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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

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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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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 ROCKETS,
<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,

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 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
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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 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 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).

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

IDEA

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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.

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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

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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

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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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24 _____
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.
 Malatesha Joshi eds. 2012).

28 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

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 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.

28 ///

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.

CLASS ACTION DEFINITION ALLEGATIONS

13
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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1 191. Thus, Defendants have deprived each Plaintiff and have or may deprive Class
2 Members of a FAPE.

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

6 193. Due to Defendants' ongoing violations of Title II of the ADA and implementing
7 regulations, injunctive and declaratory relief are appropriate remedies.

8 194. WHEREFORE, Plaintiffs pray for relief as set forth below.

9 **Fourth Claim for Relief**

10 **Violations of Cal. Educ. Code §§ 56000 *et seq.*, Cal. Code Regs. tit. 5 §§ 3030 *et seq.***

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

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

14 196. California law requires that “[a] child shall qualify as an individual with
15 exceptional needs . . . if the results of the assessment as required by [the] Education Code . . .
16 demonstrate that the degree of the child’s impairment as described in subdivisions (b)(1) through
17 (b)(13) requires special education in one or more of the program options authorized by [the]
18 Education Code.” Cal. Code Regs. tit. 5 § 3030(a) (2017). The law further explains that,
19 “Specific learning disability means a disorder in one or more of the basic psychological processes
20 involved in understanding or in using language, spoken or written, that may have manifested
21 itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical
22 calculations, including conditions such as perceptual disabilities, brain injury, minimal brain
23 dysfunction, *dyslexia*, and developmental aphasia. The basic psychological processes include
24 attention, visual processing, auditory processing, sensory-motor skills, cognitive abilities
25 including association, conceptualization and expression.” *Id.* § 3030(b)(10) (emphasis added).

26 197. All Plaintiffs are and Class Members are or may be students with “exceptional
27 needs” within the meaning of California regulations. *Id.* § 3030(b).

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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 “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

EXHIBIT 1

[REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED]



May 29, 2015

VIA CERTIFIED U.S. MAIL

Return Receipt Requested

California Department of Education
Special Education Division
Procedural Safeguards Referral Service
1430 N Street, Suite 2401
Sacramento, CA 95814-5901

Certified Mail #: 7004 2510 0005 7303 9941

RE: Request for Direct State Intervention

Complaint by Disability Rights Education and Defense Fund Alleging Systemic Violations of Special Education Law Regarding Students with Specific Learning Disabilities and Suspected Specific Learning Disabilities in the Berkeley Unified School District

Dear Sir or Madam:

This is a special education compliance complaint made pursuant to the California Department of Education's (CDE) Uniform Complaint Procedures, 5 C.C.R. §§ 4600 *et seq.*, and its statutory obligations to supervise and monitor local education agency compliance with the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1412(a)(11)(A).

This is a complaint against Berkeley Unified School District (District), the North Region Special Education Local Plan Area (SELPA),¹ and CDE for their failures to ensure the provision of a free appropriate public education (FAPE) in the least restrictive environment (LRE) in violation of numerous state and federal laws. See, e.g., 20 U.S.C. §§ 1400(d) and 1416 *et seq.*; 34 C.F.R. §§ 300.101 and 300.151-153; 5 C.C.R. §§ 4600(c) and (d); § 4650(a)(7) *et seq.* Both state and federal laws recognize SELPAs as "public agencies" subject to the IDEA state complaint procedures. Cal. Educ. Code §§ 56028.5, 56500, and 56500.2; 34 C.F.R. § 300.33.

¹ The District determines a student's eligibility for special education using criteria set by the North Region SELPA. See North Region SELPA (2014). *Eligibility Statements*. Available at: <http://www.northregionselpa.org/wp-content/uploads/2014/07/Eligibility-Statements.pdf> (last visited May 27, 2015). The North Region SELPA's criteria for Specific Learning Disability (SLD) fail to recognize dyslexia as a qualifying SLD and exclude a number of recognized "basic psychological processes" (e.g., phonological processing). Moreover, as explained below, these criteria have been superseded by 5 C.C.R. § 3030(b)(10) and are invalid as a matter of law. See *infra* note 2.

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The basis for complaining against CDE is plainly recognized in official comments to IDEA regulations at 71 Fed. Reg. 46602 (2006) (comment):

We do not believe it is necessary to specify in the regulations how the SEA should handle a complaint filed against the SEA because § 300.151 clarifies that, if an organization or individual files a complaint, pursuant to §§ 300.151 through 300.153, that a public agency has violated a requirement of Part B of the Act or part 300, the SEA must resolve the complaint. Pursuant to § 300.33 and section 612(a)(11) of the Act, the term public agency includes the SEA. The SEA must, therefore, resolve any complaint against the SEA pursuant to the SEA's adopted State complaint procedures. The SEA, however, may either appoint its own personnel to resolve the complaint, or may make arrangements with an outside party to resolve the complaint. If it chooses to use an outside party, however, the SEA remains responsible for complying with all procedural and remediation steps required in part 300.

Disability Rights Education and Defense Fund (DREDF) makes this complaint pursuant to 5 C.C.R. § 4600(d) as an interested third party organization. The District has failed to implement special education laws regarding students with specific learning disabilities and suspected specific learning disabilities (SLD), especially dyslexia. The SELPA has failed to draft special education policies and procedures regarding students with SLDs that are consistent with state and federal laws. CDE has failed to take necessary steps to enforce compliance. DREDF requests direct state intervention because the actions complained of are systemic violations of IDEA, and systemic relief is sought. 5 C.C.R. §§ 4650(a)(7)(A) and (F).

Numerous attempts to resolve these issues through correspondence and meetings with District and CDE representatives since at least August 2014 have proven unsuccessful.

I. Brief Summary of Facts

On August 29, 2014, DREDF wrote to CDE (copying the District and SELPA Director) urging it to require the District to, among other things, reform its exclusionary policies regarding dyslexia. See attached Exhibit A. Following that letter, DREDF staff met with District and CDE personnel in person on December 5, 2014, in an attempt to review and resolve numerous concerns outlined in DREDF's August 29 letter, especially its exclusionary policies with respect to specific learning disabilities. On March 27, 2015, DREDF wrote to the District (copying CDE and the SELPA Director) to propose a settlement regarding the District's practices and procedures regarding students with

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specific learning disabilities, especially dyslexia. See attached Exhibit B. To date, no substantive response has been received from either the District or CDE.

DREDF's March 27, 2015 letter summarizes DREDF's concerns of numerous families, including that the District actively dissuades parents of students with a range of legally recognized specific learning disabling conditions from requesting IDEA evaluations, requires parents seeking these evaluations to first provide a medical diagnosis, ignores medical diagnoses and independent educational evaluations, and does not offer appropriate, research-based curricula for students with specific learning disabilities.

Further, DREDF's March 27, 2015 letter asserts that the District's interpretation of special education laws regarding specific learning disabilities is plainly unlawful. The District has told DREDF numerous times in person that it does not consider dyslexia to constitute a processing disorder. The District also testified to this belief in OAH Case Number 2013120159 at 24. The District further clarified and confirmed its views on dyslexia in a March 24, 2015 letter to DREDF:

The District does not have a policy on dyslexia and is not required to have one under state or federal law. *The District does not consider dyslexia to be processing disorder.* However, an individual may have a processing disorder combined with other factors that may lead to a clinical diagnosis of dyslexia. Medical and clinical diagnoses are considered when evaluating students and determining eligibility for special education services. State and federal law requires that students are found eligible under one or more of 13 disability categories. *Dyslexia is not a category.* A student that has a clinical diagnosis of dyslexia may or may not meet eligibility criteria for special education. *That being said, it is my understanding the dyslexia is no longer a clinical diagnosis under the new DSM V.* (emphasis added) See attached Exhibit C.

Attached are numerous witness statements by parents with children in the District who have been aggrieved for years by the District's various systemic violations of law listed below. These statements are submitted *confidentially* to CDE and the District. The identities of the parents and their children must remain confidential and used only for purposes of investigating this complaint. See **CONFIDENTIAL** Exhibits D-H.

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II. Summary of Legal Violations

1. CDE is failing to fulfill its monitoring and compliance responsibilities to ensure FAPE in the LRE:

State education agencies are ultimately responsible to ensure that each child within its jurisdiction is provided a FAPE. 20 U.S.C. § 1412(a)(11)(A); 34 C.F.R. § 300.600 *et seq.* As discussed above, CDE is fully aware of the District's systemic noncompliance regarding students with specific learning disabilities and suspected specific learning disabilities, especially dyslexia, and has failed to take necessary enforcement action.

2. CDE, the SELPA, and the District are ignoring federal and state statutes and regulations that explicitly recognize dyslexia as a qualifying condition under IDEA:

As described below, dyslexia is explicitly covered in governing laws as a specific learning disability. Both the SELPA's SLD policies and the District's interpretation quoted above are clearly erroneous as a matter of law. By their emphatic exclusionary policies and practices they are violating all related laws and regulations that follow below; CDE has failed to issue appropriate corrective actions necessary to enforce compliance as required by law. Among other violations, the District, the SELPA, and CDE are blatantly ignoring recent amendments to CDE's regulations that are on point.²

See *also*, 20 U.S.C. § 1401(30)(B), 34 C.F.R. § 300.8(c)(10)(i); Cal. Educ. Code §§ 56337, 56337.5. *Cf.* 20 U.S.C. § 1414(b)(6)(A), 34 C.F.R. §§ 300.307(a) and 300.309, Cal. Educ. Code § 56337(b) (severe discrepancy not required in determining eligibility under specific learning disabilities; school districts/local education agencies (LEAs) may consider it under IDEA). While the District may apply a severe discrepancy standard in its evaluation of students with suspected specific learning disabilities, it may not categorically refuse to qualify students who demonstrate a severe discrepancy

² 5 C.C.R. § 3030(j) ***was superseded*** by § 3030(b)(10) in 2014 which now states explicitly: "Specific learning disability means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may have manifested itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations, ***including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.*** The basic psychological processes include attention, visual processing, auditory processing, sensory-motor skills, cognitive abilities including association, conceptualization and expression." Emphasis added.

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between achievement and intellectual ability simply because of its mistaken belief that dyslexia is not a qualifying condition under the IDEA.

3. CDE and the District are ignoring very specific affirmative obligations to conduct thorough child find activities under IDEA to identify, locate and evaluate all students with suspected disabilities, in all areas of suspected disability, promptly:

See 20 U.S.C. §§ 1412(a)(3)(A), 1414(b)(3)(B), 34 C.F.R. §§ 300.309(c) (evaluate promptly), 300.111(a), 300.301; Cal. Educ. Code §§ 56171, 56300 et seq., 56301(a) and (b), 56302, 56302.1. An LEA's child find duty is not dependent on any request by the parent for special education evaluations or referral for services. *Id.* Pre-assessment interventions, including "Response to Intervention" may not be used to delay or deny special education evaluations.³ The District's categorical noncompliance includes refusing to evaluate students with suspected learning disabilities prior to second grade and those who are not academically behind at least two years at any point in their elementary and secondary education.⁴

³ U.S. Department of Education, Office of Special Education Programs (OSEP) No. 11-07, *A Response to Intervention (RTI) Process Cannot Be Used to Delay-Deny an Evaluation for Eligibility under the Individuals with Disabilities Education Act (IDEA)* (2011). Available at: <http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/osep11-07rtimemo.pdf> (last visited May 14, 2015).

⁴ See April 17, 2015 letter from U.S. Department of Education, OSEP No. 15-08, to State Directors of Education urging them to distribute December 20, 2013 OSEP *Letter to Delisle* to all local education agencies (LEAs) in each state: "I am requesting that you widely distribute *Letter to Delisle* to the LEAs in your State, and remind each LEA of its obligation to evaluate all children, regardless of cognitive skills, suspected of having one of the 13 disabilities outlined in 34 CFR §300.8."

Available at:

<http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/041715osepmemo15-082q2015.pdf> (last visited May 19, 2015), p. 2. *Letter to Delisle* provides guidance that "it would be inconsistent with the IDEA for a child, regardless of whether the child is gifted, to be found ineligible for special education and related services under the SLD category solely because the child scored above a particular cut score established by State policy." Available at: <http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/122013delisletwiceexceptional4q2013.pdf> (last Visited May 19, 2015), pp. 1-2. *Letter to Delisle* quotes U.S. Department of Education *Analysis of Comments and Changes* in the 2006 final regulations implementing Part B of the IDEA to clarify that "No assessment, in isolation, is sufficient to indicate that a child has an SLD. Including reading fluency in the list of areas to be considered when determining whether a child has an SLD makes it more likely that a child who is gifted and has an SLD would be identified." 71 Fed. Reg. 46540, 46652 (Aug. 14, 2006).

4. CDE and the District are ignoring numerous other federal and state special education laws, including but not limited to:

- a. 34 C.F.R. § 300.503; Cal. Educ. Code § 56500.4. Failure to provide prior written notice to the parents of a child with a disability a reasonable time before proposing or refusing to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.
- b. 34 C.F.R. § 300.304(c)(4). Failure to assess in all areas related to the child's suspected disability.
- c. 34 C.F.R. §§ 300.324(a)(2)(i) and (b)(2). Failure to ensure that the IEP team considered strategies and supports to address the behavior of a child that impeded his or her learning or that of others during the development, review, and revision of the IEP.
- d. 20 U.S.C. § 1414(e); Cal. Educ. Code § 56342.5. Failure to ensure that the parents of a child with a disability are members of any group that makes decisions on the educational placement of their child.
- e. 20 U.S.C. § 1415(b); 34 C.F.R. § 300.502; Cal. Educ. Code § 56329. Failure to provide independent educational evaluations (IEEs) or to consider IEE recommendations in the IEP process.
- f. 20 U.S.C. § 1414(d)(1)(A)(i)(IV). Failure to include in IEPs "a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child[.]"
- g. Cal. Educ. Code § 52853(a)(3). Failure to train staff on legal requirements with respect to specific learning disabilities, especially dyslexia. The California legislature explicitly recommends LEA staff development training regarding dyslexia. See *a/so* §§ 56245 and 56337.5(c): "It is the intent of the Legislature that the program guidelines developed pursuant to Section 2 of Chapter 1501 of the Statutes of 1990, for specific learning disabilities, including dyslexia and other related disorders, be available for use by teachers and parents in order for them to have knowledge of the strategies that can be utilized with pupils for the remediation of the various types of specific learning disabilities."⁵

⁵ In higher education teacher programs, use of experts to train teachers explicitly regarding dyslexia is recommended: Cal. Educ. Code § 44227.7. Exemplary resources and programs: International Dyslexia Association <http://eida.org/testing-and-evaluation/>

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III. Proposed Resolution

1. First and foremost, CDE should conduct a proper investigation into its monitoring practices and take all necessary steps to eliminate its evident lack of effective enforcement of IDEA rights in the District.
2. CDE should require the District and the SELPA to immediately discontinue all policies, procedures and practices that do not comply with the laws cited above. This includes identifying staff responsible for any violations of the laws cited above for re-training, follow-up review, and appropriate disciplinary action.
3. CDE should issue comprehensive corrective actions regarding all relevant policies and practices of the District and the SELPA, including but not limited to the following:
 - a. Immediately take action to reform policies, procedures and practices to fully comply with the laws cited above. Require a new District board-approved policy statement acknowledging the rights of students with specific learning disabilities outlined above, summarizing policy reforms, and reasserting the District's commitment to honor those rights. Require the District to broadly disseminate the board-approved policy statement as part of effective outreach plan.
 - b. Immediately establish a District-wide early intervention system for regularly assessing and monitoring the reading skills of all students in kindergarten to 6th grade.⁶ Studies show that early intervention is key to remediating dyslexia, but the District has not shown that it has a uniform system for ensuring early detection of reading difficulties.

(last visited May 14, 2015); San Ramon Unified School District:

<http://www.srvusd.net/AbilityAwarenessProgramHigh>;

<http://srvusd.ca.schoolloop.com/file/1275747793297/1262503233276/5198427484263293511.pdf> (last visited May 14, 2015); Lindamood-Bell: <http://lindamoodbell.com/> (last

visited May 22, 2015); Fast ForWord: <http://www.gemmllearning.com/programs/fast-forward/> (last visited May 22, 2015).

⁶ See, e.g., the Dynamic Indicators of Basic Early Literacy Skills (DIBELS) test developed by the University of Oregon:

<https://dibels.uoregon.edu/market/assessment/dibels> (last visited May 22, 2015). The DIBELS test is a set of procedures and measures for regularly assessing and monitoring the development of early literacy skills, and is currently in use in the Lafayette School District and other school districts in California.

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- c. Immediately establish appropriate, research-based services (*see, e.g.*, resource information above) necessary to provide a FAPE in the LRE to students with specific learning disabilities, especially dyslexia.
- d. Immediately develop a “practical method” to carry out child find duties, especially in the general education setting, and timely identify all students with suspected specific learning disabilities, especially dyslexia; offer complete evaluations in compliance with law cited above.
- e. Through a fully compliant and timely IEP process, offer and provide FAPE in the LRE, including appropriate, research-based services, compensatory education services and monetary reimbursement as appropriate to all students found eligible in accordance with laws cited above.
- f. Require the District to ensure compliance with all applicable laws governing prior written notice when initiating, changing or refusing identification, evaluation, educational placement or provision of FAPE in the LRE, including documented training of all staff responsible to prepare prior written notices.
- g. Provide for immediate and continuing education and evaluation of progress toward compliance by a mutually agreed upon third-party expert. Expert should provide training to all staff outlining all of the above legal requirements: child find, evaluation/identification, appropriate intervention services for the variety of specific learning disabilities in the law, especially dyslexia, and program evaluation following implementation of reforms.

DREDF reserves the right to amend this complaint, provide further evidence, and seek additional remedies as the investigation progresses. 34 C.F.R. § 300.153(b)(4)(v); pursuant to 5 C.C.R. § 4663(b), we specifically seek an opportunity to provide more information to the assigned investigator(s).

DREDF expects CDE to conduct a full investigation as discussed in the November 3, 2014, OSEP *Letter to Reilly*:⁷

Under 34 CFR §300.152, once a State complaint is properly filed, it is *solely* the SEA’s duty to investigate the complaint, gather evidence, and make a determination as to whether a public agency violated the IDEA. *It is not the burden of the complainant – or any other party – to produce sufficient evidence to persuade the SEA to make a determination one way or another.* Rather, the

⁷ See 114 LRP 49672, <http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/acc-13-020871r-me-reillystatecomplaints.pdf> (last visited May 19, 2015).

SEA must independently review and weigh the evidence, generally by reviewing student and school records, data and other relevant information, and come to a determination supported by relevant facts. (emphasis added)

Finally, following a thorough investigation and comprehensive corrective actions consistent with the proposed resolution requested above, DREDF requests CDE to require the District and the SELPA to provide timely follow up compliance reports to CDE and to DREDF addressing each of the areas listed in the proposed resolution and corresponding corrective actions, and CDE to provide timely evidence of its follow up enforcement actions to DREDF, all of which are necessary to ensure that the District and the SELPA are brought into compliance with applicable laws cited in this complaint.

Thank you for your prompt assistance with this request for investigation and resolution, including an investigation report within 60 days as required by governing regulations. Please contact me for further information, and in advance of any plans to contact the parents who have submitted confidential witness statements.

Sincerely,



Larisa Cummings
Staff Attorney

Enc. Exhibits A-H

Cc via email:

Fred Balcom, Director of Special Education, California Department of Education
Ruby Smith, FMTA Consultant, California Department of Education
Martha Schultz, Director, North Region SELPA
Members of the Berkeley Unified School District School Board
Donald Evans, Superintendent of the Berkeley Unified School District

Exhibit A



August 29, 2014

VIA EMAIL AND CERTIFIED MAIL

James T. Johnson III, Administrator
Focused Monitoring and Technical
Assistance Unit Three
California Department of Education
1430 N Street, Suite 2401
Sacramento, CA 95814

Certified Mail #: 7012 2920 0002 3908 4430

RE: Pending Corrective Actions Issued to Berkeley Unified School District

Dear Mr. Johnson:

On behalf of Disability Rights Education and Defense Fund (DREDF), and its Parent Training and Information Unit (PTI), I am writing to request information about your July 1, 2014, letter to Superintendent Evans in the Berkeley Unified School District (BUSD). A copy of that letter is enclosed. Because the letter requires BUSD to make comprehensive reforms to its special education policies and regulations by September 29, 2014, we want to know what actions California Department of Education (CDE) is taking to ensure *all necessary* reforms are being made. We also take this opportunity to inform you of numerous specific concerns we have about BUSD's special education policies and practices that we believe need to be reformed through this process and without delay.

We understand that the corrective actions were issued following CDE's review of a recent OAH decision regarding alleged Child Find violations by BUSD, where the Administrative Law Judge (ALJ) noted, as quoted in your letter:

Berkeley's preferred manner of addressing student needs was to first convene a student study team meeting, before initiating a special education referral. Adherence to this protocol of steering families towards the student study team process, and Berkeley's offer of such a meeting, did not discharge its child find duty as to Student. Further, it raises a serious question as to Berkeley's global child find policies and procedures in terms of ensuring that staff are aware of legal requirements and supported in their individual duties. The fact that teachers do not refer students for special education assessment calls into question Berkeley's internal child find training.

