

**Kevin C. Brague, OSB No. 050428**  
kevin@braguelawfirm.com  
THE BRAGUE LAW FIRM  
1205 NW 25<sup>th</sup> Avenue  
Portland, Oregon 97210  
t: 503.922.2243  
f: 844.714.6450

Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON  
PORTLAND DIVISION

**SAVE ACCESS ACADEMY**, an  
unincorporated association,

Plaintiff,

v.

**MULTNOMAH COUNTY SCHOOL  
DISTRICT NO. 1J**, an Oregon public  
corporate entity by and through the **BOARD  
OF DIRECTORS OF MULTNOMAH  
COUNTY SCHOOL DISTRICT NO. 1J**,

Defendant.

Case No.

**COMPLAINT**

(ADA; Section 504; § 1983 – EPC;  
Declaratory Relief)

Plaintiff alleges the following:

**PARTIES**

1.

At all material times, Plaintiff Save ACCESS Academy, an unincorporated association are parents and highly gifted and twice exceptional students who reside within Defendant's public school district within Multnomah County, Oregon.



## STATEMENT OF THE CASE

5.

Plaintiff is comprised of parents and highly gifted<sup>1</sup> and twice exceptional<sup>2</sup> students.

6.

The parents and children comprising Save ACCESS Academy attend PPS by compulsion pursuant to ORS 339.010 and 339.020 and PPS Policy 4.10.010-P.

7.

It is the policy of the state of Oregon for parents and community members to participate with School Districts in implementing educational goals and to participate in decision-making at the school site.<sup>3</sup> Similarly, it is the policy of PPS to establish a culture of best practices for

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<sup>1</sup> In Oregon, students demonstrating performance at or above the 97<sup>th</sup> percentile on one or more nationally normed language arts, mathematics, or cognitive/ intellectual tests are entitled to instruction designed to accommodate their assessed levels of learning and accelerated rates of learning. ORS 343.395; OAR 581-022-0102(38, 581-022-2325(1), 581-022-2500. To qualify for ACCESS Academy, the student must demonstrate a 99<sup>th</sup> percentile score (described as “highly gifted”) on one or more of the tests. ACCESS Academy, Frequently Asked Questions (FAQs), <https://www.pps.net/Page/9743>.

<sup>2</sup> Twice-exceptional learners are students who give evidence of the potential for high achievement in areas such as specific academics; general intellectual ability; creativity; leadership; and/or visual, spatial, or performing arts and also give evidence of one or more disabilities as defined by federal or state eligibility criteria such as specific learning disabilities; speech and language disorders; emotional/behavioral disorders; physical disabilities; autism spectrum; or other health impairments, such as AD/HD.

Identification of twice-exceptional students requires assessment in both the areas of giftedness and disability, as one does not preclude the other. Twice-exceptional students qualify to receive an Individualized Education Plan (IEP) or a 504 accommodation plan. This plan must address both their strengths and weaknesses. Twice-exceptional students require differentiated instruction, accommodations and/or modifications, direct services, specialized instruction, acceleration options, and opportunities for talent development. These services are necessary for twice-exceptional students to achieve growth at a level commensurate with their abilities, develop their gifts and talents, and learn compensation skills and strategies to address their disabilities.

*(Conceived by a Joint Commission of Participants Representing The National Research Center on the Gifted and Talented (NRC/GT), the Association for the Education of Gifted Underachieving Students (AEGUS), AEGUS, and the Bridges Academy. See [http://www.2enewsletter.com/subscribers\\_only/arch\\_symposium\\_public\\_7-09.htm](http://www.2enewsletter.com/subscribers_only/arch_symposium_public_7-09.htm)).*

<sup>3</sup> ORS 329.125.

parental and family involvement in support of academic achievement for all students.<sup>4</sup> It is also the policy of the Oregon Department of Education (ODE) that the school district shall provide parents of students identified as talented and gifted “an opportunity to give input and discuss with the district the programs and services available to their child.”<sup>5</sup>

8.

It is the policy of the state of Oregon to promote and encourage successful and innovative schools. Successful school will be rewarded with additional tools to further improve student learning.<sup>6</sup>

9.

It is the policy of the state of Oregon that, when talented and gifted programs are offered, the programs should be provided by common or union high school districts, combinations of such districts or education service districts, in accordance with ORS 334.175, and that the state will provide financial and technical support to the districts to implement the education programs within the limits of available funds.<sup>7</sup>

10.

