

1  Expedite  
2  No Hearing Set  
3  Hearing Set  
4 Date: April 26, 2019  
5 Time: 9:00am  
6 Judge: The Honorable Christopher Lanese

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

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

17 Plaintiffs,

18 v.

19 OFFICE OF SUPERINTENDENT OF PUBLIC  
20 INSTRUCTION; CHRIS REYKDAL, in his  
21 official capacity as SUPERINTENDENT OF  
22 PUBLIC INSTRUCTION,

23 Defendants.

No. 17-2-03293-34

**PLAINTIFFS' CROSS MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

24 **INTRODUCTION**

25 This case arises from the systematic deprivation of educational opportunity for students  
26 with disabilities in the Pasco and Yakima school districts (the "Districts"). After 15 months of  
discovery, there is no factual dispute that these students are removed from their classrooms at  
unusually high rates. There is no factual dispute that the rate at which they are removed from the  
classroom exceeds the rate for non-disabled children. And there is no factual dispute that these  
frequent and disproportionate classroom removals harm students with disabilities, denying them

1 the opportunity to obtain essential skills and knowledge. This pattern of exclusion (i) deprives  
2 students with disabilities, including Plaintiffs, of their positive constitutional right to educational  
3 opportunity under Article IX, Section 1 of the Washington State Constitution (“Article IX”), and  
4 (ii) violates their civil right to be free from discrimination in public schools.

5           There is no legal dispute that Defendants, the Office of Superintendent of Public  
6 Instruction (OSPI) and Superintendent Chris Reykdal, are bound by both Article IX and state  
7 anti-discrimination laws. Indeed, there is no legal dispute that Defendants have both  
8 constitutional and statutory duties to monitor and supervise school districts in order to ensure  
9 educational opportunity for all Washington students.  
10

11           But the undisputed record establishes that Defendants have failed to discharge these  
12 duties by implementing a compliance system more focused on the generation of paperwork than  
13 in requiring compliance with the law. The record reflects a process that has ignored (or failed  
14 even to notice) red flags like school districts openly re-categorizing discipline as non-discipline;  
15 a process that permits districts themselves to decide what data to collect, how to analyze that  
16 data, and whether to conclude on the basis of that data there is even disproportionality; and a  
17 process that has proven time and again to be ineffectual at protecting the rights of disabled  
18 students.  
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20           Defendants’ failures have caused serious irreparable harm to Plaintiffs, who have already  
21 been deprived of irreplaceable educational opportunity. Plaintiffs are entitled to partial summary  
22 judgment so that proper injunctive relief can be fashioned to prevent additional imminent injury.  
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1 **I. STATEMENT OF FACTS**

2 **A. Students with disabilities are being excessively disciplined and deprived of**  
3 **their educational opportunities**

4 There is no dispute that students with disabilities<sup>1</sup> are disciplined frequently, and at rates  
5 far exceeding those of students without disabilities. *See, e.g.*, Ex. 1 (Hennessey Tr.)<sup>2</sup> at 102:2–6  
6 (agreeing that “students with disabilities are disproportionately impacted by the use of  
7 suspensions and expulsions”); Ex. 2 (Meierbachtol Tr.) at 36:14–19, 118:8–119:23, 122:23–  
8 123:22, 124:21–125:6; Ex. 3 (Superintendent Reykdal explaining that “[t]he data is clear.  
9 Students of color and students with disabilities are disciplined at disproportionate rates”);  
10 TeamChild Decl. ¶¶ 14–17; *see also* Ex. 4 (May Tr.) at 129:7–12; Ex. 5 (Lynch Tr.) at 50:11–25;  
11 Ex. 6 (Albertson Tr.) at 107:20–108:22. Statewide, students with disabilities have been excluded  
12 from the classroom for over 75,000 days over the 2016<sup>3</sup> school year. Whitaker Decl. ¶ 9.  
13 Exclusions of students with disabilities accounted for 31% of all lost school days in this period—  
14 despite this cohort comprising merely 12% of all Washington students. *Id.* ¶ 9.

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16 In the Pasco School District (“Pasco”) alone, students with disabilities were excluded  
17 from the classroom for 1,332 days over the 2015–16 school year, accounting for 29% of all  
18 school days missed. *Id.* ¶ 10. And in the Yakima School District (“Yakima”), students with  
19 disabilities missed 2,427 days over the same period, accounting for 30% of all school days  
20 missed. *Id.* ¶ 11. The five Plaintiffs themselves have missed at least 176 days of instructional  
21 time—the equivalent of approximately one school year—due to formally recorded suspensions  
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25 <sup>1</sup> “Students with disabilities” refers to students receiving services under Section 504 of the Rehabilitation Act and  
the Individuals with Disabilities Education Act, as well as those who are covered by the “Child Find” provisions  
of the IDEA.

26 <sup>2</sup> “Ex.” refers to exhibits to the Declaration of Alex Hyman filed contemporaneously herewith.

<sup>3</sup> A school year refers to the end of the relevant year. For example, the 2016 school year refers to the 2015–16  
school year.

1 and expulsions, which does not include additional times when they were excluded from class in  
2 other ways, *e.g.*, being sent home early. *See* Madison Decl. ¶¶ 12, 15, 20; Parks Decl. ¶¶ 8, 12,  
3 17; Forrester Decl. ¶ 7; Doe Decl. ¶ 14.

4 Data published by the Defendants<sup>4</sup> illuminate the problem. In Pasco, students receiving  
5 special education services were *more than twice as likely* to suffer formal exclusionary discipline  
6 (“removal”) than general education students during the 2017 school year, and Section 504  
7 students were 1.38 times more likely to be excluded from the classroom. Krezmien Decl. ¶ 20.  
8 During the same time period, special education students in Yakima were 1.34 times more likely  
9 to be removed than their peers, while students on Section 504 plans were almost *three times as*  
10 *likely to be excluded*. *Id.* ¶ 21. Because Yakima does not report the exclusions of special  
11 education students that are determined to be a manifestation of a student’s disabilities as  
12 disciplinary removals, Section 504 removals more closely approximate the actual disciplinary  
13 rates of students with disabilities in that district. *See* Ex. 7 (Coe Tr.) at 97:10–24. The  
14 disparities observed in Yakima and Pasco are representative of the disproportionate rates of  
15 discipline that students with disabilities are subjected to throughout the State. *See* Krezmien  
16 Decl. ¶ 29, Ex. A (T.9).

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19 These disparities are even more pronounced within the individual schools in the Districts.  
20 Special education students are at substantially higher risk of being removed from the classroom  
21 than general education students at the majority of schools in Pasco and Yakima. *See id.* ¶¶ 33–  
22 34. Elementary school special education students faced some of the highest removal risk rates.  
23 In Pasco, special education students at Edwin Markham Elementary were excluded at rates *ten*  
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26 <sup>4</sup> School districts regularly report disciplinary data to OSPI, which then publishes disaggregated data by student groups, including special education and students with Section 504 status. RCW 28A.600.460(5); WAC 392-190-076(2)(b).

