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6

7 *Attorneys for Plaintiffs-Petitioners*

8 *Additional counsel on next page*

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **COUNTY OF CONTRA COSTA**

11 Mark S., by and through his guardian ad litem,
12 Anna S., Rosa T., by and through her guardian
ad litem Sofia L., and Jessica Black, Michell
13 Redfoot, and Dr. Nefertari Royston, as
taxpayers,

14 Plaintiffs and Petitioners,

15 v.

16 STATE OF CALIFORNIA; TONY
17 THURMOND, in his official capacity as STATE
SUPERINTENDENT OF PUBLIC
18 INSTRUCTION; STATE BOARD OF
EDUCATION; CALIFORNIA DEPARTMENT
19 OF EDUCATION; and PITTSBURG UNIFIED
SCHOOL DISTRICT, DOES 1-100,
20 INCLUSIVE

21 Defendants and Respondents.

Case No. N21-1755

UNLIMITED JURISDICTION

**PLAINTIFFS' REQUEST FOR
JUDICIAL NOTICE IN SUPPORT OF
PLAINTIFFS' OPPOSITIONS TO
DEMURRERS FILED BY
DEFENDANT DISTRICT AND
DEFENDANTS CALIFORNIA
DEPARTMENT OF EDUCATION,
STATE BOARD OF EDUCATION,
STATE SUPERINTENDENT TONY
THURMOND JOINED BY
DEFENDANT STATE OF
CALIFORNIA**

Judge Edward G. Weil
Department 39
Time: 9:00 A.M.
Date: February 24, 2022

REDACTED

1 Linnea Nelson (SBN 278960)
LNelson@aclunc.org
2 Brandon Greene (SBN 293783)
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3 Grayce Zelphin (SBN 279112)
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20 *Attorneys for Plaintiffs-Petitioners*
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1 Student Plaintiffs Mark S. and Rosa T., through their guardians ad litem, Anna S. and
2 Sofia L., and Taxpayer Plaintiffs Jessica Black, Michell Redfoot, and Dr. Nefertari Royston
3 (collectively, “Plaintiffs”) respectfully request that this Court take judicial notice of the
4 following documents in connection with their Opposition to the Demurrer to Plaintiffs’
5 Complaint filed by Defendants State of California, State Board of Education, California
6 Department of Education, Tony Thurmond, in his official capacity as State Superintendent of
7 Public Instruction, and their Opposition to the Demurrer filed by Pittsburg Unified School
8 District (collectively, “Defendants”).

- 9 1. Attached hereto as **Exhibit A** is a true and correct copy of the California
10 Department of Education’s letter informing Taxpayer Plaintiff Jessica Black that
11 the Department of Education closed her appeal.
- 12 2. Attached hereto as **Exhibit B** is a true and correct copy of the California
13 Department of Education’s letter informing Taxpayer Plaintiff Michell Redfoot
14 that the Department of Education closed her appeal.
- 15 3. Attached hereto as **Exhibit C** is a true and correct copy of the California
16 Department of Education’s letter informing Taxpayer Plaintiff Dr. Nefertari
17 Royston that the Department of Education closed her appeal.
- 18 4. Attached hereto as **Exhibit D** is a true and correct copy of Rosa T.’s Request for
19 Reconsideration of the California Department of Education’s decision of her
20 Complaint Resolution Process (CRP) complaint.
- 21 5. Attached hereto as **Exhibit E** is a true and correct copy of the California
22 Department of Education’s letter in response to Student Plaintiff Rosa T.’s
23 Request for Reconsideration of the Department of Education’s decision of the
24 CRP complaint.
- 25 6. Attached hereto as **Exhibit F** is a true and correct copy of the California
26 Department of Education’s letter in response to Taxpayer Plaintiff Jessica Black’s
27 CRP complaint limiting the scope of the Department of Education’s investigation.

1 7. Attached as **Exhibit G** is a true and correct copy of the plaintiffs’ complaint in
2 *Student A. v. Berkeley Unified School District*, No. 3:17-cv-02510-JST, Dkt. 1.

3 This Court may take judicial notice of official acts of the executive departments of any
4 state of the United States. Cal. Evid. Code § 452(c). Exhibits A, B, C, E and F are records of
5 official acts of the California Department of Education (“CDE”), an executive department of the
6 State of California. Cal. Educ. Code § 33300.

7 This Court may also take judicial notice of records of any court of this state or any court
8 of the United States. Cal. Evid. Code § 452(d)(1)-(2); *see also Gilman v. Dalby*, 61 Cal. App. 5th
9 923, 929 (2021) (granting judicial notice of several filings from same and related cases). Exhibit
10 G is a court record noticeable under this rule.

11 The Court may also take judicial notice of “[f]acts and propositions that are not
12 reasonably subject to dispute and are capable of immediate and accurate determination by resort
13 to sources of reasonably indisputable accuracy.” Cal. Evid. Code § 452(h). All of the Exhibits
14 that are the subject of Plaintiffs’ request are records noticeable under this rule.

15 Exhibits A, B, and C are true and correct copies of the California Department of
16 Education’s (“Department”) letters informing Taxpayer Plaintiffs that the Department has closed
17 their appeals, which is not reasonably subject to dispute. These documents are relevant to
18 establishing that Taxpayer Plaintiffs have been informed that the California Department of
19 Education closed their appeals related to their local discrimination complaints to the Pittsburg
20 Unified School District. Plaintiffs do not seek to establish “the truth of statements contained in
21 the document and its proper interpretation,” *Fremont Indem. Co. v. Fremont Gen. Corp.*, 148
22 Cal. App. 4th 97, 113 (2007), only the fact of their existence and transmittal as official acts.

23 Exhibit D is a true and correct copy of Student Plaintiff Rosa T.’s Request for
24 Reconsideration of the California Department of Education’s decision of her Complaint
25 Resolution Process (CRP) complaint, which is not reasonably subject to dispute. Exhibit E is a
26 true and correct copy of the California Department of Education’s letter in response to Student
27 Plaintiff Rosa T.’s request for reconsideration of the Department’s decision of the CRP

1 complaint, which is not reasonably subject to dispute. These documents are relevant to
2 establishing that Student Plaintiff requested reconsideration of her CRP complaint and the
3 California Department of Education completed its review of the request. Plaintiffs do not seek to
4 establish the “the truth of statements contained in the document and its proper interpretation,” *id.*
5 at 113, only that Rosa T. requested reconsideration.

6 Exhibit F is a true and correct copy of the California Department of Education’s letter to
7 Taxpayer Plaintiff Jessica Black notifying her that the Department will not investigate issues that
8 have been previously investigated, which is not reasonably subject to dispute. This document is
9 relevant to establishing futility of further exhaustion of Plaintiffs’ administrative remedies.
10 Plaintiffs do not seek to establish the “the truth of statements contained in the document and its
11 proper interpretation,” *id.* at 113, only that Plaintiffs have been informed that the Department
12 will not investigate issues previously investigated.

13 Exhibit G is a true and correct copy of the complaint in *Student A. v. Berkeley Unified*
14 *School District*, No. 3:17-cv-02510-JST, Dkt. 1, which is not reasonably subject to dispute.
15 Plaintiffs do not seek to establish the “the truth of [allegations] contained in the document and its
16 proper interpretation,” *Fremont Indem. Co.*, 148 Cal. App. 4th at 113, only that the allegations
17 were made and were the subject of the defendants’ motion to dismiss, which was denied. *Student*
18 *A. v. Berkeley Unified Sch. Dist.*, 2017 U.S. Dist. LEXIS 169086, at *12.

19 For these reasons, the Court should take judicial notice of Exhibits A-G.

20 Dated: February 1, 2022

Respectfully submitted,

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22 Malhar Shah
23 Claudia Center
24 DISABILITY RIGHTS EDUCATION AND
DEFENSE FUND

25 *Attorneys for Plaintiffs-Petitioners continued*
26 *on next page*

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Linnea Nelson
Brandon Greene
Grayce Zelphin
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF NORTHERN
CALIFORNIA



Ana G. Nájera Mendoza
Victor Leung
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF SOUTHERN
CALIFORNIA



Robyn Crowther
Amanda Schwartz
STEPTOE & JOHNSON LLP

Attorneys for Plaintiffs-Petitioners

Exhibit A



**CALIFORNIA DEPARTMENT
OF EDUCATION**

TONY THURMOND
STATE SUPERINTENDENT OF
PUBLIC INSTRUCTION

1430 N STREET, SACRAMENTO, CA 95814-5901 • 916-319-0800 • WWW.CDE.CA.GOV

December 2, 2021

Linnea Nelson, Senior Staff Attorney
Racial & Economic Justice Program
ACLU Foundation of Northern California
Attention: Ms. Jessica Black
lnelson@aclunc.org

RE: Case Matter No. 2021-0108 (Appellant –Jessica Black)

Dear Counsel Nelson and Ms. Black:

On November 4, 2021, the California Department of Education (CDE), Education Equity UCP Office (EEUCPO) issued its Decision on your appeal of the Pittsburg Unified School District's (PUSD) Investigation Report (IR)/decision on a matter pertaining to discrimination on the basis of race or ethnicity. In the Appeal Decision, the CDE's Conclusion stated the following:

This matter is referred back to the LEA to make the necessary material findings of fact and conclusion of law, and issue an amended IR to the Complainant within 20 days of the return, as per 5 CCR, section 4633(f)(1).

The LEA shall do the following:

1. The LEA shall make the necessary material findings of fact and conclusion of law as to discrimination on the basis of race or ethnicity, relative to the allegation in the complaint. Pursuant to 5 CCR, Section 4630(b), the relevant time period for investigation is December 29, 2020, through June 29, 2021. The LEA shall issue an amended IR to the Complainant, within 20 days of receipt of CDE's Decision.
2. The LEA must also provide the CDE with a copy of the amended IR provided to the Complainant either by fax at 916-319-0966 or by e-mail to eeucpo@cde.ca.gov.

On November 24, 2021, the CDE received a copy of the PUSD's amended IR/decision dated November 24, 2021, that was provided to you. The PUSD's amended IR/decision provided to you dated November 24, 2021, complies with the conclusion contained in the CDE's Appeal Decision dated November 4, 2021, only to the extent that the PUSD provided an amended IR/decision to you. Accordingly, this appeal is now closed.

The CDE's closure of your appeal on the allegations pertaining to discrimination on the basis of race or ethnicity is based on the CDE's referral of the matter back to the local educational agency and not on any particular outcome resulting from that referral.

If you are not in agreement with the PUSD's amended IR/decision, you have the right to appeal the amended IR/decision to the CDE by filing a written appeal within 30 days from the date of the amended IR/decision.

In addition, 5 CCR, section 4632(b), requires that the appeal, when submitted to the CDE, shall include **a copy of the original complaint and the PUSD's amended IR/decision**. Additionally, the request for appeal **must specify and explain** the basis for the appeal including at least one of the following:

- The local educational agency (LEA) failed to follow its complaint procedures.
- Relative to the allegations of the complaint, the LEA Investigation Report lacks material findings of fact necessary to reach a conclusion of law.
- The material findings of fact in the LEA Investigation Report are not supported by substantial evidence.
- The legal conclusion in the LEA Investigation Report is inconsistent with the law.
- In a case in which the LEA found noncompliance, the corrective actions fail to provide a proper remedy.

It is crucial that your appeal when submitted, complies with the requirements stated above. Appeals that do not comply with the requirements stated above will not be processed.

If you have any questions, you may contact the EEUCPO by e-mail at eeucpo@cde.ca.gov.

Sincerely,



Dianna Gutiérrez, Education Administrator I
Education Equity UCP Office
Legal and Audits Branch

DG:mb

Exhibit B



**CALIFORNIA DEPARTMENT
OF EDUCATION**

TONY THURMOND
STATE SUPERINTENDENT OF
PUBLIC INSTRUCTION

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December 2, 2021

Linnea Nelson, Senior Staff Attorney
Racial & Economic Justice Program
ACLU Foundation of Northern California
Attention: Michell Redfoot
lnelson@aclunc.org

RE: Case Matter No. 2021-0094 (Appellant – Michell Redfoot)

Dear Ms. Nelson and Ms. Redfoot:

On November 4, 2021, the California Department of Education (CDE), Education Equity UCP Office (EEUCPO) issued its Decision on your appeal of the Pittsburg Unified School District's (PUSD) Investigation Report (IR)/decision on a matter pertaining to discrimination on the basis of race or ethnicity. In the Appeal Decision, the CDE's Conclusion stated the following:

This matter is referred back to the LEA to make the necessary material findings of fact and conclusions of law, and issue an amended IR to the Complainant within 20 days of the return, as per 5 CCR, section 4633(f)(1).

The LEA shall do the following:

1. The LEA shall make the necessary material findings of fact and conclusions of law for discrimination on the basis of race and ethnicity, nationality/national origin, and disability relative to the specific allegations in the complaint. Pursuant to 5 CCR, Section 4630(b), the relevant time period for investigation is December 1, 2020, through June 1, 2021. The LEA shall issue an amended IR to the Complainant within 20 days of receipt of CDE's Decision.

With respect to Allegation 1 - Overidentifying students of color and ELs as having more severe disabilities than they actually have:

The LEA shall make factual findings as to whether LEA staff at Willow Cove Elementary School administered SPED assessments in students' native languages.

With respect to Allegation 2 - Disproportionately segregating students of color and ELs into SPED classrooms:

The LEA shall make factual findings as to whether Black/African American and Latinx students were disproportionately placed into SPED classrooms.

With respect to Allegation 3 - Refusing to provide supports to students in SPED classrooms that would allow them to be better integrated into general education classrooms:

The LEA shall make factual findings as to whether the LEA improperly failed to follow the Complainant's recommendations for increased time in general education for Complainant's students.

The LEA shall make factual findings as to whether the LEA failed to provide needed behavior supports and/or aides in the general education classroom before placing students in SPED classrooms.

With respect to Allegation 4 - Failing to provide evidence-based instruction tied to California CCSS to students in SPED classrooms:

The LEA shall make factual findings as to whether the LEA offered evidence-based instruction tied to California CCSS to students in SPED classrooms. The focus should be on the instruction actually provided, as opposed to whether or not students had appropriate IEP goals.

With respect to Allegation 5 - Disproportionately suspending and expelling students of color and students with disabilities:

The LEA shall make factual findings as to whether racial disparities in discipline were mitigated by LEA measures.

2. The LEA must also provide the CDE with a copy of the amended IR provided to the Complainant either by fax at 916-319-0966 or by e-mail to eeucpo@cde.ca.gov.

On November 24, 2021, the CDE received a copy of the PUSD's amended IR/decision dated November 24, 2021, that was provided to you. The PUSD's amended IR/decision provided to you dated November 24, 2021, complies with the conclusion contained in the CDE's Appeal Decision dated November 4, 2021, only to the extent that the PUSD provided an amended IR/decision to you. Accordingly, this appeal is now closed.

The CDE's closure of your appeal on the allegations pertaining to discrimination on the basis of race or ethnicity is based on the CDE's referral of the matter back to the local educational agency and not on any particular outcome resulting from that referral.

If you are not in agreement with the PUSD's amended IR/decision, you have the right to appeal the amended IR/decision to the CDE by filing a written appeal within 30 days from the date of the amended IR/decision.

In addition, 5 CCR, section 4632(b), requires that the appeal, when submitted to the CDE, shall include **a copy of the original complaint and the PUSD's amended IR/decision**. Additionally, the request for appeal **must specify and explain** the basis for the appeal including at least one of the following:

- The local educational agency (LEA) failed to follow its complaint procedures.
- Relative to the allegations of the complaint, the LEA Investigation Report lacks material findings of fact necessary to reach a conclusion of law.
- The material findings of fact in the LEA Investigation Report are not supported by substantial evidence.
- The legal conclusion in the LEA Investigation Report is inconsistent with the law.
- In a case in which the LEA found noncompliance, the corrective actions fail to provide a proper remedy.

It is crucial that your appeal when submitted, complies with the requirements stated above. Appeals that do not comply with the requirements stated above will not be processed.

If you have any questions, you may contact the EEUCPO by e-mail at eeucpo@cde.ca.gov.

Sincerely,



Dianna Gutiérrez, Education Administrator I
Education Equity UCP Office
Legal and Audits Branch

DG:mb

Exhibit C



**CALIFORNIA DEPARTMENT
OF EDUCATION**

TONY THURMOND
STATE SUPERINTENDENT OF
PUBLIC INSTRUCTION

1430 N STREET, SACRAMENTO, CA 95814-5901 • 916-319-0800 • WWW.CDE.CA.GOV

December 2, 2021

Linnea Nelson, Senior Staff Attorney
Racial & Economic Justice Program
ACLU Foundation of Northern California
Attention Dr. Nefertari Royston
lnelson@aclunc.org

RE: Case Matter No. 2021-0104 (Appellant – Dr. Nefertari Royston)

Dear Counsel Nelson and Dr. Royston:

On November 4, 2021, the California Department of Education (CDE), Education Equity UCP Office (EEUCPO) issued its Decision on your appeal of the Pittsburg Unified School District's (PUSD) Investigation Report (IR)/decision on a matter pertaining to discrimination on the basis of race or ethnicity. In the Appeal Decision, the CDE's Conclusion stated the following:

This matter is referred back to the LEA to make the necessary material findings of fact and conclusions of law, and issue an amended IR to the Complainant within 20 days of the return, as per 5 CCR, section 4633(f)(1).

The LEA shall do the following:

1. The LEA shall make the necessary material findings of fact and conclusions of law as to discrimination on the basis of race or ethnicity relative to the allegations in the complaint. Pursuant to 5 CCR, Section 4630(b), the relevant time period for investigation is December 25, 2020, through June 25, 2021. The LEA shall issue an amended IR to the Complainant, within 20 days of receipt of CDE's Decision.
2. The LEA must also provide the CDE with a copy of the amended IR provided to the Complainant either by fax at 916-319-0966 or by e-mail to eeucpo@cde.ca.gov.

