received an abbreviated school day program placement for more than 30 school days, and it began developing systems for long-term data collection. (2-SER-556-57). Finally, ODE pledged support for needed legislative action to establish a statewide IEP system and to fund additional special education staffing. (2-SER-485).

D. The Oregon legislature enacted SB 819 to reform state-level SSD policy.

While ODE was implementing those policy reforms, the Oregon legislature separately enacted SB 819 (2023) to reform state-level SSD policy. Or. Laws. 2023, ch. 290, *codified at* Or. Rev. Stat. §§ 343.321 to 343.333. The legislature enacted SB 819 specifically in response to this litigation. The first public hearing on the bill opened with a presentation from the Legislative Policy and Research Office summarizing the relevant federal and state law, the plaintiffs' complaint in this case, and the findings of the Bateman report. (2-SER-432; 2-SER-438-47; *see also* 1-SER-14-32 (LPRO slide deck)).

In enacting SB 819's reforms, the legislature found that "[s]tudents with disabilities have a right to meaningful access to the same number of hours of instruction and educational services as the majority of students without disabilities who are in the same grade within the student's resident school district"; that "[r]emoval from school is neither a service nor support for students with disabilities"; and that "[u]se of an abbreviated school day program for students with disabilities should be infrequent and, under most circumstances, should be used for a limited duration." Or. Rev. Stat. § 343.322(1). SB 819 repealed Oregon's preexisting SSD statute and established a new supervision framework requiring data collection, informed and written parental consent, enhanced monitoring and enforcement, and increased accountability for ODE and local school districts.

First, SB 819 imposes on ODE a statutory requirement to collect information regarding school districts that impose SSDs and that may need further supervision and monitoring. At least every 30 days, school districts must provide data to ODE regarding each student with a disability placed on an SSD program, which is defined to include *any* reduction in instructional time relative to the student's peers that results in an SSD for more than 10 days per school year. Or. Rev. Stat. § 343.326(2)(e); *see also* Or. Rev. Stat. § 343.321(2) (defining "abbreviated school day program"). The required data

includes the student's grade level; the number of hours of instruction and educational services the school district is scheduled to provide to the student each week; the date the student began the SSD program; and the date by which the student is expected to receive meaningful access to the same number of hours of instruction and educational services that are provided to the majority of other students who are in the same grade within the student's school district. *Id.*

Second, SB 819 created new safeguards for parents and a new state-level monitoring and enforcement framework. SB 819 requires schools to obtain the informed and written consent of parents or foster parents before placing a student on an SSD program. Or. Rev. Stat. § 343.321(8). Informed and written consent requires, among other things, (1) that the parent or foster parent has an opportunity to meaningfully participate in an IEP team meeting before the school district requests consent; (2) that the school offer at least one reasonable alternative placement before requesting parental consent; (3) that the parent or foster parent voluntarily sign the consent form for the SSD placement; and (4) that the parent or foster parent is informed of the right to revoke consent at any time. *Id.*; *see also* Or. Rev. Stat. § 343.328(1)(a) ("A parent or a foster parent may, at any time, revoke consent for the placement of a student with a disability on an abbreviated school day program."). If a parent does exercise their right to

revoke consent, SB 819 requires the school district superintendent to ensure that, within five school days, the student is restored to meaningful access to the same number of hours of instruction and educational services provided to the majority of the student's peers. Or. Rev. Stat. § 343.328(1)(c).

SB 819 also established a new enforcement and accountability framework that includes specific triggers and short timelines for ODE investigation. ODE must investigate whenever it receives a complaint or has cause to believe that a student has been unilaterally placed on an SSD, and ODE must complete that investigation and inform the district of any noncompliance within 30 days. Or. Rev. Stat. 343.328(2)(a). If ODE identifies noncompliance—or if a complaint reflects a parental objection to the SSD—ODE must order the school district to terminate the SSD placement and return the student to school within five school days. Or. Rev. Stat. § 343.328(2)(b).

