□ Expedite
□ No Hearing Set
[X] Hearing Set
Date: July 19, 2019
Time: 9:00am
Judge: The Honorable Christopher 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,

Plaintiffs,

v.

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

Defendants.

No. 17-2-03293-34

PLAINTIFFS' SUPPLEMENTAL BRIEF IN SUPPORT OF MANDAMUS RELIEF

INTRODUCTION

Plaintiffs are entitled to mandamus relief because Defendants have failed to perform their statutory duties under the Equal Education Opportunity Law ("EEOL"), which prohibits discrimination in Washington's public schools on the basis of "sensory, mental, or physical disability." RCW 28A.642.010. The EEOL specifically charges the Office of Superintendent of Public Instruction ("OSPI") with eliminating—not just examining or monitoring—discrimination

AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON FOUNDATION
901 FIFTH AVENUE, STE 630
SEATTLE, WA 98164
(206) 624-2184

in public schools. RCW 28A.642.020; RCW 28A.642 (titling the Chapter, "DISCRIMINATION PROHIBITION"). Specifically, it requires Defendants to: (1) "develop rules and guidelines to eliminate discrimination" in access to course offerings based on disability (RCW 28A.642.020 (with RCW 28A.642.010 prohibiting discrimination on the basis of disability)); (2) monitor school districts' compliance with the EEOL (RCW 28A.642.030); and (3) establish a compliance timetable, rules, and guidelines for enforcement of the EEOL (RCW 28A.642.030). The Legislature authorized Defendants "to enforce and obtain compliance with the provisions of this chapter." RCW 28A.642.050.

Defendants' duties are self-evident from the plain language of the statute, consistent with OSPI's other constitutional and statutory obligations, and mandatory in nature. But rather than develop rules and guidelines designed to actually eliminate discrimination, Defendants have promulgated rules that provide no meaningful guidance to districts as to what constitutes substantial disproportionality or actions that school districts are required to take if they identify substantial disproportionality. Rather than satisfy their duties to monitor and enforce compliance with the EEOL itself—which prohibits precisely the sort of discrimination that is the subject of this suit—Defendants have directed their efforts solely at monitoring and enforcing district compliance with various data reporting requirements. And rather than avail themselves of any of the tools the EEOL places at their disposal to procure compliance, Defendants have refused to act at all to ensure such compliance.

The EEOL provides Defendants with discretion, as is appropriate for an agency assumed to have regulatory expertise. It does not, for example, specify what precise rules Defendants must promulgate to eliminate discrimination; nor does it require that Defendants undertake any particular action to enforce compliance, such as corrective action in one circumstance, and

AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON FOUNDATION
901 FIFTH AVENUE, STE 630
SEATTLE, WA 98164
(206) 624-2184

defunding in another. But the EEOL is clear that Defendants have a mandatory duty to take actions designed to eliminate discrimination: Defendants do not have discretion to take no meaningful action at all.

Because Defendants have failed to discharge their mandatory duty to act, a writ of mandamus should issue.[1] To the extent the Court declines to issue a writ, Plaintiffs respectfully request that the Court grant their cross-motion for partial summary judgment or, at a minimum, declare that OSPI has failed to satisfy its enumerated duties under the EEOL.

I. STATEMENT OF FACTS

A complete recitation of the facts of the case and supporting evidence are set forth in Plaintiffs' Cross Motion for Summary Judgment and are incorporated herein by reference. Pls.' Cross Mot. Summ. J. 3–18. Facts pertinent to this brief are noted in the argument section below.

II. PROCEDURAL HISTORY

On June 8, 2017, Plaintiffs filed a putative class action complaint against Defendants on behalf of students with disabilities in the Yakima and Pasco school districts subject to pervasive exclusionary discipline, seeking declaratory and injunctive relief for violations of their constitutional rights under the Washington State Constitution, Article IX, Section 1, and the Washington Law Against Discrimination ("WLAD"), RCW 49.60. After engaging in 15 months of discovery, the parties filed cross motions for summary judgment.[2]

At the April 26, 2019 hearing on the parties' summary judgment motions, the Court requested that the parties file supplemental briefs on whether a writ of mandamus should issue.

---

[1] Supplemental briefing on mandamus as a vehicle for enforcing Plaintiffs' rights under the Washington Law Against Discrimination and EEOL was requested by the Court at an April 26, 2019 hearing.

[2] The parties stipulated that class certification briefing would be delayed pending resolution of summary judgment.

AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON FOUNDATION
901 FIFTH AVENUE, STE 630
SEATTLE, WA 98164
(206) 624-2184

Supp. Ex. 1 at 7:7–8:3.[3] The Court did not require that Plaintiffs amend their complaint because it recognized that Defendants had adequate notice of Plaintiffs' claims under Washington's liberal pleading standard. Supp. Ex. 1 at 4:20–5:1 ("[U]nder the liberal pleading standards that apply in Washington and given that this happens all the time, I believe there is adequate notice that that was really the intent of the parties in this case was to make OSPI do something. And so I believe we don't need an amended complaint for that . . . .").