1 *times* that of their peers during the 2018 school year. *Id.* Ex. B. At Emerson and Ruth  
2 Livingston Elementary, special education students were excluded at rates *eight times* that of their  
3 peers in the 2017 school year. *See id.* Similarly, in Yakima, students at Nob Hill Elementary  
4 School were excluded at rates more than *eight times* that of their peers in the 2016 school year.  
5 *See id.* Ex. C. The substantial variation in the disproportionate disciplinary removal of special  
6 education students *between schools* demonstrates that the risk that these students will be  
7 removed is determined in large part by the school they happen to attend. *See also id.* ¶ 35  
8 (noting that the difference in discipline rates among districts shows inequity suffered by students  
9 “based on where they happen to reside”).  
10

11           Unfortunately, the above data underrepresents the lost instructional time because it only  
12 accounts for formal discipline, and does not include informal discipline and other exclusionary  
13 practices. For example, a school’s request to a parent to pick up her child early would not be  
14 accounted for in the data—and requests for early pick-ups are rampant. *See* Madison Decl. ¶ 20;  
15 Parks Decl. ¶ 8; Forrester Decl. ¶¶ 5–7; Jenson Decl. ¶¶ 10–11; Doe Decl. ¶ 14; Gordon Decl. ¶  
16 6; Wampole Decl. ¶¶ 4, 6; TeamChild Decl. ¶¶ 8, 11; *see also* Ex. 8 (Weaver-Randall Tr.) at  
17 73:10–17 (OSPI’s data reporting system does not track early pickups); Ex. 9 at 11  
18 (acknowledging there is “no mechanism” to monitor “district policies, procedures, and practices  
19 with regard to early pick-ups of students with disabilities”). Also unaccounted for are the  
20 practices prevalent in certain schools of sending students with disabilities to “time outs,”  
21 isolation rooms, and other spaces outside their normal classrooms where they are denied access  
22 to instruction and the opportunity to interact with their teachers and peers. Parks Decl. ¶ 9;  
23 Forrester Decl. ¶¶ 5–7; Jenson Decl. ¶¶ 10–11; Doe Decl. ¶ 14. For these reasons, the  
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1 Defendants' current monitoring and supervision systems, *see* Sections I.C, IV.C, *infra*, make it  
2 impossible to ascertain the true severity of the deprivation.

3 **B. Removal from the classroom is harmful to students**

4 Defendants acknowledge—as they must—that classroom removal harms students.<sup>5</sup>

5 Materials published by OSPI itself confirm that “out-of-school suspensions are linked to course  
6 failure, lower attendance, and dropping out—as well as much lower school-wide academic  
7 achievement.” Ex. 12 at 12–13. A 2015 presentation given to Yakima by OSPI detailed a  
8 number of potentially harmful effects of exclusionary discipline, including the failure to  
9 “become productive citizens”; the risk that “[s]tudents already behind” will “get further behind”;  
10 and that excluded students “[l]ack social development of how to function in class.” Ex. 13 at –  
11 ’793; *see also* TeamChild Decl. ¶ 14 (exclusionary discipline results in “academic and social  
12 disengagement”); Ex. 10 at 16 (noting concern that exclusionary discipline practices may further  
13 exacerbate the achievement gap between special education students and their non-disabled  
14 peers). Defendant Reykdal has also acknowledged the harmful effects of classroom removal on  
15 students with disabilities. *See* Ex. 3 (“Each day a student misses class for disciplinary purposes  
16 is a day they miss learning.”); Ex. 14 (stating that “the way districts and schools have been  
17 operating has unintentionally created a system that’s biased, racist and hurts students struggling  
18 with disabilities”); *see also* Krezmien Decl. ¶¶ 7–10, 35 (classroom removals deprive students of  
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22 <sup>5</sup> This conclusion is supported by current academic literature. *See* Ex. 10 at 16–17 (“One of the most consistent  
23 findings in modern educational research is the correlation between instructional time and academic achievement  
24 . . . [A] disciplinary system favoring exclusionary practices for [special education] students accelerates a  
25 vicious cycle of academic struggle, leading to problematic classroom behavior, and ultimately continued  
26 removal from the classroom and further instruction.”) (internal citations omitted); Ex. 11 (“Loss of classroom  
instruction time damages student performance . . . New research shows that higher suspension rates are closely  
correlated with higher dropout and delinquency rates, and that they have tremendous economic costs for the  
suspended students, as well as for society as a whole.”) (internal citations omitted); *see also* Krezmien Decl. ¶¶  
7–12; TeamChild Decl. ¶¶ 20–23.

1 the essential knowledge and skills required for grade promotion, success on high stakes  
2 assessments, and graduation).

3 **C. The Plaintiffs**

4 The experiences of Plaintiffs—and those of the putative class of similarly situated  
5 students they seek to represent<sup>6</sup>—are illustrative of the exclusionary practices<sup>7</sup> rampant  
6 throughout the Districts.

7 **A.D.** Plaintiff A.D. is a 14-year old boy with disabilities in the ninth grade, who is  
8 currently attending Eisenhower High School in the Yakima School District. Madison Decl. ¶ 3.  
9 A.D. has received special education services since the fourth grade, and has multiple disabilities  
10 including Autism Spectrum Disorder, ADHD, Oppositional Defiant Disorder, and anxiety. *Id.*  
11 ¶¶ 4, 9. For several years, A.D. has been excluded from classroom learning, impairing his  
12 opportunity and ability to receive an education. During the 2016, 2017, and 2018 school years,  
13 A.D. was excluded from class for more than 100 days, including 71 days of formal suspension  
14 and multiple instances of being sent home early that did not result in formal suspensions. *Id.* ¶  
15 15. In the 2019 school year, A.D. has been suspended or expelled on at least three occasions for  
16 at least 10 days for behaviors related to his disabilities. *Id.* ¶ 20. During his exclusions, he has  
17 received minimal compensatory education and instruction. *Id.* ¶¶ 21–22. As a result of these  
18 exclusions, A.D.’s academic performance in reading and math has suffered, and his mother fears  
19 that discipline has stigmatized him at school. *Id.* ¶¶ 23, 25. A.D.’s mother submitted a petition  
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25 <sup>6</sup> Because Defendants indicated they intended to seek further discovery on class certification, the parties agreed to  
26 continue Plaintiffs’ Motion for Class Certification until after the close of fact discovery. *See* Ex. 15 at 1-2.

<sup>7</sup> The term “exclusionary practices” encompasses formal recorded discipline as well as unrecorded informal  
exclusionary practices that remove students from their classrooms, as described in Section I.A, *supra*.

1 to OSPI in 2018 expressing concern about the discipline of students with disabilities in the  
2 Yakima School District, but received no response. *Id.* ¶ 27.<sup>8</sup>

3       **A.P.** Plaintiff A.P. is a ten-year-old boy with disabilities in the third grade, who is  
4 currently attending Ridgeview Elementary School in the Yakima School District. Parks Decl. ¶  
5 2. A.P. has qualified for special education services since he was three years old, and has  
6 multiple disabilities, including developmental delays and Autism Spectrum Disorder. *Id.* ¶ 3.  
7 A.P. was so frequently and consistently excluded from his classroom (26.5 days throughout the  
8 2016 and 2018 school years) that his mother was forced to withdraw him from the Yakima  
9 School District for much of the 2016 school year, and virtually all of the 2017 and 2018 school  
10 years. *Id.* ¶¶ 8, 12, 15. A.P. reenrolled in the Yakima School District for the 2019 school year,  
11 during which he has been suspended for more than 28 days thus far due to behavior related to his  
12 disabilities. *Id.* ¶¶ 17–18.

