



Northern  
California

September 28, 2018

**VIA U.S. MAIL AND EMAIL**

Superintendent Matt Wayne  
Hayward Unified School District  
24411 Amador Street  
Hayward, CA 94544

Dear Dr. Wayne:

I write on behalf of the American Civil Liberties Union Foundation of Northern California (ACLU-NC) to express our concern regarding the mistreatment of Black students with disabilities in Hayward Unified School District (“District”). The ACLU works to ensure that all students have an equal opportunity to attend schools that are safe and nurturing. And here, we are concerned that the District is neglecting blatant mistreatment towards E.E., a young Black student with disabilities in your District. As explained more fully below, from April to June 2018, Hayward Unified school officials failed to ensure that he was properly supervised---especially on the playground---in violation of Section 5552 of the California Code of Regulations. Students with disabilities are also entitled to a free appropriate public education, with an individualized education program (IEP) that is tailored to their needs. The District failed to ensure that E.E.’s IEP was still meeting his needs after receiving notice of significant changes in his mood and behavior. As a result, it failed to guarantee that E.E. was receiving a free appropriate public education at all times. Finally, the District failed to create an inclusive environment for E.E. As a result, he suffered severe physical and emotional injuries that could have been easily prevented. Moreover, it has come to our attention that this may be a recurring problem confronting Black students confront in your District. We urge the District to ensure that it is applying its policies and procedures in a fair manner that will prevent these situations from arising. Based on our understanding that this problem exists for Black students, we also request that District staff and teachers undergo implicit and explicit bias training as soon as possible.

**I. Background of E.E.’s Hardships with the District**

*A. Transition from Inglewood to Hayward*

As the District is aware, E.E. is a five-year-old Black boy with autism. He also has speech and language impairments and communicates in three-to-five-word utterances at most. Under the Individuals with Disabilities Education Act (IDEA), he is entitled to “specially designed instruction” (special education) and services “required to assist a child with a disability to benefit



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from special education.”<sup>1</sup> The nature of his special education and related services are detailed in his individualized education program (IEP). On March 8, 2017, he was issued an initial IEP from Inglewood Unified School District (IUSD), which provided him with one hour of speech and language services per week, twenty-five minutes of occupational therapy per week, and three-and-a-half hours of specialized academic instruction per day.<sup>2</sup> In addition, per a July 27, 2017 settlement agreement, E.E. was to be placed in a nonpublic school (NPS) and to be given his own adult aide during the first ninety days of his transition.<sup>3</sup>

In April 2018, E.E. and his family moved from Inglewood to Hayward, CA. E.E. began attending Helen Turner Children’s Center in the District. He was the only Black student, the seven other students in the class also had special needs. The classroom also had three paraprofessional aides and one teacher. Later this month, the District issued E.E. another IEP which included fifty minutes of speech and language services per week and five hours of specialized academic instruction per day. The District offered occupational therapy, but did not offer behavioral intervention services, nor was E.E. given a one-on-one adult aide.

### B. Initial Concerns

On April 11, 2018, Linda noticed a fingernail-shaped scratch on E.E.’s right shoulder after he returned from school.<sup>4</sup> Linda immediately notified E.E.’s teacher, Ms. Hermone, who admitted that she had seen the scratch during school but was unsure of where it came from. Indeed, without raising the concerns with Linda, Ms. Hermone just assumed that it had occurred during recess. Shortly after this, Linda began noticing changes in E.E.’s mood and behavior. E.E. would come home from school quiet and detached or clingy and irritable, and he began wetting the bed at night. Linda noticed these mood changes were during the week while he was attending school at the District. On May 15<sup>th</sup>, Linda emailed Ms. Hermone conveying these concerns.<sup>5</sup> Ms. Hermone, nevertheless, responded by saying that she had not noticed any changes in E.E.’s

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<sup>1</sup> Individuals with Disabilities Education Act § 602, 20 U.S.C. § 1401 (2016) [hereinafter IDEA]; *see also* *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017).