III. ARGUMENT

Mandamus is a form of equitable relief that compels performance of a governmental agency's legal duty, particularly where a statute establishes a clear duty and the responsible agency fails to perform that duty. *Hood Canal Sand & Gravel, LLC v. Goldmark*, 195 Wn. App. 284, 304, 381 P.3d 95, 106 (2016); *Eugster v. City of Spokane*, 118 Wn. App. 383, 402, 76 P.3d 741, 753 (2003) (mandamus requires "performance of an act which the law especially enjoins as a duty resulting from an office, trust or station") (quoting RCW 7.16.160); *Goldmark v. McKenna*, 172 Wn.2d 568, 570, 259 P.3d 1095, 1097 (2011); *Walker v. Munro*, 124 Wn.2d 402, 408, 879 P.2d 920 (1994) (mandamus appropriate when the remedy sought is an order compelling performance of a public official's existing duties).

That some agency duties may involve agency discretion does not preclude mandamus, which "lies to compel discretionary acts of public officials when they have totally failed to exercise their discretion to act." *National Elec. Contractors Ass'n, Cascade Chapter v. Riveland*, 138 Wn.2d 9, 32, 978 P.2d 481 (1999); *see also State ex rel. Reilly v. Civil Serv. Comm'n of City*

[3] "Supp. Ex." refers to the exhibits attached to the Declaration of Alex Hyman, filed contemporaneously with this brief. "Pls.' Cross Mot. Summ. J. Ex." refers to those exhibits attached to the March 22, 2019 Declaration of Alex Hyman filed contemporaneously with Plaintiffs' cross motion for partial summary judgment.

AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON FOUNDATION
901 FIFTH AVENUE, STE 630
SEATTLE, WA 98164
(206) 624-2184

of Spokane, 8 Wn.2d 498, 501, 112 P.2d 987, 988 (1941) (concluding that where a government body "refuses to exercise its discretion, the law will by mandamus require it to exercise its discretionary power").

Mandamus "must" issue when: (1) the government agency is under a clear duty to act; (2) the applicant has no "plain, speedy and adequate remedy in the ordinary course of law"; and (3) the applicant is "beneficially interested." *See Eugster*, 118 Wn. App. at 402–03 (citing RCW 7.16.160–170). A writ of mandamus "must be issued upon affidavit on the application of the party beneficially interested. If disputed material fact issues exist, the trial court has discretion to hold a trial before it determines the appropriateness of mandamus." *Eugster*, 118 Wn. App. at 402 (citing RCW 7.16.170 and RCW 7.16.210).[4]

Where, as here, there are no material disputed facts that OSPI has "violated and continues to violate" its "specific, existing dut[ies]," mandamus "is an appropriate remedy to compel performance." *Eugster*, 118 Wn. App. at 404; *see Walker*, 124 Wn.2d at 408; *see generally* Pls.' Cross Mot. Summ. J. (showing no material disputed facts).

A. The EEOL Imposes Mandatory Non-Discretionary Duties on OSPI to Eliminate Discrimination Against Students with Disabilities and Provide Them "Equal Education Opportunity"

Students with disabilities have both the constitutional right to educational opportunity under Article IX, Section 1, and statutory protection from discrimination under the WLAD. However, until 2010, no agency was empowered to enforce antidiscrimination laws, other than those regarding sexual equality, in the state's public schools.[5] RCW 28A.642.005. To address

[4] All evidence, including affidavits, submitted contemporaneously with Plaintiffs' cross-motion for summary judgment, and opposition to Defendants' motion for summary judgment, are herein incorporated by reference.

[5] *See* Supp. Ex. 2.

AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON FOUNDATION
901 FIFTH AVENUE, STE 630
SEATTLE, WA 98164
(206) 624-2184

this gap, the Legislature passed the EEOL, which specifically prohibited discrimination in Washington public schools on the basis of "sensory, mental, or physical disability" (RCW 28A.642.010) and designated OSPI as the agency responsible for eliminating that discrimination. RCW 28A.642.005, .010, .020; RCW 28A.642 (titling the Chapter, "DISCRIMINATION PROHIBITION").

Under the EEOL, Defendants have a mandatory affirmative duty to: (1) "develop rules and guidelines to eliminate discrimination" based on disability (RCW 28A.642.020); (2) monitor school districts' compliance with the EEOL (RCW 28A.642.030); and (3) "establish a compliance timetable, rules, and guidelines for enforcement" of the EEOL (RCW 28A.642.030). To aid OSPI in carrying out these duties, the Legislature empowered OSPI with a variety of enforcement mechanisms against offending school districts, including, but not limited to, **(i)** terminating or reducing funding, **(ii)** ending programs with "flagrant" violations, **(iii)** instituting "corrective action," and **(iv)** placing the offending school district on probation. RCW 28A.642.050.

The plain language of the EEOL reflects an integrated statutory scheme; its title, each of its sections, and its legislative history must be considered together. *Yakima v. Yakima Herald-Republic*, 170 Wn.2d 775, 797, 246 P.3d 768 (2011) ("The primary goal of statutory interpretation is to ascertain and give effect to the legislature's intent and purpose. This is done by considering the statute as a whole, giving effect to all that the legislature has said . . . .") (internal citations omitted). The Legislature identified a problem (discrimination in education against, *inter alia*, children with disabilities), designated OSPI as the agency to fix that problem, and specified how it wanted OSPI to fix it: through a system of guidelines to set the terms of

AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON FOUNDATION
901 FIFTH AVENUE, STE 630
SEATTLE, WA 98164
(206) 624-2184

compliance and expectations for school districts, monitoring to determine compliance, and—most critically—action to obtain compliance.

