

Expedite
 No Hearing Set
 Hearing Set
Date: 2/2/2018
Time: 9AM
Judge: Lanese

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

A.D., a minor, by and through his mother, Christina Madison; G.J., a minor, by and through his mother, Krystal Jenson; T.R., a minor, by and through her mother, Michele Forrester; A.P., a minor by and through his mother, Devon Parks; E.S., a minor by and through her mother, Jane Doe; individually and on behalf of all others similarly situated,

Case No. 17-2-03293-34

MOTION FOR CLASS CERTIFICATION

Plaintiffs,

v.

OFFICE OF SUPERINTENDENT OF PUBLIC INSTRUCTION; CHRIS REYKDAL, in his official capacity as SUPERINTENDENT OF PUBLIC INSTRUCTION,

Defendants.

I. INTRODUCTION

Defendants’ failure to exercise adequate supervision over the Pasco and Yakima School Districts (the “Districts”) has resulted in, and continues to result in, the excessive discipline of students with special education needs and the deprivation of these vulnerable

1 students' education. Defendants' actions (or inactions) have caused serious irreparable injury to
2 Plaintiffs and the Class, and Plaintiffs' claims are ideally suited for class certification.

3 Washington students are guaranteed the right to an education by Article IX,
4 Section 1 of the Washington State Constitution. Defendants are entrusted with safeguarding that
5 right by, among other things, monitoring school district practices, exercising appropriate
6 supervision over school districts, and preventing discrimination. Defendants' failure to fulfill
7 their required duties has allowed the Districts to employ the excessive use of exclusionary
8 disciplinary practices, resulting in the systemic exclusion of hundreds of students with special
9 education needs from the Pasco and Yakima public schools.

10 Plaintiffs—minors with disabilities in need of special education services—seek
11 certification of a class of the numerous similarly situated minors residing in the Districts (the
12 “Class”). Class certification is particularly appropriate in this case because the claims of the
13 Plaintiffs and the Class arise from the same course of Defendants' conduct and implicate
14 common questions of law and fact. The relief sought by the Plaintiffs is also typical to the Class:
15 injunctive relief that compels the Defendants to, pursuant to the educational guarantees afforded
16 students with disabilities under the Washington State Constitution and Washington's anti-
17 discrimination laws, exercise adequate supervision and take appropriate action regarding the
18 Districts' use of discriminatory and excessive disciplinary practices against students with special
19 education needs. Finally, Plaintiffs are well-positioned to fairly and adequately protect the
20 interests of the Class and are represented by Class counsel that have extensive experience in civil
21 rights and class action litigation.

22 II. BACKGROUND

23 A. Students with Special Education Needs Are Disproportionately Subjected to 24 Exclusionary Discipline

25 In the 2015–2016 school year, the most recent year for which discipline data is
26 available as of the filing of this motion, there were approximately 170,491 special education
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1 students statewide.¹ In the Pasco and Yakima school districts in the 2015–2016 school year,
2 there were 2,686 and 2,783 special education students, respectively. These numbers likely
3 underestimate the total number of students with special education needs, as they do not capture
4 students who received alternative accommodations or those with undiagnosed disabilities.

5 As Defendants well know, students with special education needs are
6 disproportionately subject to exclusionary disciplinary practices across the state of Washington.
7 One way in which this is shown is through the “Discipline Rate,” or the percentage of students
8 within a demographic group who receive a suspension or expulsion in a school year. According
9 to data gathered and published by Defendants, in the 2015–2016 school year, the Discipline Rate
10 for special education students in the state was 7.4 percent—a rate approximately 2.5 times
11 greater than the Discipline Rate for non-special education students (3.0 percent). Put another
12 way, despite accounting for approximately 15 percent of the student population, special
13 education students received 30 percent of all suspensions and expulsions that school year.

14 Disciplinary rates for special education students in the Pasco School District
15 mirror statewide trends. In the 2015–2016 school year in Pasco, the Discipline Rate was 9.0
16 percent for special education students—a rate almost twice as great as the Discipline Rate for
17 non-special education students (4.7 percent). Both these rates exceed the statewide Discipline
18 Rates for special education and non-special education students. Indeed, Defendants’
19 Consolidated Program Review process concluded that Pasco is out of compliance with OSPI’s
20 requirements. In the Yakima School District in the 2015–2016 school year, the Discipline Rate
21 was 7.5 percent for special education students—a rate 1.4 times greater than the Discipline Rate
22 for non-special education students (5.3 percent).

23 As alarming as these statistics may be, they do not even capture the many
24 instances of undocumented informal disciplinary measures that Defendants have permitted to

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26 ¹ The data cited in this motion is available on Defendants’ website. *See*
1 <http://www.k12.wa.us/DataAdmin/PerformanceIndicators/DisciplineRates.aspx>

1 flourish in the Districts. These practices include, but are not limited to, requesting that parents
2 pick up a student with special education needs prior to the conclusion of the school day and
3 isolating students in separate classrooms apart from their peers. Finally, as alleged by Plaintiffs
4 in the Complaint, the widespread use of formal and informal exclusionary discipline is especially
5 troubling because it is often administered in response to student behavior that is a result of that
6 student’s disabilities. *See* Compl. ¶¶ 152, 163, 188.