On November 24, 2021, the CDE received a copy of the PUSD's amended IR/decision dated November 24, 2021, that was provided to you. The PUSD's amended IR/decision provided to you dated November 24, 2021, complies with the conclusion contained in the CDE's Appeal Decision dated November 4, 2021, only to the extent that the PUSD provided an amended IR/decision to you. Accordingly, this appeal is now closed.

The CDE's closure of your appeal on the allegations pertaining to discrimination on the basis of race or ethnicity is based on the CDE's referral of the matter back to the local educational agency and not on any particular outcome resulting from that referral.

If you are not in agreement with the PUSD's amended IR/decision, you have the right to appeal the amended IR/decision to the CDE by filing a written appeal within 30 days from the date of the amended IR/decision.

In addition, 5 CCR, section 4632(b), requires that the appeal, when submitted to the CDE, shall include **a copy of the original complaint and the PUSD's amended IR/decision**. Additionally, the request for appeal **must specify and explain** the basis for the appeal including at least one of the following:

- The local educational agency (LEA) failed to follow its complaint procedures.
- Relative to the allegations of the complaint, the LEA Investigation Report lacks material findings of fact necessary to reach a conclusion of law.
- The material findings of fact in the LEA Investigation Report are not supported by substantial evidence.
- The legal conclusion in the LEA Investigation Report is inconsistent with the law.
- In a case in which the LEA found noncompliance, the corrective actions fail to provide a proper remedy.

It is crucial that your appeal when submitted, complies with the requirements stated above. Appeals that do not comply with the requirements stated above will not be processed.

If you have any questions, you may contact the EEUCPO by e-mail at eeucpo@cde.ca.gov.

Sincerely,



Dianna Gutiérrez, Education Administrator I
Education Equity UCP Office
Legal and Audits Branch

DG:mb

Exhibit D

Dear Ms. Marsh,

Per California Code of Regulations, Title 5, Section 3204, [REDACTED], through her Counsel, the Disability Rights Education and Defense Fund, requests reconsideration of the California Department of Education's ("CDE" or "the Department") Investigation Report (Case S-0049-21/22) mailed on October 7, 2021.

Ms. [REDACTED] requests reconsideration on grounds that: 1) the report lacks material findings of fact, 2) legal conclusions in the report are inconsistent with the law, and 3) the corrective actions in the report fail to provide a proper remedy.

On August 2, 2021, Ms. [REDACTED] submitted a Special Education Complaint ("Complaint"), requesting direct state intervention for systemic failures at the Pittsburg Unified School District ("District") and CDE to ensure the provision of a free appropriate public education ("FAPE") in the least restrictive environment ("LRE"). The complaint made the following three allegations:

- 1) The District lacks policies and procedures to ensure disabled students are educated in the LRE and systemically pushes disabled students into segregated settings;
- 2) The District has a policy and systemic practice of refusing to provide evidence-based instruction that enables disabled students in general education and segregated classrooms to meet California's academic content standards; and
- 3) The District has a policy and systemic practice of refusing to assess students for and provide educational related mental health services ("ERMHS").

On October 7, 2021, the CDE mailed its completed investigation report, which contains the following four flaws:

First, the CDE failed to investigate Ms. [REDACTED]'s allegation that Pittsburg Unified School District has a policy and practice of refusing to provide instruction that enables disabled students to meet challenging objectives, like the California Common Core Standards. (Special Education Complaint, Section III.b, pp. 8-10.) The investigation report only included citations, findings of fact, and conclusions for two allegations (mirroring solely the first and third allegations in the complaint), and only in regard to the District's interaction with [REDACTED]:

- 1) The Complainant alleges the District failed to comply with educational placement in the least restrictive environment requirements as set forth in 34 CFR Section 300.114(a)(2)(ii), when the District did not provide push-in services to allow the student to remain in the general education setting, between August 9, 2020, and August 9, 2021.
- 2) The Complainant alleges the District failed to comply with requirements pertaining to evaluations set forth in 34 CFR Section 300.304(c)(4), when the District failed to assess the student in all areas of the suspected disability, including mental health, between August 9, 2020, and August 9, 2021.

The Department failed to explain why it did not investigate the allegation in question despite detailed evidence in Ms. [REDACTED]'s complaint that supports the allegation. The Complaint outlined evidence (pp. 4-6) to support the allegation that the District is failing to provide FAPE and does

not provide services and supports designed to enable students to be involved in, and make progress in, the general education curriculum. It outlines evidence that the District fails to provide adequate training to general education teachers and push-in instructional aides around the implementation of evidence-based special education instruction to disabled students in general education classrooms. The Complaint also propounded that the District fails to adequately train special education teachers and instructional aides around implementing evidence-based special education instruction to disabled students in segregated classrooms. As a specific example, the Complaint details how “during the 2019-21 academic years, ██████’s general education and special education teachers provided little to no evidence-based special education instruction on standard academic goals for disabled students to progress from grade to grade.”

Ms. ██████ requests that the Department reconsider the exclusion of this allegation of systemic failure, investigate its merits, and order the corrective actions it finds appropriate.

Second, with regard to all allegations, the Department failed to investigate Ms. ██████’s systemic allegations. All three allegations included claims of systemic violations that impact students similarly situated to ██████, yet the Department limited its investigation to ██████.

Each legal allegation points to District-wide policies and practices, or lack thereof, that violate the law. Specifically, the first allegation (least restrictive environment) includes two systemic claims, each supported by the evidence, before detailing a claim specific to ██████:

- The District regularly identifies students as having more severe disabilities than their behaviors and assessments suggest. (Special Education Complaint, Section III.a, p. 8.)
- The District does not have policies, procedures, or trainings to ensure that supports and services are provided to accommodate students in an integrated setting before placing them in a segregated setting. (Special Education Complaint, Section III.a, p. 8.)

The second allegation (evidence-based instruction) also includes a systemic claim supported by evidence:

- The District maintains an unlawful policy and systemic practice of refusing to provide evidence-based special education instruction to students in general education and special education classrooms that enables them to meet challenging objectives, including Common Core Standards. (Special Education Complaint, Section III.b, p. 10.)

The third allegation (assessment for mental health services) also includes systemic claims that impacts students similarly situated to ██████:

- The District maintains an unlawful policy and systemic practices of refusing to provide ERMHS assessments and services to students with mental-health symptoms that interfere with their education. (Special Education Complaint, Section III.c, p. 11.)

Ms. ██████ requests that the Department investigate these systemic claims:

Third, with regard to the least restrictive environment allegation, the Department's investigation failed to consider ██████████'s lack of adequate academic progress on grade level standards and did not take a qualitative investigative approach, including classroom observations and teacher interviews.

Observations of classrooms and interviews with general and special education staff would support a different conclusion. The Complaint includes allegations of disabled students with behavioral issues being denied general classroom supports in favor of segregated placements due to untrained IEP staff, a lack of procedures to ensure consideration of less restrictive supports, overburdened or untrained paraprofessionals, and a refusal to offer Functional Behavioral Assessment, among others. (Special Education Complaint, Section I, pp. 2-3). Observations and interviews would support the investigation into whether Jessica and similarly situated students were denied opportunities to succeed in less restrictive placement with adequate supports before being pulled out of general education classrooms.

Ms. ██████ requests that the Department expand its fact finding with regard to the first allegation and reconsider its conclusion based on any additional findings.

Fourth, with regard to the corrective actions ordered to address the District's failure to assess ██████████'s mental health, the Department failed to consider and require compensatory education services. Compensatory education is proper because the District's failure to conduct a mental health assessment and provide related services caused ██████ to miss numerous days of school and fall further behind academically, including in this school year. Because of ██████'s deteriorating mental health, she cannot attend school in-person.

The Department found that the District was aware of ██████████'s mental health issues for over a year and did not conduct a mental health assessment. Instead of assessing ██████ to determine how to best serve her, the District pursued truancy proceedings which only exacerbated ██████'s anxiety and mood issues. The District's lack of assessment prolonged the period of time Jessica's mental health issues made her education inaccessible.

Ms. ██████ requests that Department reconsider the required corrective actions for the District's failure to assess, and consider compensatory education as a proper remedy.

Please contact me directly regarding this request at the contact information supplied below. Thank you for your prompt attention to this matter.

Sincerely,

Malhar Shah, Staff Attorney
Disability Rights Education and Defense Fund
mshah@dredf.org

Exhibit E

December 31, 2021

Malhar Shah
3075 Adeline Street, Suite 210
Berkeley, CA 94703

Dear Mr. Shah:

Subject: Request for Reconsideration, Case R-0262-21/22
Student Name: [REDACTED]

The purpose of this letter is to inform you that we have reviewed your request for reconsideration of case S-0049-21/22, and we will be issuing an amended investigative report.

If you would like to file a new allegation on other complaint issues, not addressed in your previous filing, please contact the Parent Help Line, by telephone, between 9 a.m. and 4 p.m. at 1-800-926-0648.

If you have any questions regarding this letter, please contact the Complaint Resolution Unit by telephone at 916-445-4623.

Sincerely,

Jane Canty Digitally signed by Jane Canty
Date: 2021.12.31 12:42:08
-08'00'

Ana Marsh, Education Administrator II
Complaint Resolution Unit
Special Education Division

AM:mkb

cc: Janet Schulze, Superintendent, Pittsburg Unified School District
Angelica Thomas, Director, Special Education, Pittsburg Unified School District
MaryAnn Frates, Director, Contra Costa County Special Education Local Plan Area

Exhibit F

July 20, 2021

Malhar Shah
3075 Adeline Street, Suite 210
Berkeley, CA 94703

Dear Mr. Shah:

SUBJECT: CASE S-0011-21/22
STUDENT: [REDACTED]

Your recent letter of July 7, 2021, was received by the Special Education Division's Complaint Resolution Units on July 7, 2021. Your correspondence has been carefully reviewed and the following information is provided for your assistance.

As a result of your request for state intervention, a complaint investigation, case **S-0011-21/22**, has been initiated, and the notification explaining the investigation process has been mailed separately. The purpose of this correspondence is to inform you that some of your concerns are not able to be investigated at this time, because:

- The issue(s) exceed the one-year statutory limit for opening complaints.
- The issue(s) do not express a violation of special education laws or regulations but rather cite to laws or codes which are outside our scope which is federal and state special education law.
- The issue(s) are currently being investigated or have previously been investigated in a compliance complaint dealing with the same student, allegation, public agency, and/or timeframe.

General education issues are outside of the scope of special education as are concerns related to the Rehabilitation Act of 1973 and/or the Americans with Disabilities Act .

If you have additional questions about special education procedural safeguards or if you need assistance filing a special education complaint, please call our toll-free information line at 1-800-926-0648, Monday through Friday, 9 a.m. to 4 p.m.

Malhar Shah
Case S-0011-21/22
July 20, 2021
Page 2

Sincerely,

Shirley Sekeres Digitally signed by Shirley
Sekeres
Date: 2021.07.20 11:10:26 -07'00'

Shirley Sekeres, Education Programs Consultant
Complaint Investigation Unit II
Special Education Division

Enclosures: Complaint Form

Exhibit G

1 ARLENE B. MAYERSON (SBN 79310)
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2 LARISA CUMMINGS (SBN 131076)
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3 RAMAAH SADASIVAM (SBN 267156)
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4 **DISABILITY RIGHTS EDUCATION
AND DEFENSE FUND, INC.**

5 Ed Roberts Campus
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6 Berkeley, CA 94703
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7 Fax: +1.510.841.8645

8 [ADDITIONAL COUNSEL LISTED ON NEXT PAGE]

9 *Attorneys for Plaintiffs*

10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**

12 STUDENT A, by and through PARENT A, her
guardian; STUDENT B, by and through
13 PARENT B, his guardian; STUDENT C, by and
through PARENT C, his guardian; and
14 STUDENT D, by and through PARENT D, her
guardian, each one individually and on behalf of
15 all other similarly situated children,

16 Plaintiffs,

17 v.

18 THE BERKELEY UNIFIED SCHOOL
DISTRICT; DONALD EVANS, in his official
19 capacity as the Superintendent for the Berkeley
Unified School District; BEATRIZ LEYVA-
20 CUTLER, TY ALPER, JUDY APPEL, JOSH
DANIELS, and KAREN HEMPHILL, each in
21 his or her official capacity as a director of the
Berkeley Unified School District Board of
22 Education; THE BOARD OF EDUCATION OF
THE BERKELEY UNIFIED SCHOOL
23 DISTRICT,

24 Defendants.

Case No. 3:17-cv-2510

COMPLAINT FOR INJUNCTIVE AND
DECLARATORY RELIEF FOR
VIOLATIONS OF THE INDIVIDUALS
WITH DISABILITIES EDUCATION ACT,
20 U.S.C. §§ 1400, *et seq.*; SECTION 504 OF
THE REHABILITATION ACT OF 1973, 29
U.S.C. § 794; AMERICANS WITH
DISABILITIES ACT, 42 U.S.C. §§ 12131 *et*
seq.; CALIFORNIA EDUCATION CODE §§
56000 *et seq.*

CLASS ACTION

JURY TRIAL DEMANDED

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INTRODUCTION

1
2 1. Every day, students bound through classroom doors, backpacks and books in tow,
3 full of endless potential. They sharpen their pencils, take their seats, and – perhaps unbeknownst
4 to them – they place their future in the hands of their educators. Accordingly, it is the urgent and
5 ever-pressing responsibility of educators – teachers, schools, and school districts – to respect this
6 tremendous act of trust. And with the futures of young lives hanging in the balance, this
7 responsibility begins by ensuring *all students* are provided the critical foundational tool that is the
8 conduit to success – the ability to read.

9 2. “All students” includes the students this case is brought on behalf of: children with
10 reading disorders such as dyslexia (“reading disorders”), enrolled in Berkeley Unified School
11 District (“BUSD.”). A large number of students have reading disorders. It is estimated, for
12 example, that 6% to 17%¹ of the population in the United States demonstrates some sign of
13 dyslexia, making it by far the most prevalent learning disability.² In California alone, it is
14 estimated that more than 1 million students in K-12 public schools display some signs of
15 dyslexia.³ Accordingly, in BUSD, which serves approximately 10,000 students,⁴ reading
16 disorders impact hundreds of students in any given school year. Because reading disorders
17 impact a vast student population, it’s imperative that school districts, like BUSD, not only

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19 _____
¹ Jack M. Fletcher, *Dyslexia: The Evolution of a Scientific Concept*, 15(4) J. of Int’l
Neuropsychological Soc’y 501, 501 (July 2009).

20 ² National Center for Learning Disabilities, *The State of Learning Disabilities: Facts, Trends, and*
21 *Emerging Issues 3*, (3d Ed. 2014), *available at* [https://www.nclld.org/wp-](https://www.nclld.org/wp-content/uploads/2014/11/2014-State-of-LD.pdf)
22 [content/uploads/2014/11/2014-State-of-LD.pdf](https://www.nclld.org/wp-content/uploads/2014/11/2014-State-of-LD.pdf). Among students who score in the bottom 30th
23 percentile in basic reading skills, about 70-80% have dyslexia, 10-15% appear to be accurate
24 readers but are too slow in word recognition and text reading, and another 10-15% appear to
25 decode words better than they can understand the meaning of written passages. Louisa Moats and
Carol Tolman, *Types of Reading Disability*, READING ROCKETTS,
<http://www.readingrockets.org/article/types-reading-disability> (excerpted from Louisa Moats and
Carol Tolman, *Language Essentials for Teachers of Reading and Spelling (LETRS): The*
Challenge of Learning to Read (Module 1) (Sopris West 2009).).

26 ³ *AB 1369 FAQ’s*, Decoding Dyslexia CA (Revised Oct. 2016), [http://decodingdyslexiaca.org/ab-](http://decodingdyslexiaca.org/ab-1369-faqs/)
27 [1369-faqs/](http://decodingdyslexiaca.org/ab-1369-faqs/).

28 ⁴ *Berkeley Unified At a Glance*, Berkeley Unified School District (2017),
<http://www.berkeleyschools.net/about-the-district/berkeley-unified-at-a-glance/>.

1 educate themselves as to what reading disorders are, but also as to how to timely identify and
2 appropriately serve all students who have them. As detailed throughout this Complaint, for years
3 and years BUSD has systematically refused to do either.

4 3. Reading disorders generally have a neurological basis. Dyslexia, for example, is a
5 serious reading disorder that is neurobiological in origin and is characterized by difficulties with
6 word recognition and by poor spelling and decoding abilities. However, like with all reading
7 disorders, it is treatable. Many children with reading disorders are incredibly bright and capable,
8 but they must be taught to read in a different way than their typically developing peers. So long
9 as students with reading disorders are properly and timely identified, a variety of research-based
10 reading interventions can be implemented to dramatically increase reading skill and performance.

11 4. When students with reading disorders are identified early and provided the
12 appropriate interventions and accommodations, they can progress through school with their peers
13 and even excel. The number of talented members of society we stand to lose because BUSD is
14 simply unwilling to exert the time and resources necessary to identify students with reading
15 disorders and provide the services and accommodations required for them to learn how to read is
16 untenable.

17 5. Moreover, if ignored or inappropriately treated, dyslexia can be devastating. Even
18 students who are extremely intelligent will fail to perform at grade level, quickly fall behind their
19 peers, and ultimately accomplish much less than their potential otherwise permits. Emotional
20 consequences may also arise. For example, undiagnosed and/or untreated reading disorders can
21 lead to extreme frustration, aggravation, anxiety, depression, school avoidance and lifelong
22 struggles. By refusing to identify and serve its students with reading disorders, BUSD is failing
23 these children on multiple fronts and the results are heartbreaking.