That the statutory scheme imposes mandatory duties upon OSPI is made clear by the plain language of the statute, which specifies that the agency "shall develop rules and guidelines," RCW 28A.642.020, and that it "shall monitor" and "shall establish a compliance timetable, rules, and guidelines for enforcement of this chapter." RCW 28A.642.030. *See Goldmark*, 172 Wn.2d at 575 ("'shall' when used in a statute, is presumptively imperative and creates a mandatory duty unless a contrary legislative intent is shown"); *Washington State Coal. for the Homeless v. Dep't of Soc. & Health Servs.*, 133 Wn.2d 894, 907–08, 949 P.2d 1291, 1298 ("By using the word 'shall,' RCW 74.13.031(1) imposes a mandatory duty."); *see id.* at 900–01 ("[These] duties set forth by the Legislature . . . are clear and are mandatory[,] [and] require[] the Department to provide child welfare services and to 'develop, administer, supervise, and monitor a coordinated and comprehensive plan that establishes, aids, and strengthens services for the protection and care of homeless, runaway, dependent, or neglected children.'").

Indeed, the only Washington case that we are aware of that discusses the EEOL describes it as a "mandate" imposed on OSPI, and highlights the importance of "compliance" and "enforcement" as part of the EEOL: "[T]he legislature directed the Office of Superintendent of Public Instruction (OSPI) to enforce and obtain compliance with its nondiscrimination mandate." *Mercer Island Sch. Dist. v. OSPI*, 186 Wn. App. 939, 347 P.3d 924 (2015). Consistent with the statute's name, the EEOL requires that OSPI "take affirmative steps to ensure that school districts comply with all civil rights laws," including the WLAD's prohibition on discrimination on the basis of disability. RCW 28A.642.005 (stating that prior to EEOL, "no[] common school provisions specifically direct[ed] the office of superintendent of public instruction to monitor and

AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON FOUNDATION
901 FIFTH AVENUE, STE 630
SEATTLE, WA 98164
(206) 624-2184

enforce compliance with these laws" as pertaining to disability, and that OSPI "should be specifically authorized to take affirmative steps to ensure that school districts comply with all civil rights laws"); RCW 28A.642.020-30.

That the enforcement piece of the statutory scheme was also intended to be mandatory is further underscored by the legislative history. *See generally* Supp. Ex. 2; *id.* at 7 ("The OSPI must have the teeth to enforce. There *must be* education as well as *enforcement*.") (emphasis added); *id*. at 10 (the bill was meant to "restate[] existing discrimination laws, [] in a way that clarifies the OSPI's enforcement role . . . Laws are meaningless without enforcement"); *id*. ("The OSPI is to monitor and enforce compliance with the chapter and other state and federal laws prohibiting discrimination, specifically including the WLAD and all of the federal laws for which the federal government requires written assurances.").

Nowhere does the EEOL or its history contemplate that OSPI pick and choose which of EEOL's mandates it follows, for example, by engaging in monitoring but refusing to take actions to procure compliance. "[S]tate regulatory schemes in this case would be rendered meaningless if [defendants] could choose not to follow procedures prescribed by law to ensure that the [defendants] compl[y] with state law." *Skokomish Indian Tribe v. Fitzsimmons*, 97 Wn. App. 84, 95, 982 P.2d 1179 (Wn. App. 1999); *see also Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996) ("Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.").

Yet that is precisely what OSPI has done. Although EEOL requires OSPI to "enforce and obtain compliance" and to use "corrective action" to bring an "offending school district" into compliance with the antidiscrimination laws, OSPI has steadfastly failed to discharge its duties. RCW 28A.642.050.

AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON FOUNDATION
901 FIFTH AVENUE, STE 630
SEATTLE, WA 98164
(206) 624-2184

B. Because Defendants Have Failed to Discharge Their Duties Under EEOL, Mandamus Should Issue

1. OSPI has failed to develop rules and guidelines to eliminate unlawful discrimination, as required by RCW 28A.642.020.

EEOL *requires* that OSPI "*shall* develop rules and guidelines to eliminate discrimination prohibited in RCW 28A.642.010 as it applies to . . . access to course offerings." RCW 28A.642.020 (emphasis added). OSPI has promulgated two rules in the Washington Administrative Code in an effort to satisfy this duty, but each is facially deficient and neither is designed to eliminate unlawful discrimination:

WAC 392-190-046, which requires that "[e]ach school district . . . must ensure that no student is denied or limited in their ability to participate in or benefit from its course offerings on the basis of . . . any sensory, mental, or physical disability," merely reiterates that which is already prohibited by law.

WAC 392-190-048 requires that:

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

Although WAC 392-190-048 provides some guidance to districts, it too is facially deficient. First, because OSPI has never defined the term "substantially disproportionate"—a finding of which is required to prompt additional action under the WAC—it is unclear how a

AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON FOUNDATION
901 FIFTH AVENUE, STE 630
SEATTLE, WA 98164
(206) 624-2184

district could ever reliably determine whether it has disciplined a "substantially disproportionate" number of students in a protected class. *See* Pls.' Cross Mot. Summ. J. Ex. 21 (Sechrist Tr.) at 117:3–7 ("OSPI does not have a definition, to my knowledge, of substantially disproportionate with respect to this particular WAC.").

Second, OSPI has provided no meaningful guidance on what actions a school district could and should take to "ensure" that disproportionate data "is not the result of discrimination"—particularly since the actions to be taken are with respect to discipline that was already imposed. *See* WAC 392-190-048. Indeed, the rule seems to anticipate only one option: that school districts provide a *post hoc* explanation of how something *other than discrimination* has caused the disproportionality. *See* Pls.' Cross Mot. Summ. J. Ex. 6 (Albertson Tr.) at 136:25–137:1 ("[I]t's unlikely a district is going to say yes, we discriminated."); Pls.' Cross Mot. Summ. J. Ex. 59 (Nishioka Tr.) at 218:23–220:18 (explaining school district employees are uncomfortable admitting that discrimination is the cause of discipline disparities).

