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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF CONTRA COSTA

KERRI K. and JACOB K., through their guardian ad litem, ELYSE K.,
SARA S., through her guardian ad litem, ZENA C.,
ANNIE T., through her guardian ad litem, ESME T., on behalf of themselves and a class of similarly situated students and their guardians ad litem,
ELYSE K.,
ZENA C., and
ESME T., as taxpayers,

Plaintiffs,

v.

STATE OF CALIFORNIA,
STATE BOARD OF EDUCATION,
STATE DEPARTMENT OF EDUCATION,
TONY THURMOND, in his official capacity as State Superintendent of Public Instruction,

Case No.

UNLIMITED JURISDICTION

**CLASS ACTION COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

**COMPLAINT FOR INDIVIDUAL DAMAGES UNDER THE UNRUH CIVIL RIGHTS ACT (Cal. Civ. Code, § 51 et seq.); TOM BANE CIVIL RIGHTS ACT (Cal. Civ. Code, § 52.1); BATTERY; NEGLIGENCE PER SE; NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS; NEGLIGENT RETENTION AND SUPERVISION; AND FOR DECLARATORY AND INJUNCTIVE RELIEF UNDER CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 526a**

CONTRA COSTA COUNTY OFFICE OF EDUCATION,
FATIMA ALLEYNE,
ANNETTE LEWIS,
VIKKI CHAVEZ,
MIKE MAXWELL, and
SARAH BUTLER, in their official capacities as members of the Contra Costa County School Board,
LYNN MACKEY, in her official capacity as Contra Costa County Superintendent of Schools,
TOM SCRUGGS, in his official capacity as Contra Costa County Director of Student Programs – Special Education,
the FLOYD I. MARCHUS SCHOOL,
DAVE FENDEL, in his official capacities as CCCOE Coordinator of Social Emotional Learning Support and former principal of the Floyd I. Marchus School,
MATT BENNETT, in his official capacity as principal of the Floyd I. Marchus School,
BECKY ARNOTT, in her official capacity as a credentialed teacher at the Floyd I. Marchus School,
DOÑA FOREMAN,
JULIE DUNCAN,
KYLA SANTANA,
ASLAM KHAN, and
BEN NAVARRO, in their individual capacities and official capacities as employees of the Floyd I. Marchus School, and
DOE DEFENDANTS 1–10.

Defendants.

**[JURY TRIAL DEMANDED]**

Students Kerri K., Jacob K., Sara S., and Annie T., on behalf of themselves and classes of similarly situated students (collectively, "Student Plaintiffs") and their guardians ad litem, Elyse K., Esme T., and Zena C., who also file as taxpayers ("Taxpayer Plaintiffs," and together with Student Plaintiffs, "Plaintiffs"), bring this action against:

The "*State Defendants*" consisting of:

- the State of California;
- the State Board of Education ("State Board");
- the California Department of Education ("CDE"); and
- Tony Thurmond (in his official capacity as the California Superintendent of Public Education).

The "*District Defendants*" consisting of:

- the Contra Costa County Office of Education ("CCCOE");
- Fatima Alleyne, Annette Lewis, Vikki Chavez, Mike Maxwell, and Sarah Butler (in their official capacities as members of the CCCOE School Board); and
- Lynn Mackey (in her official capacity as the Contra Costa County Superintendent of Schools).

The "*Marchus Defendants*" consisting of:

- The Floyd I. Marchus School ("Marchus");
- Tom Scruggs (in his official capacity as CCCOE Director of Student Programs – Special Education);
- Dave Fendel (in his official capacities as CCCOE Coordinator of Social Emotional Learning Support and former principal of Marchus);
- Matt Bennett (in his official capacity as current principal of Marchus and former Vice Principal);
- Becky Arnott (in her official capacity as a credentialed teacher at Marchus);
- Kyla Santana (in her individual and official capacity as an occupational therapist at Marchus);

- Julie Duncan, Doña Foreman, Aslam Khan, and Ben Navarro (in their individual capacities and official capacities as instructional assistants, teacher's aides, and/or employees at Marchus); and
- Certain unknown actors acting on behalf of Marchus and/or CCCOE ("Doe Defendants 1–10") (and together with State and District Defendants, "Defendants").

Unless explicitly stated to the contrary, all allegations are based upon information and belief. Plaintiffs allege the following:

## I. INTRODUCTION

1. In 2019, it is difficult to accept, but true, that California schools continue to use restraints, seclusion, and isolation excessively on students with disabilities. Contrary to law, these interventions are used to control and punish. California schools that are mandated to teach these children instead routinely restrain, seclude, and isolate them. They use restraints that are banned precisely because they threaten the welfare, well-being, and even the lives of students. Physical restraints are so dangerous and traumatizing that a number of states, including California, specifically outlaw or limit their use. Just this year, California explicitly recognized that "restraint and seclusion are dangerous interventions, with certain known practices posing a great risk to child health and safety" and that those practices "may cause serious injury or long lasting trauma and death, even when done safely and correctly"; that "[t]here is no evidence that restraint or seclusion is effective in reducing the problem behaviors that frequently precipitate the use of those techniques"; and that these practices "do not further a child's education." (Cal. Ed. Code, § 49005, subs. (a), (d), (e), (j).) As illustrated in this Action, these risks are not hypothetical. Restraints and seclusion can be a matter of life and death, as evidenced by the devastating death of a 13-year-old child with autism following the use of restraint at a segregated special education school in Northern California on November 28, 2018.[1]

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[1] *Sheriff: Boy with Autism Dies After Being Restrained at El Dorado Hills School During Violent Outburst*, CBS Sacramento (Dec. 6, 2018)<https://sacramento.cbslocal.com/2018/12/06/el-dorado-hills-autistic-boy-death-investigation/> (as of May 4, 2019). CDE decertified this school after the death of the student, which was highly publicized and met with tremendous

2. These abuses are the inevitable and direct consequence of the State Defendants' failure to oversee what physical and psychological punishments are meted out to students whose disabilities have behavioral manifestations, including at schools like Marchus, located in Contra Costa County. Rather, the State Defendants rely on passive data collection—as previously required by the U.S. Department of Education ("DOE")—and an un-expedited, after-the-fact system of complaint resolution, rather than proactive monitoring, allowing these practices to continue day in and day out. As a direct consequence of the State and District Defendants' failures to provide meaningful oversight, there may be no consequence—and there certainly will be no immediate consequence—for schools like Marchus that mistreat the children entrusted to their care. As the facts here demonstrate, the existence of a State complaint and reporting system does not provide parents with any actual relief, since it does not address schools' failures to report misconduct when it occurs, and, in fact, rewards non-compliance. The State Defendants' oversight is further rendered useless by the lack of any accountability for <u>not</u> reporting misconduct.

3. Through this Action, Plaintiffs seek to hold Defendants accountable for their breach of a multitude of promises made to California's students with disabilities and to stop this misconduct.

4. California makes a number of promises to students and families, but as demonstrated by Defendants' actions and inactions, these promises are empty. California, for one thing, promises "to provide an appropriate and meaningful educational program in a safe and healthy environment for all children regardless of possible physical, mental, or emotionally disabling conditions." (Cal. Ed. Code, § 56520, subd. (a)(1).) For California's most vulnerable children—those with "exceptional needs"—California makes even bolder commitments to "address the[ir] learning and behavioral needs" and to protect them from behavioral interventions that cause "physical pain," "excessive emotional trauma," and deprive them of "human dignity and personal privacy." (*Id.*, §§ 56520, subds. (a)(2)–(3), (b)(3); 56521.2, subds. (a)(1), (4).)

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public outcry over the fact that this death could have been prevented had the school faced consequences for failing to comply with the law.

5. California's laws reflect the recognition, borne of experience and expert consensus, that children with "significant behavioral challenges that have an adverse impact on their learning" are disproportionately subjected to inappropriate behavioral interventions that can create and exacerbate emotional and psychological trauma. (*Id.*, § 56520, subds. (a)(2); see *id.*, § 49005, subd. (f) ("Students with disabilities . . . are disproportionally subject to restraint and seclusion.").)[2]

6. Further, California law makes clear that the obligation to protect this population of students is within the province of the State Defendants, as "[t]he State itself bears the ultimate authority and responsibility to ensure that its district-based system of common schools provides basic equality of educational opportunity." (*Butt* v. *State of California* (1992) 4 Cal.4th 668, 685.) To enforce this promise, school authorities have a "duty to supervise at all times the conduct of the children on school grounds and to enforce those rules and regulations necessary to their protection . . . ." (*C.A.* v. *William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 869 [internal quotation marks and citations omitted].) The affirmative duty of those who "have a special relationship with the district's pupils" is at its apex when children with physical, mental, emotional, and behavioral disabilities are entrusted to their supervision and care. *Id.* Taken together, the State Defendants bear the responsibility to ensure "the right of all students to a school environment fit for learning," which "cannot take place without the physical and mental well-being of the students. The school premises, in short, must be safe and welcoming." (*In re William G.* (1985) 40 Cal.3d 550, 563.)

7. These promises under California law have never been emptier than for the emotionally vulnerable elementary school children attending Marchus, a segregated school for disabled students with behavioral issues operated by CCCOE in Concord, California. Marchus claims to provide a "Counseling and Education Program" ("CEP") that caters specifically to

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[2] California data on the use of physical restraints and seclusion in the 2013–2014 school year indicates that of the estimated 1,953 California students subject to physical restraints or seclusion, about 1,542, or 79%, were individuals with disabilities. See U.S. Dep't of Ed., Office for Civil Rights, 2013–2014 State and National Estimations, 2013–2014 Restraint and Seclusion Estimations by Restraint or Seclusion Category.<https://ocrdata.ed.gov/StateNationalEstimations/Estimations_2013_14> (as of May 4, 2019).

children "who have been identified with significant emotional and behavioral needs" and found eligible to receive special education services.[3] According to Marchus's own publication, the school's "intent" is "to help students address their challenges and change their behavior so that they may return to a less restrictive educational . . . setting when appropriate. To that end, the CEP teaches academic, social, and conflict resolution skills that foster healthy emotional development and academic achievement."[4]

8. Yet, instead of providing equal educational opportunities or meaningful behavioral supports, Marchus prioritizes behavioral compliance, which creates a traumatic educational environment for those students who attend Marchus, all of whom have been identified as students with disabilities and are subjected to abusive, trauma-inducing, and punitive behavioral interventions. The trauma Marchus students have suffered prevents them from learning and otherwise engaging in their education. And every minute that Marchus restrains or secludes students is a minute that Marchus denies the students access to the classroom and learning. Moreover, Marchus's emphasis on behavioral interventions comes at the cost of focusing on students' emotional and learning disabilities and ensuring they advance through the grade levels. Accordingly, Marchus has failed to properly assess its students for learning disabilities or deliver necessary individualized interventions, such as assistive technology support or dyslexia-trained teachers. Instead, Marchus is actively sabotaging students' progress toward the students' individualized educational goals by exposing them to the very triggers documented and prohibited by their educational assessments. As a result, students have not learned foundational skills in reading, writing, and math that are necessary parts of a basic education, and have therefore been deprived of their basic educational rights. Meanwhile, the State has consistently taken the surprising and unfounded position that it has no responsibility

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[3] Contra Costa County Office of Education Web site, "About Marchus" <https://www.cccoe.k12.ca.us/cccoe_schools/special_education/marchus_school/aboutmarchus> (as of May 4, 2019).

[4] Floyd I. Marchus School, 2017–2018 School Accountability Report Card, p. 1 <https://www.cccoe.k12.ca.us/UserFiles/Servers/Server_1077313/File/Programs%20&%20Services/For%20Parents%20&%20Students/School%20Accountability%20Report%20Cards/Floyd_I._Marchus_School.pdf> (as of May 4, 2019).

and is powerless to intervene under the California Constitution to stop these discriminatory practices—a position that has been repeatedly and consistently repudiated by every court to consider the question.[5]

9. The United States Government Accountability Office ("GAO") strongly cautions against these practices, reporting in 2009 hundreds of cases of alleged abuse and at least twenty deaths resulting from the use of restraints and seclusion.[6] Because of these known and severe risks, DOE offers considerable guidance to schools like Marchus on the dangers associated with various techniques.[7]

10. Despite these restrictions and well-known risks, Defendants, through their actions and failure to act, have subjected and continue to subject the vulnerable children in their care to prohibited restraints and seclusion, thereby jeopardizing the children's health, safety, and education. In addition to the trauma and violence they inflict, these behavioral interventions deny Marchus students their right to a free appropriate public education ("FAPE") and to equal education opportunity, as guaranteed by the California Constitution.