14       **G.J.** Plaintiff G.J. is an 11-year-old boy with disabilities in the fifth grade, who is  
15 currently enrolled at Maya Angelou Elementary School in the Pasco School District. G.J. has  
16 multiple disabilities, including autism, ADHD, social pragmatic disorder, and mood disorder,  
17 and has received special education services since he was three years old. Jenson Decl. ¶¶ 2–3.  
18 During the 2016, 2017, and 2018 school years, G.J. was sent home early from school on at least  
19 two occasions that did not result in formal suspensions, and was excluded from his normal  
20 classroom in other areas of the school (*e.g.*, confined to the time out room or the office) on at  
21 least 15 occasions. *Id.* ¶¶ 10–11; *see also* Ex. 17 (Jenson Tr.) at 22:12–13. During these  
22 exclusions, G.J. did not receive compensatory education for lost class time. Jenson Decl. ¶ 11.  
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25 <sup>8</sup> Separately, Christina Madison, A.D.’s parent and guardian, filed a due process complaint against the Yakima  
26 School District for violation of the Individuals with Disabilities Education Act, which was resolved on  
November 2, 2018. Ex. 16. Nonetheless, the Yakima School District continues to exclude A.D. from his  
classroom. Madison Decl. ¶¶ 19–20.



1 Pasco’s Special Education Director expressed concerns that the behaviors leading to G.J.’s  
2 discipline “are probably very directly related to his disability,” and stated that G.J. “shouldn’t  
3 have the same progressive discipline as another student.” Ex. 18 at 1. According to G.J.’s  
4 mother, these exclusions impeded G.J.’s educational progress, and she ultimately decided to hold  
5 him back in third grade. Ex. 17 (Jenson Tr.) at 22:12–19, 38:20–23.

6 **E.S.** Plaintiff E.S. is a ten-year-old girl with disabilities in the fifth grade, who is  
7 currently enrolled at McGee Elementary School in the Pasco School District. Doe Decl. ¶ 3.  
8 E.S. has been diagnosed with ADHD and autism, and has received special education services  
9 since she was seven years. *Id.* ¶ 5. During the 2016, 2017, and 2018 school years, E.S. was  
10 formally suspended or expelled for 12.5 days, excluded from her normal classroom in other areas  
11 of the school more than 10 times, and informally disciplined more than 40 times. *Id.* ¶ 14. E.S.  
12 never received compensatory education for the class time that she missed due to her expulsions.  
13 *Id.* ¶ 15.

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15 **E.S.’s** mother sought assistance from OSPI and Superintendent Reykdal directly by  
16 email, expressing concern with the exclusionary practices inflicted on her daughter and the  
17 impact they had on her education. *See* Ex. 19; Doe Decl. ¶ 17. She also left a voicemail for  
18 Reykdal, but received no response from OSPI. Ex. 20 (Doe Tr.) at 82:21–83:5; Doe Decl. ¶ 17.  
19 In total, E.S. was excluded from the classroom for at least 22.5 days. Doe Decl. ¶ 14. As a result  
20 of these exclusions, E.S. has exhibited post-traumatic stress reactions which have exacerbated  
21 her disability-related behavioral issues. *Id.* ¶ 18.

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23 **T.R.** Plaintiff T.R. is an 11-year-old girl in the fifth grade, who is currently enrolled at  
24 McKinley Elementary School in the Yakima School District. Forrester Decl. ¶ 2. Despite  
25 repeated requests by her mother to school administrators and teachers, T.R. has not been  
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1 evaluated for special education services. On information and belief, T.R. is a student with a  
2 disability in need of special education services. *Id.* ¶ 3. In April 2017, T.R. was placed on a  
3 Section 504 plan on the basis of a vision disability. *Id.* ¶ 4. During the 2017 and 2018 school  
4 years, T.R. received a five-day in school suspension and a 10-day emergency expulsion (that was  
5 later converted to two days). *Id.* ¶ 7. In addition, she was repeatedly excluded from the  
6 classroom by being placed in “time outs” and being sent home early—without these incidents  
7 being recorded as suspensions. *Id.* ¶¶ 5–7. In total, T.R. was excluded from the classroom for  
8 approximately seven days, for which she did not receive compensatory education. *Id.* ¶ 7.

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10 **D. Other Putative Class Members**

11 There are many members of the putative class that have had similar experiences. For  
12 example:

13 **A.G.** Putative class member A.G. is an eight-year-old boy in the second grade at Barge  
14 Lincoln Elementary School in the Yakima School District. Gordon Decl. ¶ 2. He has been  
15 diagnosed with anxiety disorder and ADHD, and has been placed on an Individualized Education  
16 Program (IEP). *Id.* ¶¶ 4–5. During the 2016 school year, A.G.’s mother was asked to pick him  
17 up early from school almost daily, and he was formally suspended for eight days. *Id.* ¶ 6.  
18 Because he missed so much school, he repeated kindergarten in 2017, during which he was sent  
19 home early and excluded from class approximately two times per week, and was formally  
20 expelled or suspended for 14 days. *Id.* ¶ 7. A.G. has also been suspended for approximately six  
21 days during the 2018 and 2019 school years, *id.* ¶ 9, and has been forcibly restrained by school  
22 staff. *Id.* ¶ 11. A.G. has struggled to receive make-up work for lost class time, and feels  
23 stigmatized, socially isolated, and unwelcome at school. *Id.* ¶¶ 10–11.  
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1           **D.R.** Putative class member D.R. is an eight-year-old boy in second grade at Ridgeview  
2 Elementary School in the Yakima School District. Rask Decl. ¶ 2. He has been diagnosed with  
3 ADHD and emotional behavioral disorder, and there are indications that he may suffer from  
4 PTSD and anxiety. *Id.* ¶ 3. During the 2018 school year, rather than accommodating D.R.’s  
5 needs in a disability-informed manner, he was characterized as simply being willfully  
6 misbehaved. In February 2018, D.R. was expelled for 80 days after a behavioral episode where  
7 the Vice Principal escalated D.R.’s behavior by removing D.R.’s shoes, and physically  
8 restraining him. *Id.* ¶ 5. D.R. received no compensatory education for several weeks, and then  
9 was inappropriately placed at a school with high school students. *Id.* ¶ 8. A social worker  
10 assisted D.R. in returning to school prior to the end of the 80-day expulsion, but only after he  
11 already missed approximately 3.5 months of school.

12           **H.W.** Putative class member H.W. is a nine-year-old girl enrolled in the fourth grade at  
13 Livingston Elementary School in the Pasco School District. Wampole Decl. ¶ 2. She has been  
14 diagnosed with autism and is non-verbal. H.W.’s education has been severely affected because  
15 she has been repeatedly excluded from school. *Id.* ¶ 3. Between 2016 and 2018, H.W. missed an  
16 estimated 2.5 to three months of school because her mother was forced to pick her up from  
17 school early dozens of times, for which she has not received compensatory education. *Id.* ¶¶ 4,  
18 6.

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21           **E. OSPI’s Limited Monitoring Processes**

22           Defendants are constitutionally charged with supervision “over all matters pertaining to  
23 public schools.” Const. art. III, § 22. By statute, OSPI is also responsible for monitoring school  
24 districts’ compliance with state civil rights laws and federal special education laws that implicate  
25 the disproportionate exclusion of students with disabilities. RCW 28A.642.030; RCW  
26

1 28A.155.090. The record shows that OSPI provides two types of monitoring, neither of which is  
2 designed to detect or rectify the disparate treatment of students with disabilities when it comes to  
3 discipline and exclusion from the classroom.