It is the policy of the State of Oregon that meeting the needs of twice exceptional students is the responsibility of both the special education (SPED) and talented and gifted (TAG) programs, which would work in cooperation with students who are twice exceptional. The student’s abilities will determine appropriate instruction.<sup>8</sup>

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<sup>4</sup> PPS Board Policy 7.10.040-P.

<sup>5</sup> OAR 581-022-2330.

<sup>6</sup> ORS 329.825.

<sup>7</sup> ORS 343.396.

<sup>8</sup> <http://www.oregon.gov/ode/learning-options/TAG/Pages/TAG-FAQ.aspx>

11.

It is the policy of PPS to commit “to an educational program that recognizes the unique value, needs and talents of the individual student[s].”<sup>9</sup> Further, the PPS Board “directs district staff to provide classroom or school programs designed to promote educational opportunity for talented and gifted students commensurate with their ability.”<sup>10</sup>

12.

It is the law of Oregon that school districts, including PPS, shall provide educational programs or services to TAG students enrolled in public schools under rules adopted by the State Board of Education.<sup>11</sup> One of those rules is that TAG students must receive education designed to accommodate their assessed levels and accelerated rates of learning.<sup>12</sup> “Rate and Level” are defined by ODE as: “Level of learning is the student's instructional level in the curriculum and the place where the student will be successful but will encounter knowledge and skills not yet learned or mastered. Level is more than advanced grade level; it involves complexity and sophisticated concepts. Rate of learning is a measure of the pace at which the student successfully progresses through the curriculum after being placed at an appropriate instructional level. A student's rate of learning will vary, depending on the subject, point in the learning process, degree of interest, level of difficulty, and learning style”.<sup>13</sup>

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<sup>9</sup> PPS Board Policy 6.10.015-P.

<sup>10</sup> Id.

<sup>11</sup> ORS 343.409.

<sup>12</sup> OAR 581-022-2500.

<sup>13</sup> Talented and Gifted and Accelerated Learners, Best Practices to Maximize Student Learning. Instructional practices in Gifted Education. Rebecca Blocher, Specialist in Talented and Gifted Education. Oregon Department of Education. January 13<sup>th</sup>, 2014, [https://www.pps.net/cms/lib/OR01913224/Centricity/Domain/196/Accelerated\\_Learners\\_Definitions.pdf](https://www.pps.net/cms/lib/OR01913224/Centricity/Domain/196/Accelerated_Learners_Definitions.pdf).

13.

In 2002, the PPS Board of Directors formally voted to adopt the ACCESS program. The ACCESS program is known as the ACCESS Academy (ACCESS). As described in its founding document, “The Portland Public Schools (PPS) ACCESS alternative program is a grade 1 through 12 educational option”.<sup>14</sup> ACCESS has never directly served high school students although ACCESS students are automatically entitled to attend high school at Grant High School where a specific “ACCESS class” was provided to 9th graders in 2006 and 10th graders in 2007. The program was never extended to 11th and 12th graders, and ACCESS students at Grant no longer receive any services as a cohort or any priority to higher level classes.

14.

In its first year (2003-2004), ACCESS served 1st to 6th grade. It added 7th grade in 2004-2005 and 8th grade in 2005-2006. From its inception until 2012 it was co-located at Sabin K-5. Since 2013, it has been located at Rose City Park, a then empty elementary school. In 2014, the 1st and 3rd grade classes from Beverly Cleary School (BCS) moved into Rose City Park as a temporary solution to overcrowding at BCS. As a result of lack of space, ACCESS was not allowed to admit all applying students. ACCESS has regularly had extensive waiting lists (75 students waitlisted in 2012-13, 110 in 2013-14, 142 in 2014-15, 118 in 2015, and 76 in 2016). Current enrollment is 336 children.

15.

All ACCESS students have scored in the 99th percentile on nationally normed tests for aptitude and/or achievement in any or all of the following areas: reading, math, or cognitive ability. Qualifying applicants must also demonstrate (by teacher and parent testimony) evidence

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<sup>14</sup> [http://www.pps.k12.or.us/depts/tag/program/access\\_draft5.pdf](http://www.pps.k12.or.us/depts/tag/program/access_draft5.pdf).

of need for an alternative education setting, including under-achievement, at-risk behavior, or twice-exceptional.

16.

