August 27, 2014

VIA CERTIFIED U.S. MAIL
Return Receipt Requested

California Department of Education
Special Education Division
Procedural Safeguards Referral Service
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Sacramento, CA 95814-5901

California Department of Education
Sharon Felix-Rochon, Director
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RE: Request for Direct State Intervention
Complaint On Behalf Of Jane Doe and John Doe,¹ and All Similarly Situated Students in the Mount Diablo 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, Cal. Code Regs., tit. 5 §§ 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), and to rectify disability discrimination pursuant to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

This is also a complaint against CDE for its failure to ensure the provision of a non-discriminatory and free appropriate public education (FAPE) in violation of state and federal law. See, e.g., 20 U.S.C. §§ 1400(d) and 1416 et seq.; 34 C.F.R. §§ 300.101 and 300.151-153; Cal. Code Regs., tit. 5, §§ 4600(c) and (d); § 4650(a)(7) et seq.; 28 C.F.R. § 35.107 and 34 C.F.R. § 104.7. The basis for this is plainly recognized in official comments to IDEA regulations at 71 Fed. Reg. 46602 (2006) (comment):

¹ The identities of Jane Doe, John Doe, their respective parent/guardian, and required contact information are listed separately in Confidential Exhibit A to protect them from unnecessary public exposure.
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) is filing this complaint on behalf of Jane Doe and John Doe, two very young students who have endured on-going deprivations of a FAPE in the least restrictive environment (LRE), including, but not limited to, emotional, physical and psychological harm due to the unlawful use of physical restraints and numerous due process violations by the Mount Diablo Unified School District (“MDUSD” or “District”). The District has also repeatedly failed to respond to student records requests in the mandated timeframe. Because the nature of the actions complained of are systemic, DREDF also makes this complaint on behalf of all other children similarly situated, who are aggrieved by the systemic failures of the District to provide them with a FAPE in the LRE, as described in this complaint.

Attempts to resolve these issues through the District’s Alternative Dispute Resolution (ADR) system since May 2014 have proven unsuccessful. We now seek direct state intervention and complain against CDE due to these very serious systemic IDEA violations, as well as our belief that the District’s use of physical restraint and seclusion threatens the health, safety, and welfare of its students. Cal. Code Regs. tit. 5, § 4650(a)(7)(C) and (E).

I. Brief Summary of Facts

The District advertises its Counseling-Enriched Program (CEP) at Sunrise Elementary School as a model program where students with mental health needs are provided full access to the services of a School Psychologist and two Behavioral Health Specialists. The stories of Jane Doe and John Doe however demonstrate that MDUSD harmful, needlessly and systematically segregates students in these highly restrictive

classrooms without adequate supervision or individualized academic, behavioral, and mental health support. Once students are placed in these restrictive classrooms, they are repeatedly subjected to unreasonable and unnecessary physical restraint and seclusion. The District determines these placements unilaterally with little to no input from parents and guardians, violating their due process rights, and fails to offer less restrictive interventions as required by law, such as a functional behavioral assessment ("FBA") or 1:1 paraeducator, before changing placement.

a. Jane Doe

Jane Doe is an African-American and multi-racial eight-year-old, second-grade student in the District who was made eligible for special education and related services in 2013, while in first grade at Mt. Diablo Elementary School. Her primary disability is Specific Learning Disability (SLD), with Other Health Impairment (OHI) as a secondary disability due to a diagnosis of Attention Deficit/Hyperactivity Disorder (ADHD). She also has a medical diagnosis of asthma, which the District has never offered to assess as a suspected disability. Jane Doe was exposed to drugs in utero and was removed by social services at birth. At age three, she was placed with her great-grandmother, who is her foster parent and legal guardian.

In less than one year, the District inexplicitly transitioned Jane from full inclusion in a general education classroom to a highly restrictive, “Intensive Classroom” where she was subjected to repeated physical restraint and seclusion. According to her September 2013 Individualized Education Plan (IEP), Jane qualified for 30 minutes of specialized academic instruction, twice a week, on a pull-out basis. In all, Jane Doe was in the general education classroom 96% of the schoolday. The IEP did not have a behavioral goal, but she did have a behavioral intervention plan (BIP). The BIP noted her behavior was at an “early stage intervention level,” and described her as engaging in “off-task behavior: out of seat, walking around the room, looking around the room.”