4 First, OSPI's Office of Equity and Civil Rights ostensibly conducts civil rights  
5 monitoring to assess compliance with laws and regulations prohibiting discrimination based on  
6 disability. This is conducted through a Consolidated Program Review ("CPR").<sup>9</sup> Second,  
7 OSPI's Special Education Division ostensibly conducts special education monitoring which, as  
8 relevant here, identifies school districts with discrepant representation of students with  
9 disabilities in discipline under the auspices of the IDEA.

#### 11 **1. Civil Rights Monitoring—Consolidated Program Review**

12 Defendants' limited effort to monitor school district compliance with civil rights laws  
13 prohibiting discrimination based on disability is conducted through CPR, OSPI's omnibus  
14 process for monitoring school district compliance with a variety of programs receiving federal  
15 and state funds.<sup>10</sup> RCW 28A.642.010. School districts' disciplinary practices are reviewed  
16 through CPR Item 14.9<sup>11</sup> ("CPR Student Discipline Item"), which assesses compliance with  
17 OSPI's implementing regulations of the Equal Education Opportunity Law ("EEOL"). Ex. 9 at  
18  
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21 <sup>9</sup> OSPI also monitors compliance with civil rights laws through two other mechanisms that are not relevant to this  
22 motion: (i) Equity Assurance Reports and (ii) individual complaints. An equity assurance report is a form filed  
23 annually by school districts assuring compliance with the civil rights laws and regulations. *See* Ex. 21 (Sechrist  
24 Tr.) at 186:14–23. Individual complaint mechanisms are best suited to address discrete disciplinary incidents,  
and are not intended to address the widespread exclusionary practices alleged here. WAC 392-190-060 to -077;  
*see also* TeamChild Decl. ¶ 26 (individual complaints are “not a timely or adequate way to resolve a student’s  
illegal or unnecessary exclusion from school” and do not address problems on a systemic level).

25 <sup>10</sup> CPR is used to review a number of programs to ensure state and federal funding awards are administered in  
26 compliance with grant and program requirements. *See* Ex. 22 at 3–5 (explaining purpose and authority of  
CPR). For the purposes of this motion, “CPR” refers to OSPI’s civil rights monitoring under RCW  
28A.640.020; RCW 28A.640.030; RCW 28A.642.020; and WAC 392-190-076.

<sup>11</sup> Prior to the 2017 school year, the Student Discipline Item was labeled 14.11. *Compare* Ex. 23 at '129–132  
(OSPI Presentation re 2016 CPR) *with* Ex. 24 at '298 (2017 CPR Checklist).

1 27; RCW 28A.640.020; RCW 28A.640.030; RCW 28A.642.020; WAC 392.190.076 (providing  
2 OSPI civil rights monitoring authority). The relevant regulations provide that:

3 At least annually, each school district and public charter school must review data  
4 on corrective and disciplinary actions taken against students within each school  
5 disaggregated by . . . *disability*, including students protected under Section 504 of  
6 the Rehabilitation Act of 1973 and the Individuals with Disabilities Education Act.  
7 This review must include, but is not limited to, short-term suspensions, long-term  
8 suspensions, expulsions, and emergency expulsions. In reviewing this data, each  
9 school district or public charter school must determine whether it has disciplined or  
10 applied corrective action to a *substantially disproportionate* number of students  
11 within any of the categories identified in this section. If a school district or public  
12 charter school finds that it has disciplined or applied corrective action to a  
13 substantially disproportionate number of students who are members of one of the  
14 categories identified in this section, *the school district or charter school must take  
15 prompt action to ensure that the disproportion is not the result of discrimination.*

16 WAC 392-190-048 (emphasis added). OSPI primarily assesses compliance based on: (i) a  
17 description of the district’s process for reviewing disaggregated student data for potential  
18 disparities along with evidence that process took place; and (ii) if disparities are identified, (a) a  
19 description of the district’s plan to address the disparity and (b) evidence of the plan’s  
20 implementation. *See* Ex. 24 at ’298.

21 The CPR is not designed to confront and remedy harmful and discriminatory disparities  
22 in exclusion of disabled students. *Contra* RCW 28A.642.020 (superintendent of public  
23 instruction “shall develop rules and guidelines to *eliminate discrimination*”) (emphasis added).  
24 The CPR process only considers whether school districts have a “process in place” to comply  
25 with the EEOL and its implementing regulations—not whether a school district has actually  
26 “determine[d] whether it has disciplined or applied corrective action to a substantially  
disproportionate number of students” in a given cohort, nor whether the district is taking “prompt  
[remedial] action.” *See* WAC 392-190-048; Ex. 25 (Roseta Tr.) at 170:19–171:7 (“We’re really  
looking just to see if the process is in place, they have evidence that supports that they’ve done

1 their data review and that they've come to some . . . conclusion about whether or not there are  
2 disparities within their district.”).

3 Nor does OSPI assess the effectiveness or quality of a district's process for reviewing its  
4 discipline data, whether the district actually identified substantially disproportionate discipline  
5 data, or whether the district took prompt action to ensure a disparity was not the result of  
6 discrimination, as required by WAC 392-190-048. *See* Ex. 6 (Albertson Tr.) at 165:24–166:5  
7 (OSPI looks for evidence that district has “looked into the reasons why” disproportionate  
8 discipline exists, “which [OSPI] take[s] as evidence of their root cause analysis.”); Ex. 1  
9 (Hennessey Tr.) at 103:22–104:8 (conceding that OSPI does not take “direct action” to ensure  
10 that school districts promptly ensure disproportional exclusionary discipline is not the result of  
11 discrimination). Indeed, OSPI has not even defined what constitutes a “substantially  
12 disproportionate” disparity. Ex. 21 (Sechrist Tr.) at 117:3–7 (“OSPI does not have a definition,  
13 to my knowledge, of substantially disproportionate with respect to this particular WAC.”); Ex. 6  
14 (Albertson Tr.) at 164:10–12, 165:19–20, 215:20–22 (same); Ex. 2 (Meierbachtol Tr.) at 103:9–  
15 15 (same).

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18 Moreover, even if disparities are detected, OSPI's CPR process does not remedy them. If  
19 OSPI deems a district “non-compliant” with its minimal requirements, OSPI simply continues to  
20 request additional documentation until the district can be marked “compliant.” *See* Ex. 22 at 33;  
21 Ex. 26 (McNeely Tr.) at 63:10–12; Ex. 1 (Hennessey Tr.) at 120:15–16, 167:4–7; Ex. 6  
22 (Albertson Tr.) at 177:22–25; Ex. 25 (Roseta Tr.) at 161:25–162:3. If it becomes apparent to  
23 OSPI that a school district will be unable to submit the documents sufficient to show compliance,  
24 the district may be placed on an “action plan,” which merely provides a timeline of additional  
25 steps that the school district should take to be marked compliant. *See* Ex. 27 at 1–2; Ex. 26  
26

1 (McNeely Tr.) at 63:10–12, 84:1–15. But that process is itself deficient because OSPI has no  
2 formalized process for monitoring whether a district actually implements an action plan. *See* Ex.  
3 26 (McNeely Tr.) at 85:3–10. In at least one instance, OSPI placed a school district on action  
4 plans only to discover—*five years later*—that it had failed to implement them. Ex. 28 at 1–2.