7
8 **B. Plaintiffs Allege that Defendants Have Breached Their Duty to Monitor and**
9 **Remedy the Excessive Use of Exclusionary Discipline Against Students with**
10 **Special Education Needs**

11 State law requires that Defendants supervise and monitor the state’s public
12 schools. As Superintendent of Public Instruction, Defendant Reykdal has supervisory authority
13 “over all matters pertaining to the public schools of the state” and is required to ensure that each
14 school district in the state provides “an appropriate educational opportunity for all children with
15 disabilities between the ages of three and twenty-one.” RCW 28A.300.040(1); 28A.155.020.
16 Among other things, Defendant Reykdal has the responsibility of assisting “school districts in the
17 formation of programs to meet the needs of children with disabilities.” RCW 28A.155.090(1).

18 As set forth in the Complaint, Defendants OSPI and Reykdal have breached their
19 duty to exercise appropriate supervisory authority over the exclusionary disciplinary practices
20 that are pervasive in the Districts. Defendants have failed to supervise the Districts’ use of
21 exclusionary discipline against students with special education needs, and have failed to ensure
22 that these disciplinary practices comply with the educational guarantees provided by
23 Washington’s constitution and anti-discrimination laws. In addition, Defendants have failed to
24 provide guidance, adequate technical assistance, or sufficient training to the Districts on how to
25 manage the behavior of students with special education needs and best provide them with the
26 education to which they are entitled.

1 For example, despite years of evidence reflecting the serious over-discipline of

1 special education students across the state, Defendants have failed to provide adequate training
2 for special education teachers, general education teachers, and paraprofessional educators on
3 effective evidence-based alternative forms of non-exclusionary discipline. *See* Compl. ¶¶ 134–
4 150. And, in the limited instances in which training is available, it is either inadequate or not
5 readily available to most educators in the Districts. *See id.* ¶ 143.

6 **C. Plaintiffs Have Been Harmed by Defendants’ Breach of Duty**

7 Plaintiffs and the Class suffer serious on-going irreparable injury as a direct result
8 of Defendants’ failure to supervise and monitor the systemic, disproportionate, and improper use
9 of exclusionary discipline against students with special education needs. *See id.* ¶¶ 161–172.
10 Without judicial relief, these students will continue to be excluded from the classroom and
11 deprived of the education guaranteed to them by the state constitution. That deprivation will
12 have lasting effects on this already vulnerable population, as school discipline is associated with,
13 among other things, lower graduation rates and increased contact with the criminal justice
14 system. *See id.* ¶¶ 173–183. Altogether, these harms deprive Plaintiffs and the proposed Class
15 of their constitutional right to an appropriate education and their rights under state law to be free
16 of discrimination in Washington public schools.

17 **III. THE PROPOSED CLASS AND CLASS COUNSEL**

18 **A. The Proposed Class**

19 Plaintiffs seek certification of the following Class:

20 All children with disabilities who require special education, residing in either the
21 Pasco School District or Yakima School District, and who are enrolled or wish to
22 be enrolled in public school in one of those districts.

23 As a child’s enrollment in the Districts is subject to change at any time, Plaintiffs and other
24 members of the Class comprise an inherently transitory class.

1 **B. The Proposed Class Representatives**

2 Plaintiffs, minors A.D., A.P., G.J., T.R., and E.S., are students with special education
3 needs who reside in the Districts and have been regularly excluded from public schools in those
4 districts for behavior related to their disabilities. These students have been regularly subjected to
5 exclusionary disciplinary practices including, without limitation, suspensions, expulsions, and
6 informal undocumented exclusion. Plaintiffs are representative of students with disabilities in
7 the Districts who require special education and are regularly excluded from school and denied
8 their right to an education for behavior related to their disabilities.
9

10 **1. A.D.**

11 A.D. is a 13-year-old boy with special education needs who attends a middle
12 school in Yakima School District. A.D. has received special education services since he was in
13 the fourth grade, and has been diagnosed with bipolar disorder, Oppositional Defiant Disorder
14 (ODD), Attention Deficit Hyperactivity Disorder (ADHD), mood disorder, and anxiety disorder.
15 During the 2015–2017 school years, A.D. was formally suspended for 41 days and sent home
16 early from school on at least 11 separate occasions, which did not result in a formal suspension.
17 Yakima School District resorted to these exclusionary disciplinary policies notwithstanding the
18 connection between A.D.’s disability and his behaviors. A.D. alleges that he is being denied his
19 right to a basic education through discipline practices that exclude him from class time and
20 deprive him of instruction for behavior related to his disabilities. A.D. also alleges that these
21 harms are a result of Defendants’ breach of their statutory duty to exercise adequate supervision
22 and take appropriate action regarding these discriminatory and exclusionary discipline practices.
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24 **2. A.P.**