Third, the WAC on its face provides no guidance to the school districts that somehow manage to identify substantial disproportionality and believe that disproportionality to be the result of discrimination. In other words, the WAC does not tell school districts what they should actually do to remediate disproportionate discipline that is caused by discrimination.

Finally, the record reflects that OSPI has failed to enforce the basic data collection and review provisions of the WAC. One OSPI employee explained that even if it were apparent a district had "no process in place" for reviewing its discipline data, OSPI would merely ask the district to "come up with a [corrective] plan that will work for their district." Supp. Ex. 3 (Hennessey Tr.) at 44:12–45:20. For example, OSPI's review of the Pasco School District revealed that, since as late as 2017, the district had no process at all to review disaggregated

AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON FOUNDATION
901 FIFTH AVENUE, STE 630
SEATTLE, WA 98164
(206) 624-2184

discipline data. *See* Pls.' Cross Mot. Summ. J. Ex. 2 (Meierbachtol Tr.) at 41:11–19 (explaining Pasco had "never" reviewed discipline data for disparities, and was "starting from scratch" at the time of Consolidated Program Review review). Likely precipitated by this lawsuit, Defendants appear to be doing slightly more. Defs.' Opp. to Pls.' Cross Mot. Summ. J. at 13 ("OECR staff conducted a site visit at the Pasco School District in March 2019, and Pasco has submitted additional documentation to OECR."). But even the prospect of judicial relief has failed to prompt more effective action and, as of April 2019, "the compliance review is still open." Defs.' Opp. to Pls.' Cross Mot. Summ. J. at 13.

The regulations promulgated by OSPI—which defer entirely to the districts to collect, analyze, and remedy discriminatory discipline—are insufficient for OSPI to satisfy its statutory mandate. Plaintiffs do not seek to compel, and this Court need not order, OSPI to promulgate any particular or specific set of rules and guidelines—but what OSPI has promulgated is insufficient to satisfy what is plainly required by the EEOL.

2. OSPI has failed to perform its statutory duty to monitor and enforce school district compliance, as required by RCW 28A.642.030.

The Legislature unequivocally tasked OSPI with monitoring and enforcing local school district compliance with the EEOL. RCW 28A.642.030, titled "Compliance—Monitoring—Compliance enforcement," requires that "[t]he office of the superintendent of public instruction shall monitor local school districts' compliance with this chapter, and shall establish a compliance timetable, rules, and guidelines for enforcement of this chapter." The use of the word "compliance," twice in the body of the statute and twice in the title, emphasizes Defendants' affirmative obligation to actually ensure that school districts comply with the EEOL. The use of the word "enforcement" further underscores that passive observation alone—

AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON FOUNDATION
901 FIFTH AVENUE, STE 630
SEATTLE, WA 98164
(206) 624-2184

i.e., monitoring—is insufficient: both monitoring *and* enforcement are required to ensure compliance with state civil rights laws.

In an effort to comply with their statutory duty, Defendants rely on the Consolidated Program Review ("CPR") process which, in their words, is focused *solely* on confirming that school districts have a "process in place" to review their own data. *See* Pls.' Cross Mot. Summ. J. Ex. 6 (Albertson Tr.) at 165:24–166:5 (OSPI looks for evidence that a district has "looked into the reasons why" disproportionate discipline exists); Pls.' Cross Mot. Summ. J. 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 their data review and that they've come to some . . . conclusion about whether or not there are disparities within their district."). In other words, OSPI's entire monitoring and enforcement mechanism is based on establishing that districts are looking at their own data. The CPR process neither contemplates that OSPI itself review data for discrepancies, inaccuracies, or disproportionality, nor that OSPI take any action to address the discrimination that may be the underlying cause of disproportionate discipline.

Even if OSPI's delegation to school districts of its monitoring duties was proper (which it is not), the CPR process would not satisfy its statutory mandate. OSPI concedes that the self-monitoring conducted by the districts is unlikely to yield reliable results because districts are loath to report noncompliance even where districts are aware of potential EEOL violations. *See* Pls.' Cross Mot. Summ. J. Ex. 6 (Albertson Tr.) at 136:25–137:1 ("It's unlikely a district is going to say yes, we discriminated."); Pls.' Cross Mot. Summ. J. Ex. 59 (Nishioka Tr.) at 218:23–220:18 (explaining school district employees are uncomfortable admitting that discrimination is the cause of discipline disparities).

AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON FOUNDATION
901 FIFTH AVENUE, STE 630
SEATTLE, WA 98164
(206) 624-2184

Neither does the CPR process satisfy OSPI's statutory mandate to "establish a compliance timetable, rules, and guidelines for enforcement of this chapter." RCW 28A.642.030. WAC 392-190-048, which requires that districts take "prompt action to ensure that the disproportion is not the result of discrimination" cannot reasonably be construed to establish a timetable, much less a timetable for substantive compliance with the EEOL.