5 **Yakima CPR.** OSPI reviewed the Yakima School District’s compliance with the CPR  
6 Student Discipline Item in 2014, 2015 and 2016. *See* Ex. 29. According to a program review  
7 supervisor’s notes, OSPI found Yakima’s discipline data review practices to be “compliant.” *Id.*  
8 Each year, Yakima submitted general descriptions of meetings in which school district  
9 administrators would analyze student discipline data for disparities and discuss plans for  
10 addressing those disparities. *Id.* As supporting evidence, Yakima submitted meeting minutes of  
11 “Discipline Committee” meetings. *See* Ex. 30 (describing administrative changes to “Discipline  
12 Task Force”); Ex. 31 (indicating “percentages” of discipline of special education students were  
13 reviewed, without discussion of whether disparities were identified). However, these minutes  
14 did not indicate whether Yakima had identified any disparities, nor did they identify a plan to  
15 address any disparities. On the contrary, these minutes revealed the District’s problematic  
16 exclusionary practices, which harm students with disabilities. For example, the minutes  
17 suggested concealing discipline by “coming up with a new attendance reason” for removing  
18 students from class for interventions, which “*would not count as discipline*” and “edit[ing] the  
19 discipline and chang[ing] it to a new *non-discipline code*” for students who were removed for  
20 behavior that was determined to be related to their disability. Ex. 30 at ’046.02 (Minutes from  
21 January 28, 2015) (emphasis added); Ex. 31 (Minutes from October 29, 2014) (emphasis added).

22 **Pasco CPR.** In May 2017, OSPI found the Pasco School District to be “non-compliant”  
23 with the CPR Student Discipline Item because Pasco lacked *any* process to review its student  
24  
25  
26

1 data, identify disparities, or address discrimination. Exs. 32–33. OSPI’s efforts to move the  
2 district into compliance primarily consisted of additional conversations with Pasco, and  
3 continued requests for evidence of the District’s data review process. *See* Exs. 34–39. After  
4 more than a year of non-compliance, OSPI finally placed Pasco on an “action plan” in July 2018,  
5 which—like the flawed CPR process—required the district to submit evidence of its process to  
6 review discipline data by October 2018. Exs. 40–41. Pasco failed to meet that deadline and  
7 upon information and belief, remained non-compliant as of January 2019. Exs. 40, 42; Ex. 43  
8 (Thornton Tr.) at 175:3–14 (CPR Student Discipline Item evidence still outstanding as of  
9 January 2019).

## 11 2. Special Education Monitoring

12 Under the auspices of the IDEA’s state performance plan indicators (“Special Education  
13 Monitoring”),<sup>12</sup> OSPI identifies annually school districts with significant discrepancies in the  
14 discipline<sup>13</sup> of special education students.<sup>14</sup> If a school district is classified as having  
15 disproportionate discipline, it must submit a “Disproportionality Workbook” (“Workbook”) to  
16

17  
18 <sup>12</sup> Plaintiffs do not allege violations of the IDEA. The failures of OSPI’s Special Education Monitoring are  
relevant to the gravamen of Plaintiffs’ complaint that OSPI’s processes for supervising the exclusion of students  
with disabilities, taken together, have deprived Plaintiffs of their constitutional and statutory civil rights.

19 <sup>13</sup> School districts have “significant discrepancy” in discipline when the rate of suspensions or expulsions greater  
20 than 10 days for (i) students with disabilities and (ii) students with disabilities in a racial/ethnic group is two  
percentage points greater than the statewide average. *See* Ex. 44 at 7; Ex. 45 (Gallo Tr.) at 198:16–199:12,  
21 202:8–19. Disproportionate representation does not account for suspensions of 10 days or less; nor does it  
consider informal classroom exclusions. Therefore, the discrepancy between the discipline of disabled students  
and their non-disabled peers is likely underrepresented. Ex. 45 (Gallo Tr.) at 199:13–20.

22 <sup>14</sup> The Special Education office also identifies school districts with “significant disproportionality” in the  
23 discipline of special education students by race or ethnicity. *See* Ex. 44. Until the current school year,  
significant disproportionality was defined as a “weighted risk ratio” of 4.0 or greater for three consecutive years  
for any racial or ethnic group. A weighted risk ratio calculates the difference in likelihood that students of a  
24 particular racial or ethnic category face a particular outcome (*e.g.*, disciplinary actions) compared to all students  
not of that particular group. The ratio is weighted according to the racial or ethnic composition of the total  
25 population analyzed (*i.e.*, school district or state). Recently, significant disproportionality was changed to a  
“risk ratio” of 3.0 or greater for three consecutive years with an allowance for “reasonable progress.” Ex. 46.  
26 Districts identified as having significant disproportionality are required to set aside a percentage of their federal  
funds to provide targeted services toward the identified groups. Neither Pasco nor Yakima has been identified  
as having significant disproportionality by race or ethnicity in the past five years.



1 OSPI, which requires the district to (i) certify that it has reviewed its policies and procedures; (ii)  
2 describe its process for gathering and reporting suspension and expulsion data; and (iii) describe  
3 its plan to reduce disproportionality. Ex. 9 at 24–25; Ex. 47; Ex. 4 (May Tr.) at 85:9–18; Ex. 48  
4 (Pasco 2018 Disproportionality Workbook). Despite characterizing the Workbook as “rigorous,”  
5 in practice, OSPI does not inquire whether the district has actually implemented any of the  
6 promised remedial actions. See Ex. 49 (Arnold Tr.) at 80:8–16; Ex. 4 (May Tr.) at 68:6–19  
7 (acknowledging that OSPI does not ask for proof that district completed follow-up actions).  
8

9 Significant discrepancies in discipline data were found for the 2016 and 2018 school  
10 years in Yakima, and the 2014 and 2016-2018 school years in Pasco. Exs. 4, 50–54. OSPI has  
11 acknowledged that this pattern of repeated disproportionate discipline for students with  
12 disabilities in the Districts is concerning and warrants further investigation, yet has been unable  
13 to identify any further inquiry that resulted. Ex. 4 (May Tr.) at 73:17–74:16, 85:9–18, 93:18–  
14 94:6, 115:16–25; see also Ex. 49 (Arnold Tr.) at 101:11–18, 115:1–12, 116:8–15.  
15

16 One example is illustrative of the inadequacy of OSPI’s monitoring process. OSPI  
17 should have been alarmed by Pasco, year after year, providing the identical response in its  
18 Disproportionality Workbook submissions (typos and all):

19 “The data does suggest that for this race/ethnicity [sic] groups some targeted  
20 intervention or PREVENTION should be considered to reduce suspendable  
21 behaviors” and “the district is significantly increasing the PBIS network of supports  
and interventions to engage in more prevenative [sic] measures.”

22 Compare Ex. 55 at 21 (Pasco 2017 Workbook) with Ex. 48 at 16–17 (Pasco 2018  
23 Workbook) with Ex. 56 at 17–18 (Pasco 2019 Workbook). Pasco’s Special Education  
24 Director acknowledged that she had likely recycled the same response from the previous  
25 year’s submission for several Disproportionality Workbooks (Ex. 57 (Wilson Tr.) at  
26 184:1–2, 189:14–16, 190:18–23) and at least one OSPI employee testified that similar

1 responses year after year should have raised red flags. Ex. 49 (Arnold Tr.) at 106:25–  
2 107:9, 134:13–135:11. However, there is no evidence that OSPI actually uncovered the  
3 issue, much less took any remedial action.

## 4 **II. ISSUES PRESENTED**

- 5 1) Are Defendants required, as a matter of law, to ensure through monitoring and  
6 supervision of school districts, that students with disabilities are not deprived of their  
7 Article IX right to an educational opportunity?
- 8 2) Are Defendants required, as a matter of law, to monitor for and remedy discriminatory  
9 exclusionary practices of school districts under the WLAD, as supplemented by the  
10 EEOL?
- 11 3) Have Defendants, as a matter of law, failed to discharge their constitutional and statutory  
12 duties?