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[5] See, e.g., State of California's Demurrer at 4–6, *Cruz* v. *State* (Super. Ct. Alameda County, Aug. 6, 2014, No. RG14727139) (arguing that "[t]he State is not a proper party to th[e] litigation" even though Plaintiffs' claims were "based on the alleged deprivation of the Constitutional rights of seven public schools based on lack of access to the 'minimum level of learning time . . . .'"); State of California's Demurrer at 6, *Doe* v. *State of California* (Super. Ct. L.A. County, Jun. 23, 2011, No. BC445151) ("Because plaintiffs fail to allege any right to relief against the State distinguishable from the Education Defendants acting as its agents, the State is not a proper party in this case as a separately named defendant . . . ."); State of California's Demurrer at 23–24, *Robles-Wong* v. *State of California* (Super. Ct. Alameda County, Aug. 10. 2010, No. RG10515768, 2010 WL 3236453). But see *Butt*, 4 Cal.4th at 681 ("Local districts are the State's agents for local operation of the common school system . . . and the State's ultimate responsibility for public education cannot be delegated to any other entity.") (internal citations omitted).

[6] See U.S. Gov't Accountability Office, GAO-09-719T, Testimony before the Committee on Education and Labor, House of Representatives: Seclusions and Restraints, Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers (2009) p. 1, 8 (hereafter "Seclusions and Restraints").

[7] See generally U.S. Dept. of Ed., Restraint and Seclusion: Resource Document (2012) <https://www2.ed.gov/policy/seclusion/restraints-and-seclusion-resources.pdf> (as of May 4, 2019).

11. Due to the risks of placing a child in a physical restraint or seclusion, schools are required to document each time that such interventions are used. To ensure that restraints are used only in true emergencies and not "used in lieu of planned, systematic behavioral interventions," a parent or guardian must be notified "within one schoolday [*sic*] if an emergency intervention is used" and a Behavioral Emergency Report ("BER"), including the name of the staff or other persons involved, a description of the incident, and details of any injuries sustained, must be "completed and maintained in the file of the individual with exceptional needs." (Cal. Ed. Code, § 56521.1, subd. (e).) Despite these requirements, Marchus has failed to report, or has inaccurately reported, many incidents involving the use of behavioral interventions, as well as the nature of the interventions, hiding the unlawful and unconscionable nature of these practices and depriving parents of the timely notice needed to promptly respond to and challenge these practices.

12. Student Plaintiffs Kerri K., Jacob K., and Annie T. are current Marchus students. Sara S. is a former Marchus student who, after being subjected to repeated behavioral interventions, required emergency psychiatric hospitalization and has been unable to return to Marchus, and for more than a year, any other educational institution. In 2019, Sara S. was compelled to enroll in a residential treatment program, which was her legal guardian's last resort.

13. After being transferred to Marchus, for its supposed expertise in positive behavior management and remediation, Kerri K., Jacob K., Sara S., Annie T., and other similarly situated students have been repeatedly restrained and secluded as punishment or to achieve compliance, despite the recognition that these practices are dangerous, ineffective, counterproductive, and authorized for use *only* in emergency situations. Marchus also routinely and inappropriately removes students from the classroom and sends them to two support rooms, where the students are further subjected to non-therapeutic and counterproductive "interventions," sometimes for hours.[8] For example:

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[8] Although designated calming rooms may serve as an important therapeutic tool in the school environment when used consistent with best practices, Marchus uses the two support rooms in a manner that significantly undermines any potential therapeutic benefit.

- Kerri K., cowering in a corner, was picked up and thrown against a wall, her legs pulled apart and her head bent toward the floor, for throwing a half-empty water bottle (which landed on the floor) in a Marchus staff member's general direction. Marchus's staff continued the restraint, even though Kerri K. repeatedly exclaimed that she was in pain and could not breathe.
- Annie T. was sent to the support room for two hours for "disrupting the class," being "disrespectful" and "non-compliant," and for going "out of area." Once in the support room, she was required to write "I will follow directions" 100 times. (Repetitive writing tasks are a common punishment for Annie T., even though she has dysgraphia and therefore such tasks can take her hours to complete.)
- Sara S. was restrained by five adults in a "floor restraint," with two adults holding each leg. Despite several team members determining that the restraint was problematic and that Sara S. could be released, one staff member refused, increasing pressure on her and ignoring both Sara S.'s exclamations of "your [*sic*] hurting me!" and the principal's instruction to release her. The principal was so disturbed by these events that he experienced a panic attack and 911 was called.

14. CDE has long been on notice that California school districts, like CCCOE, send thousands of students with behavioral disabilities to schools like Marchus, whose staff use restraint and seclusion on a routine, non-emergency basis. In 2014, DOE's Office for Civil Rights ("OCR") released a national report disclosing that students with disabilities "represent 12 percent of the national student population, but 58 percent of those placed in seclusion and 75 percent of those subjected to physical restraint."[9] In California the disparities were even greater, with students eligible for special education services composing 81% of the students exposed to physical restraint.[10] The heaviest use of physical restraint occurs in segregated special education settings.

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[9] Assem. Com. on Education Rep. on Assem. Bill No. 2657 (2017–2018 Reg. Sess.) (Apr. 25, 2018), p. 8 (hereafter "2657 Committee Report").

[10] See *id.*

15. Even when confronted with widely publicized incidents of excessive and dangerous restraints and seclusion, or reports documenting the use of non-emergency physical restraints in these segregated schools, CDE has failed to take meaningful proactive measures to monitor and prevent these unlawful practices.

16. "California has assumed specific responsibility for a statewide public education system open on equal terms to all" such that "[p]ublic education is an obligation which the State assumed by the adoption of the Constitution," and "the State's ultimate responsibility for public education cannot be delegated to any other entity . . . ." (*Butt*, 4 Cal.4th at 680–81.) The State, and by extension CDE, is required to "intervene to prevent unconstitutional discrimination at the local level" "even when the discriminatory effect was not produced by the purposeful conduct of the State or its agents." (*Id.* at 688, 681 [internal quotation marks omitted].) By failing to monitor, review, inspect, and remedy an educational system that steers students with behavioral manifestations of their disabilities into separate and inferior schools where they are exposed and/or subjected to physical restraints and isolation that bar them from accessing the classroom and learning, and by failing to ensure their return to less restrictive educational settings as soon as possible, the State and CDE are violating their affirmative obligation to ensure the right to an equal education.

17. The State's and CDE's inaction violates their duty as the ultimate guarantors of children's fundamental education rights. The State's purported system for ensuring compliance with its legal obligation does nothing to address the traumatic educational environments that persist throughout the state. The results of this inaction are serious and palpable: Plaintiffs have been deprived of their right to an equal education and, instead, are subjected to needless violence, trauma, and re-traumatization, thereby jeopardizing their health, safety, and education. The harms that Marchus in particular has perpetrated are a direct and foreseeable result of the State's failure to meaningfully address its broken system and is emblematic of a wider pattern and practice of inaction that wreaks havoc on vulnerable children throughout the state.

18. Plaintiffs bring this Action on behalf of themselves and classes of similarly situated students for declaratory, injunctive, and other appropriate relief against CDE, CCCOE,

Marchus, and other Defendants identified below to ensure compliance with state constitutional and statutory law.

19. Kerri K., Jacob K., Annie T., and Sara S., as individuals on behalf of themselves, also seek compensatory relief, including damages for physical and emotional harm, as well as statutory damages under the Unruh Civil Rights Act and Tom Bane Civil Rights Act from Defendants as identified below. As a direct result of Marchus's use of extreme behavioral interventions and dishonest recordkeeping, Student Plaintiffs have suffered, and will continue to suffer, trauma, physical harm, severe emotional distress, developmental disruption, and loss of reputation.

## II. GOVERNMENT TORT CLAIMS

20. Kerri K., Jacob K., Annie T., and Sara S.'s compliance with the requirements of the Government Claims Act ("the Act"), California Government Code section 810 et seq., for their individual damages claims is excused because the damages sought are incidental to their claims for equitable relief. Nonetheless, Kerri K., Jacob K., and Sara S. have satisfied the Act's requirements. On October 9, 2018, Kerri K., Jacob K., and Sara S. filed a claim with CCCOE alleging each of the facts underlying their allegations for damages against Defendants CCCOE, Mackey, Marchus, Scruggs, Fendel, Arnott, Khan, Navarro, and Doe Defendants 1–10. On November 21, 2018, Defendants rejected these claims in their entirety. On May 7, 2019, Annie T. filed with CCCOE a claim for damages alleging each of the facts underlying her allegations against the same Defendants CCCOE, Marchus, Scruggs, Bennett, Fendel, Navarro, and Doe Defendants 1–10, along with Defendants Santana, Duncan, and Foreman.

## III. PARTIES

### A. Plaintiffs

21. **Plaintiff Kerri K.** has been officially enrolled at Marchus since January 5, 2017. Marchus failed to conduct a functional behavioral assessment, academic assessment, or specific learning disability assessment when Kerri K. first enrolled. While at Marchus, Kerri K. has been subjected to counterproductive, traumatizing, and otherwise inappropriate behavioral interventions that have significantly interfered with her education. These interventions further

re-traumatize Kerri K. and retrigger Kerri K.'s behavioral problems because she feels insecure about her academic progress. As a result, Kerri K. is currently operating at an early third grade level in reading, writing, and math, despite being in a higher grade. Kerri K. has suffered, and will continue to suffer, physical harm, severe psychological and emotional distress, and educational deprivation.

22. **Plaintiff Jacob K.** has been officially enrolled at Marchus since January 9, 2017. Marchus failed to conduct a functional behavioral assessment or academic assessment when Jacob K. first enrolled. While at Marchus, Jacob K. has been subjected to counterproductive, traumatizing, and otherwise inappropriate behavioral interventions that have significantly interfered with his education. As a result, Jacob K. misses 50% of class time and currently operates at a second grade level in reading, writing, and math, despite being in a higher grade. Moreover, Jacob K. has consistently not met his IEP goals and failed to meet a single academic goal in the 2017–2018 academic year. Jacob K. has suffered, and will continue to suffer, physical harm, severe psychological and emotional distress, and educational deprivation.

23. **Plaintiff Elyse K.** is Kerri K.'s and Jacob K.'s mother, their guardian ad litem, and a taxpayer in the State of California, who paid state taxes in the past year. She is a paraprofessional who works with students who have emotional and behavioral disabilities in one of the California school districts that both refers children to Marchus and receives students after they have left Marchus. Marchus students frequently transfer to Elyse K.'s school for sixth grade, and Elyse K. has personally observed the damage Marchus's "behavioral intervention" policies and/or practices can cause. Elyse K.'s familiarity with the school district led her to believe that her children have no viable alternative placement to Marchus. Elyse K. is familiar with restraints, having received Crisis Prevention Institute ("CPI") training on the use of behavioral interventions.

24. **Plaintiff Sara S.** attended Marchus from August 23, 2017 until she was suspended on October 10, 2017. Marchus failed to conduct a functional behavioral assessment or academic assessment when Sara S. was first enrolled. While at Marchus, Sara S. was subjected to counterproductive, traumatizing, and otherwise inappropriate behavioral

interventions that have significantly interfered with her education. Moreover, because Sara S. previously suffered sexual trauma and abuse, Marchus's behavioral interventions re-traumatized and retriggered Sara S.'s maladaptive behavior. Sara S.'s functional behavioral assessment revealed that future behavioral interventions must take a completely hands-off approach. Sara S. currently operates at the second grade level in reading, writing, and math, and is currently enrolled in a residential placement. Sara S. has sustained physical harm and has suffered, and will continue to suffer, severe psychological and emotional distress and educational deprivation.

25. **Plaintiff Zena C.** is Sara S.'s grandmother, legal guardian, guardian ad litem, and a taxpayer in the State of California, who paid state taxes in the past year. Zena C. was both a nurse and a social worker before she retired.