OSPI does, through its CPR process, occasionally request additional documents from districts with "substantially disproportionate" disparities in discipline, and that process contemplates a timeframe of 45 days for a district to submit new evidence of compliance. *See* Pls.' Cross Mot. Summ. J. Ex. 22 at 33 (detailing the "Follow-Up Process," wherein a local district gets 45 days to submit new evidence of compliance, OSPI reviews and responds, and the district then gets two weeks to submit further evidence for OSPI to review, and the process "[r]epeat[s] as necessary").[6] But this process is for the purpose of ensuring compliance with WAC 392-190-048's data collection and analysis requirements, not evidence of compliance with the EEOL mandate to eliminate discrimination. The process thus fails to satisfy the EEOL's requirement that OSPI "establish a compliance timetable, rules, and guidelines *for enforcement of this chapter*," *i.e.,* eliminate discrimination. RCW 28A.642.030 (emphasis added).

Similarly, OSPI may through its CPR process place a perpetually "non-compliant" district on an "action plan." *See* Pls.' Cross Mot. Summ. J. Ex. 27 at 1–2; Pls.' Cross Mot. Summ. J. Ex. 26 (McNeely Tr.) at 63:10–12, 84:1–15. But this Court should not be misled by the term "action plan." Although an action plan is OSPI's most severe "consequence" reserved

[6] *See also* Pls.' Cross Mot. Summ. J. Ex. 26 (McNeely Tr.) at 63:10–12; Pls.' Cross Mot. Summ. J. Ex. 1 (Hennessey Tr.) at 120:15–16, 167:4–7; Pls.' Cross Mot. Summ. J. Ex. 6 (Albertson Tr.) at 177:22–25; Pls.' Cross Mot. Summ. J. Ex. 25 (Roseta Tr.) at 161:25–162:3.

AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON FOUNDATION
901 FIFTH AVENUE, STE 630
SEATTLE, WA 98164
(206) 624-2184

for the worst offending districts, OSPI makes clear that such plans constitute suggested timelines of additional steps (primarily additional data collection) that the district must take to be marked compliant *with the data collection and analysis process* described in WAC 392-190-048, not with the EEOL itself. Indeed, so-called "action plans" contain no timetable for compliance with the EEOL itself, and do not even contemplate OSPI monitoring or enforcing whether the district actually follows through on the "action plan." Pls.' Cross Mot. Summ. J. Ex. 26 (McNeely Tr.) at 85:3–10 (stating that once OSPI accepts the action plan "it's the responsibility of the individual programs to follow up as necessary. So sometimes that occurs and sometimes it doesn't, depending on what it is as well").

None of the CPR process is designed to enforce (much less actually enforce) the EEOL, as required by the EEOL. *Enforcement*, *Oxford Living Dictionaries*, https://en.oxforddictionaries.com/definition/enforcement (last visited Jun. 6, 2019) (enforcement is "[t]he act of compelling observance of or compliance with a law, rule, or obligation"). A district could repeatedly be found in compliance with the entirety of OSPI's regulatory scheme—complying with the CPR process by collecting, reporting, and analyzing data pursuant to WAC 392-190-048—and yet still engage in the most egregiously discriminatory discipline practices. In any event, the record reflects that OSPI has failed even to enforce its deficient scheme on its own terms: it placed the Ellensburg School District on an action plan, only to discover—*five years later*—that the district had failed to implement any of the measures required by the plan. Pls.' Cross Mot. Summ. J. Ex. 28 at 1–2.

Finally, OSPI's regulatory scheme is insufficient as a matter of law to satisfy its mandatory duty to establish a compliance timetable—which, in the context of anti-discrimination law, identifies specific timeframes to achieve concrete goals. *See, e.g.*, *Lindsay v. City of Seattle*,

AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON FOUNDATION
901 FIFTH AVENUE, STE 630
SEATTLE, WA 98164
(206) 624-2184

86 Wn.2d 698, 710, 548 P.2d 320, 328 (1976) ("[G]oals and timetables are in appropriate circumstances a proper means for helping to implement the nation's commitments to equal employment opportunities . . . .") (internal quotations omitted); *Cohen v. Brown Univ.*, 101 F.3d 155, 170 (1st Cir. 1996) (requiring "numerical goals, and a specific timetable for achieving those goals" for hiring minorities); *cf.* 42 U.S.C. § 7602(p) (defining "schedule and timetable of compliance" as "a schedule of required measures including an enforceable sequence of actions or operations leading to compliance with an emission limitation, other limitation, prohibition, or standard" in the environmental context); *see also* Supp. Ex. 4 (discussing instance where school administrators successfully addressed discipline policies after discovering disproportionality).

3. OSPI has failed to perform its statutory duty to enforce the EEOL, as required by RCW 28A.642.050.

The EEOL plainly empowers OSPI with several potential means by which to obtain district compliance. RCW 28A.642.050 specifically authorizes OSPI to "enforce and obtain compliance with the provisions of this chapter and the rules and guidelines adopted under this chapter, by appropriate order made pursuant to chapter 34.05 RCW." RCW 28A.642.050. The statute provides non-exhaustive means by which OSPI may obtain compliance, including:

> (1) termination of all or part of state apportionment or categorical moneys to the offending school district;
> (2) termination of specified programs in which violations may be flagrant within the offending school district;
> (3) institution of corrective action; and
> (4) placement of the offending school district on probation with appropriate sanctions until compliance is achieved.

Id. RCW28A.642.050, particularly when read with the rest of the EEOL, makes unequivocally clear that EEOL's mandate is not aspirational and, if necessary, must be achieved through OSPI action to enforce compliance.

AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON FOUNDATION
901 FIFTH AVENUE, STE 630
SEATTLE, WA 98164
(206) 624-2184

To our knowledge, OSPI has never availed itself of any of these compliance mechanisms and has not incorporated any of these compliance mechanisms into its regulatory scheme. Supp. Ex. 5 (Albertson Tr.) at 138:23–140:24 (OSPI can impose sanctions on a school district, but at least for the last four years, has never withheld funding from a school for noncompliance); Supp. Ex. 6 (Meierbachtol Tr.) at 108:21–23; Supp. Ex. 7 (Sechrist Tr.) 215:10–22. Indeed, OSPI witnesses were unaware of the agency's authority to enforce antidiscrimination laws and, shockingly, former State Director of Special Education of OSPI Doug Gill testified that he was unaware of the existence of EEOL. Supp. Ex. 8 (Gill Tr.) at 84:17–18, 22–25; 85:5–7 ("Q. So whose responsibility is it to enforce the EEOL? . . . A. I would assume that there might be a partial agency responsibility for that. It might also be like a Human Rights Commission or another state-level office . . . Q. And are you sure it's not OSPI? . . . A. . . . There may be some responsibility under OSPI, but I did not see that as a component – separate monitoring component under special education."); *id.* at 96:3–7 ("Q. . . . I just want to revisit just a couple questions about the Equal Education Opportunity Law codified as RCW 28A.642. And just to confirm, Mr. Gill, you're not familiar with that law, are you? A. Not specifically, no."); Supp. Ex. 3 (Hennessey Tr.) at 47:22–25 ("Do your duties include monitoring and enforcing compliance with the Washington Law Against Discrimination? A. No.").

Far from utilizing any of the tools provided by the Legislature, OSPI concedes that it takes no "direct action" to ensure EEOL compliance as to exclusionary discipline policies. *See* Pls.' Cross Mot. Summ. J. Ex. 1 (Hennessey Tr.) at 103:22–104:8. In the absence of any evidence of disproportionate discipline, OSPI's inaction would not constitute a dereliction of duty. But OSPI has long been aware that students with disabilities are excluded from school at dramatically disproportionate rates compared to students without disabilities—and OSPI

AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON FOUNDATION
901 FIFTH AVENUE, STE 630
SEATTLE, WA 98164
(206) 624-2184

personnel agree that the disproportionality could be the result of discrimination. *See* Pls.' Cross Mot. Summ. J. 3–5 (discussing disproportionate data); Pls.' Cross Mot. Summ. J. Ex. 2 (Meierbachtol Tr.) at 118:8–119:23; 122:18–123:22 (agreeing that discrimination is a potential cause of disproportionate discipline of students with disabilities in Pasco and Yakima).

The failure to act in the face of this evidence constitutes a wholesale abdication of OSPI's statutory mandate to ensure "compliance" through "enforcement" in order to "eliminate discrimination." RCW 28A.642.030; RCW 28A.642.020. Plaintiffs do not seek, and this Court need not order, OSPI to utilize any particular tool it has been granted by the Legislature to enforce the EEOL. But it is plain that OSPI cannot lawfully refuse to use any tool at all. *Riveland*, 138 Wn.2d at 32 ("Mandamus lies to compel discretionary acts of public officials when they have totally failed to exercise their discretion to act . . ."); *see also State ex rel. Reilly*, 8 Wn.2d at 501 (concluding that where a government body "refuses to exercise its discretion, the law will by mandamus require it to exercise its discretionary power"); *State ex rel. Sater v. Bd. of Pilotage Comm'rs of Washington*, 198 Wn. 695, 700, 90 P.2d 238, 240 (1939) (where "there has been no exercise of the discretionary power, and in such cases the law will, by mandamus, compel the tribunal to act honestly and fairly"); *see also Eugster*, 118 Wn. App at 405 (mandamus will "tell[] the respondent what to do, but not how to do it").

C. Plaintiffs Are Beneficially Interested in the Suit, and Have Suffered Harm as a Result of Defendants' Abdication of Their Statutory Duties

A party seeking a writ of mandamus must show that it "has an interest in the matter beyond that of other citizens." *Retired Pub. Employees Council of Washington v. Charles*, 148 Wn.2d 602, 620, 62 P.3d 470, 480 (2003); *see Eugster*, 118 Wn. App. at 403; RCW 7.16.170 (requiring that an applicant for a writ of mandamus be "beneficially interested"). As students with disabilities attending public schools in Washington, there is no doubt that Plaintiffs have a

AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON FOUNDATION
901 FIFTH AVENUE, STE 630
SEATTLE, WA 98164
(206) 624-2184

distinct, vested interest in the outcome of this action. An order directing Defendants to discharge their statutory duties would begin to remedy the disproportionate classroom exclusions that Plaintiffs have been subject to for far too long.

It is undisputed that students with disabilities in Washington State are disciplined frequently, and at rates far exceeding those of students without disabilities. Statewide, students with disabilities have been excluded from the classroom for over 75,000 days over the 2016 school year.[7] Pls.' Cross Mot. Summ. J. Whitaker Decl. ¶ 9. Exclusions of students with disabilities accounted for 31% of all lost school days in this period—despite this cohort comprising merely 12% of all Washington students. *Id*. In the Pasco School District alone, students with disabilities were excluded from the classroom for 1,332 days over the 2015–16 school year, accounting for 29% of all school days missed. *Id*. ¶ 10. And in the Yakima School District, students with disabilities missed 2,427 days over the same period, accounting for 30% of all school days missed. *Id*. ¶ 11. Special education students in Pasco are more than twice as likely to be excluded from the classroom as general education students, while students on 504 Plans in Yakima are nearly three times as likely to be excluded.[8] Pls.' Cross Mot. Summ. J. Krezmien Decl. ¶¶ 20–21. The five Plaintiffs themselves have missed at least 176 days of instructional time—the equivalent of approximately one school year—due to formally recorded suspensions and expulsions, which does not include additional times when they were excluded

[7] A school year refers to the end of the relevant year. For example, the 2016 school year refers to the 2015–2016 school year.