At the start of second grade in September 2013, the IEP Team referred Jane Doe for an educationally related mental health services (ERMHS) assessment due to her increased frustration and disinterest in school. The ERMHS assessment was limited to little more than a record review, and the assessor recommended a more restrictive placement based solely on the recommendations of Jane’s teachers. Instead of conducting an FBA, adjusting Jane’s IEP/BIP or intervening with a 1:1 paraeducator, or other general education supports, the District recommended transfer to the CEP at

\[\text{3 Attachment 1, Sept. 23, 2013 IEP.}\]
\[\text{4 Id.}\]
\[\text{5 Attachment 2, Mar. 25, 2013 BSP.}\]
\[\text{6 Attachment 3, Sept. 13, 2013 ERMHS Assessment.}\]
Sunrise Elementary School. The District placed Jane at CEP at the beginning of October 2013.

Jane Doe received little academic or behavioral support in the CEP, and was traumatized by the sight of her classmates being physically restrained by adult staff.\(^7\) For example, her October 28, 2013 daily report card includes a note from her teacher explaining that she should “ignore” the upsetting behaviors she was witnessing.\(^8\) Jane told her guardian repeatedly that she did not want to go to school, expressed distress by crying about school, and repeatedly asked her guardian to come to school with her. Jane began to exhibit more severe behaviors after entering Sunrise, including trichotillomania (pulling out one’s own hair—a new behavior attributed by her psychiatrist to medications, but guardian feels also related to increasing anxiety), an inability to relax (as evidenced by hypervigilance with family members), a reluctance to be alone, and increased anger about having to go to school.\(^9\)

Soon she too was subjected to physical restraint and seclusion. According to District behavioral incident emergency reports, during the first five months Jane attended the CEP, she was physically restrained a total of twelve times.\(^10\) It is very unlikely this is an accurate count, because the District did not complete these reports in a timely manner, and Jane complained to her guardian about other undocumented incidents of restraint. Due to her “escalating behaviors”, as documented at school in increasing behavioral incident emergency reports, the District transferred Jane to Sunrise’s “Intensive Classroom,” a multi-grade level classroom comprised of mostly older boys, in March 2014.\(^11\)

Jane’s behaviors continued to escalate after being transferred to the “Intensive Classroom.” According to her daily report cards, she began to spit, swear, and throw things at other students, and would spend most of some days out of the classroom roaming the campus.\(^12\) Rather than performing an FBA, the Sunrise staff responded to her behaviors through the repeated use of physical restraint. According to District

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\(^7\) MDUSD hires Pro-ACT for its emergency intervention training. Pro-ACT utilizes a “train the trainer” approach where Pro-ACT trains a district administrator who then trains district staff. The Pro-ACT website itself emphasizes that restraint should always be the last resort: “Development and implementation of an individualized primary plan, intervention, or treatment plan is the most important tool for maintaining safety. The need for restraint, then, can be viewed as a break down in the primary plan. When the primary plan breaks down and assault occurs, restraint may become the safest decision, but only as a last resort. In these instances, restraint is an indicator of treatment failure.” Pro-ACT Overview, http://www.proacttraining.com/about/pro-act-is-principles-not-techniques (last visited August 21, 2014).


\(^9\) See, e.g., Attachment 5, Letter from Trudi Frazel, Contra Costa County Children & Family Services, to Sunrise Elementary School (May 28, 2014). Jane’s social worker Ms. Frazel details the new behaviors Jane began to show at Sunrise, including vandalism and increased antagonism towards younger children.\(^10\) See Attachment 6, Jane Doe Behavioral Incident Emergency Reports.

\(^11\) See Attachment 7, March 28, 2014 IEP.

\(^12\) See, e.g., Attachment 8, Mar. 31, 2014 and Apr. 28, 2014 Daily Report Cards.
behavioral incident emergency reports, in the less than two months Jane spent in the “Intensive Classroom”, she was physically restrained at least thirteen times, including floor-assisted prone restraint four times. Again, given that many of these reports appear to be created after the fact, they are highly suspect and are likely an underestimation of the times Jane was subjected to physical restraints because she self-reported to her guardian many more.