26. **Plaintiff Annie T.** has attended Marchus since September 24, 2014. Marchus failed to conduct a functional behavioral assessment, academic assessment, or specific learning disability assessment when Annie T. first enrolled. When Annie T. was finally assessed, she was diagnosed with education-related disabilities and is now eligible for special education services. However, while at Marchus, Annie T. has been subjected to counterproductive, traumatizing, and otherwise inappropriate behavioral interventions that have significantly interfered with her education. Moreover, Annie T. has suffered trauma from witnessing Marchus's use of inappropriate behavioral interventions on her classmates. Furthermore, Annie T. has never received structured, evidence-based literacy instruction at Marchus. As a result, Annie T. currently operates at the first grade level in reading, writing, and math, despite being in a higher grade. Annie T. has suffered, and will continue to suffer, physical harm, severe psychological and emotional distress, and educational deprivation.

27. **Plaintiff Esme T.** is Plaintiff Annie T.'s mother, guardian ad litem, and a taxpayer in the State of California, who paid states taxes in the past year. Esme T. is a medical records clerk.

**B. <u>Defendants</u>**

28. **Defendant Marchus** is a public CEP located in Concord, California, and run by CCCOE. Marchus provides special education services to approximately 110 K–12 students from

16 California school districts "who have been identified with significant emotional and behavioral needs."[11] Marchus receives state financial assistance.

29. **Defendant CCCOE** is an educational agency (see Cal. Ed. Code, § 56026.3) responsible for providing school children with full and equal access to public education programs, in addition to other activities offered by the agency. CCCOE serves Contra Costa County and operates 12 schools, including Marchus. CCCOE is headquartered at 77 Santa Barbara Road, Pleasant Hill, California 94523. CCCOE receives state financial assistance, and is the "district of service" for all Marchus students. CCCOE's responsibilities include making and implementing educational decisions for the schools in its jurisdiction.

30. **Defendants Fatima Alleyne, Sarah Butler, Vikki Chavez, Annette Lewis, and Mike Maxwell,** sued here in their official capacities, are members of the CCCOE Board of Education. Defendants Alleyne, Butler, Chavez, Maxwell, and Lewis exercise control over the actions of CCCOE teachers, principals, and staff. (See Cal. Ed. Code, § 35020 ["The governing board of each school district shall fix and prescribe the duties to be performed by all persons in public school service in the school district."]) As members of the CCCOE Board of Education, Defendants are required to ensure that district programs and activities are free from discrimination based on, among other things, disability. (See *id.*, § 260.)

31. **Defendant Lynn Mackey**, sued here in her official capacity, is the Contra Costa County Superintendent of Schools. Defendant Mackey exercises supervision and control over the daily activities of CCCOE, including all hiring and human resource decisions, as well as supervision over the use of behavioral restraints.[12]

32. **Defendant Tom Scruggs**, sued here in his official capacity, is CCCOE Director for Student Programs – Special Education. Defendant Scruggs exercises supervisory and administrative control over the special education programs run by CCCOE, including Marchus.

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[11] Footnote 3, *supra*.

[12] See, e.g., Cal. Ed. Code, §§ 1240–1281 (powers and duties of county superintendent of schools); *id.*, § 35035 (powers and duties of superintendent); *id.*, § 56521, subd. (b).

33. **Defendant Dave Fendel**, sued here in his official capacities, is currently CCCOE's Social and Emotional Learning Coordinator, and was Marchus's principal from at least January 2017 to November 2018. As principal, Fendel oversaw both the elementary and secondary schools. Defendant Fendel was "responsible for the supervision and administration of his school." (Cal. Code Regs., tit. 5, § 5551 [administration of school].)

34. **Defendant Matt Bennett**, sued here in his official capacity, is Marchus's principal. Defendant Bennett oversees both the elementary and secondary schools at Marchus and is "responsible for the supervision and administration of his school." (*Id*.) Before becoming principal in December 2018, Defendant Bennett was the Vice Principal at Marchus.

35. **Defendant Becky Arnott**, sued here in her official capacity, has been a teacher at Marchus since at least January 2017. She is in charge of the two support rooms and supervises non-credentialed support room staff, including Defendants Navarro and Khan.

36. **Defendant Ben Navarro**, sued here in his individual and official capacities, has been a non-credentialed "Instructional Assistant and Aide" at Marchus since at least January 2017. Defendant Navarro is one of the support room staff whom Defendant Arnott supervises. Defendant Navarro routinely engages in the misuse of restraints and seclusion on elementary school students.

37. **Defendant Aslam Khan**, sued here in his individual and official capacities, has been a non-credentialed "Instructional Assistant and Aide" at Marchus since at least December 2016. Defendant Khan routinely engages in the misuse of restraints and seclusion on elementary school students.

38. **Defendant Doña Foreman**, sued here in her individual and official capacities, has been a non-credentialed "Instructional Assistant and Aide" at Marchus since at least November 2014. Defendant Foreman routinely engages in the misuse of restraints and seclusion on elementary school students.

39. **Defendant Julie Duncan**, sued here in her individual and official capacities, was an employee at Marchus. Defendant Duncan routinely engaged in the misuse of restraints and seclusion on elementary school students.

40. **Defendant Kyla Santana**, sued here in her individual and official capacities, was an occupational therapist at Marchus. Defendant Santana routinely engaged in the misuse of restraints and seclusion.

41. **Defendant State Board** and its members are responsible for establishing policies governing California's schools and for adopting rules and regulations for the supervision and administration of all local school districts. Pursuant to California Education Code sections 33030–32, Defendant State Board is required to supervise local school districts to ensure that local school districts comply with state requirements concerning educational services. Defendant State Board is also tasked with "adopt[ing] rules and regulations necessary for the efficient administration [of the State's special education programs]." (Cal. Ed. Code, § 56100, subd. (a).)

42. **Defendant State of California** is the legal and political entity with plenary responsibility for educating all California public school students, including for establishing and maintaining the system of common schools and a free education, under article IX, section 5 of the California Constitution.

43. **Defendant CDE** is the department of California's state government responsible for administering and enforcing laws related to education. (Cal. Ed. Code, § 33308.) Pursuant to California Education Code sections 33300–16, CDE is responsible for cooperating with federal and state agencies in prescribing rules, regulations, and instructions required by those agencies. CDE bears ultimate responsibility for CCCOE and Marchus.

44. **Defendant Tony Thurmond**, sued here in his official capacity, is the State Superintendent of Public Instruction for the State of California, the Secretary and Executive Officer for the State Board of Education, and the Chief Executive Officer of the California Department of Education. As such, he is obligated to take all necessary steps to ensure that school districts comply with the California Constitution and State laws. Pursuant to California Education Code sections 33301–03, he is the Director of Education in whom all executive and administrative functions of CDE are vested. Pursuant to California Education Code section 33112, subdivision (a), he is charged with superintending the schools of this State. Defendant Thurmond is responsible for ensuring that children in California receive a FAPE, and for

administering, monitoring, and enforcing the law regarding special education programs. (See Cal. Ed. Code, §§ 56120, 56125, 56600.6.)

45. Plaintiffs presently do not know the names or capacities of other Defendants responsible for the wrongs described in this Complaint, and, pursuant to California Code of Civil Procedure section 474, sue such Defendants under the fictitious names "Doe Defendants 1–10," inclusive.

## IV. JURISDICTION AND VENUE

46. Plaintiffs' claims arise under state law. This Court has jurisdiction under article VI, section 10 of the California Constitution and California Code of Civil Procedure section 410.10.

47. Venue is proper in this Court because the Action arose in this County, and District Defendants and Marchus are situated in this County. (See Cal. Code Civ. Proc., §§ 394(a), 395(a).)

## V. CLASS ACTION ALLEGATIONS

48. This action is maintainable as a class action pursuant to section 382 of the California Code of Civil Procedure. With respect to any injunctive and declaratory relief sought, Plaintiffs bring this Action not only on their own behalves, but on behalf of all persons similarly situated. To preserve any potential damages claims of class members, this Action does not seek damages on behalf of the class.

49. **Restraint and Seclusion Class:** Student Plaintiffs Kerri K., Jacob K., and Annie T. seek to represent a class consisting of all current or future Marchus students who are subject to, or will be subjected to, Marchus's policies and/or practices governing the use of unlawful behavioral interventions (the "Restraint and Seclusion Class").

50. **Reporting Class:** Student Plaintiffs Kerri K., Jacob K., Annie T., and Sara S. seek to represent a class consisting of all students who are currently enrolled, have been enrolled in the past three years, or will enroll at Marchus, and who have been, are, or will be subjected to Marchus's failure to report, inaccurate and misleading reporting, or untimely reporting, to the detriment of both students and their parents (the "Reporting Class").

51. The Restraint and Seclusion Class and the Reporting Class are referred to, collectively, as the "Classes."

52. **Numerosity.** The Classes are so numerous that joinder of all members is impracticable. In the Restraint and Seclusion Class, attendance during the 2018–2019 school year at Marchus alone (with enrollment at approximately 110 students) subjects class members to its policies and/or practices governing inappropriate behavioral interventions. The Reporting Class is similarly numerous because current and past attendance at Marchus subjects Class Members to its inaccurate, misleading, untimely, and damaging reporting practices.

53. **Commonality.** There is a well-defined community of interest in that there exist questions of law and/or fact common to the Restraint and Seclusion Class, that predominate over any individual question, including:

i. Whether State Defendants, District Defendants, and Marchus deny Student Plaintiffs and those similarly situated their rights under section 56000 et seq. of the California Education Code by, among other actions, employing policies and/or practices that:

   a. Deny Plaintiffs and those similarly situated of their rights to FAPE and the educational and procedural safeguards set forth in section 56000 et seq. of the California Education Code.

ii. Whether District Defendants and Marchus have employed in the past, or will in the future employ, policies and/or practices that violate section 56520 et seq. of the California Education Code including:

   a. Subjecting students to unlawful behavioral interventions in non-emergency situations; and

   b. Failing to adequately train teachers and staff on how to use appropriate behavioral interventions.

iii. Whether State Defendants, District Defendants, and Marchus deny Student Plaintiffs and those similarly situated their rights under section 11135 of the

California Government Code, by, among other actions, employing policies and/or practices that:

a. Deny Plaintiffs and those similarly situated the opportunity to participate in or benefit from a public education equal to that provided to others and free from harm;

b. Deny Plaintiffs and those similarly situated the opportunity to participate in or benefit from an education that is as effective as that provided to other non-disabled students;

c. Deny Plaintiffs and those similarly situated the opportunity to return to a more inclusive educational environment;

d. Fail to incorporate reasonable accommodations or modifications to ensure students are able to meaningfully access their education; and/or

e. Utilize methods of administration that have the effect of subjecting Plaintiffs and those similarly situated to discrimination on the basis of disability.

iv. Whether State Defendants violate the state constitutional rights of Student Plaintiffs and those similarly situated by, among other things, employing policies and/or practices that facilitate the deprivation of students' fundamental right to an education under the California Constitution.

v. Whether District Defendants and Marchus Defendants have employed in the past, or will in the future employ, policies and/or practices regarding behavioral interventions that violate students' rights under article 1, section 13 of the California Constitution;

vi. Whether there are policies and/or practices that may effectively eliminate the inappropriate application of behavioral interventions and corresponding discrimination on the basis of disability; and

vii. Whether injunctive relief would successfully remedy Plaintiffs' harm and Defendants' use of traumatic and/or discriminatory policies and/or practices.