25 A.P. is an eight-year-old boy with special education needs who lives in Yakima
26 County, Washington, and is currently homeschooled. During the 2015–2016 school year, he
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1 attended an elementary school in Yakima School District. A.P. was diagnosed with Asperger’s
2 Syndrome when he was seven years old, and was also diagnosed with Post-Traumatic Stress
3 Disorder (PTSD) after a near-fatal car accident on March 13, 2013. During the 2015–2016
4 school year, A.P. was formally suspended for 12.5 days. He was also subject to informal
5 exclusionary discipline that did not rise to the level of a formal suspension—he was sent home
6 early from school at least three times every week, removed from his normal classroom setting at
7 least 11 times, and also restrained at least three times. During the 2017-2018 school year, A.P.
8 was suspended and pushed out of school for breaking pencils and “being defiant” within two
9 weeks of re-enrolling. Yakima School District resorted to these exclusionary disciplinary
10 policies notwithstanding the connection between A.P.’s disability and his behaviors. A.P.
11 alleges that he is being denied his right to a basic education through discipline practices that
12 exclude him from class time and deprive him of instruction for behavior related to his
13 disabilities. A.P. also alleges that these harms are a result of Defendants’ breach of their
14 statutory duty to exercise adequate supervision and take appropriate action regarding these
15 discriminatory and exclusionary discipline practices.

16 **3. G.J.**

17 G.J. is a 10-year-old boy in the fourth grade with special education needs who
18 attends an elementary school in Pasco School District. G.J. has been diagnosed with
19 microcephaly, seizure disorder, ADHD, pervasive developmental disorder, and mood disorder.
20 Due to district special education policies, G.J. has attended three elementary schools in four
21 years. During the 2016–2017 school year, G.J. was subjected to informal exclusionary discipline
22 that did not rise to the level of a formal suspension—he was sent to a time out room on at least
23 15 different occasions and sent home early from school on at least two separate occasions. Pasco
24 School District resorted to these exclusionary disciplinary policies notwithstanding the
25 connection between G.J.’s disability and his behaviors. G.J. alleges that he is being denied his
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1 right to a basic education through discipline practices that exclude him from class time and
2 deprive him of instruction for behavior related to his disabilities. G.J. also alleges that these
3 harms are a result of Defendants' breach of their statutory duty to exercise adequate supervision
4 and take appropriate action regarding these discriminatory and exclusionary discipline practices.

5 **4. T.R.**

6 T.R. is a 10-year-old girl in the third grade who attends an elementary school in
7 Yakima School District. On information and belief, she is a student with a disability who
8 requires special education services, but has not yet been evaluated. Despite repeated requests by
9 T.R.'s mother, over the past two years, that Yakima School District evaluate T.R. for special
10 education services, Yakima School District has never evaluated T.R. for special education
11 services. During the 2016–2017 and 2017-2018 school years, T.R. was excluded from the
12 classroom and informally disciplined. Yakima School District resorted to these exclusionary
13 disciplinary policies notwithstanding the connection between T.R.'s disability and her behaviors.
14 T.R. alleges that she is being denied her right to a basic education through discipline practices
15 that exclude her from class time and deprive her of instruction for behavior related to her
16 disabilities. T.R. also alleges that these harms are a result of Defendants' breach of their
17 statutory duty to exercise adequate supervision and take appropriate action regarding these
18 discriminatory and exclusionary discipline practices.

19 **5. E.S.**

20 E.S. is a nine-year-old girl with special education needs who attends an
21 elementary school in Pasco School District. E.S. has been diagnosed with sensory processing
22 disorder and emotional delay. During the 2015–2016 and 2016–2017 school years, E.S. missed
23 12.5 days of school due to suspension or expulsion, was excluded from her normal classroom
24 more than 10 times, and was denied lunch time or recess more than 40 times. Pasco School
25 District resorted to these exclusionary disciplinary policies notwithstanding the connection
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1 between E.S.'s disability and her behaviors. E.S. alleges that she is being denied her right to a
2 basic education through discipline practices that exclude her from class time and deprive her of
3 instruction for behavior related to her disabilities. E.S. also alleges that these harms are a result
4 of Defendants' breach of their statutory duty to exercise adequate supervision and take
5 appropriate action regarding these discriminatory and exclusionary discipline practices.

6 **C. The Proposed Class Counsel**

7 Plaintiffs request that the Court appoint the American Civil Liberties Union of
8 Washington Foundation ("ACLU") as lead counsel. Paul, Weiss, Rifkind, Wharton & Garrison
9 LLP ("Paul, Weiss") is also counsel to the Plaintiffs. The ACLU and Paul, Weiss have extensive
10 experience in civil rights and class action litigation.

11 **IV. ARGUMENT**

12 **A. Class Action Standard**

13 Under Superior Court Civil Rule ("CR") 23, class action certification requires a
14 finding that the proposed class satisfies CR 23(a)'s requirements of numerosity, commonality,
15 typicality, and representativeness. Moreover, at least one of CR 23(b)'s requirements must be
16 satisfied. Where, as here, an injunctive class is sought, the relevant provision is CR 23(b)(2)'s
17 requirement that the "party opposing the class has acted or refused to act on grounds generally
18 applicable to the class, thereby making appropriate final injunctive relief or corresponding
19 declaratory relief with respect to the class as a whole."