If the school district fails to comply with ODE's order, ODE must—as the Bateman report recommended, (3-ER-354, 3-ER-356)—withhold State School Fund money that would typically be allocated to the district and order compensatory education "equivalent to at least one hour of direct instruction for every two hours of instruction that were lost[.]" Or. Rev. Stat. § 343.328(2)(c)(C)-(D). Additionally, school district superintendents are subject to licensure discipline by the Teacher Standards and Practices

Commission if they fail to comply with an ODE order or fail to restore meaningful access to a student within the time required by the Act. Or. Rev. Stat. § 343.328(3).

Plaintiffs' counsel testified in support of SB 819. (2-SER-433-34; 2-SER-467-71)). Counsel argued that SB 819 provided "a clear legal framework that will require [ODE] to aggressively pursue the elimination of frequent and long-term [SSDs] in an accountable way. In doing so, it will spare hundreds of Oregon children from an experience that robs them of their basic right to receive a full day of effective education at a public school where they live. It will change lives." (2-SER-433; *see also* 2-SER-470 (counsel's testimony that SB 819 "will require ODE to see, to count, and to track [SSDs] in an accountable way to assume an active and informed role in ensuring that every child with a disability gets what they need to learn and be part of their schools")).

E. ODE began implementing SB 819.

After SB 819's enactment, ODE began diligently implementing its requirements. (1-SER-8). ODE established a three-phased approach to implementation: (1) establishing guidance and facilitating trainings; (2) developing and building ODE's internal capacity to effectively implement SB

819 and enhancing collaboration agency-wide; and (3) building the SB 819 complaint and ongoing monitoring systems. (1-SER-8-11, 36).

In phase one, ODE issued communications and updates and developed over 25 guidance documents, sample forms and FAQs regarding SB 819, developed comprehensive internal and external training materials, and conducted extensive training on SB 819 for districts, partners, and parents. (1-SER-8-11; 1-SER-45 to 2-SER-430 (ODE's new guidance and other documents developed to implement SB 819)). In particular, ODE:

- Prepared updates regarding SB 819 for superintendents, principals, charter school leaders, curriculum directors, special education directors, business managers, and case managers. (1-SER-45-52).

- Prepared a detailed guidance document entitled, "Implementing SB 819: Guidance for School Districts and Programs," and an ancillary slide deck for training presentations. (1-SER-52-229).

- Prepared several sample forms to facilitate local school districts' implementation of and compliance with SB 819. (1-SER-230-68).

- Prepared several other documents providing additional tools, resources, and answers to frequently asked questions for local school districts. (1-SER-269-89).

- Prepared "Train the Trainer" materials for training regional technical assistance providers to train educators in local school districts. (2-SER-291-430).

- Created a dedicated email inbox to respond to questions from parents, advocates, and local school districts. (1-SER-10).

In phase two, ODE significantly scaled up its systems and capacity to implement SB 819 and to support school districts in doing the same. (1-SER-10-11). ODE hired a Director of IDEA Initiatives ("SB 819 Director") to lead ODE's implementation of SB 819 and serve as a centralized point of contact. The SB 819 Director is a full-time position dedicated to supporting ODE staff responsible for assisting school districts with implementation, consulting with school districts and developing resources, responding to complaints and conducting investigations, and reviewing, analyzing, and ensuring follow up on school district data. (*Id.*). ODE also hired six additional District Support Specialists—doubling the size of the cadre—to support implementation of SB 819. (*Id.*).

In phase three, ODE has built and continues to refine the complaint and ongoing monitoring systems required by SB 819. (*Id.*). ODE has launched a permanent data collection system on SSD placements, developed comprehensive monitoring protocols, and responded to complaints and concerns through appropriate mechanisms. (*Id.*).

F. The district court dismissed plaintiffs' lawsuit as moot based on SB 819 and ODE's policy reforms.

Given the significant changes in ODE policies and practices after the Bateman report and the legislature's enactment of SB 819, ODE moved to dismiss plaintiffs' lawsuit as moot. (2-ER-98-115). The district court agreed

and granted the motion. In reaching that conclusion, the district court explained that "SB 819 was enacted specifically to fill the gaps plaintiffs successfully identified in this case" and "precisely imports remedies plaintiffs requested to address the shortcomings plaintiffs pointed to throughout [the] litigation." (1-ER-16).