54. There is a well-defined community of interest in that there exist questions of law and/or fact common to the Reporting Class, that predominate over any individual question, including:

i. Whether Plaintiffs have been denied full and equal benefits of, or discriminated against under, a service, program, and/or activity of a public entity or program receiving state assistance in violation of section 11135 of the California Government Code because of District Defendants' and Marchus's inaccurate and incomplete reporting policies and/or practices which:

a. Deny Plaintiffs and those similarly situated the opportunity to participate in or benefit from a public education equal to that provided to others that is free from harm;

b. Deny Plaintiffs and those similarly situated the opportunity to return to a more inclusive educational environment; and/or

c. Utilize methods of administration and application that have the effect of subjecting Plaintiffs and those similarly situated to discrimination on the basis of disability.

ii. Whether District Defendants and Marchus have employed, or will in the future employ, policies and/or practices that violate section 56520 et seq. of the California Education Code by:

a. Failing to document, adequately and accurately, instances in which "emergency" behavioral interventions are used; and

b. Failing to adequately, accurately, and promptly notify parents when "emergency" behavioral interventions are used.

iii. Whether District Defendants and Marchus have employed, or will in the future employ, policies and/or practices that violate sections 11164–11174.4 of the California Penal Code by failing to report instances of child abuse;

iv. Whether certain Defendants have a duty or responsibility to accurately and properly report restraint and seclusion incidents;

v. Whether the duties, manners, and methods of proper reporting have been communicated to Marchus's staff and/or are included in Marchus's operating policies and/or practices;

vi. Whether certain Defendants have received feedback that their reports are inaccurate;

vii. Whether Defendants' reporting policies and/or practices are designed and/or deployed to cover up their own misconduct;

viii. Whether certain Defendants review these reports in order to assess and improve their conduct and/or the adequacy of their reporting practices;

ix. Whether Defendants' reliance on or use of the records created in accordance with Defendants' policies and/or practices have inhibited students from enrolling in other schools, especially those with more inclusive settings;

x. Whether the accurate and compliant maintenance of academic and behavioral records provides students greater opportunities for integration into more inclusive settings and/or those best suited to students' educational and behavioral needs; and

xi. Whether there are better policies and/or practices that may ensure reporting compliance, result in accurate records, and mitigate the harm Plaintiffs have suffered and will continue to suffer as a result of Defendants' reporting practices.

55. **Typicality.** The claims of the Student Plaintiffs, as class representatives, are typical of the claims of the Classes. Student Plaintiffs have been subjected to unlawful restraints and seclusion, in the case of the Restraint and Seclusion Class, and have been subject to inadequate and misleading reporting, in the case of the Reporting Class. Moreover, the Student Plaintiffs' individual damages claims are incidental to their claims for equitable relief and therefore do not undermine their ability to represent the Classes.

56. **Adequate Representation.** The Student Plaintiffs, as class representatives, will fairly and adequately protect the interests of each of the Classes. Each Student Plaintiff possesses a strong personal interest in the subject matter of this lawsuit. The Student Plaintiffs'

individual damages claims are incidental to their claims for equitable relief and therefore do not undermine the Student Plaintiffs' ability to represent the Classes. The Student Plaintiffs are represented by experienced counsel with expertise in federal and state law concerning disability rights and special education, as well as class action litigation. Counsel have the legal knowledge and resources to fairly and adequately represent the interests of all class members in this Action.

57. Defendants have acted and/or refused to act on grounds generally applicable to the Classes, thereby making appropriate injunctive and declaratory relief with respect to the Classes as a whole.

## VI. STATEMENT OF CLAIMS

### A. Marchus Improperly Uses Dangerous and Traumatizing Behavioral Interventions

58. At Marchus, staff members respond to disability-related behaviors with physical restraint and seclusion as a matter of routine, rather than restricting the use of these physical interventions to situations in which there is an immediate danger of serious physical harm to the student or others that cannot be otherwise remedied, as required by law. Safer and less traumatic interventions have been successfully implemented in school systems, eliminating seclusion and reducing physical restraint to an extremely rare occurrence. These non-physical interventions are linked to positive outcomes such as greater academic achievement, as noted below. District Defendants and Marchus Defendants have failed to implement these alternatives.

59. DOE guidance on restraint and seclusion identifies some of the harms and negative educational consequences associated with those practices. For example, DOE cautioned school districts in a 2016 "Dear Colleague" letter regarding the "limits that [f]ederal civil rights laws . . . impose on the use of restraint and seclusion" in public schools.[13] According to the letter, a "school district discriminates on the basis of disability in its use of restraint or seclusion by (1) unnecessarily treating students with disabilities differently from students without disabilities; (2) implementing policies, practices, procedures, or criteria that have an

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[13] Catherine E. Lhamon, Dear Colleague Letter: Restraint and Seclusion of Students with Disabilities, U.S. Dep't of Ed. Office for Civil Rights, p. 1 (Dec. 28, 2016) <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201612-504-restraint-seclusion-ps.pdf> (as of May 4, 2019).

effect of discriminating against students on the basis of disability or defeating or substantially impairing accomplishment of the objectives of the school district's program or activity with respect to students with disabilities; or (3) denying the right to a free appropriate public education . . . ."[14]

60. Consistent with these warnings, Marchus students are deprived of equal educational opportunities when they are subjected to harmful, traumatic, counter-productive, non-educational, and non-emergency restraints and seclusion by Marchus's staff, who are often ineffectively trained and/or supervised.

**1. Restraints**

61. "Restraint" is "any manual method, physical or mechanical device, material, or equipment that immobilizes or reduces the ability of an individual to move his or her arms, legs, body, or head freely."[15] There are various restraint techniques.

62. Marchus's records suggest that Marchus's staff most often use the following restraints and refer to them as follows: (1) "basket hold" or "child's control position"; (2) "team control hold"; and (3) "transport position" or "escort position." Marchus's incomplete records also reflect that its staff routinely use restraints that "bring children to the floor," which may involve the use of "prone," "supine," and/or the floor version of "child control" restraints.

63. ***Basket Hold.*** The basket hold, or child's control position, involves one or more adults "holding [a] child's crossed arms" across his or her torso in a standing, seated or lying down position.[16] (See Fig 1.) No fewer than 14 states ban this kind of restraint, which obstructs a child's breathing and can asphyxiation and death.[17]

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[14] *Id.*, p. 3.

[15] Seclusions and Restraints, footnote 6, *supra*, p. 1.

[16] *Id.*, p. 6.

[17] Butler, How Safe is the Schoolhouse? An Analysis of State Seclusion and Restraint Laws and Policies (2017) p. 64 <https://www.autcom.org/pdf/HowSafeSchoolhouse.pdf> (as of May 4, 2019).

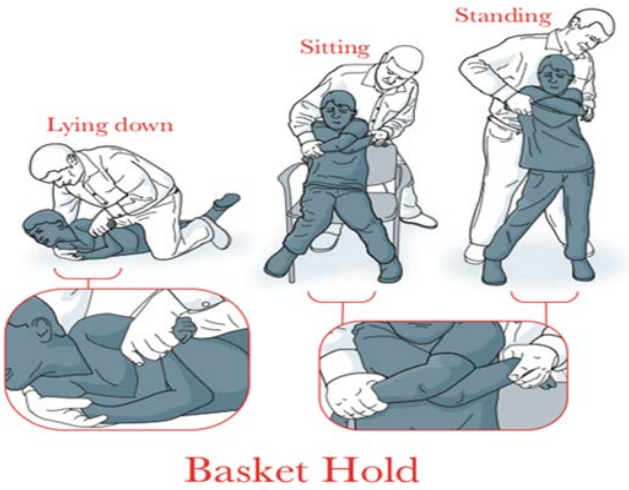


*Figure 1: Basket Hold*[18] *or Child's Control Position*

64. Even Marchus's under-inclusive self-reporting for January 2017 to November 2017 reveals that Marchus's use of this restraint is frequent, with at least *34 incidents inflicted on three of the Plaintiffs* during that time alone.

65. ***Team Control.*** The team control position involves "[t]wo staff members hold[ing] the individual as the auxiliary team members continually assess the safety of all involved and assist, if needed."[19] The adults using the technique must "[f]ace the same direction as the Acting Out Person while adjusting, as necessary, to maintain close body contact with the individual"; "[k]eep their inside legs in front of the individual"; "[b]ring the individual's arms across their bodies, securing them to their hip areas"; and "[p]lace the hands closest to the individual's shoulders in 'C-shape' position to direct the shoulders forward."[20] (See Fig. 2.) CPI, a for-profit organization that has provided training to Marchus's staff, prohibits the use of team control position on elementary school-aged children.

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[18] Vogell et al., Restraint Techniques (June 19, 2014) ProPublica <http://projects.propublica.org/graphics/restraint-techniques> (as of May 4, 2019).

[19] Hadley School, Physical Restraint Procedures (2014) p. 4 <https://www.hadleyschools.org/sites/hadleymaps/files/uploads/jkaa-r-1_physical_restraint_procedures.pdf> (as of May 4, 2019) (hereafter "Physical Restraint Procedures").

[20] *Id*.

*Figure 2: Team Control Position*

66. Even Marchus's under-inclusive self-reporting for January 2017 through November 2017 reveals that Marchus's use of this restraint is frequent, with at least *27 incidents inflicted on three of the Plaintiffs* during that time period alone.

67. ***Prone Restraint.*** The prone restraint, or "prone hold," involves one or more adults holding a child face-down on the floor. The figure below represents the "sanitized" version of such a hold. The prone hold can "cause[] suffocation, by compressing the child's ribs so the chest cavity cannot expand, and pushing the abdominal organs up so they restrict the diaphragm and reduce the room for lung expansion."[21] (See Fig. 3.)

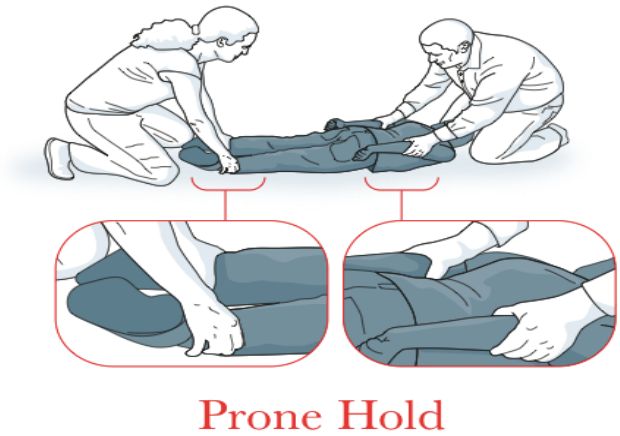


*Figure 3: Prone Restraint*[22]

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[21] Butler, footnote 17, *supra*, p. 64.

[22] Vogell, footnote 18, *supra*.

68. DOE has published guidance stating that "[p]rone (i.e., lying face down) restraints or other restraints that restrict breathing *should never be used* because they can cause serious injury or death."[23] Three states ban outright the use of prone restraints, 14 states ban the use of both prone restraints and other restraints that obstruct a child's breathing, two states regulate the use of prone restraints, and 33 states ban the use of prone restraints on children with disabilities.[24] In CDE's initial investigation report responding to a compliance complaint filed by Elyse K., the investigator noted that "the staff is not permitted to perform floor prone restraints."[25]

69. ***Supine Hold.*** The supine hold involves one or more adults holding a child face-up on the floor and can "interfere with [a child's] ability to protect [his or her] airway" and cause aspiration or death.[26] (See Fig. 4.) Girls and those who have experienced sexual trauma are especially at risk for psychological traumatization or re-traumatization as a result of supine holds.[27]

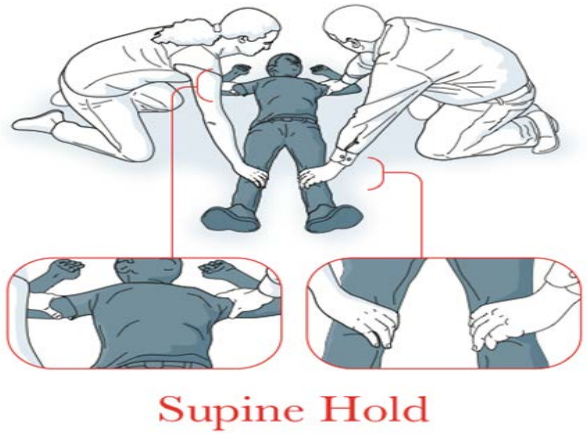


*Figure 4: Supine Hold*[28]

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[23] Restraint and Seclusion Resource Document, footnote 7, *supra*, p. 16 (italics added).

[24] Butler, footnote 17, *supra*, p. 64.

[25] Cal. Dept. of Education, Investigation Report: Case S-0381-17/18 (mailed Jan. 12, 2018) p. 4. (hereafter "CDE Investigation Report").

[26] Mohr et al., *Adverse Effects Associated with Physical Restraint* (2003) 48 Can. J. Psych. 330, 332.