[8] This data likely underreports the total number of exclusions because it does not include informal exclusions like early pickups. Pls.' Cross Mot. Summ. J. at 5–6; Pls.' Cross Mot. Summ. J. Ex. 8 (Weaver-Randall Tr.) at 73:10-17 (OSPI's data reporting system does not track early pickups); Pls.' Cross Mot. Summ. J. Ex. 9 at 11.

AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON FOUNDATION
901 FIFTH AVENUE, STE 630
SEATTLE, WA 98164
(206) 624-2184

from class in other ways, *e.g.*, being sent home early. *See* Pls.' Cross Mot. Summ. J. Madison Decl. ¶¶ 12, 15, 20; Parks Decl. ¶¶ 8, 12, 17; Forrester Decl. ¶ 7; Doe Decl. ¶ 14.

It is also undisputed that classroom removal harms students. Materials published by OSPI itself state that "out-of-school suspensions are linked to course failure, lower attendance, and dropping out—as well as much lower school-wide academic achievement." Pls.' Cross Mot. Summ. J. Ex. 12 at 13. A 2015 presentation given to Yakima by OSPI detailed a number of potentially harmful effects of exclusionary discipline, including the failure to "become productive citizens"; the risk that "[s]tudents already behind" will "get further behind"; and that excluded students "[l]ack social development of how to function in class." Pls.' Cross Mot. Summ. J. Ex. 13 at '793; *see also* TeamChild Decl. ¶ 14 (exclusionary discipline results in "academic and social disengagement"); Pls.' Cross Mot. Summ. J. Ex. 10 at 16 (noting concern that exclusionary discipline practices may further exacerbate the achievement gap between special education students and their non-disabled peers).

This evidence and other evidence submitted contemporaneously with Plaintiffs' cross-motion for summary judgment and opposition to Defendants' motion for summary judgment leaves no doubt that Plaintiffs are beneficially interested parties.

D. There Is No Other Plain, Speedy, and Adequate Remedy in the Ordinary Course of the Law

The final requirement for mandamus to issue is that "petitioner must not have a plain, speedy and adequate remedy in the ordinary course of law."[9] *Eugster*, 118 Wn. App. at 414. Where, as here, "there is a specific, existing duty which a state officer has violated and continues

[9] The fact that Plaintiffs have also sought declaratory and injunctive relief is not a bar to mandamus relief. *See Eugster*, 118 Wn. App. at 415, 419–20; *see also Thompson v. Wilson*, 142 Wn. App. 803, 175 P.3d 1149 (2008) (presence of different, alternative theories for relief in a case does not foreclose mandamus relief).

AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON FOUNDATION
901 FIFTH AVENUE, STE 630
SEATTLE, WA 98164
(206) 624-2184

to violate, mandamus is an appropriate remedy to compel performance." *Id.* (internal quotations omitted). What constitutes a "plain, speedy, and adequate remedy" is fact-specific, *Dress v. Dep't of Corr.*, 168 Wn. App. 319, 337, 279 P.3d 875 (2012) (internal quotations and citation omitted), and "the remedy issue turns on whether the duty the plaintiff seeks to enforce 'cannot be directly enforced' by any means other than mandamus." *Eugster*, 118 Wn. App. at 414.[10]

While Defendants have previously contended that Plaintiffs should avail themselves of the "citizens complaint" procedure instituted by OSPI, notwithstanding the fact that it leaves the question of whether to take any remedial action entirely to OSPI's discretion, that mechanism is intended to address discrete issues of classroom exclusions and is ill-suited to remedy widespread discrimination of the ilk alleged in the complaint. TeamChild Decl. ¶ 26 ("The burden for supervising school districts' systemic behavior should fall on OSPI proactively, not only when parents make the effort to get OSPI's attention regarding one individual case."); Supp. Ex. 8 (Gill Tr.) at 30:10–12 ("Q. Did you receive any systemic -- or complaints about systemic discipline issues? A. No.").

Here, where prospective relief is sought, mandamus is particularly appropriate because judicial intervention is necessary to compel OSPI's performance of its mandatory statutory duties that, until this time, it has refused to perform. *Walker*, 124 Wn.2d at 408 ("Where there is a specific, existing duty which a state officer has violated and continues to violate, mandamus is an appropriate remedy to compel performance."); *Eugster*, 118 Wn. App. at 404–05 (quoting *Walker*). Indeed, the Legislature created a private right of action for those aggrieved by OSPI's

[10] The Court previously opined that Plaintiffs' constitutional and statutory (WLAD) claims are not "the strongest." Supp. Ex. 1 at 6:4–10. While Plaintiffs respectfully disagree with that analysis, to the extent that represents the holding of the Court, Plaintiffs would be deprived of any adequate equitable remedies. *See Eugster*, 118 Wn. App. at 416 ("several jurisdictions hold mandamus will not lie where the plaintiff is afforded adequate equitable remedies, such as injunctive relief").

AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON FOUNDATION
901 FIFTH AVENUE, STE 630
SEATTLE, WA 98164
(206) 624-2184

violation of EEOL, making it abundantly clear that the Legislature intended that EEOL's mandate be not only aspirational, but also enforceable. RCW 28A.642.040 ("[a]ny person aggrieved by a violation of [the EEOL], or aggrieved by the violation of any rule or guideline adopted under this chapter, has a right of action in superior court for civil damages and such equitable relief as the court determines").

IV. PLAINTIFFS ARE ALSO ENTITLED TO DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs incorporate by reference their prior briefing and expressly reaffirm and renew their request for declaratory and injunctive relief which, in addition to mandamus, are warranted on the facts of this case. *See Washington State Coal. for the Homeless,* 133 Wn.2d at 916–17. To the extent the Court finds that it cannot compel Defendants to satisfy any one of their enumerated EEOL duties via a writ of mandamus, Plaintiffs respectfully request that the Court consider declaratory and/or injunctive relief pursuant to their previous submissions. Specifically, Plaintiffs respectfully request the Court to consider issuing a declaration that Defendants have failed to satisfy any duty under the EEOL for which a writ of mandamus will not issue.

CONCLUSION

For the aforementioned reasons, Plaintiffs' request for mandamus relief should be granted.

AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON FOUNDATION
901 FIFTH AVENUE, STE 630
SEATTLE, WA 98164
(206) 624-2184

DATED this 7th day of June, 2019.

Respectfully submitted,

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP

By: /s/ Alex M. Hyman
Karen R. King*
kking@paulweiss.com
Alex M. Hyman*
ahyman@paulweiss.com
1285 Avenue of the Americas
New York, New York 10019-6064
Tel: (212) 373-3000
Fax: (212) 757-3990

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

Emily Chiang, WSBA # 50517
echiang@aclu-wa.org
Eunice Cho, WSBA # 53711
echo@aclu-wa.org
John Midgley, WSBA #6522
jmidgley@aclu-wa.org
901 Fifth Avenue, Suite 630
Seattle, Washington 98164
Tel: (206) 624-2184

Attorneys for Plaintiffs
**Admitted pro hac vice*

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:

Peter J. Helmberger, Senior Counsel	PeterH@atg.wa.gov
Jean M. Wilkinson, Senior Counsel	JeanW@atg.wa.gov
Diane Hoosier, Paralegal	DianeP1@atg.wa.gov
Ali Hollenbeck, Legal Assistant	AliB@atg.wa.gov
Electronic Mailing Inbox	ComCEC@atg.wa.gov

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

DATED this 7th day of June, 2019, at New York, NY.

/s/ Alex M. Hyman
Alex M. Hyman, NY Bar No. 4944526*
1285 Avenue of the Americas
New York, NY 10019-6064
Tel: (212) 373-3000
Fax: (212) 757-3990
ahyman@paulweiss.com
**Admitted pro hac vice*

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION
901 FIFTH AVENUE, STE 630
SEATTLE, WA 98164
(206) 624-2184

□ Expedite
□ No Hearing Set
[X] Hearing Set
Date: July 19, 2019
Time: 9:00am
Judge: The Honorable Christopher 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,

Plaintiffs,

v.

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

Defendants.

No. 17-2-03293-34

ORDER GRANTING PLAINTIFFS' WRIT OF MANDAMUS

[PROPOSED]

Upon consideration of Plaintiffs' Writ of Mandamus is **GRANTED** and it is hereby **ORDERED** that:

(1) Pursuant to RCW 28A.642.020, Defendants shall develop rules and guidelines designed to eliminate discrimination on the basis of any sensory, mental, or physical disability in access to course offerings;

(2) Pursuant to RCW 28A.642.030, Defendants shall monitor local school districts' compliance with this chapter, RCW 28A.642; and

(3) Pursuant to RCW 28A.642.030, Defendants shall establish a compliance timetable, rules, and guidelines for enforcement of the Equal Education Opportunity Law, RCW 28A.642.

It is **SO ORDERED**.

ISSUED this _____ day of _____ 2019.

_____
HON. CHRISTOPHER LANESE

Presented by:

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP

By: /s/ Alex M. Hyman
Karen R. King*
kking@paulweiss.com
Alex M. Hyman*
ahyman@paulweiss.com
1285 Avenue of the Americas
New York, New York 10019-6064
Tel: (212) 373-3000
Fax: (212) 757-3990

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

Emily Chiang, WSBA # 50517
echiang@aclu-wa.org
Eunice Cho, WSBA # 53711
echo@aclu-wa.org
John Midgley, WSBA #6522
jmidgley@aclu-wa.org
901 Fifth Avenue, Suite 630
Seattle, Washington 98164
Tel: (206) 624-2184

Attorneys for Plaintiffs
**Admitted pro hac vice*

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:

Peter J. Helmberger, Senior Counsel	PeterH@atg.wa.gov
Jean M. Wilkinson, Senior Counsel	JeanW@atg.wa.gov
Diane Hoosier, Paralegal	DianeP1@atg.wa.gov
Ali Hollenbeck, Legal Assistant	AliB@atg.wa.gov
Electronic Mailing Inbox	ComCEC@atg.wa.gov

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

DATED this 7th day of June, 2019, at New York, NY.

/s/ Alex M. Hyman
Alex M. Hyman, NY Bar No. 4944526*
1285 Avenue of the Americas
New York, NY 10019-6064
Tel: (212) 373-3000
Fax: (212) 757-3990
ahyman@paulweiss.com
**Admitted pro hac vice*