Historically, other than at ACCESS, PPS has failed to provide TAG students with meaningful “special programs or services” beyond those normally provided by the regular school program pursuant to ORS 343.397. Throughout the past 20 years, the district has repeatedly developed plans for providing district-wide TAG services, but it has not implemented any of these. Each plan was developed as part of a corrective action resulting from non-compliance with applicable statutes and administrative rules, but strategies were rarely implemented, much less sustained. PPS has yet to finalize, fund, staff, or implement a district-wide TAG plan.

17.

Other than at ACCESS, the only district-wide opportunities for any acceleration is whole grade acceleration, single subject acceleration (SSA) in mathematics only and compacted math<sup>15</sup> in 7th and 8th grades. PPS has struggled to implement SSA in math because of entrenched resistance in neighborhood schools, siloed math and TAG departments, scheduling difficulties, and lack of funding. SSA requires schedule blocking; thus, even if a student successfully passes the SSA placement test, an individual building administrator may choose not to accommodate the acceleration.

18.

PPS also impedes families accessing SSA in neighborhood schools; parents who apply for their student to accelerate one year in mathematics must go through a months-long process

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<sup>15</sup> Compacting is an acceleration strategy in which multiple years of curriculum are compacted into a shorter period of time. PPS’ “compacted math” curriculum is the ability to take 7-9th grade math (through Algebra 1) in 7th and 8th grade.

seeking placement and must agree to provide student transportation to and from math class at their neighborhood middle or high school each day when the student reaches the highest level of mathematics at their elementary or middle school.<sup>16</sup> Consequently, it is substantially easier to whole-grade accelerate a PPS student (skip a grade) than to accelerate only for math.

19.

PPS’s compacted math pathway—which allows qualifying middle school students to earn high school algebra credit—is purported to be broadly available, but historically has not been implemented equitably. It was so unevenly offered in PPS’s racially diverse and low-income Title 1 schools that a school board member included this as one of the problematic courses when he filed a complaint alleging racial discrimination in 2016.<sup>17</sup>

20.

PPS disregards the rights of its TAG students and generally ignores the ODE’s Administrative Rules. PPS was in corrective action or was the subject of court mediation for 15 out of the last 20 years. ODE imposed corrective action for PPS’s violations of TAG law and regulations. PPS has been in “voluntary corrective action” since spring 2016 for lack of compliance with TAG administrative rules.

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<sup>16</sup> <https://www.pps.net/Page/2886>.

<sup>17</sup> [https://articles.oregonlive.com/education/index.ssf/2016/07/portland\\_school\\_board\\_member\\_f.amp](https://articles.oregonlive.com/education/index.ssf/2016/07/portland_school_board_member_f.amp).

The following timeline provides important dates about PPS’s failure to provide TAG services and the history of ACCESS:

<b>YEAR</b>	<b>GENERAL TAG CORRECTIVE ACTION WITH ODE</b>	<b>OREGON CIRCUIT COURT</b>	<b>ACCESS-SPECIFIC EVENTS</b>
1997	Parents appeal to Oregon Dept of Education (ODE), claiming PPS is not in compliance with OARs relating to TAG services.		
1998 (Mar)	ODE issues compliance order and PPS enters corrective action		
1999	PPS in corrective action		
2000	PPS in corrective action; follow-up investigation on corrective action begins		
2001	PPS in corrective action		ACCESS is conceptualized
2002	PPS in corrective action		(Feb) PPS Board votes to open ACCESS based on “draft 5” vision
2003	PPS in corrective action; program review undertaken ( <a href="http://www.tagpdx.org/maurer_program_review_portland_public_s.htm">http://www.tagpdx.org/maurer_program_review_portland_public_s.htm</a> ).		(Sep) ACCESS opens at Sabin Elementary as grades 1-6
2004	(Spring) ODE releases PPS from corrective action entered in 1998. Parents immediately file petition with ODE to object to releasing PPS corrective action.	(Fall) Parents petition Circuit Court to have ODE enforce TAG OARs with PPS.	ACCESS @ Sabin extends to 7 <sup>th</sup> grade
2005		Circuit Court finds with parents and allows suit to proceed.	ACCESS @ Sabin extends to 8 <sup>th</sup> grade
2006		ODE and parents enter mediation.	ACCESS @ Grant HS opens for 9 <sup>th</sup> grade cohort, only one class is offered.
2007	(June) PPS in corrective action for ACCESS-specific complaint. <a href="http://www.tagpdx.org/draft%20strategic%20plan.pdf">http://www.tagpdx.org/draft%20strategic%20plan.pdf</a>		ACCESS @ Grant HS extends to 10 <sup>th</sup>  ACCESS Parents file administrative complaint with PPS regarding school’s lack of