More specifically, the district court explained that, with respect to data collection, "plaintiffs sought adoption of policies requiring data collection aimed at enabling defendants to proactively identify violations of the class members' rights," and "the information SB 819 requires to be collected would enable the proactive identification of violations plaintiffs seek." (1-ER-18). With respect to monitoring and enforcement, the district court explained that "[p]laintiffs challenged defendants' lack of policies and practices to proactively monitor compliance [and] correct noncompliance 'beyond simply operating [ODE's] administrative complaint system,'" and "[b]y its text, SB 819 requires actions that [go] well beyond 'simply operating a complaint system.'" (1-ER-21).

Finally, with respect to technical assistance, the district court explained that ODE's internal reforms and new guidance materials rendered plaintiffs' claims moot. (1-ER-26-27). It rejected plaintiffs' argument that the "voluntary cessation" exception to mootness applied, given that

> [ODE's] policy change to provide resources, technical training, and guidance to the districts is (1) broad in scope and unequivocal, evidenced by the multitude of training documents created and [ODE's] contractual commitments; (2) the policy change fully addresses plaintiffs' allegations in this case of inadequate resources and training; (3) this lawsuit served as a catalyst for defendants' policy change, including the findings and recommendations from the expert Report on the need for technical training, which defendants imported; (4)-(5) while defendants' increased commitment to delivering technical training and guidance has not been in force for a long duration, defendants nevertheless demonstrate that the agency's officials have not engaged in conduct similar to that challenged by plaintiffs, evidenced by the multiple trainings and guidance now issued. Finally, the contracts, agreements, and financial investments [ODE has] made weigh against a finding that they might "easily abandon or alter" their conduct in the future.

(1-ER-26-27 (quoting *Rosebrock v. Mathis*, 745 F.3d 963, 971 (9th Cir. 2014)). The district court accordingly dismissed plaintiffs' lawsuit for lack of subject-matter jurisdiction. Or. R. Civ. P. § 12(h)(3). Plaintiffs now appeal that ruling, but this court should affirm the district court's judgment.

SUMMARY OF ARGUMENT

The district court correctly ruled that the Oregon legislature's enactment of SB 819 and ODE's own policy reforms rendered plaintiffs' claims moot. Plaintiffs' class-action claims assert "systemic" deficiencies in ODE's state-level policy regarding SSDs. That is, plaintiffs do not challenge any specific IEP placement, but rather challenge ODE's state-level policies regarding data collection, monitoring, enforcement, and technical assistance to local school

districts. Here, SB 819's data collection, monitoring, and enforcement requirements and ODE's implementation of data-collection policies and technical assistance policies and materials resolve plaintiffs' allegations of deficient *state-level policy*. The district court correctly ruled that those policy reforms rendered plaintiffs' claims moot.

The district court also correctly ruled that ODE's policy reforms regarding technical assistance rendered plaintiffs' claims moot despite the voluntary cessation exception. As the district court correctly explained, ODE's extensive investment-backed policy reforms demonstrate that the preexisting state-level policies and practices that plaintiffs challenged are not reasonably likely to recur.

ARGUMENT

A. Standard of Review

This court reviews *de novo* a district court's ruling granting a motion to dismiss for lack of subject-matter jurisdiction. *See Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983). In reviewing a jurisdictional motion involving factual issues which also go to the merits, a summary-judgment standard applies. *Id.* The moving party is entitled to prevail "if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Id.*

B. The district court correctly concluded that SB 819 and ODE's policy reforms rendered plaintiffs' claims moot.

Under Article III of the United States Constitution, the federal judicial power extends only to "cases" or "controversies." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90 (2013). That requirement persists "through 'all stages' of the litigation." *Id.* at 90-91; *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) ("[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.").