24 6. These are the types of harms Plaintiffs either have experienced or are likely to
25 experience and are seeking to remedy and prevent. BUSD has systemically declined to timely
26 identify, evaluate and provide appropriate interventions and accommodations to students with
27 reading disorders, which are necessary tools required for them to process information and thereby
28 attain the foundational unit of their education – to learn to read. BUSD’s failures are long-

1 standing, willful and egregious violations of Plaintiffs’ most fundamental rights under federal and
 2 state laws and implementing regulations ensuring the right to a free appropriate public education
 3 (“FAPE”).⁵

4 7. Congress and the California legislature have mandated that children with reading
 5 disorders are entitled to special protections, to enhance their prospects of educational
 6 achievement. Under IDEA and related state law, a child with at least one of the thirteen
 7 disabilities enumerated in the law may be entitled to special education and related services
 8 receive a FAPE.⁶ One of the eligible disabilities is a “specific learning disability” (“SLD”).
 9 Dyslexia, for example, a learning disability under which individuals have difficulty processing
 10 written language is specifically included in the definition of SLD.⁷

11 8. Similarly, under Section 504 and ADA, a student is entitled to a FAPE if he or she
 12 “(i) has a physical or mental impairment which substantially limits one or more major life
 13 activities [such as learning or reading], (ii) has a record of such an impairment, or (iii) is regarded
 14 as having such an impairment.”⁸

15 9. To receive a FAPE, students with disabilities due to reading disorders typically
 16 require special education, such as appropriately intensive research-based reading interventions,

17
 18 ⁵ The relevant statutes and implementing regulations are: the Individuals with Disabilities
 19 Education Act, 20 U.S.C. §§ 1400 *et seq.* (“IDEA”), and its implementing regulations at 34 C.F.R.
 20 Pt. 300, and related state law, California Education Code §§ 56000 *et seq.* (“Section 56000”), and
 21 its implementing regulations at Cal. Code Regs. tit. 5 §§ 3000 *et seq.* (2017); Section 504 of the
 22 Rehabilitation Act of 1973, 29 U.S.C. § 794 (“Section 504”), and its implementing regulations at
 23 34 C.F.R. Pt. 104; and Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131 *et seq.*
 24 (“ADA”), and its implementing regulations at 28 C.F.R. Pt. 35.

25 ⁶ 20 U.S.C. § 1401(3)(A)(ii); Cal. Educ. Code § 56337(a).

26 ⁷ IDEA defines an SLD as “a disorder in 1 or more of the basic psychological processes involved
 27 in understanding or in using language, spoken or written, which disorder may manifest itself in the
 28 imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations.” 20
 U.S.C. § 1401(30)(A). “Such term includes such conditions as perceptual disabilities, brain
 injury, minimal brain dysfunction, *dyslexia*, and developmental aphasia.” *Id.* § 1401(30)(B)
 (emphasis added); Cal. Educ. Code § 56337. *See also* United States Department of Education
 Office for Special Education and Rehabilitative Services, *Dear Colleague Letter*, (Oct. 23, 2015),
 available at <http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/guidance-on-dyslexia-10-2015.pdf> (affirming that school districts must allow for the use of the terms dyslexia, dyscalculia
 and dysgraphia in evaluation documents, Individualized Education Plans (“IEPs”), and other
 special education materials).

⁸ 34 C.F.R. §§ 104.3(j), .33(a), .34(a); *see* 28 C.F.R. §§ 35.103(a), .108.

1 related services, supplementary aids and services, and curricular accommodations and
2 modifications, such as accessible materials, assistive technology (“AT”), and changes to
3 curriculum, (“special education and related aids and services”) as provided by law.

4 10. Federal and state laws require every California school district to provide students
5 with disabilities with a non-discriminatory and free appropriate public education in the least
6 restrictive environment (“FAPE in the LRE”). These laws and the corollary California law place
7 specific obligations on BUSD to *timely* (1) identify schoolchildren who may have reading
8 disorders, including children in early elementary school; respond appropriately to referrals for
9 evaluation; (2) evaluate those children suspected to have reading disorders to determine their
10 eligibility for special education and related aids and services; (3) provide children who have
11 qualifying reading disorders the necessary special education and related aids and services so that
12 they can make appropriate progress in the general education curriculum; and (4) continue to
13 monitor and promote students’ progress with meaningful parental involvement, by adhering to
14 procedural safeguards, and providing timely periodic reviews and re-evaluations of students to
15 effectively meet their learning needs.

16 11. BUSD systematically fails to abide by these obligations. As a threshold problem,
17 BUSD makes no coordinated effort to identify students with suspected reading disorders. Rather,
18 BUSD generally treats all struggling readers the same, and takes insufficient steps to determine
19 why they are struggling, *e.g.*, due to a reading disorder or some other reasons. The result of this
20 one-size-fits-all approach is that students with reading disorders are not appropriately or timely
21 identified, and, even when placed in reading programs that BUSD offers, they are not
22 appropriately served. BUSD’s reading programs are not designed for students with reading
23 disorders, who typically struggle to decode words. Further, BUSD maintains policies and
24 practices that, *inter alia*, actively discourage parents from requesting that BUSD evaluate
25 children with reading difficulties until those children have fallen years behind their peers, often
26 forcing those families to seek private evaluations at their own expense, if they can. BUSD also
27 fails to train its educators to recognize and appropriately address reading disorders; and fails to
28 ///

1 offer and provide special education and related aids and services necessary for students with
2 disabilities due to reading disorders to receive a FAPE in the LRE.

3 12. These are systemic failures that relate to a very common condition faced by a large
4 population within BUSD and which have wrought a devastating and costly impact on students
5 and their families. These students have found and/or will find themselves at worst functionally
6 illiterate as high schoolers, and at best reading several levels or more below the grade in which
7 they are enrolled, assuring they cannot access or benefit from relevant and grade-appropriate
8 curriculum.

9 13. BUSD's most recent "Bi-Annual Report, Winter 2016" shows that while the
10 district's goal is that all students will read proficiently (*i.e.*, "satisfactorily") by third grade, only
11 70% of all third grade students read proficiently.⁹ For students who receive special education,
12 the outcomes are especially discouraging.¹⁰ BUSD's failures, detailed herein, are a major
13 contributor to these shortfalls.

14 14. Plaintiffs and purported Class Members, all of whom are students who are or will
15 be enrolled in BUSD, like any other students, have goals of learning to read, graduating fully
16 literate, and seeking further education, employment, and independent living. However, these
17 goals are essentially unattainable if Defendants continue to relegate these children to learning
18 conditions that manifestly fail the standards and criteria demanded by the law. The named
19 Plaintiffs in this action are BUSD students with reading disorders who have tried to obtain
20 necessary special education and related aids and services from BUSD, especially appropriately
21 intensive research-based reading interventions and accommodations, but have been deprived of
22 access to these services because of Defendants' systemic refusals. Defendants continuously fail
23 to provide Plaintiffs and other similarly situated students with a requisite FAPE in the LRE.

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26 ⁹ Berkeley Unified School District, Berkeley Public Schools Bi-Annual Report 2 (Winter 2016),
http://www.berkeleyschools.net/wp-content/uploads/2016/02/BUSDnews_Winter2016_Final.pdf.

27 ¹⁰ See California Department of Education, English Language Arts Assessment Report for
28 Berkeley Unified – Alameda County, (Spring 2017), *available at* California School Dashboard,
<https://www.caschooldashboard.org/#/ReportDetail/01611430000000/1/6>.

1 15. The deficiencies in Defendants' policies and practices with respect to reading
2 disorders are long-standing and additionally well known to California Department of Education
3 ("CDE") officials. Despite receiving repeated notice about the damaging effect of their lack of
4 appropriate policies and practices specific to reading disorders, and the associated breach of
5 federal and state laws, Defendants have refused to institute necessary reforms. Indeed, even
6 though BUSD recently admitted that it is has not adequately served its students with dyslexia, it
7 has gone a step further and directed schools *not* to evaluate students with suspected dyslexia
8 unless and until it receives guidelines from CDE, which BUSD may not have until Fall 2017. In
9 short, Defendants have not only failed, they have actively condemned this class of students, as
10 those before, to deprivation of their rights, ongoing academic struggle, social stigmatization, and
11 a high risk of failure, over and over again.

12 16. Plaintiffs bring this action on behalf of themselves and the hundreds of members
13 of the Classes, defined below, for declaratory and injunctive relief to require BUSD to provide
14 legally-mandated services to schoolchildren with suspected disabilities and disabilities due to
15 reading disorders, so that they can gain the essential life skill of learning to read as early as
16 possible along with their nondisabled peers and to participate fully in their education throughout
17 their years in BUSD, as are their rights. This action is necessary to bring an end to the immense
18 personal and societal costs of BUSD's fundamentally flawed response to Plaintiffs' learning
19 needs.

20 JURISDICTION

21 17. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §
22 1331 and §§ 1343(a)(3) and (4), as this is an action for injunctive and declaratory relief brought
23 pursuant to IDEA, 20 U.S.C. §§ 1400, *et seq.*, and its implementing federal regulations, 34 C.F.R.
24 Part 300; Section 504, 29 U.S.C. § 794, and its implementing regulations, 34 C.F.R. Pt. 104; and
25 Title II of the ADA, 42 U.S.C. §§ 12131 *et seq.*, and its implementing regulations, 28 C.F.R. Pt.
26 35.

27 18. Plaintiffs also bring claims under California Education Code §§ 56000 *et seq.* and
28 its implementing regulations, Cal. Code Regs. tit. 5 §§ 3000 *et seq.* This Court has supplemental

1 jurisdiction over Plaintiffs' Section 56000 claims pursuant to 28 U.S.C.A. § 1367(a), as these
2 claims are so related to Plaintiffs' claims under IDEA, Section 504, and ADA, that they form part
3 of the same case or controversy.

4 19. This Court has jurisdiction to issue a declaratory judgment pursuant to 28 U.S.C. §
5 2201.

6 **VENUE**

7 20. Venue is proper in the Northern District of California pursuant to 28 U.S.C. §§
8 1391(b)(1) and (b)(2).

9 21. Defendants reside in the Northern District of California and a substantial part of
10 the events or omissions giving rise to this action arose in Alameda County, which is located
11 within the Northern District of California.

12 22. Members of the Class reside in the Northern District of California. The Plaintiffs
13 reside in the Northern District of California.

14 **INTRADISTRICT ASSIGNMENT**

15 23. This action must be assigned to the San Francisco or Oakland Divisions of the
16 Northern District of California pursuant to Civil Local Rule 3-2(d) because this action arises in
17 Alameda County.

18 **PARTIES**

19 **Plaintiffs**

20 24. Plaintiff Student A is a 7 year-old second grade student at a BUSD elementary
21 school. Student A resides with her guardian, Parent A, in Berkeley, Alameda County, California,
22 and comes within the jurisdiction of Defendants. Student A has been diagnosed with SLDs in the
23 areas of reading (dyslexia) and math, disabilities that entitle her to services under IDEA, Section
24 504, ADA, and Section 56000. BUSD recently determined that Student A was ineligible for
25 special education and related aids and services within the meaning of IDEA, despite Student A's
26 clear reading disorder and resulting anxiety and avoidant behaviors. Student A's parents
27 disagreed with this determination, and they continue to have to pay for private reading
28 intervention services for Student A. BUSD has failed to provide her a FAPE in the LRE. Student

1 A brings this action by and through her guardian, Parent A.

2 25. Plaintiff Student B is a 9 year-old fourth grade student at a BUSD elementary
3 school. Student B resides with his guardian, Parent B, in Berkeley, Alameda County, California,
4 and comes within the jurisdiction of Defendants. Student B has been diagnosed with Attention
5 Deficit Hyperactivity Disorder (“ADHD”) and SLDs in the areas of reading (dyslexia), written
6 expression, and math, disabilities that entitle him to services under IDEA, Section 504, ADA, and
7 Section 56000. BUSD has failed to provide him a FAPE in the LRE. Student B brings this
8 action by and through his guardian, Parent B.

9 26. Plaintiff Student C is a 15 year-old ninth grade student at Berkeley High School
10 (“BHS”). Student C resides with his guardian, Parent C, in Berkeley, Alameda County,
11 California, and comes within the jurisdiction of Defendants. Student C has SLDs in the areas of
12 reading (dyslexia), written expression, and math, disabilities that entitle him to services under
13 IDEA, Section 504, ADA, and Section 56000. BUSD has failed to provide him a FAPE in the
14 LRE. Student C brings this action by and through his guardian, Parent C.

15 27. Plaintiff Student D is a 17 year-old twelfth grade student at BHS. Student D
16 resides with her guardian, Parent D, in Berkeley, Alameda County, California, and comes within
17 the jurisdiction of Defendants. Student D has a learning disability in the area of reading
18 (dyslexia), a disability that entitles her to receive services under IDEA, Section 504, ADA, and
19 Section 56000. BUSD has failed to provide her a FAPE in the LRE. Student D brings this action
20 by and through her guardian, Parent D.

21 28. Plaintiffs Student A, Student B, Student C, and Student D have standing to bring
22 this action to enforce IDEA pursuant to 20 U.S.C. § 1415(i)(2), which provides that, “[a]ny party
23 aggrieved by the findings and decision made under subsection (f) or (k) who does not have the
24 right to an appeal under subsection (g), and any party aggrieved by the findings and decision
25 made under this subsection, shall have the right to bring a civil action with respect to the
26 complaint presented pursuant to this section, which action may be brought in any State court of
27 competent jurisdiction or in a district court of the United States, without regard to the amount in
28 controversy.”

1 29. Each Plaintiff has standing to bring this action to enforce Section 504 pursuant to
2 29 U.S.C. § 794a(a)(2), which provides that, “[t]he remedies, procedures, and rights set forth in
3 Title VI of the Civil Rights Act of 1964 . . . shall be available to any person aggrieved by any act
4 or failure to act by any recipient of Federal assistance”

5 30. Each Plaintiff has standing to bring this action to enforce ADA pursuant to 42
6 U.S.C. § 12133, which provides that “[t]he remedies, procedures, and rights set forth in section
7 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any
8 person alleging discrimination on the basis of disability in violation of section 12132 of this title.”

9 31. Each Plaintiff has standing to bring this action to enforce California Education
10 Code §§ 56000 *et seq.* pursuant to Cal. Educ. Code § 56500.1(a), which provides that “[a]ll
11 procedural safeguards under the Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400
12 and following) shall be established and maintained by each noneducational and educational
13 agency that provides education, related services, or both, to children who are individuals with
14 exceptional needs”, including the right to bring a civil action under IDEA.

15 **Defendants**

16 32. Defendant BUSD is a government agency responsible for providing school
17 children with full and equal access to the public education programs and activities it offers in
18 compliance with the requirements of federal and state laws and regulations. On information and
19 belief, BUSD is chartered and incorporated under California law and is a recipient of federal
20 financial assistance. BUSD’s responsibilities include making and implementing educational
21 decisions for the schools within its jurisdiction.

22 33. Defendant Donald Evans (“Defendant Evans”) is the Superintendent of BUSD.
23 Defendant Evans is appointed by the Board of Education to implement policies created by the
24 Board of Education and/or mandated by federal and state laws and regulations. Defendant Evans
25 is responsible for ensuring that children in BUSD are provided equal access to public education
26 programs and activities offered in BUSD. Defendant Evans is also responsible for ensuring that
27 all eligible children with disabilities are provided a FAPE in the LRE, including special education
28 and related aids and services in compliance with federal and state laws and regulations.

1 Defendant Evans is sued only in his official capacity.

2 34. Defendant Board of Education of the BUSD (“Board of Education”) works with
3 Defendant Evans, in his capacity as Superintendent, to fulfill its major responsibilities, which
4 include, among others:

- 5 • “Setting the direction for the district through a process that involves the
6 community, parents/guardians, students, and staff and is focused on student
7 learning and achievement”;
- 8 • “Establishing academic expectations and adopting the curriculum and instructional
9 materials”;
- 10 • “Monitoring and evaluating the effectiveness of [its] policies”; and
- 11 • “Monitoring student achievement and program effectiveness and requiring program
12 changes as necessary.”¹¹

13 35. Defendants are Beatriz Leyva-Cutler, Ty Alper, Judy Appel, Josh Daniels, and
14 Karen Hemphill, who are Directors of the Board of Education (collectively, “Director
15 Defendants”), and they are sued only in their official capacities.

16 36. Defendants Evans, the Board of Education, the Director Defendants, and BUSD
17 are collectively and interchangeably referred to as “Defendants” or “BUSD.”

18 **STATUTORY FRAMEWORK**

19 37. IDEA, Section 504, ADA and Section 56000 require that California school
20 districts offer a “FAPE in the LRE” to children identified as disabled under those laws. ADA
21 requires that no qualified individual with a disability shall, by reason of such disability, be
22 excluded from participation in or be denied the benefits of the services, programs, or activities of
23 a public entity, such as a school, or be subject to discrimination by such entity. 42 U.S.C. §
24 12132. The requirements regarding the provisions of a FAPE, specifically described in Section
25 504 regulations, are incorporated in the general non-discrimination provisions of the applicable
26 ADA regulation. 28 C.F.R. § 35.103(a).

27 ///

28 ¹¹ Board Bylaws 9000, Role of the Board (June 24, 2015).

IDEA

1
2 38. IDEA is a federal grant program administered by the U.S. Department of
3 Education (“DOE”). 20 U.S.C. §§ 1400 *et seq.* States, including California, that receive DOE
4 funds must comply with the mandates contained in IDEA and its implementing regulations. In
5 turn, school districts must comply with IDEA and meet IDEA-standards established by the state
6 education agency, which is CDE in California. 20 U.S.C. § 1401(9)(B).

7 39. IDEA’s primary mandate is the guarantee that “all children with disabilities have
8 available to them a [FAPE] that emphasizes special education and related services designed to
9 meet their unique needs and prepare them for further education, employment, and independent
10 living.” 20 U.S.C. § 1400(d)(1)(A).