## 13 **III. LEGAL STANDARD**

14 Summary judgment is appropriate “where the pleadings, affidavits, depositions and  
15 admissions on file demonstrate that there is no genuine issue as to any material fact and the party  
16 bringing the motion is entitled to judgment as a matter of law.” *Christen v. Lee*, 113 Wn.2d 479,  
17 488, 780 P.2d 1307 (1989). A motion for summary judgment should be granted “if reasonable  
18 persons, from all of the evidence, could reach but one conclusion.” *Id.*

## 19 **IV. ARGUMENT**

20 There is no material dispute of fact that the systemic exclusion from the classroom of  
21 Plaintiffs and other members of the putative class harms those students and violates their rights  
22 under Article IX and the WLAD, as supplemented by EEOL. There is also no dispute that  
23 Defendants are required by law to monitor school districts for discrimination and deprivation of  
24 educational opportunity and, where necessary, take remedial action. Finally, there can be no  
25 dispute that Defendants’ monitoring and compliance process is wholly inadequate to satisfy its  
26 legal obligations. Because the undisputed record demonstrates that Defendants have failed to

1 discharge their constitutional and statutory duties, Plaintiffs’ Motion for Partial Summary  
2 Judgment should be granted.<sup>15</sup>

3 **A. Systemic Classroom Exclusions Deprive Students with Disabilities of their**  
4 **Constitutional and Statutory Rights**

5 **1. All Washington students have the right to educational opportunity,**  
6 **and the right to be free from discrimination.**

7 The Washington State Constitution provides that “[i]t is the paramount duty of the state  
8 to make ample provision for the education of *all children* residing within its borders.” Const. art  
9 IX, § 1 (emphasis added). The State Supreme Court has long recognized that this constitutional  
10 provision imposes a “judicially enforceable affirmative duty on the State” to provide basic  
11 education to all Washington students, and that the duty extends to “the entire state,” not a single  
12 branch of government. *McCleary v. State*, 173 Wn.2d 477, 485, 514, 541, 269 P.3d 227 (2012)  
13 (citing *Seattle Sch. Dist. No. 1 of King Cty. v. State*, 90 Wn.2d 476, 520, 585 P.2d 71 (1978)).  
14 This court’s authority to interpret Article IX and “give it meaning and legal effect” is clearly  
15 established. *McCleary*, 173 Wn.2d at 515, 520.

16 The State’s obligation to provide educational opportunity to all children in Washington is  
17 uniquely robust. In describing the State’s duty as “paramount,” Article IX establishes the  
18 provision of education to all students as “the State’s *first and highest priority* before any other  
19 State programs or operations.” *Id.* at 520–21 (emphasis added). The term “paramount” appears  
20 only once in the Constitution, placing the right to educational opportunity above all others. *See*  
21 Robert F. Utter & Hugh D. Spitzer, *The Washington State Constitution* 169 (2013). As one  
22  
23  
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25

26 <sup>15</sup> Plaintiffs oppose Defendants’ Motion for Summary Judgment and will discuss the myriad reasons for denying  
that Motion in Plaintiffs’ forthcoming Opposition.

1 drafter of Article IX noted, “[n]o other state has placed the common school on so high a  
2 pedestal” as Washington. *Id.*

3 All children enjoy the right to educational opportunity. *See McCleary*, 173 Wn.2d at  
4 520–21 (“‘All’ children under article IX, section 1 therefore encompasses ‘each and every child  
5 since each will be a member of, and participant in, this State’s democracy, society, and  
6 economy.’ *No child is excluded.*”) (emphasis added) (citations omitted). The Supreme Court  
7 has repeatedly defined the right to educational opportunity to encompass the “opportunity for  
8 every child to gain the knowledge and skills” so that they may “compete in today’s economy and  
9 meaningfully participate in this State’s democracy.” *Id.* at 521, 546; *Seattle Sch. Dist.*, 90 Wn.2d  
10 at 518.

12 Likewise, each child has the right to be free from discrimination, including discrimination  
13 in their educational opportunities based on a disability. The Washington State Legislature  
14 declared that “practices of discrimination . . . threaten[] not only the rights and proper privileges  
15 of [Washington’s] inhabitants but menace[] the institutions and foundation of a free democratic  
16 state.” RCW 49.60.010. For that reason, the WLAD makes it unlawful for “any person or the  
17 person’s agent or employee to commit an act which directly or indirectly results in any . . .  
18 discrimination . . . in any place of public . . . accommodation.” RCW 49.60.215. The WLAD  
19 recognized the civil right of all of the State’s inhabitants “to be free from discrimination because  
20 of . . . the presence of any sensory, mental, or physical disability.” RCW 49.60.030(1).  
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1                   **2.       Widespread exclusionary practices deprive Plaintiffs of their rights**  
2                   **and cause them harm.**

3                   The repeated, systemic, and harmful exclusionary practices at issue in this case deprive  
4 Plaintiffs of their Article IX right.<sup>16</sup> Students with disabilities in the state have missed more than  
5 75,000 days of instruction during the 2016 school year, including 3,700 days in the Districts  
6 alone, due to formal disciplinary exclusions. *See* Whitaker Decl. ¶¶ 9–11. Plaintiffs have  
7 cumulatively been deprived of approximately one year of missed instruction through formal and  
8 informal discipline, *see* Section I.A, *supra*, which all but ensures they will not gain the basic  
9 knowledge and skills contemplated by *McCleary*, 173 Wn.2d at 521, and *Seattle School District*,  
10 90 Wn.2d at 518. *See* Krezmien Decl. ¶ 35; *see also* Section I.B, *supra*; *cf.* *Goss v. Lopez*, 419  
11 U.S. 565, 574–75 (1975) (recognizing that exclusions from the classroom harm students’  
12 opportunities for higher education and employment); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493  
13 (1954) (“[I]t is doubtful that any child may reasonably be expected to succeed in life if he is  
14 denied the opportunity of an education.”).

15                   Similarly, Plaintiffs and the putative class are being deprived of their civil rights.  
16 The undisputed facts demonstrate unlawful discrimination under the WLAD: “(1) [plaintiffs]  
17 have a disability recognized under the statute; (2) the defendant’s business or establishment is a  
18 place of public accommodation; (3) [plaintiffs] were discriminated against by receiving  
19 treatment that was not comparable to the level of designated services provided to individuals  
20 without disabilities by or at the place of public accommodation; and, (4) the disability was a  
21 substantial factor causing the discrimination.” *Fell v. Spokane Transit Auth.*, 128 Wn.2d 618,  
22  
23  
24

25  
26 <sup>16</sup> Plaintiffs do not allege that *any* exclusion from school violates Art. IX, sec. 1; only that the exclusionary practices documented in this case, perpetuated by OSPI’s inadequate monitoring systems, violate the Constitution.

1 637, 911 P.2d 1319 (1996) (discussing RCW 49.60.215). Courts are directed to “liberally  
2 construe WLAD to eradicate discrimination, including discrimination in places of public  
3 accommodation.” *Floeting v. Grp. Health Coop.*, 434 P.3d 39, 41 (Wash. 2019).