A case that becomes moot is no longer a justiciable case or controversy. *Already*, 568 U.S. at 90-91 (federal courts have "no business" deciding moot cases). A case becomes moot if "changes in the circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief" from the federal judiciary. *Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1129 (2005); *see also Thomas v. City of Memphis, Tenn.*, 996 F.3d 318, 324 (6th Cir. 2021) ("the government's ability to self-correct provides a secure foundation for a dismissal based on mootness so long as the change appears genuine").

Here, the district court correctly ruled that the Oregon legislature's enactment of SB 819 and ODE's own policy reforms have mooted plaintiffs' lawsuit. Plaintiffs sought more robust state-level policies regarding data collection, monitoring, enforcement, and technical assistance. Within the

appropriate sphere of federal court authority to grant that relief, SB 819 and ODE's own policy reforms have provided the more robust policy on each of those issues that plaintiffs have sought.

1. Plaintiffs' class-action lawsuit alleges systemic claims challenging ODE's state-level policies, not individual IEP placements.

The placement of a student with disability on an SSD does not, standing alone, violate the IDEA's requirement of a FAPE. *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. Sch. Dist.*, 933 F.2d 1285, 1291 (5th Cir. 1991) ("[T]o presume that every child's school day should be 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.").

Consistently, here, plaintiffs' claims are not about whether individual students are denied a FAPE. (*See, e.g.*, C.R. 101 at 18) (plaintiffs' reply in support of their motion for class certification, stating that plaintiffs "do *not* ask the Court to 'determine whether the IEP team for each putative class member has reached the correct decision'"). As the district court noted in granting

plaintiffs' motion for class certification, "plaintiffs do not challenge individually-faulty IEPs, they challenge uniformly applicable state practices that they allege expose them and all class members to a risk of being placed unnecessarily on" a SSD. (3-ER-486; *see also* 1-ER-15 (district court's opinion granting motion to dismiss, explaining that plaintiffs' claims "are *not* about whether individual students are denied FAPE—which necessarily requires an individualized 'student specific' assessment—but instead are about whether ODE has in place procedural safeguards that comply with the state's general supervision obligations")).

That is, plaintiffs raised "systemic" IDEA claims. *Martinez*, 46 F.4th at 974-75 (explaining that a "systemic" IDEA claim challenges "an agency decision, regulation, or other binding policy" rather than an individual student's placement). The judicial relief that plaintiffs seek is an injunction ordering ODE "to develop, adopt, and implement policies and practices that will ensure the State of Oregon and its school districts provide a [FAPE] 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." (3-ER-627).[3]

As explained above, however, under the IDEA framework, what constitutes a FAPE entails an individualized inquiry determined on a student-by-student basis. *See Endrew F.*, 137 S. Ct. at 999, 1001 ("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."). And this court has cautioned that, although the judiciary "review[s] *de novo* the appropriateness of an education program," it should be careful not to "substitute [its] own notions of sound educational policy for those of the school authorities which they review." *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1524 (9th Cir. 1994) (quoting *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1310 (9th Cir. 1987)).

The judicial relief plaintiffs sought in this litigation was a change in ODE's *state-level* policies that would "ensure" an outcome—the elimination of a risk of denial of FAPE. But whether FAPE is provided can only be assessed on a student-by-student basis in a way not raised by plaintiffs' systemic claims

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[3] As noted above, plaintiffs' ADA and RA claims are also "systemic" in the same way because they turn on the same allegations of deficient state-level policy putting plaintiffs at risk of a denial of FAPE, which they contend applies to the class as a whole. Fed. R. Civ. P. 23(b)(2).

here. *Endrew F.*, 137 S. Ct. at 999, 1001; *Martinez*, 46 F.4th at 974-75. Moreover, the type of systemic, injunctive relief plaintiffs sought at the level of state policy entails a modicum of judicial restraint in deference to state policymakers. *Union*, 15 F.3d at 1524. And an injunction that would categorically prohibit SSDs would run afoul of the student-based focus of the IDEA. *Adams*, 195 F.3d at 1150; *Christopher M.*, 933 F.2d at 1291.