OAH Decision No. 2013120159 at 30 (March 17, 2014) (enclosed). The ALJ further chastised BUSD, adding that “[t]he fact that teachers do not refer students for special education assessments calls into question the efficacy of Berkeley’s internal child find training.” *Id.*

As you know, the federal Office of Special Education Programs (OSEP) has consistently stated that pre-assessment interventions do not exempt LEAs from their IDEA Child Find obligations. In January 2011, OSEP released Memorandum 11-07.¹ This guidance emphasized that SEAs and LEAs have an obligation to ensure that evaluations of children suspected of having a disability are not delayed or denied because of implementation of a Response to Intervention (RTI) strategy. Both RTI and SST meetings are pre-assessment strategies for children struggling academically and behaviorally. Because NR SELPA Policy No. 6500 *requires* this type of delay, we urge CDE to closely monitor how BUSD corrects its child find policies and procedures and how it trains its staff. Specifically, we urge CDE to actively ensure the following:

- The District should revise its Child Find policies and procedures to explicitly recognize that BUSD staff has an obligation, and parents have a right, to make direct referrals for special education assessment that may not be deferred by SST meetings.
- The District should ban its use of inappropriate requirements to make/accept assessment referrals, including waiting for students to first fail, waiting for parents to initiate assessments, and failing to help parents put referrals in writing.
- The District should be required to reform its exclusionary eligibility policies, especially regarding dyslexia. 34 C.F.R. § 300.8(c)(10). Please see the OAH decision cited above. Current BUSD Interim Special Education Director, Lisa Graham, testified that dyslexia in and of itself did not constitute an IDEA-eligible processing disorder. OAH Case Number 2013120159 at 24. The ALJ made note of this “mistaken” opinion at the conclusion of her opinion. *Id.* at 40. Based on information we have received from other parents, this appears to be BUSD policy.
- With respect to the training you have required, the District should provide not only a “training agenda” and “list of participants, including their names and titles”

¹ Office of Special Education Programs (OSEP) No. 11-07, *A Response to Intervention (RTI) Process Cannot Be Used to Delay-Deny an Evaluation for Eligibility under the Individuals with Disabilities Education Act (IDEA)* (2011). Available at: <http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/osep11-07rtimemo.pdf> (last visited August 28, 2014).

as you have required, but *a complete set of training materials for all teachers and relevant staff regarding all mandated policy reforms*, for prior review and approval by CDE.

Further Compliance Concerns

We urge CDE to closely monitor how BUSD addresses the following in the mandated policy reforms and follow up training:

- A. Determining eligibility under each condition listed in 34 C.F.R. § 300.8, including dyslexia, and ensuring determinations are by IEP team decision, not predetermination of school team.
- B. Conducting appropriate assessments, including Independent Educational Evaluations.
- C. Providing prior written notice, including all legally required elements.
- D. Ensuring timely provision of all student records upon request.
- E. Ensuring proper consideration of parent input and the input of independent experts in all points along IEP process, conducting proper IEP meetings, providing translation services for meetings and documents.
- F. Using adequate data (formal and informal) in determining specialized education and related service needs, including physical, behavioral (especially functional behavioral assessments, behavioral intervention plans and behavioral service plans) and mental health services, social skills support, Applied Behavior Analysis (ABA) services, assistive technology, 1:1 aides, and providing appropriately trained aides.
- G. Developing a continuum of services and placement options to keep students in District /SELPA settings and their least restrictive environment (LRE), including the provision of appropriately trained, consistent 1:1 paraprofessionals and aides to students who need them in order to benefit from their education in the LRE.
- H. Making proper placement decisions, including placements in the LRE, private and residential placements as needed.
- I. Ensuring individualized determinations pursuant to mandatory IEP processes for Berkeley High Small School assignments.
- J. Ensuring delivery of IEP services in charter schools to which BUSD is the LEA.
- K. Ensuring appropriate transition planning and service delivery, which includes proper evaluation, goals and services aimed at meaningful outcomes based on students' evaluations and post high school plans.
- L. Ensuring compliant disciplinary practices, including suspension, manifestation determinations and expulsion.
- M. Ensuring strict compliance with legal requirements regarding restraint and seclusion.

- N. Offering and providing effective Positive Behavioral Intervention Services (PBIS) by all staff across all settings to promote use of positive methods of addressing problem behaviors and instill pro-social behaviors among all students.
- O. Ensuring compliant interdistrict transfers.
- P. Ensuring that general education teachers and any other appropriate staff are aware of and compliant with IEPs.
- Q. Providing individualized interventions when students are struggling to incur credits or attend their general education courses, as opposed to using one-size-fits-all online computer courses like Cyber High.

As you can see, this is a long list. We call your attention to these specific areas because we have received numerous complaints from affected families in BUSD over the last several years and our staff has been busy providing related advocacy services to redress these failures and oversights by BUSD. We would like to provide you with further information as needed and offer to meet with you and District representatives in person at your earliest convenience to elaborate on these concerns. Thank you in advance for your attention and a prompt response. Please contact me directly with any questions you may have.

Sincerely yours,



Larisa Cummings, Staff Attorney

Encs.

cc: Donald Evans, Superintendent, Berkeley Unified School District
Kay Altizer, Acting Special Education Director, Berkeley Unified School District
Lisa Graham, Interim Special Education Director, Berkeley Unified School District
Martha Shultz, Director, North Region Special Education Local Plan Area
Anamaria Loya, U.S. Department of Education, Office for Civil Rights
Deborah R. Jacobson, Esq.



CALIFORNIA
DEPARTMENT OF
EDUCATION

COPY
TOM TORLAKSON
STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

mailed 7/2/14

July 1, 2014

Donald Evans, Superintendent
Berkeley Unified School District
2020 Bonar Street, Suite 321
Berkeley, CA 94702

Dear Superintendent Evans:

Subject: Office of Administrative Hearings Case Number: 2013120159
Student Name: [REDACTED]

The California Department of Education, Special Education Division, has reviewed the aforementioned Office of Administrative Hearings (OAH) decision dated March 17, 2014. A re-examination of the due process hearing decision revealed Berkeley Unified School District violated procedural and/or substantive federal and/or state law pertaining to the education of students with disabilities, including *California Education Code (EC)* sections 56301 and 56302.

Specifically, Berkeley was aware that the student was frequently absent in kindergarten and first grade, suffered from anxiety, and then did not regularly attend the weekly independent study lessons for which the district agreed to enroll her. The OAH Administrative Law Judge stated in his decision:

"Berkeley's preferred manner of addressing student needs was to first convene a student study team meeting, before initiating a special education referral. Adherence to this protocol of steering families towards the student study team process, and Berkeley's offer of such a meeting, did not discharge its child find duty as to Student. Further, it raises a serious question as to Berkeley's global child find policies and procedures in terms of ensuring that staff are aware of legal requirements and supported in their individual duties. The fact that teachers do not refer students for special education assessments calls into question the efficacy of Berkeley's internal child find training."

EC Section 56301 states:

(a) All children with disabilities residing in the state, including children with disabilities who are homeless children or are wards of the state and children with disabilities attending private, including religious, elementary and secondary

Donald Evans, Superintendent
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schools, regardless of the severity of their disabilities, and who are in need of special education and related services, shall be identified, located, and assessed and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services as required by Section 1412(a)(3) and (10)(A)(ii) of Title 20 of the United States Code. A child is not required to be classified by his or her disability so long as each child who has a disability listed in Section 1401(3) of Title 20 of the United States Code and who, by reason of that disability, needs special education and related services as an individual with exceptional needs defined in Section 56026.

In addition, the parents contacted the special education department regarding the referral process, yet the student was not assessed until at least six months later, and after the parent informed the District that the student was being privately assessed.

EC Section 56302 states:

A local educational agency shall provide for the identification and assessment of the exceptional needs of an individual, and the planning of an instructional program to meet the assessed needs. Identification procedures shall include systematic methods of utilizing referrals of pupils from teachers, parents, agencies, appropriate professional persons, and from other members of the public. Identification procedures shall be coordinated with school site procedures for referral of pupils with needs that cannot be met with modification of the regular instructional program.

In order to correct these findings, the Berkeley Unified School District must complete the following corrective actions:

1. By September 29, 2014, the District shall provide updated Board adopted Special Education Policies (BP) and Administrative Regulations (AR). Acceptable evidence should include a copy of the BP and ARs with the adoption date, agenda(s), and minutes of the Board meeting(s) when the policies and regulations were adopted.
2. By September 29, 2014, the District shall review and revise the child find policies, processes and procedures, used by the District in order to ensure compliance with state and federal law, and shall provide a copy to the CDE.

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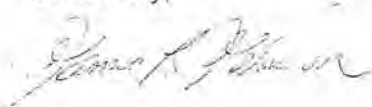
3. By September 29, 2014, the District shall provide evidence it has conducted a training for appropriate general and special education staff and administrators. The training shall cover California *Education Code (EC)* sections 56301 and 56302. Acceptable evidence should include the training agenda and a list of participants, including their names and titles.

Evidence of required corrective actions shall be sent to:

**James T. Johnson III, Administrator
Focused Monitoring and Technical Assistance Unit Three
California Department of Education
1430 N Street, Suite 2401
Sacramento, CA 95814
916-327-6966 Phone
916-327-8878 Fax**

If you have any questions regarding this letter, please contact Shirley Sekeres, Education Programs Consultant, by phone at 916-322-0377 or by e-mail at ssekeres@cde.ca.gov.

Sincerely,



James T. Johnson III, Administrator
Focused Monitoring and Technical Assistance Unit Three
Special Education Division

JTJ:ss

cc: Martha Shultz, Director, North Region Special Education Local Plan Area
Kay Altizer, Special Education Director, Berkeley Unified School District

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

BERKELEY UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2013120159

DECISION

On December 2, 2013, Student filed a request for a due process hearing (complaint) with the Office of Administrative Hearings (OAH), naming Berkeley Unified School District (Berkeley).

Administrative Law Judge (ALJ) Theresa Ravandi heard this matter in Berkeley, California, on January 28-30 and February 4-5, 2014.

Deborah Jacobson, Attorney at Law, represented Parents and Student. Parents attended each day of hearing. Student was not present.

Jan E. Tomsy, Attorney at Law, represented Berkeley. Kay Altizer, Berkeley's Executive Director of Special Education attended the first week of hearing with the exception of the afternoons of January 28-29, 2014. Lisa Graham, program supervisor, attended as Berkeley's representative at that time as well as on February 4-5, 2014, in Ms. Altizer's absence.

At the conclusion of the hearing, the matter was continued to March 3, 2014, to afford the parties an opportunity to submit written closing briefs. The record closed with the parties' timely submission of closing briefs and the matter was submitted for decision.

ISSUES

1. From February 2013 to November 2013, did Berkeley deny Student a free appropriate public education (FAPE) by failing to timely locate, identify, or evaluate her pursuant to its affirmative child find obligations?

receiving educational benefit.³⁶ Student's report cards documented her progress. None of Student's teachers identified her as a child in need of special education. Ms. Macdonald persuasively established that Student did not require special education at the time of the IEP team meeting or at the time of hearing because she demonstrated the skills to independently perform consistent with grade level standards; Student was performing at and often exceeding grade level expectations during her second grade year.

71. Ms. Lee and Ms. Smith, based upon their assessments and observations, likewise established that Student did not require special education in order to receive educational benefit. Parents maintained that Student's need for special education was due to her failure to achieve commensurate with her superior intellect and that her academic and reading skills did not match her potential and were holding her back. Even so, Student would not be expected to test higher than the grade level curriculum to which she had been exposed, and she had limited exposure to the curriculum due to her frequent absences.

Parental Participation at the November 2013 IEP Team Meetings

72. The IEP team initially met on November 4, 2013, for two hours.³⁷ All required Berkeley members were in attendance along with Parents, their advocate Lara Forest, Dr. Owen-Wilson, and Dr. Dimitrova. Ms. Lee prepared a detailed psycho-educational report to present to Student's IEP team. In her report she listed the criteria for specific learning disability, and an analysis of why Student did not meet the criteria based upon her assessment. She was surprised at how well Student performed and was doing in her second grade class in contrast to what she had learned from Parents, and in light of Student's frequent absences even during the assessment process. Ms. Lee was clear in her report and persuasive in her testimony that the purpose of her report was to share information with the IEP team for the consideration of all members in determining eligibility, Student's need for services, and planning for success. She was clear that the IEP team as a whole determined whether or not Student was eligible for special education.

73. Ms. Lee provided Parents a draft copy of her report a day or two prior to the November 4, 2013 IEP team meeting. Parents also received draft copies of Berkeley's academic testing, occupational therapy and assistive technology reports by November 1 2013. Although Parents had requested the opportunity to review the reports even earlier than they received them, they did not request that the meeting be delayed to a later date.

74. Berkeley team members did not meet in advance of the IEP team meeting to determine Student's eligibility, but they had questions about the legal criteria for determining

³⁶ Student did not prove her contention that any academic benefit was a result of her participation in Parent funded reading programs during summer 2013 and winter 2013-2014.

³⁷ This was a rescheduled date to accommodate Dr. Owen-Wilson.

a specific learning disability, including the impact of Student's poor school attendance, lack of math and reading instruction, and the significance of a diagnosis of dyslexia in determining the existence of a processing disorder. In response to their questions, Ms. Graham provided Berkeley team members with references to the education code and the criteria for specific learning disability prior to the IEP team meeting.³⁸ Ms. Graham's opinion was that dyslexia in and of itself did not constitute a processing disorder. It is reasonable to conclude that in responding to legal questions, Ms. Graham shared her interpretation of the law with Berkeley team members.

75. Berkeley's psycho-educational report addressed the first question to be answered, namely whether Student met eligibility criteria. Therefore, Ms. Lee discussed her report and eligibility criteria first pursuant to standard practice. Parents questioned Ms. Lee about her findings and pointed out errors such as Ms. Johnston being identified as a Berkeley Arts teacher. They had no questions for Susan Deutsch, assistive technology specialist, or for Ms. Rudel who both briefly presented their reports. Parents, their advocate, the assessor and therapist all participated in the discussion of Berkeley's findings and conclusions, although agreement was not reached. Ms. Forest questioned how the school would assist Student to perform to her full potential. Parent discussed Student's background and school refusal issues, and in her own words, she disagreed "passionately" with Berkeley's conclusions.

76. Dr. Owen-Wilson presented her report last. She acknowledged that Berkeley team members listened, considered, and responded to information she presented. Due to the many questions posed, she was not able to completely discuss her findings. Even so, Parent did not request additional time for Dr. Owen-Wilson to address the team. Dr. Owen-Wilson did not attend the reconvened IEP team meeting or request that it be rescheduled to allow for her attendance.

77. Although Dr. Dimitrova felt as though Berkeley did not ask for her input, she acknowledged that the team listened to her as she discussed Student's regulatory and early attachment issues, learning disability and related stress, and need for support. Berkeley team members heard for the first time that Student was reporting to her therapist that she could not read. Parent report of the severity and frequency of Student's school refusal was also new information that did not match Berkeley's knowledge and experience of Student at school.

³⁸ Ms. Graham has been a special education program supervisor for seven years, the last three years with Berkeley. She has worked in the field of special education in various capacities for the past 14 years. Ms. Graham is a national board certified teacher and holds clear administrative services and multiple subject elementary level teaching credentials, as well as a level II educational specialist instructional credential in the field of deaf and hard of hearing. She earned a master's degree in organization and leadership from the University of San Francisco in California in 2006.

first identifying the source of Student's anxiety (i.e. academics or separation). Therefore, that Student's anxiety may have been triggered by the transfer of her best friend to another school, or that her school refusal might have been a learned behavior reinforced by rewards such as Parental attention, or that Student did not display any anxiety at school did not relieve it of its child find duty. Berkeley had an affirmative duty to assess Student to discover why she was not attending.

16. Berkeley's preferred manner of addressing student needs was to first convene a student study team meeting, before initiating a special education referral. Adherence to this protocol of steering families towards the student study team process, and Berkeley's offer of such a meeting, did not discharge its child find duty as to Student. Further, it raises a serious question as to Berkeley's global child find policies and procedures in terms of ensuring that staff are aware of legal requirements and supported in their individual duties. The fact that teachers do not refer students for special education assessments calls into question the efficacy of Berkeley's internal child find training.

17. In March 2013, Berkeley authorized Student's participation in independent study even though it knew this program would not provide instruction comparable to that delivered in its first grade classrooms. Further, Berkeley knew that Student did not engage in or attend to her weekly instructional meetings. Student is not required to first fail before Berkeley's child find duty arises, and Berkeley's position that Student was still making adequate progress did not relieve it of its fundamental duty to assess. Berkeley agreed that Student's educational performance was adversely affected by her excessive absences and removal from the classroom setting. Once on notice of Student's alleged school refusal and anxiety, and her concerning behaviors during her weekly independent study sessions, Berkeley was obligated to start the assessment process independent of any request from Parent and regardless of the fact that Parent did not provide a written diagnosis of Student's alleged anxiety disorder. Berkeley had an obligation to refer Student for a special education assessment by the end of March 2013, and it did not do so. Therefore, Student met her burden of proof that Berkeley procedurally violated the IDEA by failing to timely assess her for eligibility.

18. In order to be entitled to substantive relief, Student must also demonstrate that as a result of Berkeley's failure to fulfill its child find duties, she was deprived of educational benefit, her right to a FAPE was impeded, or Parents' ability to participate in the decision making process was significantly impeded. As determined by this Decision, Student did not establish that she is eligible for special education services as a student with a specific learning disability.⁴³ Therefore, Student did not prove a substantive denial of a FAPE and no award of educational services is warranted.

⁴³ Student solely alleged eligibility under the category of specific learning disability. No findings are made as to whether Student may be eligible pursuant to another qualifying condition.

53. Ms. Graham held the opinion that dyslexia could not constitute a processing disorder. It is reasonable to conclude that in responding to Berkeley team members' questions about the criteria for specific learning disability prior to the IEP team meeting, she shared her interpretation of the law and opinion on dyslexia. However, team members are not prohibited from meeting in advance of the IEP team meeting or from discussing and forming opinions about the topic at hand. What is prohibited is attending the meeting with a mindset that they have already determined the eligibility question. Student did not prove this. At least one Berkeley team member held the opinion prior to the IEP team meeting that dyslexia was not a processing disorder. However mistaken as this opinion may be, Student did not establish that Berkeley predetermined eligibility and was not open to Parent input. In conclusion, Student did not prove that Berkeley denied Parents their participatory rights.

ORDER

All relief sought by Student is denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student substantially prevailed as to Issue One. Berkeley prevailed as to Issues Two and Three.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

Dated: March 17, 2014

/s/

THERESA RAVANDI
Administrative Law Judge
Office of Administrative Hearings

Exhibit B



March 27, 2015

Email and Certified Mail

7004 2510 0005 7303 9996

Return Receipt Requested

Lisa Graham, Interim Special Education Director
Berkeley Unified School District
2020 Bonar Street
Suite 301
Berkeley, CA 94702

Re: FAPE for students with dyslexia under IDEA and Section 504

Dear Ms. Graham:

We are writing to follow up our December 5, 2014 meeting at the California Department of Education's (CDE) Sacramento office and to propose a resolution to the myriad concerns we raised regarding the provision of special education supports and services to students with specific learning disabilities.

As you know, DREDF has concerns with the District's practices and procedures regarding students with specific learning disabilities, including dyslexia, and has shared those concerns with you and CDE. We have told you that numerous families have complained that the District dissuades parents of students with a range of legally recognized conditions from requesting IDEA and Section 504 evaluations, requires parents seeking these evaluations to first provide a medical diagnosis, and does not offer appropriate, research-based curricula for students with specific learning disabilities. By our letter to CDE last August, and our December follow up meeting, CDE is on notice of these problems.

It appears that the District's interpretation of special education laws regarding specific learning disabilities is unlawful. For example, the District has told DREDF numerous times in person that it does not consider dyslexia to constitute a processing disorder. As you know, since our letter last summer, we have raised concerns that the District also testified to this belief in OAH Case Number 2013120159.

The District further clarified its views on dyslexia in its March 24, 2015 letter to DREDF:

The District does not have a policy on dyslexia and is not required to have one under state or federal law. *The District does not consider dyslexia to be processing disorder.* However, an individual may have a processing

disorder combined with other factors that may lead to a clinical diagnosis of dyslexia. Medical and clinical diagnoses are considered when evaluating students and determining eligibility for special education services. State and federal law requires that students are found eligible under one or more of 13 disability categories. *Dyslexia is not a category.* A student that has a clinical diagnosis of dyslexia may or may not meet eligibility criteria for special education. *That being said, it is my understanding the dyslexia is no longer a clinical diagnosis under the new DSM V.* (emphasis added)

As described below, dyslexia is explicitly covered in governing laws as a specific learning disability. Therefore, DREDF believes this interpretation is erroneous as a matter of law, particularly in light of recent changes to Title 5 of the California Code of Regulations.¹

Below we propose systemic remedies, and hope that you will agree to work collaboratively with DREDF to bring your policies, practices and procedures into conformance with the law.

1. Federal and state statutes and regulations explicitly recognize dyslexia as a qualifying condition under IDEA:

20 U.S.C. § 1401(30)(B), 34 C.F.R. § 300.8(c)(10)(i); Cal. Ed. Code §§ 56337, 56337.5, 5 C.C.R. § 3030(b)(10). *Cf.* 20 U.S.C. § 1414(b)(6)(A), 34 C.F.R. §§ 307(a) and 309, Cal. Ed. Code § 56337(b) (severe discrepancy not required in determining eligibility under specific learning disabilities; LEAs may consider it under IDEA).² While we

¹ 5 C.C.R. § 3030(j) ***was superseded*** by § 3030(b)(10) in 2014 which now states explicitly: “Specific learning disability means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may have manifested itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations, ***including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.*** The basic psychological processes include attention, visual processing, auditory processing, sensory-motor skills, cognitive abilities including association, conceptualization and expression.” Emphasis added.

² Under Section 504, disability is defined as a physical or mental impairment, including specific learning disability, which substantially limits one or more of nine major life activities, one of which is learning. See 34 C.F.R. 104.3 (j)(2)(ii). Thus, a student with dyslexia, who has a limitation in learning, can still be considered to have a disability under Section 504, whether or not the student has a disability under IDEA.

Ms. Lisa Graham
Interim Special Director, BUSD
March 27, 2015
Page 3 of 5

understand that the District applies a severe discrepancy standard in its evaluation of students with suspected specific learning disabilities, and may lawfully do so, it may not refuse to evaluate students with suspected dyslexia.

2. LEAs have very specific affirmative obligations to conduct thorough child find activities under IDEA and Section 504 to identify, locate and evaluate all students with suspected disabilities, in all areas of suspected disability, promptly:

IDEA: 20 U.S.C. §§ 1412(a)(3)(A), 1414(b)(3)(B), 34 C.F.R. §§ 300.309(c) (evaluate promptly), 300.111(a), 300.301; Cal. Ed. Code §§ 56171, 56300 et seq., 56301(a) and (b), 56302, 56302.1. A LEA's child find duty is not dependent on any request by the parent for special education evaluations or referral for services. *Id.* Pre-assessment interventions, including "Response to Intervention" may not be used to delay or deny special education evaluations.³

Section 504: 34 C.F.R. § 104.32 (child find); 34 C.F.R. § 104.33 (FAPE); 34 C.F.R. § 104.35 (evaluations and placement).