[27] *Id.* at 334; Gallop et al., *The Experience of Hospitalization and Restraint of Women who have a History of Childhood Sexual Abuse*, 20 Health Care for Women Internat. 401, 401.

[28] Vogell, footnote 18, *supra*.

70. ***Transport.*** The transport position, or escort position, involves one or more adults immobilizing a child by grabbing their own wrists and securing the child against their bodies for the purpose of relocating the child.[29] (See Fig. 5.)

*Figure 5: Transport or Escort Position*

71. In addition, Marchus's staff have utilized their own, invented "restraints" beyond those identified above. On one occasion, 72.5-pound Kerri K. was pinned against a wall by Defendants Arnott and Navarro "like a coat hanging on a coat hanger," with her feet dangling in the air.[30] Incident reports suggest that Marchus's staff regularly use such dangerous and untested techniques.

**2. Seclusion**

72. Marchus also psychologically traumatizes its students through the use of seclusion and inappropriate isolation in the support room.

73. "Seclusion" refers to the "involuntary confinement of a student alone in a room or area from which the student is physically prevented from leaving."[31]

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[29] Physical Restraint Procedures, footnote 29, *supra*, pp. 4–5; see also 42 U.S.C. § 290ii(d)(3) (defining the "transport position" in the context of youth psychiatric hospitals as "the temporary touching or holding of the hand, wrist, arm, shoulder or back for the purpose of inducing a resident who is acting out to walk to a safe location").

[30] See *infra*, ¶ 153.

[31] Restraint and Seclusion: Resource Document, footnote 7, *supra*, p. 10; see Council for Children with Behavioral Disorders, CCBD's Position Summary on The Use of Physical Restraint Procedures in School Settings (2009) (hereafter "CCBD Position Summary: Seclusion"); see Cal. Ed. Code, § 49005.1, subd. (i).

74. A 2001 study found that seclusion "may cause additional trauma and harm," and "the practice of seclusion does not add to therapeutic goals and is in fact a method to control the environment instead of a therapeutic intervention."[32]

75. Children have reported feeling afraid and abandoned while secluded. In its "Position Summary on the Use of Seclusion in School Settings," the Council for Children with Behavioral Disorders states: "[m]ost important are the continuing significant psychological damage and the potential of physical injury and even death associated with the ongoing abusive and inappropriate use of seclusion in school settings."[33] Marchus's records suggest that the school has at least two rooms—the "small support room" and the "large support room"—where Marchus students are inappropriately suspended in-house or subjected to seclusion.[34] The small support room is windowless and has been described as "the closet." Marchus's staff sometimes stand in the doorway or block the doorway with gym mats to prevent students from even peering outside.

76. Marchus's staff use the "large support room" to remove students from their classes and peers for up to hours at a time as punishment, for in-school suspension, and/or to engage in otherwise inappropriate behavioral interventions. Carrying over punishment that occurred on the previous day is both inappropriate and harmful.

**B. <u>Restraints and Seclusion Cause Tangible Trauma and Harm</u>**

77. The GAO has explained that that even if no physical injury is sustained, children who are restrained or secluded can be severely traumatized as a result.[35] Students are too anxious, frightened, or angry to focus on and fully participate in classroom activities, hindering their return to general education settings with supports as soon as possible. When an individual is exposed to trauma, especially in the form of repeated traumatic stress or an extreme traumatic

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32. Finke, *The Use of Seclusion is Not an Evidence-Based Practice* (2001) 14 J. Child & Adolescent Psychiatric Nursing 186, 189.

33 CCBD Position Summary: Seclusion, footnote 31, *supra*, p. 237.

34 See *id*. at 236 ("Schools have developed a wide variety of names for the locations where students are sent to be secluded. Regardless of the name or the purpose, if a student is alone and prevented from leaving, this setting constitutes seclusion.")

35 Seclusion and Restraint, footnote 6, *supra*, p. 1, 8.

event, the brain becomes over-sensitized to any potential stimulus that might cue a threat. The individual, thus, perceives ordinary encounters as threatening ones, triggering a reactive "fight or flight" or dissociative response.[36]

78. The counter-productive effects of restraint and seclusion are further confirmed by research. These manifestations of trauma impair a student's attention, organization, comprehension, memory, and trust, all necessary for the acquisition of academic skills. Childhood trauma is linked to poor academic outcomes, including failure to reach proficiency in core subjects and/or to graduate from high school. Exposure to trauma also often induces maladaptive behaviors due to loss of ability to emotionally self-regulate—including aggression, disproportionate reactivity, impulsivity, distractibility, or withdrawal and avoidance—that disrupt the learning environment and frequently lead to exclusionary school discipline measures or absence from school.

79. These practices create a chaotic and violent atmosphere that undermines trust between students and staff and fails to teach students important adaptive behaviors, including how to engage in positive, self-directed activities and meaningful alternative ways of communicating and interacting. The resulting trauma Marchus students have suffered prevents them from learning and otherwise engaging in their education. Every minute that Marchus restrains or secludes students is a minute that Marchus denies the students access to the classroom and learning. Moreover, Marchus's emphasis on behavioral interventions comes at the cost of focusing on students' emotional and learning disabilities and ensuring they advance through the grade levels. Marchus has failed to properly assess its students for learning disabilities or to deliver necessary individualized interventions, such as assistive technology support or dyslexia-trained teachers. As a result, students have not learned foundational skills in reading, writing, and math that are necessary parts of a basic education, and are multiple grade

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[36] Perry et al., *Childhood Trauma, the Neurobiology of Adaptation, and "Use-dependent" Development of the Brain: How "States" Become "Traits"* (1995) 16 Infant Ment. Health J. 271, 277–79 <http://media.wix.com/ugd/29cec4_4951bdf3fb444a62b01f2da71e4a4cae.pdf> (as of May 4, 2019).

levels behind. Accordingly, students who attend Marchus have been wholly deprived of access to the classroom, learning and, thus, their basic education rights.

80. In fact, Elyse K. and Esme T. repeatedly have been told by other Marchus parents that children who attempt to return to a general education classroom after attending Marchus are so behind academically that they are unable to graduate without significant remedial support.

## C. Marchus's Traumatizing Restraint and Seclusion of the Student Plaintiffs

### *i. Plaintiff Kerri K.*

81. Before enrolling at Marchus, Kerri K. was diagnosed with Emotional Disturbance and Attention Deficit Hyperactivity Disorder ("ADHD"), and was determined to be eligible for special education services. Kerri K.'s disabilities entitle her to services and protection from discrimination under state law. Kerri K.'s enrollment at Marchus is part of her Individualized Education Program ("IEP") and required a written contract between her home school district, San Ramon Valley Unified School District ("SRVUD"), and CCCOE. CCCOE is Kerri K.'s current district of service.

82. When Kerri K. enrolled at Marchus, she was approximately three feet, nine inches tall, and weighed approximately 60 pounds. On May 21, 2017, she was less than four-and-a-half feet tall and weighed 72.5 pounds. Kerri K. currently is four feet, seven inches tall, and weighs approximately 100 pounds.

83. Kerri K. has both an IEP and a Behavior Intervention Plan ("BIP"). Kerri K. has had an IEP since June 2, 2016 and a BIP since May 2017. Marchus's staff is well aware of Kerri K.'s diagnoses, and that using restraint as a behavioral intervention is not in her best interest but, instead, is counterproductive. Notes from an IEP team meeting on May 27, 2017 reflect that "[Kerri K.] seems to like having her hands rubbed to help her calm down" and that she "does better with autonomy." In the same notes, the school psychologist recommended "working to decrease and ultimately completely stop all hands on restraints." According to Kerri K.'s May 26, 2017 IEP, "[o]nce angered to the point of aggression, it can be very difficult for this child to re-regulate. Typical means of physical control (i.e., CPI holds for an acting-out

person) are often counter productive [*sic*] and may only further enrage this child." Kerri K.'s May 23, 2017 BIP states:

> Remember, this is a young child who still looks to adults for safety and to model the proper examples. Teach the student to negotiate, to be flexible, patient and be respectful. If needed, set clear expectations and limits. Give space and ability to vent when possible. If tantrums become a danger, as *a very last resort* consider CPI techniques to keep everyone safe. Use least restrictive means and *stop a restraint as soon as possible*.

(Italics added.)

84. Marchus's staff began to restrain Kerri K. as early as February 2017, less than two months after she enrolled at Marchus. According to Marchus's incomplete records, between February and November 2017, Kerri K. was subjected to 45 *documented* instances of restraint, despite having never been subjected to a restraint at any of her previous schools. These restraints are so ineffective that, as Marchus's own records confirm, Kerri K. has been restrained *five or more times in one school day* on multiple occasions, suggesting that the initial restraint did not address the underlying behavioral issue. For example, Kerri K. was restrained at least seven times on October 10, 2017, at least five times on October 31, 2017, and at least five times on November 9, 2017. The use of restraints has continued to the present day, with Marchus's staff subjecting Kerri K. to a restraint as recently as October 2018.

85. The following few examples demonstrate how Marchus's staff have inappropriately restrained Kerri K.:

- ***February 21, 2017:*** Kerri K. became frustrated with her math assignment, a specifically identified behavioral "trigger" described in Kerri K.'s IEP.[37] Kerri K. reacted to this trigger by tearing her math book and kicking a classroom trash can. Despite the fact that this trigger was identified in her IEP, and that Kerri K.'s IEP cautions against the use of restraints, Marchus did not deploy any positive behavioral intervention or alternative strategies. Instead, Marchus used a child control restraint, notwithstanding this restraint's known dangers, including

[37] Kerri K.'s Individualized Education Program (IEP) (May 26, 2017).

asphyxiation and death. The behavior sought to be controlled did not present a clear and present danger to anyone.

- ***April 12, 2017:*** Marchus's staff restrained Kerri K. in the child support position for being "argumentative" and "pushing dividers" around the support room.
- ***Approximately June 2017:*** As Kerri K. cowered in the corner of one of the support rooms crying, Navarro, who refers to himself as "the bouncer," entered the room. Kerri K. asked Defendant Navarro to go away (which would seem reasonable in a support room). Instead, Navarro moved toward her in a threatening manner. Kerri K. again begged Navarro to stop approaching her and asked him to leave the room, where other staff were also present. Disregarding her multiple requests, Navarro continued to approach her. In response, Kerri K. threw a half-empty water bottle in Navarro's direction (which did not come close to hitting anyone and landed on the floor). Kerri K. then returned to a huddled position on the floor, crying. Kerri K. did not try to pick up any other object or approach any adult. In apparent anger, Navarro exclaimed "that's it" and motioned for Arnott to join him. Arnott clarified: "We're restraining?" and Navarro affirmed. Navarro and Arnott lifted Kerri K.—at the time just four-and-a-half feet tall and weighing approximately 72.5 pounds—and pinned her against the wall cabinets, with Arnott on one side and Navarro on the other. Kerri K.'s feet were dangling off the ground. They then forcibly spread her legs apart using their own legs, before each placing one of their own legs over Kerri K.'s. Having pinned Kerri K. against the wall, they bent her head between her legs, effectively creating an airborne version of the team control position.[38] Kerri K.'s legs were dangling off the floor. One of her shoes fell off. Kerri K. repeatedly exclaimed that she was in pain and her legs were not touching the floor. At least three times Kerri K. also said, "I'm hot," as her voice got fainter. Navarro and Arnott yelled

[38] CPI, a for-profit organization that has provided training to Marchus's staff, prohibits the use of team control position on elementary school-aged children.

at Kerri K. and told her they would not stop until her body was relaxed and she told them she was "calm," ignoring the terror Kerri K. was experiencing and the fact that she was already going limp. Eventually she faintly exclaimed, "I can't breathe." The staff continued to yell at her to tell them what they wanted to hear, refusing to adjust their position. Finally, Navarro and Arnott released her and Kerri K. slumped to the floor.