4 **B. As a Matter of Law, Defendants are Obligated to Monitor School Districts’**  
5 **Compliance with Article IX and the WLAD, as Supplemented by the EEOL**

6 **1. OSPI is bound by Article IX and has general supervision over public**  
7 **schools.**

8 There is no dispute that OSPI is responsible for safeguarding the Article IX mandate.  
9 *Seattle Sch. Dist.*, 90 Wn.2d at 512; *McCleary*, 173 Wn.2d at 515; *see* Ex. 2 (Meierbachtol Tr.)  
10 at 75:9–13 (OSPI included within the “overall constitutional obligation” or Article IX). State  
11 action is required to safeguard this positive constitutional right. *See McCleary*, 173 Wn.2d at  
12 519. When a positive constitutional right is at issue, the relevant question is whether the state  
13 has acted in a way that “is reasonably likely to achieve the constitutionally prescribed end.” *Id.*  
14 at 519 (internal quotation marks omitted). If the right has been infringed, the judiciary must  
15 compel the appropriate state actors to take remedial action. *Id.*; *see also Seattle Sch. Dist.*, 90  
16 Wn.2d at 501 (noting “the constitutional command of Const. article IX, Section § 1 is Not  
17 directed solely to the Legislature”).

18  
19 The Washington State Constitution further provides that the Superintendent of Public  
20 Instruction “shall have supervision over *all matters* pertaining to public schools . . . .” Const. art.  
21 III, § 22 (emphasis added). This duty is no “mere formality”—it includes “the power to review  
22 all the acts of the local officers, and to correct, or direct a correction of, any errors committed by  
23 them. Any less power than this would make the supervision an idle act—a mere overlooking  
24 without power of correction or suggestion.” *El Centro De La Raza v. State*, 192 Wn.2d 103,  
25 122, 428 P.3d 1143 (2018) (internal quotation marks omitted). OSPI’s supervisory authority  
26

1 entails “more than the power merely to confer with and advise, or to receive reports, or file  
2 papers.” *Id.* (quoting *State ex rel. Sch. Dist. No. 301 v. Preston*, 84 Wash. 79, 86, 146 P. 175  
3 (1915)). And while the legislature has the authority to “define the Superintendent’s role within  
4 the public school system,” OSPI must not be “made subordinate” to any other entity or  
5 subdivision with respect to supervision of the State’s school districts. *Id.* (citing 1998 Op. Att’y  
6 Gen. No. 6, at 4 and 2009 Op. Att’y Gen. No. 8, at 15).

7  
8 **2. OSPI must monitor school districts’ compliance with civil rights laws  
under the WLAD and EEOL.**

9 OSPI was designated by the Legislature as the agency responsible for eliminating  
10 discrimination in public schools. In 2010, the Washington State Legislature passed the EEOL to  
11 supplement the anti-discrimination protections of WLAD. Among other things, the EEOL  
12 required that OSPI “take affirmative steps to ensure” that school districts comply with “all civil  
13 rights laws,” including the WLAD’s prohibition on discrimination on the basis of disability.  
14 RCW 28A.642.005; RCW 28A.642.010 (“Discrimination in Washington public schools on the  
15 basis of . . . any sensory, mental, or physical disability . . . is prohibited,” incorporating RCW  
16 49.60 (WLAD) by reference); Ex. 58 (identifying the WLAD, Section 504 of the Rehabilitation  
17 Act of 1973, and the Individuals with Disabilities Act (IDEA) as relevant state and federal civil  
18 rights laws of concern in the EEOL).

19  
20  
21 The EEOL requires OSPI to (i) “develop rules and guidelines to eliminate  
22 discrimination” in students’ “access to course offerings,” RCW 28A.642.020, and (ii) “monitor  
23 local school districts’ compliance with this chapter,” by “establish[ing] a compliance timetable,  
24 rules, and guidelines for enforcement of this chapter.” RCW 28A.642.030. The EEOL  
25 empowers OSPI with a variety of enforcement mechanisms against the offending school district,  
26 including (i) terminating or reducing funding, (ii) ending programs with “flagrant” violations,

1 (iii) instituting “corrective action,” and (iv) placing the offending school district on probation.  
2 RCW 28A.642.050. In 2014, in accordance with the requirement that it “develop rules and  
3 guidelines to eliminate discrimination” in students’ access to instruction, RCW 28A.642.020,  
4 OSPI promulgated WAC 392-190-048—fully set forth in Section I.E.1, *supra*, to address the  
5 impact of exclusionary practices on students’ access to course offerings.

6 **C. The Record Demonstrates that OSPI Has Failed To Discharge its**  
7 **Constitutional and Statutory Duties**

8 Defendants are aware that the exclusionary practices described above have deprived  
9 students with disabilities of their rights under Article IX and the WLAD. Accordingly,  
10 Defendants are required by both Article IX and the WLAD to take remedial action. *See*  
11 *McCleary*, 173 Wn.2d at 519; RCW 28A.642.020. However, the factual record reflects that the  
12 flawed civil rights and special education monitoring systems (together, “monitoring systems”) on  
13 which Defendants rely are plainly insufficient and cannot, as a matter of law, satisfy Defendants’  
14 obligations under Article IX and the WLAD. *First*, Defendants either did not recognize or did  
15 not respond to red flags which allowed the excessive, disproportionate exclusionary practices to  
16 continue unabated. *Second*, because the monitoring systems effectively depend on districts to  
17 police themselves, Defendants improperly rely on the districts to satisfy Defendants’  
18 constitutional and statutory responsibility to remedy instances of discrimination. *Finally*,  
19 Defendants’ monitoring systems are indisputably toothless and ineffective tools for remedying  
20 violations of Plaintiffs’ rights.  
21  
22

23 **1. Defendants are aware of the violations of Plaintiffs’ rights, but have**  
24 **failed to take remedial action.**

25 Defendants acknowledge that rates of exclusion for students with disabilities in the  
26 Districts are unacceptably high, and that the disparities between disciplinary rates for special



1 education and non-special education students are concerning, problematic, and warrant further  
2 inquiry. *See* Ex. 4 (May Tr.) at 73:17–74:16, 93:18–94:6, 115:16–25; Ex. 2 (Meierbachtol Tr.) at  
3 118:8–119:18; Ex. 49 (Arnold Tr.) at 79:22–25 (agreeing that discrepant data is “a cause for  
4 concern that requires further inquiry”). Indeed, Defendants have acknowledged that the  
5 disproportionate rates of discipline suffered by Plaintiffs and the putative class may be the result  
6 of discrimination. *See* Ex. 2 (Meierbachtol Tr.) at 118:8–119:23; 122:18–123:22 (agreeing that  
7 discrimination is a potential cause of disproportionate discipline of students with disabilities in  
8 Pasco and Yakima). Inadequate as they may be, Defendants’ own monitoring mechanisms  
9 identified several red flags—none of which have been adequately addressed by OSPI.  
10

11 First, with regard to Yakima, the district submitted evidence during its CPR review  
12 indicating it was removing students from the classroom without recording these exclusions as  
13 disciplinary in nature. Notes from an October 2014 “Discipline Committee Meeting,” stated that  
14 “OSPI is looking at our numbers to make sure we are not suspending kids  
15 disproportionately.” Ex. 31. The proposed solution was to “edit the discipline and change it to a  
16 new *non-discipline code*” for students who were removed for behavior that was determined to be  
17 related to their disability. *Id.* Yakima’s special education director testified that this solution was  
18 indeed implemented, and remains Yakima’s practice. *See* Ex. 7 (Coe Tr.) at 97:10–24.