11 40. To carry out this broad mandate, BUSD must have in effect policies, procedures
12 and programs to ensure that all children who are in need of special education and related aids and
13 services are identified, located, evaluated and provided a specially-designed Individualized
14 Education Program (“IEP”).¹² The specific mandates of IDEA require Defendants to (1) identify,
15 locate and evaluate every child suspected of having a disability, residing in the district’s
16 jurisdiction (“Child Find Duty”); (2) provide procedural safeguards to children with disabilities
17 and their parents (“Procedural Safeguards Duty”); (3) consider data that demonstrate that prior, or
18 as part of the referral process, students were provided appropriate instruction by qualified
19 personnel (“Appropriate Instruction by Qualified Personnel Duty”); (4) comprehensively evaluate
20 students to determine whether they are eligible for special education and related aids and services
21 (“Evaluation Duty”); (5) after determining eligibility, offer and develop an IEP with effective
22 special education and related aids and services, including appropriately intensive research-based
23 interventions (“Special Education Duty”); and (6) monitor the efficacy of the special education
24 and related aids and services provided to students, hold annual IEP meetings and more as needed
25 to review progress and make changes or revisions to IEPs where necessary to ensure FAPE in the
26 LRE (“Monitoring Duty”). 20 U.S.C. §§ 1400 *et seq.*; 34 C.F.R. Pt. 300.

27
28 ¹² 20 U.S.C. §§ 1412(a)(1), (a)(3)-(7), (a)(16), 1413(a)(1), 1414(a)-(e); 34 C.F.R. §§ 300.111,
.301, .304-.311; Cal. Educ. Code § 56337; Cal. Code Regs. tit. 5 §§ 3030(b)(10)(A)-(C) (2017).

Child Find Duty

1
2 41. One of the specific mandates of IDEA is that “children with disabilities residing in
3 the State and children with disabilities attending private schools . . . regardless of the severity of
4 their disabilities, and who are in need of special education and related aids and services are
5 identified, located, and evaluated . . .” 20 U.S.C. § 1412(a)(3)(A). This is known as the “Child
6 Find Duty.”

7 42. The Child Find Duty requires school districts to timely identify, locate, and
8 evaluate all children with suspected disabilities. *Id.* § 1412(a)(3); 34 C.F.R. §§ 300.101(c), .111.
9 School districts, thus, must fulfill their Child Find obligation; otherwise, a child who has a
10 disability or suspected disability under IDEA will not be identified and accordingly, will not
11 receive appropriate special education.

Procedural Safeguards Duty

12
13 43. IDEA expressly includes certain procedural safeguards, requirements, and duties
14 of school districts to ensure meaningful parental participation, notification, and consent through
15 the special education process. 20 U.S.C. §§ 1400, 1412(a), 1414; Cal. Educ. Code §§ 56000 *et*
16 *seq.*; *see also* 34 C.F.R. Pt. 300.

17 44. As part of the “Procedural Safeguards Duty,” school districts must give parents
18 prior written notice within a reasonable time before they propose or refuse to initiate or change
19 the identification, evaluation, or educational placement or the provision of FAPE in the LRE to
20 the child. 34 C.F.R. § 300.503; Cal. Educ. Code § 56500.4. Thus, school districts must obtain
21 informed written parental consent in order to support an initial evaluation of a student and an
22 initial provision of special education services. Parental consent is further required to provide
23 special education services and re-evaluations. Parental consent means that the parent is “fully
24 informed of all information relevant to the activity for which consent is sought, in his or her
25 native language, or through another mode of communication,” and that the parent “understands
26 and agrees” in writing to the carrying out of the activity for which his or her consent is sought.
27 34 C.F.R. § 300.9.

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1 45. School districts must ensure that the parents of a child with a disability are
 2 members of the IEP team that makes determinations regarding eligibility (20 U.S.C. §
 3 1414(b)(4)(a)) and any group that makes decisions on the educational placement of their child.
 4 *Id.* § 1414(e); Cal. Educ. Code § 56342.5. School districts must ensure that the parents are
 5 invited to each IEP team meeting and are afforded the opportunity to participate, which includes:
 6 (1) notifying parents of the meeting early enough to ensure that they will be able to attend; (2)
 7 provide information to parents; and (3) afford parents the opportunity to know the purpose of the
 8 meeting, who will participate, and to identify other representatives who should be invited. 20
 9 U.S.C. §§ 1400, 1412(a), 1414, 1415; *see also* 34 C.F.R. §§ 300.309(b)(2) and (c), .311(a)(7)(ii)
 10 and (b), .321, 300.327, 300.501(c).

11 **Appropriate Instruction by Qualified Personnel Duty**

12 46. IDEA regulations provide that:

13 To ensure that underachievement in a child suspected of having a specific
 14 learning disability is not due to lack of appropriate instruction in reading or math,
 15 the group must consider, as part of the evaluation described in §§ 300.304 through
 16 300.306 - (1) Data that demonstrate that prior to, or as a part of, the referral
 17 process, the child was provided appropriate instruction in regular education
 18 settings, delivered by qualified personnel; and (2) Data-based documentation of
 19 repeated assessments of achievement at reasonable intervals, reflecting formal
 20 assessment of student progress during instruction, which was provided to the
 21 child's parents. 34 C.F.R. § 300.309(b).

22 47. With respect to SLDs, IDEA additionally mandates that school districts that offer
 23 and provide "response-to-intervention programs" ("RTI") must provide "scientific, research-
 24 based intervention." 20 U.S.C. § 1414(b)(6)(B); 34 C.F.R. § 300.309(a)(2)(i). "RTI is a
 25 multi-tiered [instructional] approach to help struggling learners. Students' progress is closely

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1 monitored at each stage of intervention to determine the need for further research-based
2 instruction and/or intervention in general education, in special education, or both.”¹³

3 48. The rate of the student’s progress in these interventions may be used as a part of
4 the identification, referral and evaluation process. 34 C.F.R. § 300.309(b)(1); Cal. Code Regs. tit.
5 § 3030(b)(10)(C)(4)(i) (2017). If the student participated in RTI, IDEA eligibility
6 determinations must include additional documentation regarding instructional strategies used,
7 student-centered data collected, and specific notice to parents regarding these services, strategies
8 for increasing the student’s rate of learning and their right to request an evaluation. 34 C.F.R. §
9 300.311(a)(7); *see also* 34 C.F.R. § 300.311(b) (specific documentation requirements by persons
10 involved in evaluations, including parents).

11 49. Ineffective RTI services fail to collect valuable data to refer a student to special
12 education, leading the student to receive only a limited response and ultimately, delayed special
13 education evaluation and special education services.¹⁴

14 **Evaluation Duty**

15 50. Once a child is identified under Child Find, school districts must promptly seek
16 parental consent to evaluate him or her for special education, under mandated timeframes,
17 including when the child has not made adequate progress after an appropriate period of time
18 when provided with appropriate instruction. 20 U.S.C. §§ 1414(b)(6); 34 C.F.R. §§ 300.301,
19 300.309(c). School districts must evaluate a child who is referred for an evaluation by a parent
20 unless they provide adequate written notice giving their reasons for refusal. 34 C.F.R. § 300.503;
21 Cal. Educ. Code § 56500.4. IDEA requires school districts to conduct comprehensive “initial
22 evaluations” to “determine whether a child is a child with a disability” and “determine the
23 educational needs of such child.” 20 U.S.C. §§ 1414(a)-(c); *see also* 34 C.F.R. § 300.301; Cal.
24 Educ. Code § 56320. The results of this Evaluation Duty are used to determine the child’s

25
26 ¹³ Deb Gorski, What is RTI? What is RTI? | RTI Action Network,
[http://www.rtinetwork.org/learn/ what](http://www.rtinetwork.org/learn/what) (last visited Apr 30, 2017).

27 ¹⁴ *See also* Memorandum from Melody Musgrave, Dir., Office of Special Educ. Programs, United
28 States Dep’t of Educ., (Jan. 21, 2011), *available at*
<http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/osep11-07rtimemo.pdf>.

1 eligibility for special education and related aids and services as well as to make decisions about
2 an appropriate educational program for the child.

3 51. IDEA and its regulations establish a comprehensive process by which a child with
4 a disability must be evaluated. The student's eligibility must be determined and an appropriate
5 program of special education and related aids and services must be developed and implemented.
6 With regard to the Evaluation Duty, a school district must use a variety of assessment strategies
7 to gather relevant information about the child and must assess the child in "all areas related to the
8 suspected disability." 34 C.F.R. §§ 300.304(b)(1), (c)(4). Among the data to be considered, the
9 Evaluation Duty requires observations by teachers and related service providers; the school
10 district must produce this data at an IEP meeting. *Id.* § 300.305. The evaluation must contain
11 information from the child's parents and others who interact with the student on a regular basis.
12 20 U.S.C. §§ 1414 (b)(2)(A), (c)(1)(A). Additionally, IDEA previously mandated the use of the
13 severe discrepancy standard in determining whether a student had a specific learning disability,
14 but this requirement was removed in 2004 when IDEA was amended.¹⁵

15 52. Within 60 days from the date that the parents provide written consent to an
16 evaluation of their child, school districts must complete the Evaluation Duty and hold an IEP
17 meeting. Cal. Educ. Code § 56344(a). School districts must have an IEP in place at the
18 beginning of each school year for every eligible child with a disability in its jurisdiction. 20
19 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(a).

20 53. The evaluation must encompass all suspected areas of the child's disability. 20
21 U.S.C. § 1414(a)(3)(B). Evaluation results are then discussed with parents in an IEP team
22 meeting to determine if the child is eligible for special education. *Id.* § 1414(a)(4).

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25 ¹⁵ 20 U.S.C. § 1414(b)(6)(A). "New Sec. 300.307(a)(2) (proposed Sec. 300.307(a)(3)) requires
26 States to permit the use of a process that examines whether the child responds to scientific,
27 research-based interventions as part of the information reviewed to determine whether a child has
28 an SLD. The regulations reflect the Department's position on the identification of children with
SLD and our support for models that focus on assessments that are related to instruction and
promote intervention for identified children." Assistance to States for the Education of Children
with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46647 (Aug.
14, 2006), *available at* <http://idea-b.ed.gov/uploads/finalregulations.html>.

Special Education Duty

54. Once determined as eligible for special education, a student receives an IEP, developed by his or her IEP team. 20 U.S.C. § 1414. Among other requirements, an IEP must include a “statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable,”¹⁶ or other evidence-based programs, and a statement of modifications and accommodations needed. *Id.* §§ 1414(d)(1)(A)(i)(IV-VI); 34 C.F.R. § 300.320(a)(4). Further, to develop an IEP, the student’s IEP team must also consider special factors, which include a child’s communication needs and “whether the child needs assistive technology devices and services.” 20 U.S.C. §§ 1414(d)(3)(B)(vi)-(v); *see id.* § 1401(1). In sum, the IEP requirement ensures that the District finds an educational solution appropriate to the specific needs of the child, given his or her disability and circumstances.

55. IDEA requires school districts to ensure that all children with disabilities receive a FAPE in the LRE; thus, students with disabilities must be educated “to the maximum extent possible” with children without disabilities. 20 U.S.C. § 1400(d); 34 C.F.R. § 300.114. A student with a disability can only be removed from the general education classroom if the student’s education “cannot be achieved satisfactorily” with the use of supplementary aids and services. 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114(a)(2).

56. Additionally, school districts have an obligation to provide instructional materials in accessible formats to students with disabilities. 20 U.S.C. § 1412(a)(23); 34 C.F.R. §§ 300.172, 300.210(b). Students with reading disorders typically do not make adequate progress in learning with grade level, print-based materials. For these materials to be accessible to these students, the materials may need to be modified or altered, which may or may not require the

¹⁶ “Section 300.320(a)(4) incorporates the language in section 614(d)(1)(A)(i)(IV) of [IDEA], which requires that special education and related services and supplementary aids and services be based on peer-reviewed research to the extent practicable. The Act does not refer to ‘evidenced-based practices’ or ‘emerging best practices,’ which are generally terms of art that may or may not be based on peer-reviewed research. . . . The phrase ‘to the extent practicable,’ as used in this context, *generally means that services and supports should be based on peer-reviewed research to the extent that it is possible, given the availability of peer-reviewed research.* We do not believe further clarification is necessary.” Assistance to States, *supra*, at 46665 (emphasis added).

1 materials to be converted in to a specialized format. 17 U.S.C. § 121(d)(4) (“specialized formats”
2 means “Braille, audio, or digital text which is exclusively for use by blind or other persons with
3 disabilities” and “includes large print formats”); *see* 34 C.F.R. § 300.172(e)(1)(iv); 20 U.S.C. §
4 1474(e)(3)(D).

5 **Monitoring Duty**

6 57. IDEA mandates that a child with an IEP in place must have the IEP reviewed
7 “periodically, but not less frequently than annually, to determine whether the annual goals for the
8 child are being achieved.” 20 U.S.C. § 1414 (d)(4)(A)(i). Moreover, where there is a lack of
9 expected progress toward the annual goals and in the general education curriculum, the IEP in
10 place must be revised to reflect updated goals, strategies, and/or resources. *Id.* § 1414
11 (d)(4)(A)(ii)(I). School districts must regularly inform parents of their child’s progress toward
12 the annual IEP goals and their child must be reevaluated at their request and every three years.
13 *Id.* §§ 1414(a)(2)(A)(ii), (B)(ii).

14 **SECTION 504**

15 58. Section 504 is a federal law that protects individuals with disabilities in programs
16 and activities that receive federal financial assistance. 29 U.S.C. § 794; 34 C.F.R. §§ 104.1, .4.
17 Specifically, Section 504 states that “[n]o otherwise qualified individual with a disability in the
18 United States ... shall, solely by reason of her or his disability, be excluded from the participation
19 in, be denied the benefits of, or be subjected to discrimination under any program or activity
20 receiving Federal financial assistance. . . .” 29 U.S.C. § 794(a). Thus, Section 504 applies to all
21 school districts that receive federal financial assistance. *Id.* § 794(b)(2); 34 C.F.R. § 104.31 .

22 59. According to Section 504’s implementing regulations, school districts must
23 “designate at least one person to coordinate its efforts to comply with this part.” 34 C.F.R. §
24 104.7(a). School districts must provide “appropriate education” to a “qualified handicapped
25 person.” *Id.* § 104.33. A student with a disability satisfies the definition of a “qualified
26 handicapped person” if the student “(i) has a physical or mental impairment which substantially
27 limits one or more major life activities [such as learning or reading], (ii) has a record of such an
28 impairment, or (iii) is regarded as having such an impairment.” 34 C.F.R. § 104.3(j).

1 60. School districts must provide the student who is a “qualified handicapped person”
2 with an “appropriate education,” which is defined as “regular or special education and related
3 aids and services that (i) are designed to meet individual educational needs of handicapped
4 persons as adequately as the needs of nonhandicapped persons are met, and (ii) are based upon
5 adherence to procedures that satisfy the requirements of [34 C.F.R.] §§ 104.34, 104.35, and
6 104.36.” *Id.* § 104.33(b)(1). School districts are required to provide these students with a “free
7 appropriate public education” “regardless of the nature or severity of the person’s handicap” and
8 “with persons who are not handicapped to the maximum extent appropriate to the needs of the
9 handicapped person ... unless ... the education of the person in the regular environment with the
10 use of supplementary aids and services cannot be achieved satisfactorily.” *Id.* §§ 104.33(a),
11 .34(a).

12 61. Before determining placement, school districts must evaluate the student who
13 “needs or is believed to need special education or related services before taking any action”
14 regarding the student’s placement in regular education, special education, or any other significant
15 change in placement. *Id.* § 104.35(a). Once a student has been evaluated, school districts must
16 consider data about the student and make placement decisions using information from a variety of
17 sources, create procedures to ensure that the information obtained is documented and carefully
18 considered, ensure that the placement decision is made by a group of people, including those
19 knowledgeable about the student, the evaluation data, and placement options, and ensure that the
20 student is educated with nondisabled peers to the “maximum extent appropriate” for the student.
21 *Id.* § 104.35(c).

22 62. Additionally, Section 504 prohibits school districts from discrimination against
23 students who meet the definition of a “qualified handicapped person.” Specifically,
24 [a] recipient, in providing any aid, benefit, or service, may not, directly or
25 through contractual, licensing, or other arrangements, on the basis of
26 handicap: (i) Deny a qualified handicapped person the opportunity to
27 participate in or benefit from the aid, benefit, or service; (ii) Afford a qualified
28 handicapped person an opportunity to participate in or benefit from the aid,

1 benefit, or service that is not equal to that afforded others; (iii) Provide a
2 qualified handicapped person with an aid, benefit, or service that is not as
3 effective as that provided to others; (iv) Provide different or separate aid,
4 benefits, or services to handicapped persons or to any class of handicapped
5 persons unless such action is necessary to provide qualified handicapped
6 persons with aid, benefits, or services that are as effective as those provided to
7 others; . . . or (vii) Otherwise limit a qualified handicapped person in the
8 enjoyment of any right, privilege, advantage, or opportunity enjoyed by others
9 receiving an aid, benefit, or service.

10 *Id.* §§ 104.4(b)(1)(i)-(iv), (vii).

11 63. The regulations implementing Section 504 further state:

12 A recipient may not, directly or through contractual or other arrangements,
13 utilize criteria or methods of administration (i) that have the effect of
14 subjecting qualified handicapped persons to discrimination on the basis of
15 handicap, (ii) that have the purpose or effect of defeating or substantially
16 impairing accomplishment of the objectives of the recipient's program or
17 activity with respect to handicapped persons, or (iii) that perpetuate the
18 discrimination of another recipient if both recipients are subject to common
19 administrative control or are agencies of the same state.

20 *Id.* § 104.4(b)(4).

21 64. For aids, benefits, or services to be “equally effective,” students who are
22 “qualified handicapped persons” must be given “equal opportunity to obtain the same result, to
23 gain the same benefit, or to reach the same level of achievement, in the most integrated setting
24 appropriate to the person's needs.” *Id.* § 104.4(b)(2).