On May 8, 2014, after an incident in which Jane became “assaultive with peers,” two paraeducators held Jane down in a floor-assisted prone restraint. An above-average sized male paraeducator pushed her face to the ground and restrained her arms, while a female paraeducator held her legs down. Eventually the two staff members escorted her to the seclusion room, where she was restrained at least three more times after she threw her lunch across the room.

When Jane’s great-grandmother came to pick her up at school, she found her crying in a locked room where she had been held under the supervision of a paraeducator for at least an hour and a half. Jane had a swollen face and later complained to her great-grandmother of pain in her ears and legs. Once in the car, Jane told her great-grandmother that she blamed her for the incident. Jane recounted how she told the staff members holding her in restraint that she was going to tell her great-grandmother, to which they responded, “Your grandmother gave us permission to do this.”

The next day, Jane’s great-grandmother and guardian notified Jane’s teacher of her concerns with the staff’s handling of the incident and her intention to take up the issue with the Principal Jenny Vargas. That same day, when Jane arrived at school at 8:30, staff placed her back in the seclusion room and gave her a sponge to clean up after the previous day’s incident. According to her daily report card, she was not returned to the classroom until 10:15.

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13 See Attachment 6, supra note 10.
14 The identities of staff believed to have subjected Jane Doe and John Doe to unlawful restraint and/or seclusion are listed separately in Confidential Exhibit B.
16 Id.
17 Sunrise staff told Jane’s guardian prior to placement that paraeducators always stay with students in the seclusion room to assist the child in deescalating and getting back to class as quickly as possible.
18 Jane’s guardian does not remember signing a waiver allowing staff to physically restrain Jane, and her attempts to uncover such a waiver through student record requests have been unsuccessful.
19 See Confidential Exhibit B for her identity.
20 See Attachment 9, May 9, 2014 Daily Report Card. Report card states she was placed in seclusion room to “process” the previous day’s events, but Jane reported to her great-grandmother that she was ordered to clean up.
21 Id.
Deeply disturbed by the staff’s mistreatment of Jane and fearful for her great-granddaughter’s health and safety, Jane’s guardian decided to pull Jane out of Sunrise Elementary. On May 13, 2014, she called for an emergency IEP meeting and requested Jane’s entire cumulative file and special education file. Principal Vargas ignored the emergency request by not scheduling the IEP meeting until May 28, 2014. At this meeting, District staff presented Jane’s guardian with over a dozen previously undisclosed suspension and behavioral incident emergency reports in response to her third records request. It was clear the reports were hastily created in preparation for the IEP meeting, as incidents from as far back as March and April 2014 were signed and dated May 23, 2014, and Jane’s guardian had not received them when the incidents purportedly happened. Furthermore, because Jane’s guardian has yet to receive either Jane’s entire cumulative or special education file, it is not clear how many behavioral incident emergency reports have been made.

Jane’s guardian will not allow Jane to return to Sunrise Elementary out of concerns for her great-granddaughter’s health and safety and academic needs. She submitted letters to the District from Contra Costa Children & Family Services and the CEP psychiatrist, Dr. Jon Whalen, M.D., requesting the District place Jane in Home Instruction over the summer in lieu of Extended School Year (ESY). The District provided minimal Home Instruction over the summer by a general education teacher who had limited ability to work effectively with Jane. Jane’s guardian also requested an Independent Education Evaluation (IEE) on June 5, 2014, as well as an initial request for a speech and language assessment. The District has yet to respond to these requests or provide her with Prior Written Notice (“PWN”).

Further depriving Jane of a FAPE in the LRE, the District provided her with little academic instruction during her time at Sunrise from October 2013 to May 2014. Her March 14, 2014 progress report lists “N/A” for social studies and every math category.
but one, signifying the District had yet to assess her in those categories.\textsuperscript{29} The District similarly failed to assess her RAP Reading Levels. In the comments section, the teacher provided little helpful or measurable feedback, writing only that “Jane is showing some improvement in on task behavior. Reading skills are also improving.”\textsuperscript{30} A volunteer from the foster family agency who has tutored Jane twice a week since April 2014 initially assessed Jane to be at a pre-school reading level in May 2014. She recently reassessed Jane and determined she now reads at a late-kindergarten reading level, but still needs intensive reading remediation.\textsuperscript{31}