19 Additional notes from a January 2015 meeting, describe a practice of removing students from  
20 their classrooms for “interventions.” Ex. 30 at ’046.02. The proposed solution was to “use a  
21 new attendance code (ISI) for in-school intervention,” and indicate that “[t]his new code would  
22 not count as discipline.” *Id.* Instead of inquiring into Yakima’s practices, OSPI marked the  
23 district “compliant.” Ex. 1 (Hennessey Tr.) at 197:15–198:10.  
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1 Second, OSPI's CPR review of Pasco revealed that the district had *no process at all* to  
2 identify discipline disparities by student group, including by disability status, as required by law.  
3 *See* Ex. 2 (Meierbachtol Tr.) at 41:11–19 (explaining Pasco had “never” reviewed discipline data  
4 for disparities, and was “starting from scratch” at the time of CPR review). And, as discussed  
5 above, Defendants’ Special Education monitoring process did not detect that Pasco simply  
6 copied and pasted, year after year, the same actions it was purportedly taking to address the  
7 disproportionate exclusions of special education students. *See* Section I.E.1, *supra*. OSPI’s  
8 failure to bring Pasco into compliance increases the risk that students with disabilities will  
9 continue to be excluded from their classrooms. Ex. 26 (McNeely Tr.) at 44:20–45:3 (explaining  
10 that “consequential” result of non-compliance “would be that there actually is a disparity that is  
11 the result of discrimination and [the district does not] identify it, and thus, [does not] come up  
12 with a resolution for it”).

14 Finally, OSPI’s Special Education division repeatedly identified both Districts as having  
15 discrepant data in student discipline. *See* Ex. 51 (Pasco 2014), Ex. 52 (Pasco 2016); Ex. 53  
16 (Pasco 2017); Ex. 54 (Pasco 2018); Ex. 44 (Yakima 2016); Ex. 50 (Yakima 2018). OSPI  
17 witnesses acknowledged that this repeated pattern of disproportionality was “cause for concern  
18 and further inquiry”— but could not identify any remedial action taken by the Special Education  
19 Office. Ex. 49 (Arnold Tr.) at 101:11–18, 115:1–12, 116:8–15; Ex. 4 (May Tr.) at 73:17–74:16,  
20 85:9–18, 93:18–94:6, 115:16–25.

22 **2. Defendants’ monitoring systems impermissibly rely on the districts to**  
23 **satisfy OSPI’s responsibilities.**

24 OSPI’s CPR process defers to a school district’s own determinations of whether it has  
25 complied with WAC 392-190-048, *i.e.*, whether a “substantially disproportionate” number of  
26 students with disabilities have been disciplined as a result of discrimination. The process

1 provides no meaningful oversight over the effectiveness of a district’s data analysis process and  
2 whether the conclusions a district draws about its own data are reasonable. *See* Ex. 25 (Roseta  
3 Tr.) at 170:19–171:7 (“We leave that to the districts.”). Indeed, because OSPI has not defined  
4 what constitutes “substantially disproportionate” discipline, it is left to a district to define the  
5 term as it sees fit. *See* Ex. 21 (Sechrist Tr.) at 117:3–7 (no definition of substantially  
6 disproportionate data); Ex. 6 (Albertson Tr.) at 164:13–20 (acknowledging different districts,  
7 looking at the same data, may reach different conclusions on disproportionality). And even if  
8 disparities are found in the data, OSPI does not actually verify whether school districts have  
9 taken remedial action to address discrimination, as required by WAC 392-190-048. *See* Ex. 25  
10 (Roseta Tr.) at 170:19–171:7; Ex. 1 (Hennessey Tr.) at 103:24–104:8; *see also* Ex. 4 (May Tr.) at  
11 68:6–19 (OSPI’s Special Education monitoring does not verify school districts completed  
12 follow-up actions).

14           The overt failure to engage with—much less monitor or supervise—a district’s data  
15 collection methodology (which may explicitly exclude relevant discipline, as in Yakima), the  
16 district’s analysis of that data, and the district’s conclusion as to whether the data reflects  
17 disproportionality, violates OSPI’s obligations under the law. *See* Const. art. III, § 22 (general  
18 supervision over all public schools); *El Centro De La Raza*, 192 Wn.2d at 122 (power to review  
19 and correct errors committed by local officers); RCW 28A.642.030 (OSPI shall “monitor local  
20 school districts’ compliance” with EEOL). The constitutional and statutory enforcement scheme  
21 of our state requires OSPI to do more precisely because, as common sense indicates, “it’s  
22 unlikely a district is going to say yes, we discriminated.” Ex. 6 (Albertson Tr.) at 136:25–137:1;  
23 *see also* Ex. 59 (Nishioka Tr.) at 218:23–220:18 (explaining school district employees are  
24 uncomfortable admitting that discrimination is the cause of discipline disparities).

1                   **3. Defendants’ monitoring systems are toothless and ineffective tools for**  
2                   **remediating violations of Plaintiffs’ rights.**

3                   Even in situations where OSPI’s monitoring has identified red flags, OSPI has not taken  
4                   effective corrective action. For example, when OSPI discovered that Pasco had no process to  
5                   review its student data, OSPI’s response was to request additional documentation and ultimately  
6                   an “action plan.” *See* Section I.E.1, *supra*. Pasco continued to miss deadlines and, upon  
7                   information and belief, remained non-compliant as of January 2019. Ex. 40; Ex. 42; Ex. 43  
8                   (Thornton Tr.) at 175:3–14 (CPR Student Discipline Item evidence still outstanding as of  
9                   January 2019).

10                  The fecklessness of OSPI’s “action plans” is not limited to Pasco. In 2012, OSPI asked  
11                  the Ellensburg School District to provide a number of “action plans to implement core elements  
12                  of several programs”—including civil rights. Ex. 28 at ’395–96; Ex. 26 (McNeely Tr.) at  
13                  103:20–23. When Ellensburg was reviewed again in 2017—five years later—OSPI observed  
14                  that “[i]t does not appear, based on our current review, that the district enacted the plans.” Ex.  
15                  28 at ’395; Ex. 26 (McNeely Tr.) at 103:7–10. OSPI’s solution to five years of noncompliance  
16                  was to provide the district with a list of deadlines to submit additional documents. *See* Ex. 28 at  
17                  ’396.

18                  The factual record reflects that OSPI’s monitoring systems have no profound  
19                  consequences beyond generating paperwork. *See, e.g.*, Ex. 60 (equity assurance report exhorting  
20                  a school district to check a box to indicate it assures compliance with equity requirements); *see*  
21                  *also* Krezmien Decl. ¶ 31 (finding no evidence of monitoring even occurring nor any mechanism  
22                  to reduce disproportionate discipline in Washington state given the highly disproportionate  
23                  discipline rates reported). Merely “receiving reports” or “filing papers” is not meaningful  
24                  supervision. *See El Centro De La Raza*, 192 Wn.2d at 122; Ex. 61 at 2 (finding poor policies  
25                  26

1 and practices on every level, including the state level, to be likely contributors to the high rates  
2 of exclusionary discipline students with disabilities are subjected to). More must be done for  
3 OSPI to satisfy its constitutional and statutory duties.

4 **CONCLUSION**

5 For the aforementioned reasons, Plaintiffs' Cross Motion for Partial Summary Judgment  
6 should be granted.

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**CERTIFICATE OF SERVICE**

I certify that on this day true copies of the foregoing document and attachments were served via electronic service per an electronic service agreement upon the following parties:

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

DATED this 22nd day of March, 2019, at New York, NY.

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