25 65. While a student who is eligible for special education and related aids and services
26 under IDEA receives an IEP, a student who is eligible only under Section 504 may receive a 504
27 Plan that like an IEP sets forth the special education and related aids and services, especially
28 including accommodations and modifications, which the student is entitled to receive. A 504

1 Plan has fewer procedural requirements and procedural safeguards than an IEP.¹⁷ Additionally,
 2 because Section 504 has a broader definition of disability than IDEA, many more students are
 3 eligible under Section 504 than under IDEA. Students who are eligible for an IEP also receive
 4 the non-discriminatory protections afforded under Section 504. However, students who are
 5 eligible only under Section 504 are ineligible for protections afforded under IDEA.

6 TITLE II OF THE ADA

7 66. ADA mandates that “no qualified individual with a disability shall, by reason of
 8 such disability, be excluded from participation in or be denied the benefits of the services,
 9 programs, or activities of a public entity, or be subjected to discrimination by any such entity.”
 10 42 U.S.C. § 12132; *see also* 28 C.F.R. § 35.130.

11 67. Title II of the ADA applies to all of the activities of public entities, including
 12 school districts that provide public education. The requirements regarding the provisions of a
 13 FAPE in the LRE, specifically described in Section 504 regulations, are incorporated in the
 14 general non-discrimination provisions of the applicable ADA regulation. 28 C.F.R. § 35.103(a).

15 68. The implementing regulations to ADA define an individual with a disability as
 16 follows: “(a)(1) Disability means, with respect to an individual: (i) A physical or mental
 17 impairment that substantially limits one or more of the major life activities of such individual; (ii)
 18 A record of such an impairment; or (iii) Being regarded as having such an impairment . . .” *Id.* §
 19 35.108.

20 69. The regulations implementing Title II of the ADA state that
 21 [a] public entity, in providing any aid, benefit, or service, may not, directly or through
 22 contractual, licensing, or other arrangements, on the basis of disability . . . (i) Deny a
 23 qualified individual with a disability the opportunity to participate in or benefit from the
 24 aid, benefit, or service; (ii) Afford a qualified individual with a disability an opportunity
 25 to participate in or benefit from the aid, benefit, or service that is not equal to that
 26

27 ¹⁷ *Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*,
 28 U.S. Dep’t of Educ., Office of Civil Rights (Oct. 16, 2015),
<https://www2.ed.gov/about/offices/list/ocr/504faq.html>.

1 afforded others; (iii) Provide a qualified individual with a disability with an aid, benefit,
2 or service that is not as effective in affording equal opportunity to obtain the same result,
3 to gain the same benefit, or to reach the same level of achievement as that provided to
4 others; (iv) Provide different or separate aids, benefits, or services to individuals with
5 disabilities or to any class of individuals with disabilities than is provided to others unless
6 such action is necessary to provide qualified individuals with disabilities with aids,
7 benefits, or services that are as effective as those provided to others; . . . [or] (vii)
8 Otherwise limit a qualified individual with a disability in the enjoyment of any right,
9 privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or
10 service. *Id.* § 35.130(b)(1)(i), (ii), (iii), (iv), (vii).

11 70. Further, “[a] public entity may not, directly or through contractual or other
12 arrangements, utilize criteria or methods of administration:

13 (i) That have the effect of subjecting qualified individuals with disabilities to
14 discrimination on the basis of disability; (ii) That have the purpose or effect of defeating
15 or substantially impairing accomplishment of the objectives of the public entity’s program
16 with respect to individuals with disabilities; or (iii) That perpetuate the discrimination of
17 another public entity if both public entities are subject to common administrative control
18 or are agencies of the same State.” *Id.* § 35.130(b)(3).

19 71. Thus, the regulations implementing Title II of the ADA require that public entities
20 avoid unnecessary policies, practices, criteria or methods of administration that have the effect or
21 tendency of excluding or discriminating against individuals with disabilities. *Id.* §§ 35.130(b)(3),
22 (8).

23 72. Further, “[a] public entity shall administer services, programs, and activities in the
24 most integrated setting appropriate to the needs of qualified individuals with disabilities.” *Id.* §
25 35.130(d). This means “a setting that enables individuals with disabilities to interact with
26 nondisabled persons to the fullest extent possible.” 28 C.F.R. pt. 35, App. B.

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1 73. Further, Title II regulations require public entities to “make reasonable
2 modifications” to their programs and services “when the modifications are necessary to avoid
3 discrimination.” 28 C.F.R. § 35.130(b)(7)(i).

4 CALIFORNIA STATE LAW

5 74. California state law implementing IDEA also requires educational instruction and
6 services to a student “with exceptional needs” if “the degree of the [student’s] impairment . . .
7 requires special education . . .” Cal. Code Regs. tit. 5 § 3030(a) (2017); see Cal. Educ. Code §§
8 56000 *et seq.*

9 75. The term student “with exceptional needs” includes students with SLDs, which is
10 defined as

11 a disorder in one or more of the basic psychological processes involved in understanding
12 or in using language, spoken or written, that may have manifested itself in the imperfect
13 ability to listen, think, speak, read, write, spell, or do mathematical calculations, including
14 conditions such as perceptual disabilities, brain injury, minimal brain dysfunction,
15 *dyslexia*, and developmental aphasia. The basic psychological processes include
16 attention, visual processing, auditory processing, phonological processing, sensory-motor
17 skills, cognitive abilities including association, conceptualization and expression. Cal.
18 Code Regs. tit. 5 § 3030(b)(10) (2017) (emphasis added).

19 76. To determine whether a student has a reading disorder, public school districts may
20 consider whether a student has a severe discrepancy between intellectual ability and academic
21 achievement. *Id.* § 3030(b)(10)(B). Using severe discrepancy, however, is not the only means by
22 which school districts can identify students with reading disorders. *Id.* § 3030(b)(10)(C). Under
23 state regulations, students may be determined to have a SLD whether or not they exhibit a severe
24 discrepancy. *Id.*

25 77. Additionally, as in IDEA (34 C.F.R. § 300.309(a)(1)-(3)), several other factors can
26 be considered together in order to determine whether a student has a reading disorder. Cal. Code
27 Regs. tit. 5 § 3030(b)(10)(C)(1)-(3). Further,

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1 [t]o ensure that underachievement in a pupil suspected of having a specific learning
 2 disability is not due to a lack of appropriate instruction in reading or math, the group
 3 making the decision must consider: (i) Data that demonstrate that prior to, or as a part of,
 4 the referral process, the pupil was provided appropriate instruction in regular education
 5 settings, delivered by qualified personnel; and (ii) Data-based documentation of repeated
 6 assessments of achievement at reasonable intervals, reflecting formal assessment of
 7 student progress during instruction, which was provided to the pupil's parents. *Id.* §
 8 3030(b)(10)(C)(4); 34 C.F.R. § 300.309(b).

9 78. Once a student is determined to have a reading disorder and needs special
 10 education, an IEP must be created for the student. Cal. Code Regs. tit. 5 § 3040. As provided
 11 under IDEA, California law provides that students with reading disorders should also be assessed
 12 to determine the need for AT to access instructional materials and the educational curriculum.
 13 Cal. Educ. Code § 56341.1(b)(5) (student's IEP team must consider whether student requires AT
 14 devices and services); *see id.* §§ 56341.1(c) (if student's IEP team determines that the student
 15 needs AT devices and/or services, then a statement regarding this determination must be included
 16 in the student's IEP), 56020.5; Cal. Code Regs. tit. 5 § 3051.19 (2017).

FACTUAL ALLEGATIONS

Dyslexia and Its Impact

19 79. "Dyslexia is a specific learning disability that is neurobiological in origin. It is
 20 characterized by difficulties with accurate and/or fluent word recognition and by poor spelling
 21 and decoding abilities. These difficulties typically result from a deficit in the phonological
 22 component of language that is often unexpected in relation to other cognitive abilities and the
 23 provision of effective classroom instruction. Secondary consequences may include problems in
 24 reading comprehension and reduced reading experience that can impede growth of vocabulary
 25 and background knowledge."¹⁸

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 28 ¹⁸ *Definition of Dyslexia*, Int'l Dyslexia Ass'n (2002), <https://dyslexiaida.org/definition-of-dyslexia/>.

1 80. Depending on the degree of dyslexia, students with dyslexia may have difficulty
2 with phonological awareness (ability to recognize sound structure in words), including phonemic
3 (sound) awareness and manipulation, single word reading, reading fluency, and spelling.¹⁹

4 81. Without appropriate interventions, services, and supports, a student with dyslexia
5 will likely struggle with reading comprehension and written language expression, causing
6 detrimental impacts on his or her ability to read, write, and learn.²⁰ Further, a student with
7 dyslexia may feel discouraged about school, undergo a great deal of stress due to academic
8 problems, and have major struggles with self-image and in relating to other people.²¹

9 82. Moreover, early identification of dyslexia is critical to a student with dyslexia.
10 “[A]ppropriate early intervention, provided in kindergarten through grade three, is very effective
11 in closing the gap for struggling readers. Early intervention and additional direct instruction
12 should begin as early as kindergarten or first grade for struggling readers when the gap is small
13 and students benefit from brain plasticity advantages for learning language-based information.”²²

14 83. Researchers have recommended the following reading interventions for students
15 with reading disorders for years: reading instruction for students with dyslexia should be (1)
16 delivered as early as possible and not after the student has failed; (2) focused on teaching the
17 structure of spoken and written language, beginning with phonology (*i.e.*, the awareness of the
18 speech sound system); (3) systematic, cumulative, explicit teaching of letters, letter-sound
19 correspondences, and patterns of orthography; (4) direct, teacher-led lessons with modeling,
20 supported practice, and independent practice; and (5) planned carry-over of skills into text
21 reading that does not allow the student to guess at words from pictures or context.²³ Most
22

23 ¹⁹ *Dyslexia Basics*, Int’l Dyslexia Ass’n (2012), <https://dyslexiaida.org/dyslexia-basics/>.

24 ²⁰ *Id.*

25 ²¹ *Id.*

26 ²² *Dyslexia Assessment: What Is It and How Can It Help?*, Int’l Dyslexia Ass’n (2017),
<https://dyslexiaida.org/dyslexia-assessment-what-is-it-and-how-can-it-help/>.

27 ²³ See *Dyslexia Basics*, *supra*; see also *Foundational Skills to Support Reading for Understanding*
28 *in Kindergarten Through 3rd Grade*, U.S. Dep’t of Educ., Nat’l Ctr. for Educ. Evaluation & Reg’l
Assistance (July 2016),
https://ies.ed.gov/ncee/wwc/Docs/PracticeGuide/wwc_foundationalreading_070516.pdf.

1 teachers trained to teach students with reading disorders such as dyslexia recognize that they
2 engage students more successfully if they use tactile-kinesthetic techniques to support symbol
3 memory. Hands-on manipulatives and actives, such as tracing and writing letters, have been
4 shown to work better in holding students' attention and supporting memory for mysterious
5 symbols called letters.²⁴

6 **Defendants' Unlawful Policies and Practices**

7 84. On information and belief, Defendants' policies and practices violate federal and
8 state laws and implementing regulations cited above in all of the following ways:

9 85. ***Failure to have in effect legally compliant policies, procedures, and programs***
10 ***required with respect to students with reading disorders.*** Defendants have failed to put into
11 effect policies, procedures and programs that ensure that all students with suspected reading
12 disorders are timely identified, located, evaluated, and that all students with eligible conditions
13 based on reading disorders are provided appropriate special education and related aids and
14 services, and monitored to ensure FAPE in the LRE.²⁵ In fact, contrary to express provisions in
15 the applicable statutes—and common sense—numerous BUSD administrators have repeatedly
16 stated that the District does not even recognize dyslexia as a “processing disorder.” BUSD
17 continues to refuse to offer services necessary to ensure FAPE in the LRE to students with
18 reading disorders.

19 86. ***Failure to satisfy Child Find obligations with respect to students with reading***
20 ***disorders.*** Defendants fail to affirmatively identify or locate children with suspected reading
21 disorders including students in private schools. Further, BUSD actively discourages parents from
22 seeking evaluations.

23 87. ***Failure to provide procedural safeguards to students with disabilities and their***
24 ***parents.*** Defendants fail to ensure that students with disabilities and their parents are provided

25 ²⁴ See Beverly J. Wolf et al., *Multisensory Teaching of Basic Language Skills* (Judith Birsh ed.,
26 Brookes Publishing 3d ed. 2011); Judith Birsh, *What is Multisensory Structured Language?, in*
27 *Expert Perspectives on Interventions for Reading*, 45-55 (Louisa Moats, Karen E. Dakin, and R.
28 Malatesha Joshi eds. 2012).

²⁵ With respect to Section 504 in particular, BUSD has essentially ignored the essential mandate to
employ staff responsible to coordinate its efforts to comply with Section 504.

1 procedural safeguards. For example, Defendants routinely fail to provide required written notice
 2 to parents when they refuse to evaluate or appropriately serve students with reading disorders or
 3 suspected reading disorders. Further, Defendants fail to ensure that parents are afforded an
 4 opportunity to meaningfully participate in decisions regarding evaluations, eligibility, and the
 5 development of their child's IEP.

6 88. ***Failure to use an appropriate RTI framework for early identification and***
 7 ***intervention for students with suspected disabilities based on reading disorders.*** Rather than
 8 providing appropriate RTI,²⁶ including timely universal screening, intensive early and research-
 9 based intervention, and referrals of students who fail to respond for special education evaluations,
 10 Defendants employ a “wait to fail” approach – Defendants simply wait for students who they
 11 suspect to have a reading disorder to fall further and further behind academically, and often have
 12 resulting emotional or behavioral deficits, before identifying, locating, and evaluating these
 13 students for special education, if at all. As part of Defendants’ “wait to fail” approach,
 14 Defendants might randomly insist that parents first attend a Student Success Team (“SST”)
 15 meeting (or multiple SST meetings) or participate in a noncompliant and ineffective RTI process
 16 before any special education evaluation is conducted. Many months or years may pass by before
 17 a student with a suspected reading disorder is actually evaluated for special education by
 18 Defendants. Many are never evaluated at all; specific IDEA service and evaluation requirements
 19 with respect to SLD and RTI are largely ignored.

20 89. Defendants implement a kind of RTI that only provides general education reading
 21 interventions, such as “Leveled Literacy Intervention” (“LLI”), “Reading Recovery”, and “Read
 22 180”²⁷ to some struggling readers, regardless of whether their struggles are the result of a reading

23 _____
 24 ²⁶ Cf. *Assisting Students Struggling with Reading: Response to Intervention (RtI) and Multi-Tier*
 25 *Intervention in the Primary Grades*, U.S. Dep’t of Educ., Inst. of Educ. Scis. (Feb. 2009),
<https://ies.ed.gov/ncee/wwc/PracticeGuide/3>, for state-endorsed RTI recommendations to identify
 struggling readers and implement evidence-based practices to serve them.

26 ²⁷ BUSD purports to offer upper elementary and secondary students another reading intervention
 27 program, Read 180. As with its other reading programs, Read 180 falls short for students with
 28 learning disabilities who have not learned to decode. *WWC Intervention Report: Read 180*, What
 Works Clearinghouse (Nov. 2016), <http://files.eric.ed.gov/fulltext/ED570964.pdf> (no discernible
 effects on alphabetics for adolescent readers).

1 disorder. While Defendants claim to provide targeted intervention and instruction at varying
2 levels that respond to the needs of struggling readers, these interventions do not meet the needs of
3 students with reading disorders, in part because they are not designed for students who cannot
4 decode words.

5 90. The two primary reading interventions provided by BUSD are LLI and Reading
6 Recovery. LLI is not specifically designed or supported by research to meet the needs of students
7 with reading disorders.²⁸ Similarly, several researchers have concluded that Reading Recovery
8 should not be used with these students as it teaches them to “guess” words rather than reading
9 words phonologically.²⁹ Indeed, Reading Recovery has been proven to further harm students
10 with reading disorders instead of help them.³⁰

11 91. Students with reading disorders need specialized and explicit instruction that
12 teaches them how to decode and spell words and the alphabetic principle, among other things.
13 Simply using general education programs that are based upon principles of “guessing” words and
14 using “multiple cues” to infer a word’s meaning, such as “Reading Recovery” or any form of
15 guided reading, guarantees that students with reading disorders will be disserved and very
16 possibly will never acquire the fundamental life skill of being able to read.³¹

17
18 ²⁸ LLI has not been subject to peer-reviewed research. The program description by the authors
19 makes no mention of systematic phonics instruction based on diagnostic testing of student
20 strengths and weaknesses in foundational reading skills. *See Leveled Literacy Intervention (LLI)*,
21 Fountas & Pinnell (2016), <http://www.fountasandpinnell.com/lli/>. In short, it is practically the
22 same as guided reading programs, which are ineffective for students with reading disorders. *See*
23 *also* Carolyn A. Denton, Jack M. Fletcher et al., *An Experimental Evaluation of Guided Reading*
24 *and Explicit Interventions for Primary-Grade Students At-Risk for Reading Difficulties*, 7 J. Res.
25 on Educ. Effectiveness 268-93 (2014).

26 ²⁹ Alison W. Arrow and Claire McLachlan, *The Emergent Literacy Approach to Effective*
27 *Teaching and Intervention*, PERSPS. ON LANGUAGE AND LITERACY 35 (2011); James W. Chapman
28 and William E. Tunmer, *Reading Recovery: Does it Work?*, Persps. on Language and Literacy 21
(2011); *see* James W. Chapman and William E. Tunmer, *Is Reading Recovery an Effective*
Intervention for Students with Reading Difficulties? A Critique of the 13 Scale-Up Study? 37
READING PSYCHOL. 1025-1042 (2016).

³⁰ Arrow, et al., *supra*, at p. 35; *see* Chapman, et al., *supra*, at p. 1025.

³¹ Keith T. Greaney, *The Multiple Cues or “Searchlights” Word Reading Theory: Implications*
for Reading Recovery, Persps. on Language and Literacy 15 (2011). *See also*, S. Baker, et al.,
Evidence-based research on Reading Recovery (2002), [http://www.iferi.org/wp-](http://www.iferi.org/wp-content/uploads/2017/01/Researchers-letter-RR-2002.pdf)
content/uploads/2017/01/Researchers-letter-RR-2002.pdf (Reading Recovery is not successful
with its targeted student population, the lowest performing students.).