- ***In or around September 2017:*** Defendant Navarro and another member of Marchus's staff, Instructional Assistant Aslam Khan, took Kerri K. down to the floor after unsuccessfully trying to execute a child control position. Unable to fully push her down to the ground, Defendants Navarro and Khan began to kick Kerri K.'s legs.
- ***November 6, 2017:*** Defendant Navarro lifted Kerri K. off the floor with her arms wrapped around her own neck, and held her there as he attempted to carry her to the so-called support room. Defendant Fendel instructed Defendant Navarro multiple times to release Kerri K., which Defendant Navarro refused to do. Defendant Fendel even went so far as to try to block Defendant Navarro's path. Defendant Navarro reversed direction, carrying Kerri K. in the child support position to the other end of the hall, where he leaned against the wall and locked her arms. At this point, Kerri K.'s shirt had ridden up above her chest. Multiple witnesses commented that someone needed to pull down her shirt. Eventually, despite Defendant Navarro's refusal to adjust his grip or release her, Vanessa Castillo, a school social worker, managed to yank the shirt down after several tries.

86. Elyse K. has observed the support room staff's use of restraints on Kerri K. In the spring of 2017, Elyse K. was at the school for an IEP meeting when Defendant Fendel informed her that Kerri K. had been in a restraint for the past 27 minutes, during which time the staff knew that Elyse K. was on campus. Elyse K. ran out of the office and heard Kerri K. screaming. When Elyse K. entered the room, Defendant Navarro jumped up and released Kerri K.

Following another IEP meeting in March 2017, Elyse K. witnessed the tail-end of a restraint. Kerri K. had already deescalated and was sitting calmly when Khan started laughing at her, causing her to re-escalate.[39] Elyse K. expressly told the school that she was upset about this behavior and wanted it to stop. Marchus's staff failed to document *any* of these incidents, although Defendant Fendel apologized to Elyse K. "for the situation [she] witnessed" during the June 8, 2017 IEP meeting.

87. On occasion, Elyse K. has kept Kerri K. out of school due to concern that Kerri K. was not safe under the supervision of certain members of Marchus's staff.

88. From March 2017 to the present, Marchus's staff have also subjected Kerri K. to seclusion and in-house suspension in the support rooms on multiple occasions. During many of these instances, Kerri K. was placed in the small support room, and the staff placed gym mats over the door so that she could not get out or see outside the room.

89. Marchus's cumulative use of restraints, seclusion, and in-house suspension on Kerri K., as well as the failure to supervise Marchus's staff, has exacerbated, rather than ameliorated, Kerri K.'s trauma-induced maladaptive behaviors, causing her to become emotionally unstable.

90. Kerri K. has developed a habit of bed-wetting after particularly aggressive restraints, as well as night terrors. Sometimes she wakes up in the middle of the night screaming phrases such as, "let her go, let her go." Kerri K. is less social—frequently unwilling to leave the house—and less engaged in school than before she enrolled at Marchus, resulting in her making little academic progress despite her high aptitude.

91. In addition, Kerri K. has experienced nightmares, anxiety and fear after witnessing the use of restraints on Sara S., her best friend, and Jacob K., her brother. On multiple occasions, Sara S. and Kerri K. witnessed the other being subjected to a restraint, or heard the other crying while being subjected to a restraint, and ran to the other in an attempt to "save" her. The traumatizing effect on Kerri K. of witnessing Marchus staff members' use of

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[39] Kerri K. has reported that, in recent months, Navarro and other staff have begun to audibly mock her, mimicking her voice when she asks a question or requests supplies.

restraints reached a crisis point in October 2017, after Kerri K. witnessed Sara S. being removed from the school in handcuffs following a series of escalating restraints. Marchus's staff did not explain to Kerri K. what she witnessed or counsel her on how to process the event, and, therefore, Kerri K. came to believe that it was her fault because Sara S. had been trying to "rescue" Kerri K. at the time of the incident. Kerri K. continues to feel responsible for Sara S.'s hospitalization and suspension. Soon after this incident, Elyse K. noticed that Kerri K. had become preoccupied with improving her flexibility. Kerri K. frequently watched stretching "how-to" videos on YouTube and practiced in her bedroom. After several weeks, Kerri K. told Elyse K. that she wanted to become more flexible so that the restraints would hurt less. Kerri K. had hidden this from Elyse K. because she assumed that her mother knew about the frequency and intensity of the restraints and endorsed their use.[40] In fact, Elyse K. did not receive a single incident report until she filed a record request in October 2017.

92. In November 2017, Elyse K. filed a compliance complaint with CDE, asking the State to investigate the use of abusive restraints on Kerri K. Although CDE initially concluded that Marchus's staff had "failed to meet the requirements of California Education Code section 56521.1(d)(3), with regard to the use of force exceeding that which is reasonable and necessary under the circumstances,"[41] CDE's finding was reversed on reconsideration on the ground that Marchus's failure to self-report made it impossible for Elyse K. to identify the specific date of the incident.[42]

93. Kerri K. attended three schools from pre-kindergarten until her enrollment at Marchus. Kerri K. was not subjected to the use of restraints or seclusion at any of these schools.

94. As a result of Marchus's use of excessive and inappropriate restraints, seclusion, and in-house suspension on Kerri K., as well as the failure of State Defendants, District Defendants, and certain Marchus Defendants to supervise and monitor Marchus's practices,

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[40] Kerri K. and Jacob K. both report that Marchus's staff frequently threaten to "call their mom" during a restraint, leading the kids to believe that Elyse K. approves of the abusive interventions.

[41] See CDE Investigation Report, footnote 25, *supra*, p. 5.

[42] Cal. Dept. Ed. Reconsideration Report, Case R-0647-17/18 and R-0744-17/18 of Compliance Case S-0381-17/18, pp. 6–7 (hereafter "Reconsideration Report").

Kerri K. has suffered, and will continue to suffer, physical harm, severe psychological and emotional distress, and educational deprivation. Kerri K. is currently operating at an early third grade level in reading, writing, and math, despite being in a higher grade.

95. The inappropriate use of such restraints, seclusion, and in-house suspension on Kerri K. is ongoing.

***ii. Plaintiff Jacob K.***

96. Before enrolling at Marchus, Jacob K. was diagnosed with Anxiety, Emotional Disturbance and ADHD, and was determined to be eligible for special education. These disabilities entitle him to services and protection from discrimination under state law. Jacob K.'s enrollment at Marchus is part of his IEP, and required a written contract between his home school district, SRVUD, and CCCOE. CCCOE is his current district of service.

97. Jacob K. has had an IEP since May 27, 2016 and a BIP since June 2017. Marchus's staff is well aware of Jacob K.'s disabilities and is on notice that the use of restraints and seclusion is not in Jacob K.'s best interest. Notes from his draft BIP, dated May 18, 2018, indicate that restraints are counterproductive:

> [Jacob K.] engages in undesired behavior to escape undesired tasks, receive intensive attention (both verbal and physical interaction) while he is able to escape, delay, or avoid undesired work, environment, or people. Restraints provide deep sensory input and reinforce the escape from tasks and reinforce the behavior with preferred people who in that moment are interacting with him.

98. Jacob K.'s May 2018 Occupational Therapy Evaluation notes that Jacob K. "[f]linches or recoils when the body is touched or when others get too close."

99. Marchus's staff began to use restraints on Jacob K. in March 2017, about two months after he enrolled at Marchus. After frequently witnessing Marchus's staff members subject Kerri K. to restraints in 2017, Jacob K. asked to be restrained as well, feeling confused as to the reason for the intervention and believing that it would be the only way to build relationships with male staff.

100. According to Marchus's incomplete records, Jacob K. was subjected to 15 documented instances of restraint and sent to the support room 24 times between March and

December 2017. Jacob K. was subjected to additional undocumented instances of restraint and seclusion during that time and has been subjected to restraints with increasing frequency, with the most recent restraint occurring in March 2019.

101. The following few examples of the restraints to which Jacob K. has been subjected underscore their inappropriate and traumatizing nature:

- ***November 15, 2017:*** Marchus's staff restrained Jacob K. using a Marchus-invented, untested, and unsafe technique involving forceful compression (a "hug" restraint), even though Marchus's records acknowledged that Jacob K.'s supposed maladaptive behavior had already stopped.
- ***February 28, 2018:*** Jacob K. was subjected to two restraints. According to the school's own records, the first restraint was initiated in response to Jacob K.'s frustration with a math problem, leading to his attempt to pull a desk towards him. In response, the staff attempted to physically remove him from the room. This physical intervention frightened him, and he supposedly kicked at the staff's shins to get away. Jacob K. was then placed into a full-blown restraint, which further exacerbated his distress. As he attempted to kick himself free, Jacob K. was brought down into a child control restraint on the floor, despite the danger of the child control position and the fact that the floor variation includes the same dangers as the floor prone restraint, which Marchus's staff is not permitted to perform.[43] After that experience, Jacob K. began engaging in self-harm, including hitting himself, hitting his head against the wall and saying that he wanted "to die," at which point he was again placed in the child control position. Jacob K. subsequently told his mother that he believed the staff thought he was a "dangerous black boy" and that this is why his father does not want to see him.
- ***March 6, 2018:*** Elyse K. attended a four-hour IEP meeting at Marchus for Jacob K. and Kerri K. Two members of the IEP team, social worker Vanessa

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[43] See CDE Investigation Report, footnote 25, *supra*, p. 4.

Castillo and Defendant Bennett, entered the meeting late and flustered, sharing that they had been attempting to "support" a student "in crisis." Two days later, Elyse K. was informed that Jacob K. had been the unidentified student "in crisis." Jacob K. was restrained while Elyse K. was in the building and Marchus's staff failed to even notify her that her son was "in crisis."

- ***May 3, 2018:*** Jacob K. was restrained in the child control position. Jacob K. became upset and yelled, "[y]ou enjoy hurting me" and "[c]all the police, they are trying to kill me." The staff did, in fact, call the police, but only in an attempt to "5150" Jacob K.[44] The police determined that Jacob K. was not a threat and left. Elyse K. received a text message from Vanessa Castillo saying that the police had been called because Jacob K. was threatening suicide. However, neither Marchus's report nor the statement from the principal included any mention of threatened suicide.
- ***March 15, 2019:*** Jacob K. received conflicting directions as to whether he could continue using a computer. A few minutes after being given permission to play a computer game by one teacher, another teacher told Jacob K. that he could not stay on the computer. Having received these conflicting directions, Jacob K. did not stop using the computer. Instead of resolving the situation, staff began putting computers away. Jacob K., frustrated that his teacher failed to acknowledge that he was given permission to stay on the computer, started engaging in self-harm. According to the behavioral emergency report that was sent to Elyse K. on March 18, 2019, Defendant Navarro, along with another Marchus staff member, restrained Jacob K. in a transport position after he began hitting himself. After being taken to a support room in the transport position, four Marchus staff members, including Defendants Navarro and Arnott, proceeded to bring Jacob K. down into a child control position on the floor. This restraint lasted 26 minutes

[44] A "5150" is a temporary, involuntary psychiatric commitment of an individual who presents a danger to themselves or others that is authorized under the California Welfare and Institutions Code. (Cal. Welf. & Inst. Code, § 5150.)

and resulted in a visible bruise on Jacob K.'s arm. The injury was not mentioned in the report sent to Elyse K., even though Elyse K. emailed Defendants Bennett and Arnott on the same day of the incident, including a picture of the bruise and Jacob K.'s account of the event.

102. Jacob K. is routinely required to begin the day in the support room instead of attending class because of his actions that occurred on the previous day, despite there being no emergency that morning.

103. When Jacob K. enrolled at Marchus, he was approximately four feet, two inches tall, and weighed approximately 80 pounds. On May 21, 2017, he was approximately four feet, five inches tall, and weighed approximately 81.5 pounds. Jacob K. currently is approximately four feet, ten inches tall, and weighs approximately 109 pounds.

104. Jacob K.'s exposure to these extreme interventions has caused him to develop trauma-induced maladaptive behaviors, increasing the likelihood that Marchus's staff will use behavioral interventions over time. Jacob K. also has developed a significant stress-eating habit and has internalized the belief that he is bad because he is black. As a result, Jacob K. misses approximately 50% of class time and currently operates at the second grade level in reading, writing, and math despite being in a higher grade. Moreover, Jacob K. has consistently not met his IEP goals. Last year, he did not meet a single academic goal.

105. On occasion, Elyse K. has kept Jacob K. out of school due to concern that Jacob K. was not safe under the supervision of certain members of Marchus's staff.

106. Jacob K. attended three schools from pre-kindergarten until his enrollment at Marchus. Jacob K. was not subjected to the use of restraints or seclusion at any of these schools.