<sup>2</sup> *See* Ex. A.

<sup>3</sup> *See* Ex. B. His initial IEP from Inglewood was amended to include four hours of behavioral intervention services per day for four days a week, fifty minutes of occupational therapy per week, and four hours of specialized academic instruction per day.

<sup>4</sup> *See* Ex. C.

<sup>5</sup> All emails are on file with the ACLU Foundation of Northern CA. The email reads as follows:

Hi Michelle! How was E.E. today? The bus driver mentioned that he wasn't [sic] himself today and I've noticed his behaviour has been off for the last couple of days. He's usually bubbly and expressive but he's been quiet and somber. How has he been in class? How has his interaction with his classmates been? Has he seemed to have any problems with the aides? I want to try and catch whatever this is before it gets worse.

E-mail from Linda to Michelle Hermone, Teacher, Helen Turner Children’s Center (May 15, 2018, 04:38 PM PST).

behavior.<sup>6</sup> Concerned regarding her son's safety, Linda began observing E.E.'s classes the week of May 21, 2018, visiting a total of seven different times.<sup>7</sup> In five of these instances, Linda was shocked to see E.E. left completely alone while other students were given more attention.<sup>8</sup> According to Linda, the aides only seemed to pay attention to him when he was involved in a group activity and Ms. Hermone was in front of the class.<sup>9</sup> On one occasion, Linda noticed an aide aggressively push E.E.'s hand away as he reached into a bowl of art supplies. Linda tried to address these issues in an email to Ms. Hermone where Linda noted that, "[the aides] definitely treat E.E. different [sic] from the other children... and 'abrasively.'"<sup>10</sup> According to Linda, this email did not fix the problems in the classroom for E.E.

Over a week later, on May 29, 2018 Ms. Hermone finally emailed Linda back, but only to notify Linda that E.E.'s new IEP (dated March 24, 2018) for his transition to kindergarten was available. Ms. Hermone also mentioned that she would be away from class the following day.<sup>11</sup> Linda responded by stating that she would keep E.E. from school, due to her distrust of the aides; and instead of trying to ease Linda's rightful concerns due to E.E.'s past mistreatment, Ms. Hermone simply replied by providing additional dates that she would be away from class.<sup>12</sup>

### *C. May 31<sup>st</sup> Incident*

On Thursday, May 31<sup>st</sup>, at 10:00 AM, Linda received a phone call from the District informing her that she needed to accompany E.E. to the emergency room. Linda states that according to the children on the playground at the District, E.E. fell and hit his head while playing on the monkey bars. Neither Ms. Hermone nor the aides witnessed the incident themselves. The gash in the middle of his forehead required three stitches and the doctor predicted that it would leave a permanent scar.<sup>13</sup> Distressed by what she felt to be a lack of care from the District, Linda emailed Ms. Hermone again because E.E. clearly was not receiving adequate attention from District staff.<sup>14</sup> Linda stated that she could "no longer in good faith leave [her] child in class with

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<sup>6</sup> E-mail from Michelle Hermone, Teacher, Helen Turner Children's Center to Linda (May 16, 2018, 07:49 AM PST).

<sup>7</sup> See E-mail from Linda to Michelle Hermone, Teacher, Helen Turner Children's Center (June 1, 2018, 12:13 AM PST) [hereinafter June 1<sup>st</sup> Email to Teacher].

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> See E-mail from Michelle Hermone, Teacher, Helen Turner Children's Center to Linda (May 29, 2018, 01:55 PM PST).

<sup>12</sup> See E-mail from Linda to Michelle Hermone, Teacher, Helen Turner Children's Center (May 29, 2018, 03:12 PM PST); E-mail from Michelle Hermone, Teacher, Helen Turner Children's Center to Linda (May 30, 2018 07:19 AM PST).

<sup>13</sup> See Ex. D.