1 92. ***Failure to conduct timely or appropriate evaluations of students with suspected***
2 ***reading disorders.*** Defendants fail to evaluate students with suspected reading disorders.
3 Defendants frequently refuse to conduct evaluations despite repeated parental requests. Even
4 when evaluations occur, they are detrimentally delayed and improperly conducted. For example,
5 Defendants have improperly required parents to provide a medical diagnosis of students with
6 suspected reading disorders prior to permitting parents to seek evaluations. Upon being provided
7 a medical diagnosis, Defendants have ignored these diagnoses, claiming they are “medical not
8 educational”. Further, Defendants routinely fail to give required consideration to independent
9 educational evaluations (“IEEs”) provided by parents.

10 93. Prior to issuing any IEPs under the IDEA framework, in its evaluation process,
11 BUSD is implementing the “severe discrepancy” approach to identify whether BUSD students
12 have a reading disorder. This severe discrepancy standard requires a student to show a severe
13 discrepancy between intellectual ability and academic achievement in the area of reading, writing
14 or math in order to identify the student as having a SLD. As stated before, IDEA previously
15 mandated the severe discrepancy standard, but removed this requirement in 2004,³² recognizing
16 that the approach resulted in late identification and/or misidentification of students with learning
17 disabilities, including reading disorders. Accordingly, the 2004 amendments to IDEA no longer
18 require school districts to take into account severe discrepancy between intellectual ability and
19 academic achievement, but permit states to continue to use the standard, so long as the standard is
20 properly applied. State regulations specifically instruct school districts that students may
21 otherwise qualify as having an SLD. Cal. Code Regs. tit. 5 § 3030(b)(10)(C) (2017).

22 94. Defendants are not applying the “severe discrepancy” standard with fidelity or
23 with proper consideration of all academic achievement scores. 34 C.F.R. § 300.309(b)(2); Cal.
24 Code Regs. tit. 5 § 3030(b)(10)(C)(4) (2017); *see also* 34 C.F.R. § 300.307; Cal. Code Regs. tit. 5
25 § 3030(b)(10)(B) (2017). As a result, BUSD’s application of the severe discrepancy requirement
26 wrongly finds students ineligible under IDEA.

27
28 ³² 20 U.S.C. § 1414(b)(6)(A); Assistance to States, 71 Fed. Reg. at 46,647.

1 95. Moreover, in November 2016, in spite of the governing law, at least one
2 representative of Defendants represented that the District central office instructed BUSD staff to
3 refuse to evaluate students with dyslexia or suspected dyslexia, until CDE issues non-mandatory
4 dyslexia guidelines, which are required to be released in the fall of 2017.

5 96. ***Failure to timely develop and revise appropriate “IEPs” or “504 Plans” for***
6 ***students with qualifying reading disorders.*** As set forth above, Defendants systematically fail to
7 timely develop and revise as necessary appropriate IEPs and 504 Plans that include appropriate
8 special education and related aids and services. If and when students are finally found to have
9 SLDs on the basis of reading disorders, Defendants have refused to offer and provide
10 appropriately intensive research-based reading intervention services, which are essential for these
11 students to learn and advance academically from grade to grade. The reading interventions
12 provided, if at all, to students with IEPs are the same as those provided to students in the district’s
13 RTI framework. Moreover, Defendants fail to appropriately monitor student progress as required
14 by law.

15 97. Defendants also systematically fail to provide students with reading disorders with
16 AT and instructional materials in accessible formats, which are also critical. Even if Defendants
17 provide students with reading disorders with some form of AT, the provision of AT is neither
18 appropriate nor consistent. Typically, students can use AT only at school, and must ask for it,
19 which many students are too embarrassed to do. Even worse, students are blamed for not
20 receiving AT because “they don’t like it or don’t know how to use it”, yet Defendants completely
21 fail to provide appropriate training or support to students, teachers and parents on how to use AT.
22 Further, because Defendants often times prohibit students from taking AT home, students with
23 reading disorders are unable to access instructional materials in accessible formats at home and
24 are consequently unable to complete their homework.

25 98. Altogether, because Defendants fail to provide appropriate special education and
26 related aids and services, including appropriately intensive research-based reading intervention
27 services, students fall further and further behind. Consequently, BUSD students with reading
28 disorders experience and are at high risk of extreme and ongoing frustration, greater anxiety,

1 humiliation, lowered self-esteem, and depression, which further interfere with their ability to
2 learn to read, and to enjoy equal opportunity to fully participate in and benefit from BUSD
3 classrooms and instructional programs.

4 **Plaintiffs Are Excused from Exhaustion of Administrative Remedies**

5 99. Exhaustion of administrative remedies under the IDEA is excused when further
6 administrative actions would be futile; when an agency has adopted a policy or pursued a practice
7 of general applicability that is contrary to the law; and when relief available through additional
8 administrative efforts would be inadequate to address a plaintiff's claims. All three of these
9 exceptions to exhaustion apply to Plaintiffs' claims herein.

10 100. First, further administrative actions would be futile, as the same challenges alleged
11 in this complaint regarding BUSD's unlawful policies and practices have been rejected by the
12 reviewing authority, CDE. Specifically, on May 29, 2015, the Disability Rights Education and
13 Defense Fund, Inc. ("DREDF") filed a "various" compliance resolution process ("CRP")
14 complaint against BUSD, North Region Special Education Local Plan Area, and CDE on behalf
15 of a group of students with SLDs and suspected SLDs in BUSD. The CRP complaint challenged
16 BUSD's unlawful policies and practices regarding dyslexia, including its failure to consider
17 dyslexia diagnoses or provide services to students with dyslexia, in violation of obligations to
18 provide a FAPE in the LRE under IDEA. A true and correct copy of DREDF's May 29, 2015,
19 CRP complaint is attached hereto as **Exhibit 1**.

20 101. In its July 31, 2015 Investigation Report, CDE found (incorrectly) that BUSD was
21 in compliance regarding all SLD-related allegations. A true and correct copy of the July 31,
22 2015, Investigation Report by CDE is attached hereto as **Exhibit 2**. In clear violation of federal
23 and state law, the CDE's Investigation Report largely ignored the CRP complaint allegations,
24 failed to investigate them and parent declarations provided in support of the CRP complaint.
25 CDE simply accepted BUSD's denials of wrongdoing.

26 102. DREDF filed a request for reconsideration on September 4, 2015, that challenged
27 the appropriateness of CDE's compliance determinations relating to BUSD's policies and
28 practices regarding dyslexia. DREDF's request carefully explained where CDE's determinations

1 were based on misapplications of the law, investigation failures, relied on incorrect findings of
2 fact, and reiterated the district-wide scope of the CRP complaint. A true and correct copy of
3 DREDF's Reconsideration Request, dated September 4, 2015, is attached hereto as **Exhibit 3**.

4 103. Despite initially denying the request, on September 17, 2015, CDE notified
5 DREDF that it would reconsider the CRP complaint. On October 13, 2015, CDE sent a letter
6 summarily rejecting DREDF's request for systemic corrective actions. A true and correct copy of
7 CDE's October 13, 2015, Reconsideration Report is attached hereto as **Exhibit 4**. Once again, in
8 clear violation of federal and state law, CDE's Reconsideration Report showed that CDE refused
9 to conduct a meaningful investigation as required by IDEA.

10 104. Plaintiffs are excused from further pursuing administrative remedies because it
11 would be futile for them to file multiple CRP complaints with CDE based on the same issues that
12 were raised in DREDF's CRP complaint filed with CDE in May 2015. Repeatedly filing
13 identical compliance complaints against BUSD on the same exact issues would serve no useful
14 purpose. As a result, it is highly improbable that Plaintiffs could obtain adequate relief by filing
15 multiple CRP complaints with CDE.

16 105. Second, because administrative remedies cannot provide adequate systemic relief
17 such as that sought herein, administrative exhaustion is excused. Federal case law and orders
18 issued by state administrative law judges clearly support the excusal of plaintiffs who allege
19 system-wide claims and seek system-wide remedies from undergoing multiple due process
20 hearings before seeking judicial relief from the courts, as due process hearings in these situations
21 would be futile. Multiple due process complaints against a school district that challenge systemic
22 or structural issues are "inefficient" and "ineffective" in achieving system-wide relief. *Smith v.*
23 *L.A. Unified Sch. Dist.*, 830 F.3d 843, 863 (9th Cir. 2016). Such complaints based on the "same
24 [systemic] policy" and "same evidence" would lead to "inconsistent rulings" and eventually
25 require a federal district court to resolve any inconsistencies. *L.M.P. ex rel. E.P. v. Sch. Bd.*, 516
26 F. Supp. 2d 1294, 1305 (S.D. Fla. 2007).

27 106. Further, past orders from administrative law judges at the Office of Administrative
28 Hearings ("OAH") clearly demonstrate that OAH will not adjudicate system-wide legal

1 deficiencies that are raised in due process complaints. *In the Matter of Parent on Behalf of*
2 *Student v. Placentia-Yorba Linda Unified Sch. Dist.*, OAH Case No. 2014061022 (2014)
3 (“[S]ystemic claims on behalf of other students are not only outside of OAH’s jurisdiction, but
4 run contrary to the express purpose of a due process proceeding to focus on the individual child
5 and his or her unique educational needs.”); *In the Matter of Parent on Behalf of Student v.*
6 *Oakland Unified Sch. Dist.*, OAH Case No. 2014060963 (2014) (dismissing systemic claims that
7 were raised in the due process complaint because “OAH’s jurisdiction is limited to due process
8 proceedings between a student, parent or guardian and the public agency involved in the
9 education of the student”); *In Matter of Guardian on Behalf of Student v. L.A. Unified Sch. Dist.*
10 *et al.*, OAH Case No. 2010110500 (2010) (dismissing alleged violations of Due Process and
11 Equal Protection Clauses of federal and state constitutions, Section 504, ADA, and the Unruh
12 Civil Rights Act because OAH lacks jurisdiction to address such claims in a due process hearing
13 under IDEA).

14 107. Thus, because OAH lacks the jurisdiction to adjudicate systemic issues, or order
15 systemic relief on behalf of multiple students’ claims, it would be perverse to require Plaintiffs to
16 file multiple individual due process complaints with OAH that challenge BUSD’s unlawful
17 systemic policies and practices regarding students with reading disorders.

18 108. Third, Plaintiffs are excused from administrative exhaustion because BUSD’s
19 policies and practices regarding students with reading disorders are defective as a matter of law,
20 as described herein.

21 **Plaintiff Student A**

22 109. Student A is a 7 year-old second grade student at a BUSD elementary school. An
23 independent evaluator recently diagnosed student A with SLDs in the areas of reading (dyslexia)
24 and math. Student A has attended this BUSD elementary school since she started kindergarten in
25 the 2014-2015 academic year. At all relevant times, Student A resided within the jurisdiction of
26 BUSD.

27 110. Student A’s academic struggles began shortly after she started elementary school.
28 At the end of Student A’s kindergarten year, Student A’s teacher observed and informed Student

1 A's parents that Student A was far below grade level in reading. When Student A started first
2 grade, she was immediately placed in a Leveled Literacy Intervention ("LLI"), a general reading
3 intervention, since her reading abilities were significantly below her peers. Student A's teachers
4 reported that she made some progress in LLI, but she continued to show emotional distress and
5 displayed reading avoidant behaviors at home. Student A, as a 7 year-old, began referring to
6 herself as "stupid"; she regularly said, "I'm dumb" and "I hate reading".

7 111. As a result, Student A's parents decided to privately fund tutoring for Student A
8 starting in January 2016. In March 2016, BUSD removed Student A from LLI general education
9 reading intervention. The school reported that she had made enough progress in reading to return
10 to "Tier 1" intervention in her general education class. While Student A's teachers reported
11 "steady progress with Tier 1 and 2 interventions", Student A's parents remained concerned about
12 Student A's inability to decode words, low self-esteem and lack of academic progress, even with
13 her private tutoring. An SST meeting was held at the end of the 2015-2016 School year, Student
14 A's first grade year. Because Student A's parents suspected that their daughter may have a
15 learning disability, they informed the SST team that they intended to refer Student A to BUSD
16 for a special education evaluation, and did so in the spring of 2016.

17 112. At the start of second grade, Student A's assessments for special education
18 commenced. Student A was placed back in LLI in early October 2016. At this time it was
19 reported by Student A's LLI instructor that Student A was reading at level "H".³³

20 113. An initial IEP meeting was held on October 27, 2016, to determine Student A's
21 eligibility for special education and related aids and services. At this meeting, Student A's IEP
22 team members reviewed her assessments. BUSD officials determined that Student A was
23 ineligible for an IEP because, according to the BUSD school psychologist, Student A did not
24 have a severe discrepancy or a processing deficit, so she did not have an SLD and accordingly did

25 _____
26 ³³ LLI uses a "text level gradient", which identifies a student's reading ability using an alphabetic
27 letter. *F&P Text Level Gradient*, Fountas & Pinnell <http://www.fountasandpinnell.com/intro/>.
28 Typically, students in kindergarten begin at level "A" and progress through the alphabet, moving
from one reading level to the next (i.e., from level "A" to level "B", from level "B" to level "C",
etc.). *Id.* Accordingly, a high school student should be reading at a level "Z+". *Id.* Second grade
students are typically reading at a level "K" at the beginning of second grade. *Id.*

1 not need special education and related aids and services. Student A's parents disagreed with this
2 determination and noted next to their signatures in the initial IEP documents that they believed
3 their daughter should have been found eligible for special education. BUSD did not provide
4 Student A's parents with prior written notice after denying Student A an IEP, nor was Student A
5 considered for a 504 Plan for much needed accommodations at school including but not limited
6 to audiobooks.

7 114. BUSD only relied on the severe discrepancy standard in evaluating Student A and
8 did not take into consideration other factors to determine whether or not Student A had an SLD,
9 such as the fact that she had participated in general education reading interventions for the
10 majority of her first and second grade school years and still could not decode words.

11 115. BUSD officials improperly concluded that Student A was ineligible for special
12 education and related aids and services because she received "average" composite scores on
13 several of the standardized tests that were administered as part of BUSD's IEP assessment
14 process. However, it was also noted that scores were too discrepant to calculate Student A's
15 processing speed and working memory, so it is unclear the procedure by which BUSD used to
16 determine that Student A did not have a processing deficit.

17 116. BUSD inappropriately and incorrectly interpreted Student A's test scores. Further,
18 BUSD disregarded Student A's inability to decode nonsense words. Student A was also behind
19 in many academic areas. BUSD's cursory review of only Student A's "composite scores" on her
20 standardized tests constitute an improper evaluation of her need for special education and related
21 aids and services.

22 117. Because BUSD failed to find Student A eligible for an IEP, Student A is currently
23 not receiving any special education and related aids and services from BUSD. Even worse, two
24 weeks after the October 2016 IEP meeting BUSD pulled her out of the LLI reading intervention.
25 Though she had received minimal and inconsistent LLI, she was at least getting one on one
26 support and attention, even if the reading intervention was inappropriate. It was reported by the
27 principal that she was removed because she was reading at a level "J", two levels up from where
28 she was just a couple weeks prior. The Principal reported that this was further proof that Student

1 A did not need specialized academic instruction. Student A's parents have been forced to
2 continue to privately fund educational therapy and provide interventions themselves to try to
3 ensure that Student A doesn't suffer in general education.

4 **Plaintiff Student B**

5 118. Student B is a 9 year-old fourth grade student at a BUSD elementary school.
6 Student B has been diagnosed by independent evaluators with ADHD and SLDs in the areas of
7 reading (dyslexia), written expression, and math. Student B is identified by BUSD as an
8 individual with a disability within the meaning of IDEA, Section 504 and ADA and as an
9 individual with exceptional needs within the meaning of California Education Code Section
10 56026. He is entitled to special education and related aids and services from BUSD as a resident
11 of Alameda County in the city of Berkeley, California. At all relevant times, Student B resided
12 within the jurisdiction of BUSD.

13 119. Student B began kindergarten at a BUSD elementary school in the 2012-2013
14 school year. He struggled greatly with academics within weeks of starting school and displayed
15 high levels of frustration and behavioral problems in class. Despite being on notice of Student
16 B's obvious learning and behavioral challenges, BUSD did not timely carry out its "Child Find"
17 mandate to identify Student B for the purposes of evaluating him in all areas of suspected
18 disability, nor did BUSD provide RTI services to him. Student B's guardian, Parent B.,
19 repeatedly requested help from BUSD.

20 120. Instead of evaluating Student B for special education and related aids and services,
21 BUSD employees advised Parent B to take Student B to a doctor to get a medical assessment for
22 medication. Student B's teacher wrote a letter to Student B's medical doctor describing Student
23 B's behavioral struggles as well as academic and fine motor deficits. She stated that Student B
24 avoided reading and writing, which was likely a contributing factor to his behaviors. Student B's
25 kindergarten teacher did not refer him for evaluation despite the fact that Student B could not
26 function in the classroom. Parent B had to remove him from school, attempted to homeschool
27 him and then placed him in a public charter school. This placement was also unsuccessful.
28 Student B was re-enrolled in BUSD late in his first grade year, on October 7, 2013. Two days

1 later Parent B referred Student B for a special education evaluation.

2 121. Over a year after he first demonstrated struggles with academics, on November 14,
3 2013, BUSD found Student B, then age six, eligible for special education under the disability
4 categories of SLD based on a severe discrepancy between his intellectual ability and his
5 achievement in reading, and OHI, based on his ADHD diagnosis. Student B's initial IEP
6 included inadequate goals in reading, listening comprehension, communication development,
7 behavior and attention. Even worse he was provided with no research-based reading
8 interventions. Because he was set up to fail, he could not reach his inadequate IEP goals,
9 especially his academic goals, much less make appropriate progress.