Jane does not currently have a placement for the 2014-2015 school year and attempts to compromise on a new placement through the District’s ADR system have been unsuccessful. Jane’s guardian reached out to the District and proposed the Floyd I. Marchus School as a diagnostic placement until the IEE, speech and language assessment and FBA are complete. The District counter-offered Home Instruction for the fall, despite the recommendation of Dr. Whalen that Home Instruction be limited to ESY and an appropriate school setting be determined for the Fall.\textsuperscript{32}

b. John Doe

John Doe is an African-American seven-year-old, second-grade student in the District who was made eligible for special education and related services and placed in Home Instruction in February 2014. Prior to receiving Home Instruction, John attended Bel-Air Elementary School. His primary disability is OHI due to a diagnosis of ADHD. He also has a medical diagnosis of asthma. John’s IEP calls for specialized academic instruction one hour a day and “wraparound” services. A 504 Plan was not offered and provided until November 5, 2013. The 504 Plan was ineffective because the District continued to repeatedly suspend John, causing him to lose educational opportunities.\textsuperscript{33}

John exhibited problematic behaviors throughout the nearly two years he attended Bel-Air Elementary School. His school records indicate issues respecting adults, following directions, and controlling his impulsive behavior. He also received multiple suspensions, including at least eight days out-of-school suspension in first grade.\textsuperscript{34} As indicated by his school records, school staff frequently required John’s mother to pick him up from school early. Staff also sent John to the office almost daily in the last two months of his first grade year,\textsuperscript{35} but never recommended assessment for

\textsuperscript{29} Attachment 17, Mar. 14, 2014 Progress Report.
\textsuperscript{30} Id.
\textsuperscript{31} Id.
\textsuperscript{32} Attachment 18, Reading Tutoring Summary (Aug. 15, 2014).
\textsuperscript{33} Attachment 15, supra note 27.
\textsuperscript{34} See Attachment 19, Feb. 7, 2014 IEP and Nov. 5, 2013 504 Plan.
\textsuperscript{35} See Attachment 20, John Doe Suspension Notices.
\textsuperscript{36} E.g., January 9, 2014 Suspension Notice found in Attachment 20, supra note 34, and Attachment 19, supra note 33.
an FBA or special education services. The District provided general education supports that were ineffective during the time it failed to comply with its child find mandates.

Following a disciplinary incident in February 2014, an IEP meeting was held in which the team agreed to place John in Home Instruction.\(^{36}\) John received Home Instruction for three months, during which time his mother had difficulty both securing his assignments from Bel-Air staff and placing him in a new school.\(^{37}\) On May 7, 2014, the District held an IEP meeting for John at Sunrise Elementary School, its proposed placement. John’s mother initially objected to District making a placement decision without her input. According to John’s mother, Program Specialist Jessica Garcia told her that if she didn’t accept placement in Sunrise’s CEP, it would take “months” to find another placement.\(^{38}\) Anxious to let her son finish second grade, John’s mother reluctantly agreed to placement at Sunrise’s CEP. The District refused to consider less restrictive interventions, such as providing an FBA and adjusting John’s BIP, despite multiple requests from his mother.\(^{39}\)

When John started at Sunrise on May 13, 2014, his behavior immediately deteriorated. His mother received near daily calls from Sunrise staff asking her to pick him up from school early. After a few weeks, she decided to sit in on his class to see what was happening.\(^{40}\) Because she had only agreed to placement at Sunrise due to the promise of a more structured environment, she was shocked by the lack of individualized attention each student received and the frequent physical restraint and seclusion imposed on the students. Many of the students would walk out of the classroom in apparent frustration, only to be aggressively restrained for failing to follow directions to return.\(^{41}\) She also noted that the teacher had poor classroom management, which in her opinion drove many of the problem behaviors.

John was subjected to repeated physical restraint and seclusion at Sunrise. In the approximately two months (including ESY) he attended the CEP, he was restrained at least ten times.\(^{42}\) He would often come home with bruises on his face and arms. John’s mother would not return him to Sunrise for the last week of school, after an incident where he again came home bruised. Moreover, a report to Child Protective Services was made by someone at the school regarding bruising on the child’s arms and torso. An investigator from the Department of Children and Family Services (DCFS) interviewed John, who told her the bruising was caused by his teachers.