YEAR	GENERAL TAG CORRECTIVE ACTION WITH ODE	OREGON CIRCUIT COURT	ACCESS-SPECIFIC EVENTS
			differentiation and failure to meet mandated instructional time for middle grades. This complaint is eventually elevated to ODE. Corrective action plan in place by June 2007. Investigative results are rolled into court mediation corrective action in early 2008.
2008	(Feb) PPS re-enters corrective action for general TAG as condition of mediation; includes ACCESS-specific corrective action.	(Feb) ODE and Parents reach draft settlement. Includes investigative results from ACCESS 2007 complaint. Includes findings that PPS is not in compliance with OARs and will re-enter corrective action.	ACCESS @ Grant HS continues but does not extend ACCESS-specific coursework to grades 11-12.  PPS Board requests an ACCESS report and recommendations in aftermath of 2007 complaint <sup>i</sup>
2009	PPS in corrective action		
2010	PPS in corrective action		ACCESS @ Grant HS stops offering any ACCESS specific coursework; cohort still matriculates but with no services (through present day).
2011	(Spring) PPS continues in corrective action (Jul) PPS released from corrective action		

YEAR	GENERAL TAG CORRECTIVE ACTION WITH ODE	OREGON CIRCUIT COURT	ACCESS-SPECIFIC EVENTS
2012	PPS performs a TAG survey		TAG Survey clearly shows ACCESS is the only consistent TAG service; high level of parent satisfaction.
2013			ACCESS (1-8) moves to Rose City Park campus (without co-location) to relieve Sabin of overcrowding after boundary change.
2014			Two grades of Beverly Cleary School are moved to Rose City Park as a temporary solution to their overcrowding; ACCESS is again a “co-located” program. Both schools have remained at the Rose City Park campus through Spring 2018.
2015	PPS produces TAG plan guidance document <a href="https://www.pps.net/Page/2896">https://www.pps.net/Page/2896</a>		(Oct) As part of PPS efforts to address boundaries, facilities, and enrollment balancing, two proposals are released. In one, ACCESS remains at Rose City Park without co-location ( <a href="https://www.pps.net/cms/lib8/OR01913224/Centricity/Domain/182/Scenario-No1-WEB.pdf">https://www.pps.net/cms/lib8/OR01913224/Centricity/Domain/182/Scenario-No1-WEB.pdf</a> ), in the other it co-locates

YEAR	GENERAL TAG CORRECTIVE ACTION WITH ODE	OREGON CIRCUIT COURT	ACCESS-SPECIFIC EVENTS
			at Kellogg MS with Creative Science, a focus option school ( <a href="https://www.pps.net/cms/lib8/OR01913224/Centricity/Domain/182/Scenario-WEB-No2.pdf">https://www.pps.net/cms/lib8/OR01913224/Centricity/Domain/182/Scenario-WEB-No2.pdf</a> ).
2016	(spring) TAG parent Advisory Council (TAGAC) insists that PPS is not in compliance with TAG OARs; PPS re-enters “voluntary” corrective action		<p>Mar) PPS proposes a boundary scenario that reopens Rose City Park as a neighborhood elementary school and places ACCESS in the empty Humboldt building in Fall 2017.</p> <p>(May) Kairos Charter requests and is granted by Board a move into Humboldt ES in Aug on a one-year lease for the 2016-17 school year.</p> <p>(Fall) Parents file administrative complaints—one general, one special education specific—with PPS regarding ACCESS admissions process. In mid-December, school</p>

YEAR	GENERAL TAG CORRECTIVE ACTION WITH ODE	OREGON CIRCUIT COURT	ACCESS-SPECIFIC EVENTS
			<p>board denies appeal because it is clear they cannot articulate a remedy within the time frame specified by internal PPS complaint process. Board directs staff to revise admissions process for 2017-18 cycle.</p> <p>TAGAC recommends growth for ACCESS to meet “currently demonstrated need” (at least 550 Students) .</p> <p>Kellogg MS—formerly a potential site for ACCESS, now slated to reopen as a middle school—is found to require extensive repairs. As the PPS Bond is reworked for Spring 2017, a full rebuild of Kellogg is planned.</p>
2017	<p>PPS in “voluntary” corrective action</p> <p>(Spring) PPS TAG department conceptualizes the “TAG Continuum” as part of corrective action.</p>		<p>(Jan) Parents forward the special education portion of the ACCESS admissions complaint to the U.S. Department</p>