20 The CR 23 requirements are liberally interpreted in favor of class actions and
21 certification. *Moeller v. Farmers Ins. Co of Wash.*, 173 Wn.2d 264, 278 (2011) (*en banc*).
22 While courts may conduct a rigorous analysis to determine whether the requirements of CR 23
23 have been met, where "class certification is sought at the early stages of litigation, courts
24 generally assume that the allegations in the pleadings are true and will not attempt to resolve
25 material factual disputes or make any inquiry into the merits of the claim." *Miller v. Farmer*
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1 *Bros. Co.*, 115 Wn. App. 815, 820 (2003). There is good reason for this policy in favor of
2 certification, as “[a] class is always subject to later modification or decertification by the trial
3 court, and hence the trial court should err in favor of certifying the class.” *Moeller*, 173 Wn.2d
4 at 278.

5 **B. Plaintiffs Satisfy the Requirements for Class Certification Under CR 23(a)**

6 The proposed Class satisfies CR 23(a)’s four elements of (1) numerosity, (2)
7 commonality, (3) typicality, and (4) adequacy of representation. This action involves thousands
8 of class members, all of whom are challenging Defendants’ failure to exercise appropriate
9 supervision and remedy the discriminatory application of exclusionary discipline against students
10 with special education needs in the Districts. Plaintiffs’ and the Class’ claims are based on the
11 same legal or remedial theory. All members of the proposed Class are students with special
12 education needs, and thus suffer common injury as a result of Defendants’ failure to supervise
13 and remedy. Finally, there are no issues with respect to the Plaintiffs’ ability to fairly and
14 adequately protect the interests of the Class.

15 **1. Plaintiffs Satisfy the Numerosity Requirement**

16 Numerosity requires that a class be sufficiently large such that “joinder of all
17 members is impracticable.” CR 23(a)(1). As a general principle, Washington courts have
18 observed that at least in the federal context, classes larger than 40 members create a “rebuttable
19 presumption” that the joinder is impracticable. *Miller*, 115 Wn. App. at 821.

20 Here, the Class significantly exceeds 40 members. While the Class is inherently
21 transitory² and thus difficult to precisely measure, it includes at least all students with disabilities
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23
24 ² The inherently transitory nature of the Class also creates a mootness exception should any of the
25 named Plaintiffs fall out of the Class definition (i.e., by enrolling at a school that is not part of the
26 Pasco or Yakima school districts). *See, e.g., Wade v. Kirkland*, 118 F.3d 667, 670 (9th Cir. 1997)
1 (holding that “inherently transitory” claims qualify for an “exception to mootness” because “there is a
constantly changing putative class that will become subject to [the challenged conduct]”); *Rivera v.*
Holder, 307 F.R.D. 539, 548 (W.D. Wash. 2015) (“[W]here a plaintiff’s claim becomes moot while

1 currently enrolled in the Pasco and Yakima school districts—which as of the 2015–2016 school
2 year included 5,469 students, as measured by students who received special education services.
3 In addition, the size of the Class is likely to be even larger, as this number does not factor in
4 other members of the proposed Class, such as students with disabilities who receive other
5 accommodations or students with undiagnosed disabilities.

6 **2. There Are Common Questions of Law and Fact**

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8 The second prerequisite for class certification is the existence of “questions of law
9 or fact common to the class.” CR 23(a)(2). The commonality requirement is a “low threshold,”
10 and “there need be only a single issue common to all members of the class” for it to be satisfied.
11 *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 320 (2002). Put another way, commonality
12 exists “when the alleged facts indicate that the defendant engaged in a ‘common course of
13 conduct in relation to all potential class members.’” *Pellino v. Brink’s Inc.*, 164 Wn. App. 668,
14 682 (2011) (quoting *Oda v. State*, 111 Wn. App. 79, 89 (2002)). Furthermore, the existence of
15 “different facts” and “different questions of law” do not necessarily defeat commonality, and
16 commonality may be satisfied so long as the class is bound by a “common nucleus of operative
17 facts.” *Brown v. Brown*, 6 Wn. App. 249, 255 (1971); *see also Pellino*, 164 Wn. App. at 683
18 (“CR 23 does not require that the shared questions of law or fact be identical as to each
19 individual class member.”).

20 The commonality requirement is satisfied here. This lawsuit raises numerous
21 common questions of law, including, but not limited to:

- 22 • Whether Defendants’ conduct constituted a breach of their statutory duty to
23 monitor and remedy the provision of an appropriate education to students with
24 disabilities in the Districts under RCW 28A.155.020;
- 25 • Whether, as a result of Defendants’ conduct, Plaintiffs were denied their right to
26 an education under Article IX, Section 1 of the Washington State Constitution;

1 she seeks to certify a class, her action will not be rendered moot if her claims are ‘inherently
transitory’ . . . as similarly-situated class members would have the same complaint.”).