In that context, the mootness analysis must focus on ODE's *state-level policies*, not the placements of individual students. That is, the question is whether the affirmative enactment of new state-level policies has resolved plaintiffs' claims alleging a systemic lack of appropriate state-level policy.

2. SB 819 and ODE's policy reforms resolve plaintiffs' systemic claims.

It has. Given the nature of plaintiffs' systemic claims challenging state-level ODE policy, the district court correctly ruled that the Oregon legislature's enactment of SB 819 and ODE's own internal policy reforms rendered plaintiffs' claims moot. *See Thomas*, 996 F.3d at 324 ("the government's ability to self-correct provides a secure foundation for a dismissal based on mootness so long as the change appears genuine"). Those policy reforms address the state-level policy issues regarding data collection, monitoring, enforcement, and technical assistance that plaintiffs allege in this case, in a way

that forestalls any further meaningful judicial relief on plaintiff's systemic claims.[4]

First, SB 819 resolves plaintiffs' concerns about data-collection policies. As the district court explained, "plaintiffs sought adoption of policies requiring data collection aimed at enabling [ODE] to proactively identify violations of the class members' rights," and "the information SB 819 requires to be collected would enable the proactive identification of violations plaintiffs seek." (1-ER-18). ODE had *already* begun reforming its data collection policies when the legislature enacted SB 819, and after its enactment ODE moved to align its more robust system with SB 819's requirements. At the level of state data-collection policy, SB 819 gives plaintiffs the relief they seek.

Second, SB 819 resolves plaintiffs' concerns about monitoring and enforcement. As the district court explained, "[p]laintiffs' challenged [ODE's] lack of policies and practices to proactively monitor compliance [and] correct noncompliance '*beyond simply operating its administrative complaint system*,"

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[4] To the extent the *amici* parties address the mootness issue before this court, they fail to appreciate the systemic nature of plaintiffs' claims. Under *amici*'s view of mootness, the federal courts would become super-administrators overseeing state policymakers at a level of detail inconsistent with the judicial restraint reflected in this court's case law. *See Union*, 15 F.3d at 1524 (in reviewing IDEA claims, courts must be careful not to "substitute their own notions of sound educational policy for those of the school authorities which they review").

and SB 819 "addressed, with specificity, the framework for proactive monitoring and correction" that "requires actions that [go] well beyond 'simply operating a complaint system.'" (1-ER-21 (emphasis added)). Moreover, both SB 819 and ODE's new administrative rule empower ODE to withhold funding as an enforcement mechanism for noncompliance. Or. Rev. Stat. § 343.328(2)(c)(C); Or. Admin. R. § 581-015-2015(12). And SB 819 requires ODE's timely investigation when ODE has cause to believe noncompliance exists and requires compensatory education equivalent to one hour of direct instruction for every two hours of instruction that were lost due to an improper SSD placement. Or. Rev. Stat. § 343.328(2)(c)(D).

Third, ODE's new guidance and reformed support policies resolve plaintiffs' claims about state-level technical-assistance policies. As noted above, ODE developed a substantial amount of new guidance materials on the use of SSDs and on SB 819, including detailed training materials, sample forms, and other literature and answers to frequently asked questions to assist local school districts. (1-SER-8-11; 1-SER-45 to 2-SER-430 (new ODE guidance and other documentation developed in implementing SB 819)). ODE hired additional staff to implement SB 819 and ODE's new SSD policies, and it committed substantial funds for the deployment of Regional Technical Assistance Providers and a Statewide Technical Assistance Center. (1-SER-12-

13). ODE's reform of its technical assistance policies and development of substantial new guidance and training materials reflects the systemic state-level policy reform that plaintiffs' claims sought and that is within the power of the federal judiciary to require of ODE.