10 122. Throughout his 2013-2014 first grade school year, Student B was deprived entirely
11 of any meaningful special education services. BUSD limited Student B's services to supervision
12 by a one-to-one instructional aide ("IA"), who was not trained as a special education teacher or in
13 any behavior intervention techniques, which Student B needed due to behaviors associated with
14 his ADHD exacerbated by academic frustration. Because of BUSD's failure to provide
15 appropriate services and supports, Student B displayed significant outbursts due to academic
16 frustration and humiliation.

17 123. On June 5, 2014, Parent B requested an IEP meeting to discuss Student B's
18 continued lack of progress in reading and overall frustration at school. Parent B brought Student
19 B's privately funded tutor to the IEP meeting, and she opined that reading was the single source
20 of Student B's high levels of frustration, which triggered his behaviors associated with ADHD.
21 However, BUSD refused to offer or provide any appropriate specialized academic instruction for
22 Student B's reading disorder. As a last resort, Parent B requested that BUSD fund one-half of the
23 cost of the tutor for Student B to receive additional reading instruction outside of the school
24 environment since BUSD refused to do it in the classroom. BUSD denied the request stating that
25 it had "provide[d] appropriate levels of direct instruction, intervention, and specialized services
26 and supports" to address Student B's significant reading deficits. However, BUSD had not
27 provided any specialized services or academic instruction, with the exception of an untrained,
28 unqualified one-to-one IA to supervise Student B, as evidenced by Student B's IEP.

1 124. At the beginning of his 2014-2015 second grade school year, Student B was
2 suspended for aggressive behaviors. A meeting to determine whether his behavior was a result of
3 his disabilities, known as a “Manifestation Determination Review”, was held for Student B on
4 October 1, 2014. Student B’s IEP team noted that Student B had a very low frustration tolerance
5 and that he could not perform in the classroom with a larger group. Instead of providing Student
6 B with additional or appropriate academic and behavioral support, BUSD informed Parent B,
7 over her objection that Student B could not return to public school. BUSD offered to provide five
8 hours a week of home instruction until an “alternative placement” could be located. While
9 BUSD unilaterally changed Student B’s placement over Parent B’s objection, it failed to provide
10 any “prior written notice” explaining its position as required by law, and failed to state any plans
11 for his return to school, or an alternative placement.

12 125. Student B was out of school nearly one-half of his second grade school year, from
13 October 1, 2014 until January 9, 2015, due to the BUSD’s failure to locate any school placement.
14 During the months at home, after being told to leave his public school, Parent B requested prior
15 written notice multiple times in response to her ongoing requests for placement and services, but
16 BUSD did not respond. On January 9, 2015, BUSD finally offered a placement at a secluded day
17 school program called Catalyst Academy (“Catalyst”), a non-public school for children with
18 severe behavioral and emotional disabilities. While Catalyst focused heavily on behavioral
19 modification, it admittedly was not academically focused and had no teachers trained in
20 interventions appropriate for children with reading disorders, like Student B.

21 126. Throughout the rest of his 2014-2015 second grade school year, BUSD continued
22 to deprive Student B of any direct, appropriate academic interventions or services. BUSD
23 completely failed to monitor Student B’s placement and progress in any way. His behaviors
24 increased dramatically while at Catalyst, and he fell further and further behind in academics,
25 especially reading. On May 20, 2015, an IEP meeting was held for Student B. At this meeting,
26 Catalyst staff reported they could not serve Student B because he was in a seclusion room by
27 himself 75% of his time at school due to serious behavioral incidents that were almost always
28 triggered by academic frustration. BUSD ignored Catalyst staff’s and Parent B’s requests for

1 additional behavioral and academic support for Student B. Parent B requested prior written
2 notice regarding the request for additional services for Student B, but BUSD failed to provide
3 required written notice of the basis for its refusals.

4 127. Student B was placed on medication for his ADHD during the summer of 2016,
5 and as a result, his behaviors decreased dramatically. However, with fewer behavior incidents
6 and more time in the classroom, his academic deficits became more pronounced. While in third
7 grade, on March 18, 2016, another IEP meeting was held for Student B; at this meeting, the IEP
8 team reviewed the results of two IEEs of Student B. Testing results revealed that Student B had
9 made absolutely no academic progress over the course of an entire academic year. Student B was
10 at the end of his third grade year, but still reading at or below first grade levels at best. Student
11 B's teacher at Catalyst agreed with the results of the IEEs that he needed intensive academic
12 remediation that could not be provided at Catalyst.

13 128. The independent evaluators diagnosed Student B with SLDs in the areas of
14 reading, writing and math, and recommended that Student B receive intensive and targeted one-
15 on-one academic remediation; specifically, a structured, sequential, direct instruction approach to
16 address Student B's needs in reading, writing and math for at least five hours a week. But,
17 because BUSD has a general policy to refuse and/or deny such research-based interventions for
18 children with specific learning disabilities, and admittedly has no staff properly trained in any
19 such methods, these recommendations were ignored.

20 129. Subsequently, at Parent B's and Catalysts' insistence, Student B was moved back
21 to a public school placement, where he could focus on academic remediation. On April 14, 2016,
22 he began attending BUSD's Cragmont Elementary School in a Counseling Enriched Special Day
23 Class. Unfortunately again, BUSD offered no specific or appropriate individualized academic
24 instruction to address his reading disorders.

25 130. Once back in public school, despite multiple parental requests, BUSD continued in
26 its utter failure to provide any meaningful academic remediation and in its failure to provide prior
27 written notice of its refusals. BUSD never responded to the recommendations of the independent
28 evaluators and never acknowledged or accommodated Student B's severe academic needs in his

1 new classroom. His special day class teacher had no specific knowledge or training in teaching a
2 child with dyslexia how to read.

3 131. On July 7, 2016, Parent B filed a due process complaint on behalf of Student B,
4 resulting in a confidential settlement agreement.

5 132. Even after the filing of the due process complaint, BUSD continued in its
6 complete failure to provide any appropriate academic interventions for Student B. He has
7 received no appropriate specialized academic instruction at all for the 2016-2017 fourth grade
8 school year, in part due to BUSD's failure to hire a special education teacher for his classroom.
9 Even after a special education teacher was hired, BUSD has failed to address Student B's
10 learning disabilities by continuing to provide inappropriate and ineffective reading interventions,
11 such as LLI. Student B is still reading and functioning academically years behind his peers.
12 Because of the documented long history of BUSD's failure to provide appropriate academic
13 interventions, Student B currently reads between a first and second grade level, even though he is
14 nearing the end of his fourth grade school year.

15 **Plaintiff Student C**

16 133. Student C is a 15 year-old ninth grade student at BHS. Independent evaluators
17 have diagnosed Student C with SLDs in the areas of reading (dyslexia), written expression, and
18 math. Student C is identified by BUSD as an individual with a disability under IDEA, Section
19 504 and ADA and as an individual with exceptional needs within the meaning of California
20 Education Code Section 56026. He is entitled to special education and related aids and services
21 from BUSD as a resident of Alameda in the city of Berkeley, California. At all relevant times,
22 Student C resided within BUSD and was only recently deemed to be a child with a disability as
23 defined by the IDEA. Student C is a lifelong resident of Berkeley, California but attended private
24 schools for most of his educational career due to his significant academic needs, having been
25 privately diagnosed with severe dyslexia as a young child.

26 134. BUSD did not identify or locate Student C under its "Child Find" duty when he
27 was in elementary and middle school at a private school. In preparation for his transition from
28 private school to ninth grade at BHS, Parent C referred Student C to BUSD for a special

1 education evaluation in spring 2016. In her written referral, Parent C provided BUSD with an
2 independent evaluation from 2016 that confirmed Student C's previously diagnosed SLDs in the
3 areas of reading, written expression and math. Parent C identified Student C's severe dyslexia,
4 which includes impairments in phonological processing as her primary concern. Student C is
5 very intelligent, but due to his severe dyslexia, he reads several years below his grade level and
6 lacks basic word decoding skills. Consequently, Student C cannot access the academic
7 curriculum without specialized instruction and AT.

8 135. In May 2016, BUSD completed an initial evaluation of Student C, and on May 18,
9 2016, an initial IEP meeting was held to discuss the results of BUSD's initial evaluation. At this
10 meeting, BUSD evaluators confirmed that Student C had significant impairments in all academic
11 areas, but especially in reading decoding and fluency, and as a result, was reading several years
12 below his grade level. Accordingly, BUSD determined that Student C had an SLD and that he
13 was, therefore, eligible for special education and related aids and services.

14 136. Although it was well-documented that Student C would enter BHS with an
15 inability to read at the ninth grade level, BUSD only developed three goals for Student C in his
16 IEP – one each in “self-advocacy,” “spelling,” and “AT.” None of these goals addressed his
17 significant academic needs, including his inability to read. To reach these inadequate and
18 inappropriate goals, BUSD only offered Student C a 55-minute support class once a day. The
19 support class – “Consultative Learning Centers” (also known as “CLC”) – is a study hall type
20 class where BHS students with disabilities go to learn organizational and study skills from a
21 special education teacher. On information and belief, students in the CLC do not receive any
22 individualized reading, writing or math instruction. Student C was not offered any kind of AT or
23 AT services even though he had an AT goal, and BUSD was aware that Student C could only
24 access textbooks in audio format. BUSD failed to even evaluate Student C's AT needs or to
25 include an AT specialist in the initial IEP process. Thus, with inadequate and inappropriate
26 goals, aids and services, BUSD failed to provide Student C with any meaningful special
27 education and related aids and services.

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1 137. After Student C had attended BHS for approximately one month, Parent C
2 requested another IEP meeting for her son in another attempt to secure essential services. On
3 September 27, 2016, Student C’s IEP team met again. Student C did not feel the CLC class was
4 useful to him in any way. Parent C requested AT services and an AT evaluation. While BUSD
5 agreed to conduct further AT evaluations, which should have been done as part of his initial IEP
6 evaluation, BUSD abruptly denied Student C any further special education and related aids and
7 services, without prior written notice. In response to Student C’s reporting that CLC was not
8 useful, BUSD offered Student C “15 minute meetings once a week with case manager” to “work
9 on IEP goals, organization, technological needs, and for a general consult around grades and
10 progress.” It is unclear how BUSD considered this to be a special education service at all. This
11 offer of “individualized instruction services” is entirely inappropriate for a high-school age
12 student who cannot read independently.

13 138. On December 14, 2016, the IEP team met again to review the AT evaluation,
14 which had been completed pursuant to Parent C’s request. Based on the AT evaluation results,
15 BUSD offered Student C five 60-minute sessions per year with an “AT specialist.” To date, it
16 remains unclear what, if any, devices or aides Student C will be provided with or taught to use, or
17 how BUSD considers this an adequate offer of AT services.

18 139. While Parent C privately paid for support and services so that Student C could
19 pass from grade to grade, BUSD, to date, has completely failed to provide Student C with any
20 meaningful or appropriate special education and related aids and services. Consequently, Student
21 C is at-risk of graduating high school functionally illiterate, at best, and is very likely to have low
22 self-esteem because of his inability to read.

Plaintiff Student D

23 140. Student D is a 17 year-old twelfth grade student at BHS. An independent
24 evaluator has diagnosed Student D with a learning disability in the area of reading. Student D is
25 identified by BUSD as an individual with a disability within the meaning of Section 504 and
26 ADA. She is entitled to special education and related aids and services from BUSD as a resident
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1 of Alameda County in the city of Berkeley, California. At all relevant times, Student D resided
2 within the jurisdiction of BUSD.

3 141. Student D attended a private school from kindergarten through eighth grade. In
4 third grade, Student D's private school evaluated Student D and found that Student D had
5 difficulty reading. To provide Student D with support, Parent D privately paid for educational
6 therapy; Student D attended twice weekly educational therapy sessions during the academic year
7 and three times a week during the summer after third, fourth, and fifth grades. She continued to
8 receive twice weekly educational therapy sessions throughout middle school. Student D's private
9 school also provided her with accommodations, including the permission to listen to audiobooks,
10 a warning before the teacher called on Student D in class, the use of a calculator and a note card
11 for rote memory items, such as formulas in math, a spelling accommodation for in-class writing
12 assignments, and extra time on examinations, among others. These accommodations coupled
13 with educational therapies helped Student D to excel as a student.

14 142. At no time throughout her elementary and middle school years did BUSD identify
15 or locate Student D to carry out its "Child Find" duty. Yet, during these years, Student D had
16 been diagnosed privately with a reading disorder. In 2010, Student D, while Student D was
17 attending private school, Student D underwent an independent neuropsychological evaluation,
18 which concluded that Student D had a superior I.Q., and dyslexia.

19 143. Parent D referred her for a 504 evaluation in spring 2012, in preparation for her
20 transition to BHS for the 2013-2014 ninth grade school year, but it was not until 2015 that
21 Defendants found Student D eligible for a 504 Plan. BUSD never referred Student D for an
22 evaluation to determine whether or not she would qualify for special education and related aids
23 and services.

24 144. Because of Student D's disability-related academic needs, Parent D sent an email
25 to the special education program specialist at BUSD in April 2012 to understand how BUSD
26 provided accommodations to students with learning disabilities at BHS. The program specialist
27 agreed to meet with Parent D and to discuss the types of accommodations students with learning
28 disabilities could receive at BHS. Before this meeting, Parent D sent her Student D's records,

1 including Student D's 2010 neuropsychological evaluation, Student D's report cards, a private
2 school screening, and a request for extended time made by Student D's educational therapist,
3 among other records.

4 145. On June 22, 2012, Parent D and the program specialist met, and at this meeting the
5 program specialist told Parent D that (1) Student D did not need accommodations at BHS because
6 she had a superior I.Q. and received As and Bs in her classes, (2) it did not matter that Student D
7 used accommodations to obtain As and Bs in her classes, (3) Student D would not qualify for
8 special education and related aids and services because Student D had to have a discrepancy
9 between I.Q. and academic achievement, have a processing disorder, *and* perform two grades
10 below her current grade level (while Student D had a discrepancy between her I.Q. and academic
11 achievement and a processing disorder, Student D did not perform at least two grades below her
12 grade level), and (4) Student D would not qualify for a 504 Plan. Without any additional
13 evaluations conducted and without any other team members present, the program specialist
14 unilaterally concluded that Student D would not qualify for an IEP or a 504 Plan. Thus, even
15 though Student D had a well-documented disability, BUSD did not even offer to evaluate Student
16 D to determine whether she was eligible for an IEP and/or 504 Plan. Moreover, Parent D never
17 received any prior written notice from BUSD that it was refusing to evaluate Student D or that
18 Student D was ineligible for an IEP.

19 146. Additionally, the BUSD program supervisor told Parent D that Student D's
20 academic needs would be determined by her teachers and high school counselor only *after* she
21 started high school – not before.

22 147. In May 2013, prior to Student D starting ninth grade, Parent D sent several
23 documents to the Director of Student Services for BUSD. The Director called Parent D and
24 informed her that Student D could not receive accommodations until after the beginning of the
25 school year and that her teachers and her high school counselor would determine her needs for
26 accommodations. As a result, when Student D started ninth grade at BHS in the fall of 2013,
27 BUSD did not provide her with any accommodations. A few weeks into academic year, Parent
28 D, Student D, Parent D's husband, and Student D's educational therapist, met Student D's high

1 school counselor, to discuss a 504 Plan for Student D. None of Student D's teachers attended this
2 meeting. The counselor stated that the culture of the school required parents and their children to
3 "prove" that the student needed accommodations.

4 148. The counselor concluded that Student D was ineligible for accommodations as
5 long as she maintained good grades. Consequently, BUSD would not, and did not, provide
6 Student D with any accommodations throughout ninth grade. As a result, Parent D was forced to
7 continue to supplement her daughter's education with educational therapy sessions for one hour,
8 twice a week and an online subscription to Audible, which provided printed books in an audio
9 format. With these supports, Student D performed well and was an "A" student.

10 149. At the beginning of her 2014-2015 tenth grade school year, Student D still did not
11 receive any accommodations from BUSD. She struggled increasingly with her assignments.
12 Student D required extra time on examinations, but because she did not have a 504 Plan, Student
13 D was forced to ask teachers individually if she could have extra time on her examinations.
14 Student D was anxious to ask her teachers for extra time because she was worried that her
15 teachers would not allow it. Parent D continued to provide Student D with support outside of
16 school; Student D attended twice weekly educational therapy sessions and listened to audiobooks.
17 Parent D also read to her aloud if Student D was unable to find particular subject matter in an
18 audio format, which was very time consuming. However, with these supports, Student D
19 continued to receive As and Bs in her classes.

20 150. While in tenth grade, Student D registered to take the PSAT, a standardized test.
21 According to the College Board, Student D was not entitled to accommodations on the PSAT
22 because she did not have a 504 Plan from BUSD. The counselor at BHS suggested that Student D
23 take the PSAT without accommodations, and if she did not do well, it could serve as evidence to
24 BUSD administration of Student D's need for a 504 Plan. As a result of this advice, Student D
25 took the PSAT without any accommodations. She was unable to complete the examination, and
26 her PSAT score was inconsistent with being an "A" student.

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1 151. In early 2015, in the middle of Student D's tenth grade year, the counselor and
2 Parent D met to discuss Student D's academic needs again, including her need for
3 accommodations. No evaluations were offered by BUSD or conducted of Student D prior to this
4 meeting, and no one else attended the meeting. Parent D presented a journal that documented the
5 times Student D required accommodations from her teachers, an additional letter of support for
6 accommodations from her educational therapist, Student D's PSAT score, and letters from her
7 ninth and tenth grade English teachers who both stated that Student D used audiobooks at home.
8 The counselor unilaterally approved a 504 Plan for Student D.³⁴ Student D's 504 Plan included
9 the following accommodations: use of notecards with formulas, extra time to take tests, spelling
10 accommodations, and use of a calculator.