<sup>14</sup> See E-mail from Linda to Michelle Hermone, Teacher, Helen Turner Children's Center (June 1, 2018, 12:13AM PST).

the [a]ides until a change has been made.”<sup>15</sup> Ms. Hermone finally took some action by scheduling an IEP team meeting for early June.<sup>16</sup> But on June 4<sup>th</sup>, Linda noticed more scratches and bruises on her son’s right arm. Linda stressed that her son had now consistently experienced scratches, bruises, and a hospital visit without any improvement, sent another email to Ms. Hermone and stressed that her son was likely being abused at school.<sup>17</sup> Given the numerous emails and the hospital visit, this should not have been news to the District. Linda requested an investigation right away.”<sup>18</sup> The District never actually responded to her email but on June 5<sup>th</sup>, the District strongly encouraged that E.E. attend school regularly to access a free appropriate public education without ever addressing the root problems that E.E. continued to face.<sup>19</sup>

*D. E.E.’s continued issues with the District*

On June 6<sup>th</sup>, the District informed Linda that they were exploring more training for aides, supervisor training, and providing mandatory staff training on childhood development. However, the District did not mention training that would address implicit bias against Black students in the District. The District mentioned there would be “random safety checks” in classrooms without further detail as to what that would mean for E.E. Linda told the District that she was considering homeschooling because E.E. needed behavioral intervention services or a one-on-one adult aide.<sup>20</sup> Despite the numerous issues E.E. faced and multiple meetings with the District regarding E.E.’s IEP, the District refused to accommodate this request. And on June 6, 2018, Linda refused to give her consent to the May 24<sup>th</sup> IEP after she noticed several discrepancies from the IEP meeting discussions. To make matters worse, the District stated that it concluded E.E.’s multiple bruises, scrapes, and hospital visit were due to the classroom “lack[ing] organization” and absolved the staff except Ms. Hermone of any wrongdoing. The District just stated Ms. Hermone should have given the aides more direction.<sup>21</sup>

Linda rightfully feels that the District has missed the mark and may continue to put students with disabilities in danger, in particular, Black students with disabilities, if it does not address the root reasons for E.E.’s mistreatment. Given her fear, she feels forced to homeschool her son for the foreseeable future.

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<sup>15</sup> *Id.*

<sup>16</sup> See E-mail from Michelle Hermone, Teacher, Helen Turner Children’s Center to Linda (June 1, 2018, 07:49 AM PST).

<sup>17</sup> See E-mail from Linda to Michelle Hermone, Teacher, Helen Turner Children’s Center (June 4, 2018, 10:56 PM PST).

<sup>18</sup> *Id.*

<sup>19</sup> See Ex. E.

<sup>20</sup> *Id.*

<sup>21</sup> See E-mail from Chloe Mach, Program Specialist, Hayward Unified School District to Linda (June 15, 2018, 12:17 PM PST).

## **II. The District Failed to Meet Its Legal Obligation of Adequately Supervising E.E.**

E.E.’s teacher and aides fell short of their legal obligations to ensure E.E.’s safety to the best of their ability. Under the California constitution, schools are required to supervise “the conduct and safety . . . [of students] who are on the school grounds during recess and other intermissions.”<sup>22</sup> According to the California Government Code, “Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty.”<sup>23</sup> The California Supreme Court has held that a “total lack” or “ineffective” supervision may constitute negligence, unless school officials are able to establish that they exercised “reasonable diligence” in fulfilling their duty.<sup>24</sup>

Per the District’s admission, E.E.’s teacher and aides failed to adequately supervise their students during recess. Four adults were responsible for eight students total, and it strains credulity to suggest that they could not have supervised their class. There is no evidence that school officials ensured E.E.’s safety with “reasonable diligence” on May 31<sup>st</sup> or on any other occasion. The fact that the District failed to have any adult witnesses to his fall demonstrates that Ms. Hermone and the class aides failed to exercise their legal duty to E.E. at all. The District failed to even acknowledge this pattern of negligent supervision within and outside of the classroom in its follow-up remarks and steps for how it planned to rectify its mistreatment of E.E. Indeed, before the accident, Linda, not the District staff, repeatedly inquired about scratches and bruises that were appearing on E.E.’s body and the pattern did not get better. E.E. had to go to the hospital after Linda put the District on notice of a likely lack of supervision. Therefore, the school officials fell well below legal duty to supervise their students at all times.