C. The voluntary cessation exception does not save plaintiffs' claims from mootness.

Ordinarily, "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Johnson v. City of Grants Pass*, 72 F.4th 868, 881 (9th Cir. 2023), *rev'd on other grounds*, 144 S. Ct. 2202 (2024) (citing *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). But the reason for that rule is the risk that "dismissal for mootness would permit resumption of the challenged conduct as soon as the case is dismissed." *Id.* (citing *Knox v. Serv. Employees Int'l Union, Local 1000*, 567 U.S. 298, 3007 (2012)).

This court "treat[s] the voluntary cessation of challenged conduct by government officials with more solicitude * * * than similar action by private parties." *Bd. of Trustees of Glazing Health & Welfare Trust v. Chambers*, 941 F.3d 1195, 1198 (9th Cir. 2019). The courts "presume[s] the government is acting in good faith," *Am. Cargo Transp., Inc. v. United States*, 625 F.3d 1176, 1180 (9th Cir. 2010), and they recognize that "the government's ability to self-

correct provides a secure foundation for dismissal based on mootness so long as the change appears genuine," *Thomas*, 996 F.3d at 324. If the record shows that "the allegedly wrongful behavior could not reasonably be expected to recur" the case is moot and must be dismissed. *Johnson*, 72 F.4th at 881. This court considers five factors in determining whether that standard is met: (1) whether the policy change is evidenced by language that is "broad in scope and unequivocal in tone"; (2) whether the policy change fully "addresses all of the objectionable measures that [government] officials took against the plaintiffs in th[e] case"; (3) whether "th[e] case [in question] was the catalyst for the agency's adoption of the new policy"; (4) whether the policy has been in place for a long time; and (5) where, "since [the policy's] implementation, the agency's officials have not engaged in conduct similar to that challenged by the plaintiff[]." *Rosebrock*, 745 F.3d at 971.

Here, the district court correctly ruled that those factors demonstrated mootness. SB 819's statutory requirements regarding data collection, monitoring, and enforcement are legislative commands to ODE, and thus, as the district court correctly recognized, the voluntary cessation exception does not apply to those aspects of plaintiffs' claims at all. (1-ER-22 n.6).

But regardless, ODE's substantial investment-backed work to implement its own policy reforms and SB 819's requirements showed that ODE's new

state-level policies are unlikely to revert to the prior policies that plaintiffs challenged in this lawsuit. The district court correctly concluded that ODE's policy reforms were genuine, given "the multitude of training documents created," the "contractual commitments" entered and hiring performed and planned, and the other financial investments ODE had made to deploy the Regional Technical Assistance Providers and Statewide Technical Assistance Center. (1-ER-26-27); *see Thomas*, 996 F.3d at 324 ("the government's ability to self-correct provides a secure foundation for a dismissal based on mootness so long as the change appears genuine").

In sum, the uncontroverted facts of the Oregon legislature's enactment of SB 819 and ODE's own policy reforms show that plaintiffs have obtained the changed state-level policy that their systemic claims sought. The district court properly concluded that plaintiffs' claims are moot.

D. Plaintiffs' arguments fail.

Plaintiffs advance essentially four arguments supporting a contrary conclusion, but this court should reject each of them. First, plaintiffs suggest (Appellant's Br. at 26-27) that the district court improperly relied on cases holding that "the repeal, amendment, or expiration of challenged policies and practices renders an action challenging those policies moot." (1-ER-22 n.6). Plaintiffs observe that they did not specifically challenge any Oregon statute

that has since been repealed, but instead assert that ODE's policies and practices violate federal law. (Appellant's Br. at 26-27). Be that as it may, plaintiffs asserted that a lack of *state-level policy* is what violated federal law. The district court correctly reasoned that SB 819 and ODE's new policies mooted plaintiffs' challenge to the prior lack of state-level policy.

Second, plaintiffs argue, as they did below, that the number of students on SSDs is alone sufficient to show that their claims are not moot. (*See, e.g.*, Appellant's Br. at 45). As explained above, however, placement on an SSD does not, in itself, violate the IDEA, *Adams*, 195 F.3d at 1150, and plaintiffs' claims are directed at *state policy*, not individual IEP placements. For all the reasons explained above, the changes in Oregon state SSD statutory law and policy have mooted plaintiffs' claims challenging the preexisting policies.