- 1
- Whether Defendants’ conduct constitutes a breach of their duty under Article IX, Section 1 of the Washington State Constitution;
 - Whether Defendants’ conduct constitutes a violation of RCW 28A.642’s prohibition against discrimination and the Washington Law Against Discrimination, RCW 49.60.10 et seq.
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5 Resolving these questions of law will also require the finding of multiple
6 questions of fact, including, but not limited to:

- Whether the Districts administer exclusionary discipline in a disproportionate and discriminatory manner against students with disabilities;
 - Whether Defendants were aware of any discriminatory disciplinary policies against students with disabilities, including whether they monitored disciplinary practices and whether they received complaints regarding disciplinary practices;
 - Whether Defendants provided satisfactory training for administrators, teachers, and paraprofessionals in the Districts regarding alternative forms of non-exclusionary discipline;
 - Whether Defendants exercised any other supervision or oversight to address the Districts’ disproportionate disciplinary practices against students with disabilities.
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15 In sum, the Defendants’ alleged failure to exercise appropriate supervision and
16 oversight of disciplinary practices in the Districts raises common questions of law and fact that
17 are applicable to Plaintiffs and the proposed Class.

18 **3. Plaintiffs’ Claims Are Typical of the Claims of the Proposed Class**

19 Typicality is satisfied if a claim “arises from the same event or practice or course
20 of conduct that gives rise to the claims of other class members, and if his or her claims are based
21 on the same legal theory.” *Pellino*, 164 Wn. App at 684 (quoting *Smith*, 113 Wn. App. at 320).
22 Even if some variation in circumstances exists within the proposed Class, typicality may still be
23 satisfied where the defendant is engaged in a “‘common course of conduct’ in relation to all
24 potential class members.” *King v. Riveland*, 125 Wn.2d 500, 519 (1994) (quoting *Brown*, 6 Wn.
25 App. at 255). In addition, multiple courts have certified classes of students with disabilities
26 challenging the systemic failures of school districts to comply with their statutory obligations—
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1 and in so doing, found typicality satisfied because the systemic failures created a common course
2 of conduct that gave rise to claims within the class predicated on the same legal theory. *See, e.g.,*
3 *M.A. ex rel. E.S. v. Newark Public Schools*, 2009 WL 4799291, at *1, 8 (D.N.J. Dec. 7, 2009)
4 (certifying class of “all present and future children . . . residing within the Newark public school
5 district, who are or may be eligible for special education and related services” seeking the
6 enjoinder of a defendant school district to provide class members with an “appropriate
7 education” as required by federal law); *Gaskin v. Comm. of Pa.*, 1995 WL 355346, at *1, 3 (E.D.
8 Pa. June 12, 1995) (certifying class of “all present and future school age students with disabilities
9 in the Commonwealth of Pennsylvania” who alleged that the defendant educational agency had
10 “failed to monitor local school districts to ensure that they comply with various provisions of
11 [federal law regarding students with disabilities]”).

12 Here, the Plaintiffs’ claims are typical of the proposed Class. Plaintiffs are
13 challenging a common course of conduct that affects all members of the proposed Class—the
14 failure to exercise appropriate supervision and remedy a systemic and discriminatory application
15 of exclusionary discipline to students with disabilities who require special education. These
16 claims are also grounded in common legal theories—that Defendants’ failure to supervise and
17 remedy was a breach of their statutory duties that deprived Plaintiffs and the proposed Class of
18 their right to an education—and thus are typical of those of the Class. *See, e.g., M.A.*, 2009 WL
19 4799291, at *8 (finding typicality requirement was satisfied where proposed class of disabled
20 students alleged systemic failure to provide an appropriate education); *Gaskin*, 1995 WL 355346,
21 at *4 (same).

22 **4. The Plaintiffs and Their Counsel will Fairly and Adequately Protect**
23 **the Interests of the Proposed Class**

24 The adequacy requirement is satisfied if the plaintiffs are (1) represented by
25 qualified and competent counsel, and (2) do not have interests that are antagonistic to those of
26 absent class members. *Trimble v. Holmes Harbor Sewer District*, 2003 WL 23100273, at *5
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1 (Wash. Super. Ct. Oct. 6, 2003).

2 Plaintiffs have retained a competent and capable team of attorneys with
3 significant experience in class actions and matters involving civil rights. Both the ACLU and
4 Paul, Weiss have extensive experience litigating complex federal civil rights cases and serving as
5 class counsel. *See* Ex. A (Declaration of Emily Chiang); Ex B (Declaration of Karen King).
6 Plaintiffs' counsel have also worked extensively to investigate the claims, are dedicated to
7 prosecuting the claims of the Class, and have the resources to do so.

8 Plaintiffs' claims are coextensive with, and not antagonistic to, the claims asserted
9 on behalf of the proposed Class. Plaintiffs seek to ensure that Defendants fulfill their statutory
10 duties to ensure that students with disabilities are provided with their constitutional right to an
11 education and have demonstrated a commitment to prosecuting this action vigorously on behalf
12 of the Class.