3. California law calls for teacher training and staff development programs regarding dyslexia:

The California legislature explicitly recommends LEA staff development training regarding dyslexia. Cal. Ed. Code § 52853(a)(3). *See also* §§ 56245 and 56337.5(c): "It is the intent of the Legislature that the program guidelines developed pursuant to Section 2 of Chapter 1501 of the Statutes of 1990, for specific learning disabilities, including dyslexia and other related disorders, be available for use by teachers and parents in order for them to have knowledge of the strategies that can be utilized with pupils for the remediation of the various types of specific learning disabilities."

In higher education teacher programs, use of experts to train teachers explicitly re dyslexia is recommended: Cal. Ed. Code § 44227.7.

4. Exemplary resources and programs:

³ U.S. Department of Education, Office of Special Education Programs (OSEP) No. 11-07, *A Response to Intervention (RTI) Process Cannot Be Used to Delay-Deny an Evaluation for Eligibility under the Individuals with Disabilities Education Act (IDEA)* (2011). Available at: <http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/osep11-07rtimemo.pdf> (last visited March 27, 2015).

International Dyslexia Association <http://eida.org/testing-and-evaluation/>
(last visited March 27, 2015):

San Ramon USD:

<http://www.srvusd.net/AbilityAwarenessProgramHigh>

<http://srvusd.ca.schoolloop.com/file/1275747793297/1262503233276/5198427484263293511.pdf> (last visited March 27, 2015)

5. Proposed systemic remedies:

- a. Immediately take action to reform policies, procedures and practices to fully comply with the law cited above. Create a new board-approved policy statement (following feedback from DREDF, review and approval by CDE) acknowledging the rights of students with specific learning disabilities outlined above, summarizing policy reforms, and reasserting the LEA's commitment to honor those rights. Broadly disseminate board-approved policy statement as part of effective outreach plan.
- b. Immediately discontinue all policies, procedures and practices that do not comply with the laws cited above.
- c. Provide for immediate and continuing education and evaluation of progress toward compliance by a mutually agreed upon third-party expert. Expert should provide training (content to be shared with DREDF) to all staff outlining all of the above legal requirements: child find, evaluation/identification, and appropriate intervention services for the variety of specific learning disabilities in the law, including dyslexia, and program evaluation following implementation of reforms.
- d. Immediately establish appropriate, research-based services⁴ (see, e.g., resource information above) necessary to provide a free, appropriate public education (FAPE) to students with specific learning disabilities, including dyslexia.
- e. Immediately commit to identifying staff responsible for any violations of the laws cited above for re-training, follow-up review, and appropriate disciplinary action.
- f. Immediately develop a "practical method" to carry out child find duties and identify all students with suspected specific learning disabilities, including dyslexia; offer complete evaluations in compliance with law cited above.
- g. Through a fully compliant IEP process, offer and provide FAPE and compensatory education services to all students found eligible in accordance with laws cited above.

⁴ The IDEA requires a student's IEP to include "a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child[.]" 20 U.S.C. 1414(d)(1)(A)(i)(IV).

Ms. Lisa Graham
Interim Special Director, BUSD
March 27, 2015
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Please respond within ten days. We believe there can be no question that the District is out of compliance here. This is a serious problem that denies IDEA and Section 504 FAPE obligations in fundamental ways: students are not learning to read and fall very behind as the years go by attending BUSD schools. We hope you will be willing to cooperate as outlined above. Please be informed that we will also closely follow up with as necessary. Please feel free to contact me or Robert Borrelle with any questions or concerns. I will be out next week, but Robert is available. Thanks for your careful attention and response.

Sincerely,

A handwritten signature in cursive script, appearing to read "Larisa Cummings".

Larisa Cummings
Staff Attorney

cc: Fred Balcom, Director of Special Education, California Department of Education
Ruby Smith, FMTA Consultant, California Department of Education
Martha Schultz, Director, North Region SELPA
Members of the Berkeley Unified School District School Board
Donald Evans, Superintendent of the Berkeley Unified School District

Exhibit C



Robert Borrelle <rborrelle@dredf.org>

Response to Request Pursuant to California Public Records Act

Mark Coplan <markcoplan@berkeley.net>

Tue, Mar 24, 2015 at 4:50 PM

To: Robert Borrelle <rborrelle@dredf.org>

Cc: Kay Altizer <kayaltizer@berkeley.net>, Lisa Graham <lisagraham@berkeley.net>

March 24, 2015

Berkeley Unified School District

VIA Electronic Mail

Disability Rights Education & Defense Fund (DREDF)

Robert Borrelle, Jr

Equal JusticeWorks Fellow

rborrelle@dredf.org

RE: Response to Request Pursuant to California Public Records Act

Dear Mr. Borrelle,

This letter will address the fourteen additional, more specific requests for information.

Request 1(e): "Records related to suspension (including all circumstances where a student is removed from his customary academic placement to any placement where a credentialed teacher is not present teaching that student), expulsion and other disciplinary related data to determine: (1) IDEA eligibility, including but not limited to eligibility based on a diagnosis of OHI, including ADHD, ED, and SLD, including dyslexia; (2) Section 504 eligibility, including but not limited to eligibility based on a diagnosis of OHI, including ADHD, ED, and SLD, including dyslexia; (3) need for reasonable accommodations; and (4) need for behavior assessment, behavior intervention plan, behavior support plan and/or other behavioral supports";

Suspension data is maintained in the District's student database. School level staff and IEP teams have access to this data. The District does not use suspension/expulsion data solely to determine IDEA eligibility for (1) IDEA or (2) Section 504. The Board of Education referred 2 students for evaluation who were referred by school sites for expulsion during this timeframe to determine if students were eligible. Regarding (3) and (4) data is not maintained. IEP teams address these questions subsequent to suspension according to state and federal code requirements.

Request 1(f): "Records related to identifying students who are IDEA eligible, have Section 504 plans and/or are

without disabilities who require a behavior assessment, behavior intervention plan, behavior support plan and/or other BUSD Response to DREDF 03/28/2014 PRA Request behavioral supports.” In response, please include all records regarding District policy on Applied Behavior Analysis (“ABA”) services, including BUSD’s policies, practices, procedures, criteria and/or referral protocols, and related actions regarding ABA services, including ABA services funded by third parties;

The District is not required to maintain aggregated records on students who require behavior assessments, BIPS, BSPs or other behavior supports. This information is located in individual student IEPs/files and is considered confidential.

Policy on ABA. Applied Behavioral Analysis (ABA) is an instructional methodology. The District does not have referral processes for instructional methodologies. District staff determines the methodology to be used to implement IEP goals. BUSD is a small district and each school has a special education program supervisor assigned. If a specific methodology is requested by a staff member that involves a third party provider, the request is made to the program supervisor.

Request 1(g): “Records that reflect the number of students referred for evaluation for IDEA and/or Section 504 eligibility, including any documents that disaggregate such referrals by the type of person referring, such as but not limited to: parent, SST team, general education teacher, school counselor or administrator”; and

Request 1(i): “Records related to identifying students to be exited/demitted from IDEA and/or Section 504 eligibility.”

[See Attachment A](#)

For the second category, we requested “[a]ll records since FY 2009-2010 maintained by BUSD and/or SELPA that address policies, practices, procedures, criteria and/or referral protocols, and related actions, regarding behavioral intervention, classroom removal, in-school suspension (including all circumstances where a student is removed from his customary academic placement to any placement where a credentialed teacher is not present teaching that student), out-of-school suspension, expulsion, and disciplinary policies and practices. We then listed nine additional, more specific requests (subsections (a) through (i)). According to our review, BUSD’s response contained no records responsive to the main request above, as well as the following additional requests:

[Special Education Policies. See Attachment B](#)

[Director of Student Services will address for District Policies and Practices](#)

Request 2(c): “Records that address the number of days students have been removed from their customary academic placements, including any documents that disaggregate such removals by school, by type of removal, by reason for the removal, by race, by IDEA eligibility, by IDEA disability category, by Section 504 eligibility and/or by Limited English Proficiency (“LEP”) status”;

[Director of Student Services will address](#)

Request 2(d): “Records that note the number of Manifestation Determination Hearings, the outcome determination and number of whether behavior in question was directly related to students’ disability, and/or failure to provide necessary supports, or was not related to either”;

The District is not required to aggregate and maintain this data. Information related to individual students is located in student IEPs/files and is considered confidential.

Request 2(e): “Records that address student status as a result of suspensions, including any documents that disaggregate students according to any of the following: stayed in school without special education instructional supports; stayed in school with special education instructional supports; sent home, without instructional supports; sent home, with instructional supports; continuation class/school; opportunity class/school; community day school; adult education programs; independent study; Juvenile Court school; County Court school; other county program; placed in another district; charter school (operated by an LEA/district); charter school (operated as an LEA/district); graduated; left district; dropped out or placement unknown; other alternative

education setting”;

The District is not required to aggregate and maintain this data. Information related to individual students is located in student IEPs/files and is considered confidential.

Request 2(f): "Records, including those produced pursuant to EC §48916.1, that note the total number of expulsion hearings and expulsions, and outcome data as to: (i) The number of students recommended for expulsion; (ii) The grounds for each recommended expulsion; (iii) Whether the pupil was subsequently expelled; (iv) Whether the expulsion order was suspended; (v) The type of referral made after the expulsion; (vi) The disposition of the pupil after the end of the period of expulsion; and (vii) any such data disaggregated by school, race, LEP status, disability status, whether IDEA-eligible or Section 504-eligible, and disability category, where applicable”; and

Director of Student Services will address

Request 2(h): “Records related to collecting and reporting suspension instances and suspension days (including partial days, and all circumstances where a student is removed from his customary academic placement to any placement where a credentialed teacher is not present teaching that student), expulsion and other disciplinary related data, including collection and reporting to disaggregate this data by race, IDEA eligibility, Section 504 eligibility and/or LEP status.”

Director of Student Services will address

For the third category, we requested “[a]ll records that address BUSD and/or SELPA policies and protocols regarding homeschooling.” BUSD did not provide any documents regarding homeschooling, including no documents responsive to our two additional homeschooling requests:

Request 3(a): “Any and all communication, records or documents that note the number or proportion of homeschooled students who are either IDEA-eligible and/or Section 504-eligible”; a

Director of Student Services will address

Request 3(b): “Any and all communication, records or documents that reflect the disciplinary histories and/or SARB records of subsequently homeschooled students.”

Director of Student Services will address

We also doubt that the District provided all documents responsive to our fourth category, a request for all records relating to corrective actions required by the California Department of Education (CDE). We have noted that we did not specify a timeframe for this request and clarify now that we request all relevant records, FY 2009-2010 to present. The District’s response to this request was limited to documents related to CDE’s recent finding of significant disproportionality.

Is it the District’s position that there are no more responsive records? We know that not to be the case. For example, we know that CDE issued a corrective action on July 1, 2014 after a due process hearing decision (OAH Case Number 2013120159) showed violations of state special education law. As a result of this decision, CDE ordered the District to update its special education Board Policies and Administrative Regulations, review and revise its child find policies, processes and procedures, and provide assurances that it trained its staff on these policies (CDE letter ordering corrective actions, attached). In order to fulfill our request, we ask that the District provide all records related to this particular ordered corrective action.

With regard to the above stated OAH case, on 4/21/14 CDE found that the District did not violate procedural and/or substantial federal and/or state law pertaining to the education of students with disabilities. Review of the due process hearing also revealed no OAH orders.

See Attachment C

Subsequently, in July, the CDE sent a letter to the district ordering corrective actions related to child find. However, the district requested an extension of the timelines to give the CDE time to review District policies to determine if the district was in fact non-compliant before the consultant issued corrective actions. The district has

submitted policies and is waiting for the CDE to provide feedback to the district regarding compliance/noncompliance. At this writing, the district volunteered to provide training to staff in child find procedures. Evidence was submitted to the CDE.

There are also a number of partial responses to our requests:

While the response to Request 1(c) included numerous training materials on Response to Intervention (RTI) and sample forms for RTI referrals, it did not include the District's official RTI "program policies and procedures."

The District does not have a policy on RTI. RTI handbook- See Attachment D.

With respect to Request 1(d), while the District and the SELPA provided a number of Child Find policies, neither included any records related to the District's policy on dyslexia as an eligible condition under IDEA. The District's dyslexia policy is of particular concern due to testimony by BUSD Interim Special Education Director, Lisa Graham, in OAH Case Number 2013120159, cited above, that dyslexia in and of itself did not constitute a processing disorder. See again, CDE letter ordering corrective actions. Based on information we have received from other parents, this is not the only time the District has taken this position. Please provide all records on District policies, practices, procedures, criteria and/or referral protocols, and related actions with respect to dyslexia.

The District does not have a policy on dyslexia and is not required to have one under state or federal law. The District does not consider dyslexia to be processing disorder. However, an individual may have a processing disorder combined with other factors that may lead to a clinical diagnosis of dyslexia. Medical and clinical diagnoses are considered when evaluating students and determining eligibility for special education services. State and federal law requires that students are found eligible under one or more of 13 disability categories. Dyslexia is not a category. A student that has a clinical diagnosis of dyslexia may or may not meet eligibility criteria for special education. That being said, it is my understanding the dyslexia is no longer a clinical diagnosis under the new DSM V.

With respect to Request 2(g), please provide a more complete response including specifically all policies, practices, procedures, criteria and/or referral protocols, and related actions on PBIS. Further, please respond to our request for records identifying "members of PBIS teams, and documents that disaggregate this date by school."

PBIS is part of a response to intervention framework. It is not a curriculum, intervention or practice. It is a decision-making framework that guides in the use of evidence-based practice academic and evidence based practices to improve the academic and behavior outcomes for all students. See Attachment E

We ask that the District give this letter its full attention and promptly provide full responses to the requests discussed above. Please contact me directly to inform me of the District's intentions, as well as if you have any further questions.

We hope that this addresses the majority of your request. The outstanding items will be completed by the Director of Student Services within the next two weeks. We apologize for this delay, but recent additions to her workload and other circumstances have impacted the amount of time she has available for additional projects.

Sincerely,

Mark Coplan, Public Information Officer

Berkeley Unified School District

CC: Kay Altizer, Lisa Graham, Susan Craig

--

Mark Coplan, Public Information Officer
Berkeley Unified School District
510-644-6320 Cell: 510-472-3811



DREDF Attachments for BUSD PRA Mar 2015.PDF
2048K

Confidential Exhibit D

██, parents of student ██████████, submit this declaration to the California Department of Education in support of DREDF’s special education compliance complaint against the Berkeley Unified School District.

- Student: ██████████
- School: ██████████████████████
- Parents: ██
- Address: ██
- Phone: ████████████████████
- Email: ████████████████████████████████████

9. During the first week of third grade, ██████'s teacher, Mrs. Nancy King, mentioned that she noticed ██████ exhibited all the signs and symptoms of Dyslexia.
10. ██████ requested a Neuropsychological Assessment the same week, in September 2007, after being instructed how to do this by a mother on ██████'s soccer team who had two children with Learning Disabilities.
11. The School Psychologist, Holly Lee, met with ██████ the next month, and spent half an hour stating that 'assessments are reserved by the serious cases only' (██████ could still not spell his own name), 'he will be pulled out of class and his schooling will be disrupted' (he could not even read any instructions given to him on tests), and generally trying to talk ██████ out of requesting an Assessment.
12. Because of ██████'s insistence, a Neuropsychological Evaluation was completed on November 2007.
13. The BUSD Neuropsychological Evaluation showed ██████ was very capable with an IQ of High Average, but was reading at 6th percentile only. He misread simple three letter words (such as reading 'be' instead of 'but' on the Woodcock Johnson test).
14. Despite his abysmal scores in reading and writing and inability to read any instructions in class, at the first IEP meeting discussing this Neuropsychological assessment on December 14, 2007, ██████ were told ██████ 'did not qualify' for an IEP because 'you spoke Dutch to him.'
15. ██████ started saying to ██████, his mother, at that time 'I am just a retard', as he realized he could not read like the other children he knew. He started becoming increasingly depressed and angry and withdrawn.
16. On December 20, 2007, ██████ hired Jane Ashley, a private Slingerland trained Reading Specialist, out of her own funds to tutor ██████ twice a week, selling the cheap horse she had bought because she could not afford tutoring as well as stabling and vet fees for the horse. ██████ met with Don Klose, Program Director for Special Education at Cragmont Elementary, stating she would do what was necessary to save her son from further intense anxiety and depression caused by his inability to read and access the curriculum. ██████ also requested an IEE.
17. For almost a year Don Klose stalled on authorizing the requested IEE for ██████

18. On February 3, 2009, ██████████ filed a complaint with the California Department of Education (CDE) on the grounds that much more than a 'reasonable amount of time' had passed since they had requested an IEE for their son ██████████, and Don Klose still had not given ██████████ a decision regarding whether an IEE would be authorized or not.
19. The CDE agreed with ██████████ ordered the IEE to be authorized, the tutor Jane Ashley to be paid by BUSD, and training to be done for BUSD Special Education personnel regarding how to properly assist students with Dyslexia, with proof of such training to be submitted to CDE.
20. The IEE Assessment was completed by Dr. Terry Doyle, a highly respected child Neuropsychologist in the East Bay, in May 2009, as well as an Audiology evaluation by Dr. Dimitra Loomos, Au.D., an expert in Central Auditory Processing Disorders, on May 8, 2009.
21. As part of the complaint filed with the CDE by ██████████ the then head of Special Education of BUSD was required to call ██████████ which he did around April 2009. When ██████████ stated that the issues ██████████ had included extreme difficulties in reading, writing, and spelling, and that ██████████ currently was in 5th grade, he responded by saying 'Oh, we have seven years to solve this problem then', infuriating ██████████ with an apparent total and complete lack of care for ██████████ who was still experiencing very high levels of stress at not being able to read, write, or spell anywhere near the 'normal' students.
22. At the second IEP meeting, with Dr. Doyle in attendance, in May 2009, ██████████ was granted an IEP, even though he had made progress by this time in reading, writing and spelling, through the wonderful help of the extremely capable Slingerland trained tutor Jane Ashley, who was still seeing ██████████ twice a week. Yet he still showed marked deficits including: hearing with background noise at 16 percentile, discriminating high and low tone bursts with only 53% correct (normal limit being 80%), 23rd percentile in writing on TOWL-3, and 16th percentile in phonemic awareness on WJ-III-CA, as well as extremely poor handwriting, with an IQ in the High Average to Superior range. All the while, the BUSD assessment of the Fall 2007 had stated that his Phonemic awareness was 'normal'.
23. BUSD has continued to refuse assistance for handwriting, sending an OT for ONE hour in June 2009, who concluded he has no handwriting issues, although Dr. Doyle had identified sensorimotor issues. His handwriting is still barely legible.

24. With Slingerland tutoring by Jane Ashley continued through September 2009, and by using the specialized computer program for Dyslexia 'Fast Forward', paid for by [REDACTED] and implemented by [REDACTED] an hour a day for two summers, [REDACTED] has improved to where he can now read most texts and write simple paragraphs with scaffolding and assistance.
25. At the annual IEP meetings in May 2011 and 2012 BUSD staff stated [REDACTED] was no longer eligible for an IEP, even though he still had a Central Auditory Processing Disorder and Dyslexia. When [REDACTED] stated she then wished to have another IEE, BUSD staff then allowed [REDACTED] to continue to have an IEP.
26. [REDACTED] still gets exhausted by reading and writing required in school, but is now able to read at grade level and no longer thinks of himself as a 'retard.' Besides being forced to pay for the Slingerland remediation, and having some modifications in place through [REDACTED]'s IEP, BUSD has not given much helpful services to [REDACTED] at all.

Signed:

[REDACTED]

Date

5/27/15

[REDACTED]

Date

5/27/15

[REDACTED]

Student: [REDACTED]
District of residence: Berkeley Unified School District
School of attendance: [REDACTED]

We are the parents of a 9-year-old girl with Dyslexia (Reading Disorder). She attended Berkeley Unified School District schools during the 2011-2012, 2012-2013 and 2013-2014 School Years, and never received any services from BUSD. She was referred for an Evaluation by her private therapist based on concerns related to her observed delayed reading skills and extreme anxiety about reading and was diagnosed with Dyslexia by an independent evaluator in June, 2013.

Our generally happy, social, funny, creative, passionate and inquisitive daughter began to refuse to attend school in the middle of the first grade, after just having turned 7 in Dec 2012. We were stunned and eventually devastated at the response from the district. We asked for help from teachers and her principal before we knew what was happening and that she had a Learning Disability because we could not get her to go to school, but we got nothing so we were forced to transfer her to BUSD Independent Study in Feb 2013.

During this time we told multiple teachers, administrators, school staff, and even the superintendent about our daughter's struggles because we were desperate to get help for our daughter. No one ever referred her for evaluation. We called the Special Education Dept in March 2013 after being referred to that office by Mr. Francisco Martinez, Admissions Director of Berkeley Unified School District.

We spoke to a BUSD Special Ed program supervisor, Ms. Elaine Eger, and explained to her our daughter's struggles; specifically her anxiety related to academics and her school refusal and were told that she would "probably not qualify for special education". Around this time, it became painfully clear that our daughter was failing at Independent Study and unable to academically or socially perform and meet the general expectations of the program. She began to exhibit new and concerning behaviors that included hiding under desks and disrupting the Independent Studies teacher that was assigned to her. It was an incredibly distressing time in our lives before we knew what it was that was affecting our daughter so severely and regularly being told by all the school professionals there was nothing they could do to help. Our daughter was clearly suffering and it didn't seem to matter or cross anybody's minds that she was only a 7 year old child exhibiting extreme behaviors more typical of middle or high school students.