11 152. Subsequently, the counselor agreed to apply on behalf of Student D for
12 accommodations (*i.e.*, extended time) with the College Board for the SAT, another standardized
13 test. However, the College Board rejected the counselor's application because "the
14 documentation submitted does not support a need for extended time". Parent D asked the
15 counselor to re-apply with additional evidence of Student D's need for extended time, but the
16 counselor said she could only "apply once" for Student D because it was too time consuming to
17 submit multiple applications for the same student. Therefore, Parent D took the initiative to reach
18 out to the College Board herself. On July 28, 2015, Parent D spoke with an evaluator at the
19 College Board, and the evaluator stated that Student D's lack of accommodations (lack of 504
20 Plan), during her ninth grade year played a crucial role in the College Board's rejection of the
21 counselor's application for accommodations for Student D on the SAT, indicating that they were
22 not necessary or called for. Because Student D was again denied accommodations, Parent D
23 privately paid for another neuropsychological evaluation of Student D in eleventh grade, in order
24 to document Student D's academic needs and to prove to the College Board that Student D
25 needed accommodations. Student D eventually obtained accommodations for the SAT.

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28 ³⁴ Although this meeting occurred in early 2015, Student C's counselor suggested that they "back date" the 504 Plan to October 1, 2014, which they did. The reason for the counselor's suggestion is unclear.

1 153. While Student D continued to have a 504 Plan in the 2015-2016 eleventh grade
2 school year, and now in twelfth grade, it is the exact same 504 Plan that was created in tenth
3 grade. Her 504 Plan has not been re-evaluated and her accommodations remain unchanged,
4 despite her need for more. Parent D continued to privately fund one hour, weekly educational
5 therapy sessions for Student D in eleventh grade, and now in twelfth grade as well as a
6 subscription to Audible, so that Student D has access to audiobooks.

7 154. Despite Student D's need for audiobooks, BUSD has done little to nothing to
8 address her academic needs in this area. BUSD only occasionally provided Student D with
9 Learning Ally, a website that provides students with access to audiobooks, but access to this
10 website was not continuous and was limited to school use only. Parent D has had to provide her
11 with access to audiobooks so that she could participate equally with her classmates and graduate
12 on time.

13 **CLASS ACTION DEFINITION ALLEGATIONS**

14 155. Pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure,
15 Plaintiffs bring this action for injunctive and declaratory relief on their own behalf and on behalf
16 of all similarly situated students. The Plaintiffs seek to represent the following Classes in this
17 matter, pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2), as follows:

18 156. **CLASS 1:** All current and future BUSD Students who have or may have
19 disabilities because of reading disorders such as dyslexia within the meaning of IDEA/related
20 state laws and/or Section 504/ADA and who are or may be subject to BUSD's policies and
21 practices concerning identification of students for the purposes of offering special education and
22 related aids and services.

23 157. **CLASS 2:** All current and future BUSD Students who have or may have
24 disabilities because of reading disorders such as dyslexia within the meaning of IDEA/related
25 state laws and/or Section 504/ADA and who are or may be subject to BUSD's policies,
26 procedures and practices concerning evaluations for the purposes of determining eligibility for
27 special education and related aids and services.

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1 158. **CLASS 3:** All current and future BUSD Students who have or may have
2 disabilities because of reading disorders such as dyslexia within the meaning of IDEA/related
3 state laws and/or Section 504/ADA and who are or may be subject to BUSD’s policies,
4 procedures and practices concerning provision of special education and related aids and services,
5 including appropriately intensive research-based reading interventions, and accommodations and
6 modifications as necessary to ensure a non-discriminatory FAPE.

7 159. **CLASS 4:** All current and future BUSD Students who have or may have reading
8 disorders such as dyslexia within the meaning IDEA/related state laws and/or Section 504/ADA
9 who are or may be subject to BUSD’s policies, procedures and practices concerning monitoring
10 student progress to determine effectiveness of services provided and need for further evaluation
11 and/or revisions to their IEPs or 504 Plans.

12 160. This action is an appropriate class action under Rule 23(b)(2), as BUSD has acted
13 or refused to act on grounds that apply generally to each Class, so that final injunctive relief or
14 corresponding declaratory relief is appropriate respecting each Class as a whole.

15 161. **Numerosity.** The persons in these Classes are so numerous that joinder of all
16 such persons is impracticable. Reading disorders affect a significant portion of the student
17 population, the prevalence of which has been estimated between 5% and 17%.³⁵ At present,
18 BUSD includes approximately 10,000 students in grades K through 12. Accordingly,
19 Defendants’ deficient policies and practices impact many hundreds of current and future students.

20 162. **Commonality.** There are questions of law and fact common to each Class
21 identified above, namely whether BUSD’s policies, procedures and practices related to
22 identification, evaluation, eligibility determination, provision of special education and related
23 aids and services, and monitoring of student progress to determine effectiveness of services
24 provided and need for further evaluation and/or revisions to their IEPs or 504 Plans, violate IDEA
25 and related state laws and/or Section 504/ADA.

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³⁵ Fletcher, *supra*.

1 163. **Typicality**. The claims of the named Plaintiffs are typical of the claims of the
 2 Classes, identified above, in that each of the named Plaintiffs is an individual with a reading
 3 disorder, such as dyslexia, that qualifies him or her as eligible for special education and related
 4 aids and services under IDEA and related state laws and/or Section 504/ADA, but named
 5 Plaintiffs: (1) were not timely identified pursuant to Defendants' Child Find Duty; (2) have not
 6 received a timely and appropriate evaluation and eligibility determination; (3) have not received
 7 timely and appropriate provision of special education and related aids and services, including an
 8 adequate IEP or 504 Plan; and (4) have not received appropriate monitoring of their progress or
 9 review of special education and related aids and services documented in their IEP or 504 Plan.

10 164. **Adequate Representation**. The named Plaintiffs will fairly and adequately
 11 protect the interests of the Classes. Plaintiffs do not have any interests antagonistic to the
 12 members of any Class. The relief sought by Plaintiffs will inure benefit to the members of each
 13 Class. Additionally, Plaintiffs are represented by counsel who are experienced, skilled, and
 14 knowledgeable about civil rights litigation, disability rights, and class action litigation.

LEGAL CLAIMS

First Claim for Relief

Violations of the IDEA, 20 U.S.C. §§ 1400 *et seq.*, 34 C.F.R. Pt. 300

(On Behalf of All Plaintiffs, Class Members)

19 165. Plaintiffs incorporate the preceding paragraphs of this Complaint as if set forth in
 20 full herein.

21 166. IDEA mandates that students with disabilities, between ages 3 and 21, have access
 22 to a FAPE in the LRE. 20 U.S.C. § 1412(a)(1)(A). Students with suspected disabilities are
 23 entitled to a full and individual evaluation under IDEA. *Id.* § 1412(a)(7), 20 U.S.C. §§ 1414(a)-
 24 (b). IDEA additionally mandates that school districts that offer and provide RTI must provide
 25 appropriate research-based interventions. 20 U.S.C. § 1414(b)(6)(B); 34 C.F.R. §
 26 300.309(a)(2)(i). The rate of the student's progress in these interventions may be used as a part
 27 of the identification, referral and evaluation process. 34 C.F.R. §§ 300.309(b)(1)-(2); Cal. Code
 28 Regs. tit. 5 §§ 3030(b)(10)(C)(4)(i)-(ii) (2017). Upon evaluation and determination of eligibility

1 for special education and related services, IDEA mandates the development and subsequent
2 monitoring of a specially designed IEP to ensure that appropriate educational services, including
3 specialized instruction, such as appropriately intensive research-based reading interventions,
4 related services, supplementary aids and services, based on peer-reviewed research to the extent
5 practicable; accommodations and modifications, AT and accessible materials are provided to
6 students with disabilities as needed to ensure a FAPE in the LRE. 20 U.S.C. § 1414(d). Child
7 and parental input is required to be taken into account. *Id.* § 1414 (a)(1)(D), (b); 34 C.F.R., Pt.
8 300.

9 167. All Plaintiffs and Class Members are or may be a “child with a disability” because
10 they (1) have or may have a SLD due to a reading disorder, including but not limited to dyslexia,
11 and (2) need or may need special education and related aids and services.

12 168. Defendants are the recipients of federal funds under the IDEA sufficient to invoke
13 coverage under the IDEA. 20 U.S.C. § 1412(a).

14 169. As set forth above, Defendants’ policies and practices regarding students with
15 SLDs due to a reading disorder constitute a persistent and systemic failure to meet the
16 requirements of IDEA.

17 170. Thus, Defendants have deprived each Plaintiff and have or may deprive Class
18 Members of a FAPE in the LRE.

19 171. As a direct and proximate result of Defendants’ violations, each Plaintiff has
20 suffered, and Class Members suffer or may suffer, irreparable harm, including substantial losses
21 of educational opportunities.

22 172. No administrative remedy exists under IDEA to address these wholesale violations
23 by Defendants.

24 173. Due to Defendants’ ongoing violations of IDEA and implementing regulations,
25 injunctive and declaratory relief are appropriate remedies.

26 174. WHEREFORE, Plaintiffs pray for relief as set forth below.

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Second Claim for Relief

Violations of Section 504, 29 U.S.C. § 794, 34 C.F.R. Pt. 104

(On Behalf of All Plaintiffs, Class Members)

175. Plaintiffs incorporate the preceding paragraphs of this Complaint as if set forth in full herein.

176. Section 504 provides in relevant part: “No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance” 29 U.S.C. § 794(a); *see* 34 C.F.R. §§ 104.4(b), .21, .43(a).

177. Section 504 mandates that a student who is eligible for special education and related aids and services under Section 504 is entitled to receive FAPE. 34 C.F.R. § 104.33.

178. All Plaintiffs are and Class Members are or may be qualified individuals with disabilities within the meaning of Section 504 and are or may be otherwise qualified to participate in or receive benefits from Defendants’ programs or activities. 29 U.S.C. § 794(a).

179. Defendants have been and are a recipient of federal financial assistance sufficient to invoke the coverage of Section 504. *Id.* § 794(b)(3).

180. As set forth above, Defendants’ policies and practices regarding students with learning disabilities due to a reading disorder constitute a persistent and systemic failure to meet the requirements of Section 504 and discriminate against all Plaintiffs and Class Members, solely by reason of their disability in violation of Section 504.

181. Thus, Defendants have deprived each Plaintiff and have or may deprive Class Members of a FAPE.

182. As a direct and proximate result of Defendants’ violations, Plaintiffs have suffered, and Class Members suffer or may suffer, irreparable harm, including substantial losses of educational opportunities.

183. Due to Defendants’ ongoing violations of Section 504 and implementing regulations, injunctive and declaratory relief are appropriate remedies.

1 184. WHEREFORE, all Plaintiffs and Class Members pray for relief as set forth below.

2 **Third Claim for Relief**

3 **Disability Discrimination - Failure to Accommodate in Violation of Title II of the ADA**

4 **42 U.S.C. §§ 12131 *et seq.*, 28 C.F.R. § 35.130**

5 **(On Behalf of All Plaintiffs, Class Members)**

6 185. Plaintiffs incorporate the preceding paragraphs of this Complaint as if set forth in
7 full herein.

8 186. Title II of the ADA mandates that “no qualified individual with a disability shall,
9 by reason of such disability, be excluded from participation in or be denied the benefits of
10 services, programs, or activities of a public entity, or be subjected to discrimination by such
11 entity.” 42 U.S.C. § 12132; *see* 28 C.F.R. §§ 35.130(a), (b)(1)-(3), (b)(7)-(8), (d).

12 187. The requirements regarding the provisions of a FAPE, specifically described in
13 Section 504 regulations, are incorporated in the general non-discrimination provisions of the
14 applicable ADA regulation. 28 C.F.R. § 35.130(a).

15 188. Each Defendant is either a public entity subject to Title II of the ADA or an
16 official responsible for supervising the operations of a public entity subject to Title II of the
17 ADA. 42 U.S.C. § 12131(1).

18 189. All Plaintiffs are and Class Members are or may be qualified individuals with
19 disabilities within the meaning of Title II of the ADA and meet the essential eligibility
20 requirements for the receipt of services, programs, or activities of Defendants. *Id.* § 12131(2).

21 190. As set forth above, Defendants’ policies and practices regarding students with
22 learning disabilities due to a reading disorder constitute a persistent and systemic failure to meet
23 the requirements of Title II of the ADA and discriminate against all Plaintiffs and Class
24 Members, solely by reason of their disability in violation of requirements of ADA by denying all
25 Plaintiffs and Class Members an equal and equally effective educational opportunity in the most
26 integrated setting appropriate, and instead providing all Plaintiffs and Class Members with a
27 separate, different, and inferior educational experience.

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1 198. Defendants are responsible for providing public education to BUSD students,
2 including all Plaintiffs and Class Members.

3 199. As set forth above, Defendants have denied students of a FAPE in the LRE.

4 200. As a direct and proximate result of Defendants' violations, Plaintiffs have
5 suffered, and Class Members suffer or may suffer, irreparable harm, including substantial losses
6 of educational opportunities.

7 201. Thus, Defendants have deprived each Plaintiff and have or may deprive Class
8 Members of a FAPE in the LRE.

9 202. As a direct and proximate result of Defendants' violations, Plaintiffs have
10 suffered, and Class Members suffer or may suffer, irreparable harm, including substantial losses
11 of educational opportunities.

12 203. Due to Defendants' ongoing violations of the California Education Code Section
13 56000 *et seq.* and implementing regulations, injunctive and declaratory relief are appropriate
14 remedies.

15 204. WHEREFORE, Plaintiffs pray for relief as set forth below.

16 **Fifth Claim for Relief**

17 **Declaratory Relief**

18 **(On Behalf All Plaintiffs, Class Members)**

19 205. Plaintiffs incorporate the preceding paragraphs of this Complaint as if set forth in
20 full herein.

21 206. As set forth above, an actual controversy has arisen and now exists between the
22 parties in that all Plaintiffs and Class Members contend, and Defendants deny, that Defendants
23 maintain policies and practices that discriminate against students with and suspected to have
24 reading disorders and deprive them of a FAPE in the LRE, and that Defendants routinely fail to
25 comply with the requirements of IDEA, 20 U.S.C. §§ 1400 *et seq.*, and its implementing
26 regulations; Section 504, 29 U.S.C. § 794, and its implementing regulations; Title II of the ADA,
27 42 U.S.C. §§ 12132 *et seq.*, and its implementing regulations; and California Education Code
28 Sections 56000 *et seq.* and its implementing regulations.

1 207. A judicial declaration is necessary and appropriate at this time in order that each of
2 the parties may know their respective rights and act accordingly.

3 208. Wherefore, Plaintiffs request relief as set forth below.

4 **PRAYER FOR RELIEF**

5 209. An order certifying this case as a class action under Federal Rules of Civil
6 Procedure 23(a) and 23(b)(2) appointing Plaintiffs as Class Representatives of the Classes and
7 their attorneys as Counsel for all Classes.

8 210. Declare that Defendants' policies, procedures, and practices regarding students
9 with and who are suspected to have reading disorders violate the rights of all Plaintiffs and Class
10 Members, under IDEA, Section 504, ADA, and Section 56000.

11 211. Issue preliminary and permanent injunctions pursuant to IDEA, Section 504,
12 ADA, and Section 56000 that enjoin Defendants, their successors in office, agents, employees
13 and assigns, and all persons acting in concert with them to promulgate compliant policies,
14 procedures and practices.

15 212. Order Defendants to:

- 16 1. Immediately take action to reform policies, procedures and practices to fully
17 comply with IDEA, Section 504, ADA and Section 56000, including with
18 respect to the RTI program that serves all students in BUSD. Create a new
19 Board of Education-approved policy statement acknowledging the rights of
20 students with reading disorders, outlined above, summarizing policy
21 reforms, and reasserting Defendants' commitment to honor those rights.
22 Broadly disseminate the Board of Education-approved policy statement as
23 part of effective outreach plan;
- 24 2. Immediately discontinue all policies, procedures and practices that do not
25 comply with the laws cited above;
- 26 3. Provide for immediate and continuing education and evaluation of progress
27 toward compliance by qualified third-party experts. Experts should provide
28 training to all BUSD staff outlining all of the above legal requirements:

1 “Child Find,” RTI, universal screening, evaluation/identification,
2 appropriate research-based reading intervention services, related services,
3 supplementary aids and services, accommodations and modifications,
4 including but not limited to AT and accessible materials, for students with
5 reading disorders. Experts should also provide program evaluation
6 following implementation of reforms;

- 7 4. Establish appropriate, peer-reviewed research programs to the extent
8 practicable or other evidence-based programs that are necessary to provide a
9 FAPE in the LRE to students with reading disorders;
- 10 5. Commit to identifying staff responsible for any violations of the laws cited
11 above for re-training, follow-up review, and appropriate disciplinary action;
- 12 6. Develop a “practical method” to carry out “Child Find” duties and identify
13 all students with suspected reading disorders. Offer complete evaluations of
14 these students in compliance with IDEA, Section 56000 and Section
15 504/ADA; and
- 16 7. Through a fully compliant process that affords procedural safeguards to
17 students with disabilities and their parents, offer and provide a FAPE in the
18 LRE as appropriate to all students found eligible in accordance with IDEA,
19 Section 56000 and Section 504/ADA.

20 213. An order awarding Plaintiffs reasonable attorneys’ fees, costs, and disbursements,
21 as authorized by law; and

22 214. For such other and further relief as this Court may deem just and proper.

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DATED: May 2, 2017

Respectfully submitted,

By: /s/ Larisa Cummings

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Attorneys for Plaintiffs

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a trial by jury on all issues triable by jury in the above entitled action.

DATED: May 2, 2017

Respectfully submitted,

By: /s/ Larisa Cummings

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ATTORNEY ATTESTATION

I hereby attest, pursuant to Local Rule 5-1(i)(3), that I obtained the concurrence in the filing of this document from the signatories indicated by the conformed (/s/) of Larisa Cummings and Deborah Jacobson.

/s/ Shane Brun
SHANE BRUN