\(^{36}\) See Attachment 19, supra note 33, and Attachment 21, John Doe Withdrawal Report.
\(^{38}\) \textit{Id.}
\(^{39}\) John’s mother requested an FBA in letters dated April 23, 2014 (Attachment 23) and July 18, 2014 (Attachment 24). She did not receive PWN in either instance.
\(^{40}\) See Attachment 22, supra note 37.
\(^{41}\) \textit{Id.}
\(^{42}\) See Attachment 25, John Doe Behavioral Incident Emergency Reports.
Although DCFS dropped the case, John’s mother was extremely embarrassed by the situation and angry with John’s teachers. Sunrise’s principal, Jenny Vargas, assured John’s mother that the teacher had been let go, and that ESY would be better. With the assurances and no alternatives, John’s mother returned him for ESY at Sunrise.

While in ESY, on July 15, 2014, John returned home from school with a split lower lip and a bloody nose that he reported came from being thrown to the floor in restraint.\(^{43}\) John’s mother filed a police report regarding this incident. The school principal, Jenny Vargas, told her that he fell while being held by the back of his shirt in restraint. John’s mother met with Ms. Vargas the next day to discuss the incident, and submitted a letter on July 21, 2014 in which she stated her intention to pull him out of Sunrise and asked for an IEP meeting, an IEE, and filed a request for John’s cumulative file.\(^{44}\) John’s mother hand delivered these to Ms. Vargas, and to Sue Massey, Program Manager for the District, who then met with the parent on July 23, 2014 and assured her the District would identify another program for him. To date, the parent has heard nothing further from the District.

As a result of this lack of action and refusal to address serious ongoing harm and related academic concerns, John’s parent decided that her only choice was to change districts and move her entire family. They now reside in the Antioch Unified School District, where John has been in school for two weeks in a Seneca-run Special Day Class (SDC) at a general education elementary school. John’s mother reports that John cried and was very upset about going to school for fear of injury, restraint and time out, but to date in his current placement, he has been doing well without need for calls home or restraint/seclusion.

II. The District Has Failed to Conduct Child Find

School districts are required to identify, locate and assess all individuals with exceptional needs. Cal. Educ. Code § 56301(a). John was enrolled in the District for nearly three years before the District found him eligible for special education. In those three years, he was repeatedly suspended, frequently sent out of the classroom and sent home early, and ultimately placed on Home Instruction. Furthermore, school districts are required to identify and assess all individuals with disabilities under Section 504. 34 C.F.R. §§ 104.32-104.33. It was not until November 5, 2013 that the District established a 504 Plan for John, which was wholly ineffective because the pattern of exclusionary discipline and losses of educational opportunity continued.

\(^{43}\) See Attachment 22, *supra* note 37.

\(^{44}\) *Id.*
III. The District Has Failed to Provide Student Records Within Five Business Days

Parents have the right and opportunity to examine all school records of his or her child and to receive copies within five business days after the request is made by the parent, either orally or in writing. Cal. Educ. Code § 56504. To date, Jane’s guardian has made four separate written requests for records, but has yet to receive Jane’s complete cumulative or special education files. These requests were made on May 1, 2014, May 15, 2014, May 23, 2014, and May 30, 2014, respectively. 45

IV. The District Has Failed to Provide Parents and Guardians with Prior Written Notice

Written notice must be given to the parents of a child with a disability a reasonable time before the public agency proposes or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. 34 C.F.R. § 300.503; Cal. Ed. Code § 56500.4. On multiple occasions, the District failed to provide PWN to the respective parent and guardian of Jane and John. Jane’s great-grandmother requested an IEE and a speech and language assessment on June 5, 2014, 46 but has yet to receive a response. John’s mother similarly never received PWN from the District following her July 21, 2014 request for an IEE 47 or her requests for an FBA on April 23, 2014 and July 18, 2014. 48

V. The District Failed to Assess Jane in All Areas of Suspected Disability

School districts are required to assess in all areas related to the child’s suspected disability. 34 C.F.R. § 300.304(c)(4). Because the District failed to assess Jane’s speech and language skills during her initial evaluation, her guardian also requested this assessment in her June 5, 2014 request for an IEE. 49 Jane also has a medical diagnosis of asthma, which the District similarly failed to assess.