13 **C. Plaintiffs Satisfy the Requirements for Class Certification Under CR**
14 **23(b)(2).**

15 Plaintiffs seek certification of an injunctive class under CR 23(b)(2), which also
16 requires that they show—in addition the CR 23(a) requirements—that “the defendant has acted
17 or refused to act or failed to perform a legal duty on grounds generally applicable to the class.”
18 *Sitton v. State Farm Mut. Auto. Ins. Co.*, 116 Wn. App. 245, 251 (2003). When seeking
19 certification of an injunctive class, “[t]he fact that some class members may have suffered no
20 injury or different injuries from the challenged practice does not prevent [a] class from meeting
21 the requirements of Rule 23(b)(2).” *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2009).
22 Rather, “it is sufficient . . . [that] class members complain of a pattern or practice that is
23 generally applicable to the class as a whole.” *Id.*

24 Here, injunctive and declaratory relief would apply equally to the members of the
25 Class. In addition, the likelihood that not all members of the proposed class have been subject to
26 exclusionary discipline is not a bar to certification of a CR 23(b)(2) class. The policies and
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1 practices of the Districts create a pattern that is “generally applicable” to the proposed Class of
2 students with disabilities in those districts and thus plainly satisfy the *Rodriguez* standard. *Id.*

3 **V. CONCLUSION**

4 For the foregoing reasons, Plaintiffs respectfully request that the Court certify the
5 proposed Class under CR 23(b)(2); A.D., A.P., G.J., T.R., and E.S. as the representatives of the
6 Class; and appoint the American Civil Liberties Union of Washington Foundation and Paul,
7 Weiss, Rifkind, Wharton & Garrison LLP as counsel for the Class.

8
9 DATED this 8th day of December, 2017.

10
11 Respectfully submitted,

12 AMERICAN CIVIL LIBERTIES UNION OF
13 WASHINGTON FOUNDATION

14 By: /s/Emily Chiang

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EXHIBIT A

1 Expedite
2 No Hearing Set
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5 Time: 9AM
6 Judge: Lanese

THE HONORABLE CHRISTOPHER LANESE

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8 **SUPERIOR COURT OF THE STATE OF WASHINGTON**
9 **FOR THURSTON COUNTY**

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21 OFFICE OF SUPERINTENDENT OF PUBLIC
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23 official capacity as SUPERINTENDENT OF
24 PUBLIC INSTRUCTION,

25 Defendants.

Case No. 17-2-03293-34

DECLARATION OF EMILY CHIANG IN
SUPPORT OF PLAINTIFFS' MOTION
FOR CLASS CERTIFICATION

26 I, Emily Chiang, declare as follows:

1. I am the Legal Director of the American Civil Liberties Union of Washington
Foundation ("ACLU-WA") and co-counsel for Plaintiffs in

CHIANG DECLARATION IN SUPPORT OF
PLAINTIFFS' MOTION FOR CLASS CERT. – 1

AMERICAN CIVIL LIBERTIES UNION OF
WASHINGTON FOUNDATION
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1 this case. I have knowledge of the facts set forth herein and could testify competently to them if
2 called upon to do so.

3 2. ACLU-WA is the state affiliate of the American Civil Liberties Union
4 Foundation, a national civil rights and civil liberties organization. ACLU-WA has significant
5 experience with complex civil litigation, including class actions in federal and state courts.
6 ACLU-WA has obtained injunctive relief for class clients in a wide variety of matters, including
7 *Fuentes v. Benton County*, No. 15-2-02976-1 (Yakima Sup. Ct. Nov. 14, 2016) (settlement
8 approved in class action challenging unconstitutional system for collecting court-imposed debts);
9 *Trueblood v. Dep't of Soc. and Health Servs.*, No. C14-1178MJP, 2016 WL 4268933 (W.D.
10 Wash. Aug. 15, 2016) (judgment in class action finding that Washington's systems for
11 competency restoration violate due process); *Khoury v Asher*, 3 F. Supp. 3d 877 (W.D. Wash.
12 2014), *aff'd* No. 14-35482, 2016 WL 4137642 (9th Cir. 2016) (judgment in class action finding
13 mandatory detention of certain individuals in removal proceedings unlawful); *Wilbur v. City of*
14 *Mount Vernon*, 989 F. Supp. 2d 1122 (W.D. Wash. 2013) (judgment in class action finding
15 violation of indigent accused Sixth Amendment right to counsel); *Wilson v. Rentgrow, Inc.*, No.
16 13-2-15514-1 (King Cty. Super. Ct. 2013) (class action challenging tenant screening company
17 violations of state credit reporting laws resolved by settlement); and *Sanchez v. U.S. Office of*
18 *Border Patrol*, No. 12-5378BHS (W.D. Wash. Aug. 27, 2012) (class action involving illegal
19 vehicle stops by Border Patrol resolved by settlement).

20 3. I have devoted the majority of my career to public policy reform through
21 litigation and other advocacy. I am admitted to the Washington State Bar Association, the United
22 States District Courts for the Western and Eastern Districts of Washington, and the United States
23 Court of Appeals for the Ninth Circuit.

24 4. I received a B.A., magna cum laude, from Yale University in 1998. In 2001, I
25 received my J.D., cum laude, from Harvard Law School, where I was a Primary Editor on the
26 *Harvard Law Review*.

1
2 5. After law school, I was an associate at Cravath, Swaine & Moore LLP
3 (“Cravath”), where I worked on complex civil litigations including class actions and where I was
4 the lead associate for the firm in the groundbreaking case of *White v. Martz*, No. C DV-2002-133
5 (Mont. filed Feb. 14, 2002)—the first class action lawsuit ever to be filed against a state for
6 failure to provide adequate public defense representation. That case eventually resulted in
7 statewide public defense reform in Montana.

8
9 6. After leaving Cravath, I became Associate Counsel in the Poverty Program at the
10 Brennan Center for Justice at N.Y.U. School of Law.