Feeling exasperated, we re-enrolled our daughter in a new BUSD school after countless conversations with district staff which became the 3rd educational setting for our 1st grader at the

time. We were told by various offices that our daughter's difficulties were not within their jurisdiction and did not know enough to request a formal assessment from the district. We were given preliminary results of the independent evaluation diagnosing our daughter with Dyslexia in June of 2013 and requested a special education assessment on June 12, 2013. The evaluator and our daughter's private therapist felt that our daughter's school refusal was likely the result of an undiagnosed, unsupported learning disability and recommended we request a school assessment for an IEP. We also enrolled her in an independent reading program for children with Dyslexia over the summer of 2013. We provided BUSD with the independent evaluation with the Dyslexia diagnosis during BUSD's evaluation process.

On back to school night the following fall and at the start of 2nd grade, [REDACTED] approached the District "Literacy Specialist" Mr. Tom Prince who had made a presentation about literacy to the school community, encouraging parents to read with their children. [REDACTED] inquired about reluctant readers and the diagnosis of Dyslexia. Mr. Prince stated that he and the District "do not believe in Dyslexia" but then took [REDACTED] to his office to "check her scores". He looked up our daughter's informal reading assessments from the previous year and told her that indeed, our daughter had phonological weakness. He promised to talk with our daughter's teacher. Her second grade teacher later contacted [REDACTED] and informed her that our daughter would not qualify for any reading support in spite of her phonological weakness because she was not a first grader whom the district prioritizes.

The initial IEP eligibility meeting was held in Nov 2013. BUSD agreed that our daughter had a severe discrepancy between her ability and achievement scores in reading, but found that she did not have a "processing disorder" despite her diagnosed Dyslexia. Ms. Lisa Graham, Program Specialist¹ for the District informed us at the meeting, and later in an email that, "Dyslexia is not a processing disorder" and therefore our daughter did not qualify for Special Education. She stated that she was not in disagreement with the diagnosis of Dyslexia, but that Dyslexia was not a processing disorder, which according to Ms. Graham is necessary for special education eligibility under the category of specific learning disability.

We objected to the finding, filed for due process and proceeded to hearing. All along the district had argued with us that there was no way our daughter could qualify for eligibility under SLD because Dyslexia is not a processing disorder and it is needed in addition to a severe discrepancy. We begged for help for our daughter hoping that she could be provided with services that address her serious needs of Anxiety and difficulty reading that prevented her from being able to learn and attend school regularly. At the hearing, the district's attorney attempted to actually then question her Dyslexia Diagnosis by the private evaluation although she meets the clinical criteria for the diagnosis then and still. Our family went to hearing due to a concern for our daughter and all children who were being excluded from support services due to the

¹ At the time of the eligibility IEP meeting, Ms. Lisa Graham was a program supervisor. Since that time she has been promoted to interim director of special education.

misguided assumption by the district that Dyslexia is not a processing disorder and although the Administrative Law Judge found that our daughter was not eligible for special education because of her attendance problems----which is an exclusionary factor in determining eligibility under the category of Specific Learning Disorder, she also found that Lisa Graham held the erroneous opinion that Dyslexia was not a processing disorder. The sad truth is that our daughter missed so much school *because* of her learning disorder.

The Administrative Law Judge did find that BUSD failed in its Child Find duties because multiple teachers, and District administrative staff were on notice of our daughter's suspected disabilities, and not one of them did anything about it. The Administrative Law Judge further found that the District's internal policy of referring children to student study team meetings instead of referring them for evaluation raises a serious question as to the District's global child find policies and procedures in term of ensuring that staff are aware of legal requirements and supported in their individual duties.

Subsequent to the hearing we removed [REDACTED] from BUSD and placed her in a charter school in another school district. She was evaluated by the charter school and provided with an IEP- she is classified as child with a specific learning disability based on her diagnosed and observed Dyslexia. She now attends a private school designed for bright children with learning disabilities and is doing great, no thanks to BUSD.

This statement is true to the best of my knowledge and belief.

[REDACTED]

[REDACTED]

5/10/15

Date

5/10/15

Date

[REDACTED]

Student: [REDACTED]
District of residence: Berkeley Unified School District
School of attendance: [REDACTED]

I never considered sending my daughter anywhere but BUSD. I wanted public school for her, to develop the skills to be comfortable with the wide range of kids our Bay Area encompasses. BUSD offered that—as well as the promise of a good education—unless your kid was at all different like mine turned out to be.

In first grade there were already problems with her writing but I was told she was too young for an IEP. She had an SST that year.

In 2010 when my daughter was in second grade we moved, in part because she had been assigned a brand new teacher at Malcolm X, this would have been her second and transitions are hard for her. We moved to Marin County where my child was evaluated and given an IEP. She was found eligible under the category of Specific Learning Disorder, with evidence of a significant visual processing disorder.

In January 2012 we returned to Berkeley and BUSD where our Marin County IEP was respected.

Fall of 2012 I felt my daughter was not progressing sufficiently and requested a reevaluation from the district so that she could receive the amount of services I felt she needed to progress academically. In December 2012 BUSD found that she had “no discrepancy between her cognitive ability and academic performance... as such she does not demonstrate the characteristics of a child with a specific learning disability”.

January 2013 I wrote the district requesting an IEE via neuropsychological evaluation for my child. I did not know the correct terminology at the time so my request was denied and I paid out of pocket for the evaluation in July 2013 with Dr. Carina Grandison.

September 2013 Dr. Grandison and I met with the IEP team where she presented her findings of a significant learning disability and the need for an IEP. I was informed by BUSD that her findings were not applicable and my child needed to be re-assessed by the district.

In December 2013 after the district's re-evaluation my daughter was found to be insufficiently disabled and exited from Special Education services in direct contradiction to Dr. Grandison's findings.

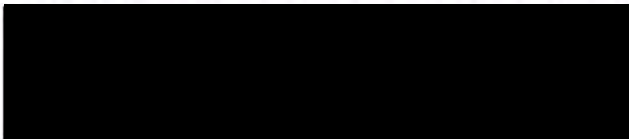
By September 2014 I had come to the conclusion that the district could not provide an appropriate education to my child and unilaterally placed her in a private school where she is in a class with only 3 other students and is receiving significant 1:1 attention and instruction as Dr. Grandison's report documented she needed. She is thriving with the support.

I found out in January 2015 that the private school was closing after this school year. I asked my daughter's teacher and the learning specialist to provide me with information about what my daughter would need to succeed in another school. They provided me with statements regarding my daughter's significant needs and obvious learning disability.

I provided these statements to BUSD and requested another evaluation with the hope to move her back to BUSD for the 2015-2016 school year. BUSD evaluated her in February and March 2015.

In March 2015 BUSD held an IEP meeting to review the latest evaluations. This time, BUSD found that my daughter qualified as a student with a learning disability based on the discrepancy between her cognitive ability and her achievement, and the finding of a processing disorder. However, they found that she did not qualify for an IEP because her learning disorder could "be accommodated in the general education setting". The last time they tried to accommodate her in the general education setting, my daughter failed to progress in any way. She was miserable, ashamed and frustrated because of her struggle with academic skills and the lack of support. While she has thrived in a small private school setting with a lot of support, she has a significant learning disorder, coupled with ADHD/executive functioning deficits. To find that she does not need special education at a large public school setting, in the face of ample evidence and teachers reports that say otherwise is a horrendous and a continued violation of my daughter's rights.

This statement is true to the best of my knowledge and belief.



5/19/15
Date

Confidential Exhibit G

██████████, parent of student ██████████, submits this declaration to the California Department of Education in support of DREDF's special education compliance complaint against the Berkeley Unified School District.

Student: ██████████
School: ████████████████████
Parent: ████████████████████
Address: ██
Phone: ████████████████████
Email: ████████████████████████████████

Statement

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

1. I am [REDACTED], resident of Berkeley, California, and the mother of an 11-year-old boy, [REDACTED], who now has an I.E.P for dyslexia.
2. [REDACTED] has attended school in the Berkeley Unified School District (BUSD) since kindergarten, 2008.
3. [REDACTED] is currently enrolled in the sixth grade at [REDACTED] in Berkeley, CA.
4. [REDACTED] began to speak developmentally on time, but no one could understand him. At around age 3, I began taking him to a speech therapist at Alta Bates Summit Campus.
5. Before [REDACTED] entered Kindergarten at Emerson Elementary in Berkeley, CA, I had him tested for speech therapy by BUSD.
6. [REDACTED] tested in the bottom 11% but was denied services by BUSD.
7. I spoke to the Speech Therapist at Emerson Elementary, Pamela Van Der Poel, who agreed to add [REDACTED] as one of her pupils. I was never aware that [REDACTED] had an I.E.P. for Speech Services, we would receive reports from Pam Van Der Poel at [REDACTED]'s parent-teacher conferences. He was receiving 30 minutes of speech therapy per week in a group setting. After a few years, [REDACTED] was disqualified. Again, we never knew he had an I.E.P. for speech so we didn't know we could object.
8. As early as Kindergarten, [REDACTED]'s dyslexia was becoming obvious. His teacher stated "I think reading and writing could be a bit more challenging, as expectations rise due to his difficulty with some speech patterns."
9. [REDACTED] did well in math and had no behavioral problems at school at all. However, his reading continued to be a problem. He was asked to stay after school and join a program called "Read Naturally" for the lowest readers.
10. [REDACTED] continued to have problem reading after kindergarten. He saw the school reading specialist, Jamie Carlson, after school. When I asked her what we, as parents, could be doing to help [REDACTED], she said he would "pop" and start reading soon.

Statement

11. In third grade, [REDACTED] was still not reading. During his parent-teacher conference, his second and third grade teacher, Kimberly Davis, said he was "slightly below grade level in reading." Ms. Davis said [REDACTED] used "avoidance tricks" when it came to reading. She made no mention of any learning disability and implied that it was [REDACTED]'s fault that he was not reading. I began researching dyslexia and how to get an I.E.P.

12. In the fall of 2011, I asked that [REDACTED] be evaluated or given a special education assessment for a learning disability, namely, dyslexia.

13. In January, 2012, we had our I.E.P. meeting with the school psychologist, Rani Dutta, the school principal, the special education representative, Michelle Hughes, Ms. Davis ([REDACTED]'s teacher), my husband and myself.

14. The school psychologist found [REDACTED]'s intellectual abilities to be in the 99th percentile, in the Very Superior range. [REDACTED]'s teacher, Ms. Davis, exhibited surprise upon hearing of his high cognitive abilities. He was granted an I.E.P. for dyslexia and given services of individual and group for 30 minutes, 2 times a week, totaling 60 minutes weekly.

15. The services that [REDACTED] received were almost never individual. He was pulled out of class in a group with other children (2 - 4) who were not reading at grade level. These sessions were never useful for [REDACTED]; he would sit and listen to others struggle to read.

16. At Emerson, [REDACTED] never received the services he was promised. For instance, he was supposed to have the assistance of the special education teacher for tests. Instead, many times she was not in her room and [REDACTED] would wander around looking for her.

17. A copy of the I.E.P. was not provided to all his teachers. He had written tests in other subjects, such as music, but these teachers were not aware of his I.E.P. and, therefore, he did not receive the following accommodations: "Test read aloud to student for classroom tests when necessary," "Flexible setting smaller group or in resource room as needed" and "Flexible time scheduling for testing requiring writing."

18. In September, 2013, I discovered "Dragon Diction" and knew this could help [REDACTED] with his writing (speech to text). I contacted his teacher, Jenny Weddle and Michelle Hughes. We gave [REDACTED] an iTouch to take to school. However, we soon found out that the internet was needed for this app. For some reason, the school would not give [REDACTED] the password. When we were finally able to get him the password, the internet did not reach his classroom. He was never able to use speech to text aids while at Emerson.

19. Although Emerson kept insisting that [REDACTED] was meeting his I.E.P.'s "goals," we believed otherwise. We had [REDACTED] tested at Lindamood-Bell on September 10, 2012. We had him retested a year later, in September of 2013 to see his alleged "progress." [REDACTED]'s scores significantly decreased when compared to the previous year. The cost of these assessments was

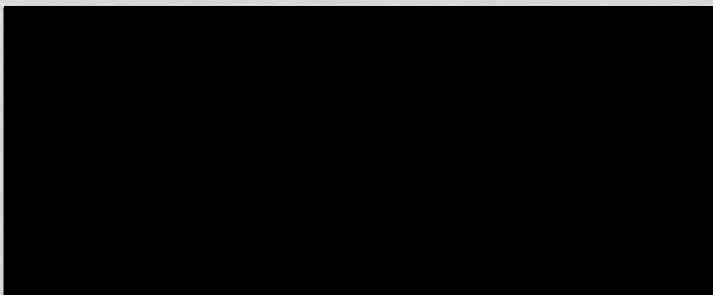
Statement

around \$400. We decided to have him spend two weeks during Winter Break in 2013 working with teachers at Lindamood-Bell. The cost of this was approximately \$3,000.

20. In 2013, we knew [REDACTED] needed help and Emerson was doing nothing. We advertised and hired tutors from the University of California at Berkeley. Tutors came and continue to come to our house and read with [REDACTED] from one to three hours several times a week. We pay them \$20 - \$30 per hour. Our schedule now is: Monday 6:30 pm: Brianna Niu, Tuesday 5:15 pm: Lori Joseph, Wednesday 5:15 pm: Natalie Myren, Sunday 4:00 pm: Dylan Wexler.

21. I have many painful examples of how misunderstood [REDACTED]'s dyslexia was. Last March (in 5th grade), [REDACTED] was given a writing assessment in class. He came home and was upset that he had not done well because he couldn't spell any words and therefore could not write. When I questioned his teacher in an email, she responded: "Students were allowed to use any tools available in the classroom. [REDACTED] used his personal dictionary and a regular dictionary. If this had been an assessment that measured his progress in any way, I would have prepared better to support [REDACTED]. Please tell [REDACTED] that he is always welcome to use any spelling tools he needs. We have several laptops in the classroom now, so I should be able to get some things set up for him soon." Suggesting that [REDACTED] use a "personal dictionary" or "regular dictionary", exemplifies how insensitive to dyslexia this teacher was. [REDACTED] spent 20 minutes during that assessment trying to look up "soccer." He thought the first two letters were SA. Also, to suggest that [REDACTED] use a laptop that did not have speech to text, means he would again have to spell a word to find its spelling. The teacher also states that she should have "some things set up for him soon." This was written in March, 2014, less than two months before [REDACTED] graduated from that school.

22. One last comment on Emerson. The principal wrote me the following in an email when I complained that [REDACTED] was not receiving his accommodations: "What I do remember about IEP's and testing accommodations is that they should be things that the child uses regularly. There is no sense in pulling out an accommodation just for a test, it should be part of the child's regular repertoire." Unfortunately, [REDACTED] had no accommodations that he used regularly, because none were provided to him. He was left to feel not smart enough to succeed in school.



5/11/16

Confidential Exhibit H

[REDACTED] parent of student [REDACTED] submits this declaration to the California Department of Education in support of DREDF's special education compliance complaint against the Berkeley Unified School District.

Student: [REDACTED]
School: [REDACTED]
Parent: [REDACTED]
Address: [REDACTED]
Phone: [REDACTED]
Email: [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

Student: [REDACTED]
District of Residence: Berkeley Unified School District
School of Attendance: [REDACTED]

My name is [REDACTED]. Since 1999, I have taught at CSU East Bay and many of my undergraduate students pursue further education to become teachers, counselors, and health personnel including, doctors, nurses, health administrators, and speech pathologists. In addition, some of my students need accommodations through Accessibility Services and I provide these to them. I am the parent of [REDACTED] a 12-year-old, sixth-grade student with Dyslexia. My daughter was adopted from China when she was one year old. She has attended Berkeley Unified schools her entire educational career (K-6). I have been an active parent serving in the schools as classroom parent from K-6. During K-5, at various times I taught Second Step Violence Prevention Program K-1 grades, chaired the English Language Learners Committee, served on the School Governance Committee, volunteered in the classroom helping children who were struggling readers, organized the staff appreciation luncheon and chaperoned field trips. In sixth grade, I served on the School Governance Committee, volunteered in the cooking program, and chaperoned two field trips.

My daughter is one of the hardest working children I know. She cares how she does and what grades she gets. She is very bright and yet she struggles with spelling and spelling as it impacts writing. Her reading is also below grade level, specifically as it impacts accuracy. She also has struggled with reading fluency. Overall, Dyslexia has impacted and continues to impact her learning. She started to show signs of learning difficulties during her first years in school, which the District attributed to the fact that at that time she was bilingual in English and Mandarin Chinese (I am fluent in Mandarin Chinese and spoke this exclusively with her until preschool). The District however did not provide her with English Language Learner (ELL) services in K- 2 grade, despite the fact that she qualified. Moreover, [REDACTED] has had District ELL reclassification on at least two occasions and the District has used her ELL scores and the fact that she was bilingual both for and against her in their arguments to deny her an IEP at different times. When I have inquired about getting [REDACTED] tested for a potential reading disability, District officials told me she was "too young to test," that it was best to wait until third grade, or that a student must be two full-grade levels behind before he or she is assessed. The District

did provide Reading Recovery, a short-term reading intervention designed for students aged five or six, from the middle of first grade until end of second grade.

By Spring 2010, the end of first grade, I was convinced my daughter had some type of learning disability. The District and I held a Student Study Team (SST) meeting at the start of second grade (September 2010) that focused on what I, the parent, could do to help my daughter. This meeting was not productive and my daughter did not benefit from it.

In 2010-2011, [REDACTED]'s second grade teacher encouraged me to have her tested. She stated that while my daughter was one of the hardest working children she ever taught, she was not progressing. I was so relieved that someone finally saw what I was seeing and had been saying—that [REDACTED] was struggling and could barely read. The District assessed [REDACTED] and ultimately found her ineligible. In 2011, the District's assessor, school psychologist Richard Anderson, assessed her for a Specific Learning Disability (SLD) and determined in a report dated March 2, 2011 that while there was a significant discrepancy between her cognitive ability and her academic achievement (in the areas of reading fluency, basic reading skills, reading comprehension, written expression and mathematics calculation), she did not have an underlying processing disorder. In his report he attributed her learning struggles, in part, to English as second language. I told him I was concerned that my daughter had a learning disability and specifically Dyslexia. He told me he was neither able nor trained to test her for Dyslexia.

I disagreed with the District's assessment and requested an Independent Educational Evaluation (IEE). When Special Education Director Kay Altizer did not respond to my IEE request within the legal timeframe, I notified the District that I was hiring Dr. Carina Grandison, PhD. who assessed my daughter and diagnosed her with significant learning disability and Dyslexia. Dr. Grandison stated she met the criteria for Specific Learning Disability. As a result of this diagnosis, I hired Lindamood-Bell for reading remediation at the end of second grade, which proved to be an extremely helpful intervention ([REDACTED] went from pretending to read to actually starting reading).

Lindamood-Bell supplemented the services I had already secured for my daughter, including 10 weeks of vision therapy at UC Berkeley School of Optometry Binocular Vision Clinic in 2010, and would secure through my health insurance including six months of speech and language services and occupational therapy from 2010-2012 until we received our legal and fully trained service dog from Canine Companions for Independence in February 2012. My daughter was also tested by an audiologist (2009) and found to have some auditory issues, specifically competing sounds. The audiologist

recommended that my daughter receive preferential seating in the classroom to easily see the speaker's face.

When I requested the District fund the IEE, the District filed for due process against me. I hired attorney Rick Ruderman of Ruderman & Knox, LLP to represent me.

In third grade my daughter had a 504 plan with pull out services. By the end of third grade (May 2012), my daughter was retested and assessed by a different District psychologist, Susan McKenna; she found my daughter qualified for an IEP with a "visual processing disorder." I was relieved that after years of fighting the District a school psychologist finally realized my daughter had a Specific Learning Disability and would be provided with a Free Appropriate Public Education (FAPE), which included special education services and accommodations.

Over the next three years, I advocated on behalf of my daughter to get the District to use well-designed measurable goals, reliable and valid assessments, and provide appropriate services, including AT services. I faced many obstacles. For example, in fifth grade (2013-2014) when I requested my daughter's Words Per Minute (WPM) in her reading assessment, the teacher sent an email stating that she could not provide these since the Winter and Spring reading assessment were done by someone else and they only recorded the range and factored in the second minute in her WPM in Winter. In fifth grade, the Resource Specialist (RSP) also tested [REDACTED]'s spelling using words that my daughter had consistently spelled correctly in lower grades. I challenged this practice and called an IEP meeting to design a better tool for appropriately measuring her spelling progress.

During the summer before sixth grade, Elaine Eger, Program Supervisor, produced an IEP that left out two of my daughter's five IEP goals and on her IEP Goals incorrectly stated her appropriate levels for progress on state standard and general curriculum. In fact, there were so many mistakes on my daughter's IEP that I had to send the District several emails documenting the mistakes and omissions and asking them to make changes. In sixth grade, I requested an IEP meeting in Fall 2014 at the District's recommendation, but when I showed up no one was there except the RSP. There have been other concerns including at my daughter's Triennial Meeting the RSP stated on tape that he only provided 30 minutes of pull-out and did not know about her other 60 minutes of push-in time or who provided it.

I have also struggled throughout the past several years to secure Assistive Technology (AT) services for my daughter. When I questioned the District this year about the lack of

AT, they told me that I shouldn't push my daughter to use a computer or spelling applications (e.g. co-writer) at school because middle school children "just want to fit in."

At my daughter's May 1, 2015 Triennial IEP meeting the District attempted to exit her from special education. The school psychologist, Francisco Perez-Pineda, claimed [REDACTED] did not have a processing disorder or a significant discrepancy since her triennial assessment showed her in the "average" cognitive ability range. This was a significant drop in cognitive ability; in two other previous School Psychologist assessments she tested either "above average" or "high average." School Psychologist Francisco Perez-Pineda, along with the RSP, also cited her improving grades over the past several years as evidence she no longer needs an IEP. This argument however ignores the fact that her improved grades are influenced by her accommodations—no points off for spelling errors, permission to rewrite essays, a differentiated learning model, etc. In addition, improved grades are an inappropriate reason to pull her IEP. Program Supervisor, Don Klose, also claimed that spelling difficulty is not a major area to qualify someone for an IEP, overlooking the ways in which my daughter's reading and writing skills are impacted by spelling challenges and her documented diagnosis of Dyslexia.