YEAR	GENERAL TAG CORRECTIVE ACTION WITH ODE	OREGON CIRCUIT COURT	ACCESS-SPECIFIC EVENTS
			<p>of Education, Office of Civil Rights; complaint is still open as of May 2018.</p> <p>(Spring) PPS staff revise and institute the new ACCESS admissions policy.</p> <p>(March) PPS Teaching &amp; Learning Board Committee affirms ACCESS program's need for room to grow from 2 to 3 strands of grades 3-8; directs staff to find a building.</p> <p>(Spring) It becomes increasingly evident that east side boundaries and facilities will not happen for Fall 2017 as PPS settles into only addressing west side boundaries.</p> <p>(Sept) PPS announces Eastside boundary plan that proposes placing ACCESS at Humboldt ES.</p>

YEAR	GENERAL TAG CORRECTIVE ACTION WITH ODE	OREGON CIRCUIT COURT	ACCESS-SPECIFIC EVENTS
			<p>(Oct 3) PPS announces Kairos Charter can stay at Humboldt campus indefinitely; Humboldt no longer available for ACCESS.</p> <p>(Oct 10) PPS proposes an 8-site “pathways” program, essentially closing the ACCESS program and relocating current ACCESS students to 4 elementary and 4 middle schools. TAGAC documents over 50 unanswered questions about the proposal.</p> <p>(Nov 16) PPS Board votes to move forward with boundary plan that does not have an identified home for ACCESS; directs Superintendent to find ACCESS a home at no more than two sites.</p> <p>(Nov 29) PPS proposes placing ACCESS at Holladay-Youngson, a site</p>

YEAR	GENERAL TAG CORRECTIVE ACTION WITH ODE	OREGON CIRCUIT COURT	ACCESS-SPECIFIC EVENTS
			current occupied by an alternative program for SpEd students who cannot be in a less restrictive environment.
2018	PPS in “voluntary” corrective action		(Mar 23) PPS reverses decision on Holladay-Youngson, leaving ACCESS without a building.

22.

ACCESS serves the needs of highly gifted students who inherently have a high degree of asynchronous development academically, intellectually, physically, and/or socio-emotionally.<sup>18</sup> For example, “Kate, with an IQ score of 170, may be six, but she has a mental age of ten.... Unfortunately, Kate, like every other highly gifted child, is an amalgam of many developmental ages. She may be six while riding a bike, thirteen while playing the piano or chess, nine while debating rules, eight while choosing hobbies or books, five (or three) while asked to go sit still.”<sup>19</sup>

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<sup>18</sup> Giftedness is asynchronous development in which advanced cognitive abilities and heightened intensity combine to create inner experiences and awareness that are qualitatively different from the norm. This asynchrony increases with higher intellectual capacity. The uniqueness of the gifted renders them particularly vulnerable and requires modifications in parenting, teaching and counselling in order for them to develop optimally. (The Columbus Group, 1991).

<sup>19</sup> Stephanie Tolan as quoted in ACCESS founding document.

ACCESS serves the uneven development of its students with structures and processes that support their academic, intellectual, or social-emotional asynchrony. For example, an elementary student who needs to study math at a high school level is able to do so without having to only work alongside high schoolers which would be developmentally inappropriate. Another example might be a student who is able to work at an academic advanced rate and level but gets emotionally dysregulated by being accidentally bumped; ACCESS has common spaces, routines, and cultural understanding to support a dysregulated student in regrouping and rejoining peers. A student with narrow or intense intellectual interests, who is incapable of making friends among his age peers, or was bullied at a previous school, will find intellectual compatriots among both grade peers and older and younger students at ACCESS. For example, a fourth and sixth grade student obsessed with geography – a subject generally ignored through primary school – might ask to use their free time to look at an adult atlas together in a library stocked with secondary and college-level materials.