11 7. In 2006, I joined the Racial Justice Program of the ACLU’s National Legal
12 Department as a Staff Attorney. At ACLU National, I litigated and conducted advocacy to
13 address violations of the United States and state constitutions, primarily in the areas of indigent
14 defense reform and juvenile justice. For example, I was lead counsel in *Harris v. Atlanta Indep.*
15 *Sch. Dist.*, 1:08-cv-1435-BBM (N.D. Ga. filed Apr. 16, 2008), a class action that succeeded in
16 getting a legal ruling that a private company is a state actor when running a public school.

17
18 8. More recently, I was an Associate Professor of Law at the S.J. Quinney College
19 of Law at the University of Utah, where I taught Constitutional Law; a seminar on Equality,
20 Race, and the Law; and created and directed a public policy clinic. While at the law school, I
21 remained involved in civil rights litigation by helping the Utah ACLU affiliate to prepare a
22 public defense reform class action and by engaging in advocacy designed to end the state’s
23 school-to-prison pipeline. I published a number of law review articles related to public policy
24 reform and received multiple awards from the University in recognition of my civil rights work.
25
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1 9. Since my arrival at the ACLU-WA in September 2015, I have obtained relief for
2 clients in matters involving due process, discrimination, and access to healthcare, including
3 *Fuentes v. Benton County*, No. 15-2-02976-1 (Super. Ct. Yakima Cty. Nov. 14, 2016) (approving
4 settlement of class action challenging unconstitutional system for collecting court-imposed
5 debts); *Trueblood v. Dep't of Soc. and Health Servs.*, No. C14-1178MJP, 2016 WL 4268933
6 (W.D. Wash. Aug. 15, 2016) (ordering the state to provide mentally disabled with timely
7 competency evaluation and restoration services); and *Coffey v. Public Hospital Dist. No. 1*, No.
8 15-2-00217-4 (Super. Ct. Skagit Cty. June 20, 2016) (holding the Reproductive Privacy Act
9 requires public hospitals to provide abortion services that are the substantial equivalent of the
10 maternity care services provided).

11
12 10. John Midgley is a senior staff attorney at the ACLU of Washington. He graduated
13 with a J.D. from University of Michigan School of Law in 1974 and is admitted to the
14 Washington State Bar Association, the United States District Courts for the Eastern and Western
15 Districts of Washington, the U.S. Court of Appeals for the Ninth Circuit, and the U.S. Supreme
16 Court.

17
18 11. After law school, Mr. Midgley worked for Evergreen Legal Services, focusing on
19 the rights of prisoners, senior citizens, and juveniles as an intern and staff attorney between 1975
20 and 1983 and again between 1989 and 1996. He spent five years in private practice at the law
21 firm Smith, Midgley & Pumplin with a focus on civil rights and criminal justice. He went on to
22 work for Columbia Legal Services as a Regional Director, Statewide Advocacy Coordinator and
23 Acting Deputy Director, Executive Director, and Advocacy Director between 1996 and 2015.
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1 12. Mr. Midgley has extensive complex litigation experience in both state and federal
2 cases, including, but not limited to *Braam v. State of Washington*, 150 Wn.2d 689 (2004) (class
3 action establishing constitutional rights of foster children; resulted in comprehensive reform
4 settlement); *Hammer v. King County*, No. C-89-521-R (W.D. Wash. filed 1989) (class action
5 conditions case regarding King County Jail in Seattle, settled by consent decree); *Collins v.*
6 *Thompson*, 679 F.2d 168 (9th Cir. 1982) (class action prison overcrowding suit; settled by
7 consent decree); *Herrera v. Pierce County*, No. C-95-5025 (W.D. Wash. filed 1995) (class action
8 conditions case regarding Pierce County Detention and Corrections Center, settled by consent
9 orders); *Lopez v. Riveland*, No. C-93-1030 (W.D. Wash. filed 1993) (challenge to lack of
10 Spanish language translation services for prisoners held by the Washington Department of
11 Corrections; resulted in settlement requiring translation services in all state prisons); *Hoptowit v.*
12 *Ray*, 682 F.2d 1237 (9th Cir. 1982) (class action omnibus prison conditions suit).

13
14 13. All counsel have been involved in the preparation and investigation of this lawsuit
15 and are familiar with the facts. We will zealously represent the Plaintiffs and the proposed Class.
16 I declare under penalty of perjury under the laws of the state of Washington that the foregoing is
17 true and correct.
18

19 EXECUTED at Seattle, Washington on December 8th, 2017.

20
21 By: /s/Emily Chiang

22 Emily Chiang, WSBA No. 50517
23 ACLU of Washington Foundation
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EXHIBIT B

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THE HONORABLE CHRISTOPHER LANESE

Expedite
 No Hearing Set
 Hearing Set
Date: 2/2/2018
Time: 9AM
Judge: Lanese

**SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY**

A.D., a minor, by and through his mother, Christina Madison; G.J., a minor, by and through his mother, Krystal Jenson; T.R., a minor, by and through her mother, Michele Forrester; A.P., a minor by and through his mother, Devon Parks; E.S., a minor by and through her mother, Jane Doe; individually and on behalf of all others similarly situated,

Case No. 17-2-03293-34

DECLARATION OF KAREN R. KING IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Plaintiffs,

v.