45 Supra note 25.
46 Attachment 16, supra note 28.
47 Attachment 22, supra note 37.
48 Attachments 23 and 24, supra note 39.
49 Attachment 16, supra note 28.
VI. The District Violated Jane’s and John’s Procedural Rights by Failing to Include Their Respective Parent/Guardian in the Decision-making Process

School districts are required 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. 20 U.S.C. § 1414(e); Cal. Educ. Code § 56342.5. In the cases of both Jane and John, the District made placement decisions without soliciting proper input from their respective parent or guardian, or giving necessary consideration to their concerns. After placing Jane in the “Intensive Classroom” in March 2014, the District created a BIP for her now “serious” behaviors without any input from her guardian.\(^{50}\) The District held John’s May 2014 IEP at Sunrise Elementary, its proposed placement, and pressured his mother into agreeing to the placement without giving her an opportunity to observe the classroom or any alternatives.\(^{51}\)

VII. The District Denied Jane and John a FAPE in the LRE by Implementing Emergency Behavioral Interventions as a Substitute for a Behavior Intervention Plan and Repeatedly Using Unlawful Disciplinary Measures, Restraint, Suspension and Exclusion

California law requires school districts to ensure that the IEP team considers strategies and supports to address the behavior of a child that impeded his or her learning or that of others. 34 C.F.R. § 300.324(a)(2)(i). At the same time, the law prohibits school districts from using emergency interventions as a substitute for the systematic behavioral intervention plan that is designed to change, replace, modify, or eliminate a targeted behavior. Cal. Educ. Code § 56521.1(b). School districts are also prohibited from using emergency interventions to control behaviors that could be prevented by a less restrictive response. Cal. Educ. Code § 56525.1(a).

Here, the District provides students in Sunrise’s CEP with non-individualized, cookie-cutter BIPs that do not address targeted behaviors, and fails to adjust these plans when behaviors escalate.\(^{52}\) As the result, Sunrise staff resort to more restrictive responses, systematically inflicting serious emotional and physical harm, such as the repeated use of Pro-ACT restraints, unsupervised isolation in timeout rooms, including lengthy locked seclusion, official suspensions, and undocumented, informal removals from school.

Furthermore, staff using emergency interventions cannot apply an amount of force that exceeds that which is reasonable and necessary under the circumstances.

\(^{50}\) See Attachment 7, supra note 11.
\(^{51}\) See, e.g., Attachment 11, supra note 24.
\(^{52}\) See Attachment 26, MDUSD CEP Report (redacted).
Cal. Educ. Code §56525.1(d)(3). The force used to restrain Jane and John was unreasonable both in the degree of force used and in the frequency of the holds. On information and belief, most restraint was performed by an above-average sized male staff member. Jane would often come home with bruises from instances of physical restraint, while John once suffered a split lip and bloody nose during a floor-assisted prone restraint. Although both Jane and John have asthma, staff repeatedly held them in floor-assisted prone restraints. Prone restraint is unreasonable for all students due to the risk of restricting a student’s breathing, but is especially dangerous when applied to students with asthma.

One multiple occasions, Sunrise staff locked students in seclusion, which is also explicitly prohibited by California law. Cal. Educ. Code § 56521.1(d)(1). California law also prohibits staff from employing emergency interventions longer than is necessary to contain the behavior. Cal. Educ. Code § 56521.1(c). Assuming the accuracy of the students’ emergency behavioral reports, Jane and John were restrained at least 25 and 10 times, respectively, during their time at Sunrise, including some incidents of restraint that lasted over thirty minutes.

VIII. As a Result of The District’s Regular Use of Emergency Behavioral Interventions, Jane and John Lost Educational Opportunity and Were Denied a FAPE in the LRE

Both Jane and John lost educational benefit while in their school placement as they were repeatedly held in Pro-ACT restraints and isolated in Sunrise’s seclusion room. After these incidents, Sunrise staff often called their respective guardian/parent to pick them up from school early. These informal, undocumented removals also constitute outrageous violations of these students’ rights cited throughout. The overall lack of structure and supervision in the classrooms also contributed to the loss of educational benefit. Jane’s daily report cards show that she sometimes spent large portions of her day out of the classroom wandering around school, and John’s records indicate repeated attempts to run away from school. Jane’s 2013-2014 progress reports show that Sunrise teachers failed to assess her progress in many academic areas.