The protocols supporting students who struggle with behavior challenges not typical of their chronological ages are second nature to all students. Students learn to clear a room long enough for a dysregulated student to get to the learning center for help calming down; this is done quickly without drama or shame. Older students often help much younger students who have become dysregulated – they know not only what to say or do, but what not to say or do. Yet no one is held back academically based on behavior alone, which commonly occurs in schools not structured with these students' needs in mind.

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24.

From 2013 until now ACCESS Academy has been located in the Rose City Park building in Northeast Portland at 2334 NE 57th Ave. Using the typical funding model for all PPS schools, ACCESS operates as a school with a Principal, Counselor, Secretary, Special Education Teacher, School Psychologist, Speech Pathologist, and classroom teachers. It is co-located at Rose City Park with 1st and 3rd grade students from Beverly Cleary School (BCS) and shares a librarian, a secretary, kitchen staff, and custodial staff with BCS. ACCESS currently serves students from the 1<sup>st</sup> through 8<sup>th</sup> grades (with a combined 1st-2nd grade classroom).

25.

ACCESS serves the needs of students within PPS's attendance boundaries. The admission process complies with all federal and state statutes and regulations. ACCESS admits highly gifted students who perform at the 99th percentile on nationally normed tests for aptitude and/or achievement in any or all of the following areas: reading, math, or cognitive ability. ACCESS is PPS's only strategy for meeting the needs of gifted and twice exceptional students who have exceeded all or most recognized benchmarks.

26.

ACCESS's curriculum covers the "scope and sequence" requirements of PPS, using instructional strategies and curriculum considered best practice in working with highly gifted students. The curriculum is taught at a flexible and accelerated pace to meet the needs of gifted students, including twice exceptional students who have exceeded all or most benchmarks. Language arts is accelerated one year for all students and is also taught in greater depth. The schedule is specifically designed to permit all students to study math at their assessed level, not their grade level, meaning that ACCESS can accommodate elementary students studying high

school math. Roughly two-thirds of ACCESS students take math at a level that is one or more years ahead of their grade level; ten percent are advanced three or more grades. Students are also accelerated in science (taking high school Physics I in 7th or 8th grade) and world languages (gaining a high school credit in Spanish or Mandarin).

27.

ACCESS understands and supports asynchronous development. An ACCESS student's opportunity to learn at his/her assessed rate and accelerated level is not determined by chronological age, grade, or disability. Learning occurs alongside both same-age and different-age peers, and alongside peers with and without documented disabilities.

28.

ACCESS Academy also provides staffing or funding for non-curricular activities ("enrichments") that reflect the particular gifts, talents, and passions of the student body, including participation in the National Geographic Bee, National Spelling Bee, Oregon Writing Festival, American Math Competition, MathCounts, Middle School Science Bowl, and Northwest Science Expo. Also reflecting its students' interests, ACCESS, with financial support from its fundraising Foundation, has staffed a daily, free, two-hour after-school "Game Club" / "Maker Space" open to all students to play board, card, and fantasy games, and pursue hands-on creative interests, such as origami or music composition. Exemplifying the asynchronous development of many students, the groups that form fluidly to play or create together during "Game Club" are typically of mixed ages, reflecting common passions nor same-age peer groups or disabled/non-disabled peers.

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29.

ACCESS consists of approximately 336 students. Of these students approximately 50 (15%) are on Individualized Education Plans (“IEPs”).<sup>20</sup> This is a higher proportion than the district average of 13-14% for elementary and middle schools<sup>21</sup>, and far higher than the district’s average for “twice exceptional” (TAG and SpEd) students of 5-6%.<sup>22</sup> Another 6.5% of ACCESS students have Section 504 Plans because they have disabilities recognized by the Rehabilitation Act of 1973.<sup>23</sup>

30.

ACCESS provides its special education services in the classroom and does not segregate its disabled population from the general student population. Although some students with IEPs have come from segregated contained behavior classrooms in their neighborhood schools, they are now mainstreamed at ACCESS.

31.

ACCESS students must be kept with their 1st to 8th grade peers in ACCESS as a whole school program on a single site to avoid discrimination of twice exceptional students.

32.

ACCESS must be maintained as a 1st to 8th grade school to ensure that twice exceptional students, due to their recognized disabilities, have access to the general education of intellectual,

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<sup>20</sup> To be eligible for an IEP a student must have a recognized disability, such as Autism Spectrum Disorder, communication disorder, deaf/blindness, emotional disturbance, orthopedic impairment, or other health impairment. Individuals with Disabilities Education Act of 2004 (IDEA) 20 U.S.C. § 1401(3); See also OAR 581-015-2130.