Dr. Grandison conducted her own reassessment and reported at the May 1st meeting that [REDACTED] had a discrepancy between achievement and intellectual ability (she determined her cognitive ability to be "above average to superior") and reaffirmed her initial diagnosis of Dyslexia. In 2015 she found my daughter to have Dyslexia and more specifically, Orthographic Dyslexia. In addition, at the IEP I presented results of a Spring 2015 test by Lindamood-Bell that found my daughter to be at grade level 5.1 for spelling and grade level 5.2 for reading accuracy. According to the Lindamood-Bell report, my daughter made little to no progress in these areas since last year. I also presented results from several other reports, including UC Berkeley School of Optometry Binocular Vision Clinic, with a diagnosis of exophoria, and below norms reading eye efficiency on the Readalyzer, and below grade norms on TAAS for phonemic awareness. Additionally, I presented a Fall 2014 Audiology report indicating my daughter has difficulty filtering out irrelevant information and tracking messages at the same time that can impact her in the classroom and it takes her longer to decode the information. The Audiologist recommended accommodations including preferential seating, pre-tutoring, and extra time for tests and a quiet setting.

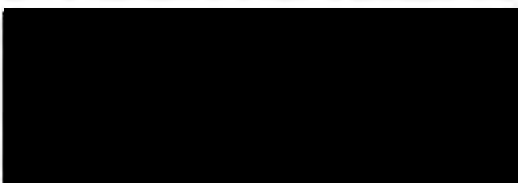
Mr. Perez-Pinada countered that Dyslexia is not a processing disorder and he is not trained to assess for Dyslexia. I then read aloud provisions of the Education Code that supersede the law cited in the District's triennial report and clearly show Dyslexia qualifies as a processing disorder (Cal. Educ. Code §3030(b)(10)). The District's

representative, Don Klose, continued the IEP meeting until May 22nd due to confusion over the conflicting reports.

At the May 22, 2015 IEP meeting, Don Klose again stated that Dyslexia is not a processing disorder and disagreed with Dr. Grandison's assessment results which showed a discrepancy between her intelligence and educational performance. The District also did not want to acknowledge concerns about the validity and reliability of district test results and my daughter's IEP goal assessments or acknowledge that my daughter had made little progress in her spelling and her reading level (including oral reading rate) since last year. When Don Klose declared that my daughter would be exited from special education, both Dr. Grandison and I pointed out that he could not make that decision unilaterally—it is a team decision. The principal also supported my daughter continuing her IEP. Mr. Klose backtracked and acknowledged there was an "impasse."

Despite fears of retaliation, I have and will continue to be an outspoken critic of the BUSD Special Education Department based on these experiences. I also have an open complaint regarding my daughter's Special Education files; after requesting all of her files, I found documents were missing, misfiled and my parent's addendum to my daughter's IEP were printed out so small that they were illegible.

This statement is true to the best of my knowledge and belief.



5/20/2015
Date

EXHIBIT 2

CALIFORNIA DEPARTMENT OF EDUCATION
Investigation Report
Case S-0952-14/15

Public Agency Donald Evans, Superintendent Berkeley Unified School District 2020 Bonar Street Berkeley, CA 94702	Complainant Larisa Cummings 3075 Adeline Street, Suite 210 Berkeley, CA 94703
Special Education Director Kay Altizer, Executive Director, Special Education Berkeley Unified School District	Parents Various
Special Education Local Plan Area (SELPA) Martha Schultz, Director North Region SELPA 1051 Monroe Street Albany, CA 94706	Student Various
Complaint Received June 1, 2015	Report Mailed July 31, 2015

INVESTIGATION PROCEDURES

The investigation and conclusions are based on the investigator's review of materials and documents provided by the Complainant and the District, as well as telephone contacts with the Complainant on June 17, 2015, and the District on July 21, 2015. Telephone messages left for the parents of Student 1, Student 2, and Student 3 were not returned.

A complaint filed with the California Department of Education (CDE) shall allege a violation of the federal Individuals with Disabilities Education Improvement Act (*United States Code*, Title 20, sections 1400 et seq.), or a provision of this part, that occurred not more than one year before the date that the complaint is received by the CDE, pursuant to California *Education Code (EC)* Section 56500.2 and *Code of Federal Regulations*, Title 34 (34 *CFR*), Section 300.153(c). The complaint was received June 1, 2015, and therefore the applicable time period for the investigation is June 1, 2014 through June 1, 2015. For this reason, certain specific concerns regarding three students are discussed in this report, even though additional information about other students (beyond the statute of limitations) was offered by the Complainant.

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SUMMARY OF ALLEGATION ONE

The Complainant alleges the District, the SELPA, and the CDE failed to implement special education requirements regarding students with specific learning disabilities. Allegation one addresses the concerns with the CDE. Allegations 2 through 8 address the District and SELPA issues.

The Complainant alleges the CDE failed to monitor the Berkeley Unified School District in the provision of free appropriate public education (FAPE) in the least restrictive environment and general supervision, including child find and effective monitoring, as required by 34 *CFR* Section 300.600, et al.

Specifically, the Complainant alleges that the CDE has failed to take necessary steps to enforce compliance with child find activities under the Individuals with Disabilities Education Act (IDEA), as related particularly to students with specific learning disabilities, especially dyslexia.

The Complainant alleges the CDE should have exercised its oversight responsibilities and interceded.

APPLICABLE CITATION

34 *CFR* Section 300.600 requires:

- (a) The State must—
 - (1) Monitor the implementation of this part;
 - (2) Make determinations annually about the performance of each LEA [local educational agency] using the categories in § 300.603(b)(1);
 - (3) Enforce this part, consistent with § 300.604, using appropriate enforcement mechanisms, which must include, if applicable, the enforcement mechanisms identified in § 300.604(a)(1) (technical assistance), (a)(3) (conditions on funding of an LEA), (b)(2)(i) (a corrective action plan or improvement plan), (b)(2)(v) (withholding funds, in whole or in part, by the SEA [state education agency]), and (c)(2) (withholding funds, in whole or in part, by the SEA); and
 - (4) Report annually on the performance of the State and of each LEA under this part, as provided in § 300.602(b)(1)(i)(A) and (b)(2).
- (b) The primary focus of the State's monitoring activities must be on—
 - (1) Improving educational results and functional outcomes for all children with disabilities; and
 - (2) Ensuring that public agencies meet the program requirements under Part B of the Act, with a particular emphasis on those requirements that are most closely related to improving educational results for children with disabilities.

(c) As a part of its responsibilities under paragraph (a) of this section, the State must use quantifiable indicators and such qualitative indicators as are needed to adequately measure performance in the priority areas identified in paragraph (d) of this section, and the indicators established by the Secretary for the State performance plans.

(d) The State must monitor the LEAs located in the State, using quantifiable indicators in each of the following priority areas, and using such qualitative indicators as are needed to adequately measure performance in those areas:

(1) Provision of FAPE in the least restrictive environment.

(2) State exercise of general supervision, including child find, effective monitoring, the use of resolution meetings, mediation, and a system of transition services as defined in § 300.43 and in 20 U.S.C. [United States Code, Title 20]1437(a)(9).

(3) Disproportionate representation of racial and ethnic groups in special education and related services, to the extent the representation is the result of inappropriate identification.

(e) In exercising its monitoring responsibilities under paragraph (d) of this section, the State must ensure that when it identifies noncompliance with the requirements of this part by LEAs, the noncompliance is corrected as soon as possible, and in no case later than one year after the State's identification of the noncompliance.

FINDINGS OF FACT

1. The CDE has a general supervision system statewide which, is divided organizationally into four regional units called Focused Monitoring and Technical Assistance Units (FMTA). For Alameda County and more specifically, the District and its SELPA, FMTA IV provides general and specific monitoring and technical assistance.
2. The general supervision system described in the CDE's State Performance Plan/Accountability Progress Report (SPP/APR) includes the following key components:
 - a. SPP/APR. The SPP/APR are central to the system of general supervision in California. The SPP includes 20 indicators addressing a broad range of both compliance processes and student outcomes. The indicators cover each of the priority areas identified in the IDEA: FAPE in the least restrictive environment, disproportionality, effective general supervision including child find, and effective transitions. The SPP identifies the baselines, benchmarks, and targets in each of the 20 indicator areas and provides a structure for annually reporting at the state and local level.

The SPP/APR are developed through a stakeholder process using information from CDE's student and district-level data collections, integrated

monitoring activities, and dispute resolution procedures. Similarly, the SPP/APR data are used for the selection of programs for review, identification of statewide and local needs, determination of monitoring activities, and provision of training and technical assistance. The SPP/APR and related calculations serve as the basis for additional state and local reporting for: public reporting of LEA indicators, LEA compliance determinations, and identification of districts having significant disproportionality.

- b. Policies, Procedures, and Effective Implementation. The CDE reviews policies, procedures, and practices through its integrated monitoring activities, dispute resolution processes, and the evaluation of student and district-level data. Whenever policies, procedures, or practices are found noncompliant, districts are required to make corrections, and demonstrate that they are implementing the policies, procedures, and practices correctly (as verified by subsequent record review demonstrating compliance at the 100 percent level).
- c. Data California Special Education Management Information System (CASEMIS). The CDE draws on both General Education (GE) and Special Education (SE) data bases to implement California's system of general supervision. The data set is updated biannually and described in detail in the CASEMIS Technical Assistance Guide (see <http://www.cde.ca.gov/sp/se/ds/documents/casemistag1112.doc>). CASEMIS software contains internal data checks and requires certification by the submitting SELPA. The software also identifies data anomalies, which are unusual or substantial changes from one year to the next. SELPAs and districts are required to explain these changes that are often the result of changes in data collection practices or definitions. Lastly, CASEMIS data are verified on-site as a part of the monitoring processes.

Other Special Education Data. In addition, parent input data are collected through CASEMIS and also through a contract with the Sacramento County Office of Education. The special education division of the CDE maintains three data bases related to: (1) monitoring findings and correction, (2) complaints findings and correction, and (3) due process hearing findings and correction. A separate data system is maintained by the Office of Administrative Hearings (OAH) regarding the procedures, timelines, and outcomes of due process hearings.

- d. The CDE statewide systems: California Longitudinal Pupil Achievement Data System (CALPADS) and the CASEMIS are the basis for IDEA reporting and accountability. APR indicators are used to comply with reporting requirements of 34 *CFR* Section 300.600 for monitoring including: SPP and APR; annual compliance determinations; data identified non-compliance; disproportionality,

and significant disproportionality. APR indicators are also used to select districts for Verification Reviews (VRs) and to form the nucleus of the compliance items reviewed in Special Education Self-Reviews (SESRs) and VRs. CDE reviews all compliance indicators for every District every year; conducts SESRs every four years, and selects Districts for VRs each year using a combination of indicators from the annual compliance determinations. Monitoring includes review of student records, policies and procedures, fiscal records, IEP implementation, educational benefit, and a review of the complaint history and individualized items selected for each district and included in a monitoring plan.

3. The CDE conducted a verification review (VR) of Berkeley including a site visit April 6, through April 10, 2015. This monitoring effort is ongoing at this time and the verification report is still in process.
4. A 2014 OAH decision found in favor of the District in a dispute over eligibility under the category of specific learning disability but raised concerns regarding the District's child find policies. The CDE imposed corrective actions, and the District submitted revised policies that satisfied the corrective actions as of February 2015.
5. In addition to the monitoring and technical assistance provided by the CDE unit to the District and SELPA, the CDE investigated six complaints filed against the District for the 2014–15 school year, which included a total of 16 separate allegations. The CDE found the District non-compliant on three of the sixteen allegations and ordered corrective actions. One of the sixteen allegations was related to child find; the District was found compliant. There have not been any allegations related to identification of students with specific learning disabilities. There was one 2014–15 reconsideration for a 2013–14 complaint with one allegation resulting in a finding of noncompliance on one allegation. The District satisfactorily performed all corrective actions by the deadline imposed by CDE (with one exception in which evidence was received 10 days after the deadline) and within the one year requirement imposed by law.

CONCLUSION

The CDE's monitoring efforts as applied to Berkeley Unified School District over the past year, met the requirements of 34 *CFR* Section 300.600. **The CDE is in compliance.**

SUMMARY OF ALLEGATION TWO

The Complainant alleges the District failed to identify, locate, and assess all individuals with exceptional needs, in violation of *EC* Section 56301(a). Specifically, the Complainant alleges the SELPA and District implement exclusionary policies and procedures related to students with specific learning disabilities (especially dyslexia). The Complainant also

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alleges the District failed to make students eligible for special education services despite assessment results indicating otherwise.

APPLICABLE CITATIONS

EC Section 56301(a) provides:

a) All children with disabilities residing in the state . . . who are in need of special education and related services, shall be identified, located, and assessed and a practical method [shall be] developed and implemented to determine which children with disabilities are currently receiving needed special education and related services . . .

34 *CFR* Section 300.8(c)(10) provides:

[A specific learning disability is] a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations . . . Such term includes such conditions as . . . dyslexia.

EC Section 56337 provides, "A specific learning disability . . . means a disorder in one or more of the basic psychological processes . . . which may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or perform mathematical calculations. . . The term "specific learning disability" includes conditions such as . . . dyslexia . . ."

EC Section 56337.5(a) provides:

A pupil who is assessed as being dyslexic and meets eligibility criteria specified in Section 56337 and subdivision (j) of Section 3030 of Title 5 of the California Code of Regulations for the federal Individuals with Disabilities Act (20 U.S.C. Sec. 1400 and following) category of specific learning disabilities is entitled to special education and related services. [emphasis supplied]

California Code of Regulations, Title 5 (5 *CCR*), Section 3030(b)(10) provides:

Specific learning disability means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may have manifested itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations, including conditions such as . . . dyslexia . . . The basic psychological processes include attention, visual processing, auditory processing, sensory-motor skills, cognitive abilities including association, conceptualization and expression.

FINDINGS OF FACT

6. In the complaint filed with the CDE on June 1, 2015, the complainant alleges the District does not recognize dyslexia as a “disorder” or “condition” as described in the above-cited law.
7. The parent of Student 3 asserts that in fall 2014, a school counselor said the District “does not offer any services around dyslexia.”
8. A March 24, 2015, e-mail from the District to the Complainant (prior to the filing of the complaint) states “the District does not consider dyslexia to be a processing disorder.”
9. In the complaint received by the CDE on June 1, 2015, Student 2 asserts that at an IEP meeting in May, 2015, a District representative said dyslexia is not a processing disorder.
10. The District’s response to the complaint does not contend that a student with dyslexia cannot be found eligible for special education as a student with a specific learning disability.
11. The District’s response to the complaint contends that the fact that a student has dyslexia, in and of itself, does not mean that he/she is eligible for special education as a student with a specific learning disability.
12. The SELPA plan cites the law listing dyslexia as a “disorder” or “condition” as described in the citations above.
13. The District’s IEP form states that a specific learning disability is a “disorder . . . including such conditions as . . . dyslexia . . .” that may have manifested itself in an imperfect ability to perform certain specifically identified skills.
14. In OAH Decision Number 2013120159 dated March 17, 2014, OAH found in favor of the District, stating that although the student had dyslexia, the student was not eligible for special education as a student with a specific learning disability. That decision is binding on the CDE per 34 *CFR* Section 300.152(c)(2)(i). OAH, however, also noted concerns about the District’s child find policies, specifically as related to the use of a student study team decision on page 30. On July 1, 2014, based on the OAH’s concerns, the CDE assigned the District corrective actions relating to its child find procedures. Specifically, the CDE required the District to revise child find policies and procedures in order to assure compliance with state and federal law and to conduct staff training on child find requirements. In February 2015, the CDE confirmed that the revised policies and procedures and evidence of training submitted by the District satisfied the corrective actions.

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CONCLUSION

The District met the requirements of *EC* Section 56301(a). The District's position with respect to dyslexia, as represented in Findings of Fact 10 and 11, is consistent with law, and the District's child find policies and procedures, as noted in findings of fact 4, 12, and 13, are consistent with law. **The District is in compliance.**

Student One

ADDITIONAL CITATIONS

EC Section 56342.5 states, "A [LEA] shall ensure that the parent of each individual with exceptional needs is a member of any group that makes decisions on the educational placement of the individual with exceptional needs."

34 *CFR* Section 300.503(a) establishes:

(a) Notice. Written notice that meets the requirements of paragraph (b) of this section must be given to the parents of a child with a disability a reasonable time before the public agency—

- (1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or
- (2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. . .

FIINDINGS OF FACT

15. The parent requested an evaluation for Student 1, who was attending a private school; and the District evaluated the student in February and March, 2015.
16. At the April 21, 2015, IEP meeting, the District found: there was a significant discrepancy between the student's written expression achievement score of 91 and the student's verbal comprehension; Student 1 had a sensory motor processing disorder that emerged in difficulties with handwriting and spelling; Student 1 benefitted from using a computer for written work; and Student 1 received all As and one B in academic classes.
17. The parent indicated that Student 1 was thriving in the small private school, but asserted that Student 1 had not made adequate progress in the past when she attended a public school.
18. The District found that Student 1 did not demonstrate a need for special education and therefore did not qualify for special education as a student with a specific learning disability. The IEP notes parent's disagreement with the determination

Student 1 did not meet special education eligibility and parent's desire that Student 1 attend a small private school.

19. The IEP documents the parent's receipt of procedural safeguards and the evaluations, tests, records, and reports as well as other relevant factors the District used as a basis for the determination the student was not eligible for special education services.

CONCLUSION

The District met the requirements of *EC* sections 56301(a) and 56342.5 and 34 *CFR* Section 300.503. There was insufficient evidence to support a finding that the District's position on eligibility for Student 1 was incorrect. In addition, although the parent and District disagreed at the meeting, the parent was a member of the decision-making group. Finally, regarding the provision of written notice, the IEP can serve as notice as long as it meets the requirements of written notice outlined in 34 *CFR* Section 300.503. The April 21, 2015, IEP includes the information required under 34 *CFR* Section 300.503. **The District is in compliance.**

SUMMARY OF ALLEGATION THREE

The Complainant alleges the District failed to include a statement of the child's present levels of academic achievement and functional performance in violation of 34 *CFR* Section 300.320(a)(1). Specifically, the Complainant alleges the District failed to include appropriate levels of performance on state standard for general curriculum in the May 2, 2014 IEP for Student 2.

APPLICABLE CITATION

34 *CFR* Section 300.320(a)(1) requires:

(a) . . . As used in this part, the term [IEP] means a written statement for each child with a disability that is developed, reviewed, and revised in a meeting in accordance with [sections] 300.320 through 300.324, and that must include--

(1) A statement of the child's present levels of academic achievement and functional performance . . .

FINDINGS OF FACT

20. The May 2, 2014, IEP includes information about the student's performance on the Wechsler Individual Achievement Test, California Standards Test and District testing and inventories. Specific information about the student's performance in fluency, accuracy, and comprehension was included in the baselines for IEP goals in reading;

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and specific information about the student's performance in spelling was included in the IEP goals for spelling.

21. The parent asserted that the IEP inappropriately stated the student's present levels. In the August 27, 2014, parent addendum, received by the District on August 27, 2014, the parent asserted the student's baseline score in spelling was incorrectly stated.

CONCLUSION

The District met the requirements of 34 *CFR* Section 300.320(a)(1). There was insufficient evidence to support a finding that the District failed to include present levels of performance in Student 2's May 2, 2014, IEP. **The District is in compliance.**

SUMMARY OF ALLEGATION FOUR

The Complainant alleges the District failed to ensure that the IEP team for each child with a disability includes one regular education teacher, in violation of 34 *CFR* Section 300.321(a)(2). Specifically, the Complainant alleges the District failed to include all required members of the IEP at the Student 2's fall 2014 IEP.

APPLICABLE CITATION

34 *CFR* Section 300.321(a)(2) requires, "(a) General. The public agency must ensure that the IEP Team for each child with a disability includes . . . (2) Not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment). . ."

FINDINGS OF FACT

22. In the complaint received by the CDE on June 1, 2015, the parent asserts that she requested an IEP meeting in fall 2014 but only the resource specialist program (RSP) teacher came. No documentation of this request was provided.
23. In the July 2, 2015, response to the complaint, the District asserts that the parent did not request an IEP meeting in fall 2014.
24. An IEP amendment dated August 21, 2014, includes the addition of a self-advocacy goal. The amendment indicates the goal was inadvertently left out of Student 2's May 2, 2014, IEP.
25. A document titled "Parent's Addendum to Student 2's IEP" was signed by the parent on August 26, 2014, and date stamped received by the District August 27, 2014.

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CONCLUSION

Although there was an August 21, 2014, amendment to the May 2, 2014, IEP, the evidence is insufficient to support a finding that the parent made a request for a full IEP meeting in fall 2014. Therefore, a violation of 34 *CFR* Section 300.321(a)(2) is not found. **The District is in compliance.**

SUMMARY OF ALLEGATION FIVE

The Complainant alleges the District failed to implement the IEP, in violation of *EC* Section 56043(i). Specifically, the Complainant alleges the District failed to provide 60 minutes of push-in RSP services to Student 2.

APPLICABLE CITATION

EC Section 56043(i) requires, "A pupil's [IEP] shall be implemented as soon as possible following the [IEP] team meeting, pursuant to Section 3040 of Title 5 of the California Code of Regulations."

FINDINGS OF FACT

26. The IEP of May 2, 2014, called for 90 minutes per week of specialized academic instruction (SAI), specifically 3 weekly sessions of 30 minutes each, on a "pull-out" basis.
27. The parent asserts the RSP teacher stated at the May 1, 2015, triennial IEP meeting that she only provided 30 minutes per week of RSP services and had no information as whether anyone else had provided the additional 60 minutes per week.
28. The RSP teacher's statement is that he met with the parent at the start of the 2014–15 school year and reached an agreement that he would do pullout RSP services once per week for 30 minutes per session. There was no evidence that the IEP was modified to reflect such an agreement.