107. As a result of Marchus's use of excessive and inappropriate restraints, seclusion, and in-house suspension on Jacob K., as well as the failure of State Defendants, District Defendants, and certain Marchus Defendants to supervise and monitor Marchus's practices, Jacob K. has suffered, and will continue to suffer, physical harm, severe psychological and emotional distress, and educational deprivation.

108. The inappropriate use of such restraints, seclusion, and in-house suspension on Jacob K. is ongoing.

***iii. Plaintiff Sara S.***

109. Before enrolling at Marchus, Sara S. was diagnosed with Depression, Anxiety, Post-Traumatic Stress Disorder, ADHD, Reactive Attachment Disorder, Attachment Disorder with Mixed Mood and Conduct, and Disruptive Mood Regulation Disorder, and was determined to be eligible for special education. These disabilities entitle her to services and protection from discrimination under state law. Sara S.'s enrollment at Marchus was part of her IEP, and required a written contract between her home school district, the Pleasanton Unified School District, and CCCOE. During the time she was enrolled at Marchus, CCCOE was Sara S.'s district of service.

110. Sara S. has had an IEP since January 23, 2017 and a BIP since September 2017. Marchus's staff were aware of Sara S.'s diagnoses and specific vulnerabilities, but used "behavioral interventions," such as extreme physical restraints, that were contrary to her best interests. According to Sara S.'s August 11, 2017 IEP, Sara S. "needs to have access to a safe place where she can decompress and receive emotional, behavioral support." Sara S.'s March 2, 2017 IEP similarly documents that Sara S.'s psychiatrist at the UCSF Benioff Children's Hospital in Oakland ("Benioff"), whom she has seen weekly for multiple years, "believes consistency and providing a safe place for [Sara S.] is paramount when building a relationship with her. Having someone at school she can trust and rely on when she is struggling would definitely help [Sara S.] to be more successful at school." Sara S.'s IEPs also reflect the extensive trauma Sara S. has endured, as well as the devastating loss of her legal guardian's partner.

111. Before transferring to Marchus in August 2017, Sara S. attended two other schools and was never subjected to restraints or seclusion. Sara S. did not even receive an IEP until approximately seven months before her transfer to Marchus.

112. Marchus's staff began to restrain Sara S. in or around August 2017, immediately after she began to attend the school. Marchus's own self-serving and incomplete records

indicate that Sara S. was subjected to 13 documented instances of restraint during the seven weeks that she attended Marchus. However, upon Sara S.'s removal from Marchus, Marchus's staff informed Zena C. that Sara S. was subjected to restraints on an almost daily basis.

113. Marchus's mistreatment of Sara S. is readily apparent from just a few examples:

- ***September 29, 2017:*** Sara S. was placed in a 53 minute, high-level hold because, according to Marchus's own report, she "continued walking up to staff in an aggressive manner" and, when the staff picked up partitions, she "continued to push against the partitions into staff." Despite Sara S.'s IEP expressly stating that she does not do well with men, two men, including Defendant Navarro, were directly involved in the restraint, causing her behavior to deteriorate and resulting in escalation of the restraint.
- ***Unknown Date between September 30 and October 8, 2017:*** Five of Marchus's staff members pinned Sara S.—who weighed approximately 90 pounds—to the ground in the seated team control position. During this restraint, Sara S. told a staff member who was holding her leg and applying pressure, "you are hurting me," and asked him to stop. A school employee directed the staff member to let go of Sara S.'s leg, but the staff member refused.
- ***October 5, 2017:*** Marchus's staff placed Sara S. in a high-level team control position after, according to Marchus's own account, she "approached staff aggressively and postured with closed fists."
- ***October 9, 2017:*** Sara S. heard Kerri K., her friend, crying and yelling. Worried that Kerri K. was being subjected to painful restraints, Sara S., according to Marchus's own records, "ran out of the classroom to attempt to help." After the staff escorted Sara S. to the support room, she again tried to reach Kerri K., at which point she was placed in a high-level team control restraint. When Sara S. tried to escape, she was brought to the floor and kept in the hold for 15 straight minutes, at which point she was released.

- ***October 10, 2017:*** Upon seeing Kerri K. "in crisis in the front parking lot," Sara S. became traumatized and upset and "ran out of [the] area in an attempt to go to the student in crisis." Marchus's staff members used the transport position and brought her to the small support room, where she was secluded. They then used the team control position (which CPI's training prohibits for use on elementary school-aged children) for 15 minutes because she "persisted" in trying to "push through staff" to return a water bottle to another Marchus staff member. Sara S. was then left in seclusion unsupervised. During this seclusion, Sara S.'s repeated trauma compounded upon itself, culminating in a behavioral and emotional crisis, whereby the 90-pound Sara S., in a perceived exercise of self-protection, threw a pair of scissors while yelling "I'm going to kill you." Marchus's staff called the police, who removed Sara S. from the school in handcuffs and called emergency services. Emergency services took her to a psychiatric hospital, where she remained for three days. Sara S. was suspended for the incident and subsequently told that she could not return to Marchus.

114. Before the October 10, 2017 incident, Marchus did not notify Zena C. even once that Marchus's staff had restrained Sara S., despite telling her occasionally that Sara S. had experienced a "bad day" and that staff needed to take her for "a walk." If Zena C. had been properly notified, she would have removed her granddaughter from the school. In addition, Marchus was well aware of Sara S.'s traumatic history with males, as it is documented in her IEP, but took no steps to prevent male Marchus staff from restraining her.

115. In August 2017, Sara S. was approximately five feet tall, and weighed approximately 90 pounds.

116. Sara S. is still upset that she was never allowed to explain what occurred on October 10, 2017, and does not understand how she could have been removed from the school without any school official discussing the event with her. On January 25, 2018, Sara S.'s Benioff psychiatric team wrote a letter expressing concern that "inaccurate or incomplete information about [Sara S.'s] history and behavior . . . may lead to no other viable options except

placement in an unnecessarily restrictive program such as residential placement." As an "example[] of inaccurate information," the team included "the fact that the Marchus School in Concord expelled her after one or two major aggressive behavior incidents that may, by some reports, have resulted from the use of excessive restraint and force against [Sara S]."

117. The psychiatric team's concern has come true: As a result of the incomplete and misleading academic record Marchus created for Sara S., she was unable to gain admission into any other school for the 2017–2018 school year, and until March 2019—when she was compelled to enroll in residential placement—continued to be denied an educational placement.

118. As a result of Marchus's use of restraints and seclusion on Sara S., as well as the failure of State Defendants, District Defendants, and certain Marchus Defendants to supervise and monitor Marchus's practices, Sara S. has developed severe anxiety and depression and was unable to attend any other school or receive any academic instruction for the remainder of the 2017–2018 school year, resulting in her making no academic progress. Sara S. currently operates at the second grade level in reading, writing, and math, and is currently enrolled in a residential placement. As a result of both the traumatizing interventions and her subsequent isolation, Sara S. has become extraordinarily dysregulated and antisocial. In the January 25, 2018 letter, Sara S.'s Benioff psychiatric team noted: "it is clear that the lack of any daytime structure, school instruction, socialization or normal educational routine is having a negative impact also on Sara S.'s motivation, learning and self-esteem as each day goes by." To this day, Sara S. reflects on being "body slammed" by the adults who were supposed to care for her.

119. Prior to her enrollment at Marchus, Sara S. had never been subjected to a restraint or seclusion at any educational placement.

120. As a result of Marchus's use of excessive and inappropriate restraints and seclusion on Sara S., as well as the failure of State Defendants, District Defendants, and certain Marchus Defendants to supervise and monitor Marchus's practices, Sara S. has sustained physical harm and has suffered, and will continue to suffer, severe psychological and emotional distress, and educational deprivation.

### *iv. Plaintiff Annie T.*

121. Annie T. has received special education services since she was 3 years old, and has had an IEP since at least 2011. Annie T. has been diagnosed with Emotional Disturbance, ADHD, and Anxiety Disorder. Despite clearly exhibiting learning issues, Annie T. was never evaluated for learning and related disabilities. Instead, her challenges were framed as emotional, behavioral, and attentional without effective exploration, assessment, or remediation by Marchus. It was not until a parent advocate assisting the family requested an Independent Educational Evaluation that Annie T.'s learning disabilities were diagnosed. Based on an evaluation by an audiologist, the Independent Educational Evaluation found that Annie T. has significant learning disabilities, including dyslexia, dyscalculia, and dysgraphia, as well as auditory processing issues. These disabilities entitle her to services and protection from discrimination under state law. Annie T.'s enrollment at Marchus is part of her current IEP and required a written contract between her home school district, Pittsburg Unified School District, and CCCOE. CCCOE is her current district of service.

122. According to Annie T.'s psycho-educational assessment, attached to her IEP since 2013, "time-out[s], scolding her, and others trying to explain what happened," are three triggers that worsen the behaviors that interfere with Annie T.'s ability to learn. Nonetheless, Annie T. is regularly punished by being sent to the support room for "non-compliance" and being "out of area," as well as for her "disrespectful/negative attitude." In the support room, Annie T. often has been forced to write dozens of times sentences such as "I will follow directions," "I will stay in my area," and "I will do my work"—an ineffective and counter-productive behavioral intervention. Annie T.'s IEP has reflected "delayed social skills" as a central problem since at least 2014, but she is removed from the classroom so often that she has been unable to develop age-appropriate socialization.

123. Annie T. has been subjected to three documented restraints since her enrollment at Marchus, and she has witnessed friends being restrained while crying and screaming to be released.

124. Annie T. was quickly subjected to traumatizing restraints and seclusion after enrolling at Marchus. For example:

- ***September 30, 2014:*** Six days after she started at Marchus, Annie T. was kept in a support room for four hours and 45 minutes.
- ***November 6, 2014:*** Annie T. was jumping on an exercise ball in an occupational therapy room and was asked by Defendant Santana to stop. "[S]taff stopped her jumping" and then asked her to go to her table. Annie T. did not go to her table and instead started resisting by hitting staff and running around the room. Despite the fact that Annie T. is able to recover relatively quickly when positive behavioral interventions are used and she is given space, Defendant Santana opted to use physical restraints. Within a matter of minutes, Defendant Santana, along with Defendants Duncan and Foreman restrained Annie T. with three different restraints: a walking restraint, a "two person sitting" restraint, and a child control restraint, notwithstanding this restraint's known dangers, including asphyxiation and death.
- ***November 17, 2014:*** Annie T. was put in a support room for two hours and forced to write "I will follow directions" 100 times. This is a recurring, counter-productive behavioral intervention that is imposed on Annie T. almost every time that she is put in a support room. Often Annie T.'s stay in a support room is prolonged because of how long it takes Annie T., who has dysgraphia (a learning disability that impacts writing ability), to complete writing the sentences.

125. Since those early incidents, despite timeouts and scolding being her known triggers, Annie T. has been continually subjected to seclusion and/or in-school suspension. In fact, from November 2014 to November 2017, Annie T. has at least 15 documented instances of in-school suspension and/or support room timeout, operating as non-positive behavioral intervention tools. Some of the most emblematic examples include:

- ***April 13, 2015:*** Annie T. brought her stuffed animal to school and took it out of her backpack during class. When did she did not put it away, Annie T. was sent

out of class for 105 minutes, during which time Annie T. hid under the desk crying and screaming, "Leave me alone!"

- ***January 30, 2017:*** After being sent to the support room for non-compliance arising from a verbal encounter with another student, Annie T. "hid under a desk for a while[.]"
- ***From November 2014 to November 2017:*** Annie T. was assigned to write sentences describing her intended behavior (as described above) at least eight times, notwithstanding her known dysgraphia and other special education needs.

126. Annie T.'s traumatic mistreatment is ongoing. In fact, on April 11, 2019, Annie T. told Esme T. that she had an emotional breakdown and was put in a support room. Annie T. also said that an aide mocked and laughed at her with another Marchus staff member right before she was taken to the support room.[45] The same aide "pretended she was squishing [Annie T.'s] head with her thumb." Marchus did not inform Esme T. about the incident, or send her any documentation about it, even though Esme T. has repeatedly asked to be informed whenever Annie T. is put in a support room.