## **III. The District Failed to Provide E.E. with Services Comparable to Those He Received at IUSD.**

The District is required to provide a free appropriate public education (FAPE) at all times, even when a student transfers between different school districts.<sup>25</sup> According to the California Education Code, when a student with an IEP transfers between school districts within the state (but under different local plans), they are entitled to “a free appropriate public education, including services comparable to those described in the previously approved individualized

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<sup>22</sup> Cal. Code Regs. tit. 5, § 5552; *see Dailey v. L.A. Unified Sch. Dist.*, 2 Cal. 3d 741, 747 (1970) (“[S]chool authorities [have] a duty to supervise at all times the conduct of the children on the school grounds and to enforce those rules and regulations necessary to their protection.”).

<sup>23</sup> Cal. Gov’t Code § 815.6; *see* Cal. Educ. Code § 44807 (outlining school employees’ responsibilities towards student conduct).

<sup>24</sup> *See* Cal. Gov’t Code § 815.6; *see also Dailey*, 2 Cal. 3d at 747.

<sup>25</sup> *See* 20 U. S. C. §1412(a)(1)(A) (outlining that the IDEA offers federal funds to states to furnish FAPE to all children with certain disabilities. In this case, the District a recipient of federal funds must provide FAPE.)

education program” for up to thirty days.<sup>26</sup> After this period, the District should have either kept the previous plan or implemented a new individualized education program that complied with the law.<sup>27</sup>

The District never provided full special education services that were comparable to his approved program that E.E. received in Inglewood. At IUSD, E.E. was entitled to occupational therapy, behavioral intervention, NPS placement, and a one-on-one adult aide, in addition to specialized academic instruction and speech/language services.

#### **IV. The District Did Not Meet Its Obligation to Ensure That E.E. Was Receiving FAPE at All Times.**

The District also failed to ensure that E.E. was receiving a free appropriate public education at Helen Turner. Under the California Education Code, all students with disabilities are entitled to a free appropriate public education in the least restrictive environment (LRE) possible.<sup>28</sup> Indeed, an IEP serves as the “primary vehicle” for providing children with the promised FAPE.<sup>29</sup> The District did not provide E.E. an IEP that was “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances” in violation of FAPE.<sup>30</sup> If a student experiences adverse changes in mood or behavior, a school may be obligated to convene an IEP team meeting to determine whether the student needs different or additional services.<sup>31</sup> Adverse changes may include “a sudden decline in grades, the onset of emotional outbursts, an increase in the frequency and intensity of behavioral interruptions, or a rise in missed classes.”<sup>32</sup> Any or all of these may be sufficient to put a school on notice that the students’ needs are no longer being met; failing to “promptly” respond is a violation of state and federal obligations to provide FAPE.<sup>33</sup>

Here, the District failed to promptly respond to adverse changes in E.E.’s mood and behavior, despite having months of notice. Linda emailed Ms. Hermone several times regarding E.E.’s changed behavior and bruises in May and Ms. Hermone failed to respond at all or with any true concern that E.E. was being neglected in her classroom. In the District’s notice of proposed action regarding its provision of FAPE on June 5<sup>th</sup>, it simply encouraged E.E. to attend school. It

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<sup>26</sup> Cal. Educ. Code § 56325(a)(1); *see also Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U. S. 176, 203 (1982).

<sup>27</sup> Cal. Educ. Code § 56325(a)(1).

<sup>28</sup> *See* Cal. Educ. Code § 56040; *see also* Individuals with Disabilities Education Act § 612, 20 U.S.C. § 1412 (2016) [hereinafter IDEA]; 34 C.F.R. § 104.33 (2000); 34 C.F.R. § 300.101 (2006).

<sup>29</sup> *See Honig v. Doe*, 484 U. S. 305, 311 (1988).

<sup>30</sup> *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017).