CONCLUSION

The District failed to meet the requirements of *EC* Section 56043(i). The evidence showed that Student 2 should have received 90 minutes per week of SAI, but instead received 30 minutes per week. The District failed to provide evidence demonstrating Student 2 was provided SAI services as required by the May 2, 2014, IEP. **The District is out of compliance.**

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SUMMARY OF ALLEGATION SIX

The Complainant alleges the IEP team failed to consider whether the student needed assistive technology devices and services when developing the IEP, in violation of 34 *CFR* Section 300.324(a)(2)(v). Specifically, the Complainant alleges the District failed to consider whether Student 2 would benefit from accommodations including use of a computer or spelling applications (Co-Writer).

APPLICABLE CITATION

34 *CFR* Section 300.324(a)(2)(v) requires, "(a) . . . (2) Consideration of special factors. The IEP Team must--Consider whether the child needs assistive technology devices and services."

FINDINGS OF FACT

29. The May 2, 2014, IEP states that: the student will receive 400 minutes per year of assistive technology consult; the student has access to a computer with a spellcheck program to assist the student with writing and spelling; the student has demonstrated good keyboarding skills; the student has access to word prediction software (Co-Writer) but often chooses not to use it for an unstated reason; the team discussed the issue of students not wanting to stand out as the only one who is using something.
30. According to the parent, District staff suggested that the parent should not push the student to use a computer or "Co-Writer" spelling application because middle school students "just want to fit in."
31. The May 1 and 22, 2015, IEP documents the discussion of the student's use of and need for a computer. Specifically, the team discussed that the computer helped with writing and spelling; the AT specialist discussed the student's present levels of keyboarding and word processing and recommended a specific program; and it was noted that the student had access to the computer, along with word prediction software, for written assignments.

CONCLUSION

The District met the requirements of 34 *CFR* Section 300.324(a)(2)(v). The evidence is insufficient to support a finding that the IEP team did not consider whether Student 2 needed assistive technology devices and services. **The District is in compliance.**

SUMMARY OF ALLEGATION SEVEN

The Complainant alleges the District failed to ensure parents are present at each IEP team meeting or are afforded the opportunity to participate, in violation of 34 *CFR* Section 300.322(a). Specifically, the District failed to afford the parent an opportunity to participate in the decision to exit Student 2 from special education.

APPLICABLE CITATIONS

34 *CFR* Section 300.322(a) states, “. . . Each public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate . . .”

EC Section 56329(c) states, “If the parent or guardian obtains an independent educational assessment at private expense, the results of the assessment shall be considered by the public education agency . . .”

34 *CFR* Section 300.503(a) establishes:

- (a) Notice. Written notice that meets the requirements of paragraph (b) of this section must be given to the parents of a child with a disability a reasonable time before the public agency—
 - (1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or
 - (2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. . .

FINDINGS OF FACT

- 32. At IEP meetings on May 1 and 22, 2015, the parent and the District disagreed as to the amount of progress the student had made; the significance of the student spelling difficulties, and whether Student 2 continued to qualify for special education as a student with a specific learning disability.
- 33. The parent presented an independent assessment completed in February 2015 (that diagnosed the student with Orthographic Dyslexia), an audiology report, and a vision therapy report. The independent assessment provider participated in the IEP meeting.
- 34. The parent asserts that District representatives disagreed with the independent assessment results and also stated that dyslexia is not a processing disorder.
- 35. The May 1, 2015, IEP notes indicate that the District’s representative stated that “dyslexia is not a criteria for [a specific learning disability]” and proposed that the student be exited from special education.

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36. The May 1, 2015, IEP notes state the District's assessor stated that a child who is being assessed due to characteristics of dyslexia shall be eligible for special education if the child meets the eligibility criteria for a specific learning disability.
37. The May 1, 2015, IEP documents parent's receipt of procedural safeguards and the evaluations, tests, records, and reports, as well as other relevant factors the District used as a basis for the determination the student was not eligible for special education services. The IEP meetings ended in a disagreement about continued eligibility.

CONCLUSION

The District met the requirements of 34 *CFR* Section 300.322(a), *EC* Section 56329(a), and 34 *CFR* Section 300.503. The parent did have an opportunity to participate in the IEP team meetings and decisions. The parent presented information, including the independent examiner's testing results, which the IEP team received and considered. Although the parent and the District disagreed about the validity of and significance of each other's testing results, the parent participated and the parent's results were considered. Finally, regarding the provision of written notice, the IEP can serve as notice as long as it meets the requirements of written notice outlined in 34 *CFR* Section 300.503. The May, 2015 IEP includes the information required under 34 *CFR* Section 300.503. **The District is in compliance.**

SUMMARY OF ALLEGATION EIGHT

The Complainant alleges the District failed to provide pupil records within five business days, in violation of *EC* Section 56504. Specifically, the Complainant alleges the District has failed to provide all records for Student 2 as requested.

APPLICABLE CITATION

EC Section 56504 requires, "The parent shall have the right and opportunity to examine all school records of his or her child and to receive copies pursuant to this section . . . within five business days . . ."

FINDINGS OF FACT

38. The parent records request dated February 9, 2015, was received by the District on February 17, 2015, and the District delivered hard copies of records within five business days, on February 19, 2015.
39. The parent asserted that the records were incomplete. Specifically, according to the parent, certain District-generated documents were missing (report cards, English learner test results); the parent's addendum to the student's IEP was printed out so

small that it was illegible; older versions of documents should have been replaced with newer versions; and certain documents the parent had provided to the District were not included (parent responses to IEPs, parent e-mails, and private assessments).

40. The parent requested that the District provide records electronically. The parent and District staff had a series of communications about doing so, and the District provided records electronically.

CONCLUSION

The District met the requirements of *EC* Section 56504. The District provided records in a timely manner, and when the parent expressed concern that some documents were missing and requested that the parent provide the records electronically, the District did so. **The District is in compliance.**

REQUIRED CORRECTIVE ACTION

Allegation Five

On or before September 15, 2015, the District shall propose a plan, sent to the parent in the form of a letter, with an offer to provide compensatory SAI services to Student 2 to make up for any missed services related to the District's failure to provide SAI. Specifically, compensatory services shall include 36 hours of SAI, to make up for one hour per week of SAI services missed for one school year. Acceptable evidence should include a copy of the letter sent to the parent and proof of mailing.

RECONSIDERATION NOTICE

The findings in this investigation report are specific to this case. While general rules are cited, findings in other investigations may differ due to the facts and issues in each case.

Pursuant to *California Code of Regulations*, Title 5, Section 4665, either party may request reconsideration:

Within 35 days of receipt of the Department investigation report, either party may request reconsideration by the Superintendent. The request for reconsideration shall designate the finding(s), conclusion(s), or corrective action(s) in the Department's report to be reconsidered and state the specific basis for reconsidering the designated finding(s), conclusion(s) or corrective action(s). The request for reconsideration shall also state whether the findings of fact are incorrect and/or the law is misapplied. . . . Pending the Superintendent's reconsideration, the Department report remains in effect and enforceable.

Compliance Case S-0952-14/15
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A request for reconsideration must be postmarked 35 days from the receipt of the investigatory report and sent to:

**Ana Marsh, Administrator
Complaint Resolution Unit
California Department of Education
1430 N Street, Suite 2401
Sacramento, CA 95814
916-445-4623 Phone
916-327-8878 Fax**

Evidence of required corrective actions or questions regarding corrective actions shall be directed to:

**Administrator
Focused Monitoring and Technical Assistance Unit Four
California Department of Education
1430 N Street, Suite 2401
Sacramento, CA 95814
916-445-9772 Phone
916-327-3534 Fax**

If compliance is determined in this investigation and no corrective actions are required, consider this case closed.



Fred Balcom, Director
Special Education Division

EXHIBIT 3



September 4, 2015

VIA CERTIFIED MAIL & FACSIMILE

Return Receipt Requested

Ana Marsh, Administrator
Complaint Resolution Unit
California Department of Education
1430 N Street, Suite 2401
Sacramento, CA 95814
Fax: 916-327-8878

Certified Mail #: 7004 2510 0005 7303 9910

Re: Request for Reconsideration, Compliance Case No. S-0952-14/15
STUDENT NAME: Various, Systemic Allegations
COMPLAINANT: Disability Rights Education & Defense Fund, 5 CCR
§ 4600(d)

Dear Ms. Marsh:

This is a request for reconsideration in response to CDE's July 31, 2015 investigation report ("Report"), received by DREDF on August 3, 2015, in the above referenced matter. Pursuant to 5 CCR § 4665(a), DREDF submits this reconsideration request within 35 days of receipt and identifies where CDE made incorrect findings of fact and conclusions or misapplied the law. The request also identifies where CDE failed to comply with mandated investigation procedures in state and federal regulations. The State should grant this reconsideration request, promptly reinvestigate the matter in full compliance with all investigation requirements, and issue appropriate remedies as requested in the underlying Complaint.

CDE has largely disregarded the Complaint, which is particularly concerning given that it included documentary evidence of unlawful policies and practices regarding specific learning disabilities, especially dyslexia, and admissions by the District as to these policies and practices which adversely affect countless students on a systemic basis. DREDF is also unsatisfied with CDE's conclusory findings regarding its obligation to monitor the District's compliance with the IDEA.

I. Summary of Incorrect Findings of Fact and Misapplications of the Law

- **Allegation 1:**¹ CDE failed to monitor the Berkeley Unified School District in the provision of free appropriate public education (FAPE) in the least restrictive

¹ The numbered allegations correspond to CDE's Report.

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environment and general supervision, including child find and effective monitoring, as required by 34 C.F.R. § 300.600, *et seq.*

- **Determination:** The CDE's monitoring efforts as applied to Berkeley Unified School District over the past year, met the requirements of 34 C.F.R. § 300.600.

This conclusory determination constitutes an incorrect finding of fact because CDE did not explain in any way how its monitoring activities in the District addressed the specific allegations of which CDE had notice more than a year ago.

DREDF wrote to CDE on August 29, 2014 (copying the District and SELPA Director) urging it to require the District to, among other things, reform its exclusionary policies regarding specific learning disabilities. See Complaint Exhibit A. Following that letter, DREDF staff met with District and CDE staff in Sacramento on December 5, 2014, in an attempt to review and resolve numerous concerns outlined in DREDF's August 29 letter, including the District's policies and practices related to specific learning disabilities (SLDs), especially dyslexia. On March 27, 2015, DREDF wrote to the District (copying CDE and the SELPA Director) to propose a settlement regarding the District's policies and procedures regarding students with SLD. See Complaint Exhibit B. To date, no substantive response has been received from either the District or CDE. DREDF filed the Complaint after giving both the District and CDE reasonable time to respond.

In its Report, CDE found itself in compliance by merely listing legal requirements related to monitoring and vaguely describing its recent monitoring work in the District. The Report cites CDE's April 2015 verification review (VR) of Berkeley Unified as evidence of compliance and claims this "monitoring effort is ongoing at this time and the verification report is still in process." Report at 5. This is not a satisfactory response because it does not describe CDE's efforts to address the specific allegations—that it was on notice of—through the VR.

Instead, CDE's Report should have provided details on how exactly it has met its IDEA monitoring requirements in the District. For example, CDE writes that it "reviews policies, procedures, and practices through its integrated monitoring activities," Report at 4, but fails to explain how it conducts these activities in the District or how it reviewed the District's SLD policies per concerns DREDF had brought directly to its attention last year. Moreover, the Report cites corrective actions CDE ordered in the District following a 2014 Office of Administrative Hearing (OAH) decision, but does not elaborate on how these corrective actions do or do not relate to the Complaint allegations.

Because its conclusory determination is not supported by any substantive findings of fact, CDE should reconsider the allegation and conduct a full investigation into its monitoring efforts in the District, in light of DREDF's allegations of systemic

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noncompliance and several efforts to get CDE's attention to correct identified noncompliance.

- **Allegation 2:** The District fails to identify, locate, and assess all individuals with exceptional needs, in violation of Cal. Educ. Code § 56301(a). Specifically, the Complainant alleges the SELPA and District implement exclusionary policies and procedures related to students with specific learning disabilities (especially dyslexia).
- **Determination:** The District met the requirements of Cal. Educ. Code § 56301(a), finding that both its position with respect to dyslexia and its child find policies and procedures are consistent with the law.

CDE relied on incomplete findings of fact in sanctioning the District's well-documented, patently illegal policies and practices regarding dyslexia.

In the Report, CDE simply accepted the District's assurance of compliance citing only to findings of fact 10 and 11 on p. 7, and disregarded nearly all of the contrary evidence provided by DREDF demonstrating the District's unlawful policies and practices relating to dyslexia. Its failure to analyze evidence that directly contradicts the District's response to the Complaint constitutes an obviously incomplete investigation into the District's policies and practices. Moreover, while CDE found evidence of noncompliance, see findings of fact 6-9 on p. 7 of the Report and finding of fact 34 on p. 13, it failed to issue necessary corrective actions. CDE may not ignore or overlook finding of fact 8 on p. 7, which constitutes an admission by a District administrator that the "District does not consider dyslexia to be a processing disorder." CDE improperly leaves unresolved these findings of fact that should have led to a conclusion that the District is in noncompliance and corrective action are necessary.

CDE also failed to fully investigate the allegations against the NR SELPA. Finding of fact 12 on p. 7 states that the SELPA plan lists dyslexia as a "disorder" or "condition," but CDE failed to investigate the legality of the SELPA's SLD eligibility criteria.² As explained in the Complaint at 1, n.1, the SELPA's eligibility criteria are outdated, fail to recognize dyslexia as a qualifying SLD, and provide a finite list of "basic psychological processes" that excludes a number of recognized processes (e.g., phonological processing). The latter is no small matter. The list of basic psychological processes in 5 CCR § 3030(b)(10) is non-exhaustive, yet the SELPA policy precludes such an application of the law.³ Because the District applies the SELPA's unlawful criteria,

² The hyperlink to this policy that DREDF provided in the Complaint is no longer active, although it was functioning at the time the Complaint was filed. The policy cited 5 CCR § 3030(j), which was superseded by 5 C.C.R. § 3030(b)(10) in March 2014.

³ AB 1369 attempts to end this unlawful practice by requiring the state board to include "phonological processing" in the list of basic psychological processes. See Assem. Bill

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many eligible students with SLDs, especially dyslexia, are wrongfully denied special education and related services. CDE should investigate this policy on reconsideration and affirm that dyslexia satisfies the processing disorder prong of the definition of SLD, and that a student with dyslexia who also shows a severe discrepancy between achievement and intellectual ability would qualify for special education.

There can be no doubt that it is well-established by law that dyslexia is a processing disorder. State and federal law define dyslexia as “**a disorder in one or more of the basic psychological processes**” (emphasis added).⁴ In OAH Case Number 2013120159, the ALJ stated that “[t]o the extent Berkeley believed that dyslexia was not a processing disorder, as highlighted by [Interim Special Education Director] Graham’s testimony, its position was not credited.”⁵ Federal courts have also held that dyslexia constitutes a processing disorder.⁶

CDE should reconsider this allegation and order the District to immediately discontinue all policies, procedures and practices that fail to recognize dyslexia as a processing disorder.⁷ CDE should order all of the corrective actions requested in the Complaint, including that the District should publicly clarify in writing its position on dyslexia.

- **Allegation 2 (Student 1):** The District fails to identify, locate, and assess all individuals with exceptional needs, in violation s of Cal. Educ. Code § 56301(a).
- **Determination:** There was insufficient evidence to support a finding that the District’s position on eligibility for Student 1 was incorrect.

CDE’s findings of fact regarding Student 1’s eligibility accurately demonstrate the District’s unlawfully restrictive SLD eligibility and parents’ related frustration. The findings clearly show that Student 1’s evaluations revealed both a severe discrepancy between achievement and intellectual ability and an underlying processing disorder:

1369, 2015-2016 Reg. Sess. (Cal. 2015), available at:

http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB1369

(last visited August 21, 2015). The Senate passed the bill on September 3, 2015, and the bill is now in the Assembly.

⁴ 5 CCR § 3030(b)(10) and 34 C.F.R. § 300.8(c)(10)(i).

⁵ OAH Decision 2013120159 at 35.

⁶ See, e.g., *Michael P. v. Dep’t of Educ.*, 656 F.3d 1057, 1060 (9th Cir. 2011) (identifying dyslexia as a “disorder in one or more basic psychological processes”).

⁷ Because the District applies the discrepancy model, a student with a diagnosis of dyslexia must still demonstrate a severe discrepancy between achievement and intellectual ability. But the District cannot categorically refuse to qualify students with dyslexia who demonstrate a severe discrepancy simply because of its mistaken belief that dyslexia is not a processing disorder. See Complaint at 4-5.

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At the April 21, 2015, IEP meeting, the District found: there was a significant discrepancy between the student's written expression achievement score of 91 and the student's verbal comprehension; Student 1 had a sensory motor processing disorder that emerged in difficulties with handwriting and spelling; Student 1 benefitted from using a computer for written work; and Student 1 received all As and one B in academic classes.

Report at 8. The Report further notes that the parent of Student 1 disagreed with the District's determination of non-eligibility. *Id.*

Despite these clear findings, CDE still inexplicably concluded that there was "insufficient evidence" that the District's position was incorrect. As discussed further below, CDE should have interviewed the parent of Student 1 for further evidence and recognized the District's inconsistent application of the SLD criteria as a part of the larger systemic problem described at length in the complaint. CDE's failure to do so despite clear evidence of noncompliance makes its reliance on the District's false assurances all the more egregious. The District's explanation for exiting Student 1—that it could accommodate her in the general education classroom—is not a lawful reason, particularly absent any supporting evidence. See Exhibit F. There is no reason why a student with an SLD cannot receive special education and related services in the general education classroom.

CDE should reconsider this allegation as evidence of the District's inconsistent and patently unlawful application of the IDEA SLD eligibility criteria.

- **Allegations 3-8 (Student 2):** Various procedural and substantive allegations relating to the IEP Team's review and revision of Student 2's IEP and the District's implementation of the IEP services and supports.
- **Determination:** CDE found the District in compliance with all allegations relating to Student 2 except for allegation 5 regarding the District's failure to fully implement the student's push-in resource support.

CDE's conclusions regarding Student 2 also rely on incorrect findings of fact and cursory reviews of submitted evidence. The Report claims there was "insufficient evidence" to support most of these allegations, yet CDE did not compile further evidence through a parent interview or record review or respond to DREDF's several attempts to provide additional evidence. Because of the deficiencies in its investigation, CDE should reconsider the complaint and conduct a full investigation into allegations 3, 4, 6, 7, and 8.

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Although DREDF believes a reversal of CDE's determinations is supported by the relevant facts already submitted, we must reiterate that it is not the complainant's responsibility to produce sufficient evidence:

Under 34 CFR §300.152, once a State complaint is properly filed, it is solely the SEA's duty to investigate the complaint, gather evidence, and make a determination as to whether a public agency violated the IDEA. It is not the burden of the complainant – or any other party – to produce sufficient evidence to persuade the SEA to make a determination one way or another. Rather, the SEA must independently review and weigh the evidence, generally by reviewing student and school records, data and other relevant information, and come to a determination supported by relevant facts.⁸ (emphasis added.)

CDE however unlawfully placed the burden on the complainant to prove these allegations. For example, in allegation 3, the parent claimed that the May 2, 2014 IEP falsely stated Student 2's baseline spelling score. Report at 10, finding of fact 21. Without an explanation, CDE found that there was "insufficient evidence to support a finding that the District failed to include present levels of performance in Student 2's May 2, 2014 IEP." *Id.* To resolve this factual dispute, CDE should have reviewed the relevant records and responded to DREDF's rightful requests for the assigned investigator's contact information and opportunities to provide further evidence through parent interviews.

The Report states that CDE left a voicemail for this parent on July 21, 2015, Report at 1, but she denies receiving such a message. DREDF submitted letters to CDE on July 16th and July 24th expressing concern that CDE had yet to contact the parent witnesses through DREDF as repeatedly requested. Notably, DREDF attached some of Student 2's educational records to the July 24th letter to support the Complaint allegations and aid CDE's investigation. CDE did not respond to these letters.

In light of the plainly deficient investigation into the allegations regarding Student 2, CDE should reconsider allegations 3, 4, 6, 7, and 8, contact DREDF to facilitate the parent interview, and independently review the student's records as required to make appropriate findings and order appropriate corrective actions.

⁸ *Letter to Reilly*, 114 LRP 49672 (OSEP 2014), <http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/acc-13-020871r-me-reillystatecomplaints.pdf> (last visited May 19, 2015).

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II. Unaddressed Allegations

CDE's Report fails to address a number of the key allegations in the Complaint. DREDF wrote to CDE on June 23, 2015 to clarify the scope of the investigation and ensure CDE did not overlook those allegations, but did not receive a substantive response to this letter or DREDF's follow up letters of July 16th and July 24th. Because of these omissions, CDE should grant reconsideration and initiate a full investigation into the claims described below.

DREDF's sole contact with CDE during the investigation was a June 17th phone interview between DREDF attorney Robert Borrelle and CDE investigators Phil Cannon and Maria Pittman. The investigators contacted Mr. Borrelle to ask questions about obscure procedural violations in the parent witness statements that he felt were irrelevant to the systemic allegations (e.g., whether a general education teacher attended an IEP meeting). Mr. Borrelle expressed his concern at the time and explained that the parent witness statements were meant to support the primary allegations in the complaint. DREDF memorialized these points in a follow-up letter on June 23, 2015:

DREDF's May 29th complaint *primarily concerned BUSD's current policies and practices related to specific learning disabilities, especially dyslexia*, which we believe violate state and federal laws. DREDF was the sole named complainant, and all of the relevant legal allegations were contained in the body of our complaint, including legal citations to each. We attached five parent declarations as *supporting evidence* to illustrate how the District's exclusionary policies on specific learning disabilities negatively affect students and their families. See 5 CCR § 4663(b)[.]

See attached letter to Maria Pittman (Jun. 23, 2015) (emphasis in original). CDE responded in a letter dated June 26, 2015 that these systemic allegations would be addressed as part of DREDF's child find allegation, Cal. Educ. Code § 56301(a).