<sup>21</sup> Portland Public Schools, School Profiles, <https://www.pps.net/Page/942>.

<sup>22</sup> 2013, 2014, 2015 data in PPS System Planning and Performance—07/21/2016jws (2016-0131).

<sup>23</sup> 29 U.S. Code § 705; 45 C.F.R. § 84.3 (defining disability).

academic, and socio-emotional peers. To reduce the cohort of peers to which they have access by splitting the program, for example by separating elementary from middle school, would remove the opportunity for the vital social development that occurs from being educated alongside academic and intellectual peers who share their interests and are tolerant of, or celebrate, their asynchrony, because they have the same traits.

33.

Proposals for co-locating ACCESS students into other schools has met community resistance. Principals at neighborhood schools have actively opposed the inclusion of ACCESS. Parents of neighborhood school children have strongly opposed the inclusion of ACCESS in their schools. In addition to community opposition, students at neighborhood schools have bullied ACCESS students prior to admittance to ACCESS; forty-six percent of ACCESS parents report that their student was bullied at prior schools.

34.

Educating this subset of TAG students, regardless of whether they have a recognized disability, in a single program in one location is the only successful district-wide model PPS has for providing TAG students with meaningful “special programs or services” pursuant to ORS 343.397. ACCESS Academy is a success functionally because of the flexibility of programing it provides. Although its needs are not adequately funded, it is also a success financially because it provides an economy of scale for educating a subset of TAG students at their assessed levels and accelerated rates of learning in a way that cannot be achieved in neighborhood schools, despite using the same budgetary formula as those schools.

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35.

To split ACCESS from a 1st to 8th grade school, into a divided program amongst several locations, or to disband it entirely is against the law of the state of Oregon, as well as the underlying policies of the ODE and PPS. To split ACCESS will cause ongoing redundancy in administration, employment, staff, services, curriculum, and transportation.

**FIRST CLAIM FOR RELIEF**

(ADA)

36.

Plaintiff realleges and incorporates by reference paragraphs 5 through 35 above.

37.

Plaintiffs include qualified individuals with disabilities<sup>24</sup> who will be denied the benefits of their public school education program and its component parts of learning, reading, concentrating, thinking, and communicating, which are major life activities.<sup>25</sup>

38.

The Americans with Disabilities Act (ADA) requires PPS to operate ACCESS so that when viewed in its entirety it is readily accessible to and usable by individuals with disabilities.<sup>26</sup>

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<sup>24</sup> Under the Americans with Disabilities Act, the term "disability" includes, "with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. §12102(1).

<sup>25</sup> Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. 42 U.S.C. §12102(2)(A).

<sup>26</sup> 42 U.S.C. § 12132.

39.

PPS, by knowingly and intentionally splitting the ACCESS into separate campuses, denies twice-exceptional students the integral part of their education in interacting with their non-disabled peers.

40.

PPS's disregard for the education of ACCESS students with their non-disabled peers constitutes an ongoing and continuous violation of the ADA. Unless restrained from doing so, PPS will violate the ADA. Unless enjoined, PPS's conduct will inflict injuries upon twice exceptional students for which they have no adequate remedy at law.

41.

The ADA authorizes injunctive relief as appropriate to remedy acts of discrimination against persons with disabilities, as well as compensation and reasonable attorney fees and costs pursuant to 42 U.S.C. § 12132 via 29 U.S.C. § 794a.

## **SECOND CLAIM FOR RELIEF**

(Section 504)

42.

Plaintiff realleges and incorporates by reference paragraphs 5 through 41, above.

43.

Plaintiff consists of parents of children with disabilities recognized under Section 504, and their disabilities substantially limit major life activities including, but not limited to, education, learning, reading, concentrating, thinking, and communicating.

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44.

PPS knows that ACCESS students were and are qualified individuals with disabilities.

45.

Section 504 requires PPS to operate ACCESS so that when viewed in its entirety it is readily accessible to and usable by individuals with disabilities.<sup>27</sup>

46.

PPS, by knowingly and intentionally splitting the ACCESS program into separate campuses denies access of disabled students to their non-disabled peers.

47.

PPS receives Federal monies through various grants and other means.

48.

As a result of PPS's deliberate indifference toward ACCESS students, they suffer a loss of an education, all to their economic and noneconomic damages in an amount to be proven at trial.