<sup>31</sup> U.S. Dep’t of Educ., Dear Colleague Letter on Responding to Bullying of Students with Disabilities 6 & n.26 (2014) [hereinafter 2014 Dear Colleague Letter].

<sup>32</sup> *Id.* at 6.

<sup>33</sup> *Id.* at 11.

did not confront the fundamental issues that caused him to miss class in the first place. Overall, the District’s response was woefully inadequate and exceedingly delayed. The District failed to meet its legal obligations under state and federal disability law, and the District likely denied E.E. FAPE as a result.

#### **V. The District Failed to Safeguard Against Disability and Racial Discrimination in the Classroom.**

As a reminder, the District has an obligation to protect E.E. from racial and/or disability-based discrimination. Indeed, the District has a responsibility to ensure that all students – including those with disabilities – have equal access to the educational opportunities it provides. Section 220 of the California Education Code states “No person shall be subjected to discrimination on the basis of disability.... race or ethnicity...”<sup>34</sup> Federal law similarly prohibits discrimination in schools. Title VI of the Civil Rights Act of 1964 (Title VI), Section 504, and Title II of the Americans with Disabilities Act (ADA) make it illegal for schools to exclude, deny benefits to, or discriminate against any individual on the basis of race, ethnicity, national origin, or disability.<sup>35</sup>

E.E. should not have been routinely neglected while other students received greater attention. The May 31<sup>st</sup> incident demonstrates that school officials shirked their duty to adequately supervise E.E. on the playground. Linda’s account suggests that this behavior continued in the classroom. Moreover, when this was brought to the teacher’s attention, it went completely unaddressed. Under the California Education Code, the District’s legal obligations to prevent discrimination and to create a safe environment require a more substantive response to accusations of discrimination than this.<sup>36</sup> Furthermore, it is our understanding that E.E.’s story is not an isolated incident, as the District has treated another Black student with disabilities differently than other white students. For example, we have heard that in the past, the District has ignored requests of another Black parent who urged the District to investigate an issue with their Black student with disabilities. As the District may be aware, recent federal data demonstrated the Black students and students with disabilities are routinely overly disciplined, possibly because of implicit and explicit bias and health and social challenges regarding how the staff view those students.<sup>37</sup> Here it seems that likely bias played out in the form of neglect and physical abuse since E.E. was under the care of the District in this dangerous environment that was created by the District. And school districts that may be at risk of treating Black students

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<sup>34</sup> Cal. Educ. Code § 220.

<sup>35</sup> Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (2016); Civil Rights Act of 1964 tit. VI, § 601, 42 U.S.C. 4000d; Americans with Disabilities Act of 1990 tit. II, 42 U.S.C. § 12132.

<sup>36</sup> See Cal. Ed. Code §§ 201, 220, 32261(a).

<sup>37</sup> United States Government Accountability Office, “Discipline Disparities for Black Students, Boys, and Students with Disabilities,” (2018) <https://www.gao.gov/assets/700/690828.pdf>.



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with disabilities differently should take immediate steps to address the racial harm that this causes to those students in the District. While we hope the District takes all concerns seriously, we are concerned that the District may be creating a hostile environment for Black students with disabilities. This is a reminder that the District has an affirmative duty to combat discrimination and to create an environment that is safe and inclusive for all students, including E.E.

**VI. Conclusion**

Hayward Unified School District should take immediate steps to remedy E.E.’s family’s legitimate concerns about his safety in school. It should also implement policies and practices to ensure that these legal violations do not occur in the future. This includes sending us and Linda specific steps that will ensure that E.E. and other students with disabilities can attend school with adequate supervision and rapid response to parents who put the District on notice that their student is being abused. Moreover, the District should implement an implicit and explicit bias training that includes specific information that outlines how Black students with disabilities are more likely to be disciplined than any other protected group of students in California. Please respond by October 10, 2018 with the District’s proposed next steps.

Sincerely,

Abre’ Conner  
Staff Attorney  
ACLU Foundation of Northern California