54 See Attachment 6, Behavioral Incident Emergency Reports, *supra* note 10, and Attachment 25, Behavioral Incident Emergency Reports, *supra* note 45.
55 See, e.g., Attachment 8, *supra* note 12 (“Ran out of class. Out entire day from 9:20”).
IX. The District Denied Jane and John a FAPE in the LRE by Failing to Follow Required Procedures When an Emergency Intervention Was Used

To prevent emergency interventions from being used in lieu of planned, systemic behavioral interventions, districts are required to notify parents and guardians within one schoolday if an emergency intervention is used. Cal. Educ. Code § 56521.1(e). Districts must complete behavioral emergency reports immediately after the incident and maintain these reports in the student’s file. Id. If a behavioral emergency report is written regarding an individual with exceptional needs who has a BIP, an incident involving a previously unseen serious behavior problem, or where a previously designed intervention is effective, shall be referred to the IEP team to review and determine if the incident constitutes a need to modify the BIP. Cal. Educ. Code § 56521.1(h).

The District failed to comply with these required procedures. Sunrise staff did not provide Jane’s guardian with behavioral incident emergency reports within one schoolday, and in fact did not regularly complete or maintain these reports at all.58 Behavioral emergency reports and suspension notices provided to Jane’s guardian at Jane’s May 28, 2014 IEP meeting were signed and dated weeks or even months after the actual incident. The District never called an IEP meeting to determine if any one of the 25 incidents of physical restraint constituted a need to modify Jane’s BIP.

Similarly, John’s mother never received behavioral incident emergency reports for incidents of restraint performed on June 30, 2014 and July 14, 2014, respectively. Nor did the District hold an IEP meeting following any of the ten documented instances of restraint. John’s mother requested an IEP meeting on July 21, 2014,59 but did not receive any response from the District.

X. As a Result of the District’s Denial of FAPE in the LRE and Infliction of Harm, Jane and John are entitled to Compensatory Education Services

In resolving a complaint in which it has found a failure to provide appropriate services, the SEA must address: (1) the failure to provide appropriate services, including corrective action appropriate to address the needs of the child (such as compensatory services or monetary reimbursement); and (2) appropriate future provision of services for all children with disabilities. 34 C.F.R. § 151(b). In all the ways described above, the District denied both Jane and John a FAPE in the LRE—by shunting them into unstructured, segregated classroom where they were subjected to repeated physical restraint and seclusion, and lost educational opportunity. The District

58 See, e.g., Attachment 11, supra note 24.
59 See Attachment 22, supra note 37.
therefore must provide them with compensatory education. Furthermore, the District must take steps to ensure the adequate provision of appropriate assessments and services for all children in the District, and especially at CEP, including providing proper training to all staff in all areas identified in this complaint.

**Summary of Legal Violations**

The District is in violation of numerous federal and state special education laws, including but not limited to:


2. Failure to provide pupil records within five business days. Cal. Educ. Code § 56504.

3. Failure to provide 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. 34 C.F.R. § 300.503; Cal. Ed. Code § 56500.4.

4. Failure to assess in all areas related to the child’s suspected disability. 34 C.F.R. § 300.304(c)(4).

5. 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. 34 C.F.R. § 300.324(a)(2)(i).

6. 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. 20 U.S.C. § 1414(e); Cal. Educ. Code § 56342.5.


The District’s use of unreasonable and unnecessary restraint and seclusion violates the following state laws:

9. Using emergency interventions as a substitute for the systematic behavioral intervention plan that is designed to change, replace, modify, or eliminate a targeted behavior. Cal. Educ. Code § 56521.1(b).


13. Failure to notify parents and guardians within one schoolday if an emergency intervention is used. Cal. Educ. Code § 56521.1(e).

14. Failure to complete behavioral emergency reports immediately after the incident and maintain these reports in the student’s file. Cal. Educ. Code § 56521.1(e).