Allegation 2 in the Report however does not to address most of the dyslexia-related claims and evidence. Absent is a response to the allegation that the District dissuades parents of students with a range of legally recognized specific learning disabling conditions from requesting IDEA evaluations. CDE ignored the numerous examples in the witness statements of the District verbally "counselling out" when parents express concerns with their children's struggles. See, e.g., Exhibits D and E. This omission is particularly alarming considering that finding of fact 7 on p. 7 illustrates this practice. When the parent of Student 3 approached a school counselor to express her concerns with her child's dyslexia-related issues, the counselor responded that the District "does not offer any services around dyslexia." Report at 7. On reconsideration, CDE should

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carefully investigate this allegation and reach out to the witnesses (again, through DREDF) for a more detailed examination of these unlawful child find practices.

CDE also failed to investigate DREDF's allegation that the District lacks appropriate, research-based curricula for students with SLDs. See, e.g., Complaint Exhibits G and I. The witness statements explain that even when the District does identify students with dyslexia, it does not implement appropriate interventions that meet their individualized needs. See, e.g., Exhibit G. CDE should investigate this allegation and order the District to administer programs to students with dyslexia that comply with state and federal law to ensure FAPE.

III. Investigation Procedure Violations

The procedures CDE utilized during the course of its investigation of this Complaint fall far short of the state requirements in 5 CCR § 4600 *et seq.* and the federal requirements in 34 C.F.R. §§ 300.151-300.153. As a result, CDE should accept this request for reconsideration and properly investigate the systemic allegations presented in the initial complaint.

The Report states that CDE left telephone messages for three parent witnesses on July 21, 2015. It is unclear why CDE did not contact all six of the parent witnesses, as each of their declarations provided evidence supporting our main systemic allegation regarding the District's practices and policies related to SLDs. Only one of our parent witnesses confirmed to DREDF that she received a telephone message from CDE. She was unable to respond because she was out of the country at the time and reviewed the message weeks later. Regardless of how many witnesses CDE called, it is unacceptable that the investigators did not honor DREDF's repeated requests to be contacted first and that CDE did not make any attempt to contact any parent witnesses until July 21st, 50 days into the mandatory 60-day investigation.

CDE also failed to provide DREDF with the name and contact number of the assigned investigator, mandated by 5 CCR § 4662(a), despite requests for this information in DREDF's June 23rd, July 16th, and July 24th follow-up letters. See Letter to Maria Pittman (June 23, 2015) ("We request that you provide us with the name and contact information of the investigator, in writing, as required by 5 CCR § 4662(a)."); Letter to Ana Marsh (July 16, 2015) ("We are also hampered by CDE's failure to provide us with the name and contact information of the assigned investigator as required by 5 CCR § 4662(a), despite our June 23rd request for this information."); Letter to Ana Marsh (July 24, 2015) ("CDE has also yet to provide us with the name and contact information of the assigned investigator as required by 5 CCR § 4662(a), despite multiple requests for this information."). The lack of this information violated regulatory requirements and

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hindered DREDF's ability to fully engage in the investigation process, as cited in our follow up letters that CDE completely ignored.

Conclusion

We urge CDE to take all of the foregoing corrective measures, to remedy its faulty investigation of very serious systemic allegations of noncompliance with special education laws. DREDF brought the Complaint on behalf of highly vulnerable young children whose rights clearly require more than simple assurances by the District. Proper investigations of compliance complaints are all the more important in light of OSEP's increased focus on complaint management systems. OSEP recently launched a new dispute resolution tool for states to emphasize the clear nexus between effective dispute resolution systems and improved outcomes for students with disabilities.⁹

Thank you for your review of DREDF's request for reconsideration. Please contact me or Robert Borrelle so that we may directly respond to any questions or concerns about this request.

Sincerely,



Larisa Cummings
Staff Attorney

Enclosures:

Letter to Maria Pittman (Jun. 23, 2015)
Letter to Ana Marsh (July 16, 2015)
Letter to Ana Marsh (July 24, 2015)

Cc via email:

⁹ Mark Sherman, "OSEP to offer resources on IDEA compliance as complement to results work," *LRP Publications* (July 27, 2015). <http://www.specialedconnection.com/LrpSecStoryTool/servlet/GetStory?docid=2269838> 1 (last accessed Sept. 4, 2015): "As we ask states to move more of their resources into improving results, we've said since the beginning that ... it's even more important that they have a rigorous dispute resolution system....So that's what we're really focusing on, to make sure that their **complaint process**, due process hearing process, resolution, mediation, and other forms of informal dispute resolution are **working effectively**." (emphasis added)

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Fred Balcom, Director of Special Education, California Department of Education
Ruby Smith, FMTA Consultant, California Department of Education
Lisa Graham, Director of Special Education
Martha Schultz, Director, North Region SELPA
Members of the Berkeley Unified School District School Board
Donald Evans, Superintendent of the Berkeley Unified School District

EXHIBIT 4

[REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED]

**CALIFORNIA DEPARTMENT OF EDUCATION
Reconsideration Investigation Report
Case R-0132-15/16 for Case S-0952-14/15**

Public Agency Donald Evans, Superintendent Berkeley Unified School District 2020 Bonar Street Berkeley, CA 94702	Complainant Larisa Cummings 3075 Adeline Street, Suite 210 Berkeley, CA 94703
Special Education Director Kay Altizer, Executive Director, Special Education Berkeley Unified School District	Parents Various
Special Education Local Plan Area (SELPA) Martha Schultz, Director North Region SELPA 1051 Monroe Street Albany, CA 94706	Students Various: Student 1 [REDACTED] Student 2 [REDACTED] Student 3 [REDACTED] Student 4 [REDACTED] Student 5 [REDACTED]
Complaint Received June 1, 2015 Reconsideration Received September 4, 2015	Report Mailed July 31, 2015 Reconsideration Report Mailed October 13, 2015

The Complainant requested reconsideration on September 4, 2015, and the request was approved on September 17, 2015. Changes to the original report (S-0952-14/15) are bolded and deletions are struck through.

The reinvestigation included telephone interviews with the parents of Students 3, 4, and 5 on October 7, and the parent of Student 2 on October 9, 2015. Student 1's parent was e-mailed on October 6 and responded on October 11, 2015. The Complainant was interviewed on October 5, 2015. The District was contacted on October 9, 2015.

INVESTIGATION PROCEDURES

The investigation and conclusions are based on the investigator's review of materials and documents provided by the Complainant and the District, as well as telephone contacts with the Complainant on June 17, 2015, and the District on July 21, 2015. Telephone messages left for the parents of Student 1, Student 2, and Student 3 were not returned.

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A complaint filed with the California Department of Education (CDE) shall allege a violation of the federal Individuals with Disabilities Education Improvement Act (*United States Code*, Title 20, sections 1400 et seq.), or a provision of this part, that occurred not more than one year before the date that the complaint is received by the CDE, pursuant to California *Education Code (EC)* Section 56500.2 and *Code of Federal Regulations*, Title 34 (34 *CFR*), Section 300.153(c). The complaint was received June 1, 2015, and therefore the applicable time period for the investigation is June 1, 2014 through June 1, 2015. For this reason, certain specific concerns regarding three students are discussed in this report, even though additional information about other students (beyond the statute of limitations) was offered by the Complainant.

SUMMARY OF ALLEGATION ONE

The Complainant alleges the District, the SELPA, and the CDE failed to implement special education requirements regarding students with specific learning disabilities. Allegation one addresses the concerns with the CDE. Allegations 2 through 8 address the District and SELPA issues.

The Complainant alleges the CDE failed to monitor the Berkeley Unified School District in the provision of free appropriate public education (FAPE) in the least restrictive environment and general supervision, including child find and effective monitoring, as required by 34 *CFR* Section 300.600, et al.

Specifically, the Complainant alleges that the CDE has failed to take necessary steps to enforce compliance with child find activities under the Individuals with Disabilities Education Act (IDEA), as related particularly to students with specific learning disabilities, especially dyslexia.

The Complainant alleges the CDE should have exercised its oversight responsibilities and interceded.

APPLICABLE CITATION

34 *CFR* Section 300.600 requires:

- (a) The State must—
 - (1) Monitor the implementation of this part;
 - (2) Make determinations annually about the performance of each LEA [local educational agency] using the categories in § 300.603(b)(1);
 - (3) Enforce this part, consistent with § 300.604, using appropriate enforcement mechanisms, which must include, if applicable, the enforcement mechanisms identified in § 300.604(a)(1) (technical assistance), (a)(3) (conditions on funding of an LEA), (b)(2)(i) (a corrective action plan or improvement plan), (b)(2)(v) (withholding funds, in whole or

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- in part, by the SEA [state education agency]), and (c)(2) (withholding funds, in whole or in part, by the SEA); and
- (4) Report annually on the performance of the State and of each LEA under this part, as provided in § 300.602(b)(1)(i)(A) and (b)(2).
- (b) The primary focus of the State's monitoring activities must be on—
- (1) Improving educational results and functional outcomes for all children with disabilities; and
- (2) Ensuring that public agencies meet the program requirements under Part B of the Act, with a particular emphasis on those requirements that are most closely related to improving educational results for children with disabilities.
- (c) As a part of its responsibilities under paragraph (a) of this section, the State must use quantifiable indicators and such qualitative indicators as are needed to adequately measure performance in the priority areas identified in paragraph (d) of this section, and the indicators established by the Secretary for the State performance plans.
- (d) The State must monitor the LEAs located in the State, using quantifiable indicators in each of the following priority areas, and using such qualitative indicators as are needed to adequately measure performance in those areas:
- (1) Provision of FAPE in the least restrictive environment.
- (2) State exercise of general supervision, including child find, effective monitoring, the use of resolution meetings, mediation, and a system of transition services as defined in § 300.43 and in 20 U.S.C. [United States Code, Title 20]1437(a)(9).
- (3) Disproportionate representation of racial and ethnic groups in special education and related services, to the extent the representation is the result of inappropriate identification.
- (e) In exercising its monitoring responsibilities under paragraph (d) of this section, the State must ensure that when it identifies noncompliance with the requirements of this part by LEAs, the noncompliance is corrected as soon as possible, and in no case later than one year after the State's identification of the noncompliance.

FINDINGS OF FACT

1. The CDE has a general supervision system statewide which is divided organizationally into four regional units called Focused Monitoring and Technical Assistance Units (FMTA). For Alameda County, and more specifically the District and its SELPA, FMTA IV provides general and specific monitoring and technical assistance.
2. The general supervision system described in the CDE's State Performance Plan/ Accountability Progress Report (SPP/APR) includes the following key components:

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- a. SPP/APR. The SPP/APR is central to the system of general supervision in California. The SPP includes 20 indicators addressing a broad range of both compliance processes and student outcomes. The indicators cover each of the priority areas identified in the IDEA: FAPE in the least restrictive environment, disproportionality, effective general supervision including child find, and effective transitions. The SPP identifies the baselines, benchmarks, and targets in each of the 20 indicator areas and provides a structure for annually reporting at the state and local level.

The SPP/APR are developed through a stakeholder process using information from CDE's student and district-level data collections, integrated monitoring activities, and dispute resolution procedures. Similarly, the SPP/APR data are used for the selection of programs for review, identification of statewide and local needs, determination of monitoring activities, and provision of training and technical assistance. The SPP/APR and related calculations serve as the basis for additional state and local reporting for: public reporting of LEA indicators, LEA compliance determinations, and identification of districts having significant disproportionality.

- b. Policies, Procedures, and Effective Implementation. The CDE reviews policies, procedures, and practices through its integrated monitoring activities, dispute resolution processes, and the evaluation of student and district-level data. Whenever policies, procedures, or practices are found noncompliant, districts are required to make corrections, and demonstrate that they are implementing the policies, procedures, and practices correctly (as verified by subsequent record review demonstrating compliance at the 100 percent level).
- c. Data California Special Education Management Information System (CASEMIS). The CDE draws on both General Education (GE) and Special Education (SE) data bases to implement California's system of general supervision. The data set is updated biannually and described in detail in the CASEMIS Technical Assistance Guide (see <http://www.cde.ca.gov/sp/se/ds/documents/casemistag1112.doc>). CASEMIS software contains internal data checks and requires certification by the submitting SELPA. The software also identifies data anomalies, which are unusual or substantial changes from one year to the next. SELPAs and districts are required to explain these changes that are often the result of changes in data collection practices or definitions. Lastly, CASEMIS data are verified on-site as a part of the monitoring processes.

Other Special Education Data. In addition, parent input data are collected through CASEMIS and also through a contract with the Sacramento County Office of Education. The special education division of the CDE maintains

three data bases related to: (1) monitoring findings and correction, (2) complaints findings and correction, and (3) due process hearing findings and correction. A separate data system is maintained by the Office of Administrative Hearings (OAH) regarding the procedures, timelines, and outcomes of due process hearings.

- d. The CDE statewide systems: California Longitudinal Pupil Achievement Data System (CALPADS) and the CASEMIS are the basis for IDEA reporting and accountability. APR indicators are used to comply with reporting requirements of 34 *CFR* Section 300.600 for monitoring including: SPP and APR; annual compliance determinations; data identified non-compliance; disproportionality, and significant disproportionality. APR indicators are also used to select districts for Verification Reviews (VRs) and to form the nucleus of the compliance items reviewed in Special Education Self-Reviews (SESRs) and VRs. CDE reviews all compliance indicators for every District every year; conducts SESRs every four years, and selects Districts for VRs each year using a combination of indicators from the annual compliance determinations. Monitoring includes review of student records, policies and procedures, fiscal records, IEP implementation, educational benefit, and a review of the complaint history and individualized items selected for each district and included in a monitoring plan.
3. The CDE conducted a verification review (VR) of Berkeley Unified School District including a site visit April 6, through April 10, 2015, and **May 20, 2015, through May 22, 2015**. This monitoring effort is ongoing at this time and the verification report is still in process. **The monitoring plan tested protocol items in 85 student records, examined SELPA and District policies and procedures, interviewed 38 District staff at nine school sites and 11 parents. Preliminary data shows a review of District level policies and procedures and SELPA governance provided zero non-compliant findings. Two additional policy area concerns that were investigated during the VR were: (1) corrective actions ordered by CDE as a result of a 2014 OAH decision regarding procedural violations found in the District's child find practices; and (2) allegations the District policies and practices excluded students with Dyslexia from eligibility under specific learning disabilities. The corrective actions were satisfied as of February 2015, and the VR found no exclusionary language regarding Dyslexia in SELPA and/or District policies and procedures. In addition, the VR examined, through interviews with school site therapists, special education teachers, and the SELPA director, policies and procedures related to Dyslexia and eligibility for special education. No non-compliant issues were found.**
 4. A 2014 OAH decision found in favor of the District in a dispute over eligibility under the category of specific learning disability but raised concerns regarding the District's child find policies. **In a July 1, 2014, letter to the District t**The CDE imposed

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corrective actions, and the District submitted revised policies that satisfied the corrective actions as of February 2015.

5. In addition to the monitoring and technical assistance provided by the CDE unit to the District and SELPA, the CDE investigated six complaints filed against the District for the 2014–15 school year, which included a total of 16 separate allegations. The CDE found the District non-compliant on three of the sixteen allegations and ordered corrective actions. One of the sixteen allegations was related to child find; the District was found compliant. There have not been any allegations related to identification of students with specific learning disabilities. There was one 2014–15 reconsideration for a 2013–14 complaint with one allegation resulting in a finding of noncompliance on one allegation. The District satisfactorily performed all corrective actions by the deadline imposed by CDE (with one exception in which evidence was received 10 days after the deadline) and within the one year requirement imposed by law.

CONCLUSION

The CDE's monitoring efforts as applied to Berkeley Unified School District over the past year, met the requirements of 34 *CFR* Section 300.600. **The CDE is in compliance.**

SUMMARY OF ALLEGATION TWO

The Complainant alleges the District failed to identify, locate, and assess all individuals with exceptional needs, in violation of *EC* Section 56301(a). Specifically, the Complainant alleges the SELPA and District implement exclusionary policies and procedures related to students with specific learning disabilities (especially dyslexia). The Complainant also alleges the District failed to make students eligible for special education services despite assessment results indicating otherwise.

APPLICABLE CITATIONS

EC Section 56301(a) provides:

- a) All children with disabilities residing in the state . . . who are in need of special education and related services, shall be identified, located, and assessed and a practical method [shall be] developed and implemented to determine which children with disabilities are currently receiving needed special education and related services . . .

34 *CFR* Section 300.8(c)(10) provides:

[A specific learning disability is] a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect

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ability to listen, think, speak, read, write, spell, or do mathematical calculations . . . Such term includes such conditions as . . . dyslexia.

EC Section 56337 provides, "A specific learning disability . . . means a disorder in one or more of the basic psychological processes . . . which may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or perform mathematical calculations. . . The term "specific learning disability" includes conditions such as . . . dyslexia . . ."

EC Section 56337.5(a) provides:

A pupil who is assessed as being dyslexic and meets eligibility criteria specified in Section 56337 and subdivision (j) of Section 3030 of Title 5 of the California Code of Regulations for the federal Individuals with Disabilities Act (20 U.S.C. Sec. 1400 and following) category of specific learning disabilities is entitled to special education and related services. [emphasis supplied]

California Code of Regulations, Title 5 (5 *CCR*), Section 3030(b)(10) provides:

Specific learning disability means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may have manifested itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations, including conditions such as . . . dyslexia . . . The basic psychological processes include attention, visual processing, auditory processing, sensory-motor skills, cognitive abilities including association, conceptualization and expression.

FINDINGS OF FACT

6. In the complaint filed with the CDE on June 1, 2015, the complainant alleges the District does not recognize dyslexia as a "disorder" or "condition" as described in the above-cited law.
7. In the complaint received by the CDE on June 1, 2015, Student 2's parent declares **in a May 20, 2015, signed statement asserts** that at an IEP meeting in May 1, 2015, a District representative said dyslexia is not a processing disorder. **In addition, at this triennial IEP meeting, the District tried to exit the student from special education due to improved grades, and testing that did not show a processing disorder or a significant discrepancy between achievement and cognitive ability. The parent states that an independent assessment was also conducted and the independent assessor presented findings that show a discrepancy between achievement and intellectual ability, and reaffirmed the student is dyslexic, specifically Orthographic Dyslexia. According to the parent, during the May 1, 2015, IEP, the school psychologist countered that the student does not qualify for special education since dyslexia is not a processing disorder.**

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The parent concludes that the District convened another IEP on May 22, 2015, disagreed with the independent assessment, and still tried to exit the student from special education, but when the school principal supported the student continuing on the IEP, the District “back-tracked.”

8. The parent of Student 3 **declares** asserts that in fall 2014, a school counselor said the District “does not offer any services around dyslexia.” **The June 13, 2015, declaration states the student was exited from special education and placed on a 504 plan in 2013 even though STAR testing showed below grade level reading scores. The parent states the District informed her that to qualify for an IEP and special education services, the student not only has to have a disability, but also demonstrates difficulty learning grade level material. The student’s grades were too high to qualify for an IEP she was told. The parent states that they accepted the 504 plan and the extra time on tests helped, but when the student transitioned into high school, the student’s grades were too high and the 504 plan was dropped. The student continued to struggle with spelling and reading, and the parent was told to seek medical help from the student’s doctor.**
9. **The parent of Student 4 declares, in a statement dated May 27, 2015, that the District attempted to exit the student from special education in May 2011 and 2012 even though the student continued to have a central auditory processing disorder and dyslexia. When the parent requested another IEE, the District allowed the student to continue on an IEP. The parent concludes the student reads at grade level but the parents are forced to pay out of pocket for Slingerland remediation.**
10. **The parent of Student 5 declares, in a May 10, 2015, statement that the student’s initial IEP was held in November 2013, and the District agreed there was a severe discrepancy between the student’s ability and achievement score in reading, but found that the student did not have a processing disorder despite being diagnosed with dyslexia. The parent declares the program specialist stated that Dyslexia was not a processing disorder and therefore, the student did not qualify for special education under the category of specific learning disability. As a result, the parents filed for due process (OAH case 2013120159) and the Administrative Law Judge found the student ineligible for specific learning disability due to attendance problems. The parents state the student was removed from the District and unilaterally placed in a charter school in another District and found eligible for specific learning disabilities (SLD) based on a diagnosis of dyslexia.**
11. **A March 24, 2015, e-mail from the District to the Complainant (prior to the filing of the complaint) states: “The District does not have a policy on dyslexia and is not required to have one under state or federal law. The District does not consider dyslexia to be a processing disorder. However, an individual may have a**

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processing disorder combined with other factors that may lead to a clinical diagnosis of dyslexia. Medical and clinical diagnoses are considered when evaluating students and determining eligibility for special education services. State and federal law requires that students are found eligible under one or more of 13 disability categories. Dyslexia is not a category. A student that has a clinical diagnosis of dyslexia may or may not meet the eligibility criteria for special education”

12. ~~The District’s response to the complaint does not contend that a student with dyslexia cannot be found eligible for special education as a student with a specific learning disability.~~
13. The District’s response to the complaint contends that:

Dyslexia is NOT a qualifying condition under the Individuals with Disabilities Education Act , as the Complainant asserts . . . It is true that Education Code section 56337 states that the term ‘specific learning disability’ includes ‘conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia’. But noting that the term might encompass such conditions is not the same as saying that having a clinical diagnosis of such a condition automatically qualifies the student for an IEP. In fact one needs only to read the very next statute—section 56337.5—to see this is clearly not the case. Section 56337.5, subdivision (a), states that ‘a pupil who is assessed as being dyslexic and who meets eligibility criteria specified in [applicable state and federal law] category of specific learning disability is entitled to special education and related services.’ Subdivision (b) continues, ‘If a pupil who exhibits the characteristics of dyslexia or another related reading dysfunction is not found to be eligible for special education and related services pursuant to subdivision (a), the pupil’s instruction shall be provided in the regular education program.’ This statute is entirely clear that a diagnosis of dyslexia, standing alone, does not qualify a student for special education. the fact that a student has dyslexia, in and of itself, does not mean that he/she is eligible for special education as a student with a specific learning disability”

14. The SELPA plan cites the law listing dyslexia as a “disorder” or “condition” as described in the citations above.
15. The District’s IEP form states that a specific learning disability is a “disorder . . . including such conditions as . . . dyslexia . . .” that may have manifested itself in an imperfect ability to perform certain specifically identified skills.