Third, plaintiffs argue that Oregon's state-level policies fail to address the completeness or reliability of data provided by local districts. Not so. SB 819 embodies a statutory mandate to provide the data contemplated. Or. Rev. Stat. § 343.326(e) ("At least once every 30 calendar days during the school year" the school district must "inform [ODE] about the student's abbreviated school day program placement," including "[t]he date by which the student is expected to receive meaningful access to the same number of hours of instruction and educational services that are provided to the majority of other

students who are in the same grade within the student's resident school district."). And ODE's own SB 819 implementation efforts and policy reforms include the active review of district data submissions for accuracy and reliability. (1-SER-4).

Fourth, and finally, plaintiffs contend that their claims are not moot because ODE's new policies are still deficient in relation to "informal removals." But plaintiffs' arguments are misguided; SB 819 and ODE's own policies apply to "informal removals," as plaintiffs describe them, in the same way as any other reduction in instructional time. SB 819 specifically defines "[a]bbreviated school day" and "[a]bbreviated school day program" by reference to hours of instruction. Or. Rev. Stat. § 343.321(1) & (2).

Any reduction from the average instructional hours of the majority of other students—including so-called informal removals—*is* an "abbreviated school day" covered by the protections established by SB 819. Or. Rev. Stat. § 343.321(1). And an "[a]bbreviated school day program" is established when *any* such reduction "results in a student with a disability having an abbreviated school day for more than 10 school days per school year." Or. Rev. Stat. § 343.321(2). That policy mirrors federal IDEA law, which provides that, "[f]or purposes of removals of a child with a disability from the child's current educational placement * * * , a change of placement" triggering the requirement

of a due process hearing "occurs if," among other things, "[t]he child has been subjected to a series of removals that constitute a pattern * * * [b]ecause the series of removals total more than 10 school days in a school year." 34 C.F.R. § 300.536(a)(2). SB 819's legislative history also reflects that the definition of "abbreviated school day" and "abbreviated school day program" were specifically adopted to reach the issue of informal removals. Audio Recording, House Committee on Education, SB 819, May 8, 2023, at 00:31:50 (statement of Sen. Gelser Blouin), https://olis.oregonlegislature.gov (accessed Nov. 8, 2024).

Moreover, ODE's new guidance and training policies contemplate specific training on informal removals. (1-SER-12). Thus, both SB 819 and ODE's new policies address informal removals at the level of state policy.

In sum, the Oregon legislature's enactment of SB 819 and ODE's own policy reforms resolve plaintiffs' claims challenging ODE's state-level policies regarding data collection, monitoring, enforcement, and technical assistance. Plaintiffs have obtained the change in state-level policy that the federal judiciary would be empowered to require of ODE, so the district court correctly ruled that plaintiffs' claims are moot.

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CONCLUSION

This court should affirm the district court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7), Federal Rules of Appellate Procedure, I certify that the Appellees' Brief is proportionately spaced, has a typeface of 14 points or more and contains 6,884 words.

DATED: November 18, 2024

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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, Sarah Kaplansky; B. M., by and through his next friend, Traci Modugno; on behalf of themselves and all others similarly situated; COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC.,

Plaintiffs-Appellants,

v.

OREGON DEPARTMENT OF EDUCATION; CHARLENE WILLIAMS, Dr.; in her official capacities as Director of Oregon Department of Education and Deputy Superintendent of Public Instruction for the State of Oregon; TINA KOTEK, in her official capacities as Governor and Superintendent of Public Instruction for the State of Oregon,

Defendants-Appellees.

U.S.C.A. No. 24-2080

STATEMENT OF RELATED CASES

Pursuant to Rule 28-2.6, Circuit Rules of the United States Court of Appeals for the Ninth Circuit, the undersigned, counsel of record for Appellees, certifies that she has no knowledge of any related cases pending in this court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2024, I directed the Appellees' Brief to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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