15. Failure to refer incident involving a previously unseen serious behavior problem, or where a previously designed intervention is effective, to the IEP team to review and determine if the incident constitutes a need to modify the BIP. Cal. Educ. Code § 56521.1(h).

 Proposed Resolution

1. CDE shall immediately conduct a full investigation and issue corrective actions regarding the all relevant policies and practices of the District, including but not limited to, child find, assessments/evaluations (all areas of suspected disability and behavioral and mental health evaluations), IEP procedures, including parent input, prior written notice, Positive Behavioral Intervention Services (“PBIS”), referrals to CEP, and the day-to-day operations at CEP. All students harmed by the District’s current policies and/or practices at CEP shall be identified, offered and provided with IEPs supervised by CDE, all appropriate services to ensure FAPE in the LRE and compensatory services as necessary to address their needs.

2. CDE shall direct the District to make policy and procedure reforms which set forth its obligation to provide PBIS and oversee the use of physical restraints and seclusion so that children are no longer harmed by the current unlawful practices of the District.
3. CDE shall ensure that policy and procedure reforms include a requirement that the District secure appropriate training by a qualified third party to be provided to all certified employees and paraeducators regarding PBIS and the lawful use of physical restraints and seclusion. The District shall produce evidence of the trainings, including when they are provided, where, by whom, and attendees, and follow up enforcement.

4. CDE shall immediately require the District to place Jane in a diagnostic placement during the pendency of her IEE and promptly pay for and expeditiously secure the requested initial speech and language assessment and IEEs for both students.

5. CDE shall immediately require the District to provide and fund 180 hours for Jane in BARTON informed reading instruction (one hour per day, five days per week, 36 weeks), and compensatory, 1:1 intensive instruction for Jane and John in all core areas of education, to be provided by a non-public agency, to be determined following input from IEEs.

6. CDE shall require the District to provide and fund compensatory services for Jane and John in all other areas of need, including, but not limited to emotional, behavioral counseling, to be provided by a non-public agency, to be determined following input from IEEs. In addition, CDE shall require the District to reimburse transportation costs for travel to and from the locations where compensatory education services are provided.

7. CDE shall require the District to provide wraparound behavioral intervention services to both Jane and John at school and at home as well as parent training in positive intervention strategies, to be determined following input from IEEs.

8. CDE shall require the District to fund six weeks of Quest Therapeutic Camp or similar behavior-based private therapeutic program for both students to support positive behavioral interventions, parent support and training, and will fund the costs of transportation to this camp for both students.

9. CDE shall require the District to ensure compliance with obligations to produce records within 5 days of requests per Cal. Educ. Code § 56504, including documented training of all staff responsible to respond to such requests.

10. CDE shall require the District to ensure compliance with all applicable laws governing PWN when initiating, changing or refusing identification, evaluation, educational placement or provision of FAPE, including documented training all staff responsible to prepare prior written notices.
11. CDE shall require the District to reform its Section 504 policies and practices to ensure non-discriminatory FAPE in the LRE as required by Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

12. CDE shall require the District to pay monetary damages to Jane and John, attorneys’ fees for this complaint, and all other appropriate relief, in amounts to be determined following input from IEEs and conclusion of this complaint process.

13. The CDE shall 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.

We reserve the right to amend this complaint and seek additional remedies on behalf of Jane and John and all other students similarly situated as the investigation progresses, in light of the fact that we do not yet have all school records because the District has failed to produce them. We also ask CDE to require the District to provide follow up compliance reports to CDE and DREDF addressing the areas listed above, and CDE to provide evidence of its follow up enforcement actions to DREDF.

Thank you for your prompt assistance with this request for investigation and resolution, including an investigation report that addresses all allegations and requested relief within 60 days as required by governing regulations. Please contact me for further information, including contact with the students’ parent/guardian, access to student records and parent/school correspondence. Pursuant to Cal. Code Regs. tit. 5, § 4663(b), we specifically seek an opportunity to provide more information to the assigned investigator(s).

Sincerely,

Robert J. Borrelle, Jr.
Equal Justice Works Fellow

Larisa Cummings
Staff Attorney
Attachments

cc: Dr. Nellie Meyer, Superintendent, Mt. Diablo Unified School District
    Anamaria Loya, U.S. Department of Education Office for Civil Rights