OFFICE OF SUPERINTENDENT OF PUBLIC INSTRUCTION; CHRIS REYKDAL, in his official capacity as SUPERINTENDENT OF PUBLIC INSTRUCTION,

Defendants.

I, Karen R. King, declare as follows:

1. I am Counsel at Paul, Weiss, Rifkind, Wharton & Garrison LLP ("Paul, Weiss"), and co-counsel for the Plaintiffs in the above-captioned matter. I have seventeen years'

1 experience representing clients in various complex litigations, including numerous class actions.

2 2. I also have represented plaintiffs in numerous civil rights actions. *See, e.g.,*
3 *Caballero v. Senior Health Partners, Inc.*, No. 16-cv-00326 (E.D.N.Y filed Jan. 21, 2016)
4 (representing a class of individuals whose Medicaid-funded home care services were unlawfully
5 reduced); *Port Auth. Police Asian Jade Soc. of N.Y. & N.J. Inc. v. Port Auth. of N.Y. & N.J.*, No.
6 05-cv-3835 (S.D.N.Y. filed Apr. 15, 2005) (representing Port Authority police officers who
7 suffered from discriminatory employment practices).

8
9 3. Paul, Weiss is a law firm that employs over 900 attorneys in eight offices around
10 the world. Paul, Weiss has represented clients in hundreds of class actions and complex
11 litigation matters in courts across the country, including in civil rights class actions. *See, e.g.,*
12 *Davis v. City of New York*, No. 10-cv-0699 (S.D.N.Y. filed Jan. 28, 2010) (representing a class
13 of more than 400,000 New York City Housing Authority (“NYCHA”) residents and guests in a
14 civil rights action challenging New York City Police Department and NYCHA policies and
15 practices regarding trespass enforcement); *Furlow v. Belmar*, No. 4:16-cv-00254 (E.D. Mo. Filed
16 Feb. 24, 2016) (representing purported class in an action challenging the St. Louis County Police
17 Department’s use of an unlawful “wanted for questioning” procedure); *Disability Advocates, Inc.*
18 *v. Cuomo*, No. 03-CV-3209 (E.D.N.Y. filed July 1, 2003) (representing Disability Advocates,
19 Inc. to bring an action on behalf of individuals with mental illness asserting violations of the
20 Americans with Disabilities Act).

21
22 4. Paul, Weiss attorneys have devoted substantial time to investigating and gathering
23 facts in connection with this action. Paul, Weiss is committed to investing the requisite time and
24 resources to aggressively prosecute this matter and achieve meaningful relief for the named
25
26

1 plaintiffs and the class of disabled students who they represent. Paul, Weiss is well equipped to
2 handle the demands of a complex litigation such as this one.

3 I declare under penalty of perjury under the laws of the state of Washington that the
4 foregoing is true and correct.
5

6
7 EXECUTED at New York, New York this 8th day of December, 2017.

8 PAUL, WEISS, RIFKIND, WHARTON &
9 GARRISON LLP

10 By: /s/ Karen R. King
11 Karen R. King, admitted *pro hac vice*
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Expedite
 No Hearing Set
 Hearing Set
Date: 2/2/2018
Time: 9AM
Judge: Lanese

THE HONORABLE CHRISTOPHER LANESE

**IN THE SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY**

A.D., a minor, by and through his mother, Christina Madison; G.J., a minor, by and through his mother, Krystal Jenson; T.R., a minor, by and through her mother Michele Forrester; A.P., a minor, by and through his mother Devon Parks; E.S., a minor, by and through her mother, Jane Doe; individually and on behalf of others similarly situated,

Case No. 17-2-03293-34

Certificate of Service

Plaintiffs,

v.

OFFICE OF SUPERINTENDENT OF PUBLIC INSTRUCTION; CHRIS REYKDAL, in his official capacity as SUPERINTENDENT OF PUBLIC INSTRUCTION,

Defendants.

On December 8th, 2017, I caused foregoing Motion for Class Certification, Declaration of Emily Chiang, and Declaration of Karen King to be served on counsel for Defendants via e-mail per an e-service agreement.

1 Counsel for Defendants:

2 Peter J. Helmberger, Senior Counsel
3 *PeterH@atg.wa.gov*

4 Jean M. Wilkinson, Senior Counsel
5 *JeanW@atg.wa.gov*

6 Diane Hoosier, Paralegal
7 *DianePI@atg.wa.gov*

8 Ali Hollenbeck, Legal Assistant
9 *AliB@atg.wa.gov*

10 Electronic Mailing Inbox
11 *ComCEC@atg.wa.gov*

12 **I declare under penalty of perjury under the laws of the State of Washington that the**
13 **foregoing is true and correct.**

14 EXECUTED at Seattle, Washington on December 8th, 2017.

15 By: /s/Emily Chiang

16 Emily Chiang, WSBA No. 50517
17 ACLU of Washington Foundation
18 901 5th Avenue, Suite 630
19 Seattle, Washington 98164
20 Tel: (206) 624-2184
21 echiang@aclu-wa.org