49.

Plaintiff is entitled to an award of their attorney fees and costs pursuant to 29 U.S.C. § 794a.

### **THIRD CLAIM FOR RELIEF**

(42 U.S.C. § 1983 - EPC)

50.

Plaintiff realleges and incorporates by reference paragraphs 5 through 49, above.

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<sup>27</sup> 34 C.F.R. § 104.22.

51.

PPS's action and policies toward TAG students, on its face and as applied or threatened to be applied, violates the Equal Protection Clause of the Fourteenth Amendment.

52.

PPS Board Policy 6.10.015-P legally distinguishes between classes of students: specifically, TAG students and general education students. An integral part of PPS's TAG students includes twice exceptional students.

53.

PPS's splitting of ACCESS is to unlawfully treat twice exceptional students unequally under its policy.

54.

PPS provided the ACCESS program as a single cohesive school program for disabled and non-disabled TAG students. Splitting ACCESS into separate programs or campuses violates PPS's policy and is not rationally related to a legitimate state interest.

55.

Plaintiff is entitled to an award of their attorney fees and costs pursuant to 42 U.S.C. § 1988.

#### **FOURTH CLAIM FOR RELIEF**

(Declaratory Judgment pursuant to ORS 28.010 et seq.)

56.

Plaintiff realleges and incorporates by reference paragraphs 5 through 55, above.

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57.

The state of Oregon through its statutes and regulations, and PPS, through its own policies have conferred certain rights, status, and legal relations between Plaintiff and Defendant.

58.

28 U.S.C. § 2201 and ORS 28.010 provides this court with authority to declare the rights, status, and legal relations of the parties.

59.

Plaintiffs seek the entry of a judgment declaring that Defendant has been in violations of the law concerning the provision of TAG programs and services, and that Defendant must maintain the ACCESS program as a unified program physically located on a single campus.

WHEREFORE, Plaintiff prays for the following relief:

1. A declaratory judgment against the Defendant;
2. Enter a declaratory judgment declaring Defendant's acts to be a violation of the ADA, Section 504, the Equal Protection Clause, and ORS 343.391 et seq.;
3. Issue a temporary restraining order, and a preliminary and permanent injunction enjoining Defendant, its Board, agents, servants, employees, and officers, from dissolving or splitting the ACCESS program.
4. Enter a declaratory judgment declaring that Defendant must maintain the ACCESS program as a unified program physically located on a single campus;
5. Enter a declaratory judgment declaring that Defendant must maintain TAG programs and services as envisioned by the laws, regulations, and policies of the state of Oregon, its Department of Education, and Defendant's own policies.

6. Award Plaintiff costs, interest and reasonable attorneys' fees for this action pursuant to 42 U.S.C. §1988, 29 U.S.C. 794a, and other relevant statutes; and,

7. Order such other and further relief as the Court deems just and proper under the circumstances.

DATED this 21<sup>st</sup> day of May, 2018.

THE BRAGUE LAW FIRM

By /s/ Kevin C. Brague

Kevin C. Brague, OSB No. 050428  
kevin@braguelawfirm.com  
1205 NW 25<sup>th</sup> Avenue  
Portland, Oregon 97210  
t: 503.922.2243  
f: 844.714.6450  
Attorney for Plaintiff

## CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **NAME OF PLEADING** on the party listed below by the following indicated method or methods:

Michael Porter  
*mporter@millernash.com*  
MILLER NASH GRAHAM & DUNN  
111 SW Fifth Avenue, Suite 3400  
Portland, Oregon 97204  
503.222.xxxx  
503.222.xxxx – fax  
*Attorney for Defendants*

by electronic means through the U.S. District Court, District of Oregon's CM/ECF document filing system.

by mailing a full, true and correct copy thereof in a sealed, first-class postage paid envelope, addressed to the address as shown above, with the U.S. Postal Service at Portland, Oregon, on the date set forth below.

by causing a full, true, and correct copy thereof to be hand-delivered to the attorney at the attorney's last known office address listed above on the date set forth below.

by faxing a full, true, and correct copy thereof to the attorney at the fax number shown above, which is the last-known fax number for the attorney's office, on the date set forth below.

DATED this 18<sup>th</sup> day of May, 2018.

*/s/ Kevin Bague*  
Kevin C. Bague, OSB No. 050428