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16. In OAH Decision Number 2013120159 dated March 17, 2014, OAH found:

33. Student failed to meet the burden of proof of establishing that she met all three of the criteria for a specific learning disability under the severe discrepancy model, namely, that the student has: 1) a severe discrepancy between intellectual ability and achievement; 2) which results from a disorder in one or more of the basic psychological processes; and 3) that the student's educational needs cannot be provided for with modification of the regular school program.

The OAH decision concluded: 44. Even if the Student had proven that the student's significant discrepancy was due to a processing disorder and not the result of the student's poor school attendance, to qualify for special education, Student must also require specialized instruction and related services in order to receive educational benefit . . . By all teacher accounts, from kindergarten through the time of hearing, Student was functioning well in the general education environment, receiving benefit, and making progress.

OAH found in favor of the District, stating that although the student had dyslexia, the student was not eligible for special education as a student with a specific learning disability. That decision is binding on the CDE per 34 *CFR* Section 300.152(c)(2)(i). OAH, however, also noted concerns about the District's child find policies, specifically as related to the use of a student study team decision on page 30. On July 1, 2014, based on the OAH's concerns, the CDE assigned the District corrective actions relating to its child find procedures. Specifically, the CDE required the District to revise child find policies and procedures in order to assure compliance with state and federal law and to conduct staff training on child find requirements. In February 2015, the CDE confirmed that the revised policies and procedures and evidence of training submitted by the District satisfied the corrective actions.

17. **The Special Education Enrollment Data Report for 2014-15 by age and disability indicates the District has 474 students identified with a specific learning disability out of a total of 1,119 students eligible for special education and services in the District, or 43 percent of the students are identified with a specific learning disability.**
18. **See Allegation one findings of Fact 3 and 4 above.**
19. **Information gathered from telephone interviews with the parents of the various students indicates that the District has denied most of the students special education eligibility based on either the student's good grades or the student's ability to work at grade level. However, most parents interviewed**

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assert the students show a severe discrepancy between ability and achievement and have diagnoses of Dyslexia which District staff told the parents was not a processing disorder that would qualify the students under a specific learning disability. Most parents report their students were forced into a Section 504 plan with accommodations like extra time on tests which helped but the parents were also left to supplement services by providing services like Slingerland or Lindamood Bell. One parent stated that she elected to move the student to a new District where the student did qualify for special education services.

CONCLUSION

~~The District met the requirements of EC Section 56301(a). The District's position with respect to dyslexia, in Findings of Fact 10 and 11, is consistent with law, and the District's child find policies and procedures, as noted in findings of fact 4, 12, and 13, are consistent with law.~~ **The District has recently revised its child find policies pursuant to CDE corrective actions, and its position on dyslexia is consistent with law, in that dyslexia alone is not a qualifying condition for special education eligibility. The District is in compliance.**

Student One

ADDITIONAL CITATIONS

EC Section 56342.5 states, "A [LEA] shall ensure that the parent of each individual with exceptional needs is a member of any group that makes decisions on the educational placement of the individual with exceptional needs."

34 *CFR* Section 300.503(a) establishes:

- (a) Notice. Written notice that meets the requirements of paragraph (b) of this section must be given to the parents of a child with a disability a reasonable time before the public agency—
 - (1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or
 - (2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. . .

FIINDINGS OF FACT

- 20. The parent requested an evaluation for Student 1, who was attending a private school; and the District evaluated the student in February and March, 2015.
- 21. At the April 21, 2015, IEP meeting, the District found: there was a significant discrepancy between the student's written expression achievement score of 91 and

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the student's verbal comprehension; Student 1 had a sensory motor processing disorder that emerged in difficulties with handwriting and spelling; Student 1 benefitted from using a computer for written work; and Student 1 received all As and one B in academic classes **and is accessing the curriculum.**

22. The parent indicated that Student 1 was thriving in the small private school, but asserted that Student 1 had not made adequate progress in the past when the student attended a public school.
23. The District found **at the April 21, 2015, IEP** that Student 1 did not demonstrate a need for special education and therefore did not qualify for special education as a student with a specific learning disability. The IEP notes **indicate that other health impairment and SLD were discussed by the team. The notes indicate the student is diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and this contributes to the student's lack of organization skills. The student does have a discrepancy between written expression and verbal comprehension. There is a sensory motor processing disorder specifically in the student's grapho-motor skills that emerges in the student's writing and spelling. The notes indicate that the discrepancy can be met with accommodations, such as typing, and addressed in a 504 plan. The IEP notes** parent's disagreement with the determination Student 1 did not meet special education eligibility and parent's desire that Student 1 attend a small private school.
24. The IEP documents the parent's receipt of procedural safeguards and the evaluations, tests, records, and reports as well as other relevant factors the District used as a basis for the determination the student was not eligible for special education services. **The parent signed the IEP as a participant only.**
25. **In a May 19, 2015, signed declaration, the parent of student 1 states the student was assessed and found student has a learning disability and a processing disorder, however, the student's IEP team found that the student did not qualify for an IEP because the learning disorder could be accommodated in the general education setting. The parent reports the last time they tried to accommodate the student in the general education environment the student struggled. The parent concludes: "To find that [Student] does not need special education at large public school setting, in the face of ample evidence and teacher's reports that say otherwise is a horrendous and continued violation of my daughter's rights."**

CONCLUSION

The District met the requirements of *EC* sections 56301(a) and 56342.5 and 34 *CFR* Section 300.503. ~~There was insufficient evidence to support a finding that the District's position on eligibility for Student 1 was incorrect.~~ **At the April 21, 2015, IEP, Student 1 was determined to be ineligible for special education services by the District and**

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offered a 504 plan which the parent did not consent to. In addition, although the parent and District disagreed at the meeting, the parent was a member of the decision-making group. Finally, regarding the provision of written notice, the IEP can serve as notice as long as it meets the requirements of written notice outlined in 34 *CFR* Section 300.503. The April 21, 2015, IEP includes the information required under 34 *CFR* Section 300.503. **The District is in compliance.**

SUMMARY OF ALLEGATION THREE

The Complainant alleges the District failed to include a statement of the child's present levels of academic achievement and functional performance in violation of 34 *CFR* Section 300.320(a)(1). Specifically, the Complainant alleges the District failed to include appropriate levels of performance on state standard for general curriculum in the May 2, 2014, IEP for Student 2.

APPLICABLE CITATION

34 *CFR* Section 300.320(a)(1) requires:

(a) . . . As used in this part, the term [IEP] means a written statement for each child with a disability that is developed, reviewed, and revised in a meeting in accordance with [sections] 300.320 through 300.324, and that must include--

(1) A statement of the child's present levels of academic achievement and functional performance . . .

FINDINGS OF FACT

26. The May 2, 2014, annual IEP for student 2 includes **present levels of performance on page 12 of 16: current reading level of 5th grade with 98 percent accuracy; reading and decoding skills are within the average range for her age; math the student is at grade level as scoring average on all assignments are 90 percent; written expression—the student is at grade level for content and below grade level for mechanics (spelling); communication development is within normal limits; gross/fine motor development is within normal limits; social/emotional/behavioral shows not problems; and health—no problems. There is also** information about the student's performance on the Wechsler Individual Achievement Test, California Standards Test and District testing and inventories. Specific information about the student's performance in fluency, accuracy, and comprehension was included in the baselines for IEP goals in reading; and specific information about the student's performance in spelling was included in the IEP goals for spelling.

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27. The parent asserted that the IEP inappropriately stated the student's present levels. In the August 27, 2014, parent addendum, received by the District on August 27, 2014, the parent asserted the student's baseline score in spelling was incorrectly stated.

CONCLUSION

The District met the requirements of 34 *CFR* Section 300.320(a)(1). There was insufficient evidence to support a finding that the District failed to include present levels of performance in Student 2's May 2, 2014, IEP. **The District is in compliance.**

SUMMARY OF ALLEGATION FOUR

The Complainant alleges the District failed to ensure that the IEP team for each child with a disability includes one regular education teacher, in violation of 34 *CFR* Section 300.321(a)(2). Specifically, the Complainant alleges the District failed to include all required members (**regular education teacher**) of the IEP at the Student 2's fall 2014 IEP.

APPLICABLE CITATION

34 *CFR* Section 300.321(a)(2) requires, "(a) General. The public agency must ensure that the IEP Team for each child with a disability includes . . . (2) Not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment). . ."

FINDINGS OF FACT

28. In the complaint received by the CDE on June 1, 2015, the parent asserts that she requested an IEP meeting in fall 2014 but only the resource specialist program (RSP) teacher came. No documentation of this request was provided.
29. In the July 2, 2015, response to the complaint, the District asserts that the parent did not request an IEP meeting in fall 2014.
30. An IEP amendment dated August 21, 2014, includes the addition of a self-advocacy goal. The amendment indicates the goal was inadvertently left out of Student 2's May 2, 2014, IEP.
31. A document titled "Parent's Addendum to Student 2's IEP" was signed by the parent on August 26, 2014, and date stamped received by the District August 27, 2014.
32. **The student's annual May 2, 2014, IEP shows a regular education teacher was present at the IEP meeting.**

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33. **The student's annual May 1, 2015, IEP shows a regular education teacher was present at the IEP team meeting.**

CONCLUSION

The District met the requirements of 34 CFR Section 300.320(a)(2). Student 2's IEPs reviewed document a regular education teacher was a member of the IEP team. A fall 2014, IEP was not provided to the investigator. Although there was an August 21, 2014, amendment to the May 2, 2014, IEP, the evidence is insufficient to support a finding that the parent made a request for a full IEP meeting in fall 2014. Therefore, a violation of 34 CFR Section 300.321(a)(2) is not found. **The District is in compliance.**

SUMMARY OF ALLEGATION FIVE

The Complainant alleges the District failed to implement the IEP, in violation of *EC* Section 56043(i). Specifically, the Complainant alleges the District failed to provide 60 minutes of push-in RSP services to Student 2.

APPLICABLE CITATION

EC Section 56043(i) requires, "A pupil's [IEP] shall be implemented as soon as possible following the [IEP] team meeting, pursuant to Section 3040 of Title 5 of the California Code of Regulations."

FINDINGS OF FACT

34. The IEP of May 2, 2014, called for 90 minutes per week of specialized academic instruction (SAI), specifically three weekly sessions of 30 minutes each, on a "pull-out" basis.
35. The parent asserts the RSP teacher stated at the May 1, 2015, triennial IEP meeting that she only provided 30 minutes per week of RSP services and had no information as whether anyone else had provided the additional 60 minutes per week.
36. The RSP teacher's statement is that he met with the parent at the start of the 2014-15 school year and reached an agreement that he would do pullout RSP services once per week for 30 minutes per session. There was no evidence that the IEP was modified to reflect such an agreement.

CONCLUSION

The District failed to meet the requirements of *EC* Section 56043(i). The evidence showed that Student 2 should have received 90 minutes per week of SAI, but instead

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received 30 minutes per week. The District failed to provide evidence demonstrating Student 2 was provided SAI services as required by the May 2, 2014, IEP. **The District is out of compliance.**

SUMMARY OF ALLEGATION SIX

The Complainant alleges the IEP team failed to consider whether the student needed assistive technology devices and services when developing the IEP, in violation of 34 *CFR* Section 300.324(a)(2)(v). Specifically, the Complainant alleges the District failed to consider whether Student 2 would benefit from accommodations including use of a computer or spelling applications (Co-Writer).

APPLICABLE CITATION

34 *CFR* Section 300.324(a)(2)(v) requires, "(a) . . . (2) Consideration of special factors. The IEP Team must--Consider whether the child needs assistive technology devices and services."

FINDINGS OF FACT

37. The May 2, 2014, IEP states that: the student will receive 400 minutes per year of assistive technology consult; the student has access to a computer with a spellcheck program to assist the student with writing and spelling; the student has demonstrated good keyboarding skills; the student has access to word prediction software (Co-Writer) but often chooses not to use it for an unstated reason; the team discussed the issue of students not wanting to stand out as the only one who is using something.
38. According to the parent, District staff suggested that the parent should not push the student to use a computer or "Co-Writer" spelling application because middle school students "just want to fit in".
39. The May 1 and 22, 2015, IEP documents the discussion of the student's use of and need for a computer. Specifically, the team discussed that the computer helped with writing and spelling; the AT specialist discussed the student's present levels of keyboarding and word processing and recommended a specific program; and it was noted that the student had access to the computer, along with word prediction software, for written assignments.

CONCLUSION

The District met the requirements of 34 *CFR* Section 300.324(a)(2)(v). The evidence is insufficient to support a finding that the IEP team did not consider whether Student 2 needed assistive technology devices and services. **The District is in compliance.**

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SUMMARY OF ALLEGATION SEVEN

The Complainant alleges the District failed to ensure parents are present at each IEP team meeting or are afforded the opportunity to participate, in violation of 34 *CFR* Section 300.322(a). Specifically, the District failed to afford the parent an opportunity to participate in the decision to exit Student 2 from special education.

APPLICABLE CITATIONS

34 *CFR* Section 300.322(a) states, “. . . Each public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate . . .”

EC Section 56329(c) states, “If the parent or guardian obtains an independent educational assessment at private expense, the results of the assessment shall be considered by the public education agency . . .”

34 *CFR* Section 300.503(a) establishes:

(a) Notice. Written notice that meets the requirements of paragraph (b) of this section must be given to the parents of a child with a disability a reasonable time before the public agency—

- (1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or
- (2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. . .

FINDINGS OF FACT

40. At IEP meetings on May 1 and 22, 2015, the parent and the District disagreed as to the amount of progress the student had made; the significance of the student spelling difficulties, and whether Student 2 continued to qualify for special education as a student with a specific learning disability.
41. The parent presented an independent assessment completed in February 2015 (that diagnosed the student with Orthographic Dyslexia), an audiology report, and a vision therapy report. The independent assessment provider participated in the IEP meeting.
42. The parent asserts that District representatives disagreed with the independent assessment results and also stated that dyslexia is not a processing disorder.
43. The May 1, 2015, IEP notes indicate that the District's representative stated that “dyslexia is not a criteria for [a specific learning disability]” and proposed that the student be exited from special education.

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44. The May 1, 2015, IEP notes state the District's assessor stated that a child who is being assessed due to characteristics of dyslexia shall be eligible for special education if the child meets the eligibility criteria for a specific learning disability.
45. The May 1, 2015, IEP documents parent's receipt of procedural safeguards and the evaluations, tests, records, and reports, as well as other relevant factors the District used as a basis for the determination the student was not eligible for special education services. The IEP meetings ended in a disagreement about continued eligibility.

CONCLUSION

The District met the requirements of 34 *CFR* Section 300.322(a), *EC* Section 56329(a), and 34 *CFR* Section 300.503. The parent did have an opportunity to participate in the IEP team meetings and decisions. The parent presented information, including the independent examiner's testing results, which the IEP team received and considered. Although the parent and the District disagreed about the validity of and significance of each other's testing results, the parent participated and the parent's results were considered. Finally, regarding the provision of written notice, the IEP can serve as notice as long as it meets the requirements of written notice outlined in 34 *CFR* Section 300.503. The May 2015 IEP includes the information required under 34 *CFR* Section 300.503. **The District is in compliance.**

SUMMARY OF ALLEGATION EIGHT

The Complainant alleges the District failed to provide pupil records within five business days, in violation of *EC* Section 56504. Specifically, the Complainant alleges the District has failed to provide all records for Student 2 as requested.

APPLICABLE CITATION

EC Section 56504 requires, "The parent shall have the right and opportunity to examine all school records of his or her child and to receive copies pursuant to this section . . . within five business days . . ."

FINDINGS OF FACT

46. The parent records request dated February 9, 2015, **via e-mail to the District and later faxed**, was received by the District on February 17, 2015, and the District delivered hard copies of records within five business days, on February 19, 2015. **February 13 and 16, 2015, are school holidays.**
47. The parent asserted that the records were incomplete. Specifically, according to the parent, certain District-generated documents were missing (report cards, English

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learner test results); the parent's addendum to the student's IEP was printed out so small that it was illegible; older versions of documents should have been replaced with newer versions; and certain documents the parent had provided to the District were not included (parent responses to IEPs, parent e-mails, and private assessments).

48. **On February 25, 2015,** the parent requested that the District provide records electronically. The parent and District staff had a series of communications about doing so, and the District provided records electronically.

CONCLUSION

The District met the requirements of *EC* Section 56504. The District provided records in a timely manner, and when the parent expressed concern that some documents were missing and requested that the parent provide the records electronically, the District did so. **The District is in compliance.**

REQUIRED CORRECTIVE ACTION

Allegation Five

On or before September 15, 2015, the District shall propose a plan, sent to the parent in the form of a letter, with an offer to provide compensatory SAI services to Student 2 to make up for any missed services related to the District's failure to provide SAI. Specifically, compensatory services shall include 36 hours of SAI, to make up for one hour per week of SAI services missed for one school year. Acceptable evidence should include a copy of the letter sent to the parent and proof of mailing.

RECONSIDERATION NOTICE

~~The findings in this investigation report are specific to this case. While general rules are cited, findings in other investigations may differ due to the facts and issues in each case.~~

~~Pursuant to *California Code of Regulations*, Title 5, Section 4665, either party may request reconsideration:~~

~~Within 35 days of receipt of the Department investigation report, either party may request reconsideration by the Superintendent. The request for reconsideration shall designate the finding(s), conclusion(s), or corrective action(s) in the Department's report to be reconsidered and state the specific basis for reconsidering the designated finding(s), conclusion(s) or corrective action(s). The request for reconsideration shall also state whether the findings of fact are incorrect and/or the law is misapplied.~~

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~~Pending the Superintendent's reconsideration, the Department report remains in effect and enforceable.~~

~~A request for reconsideration must be postmarked 35 days from the receipt of the investigatory report and sent to:~~

~~**Ana Marsh, Administrator
Complaint Resolution Unit
California Department of Education
1430 N Street, Suite 2401
Sacramento, CA 95814
916-445-4623 Phone
916-327-8878 Fax**~~

Evidence of required corrective actions or questions regarding corrective actions shall be directed to:

**Donna DeMartini, Administrator
Focused Monitoring and Technical Assistance Unit Four
California Department of Education
1430 N Street, Suite 2401
Sacramento, CA 95814
916-445-9772 Phone
916-327-3534 Fax**

If compliance is determined in this investigation and no corrective actions are required, consider this case closed.


Fred Batcom, Director
Special Education Division

CIVIL COVER SHEET

JS-CAND 44 (Rev. 07/16)

The JS-CAND 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

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

DEFENDANTS

See Attachment

(b) County of Residence of First Listed Plaintiff Alameda

County of Residence of First Listed Defendant

(c) Attorneys (Firm Name, Address, Email and Telephone Number)

See Attachment

NOTE: INLAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED. Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, PTF DEF, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Table with columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Includes various legal categories like Personal Injury, Real Property, Labor, etc.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District, 6 Multidistrict Litigation-Transfer, 8 Multidistrict Litigation-Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 20 U.S.C. §§ 1400, et seq., 29 U.S.C. § 794, and 42 U.S.C. §§ 12131 et seq.

Brief description of cause: Injunctive and Declaratory Relief for Violations of the Individuals with Disabilities Ed. Act, Section 504 of the Rehabilitation Act of 1973, Americans with Disabilities Act, and California Ed. Code

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, Fed. R. Civ. P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S)

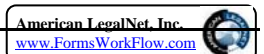
IF ANY (See instructions): JUDGE DOCKET NUMBER

IX. DIVISIONAL ASSIGNMENT (Civil Local Rule 3-2)

(Place an "X" in One Box Only) SAN FRANCISCO/OAKLAND SAN JOSE EUREKA-MCKINLEYVILLE

DATE: May 2, 2017

SIGNATURE OF ATTORNEY OF RECORD: /s/ Shane Brun



INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS-CAND 44

Authority For Civil Cover Sheet. The JS-CAND 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I. a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the “defendant” is the location of the tract of land involved.)
- c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section “(see attachment).”
- II. Jurisdiction.** The basis of jurisdiction is set forth under Federal Rule of Civil Procedure 8(a), which requires that jurisdictions be shown in pleadings. Place an “X” in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
- (1) United States plaintiff. Jurisdiction based on 28 USC §§ 1345 and 1348. Suits by agencies and officers of the United States are included here.
 - (2) United States defendant. When the plaintiff is suing the United States, its officers or agencies, place an “X” in this box.
 - (3) Federal question. This refers to suits under 28 USC § 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 - (4) Diversity of citizenship. This refers to suits under 28 USC § 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS-CAND 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an “X” in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an “X” in one of the six boxes.
- (1) Original Proceedings. Cases originating in the United States district courts.
 - (2) Removed from State Court. Proceedings initiated in state courts may be removed to the district courts under Title 28 USC § 1441. When the petition for removal is granted, check this box.
 - (3) Remanded from Appellate Court. Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 - (4) Reinstated or Reopened. Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 - (5) Transferred from Another District. For cases transferred under Title 28 USC § 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 - (6) Multidistrict Litigation Transfer. Check this box when a multidistrict case is transferred into the district under authority of Title 28 USC § 1407. When this box is checked, do not check (5) above.
 - (8) Multidistrict Litigation Direct File. Check this box when a multidistrict litigation case is filed in the same district as the Master MDL docket. Please note that there is no Origin Code 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC § 553. Brief Description: Unauthorized reception of cable service.
- VII. Requested in Complaint.** Class Action. Place an “X” in this box if you are filing a class action under Federal Rule of Civil Procedure 23. Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction. Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS-CAND 44 is used to identify related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.
- IX. Divisional Assignment.** If the Nature of Suit is under Property Rights or Prisoner Petitions or the matter is a Securities Class Action, leave this section blank. For all other cases, identify the divisional venue according to Civil Local Rule 3-2: “the county in which a substantial part of the events or omissions which give rise to the claim occurred or in which a substantial part of the property that is the subject of the action is situated.”

Date and Attorney Signature. Date and sign the civil cover sheet.

ATTACHMENT TO CIVIL COVER SHEET

1.a: DEFENDANTS:

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

1.c Attorneys for Plaintiffs:

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ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Students with Reading Disorders Sue Berkeley Unified School Dist.](#)