127. Although Annie T. regularly receives Bs on her report card, she has made little actual progress academically since attending Marchus, making her ineligible to return to a less restrictive academic environment. Given her recent independent evaluations showing significant learning disabilities, it is no surprise that Annie T., struggles to read beyond a first grade level and to do basic math, such as count money. However, instead of properly diagnosing and addressing these deficits, such as using evidenced-based structured literacy intervention per the California Dyslexia Guidelines (which Marchus does not offer and in which no Marchus teacher is trained), Marchus has exacerbated Annie T.'s learning and social delays by forcing her to spend hours at a time isolated in the support room as punishment.

128. Annie T. has internalized the view that she does not deserve the services to which she is entitled. Annie T. has come to believe that she is unlikeable, and that she needs to be

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[45] Annie T. has experienced many incidents where Marchus staff have laughed at and mocked her when she is crying or visibly upset.

isolated in the support room, away from her classmates and teachers, because "nobody likes [her]." Annie T. has also witnessed students being carried through the halls in painful-looking restraints and barricaded in the small support room with gym mats. Following these incidents, Annie T. experiences extreme anxiety.

129. Prior to her enrollment at Marchus, Annie T. had never been subjected to a restraint or seclusion at any educational placement.

130. As a result of Marchus's cumulative use of punitive and non-productive isolation in the support room and in-house suspension, as well as the failure of State Defendants, District Defendants, and certain Marchus Defendants to supervise Marchus's practices, Annie T. has suffered, and will continue to suffer, emotional distress and extreme educational deprivation.

**D. Marchus Uses Extreme Restraint and Seclusion as Punishment**

131. Marchus's own self-serving reports confirm that the use of restraints, seclusion, and isolation is routine, underscoring that such techniques are ineffective, counterproductive, and are being used in lieu of systemic behavioral plans, appropriate assessments, and positive supports to control predictable behavior.

132. Although Marchus both underreports and mischaracterizes the circumstances giving rise to the use of "emergency interventions" in non-emergency situations, the sheer number of incidents that Marchus *has* reported, especially when combined with the additional reports from students and parents, is substantial. Indeed, Marchus's own records indicate that Plaintiff Kerri K. was restrained at least 45 times in two semesters, Sara S. at least 13 times in seven weeks, and Jacob K. at least 15 times with 24 in-house suspensions in the support room in only two semesters.

133. A former Marchus employee has personally witnessed multiple incidents of the use of restraints in non-emergency situations involving Plaintiffs and other Marchus students.

134. California has prosecuted individuals for felony child abuse for less egregious conduct than that described above and to which Student Plaintiffs have been subjected.[46]

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[46] See, e.g., *People* v. *Clark* (2011) 201 Cal.App.4th 235, 241–46 (holding that tripping and repeatedly slapping a fourteen-year-old child, who was fairly thin and of average height,

135. Marchus's records make clear that these "emergency interventions" serve no positive behavioral function and, instead, are used as punishments. That is, instead of addressing Plaintiffs' educational, emotional, and behavioral needs,[47] Marchus's staff use restraints and seclusion to punish Plaintiffs *because of* behaviors that result from their disabilities. For example, Marchus's staff used an extreme restraint on Kerri K. when she became agitated by a known trigger, even though her May 26, 2017 IEP noted that a "[t]ypical means of physical control (i.e., CPI holds for an acting-out person) are often counter productive [*sic*] and may only further enrage this child." Likewise, Defendant Navarro's "that's it" comment, followed by his violently pinning a cowering 72.5-pound Kerri K. against a wall, can only be described as excessively punitive, as it was precipitated by nothing more than Kerri K.'s throwing a half-empty bottle in Navarro's general direction. Impatient Marchus staff members reportedly used restraints on Sara S. in a wide range of non-emergency situations, such as in one instance when she attempted to push past staff to return a water bottle to its owner.

136. Marchus's staff also routinely maintain a restraint after the alleged maladaptive behavior has stopped, as with the dangerous "hug" restraint used on Jacob K., or the continued physical restraint of Kerri K. after she had gone limp.

137. Marchus's practice of requiring students to begin the school day in the support room because of behaviors on the previous day often dysregulates those students and requires them to miss class time without regard for educational need, long after the disruptive behavior has ceased.

## E. Marchus's and CCCOE's Perversion of Their Reporting Obligations: The Cover-Up

138. Marchus's staff routinely fail to notify a student's parent or guardian or maintain detailed, contemporaneous records whenever a child in their custody is subjected to the use of "emergency interventions," such as restraint or seclusion. By law, reports must be drafted by a

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supported a conviction of felony child abuse, even though the child testified that the "slaps did not hurt"); *Cline* v. *Superior Ct.* (1982) 135 Cal.App.3d 943, 949 (finding that evidence, including that the defendant briefly carried the child "like a football," tossed the child into a car and drove dangerously was sufficient to support a felony child abuse conviction).

[47] See Cal. Ed. Code, § 56520, subd. (a)(1).

staff member who was involved in the underlying incident. This includes notifying students' guardians within one school day of the use of any emergency intervention; completing and filing an objective and accurate behavioral emergency report; and reporting whenever an intervention inflicts physical injury or harm. (Cal. Ed. Code, § 56521.1, subd. (e).)

139. To the extent that Marchus's staff document the use of restraints and seclusion at all, their reports often leave blank the "parent notification" line, indicating that the child's parent or guardian was never notified. Further, they are often prepared *en masse* by one or a few of Marchus's staff who were not personally involved, lack actual knowledge of the event and, therefore, use boilerplate and second-hand descriptions.

140. For instance, Elyse K. has observed Kerri K. being restrained on at least two occasions that are not reflected in Marchus's school records. Marchus's staff also have informed Elyse K. of instances where Kerri K. was restrained, but which were not documented. Both Kerri K. and Jacob K. have described specific incidents of restraint in detail to Elyse K. that are not reflected in Marchus's records and about which Elyse K. was never formally notified. Elyse K. also discovered that she had been orally notified of several incidents that did not have corresponding written reports.

141. Annie T. routinely reports to her mother that she spent a portion of the day in the support room and has reported that she was restrained, even though Esme T. has not regularly received incident reports since Annie T.'s first year at the school.

142. Similarly, although Marchus's records reflect that Sara S. was restrained at least 13 times, multiple staff reported to Zena C. that Sara S. was restrained almost daily.

143. Marchus's staff failed to notify Zena C. that Sara S. had ever been subjected to a restraint until she was hospitalized in October 2017. Nor did Zena C. ever receive a BER or incident report. After learning what had happened to Sara S., Elyse K. requested her own children's records in October 2017, only to discover that Marchus's staff had created BERs and incident reports for a number of restraints about which she never received notice.

144. Marchus's records not only underreport the number of instances of restraints, seclusion, and isolation, but also the duration of each instance. Similarly, the reports associated with multiple emergency interventions do not provide the length of the intervention.

145. Critically, the many instances of restraint are not for true emergencies, but are instead used to secure compliance and to punish. As noted above, Marchus's staff also routinely mischaracterize predictable, non-emergency situations as actual emergencies.

146. Marchus's efforts to cover up its staff's conduct both violates California law and is emblematic of a wider culture of silence and intimidation at Marchus. For example, when a former school employee shared his concerns about the use of extreme behavioral interventions in non-emergency situations, Marchus administrators attempted to intimidate him by suggesting that he was complicit in Marchus's conduct for failing to report his suspicions of abuse to the police.

147. Defendant CCCOE has also failed to properly report the use of restraints and seclusion. For example, in 2015–2016, the most recently published reporting period by the CRDC, CCCOE reported that zero Marchus students had been subjected to restraints and/or seclusion even though Defendant Navarro, who is known to engage in the use of restraints and seclusion regularly, has worked at the school for over a decade.[48] Based on information and belief, this is a gross underreporting.

148. As a result of the Defendants' systematic failure to comply with reporting requirements and inaccurate recordkeeping, the disciplinary records of Marchus students reflect inaccurate behavioral profiles that make it more difficult for Marchus students to assimilate to more inclusive educational institutions.

**F. Educationally Appropriate Behavioral Interventions**

149. Restraints, seclusion, and in-house suspension are not only harmful, but less effective than alternative approaches, such as positive behavioral supports, for addressing

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[48] Civil Rights Data Collection, Floyd I. Marchus School 2015–2016 School Year, Discipline, Restraints/Seclusion, Harassment/Bullying <https://ocrdata.ed.gov/Page?t=s&eid=521338&syk=8&pid=2498> (as of May 4, 2019).

maladaptive behaviors. Authorities recognize the usefulness of positive behavioral supports, requiring, for example, that IEP teams consider the use of such supports in addressing the behavior of a child with a disability whose behavior impedes her own or others' learning. This includes Multi-Tiered Systems of Support ("MTSS") incorporating school-wide Positive Behavioral Interventions and Supports ("PBIS") needed to facilitate the integration of students' mental health disabilities.[49] Widely accepted MTSS practices include assessment (*i.e.*, "screening to identify need") and "positive behavioral interventions" as part of a comprehensive plan, training, and coordination (i.e., a "[c]ollaborative, team-based approach to development, implementation, and evaluation of alternative interventions" and "[e]xpectations for parent involvement").[50] These safer and less traumatic interventions have been successfully implemented in school systems, eliminating seclusion and reducing physical restraint to an extremely rare occurrence. These non-physical interventions are linked to positive outcomes such as greater academic achievement, fewer disciplinary problems, and decreased occupational injuries for staff.

## G. District Defendants' and Certain Marchus Defendants' Failure to Remedy the Abusive Use of Restraints and Seclusion

150. "[A] school district and its employees have a special relationship with the district's pupils . . . arising from the mandatory character of school attendance and the comprehensive control over students exercised by school personnel, 'analogous in many ways to the relationship between parents and their children.'" (*William S. Hart Union High School Dist.* (2012) 53 Cal.4th at 869 [quoting *Hoff* v. *Vacaville Unified School Dist.* (1998) 19 Cal.4th 925, 935].) As such, "the duty of care owed by school personnel includes the duty to use reasonable measures to protect students from foreseeable injury at the hands of third parties acting negligently or intentionally." (*Id.* at 870.) "School principals and other supervisory employees,

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[49] See OSEP Tech. Assistance Ctr., *Positive Behavioral Interventions & Supports, Multi-tiered System of Support (MTSS) & PBIS*, <http://www.pbis.org/school/mtss> (as of May 4, 2019) (defining MTSS as providing instruction and interventions "matched to student need, monitoring progress frequently to make decisions about changes in instruction or goals, and applying child response data to important educational decisions").

[50] *Id.*

to the extent their duties include overseeing the educational environment and the performance of teachers and counselors, [owe a duty] of taking reasonable measures to guard pupils against harassment and abuse from foreseeable sources, including any teachers or counselors they know or have reason to know are prone to such abuse." (*Id.* at 871.)

151. As Contra Costa County Superintendent of Schools, Defendant Mackey is responsible for overseeing the administration of all of the schools in Contra Costa County and is responsible for "all hiring and human resource decisions at the CCCOE."[51] Defendant Mackey is further required to monitor and supervise the use of behavioral restraints. (Cal. Ed. Code §§ 56033; 56521.) As Director of Student Programs – Special Education, Defendant Scruggs's job description includes: "plan[ning], organiz[ing], control[ing] and direct[ing] the educational operations, activities, sites and services of Special Education for the County Office; . . . coordinat[ing] and direct[ing] communications, information, personnel, resources, curriculum and budgets . . . [; and] supervis[ing] and evaluat[ing] the performance of assigned personnel."[52] As Marchus's principal, Defendant Fendel was, and Defendant Bennett is, "responsible for the supervision and administration of his school." (Cal. Code Regs., tit. 5, § 5551.) As the teacher in charge of the support rooms, Defendant Arnott is responsible for the supervision and administration of non-credentialed Marchus staff members, including Defendant Navarro.

152. District Defendants were repeatedly put on notice of the use of restraints and seclusion in non-emergency situations at Marchus, but failed to take appropriate action to remedy the situation. Marchus employees, along with Elyse K. and other Marchus parents, have raised concerns about the use of restraints and seclusion at the school to Marchus and CCCOE officials, including Defendants Scruggs and Fendel.

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[51] Contra Costa County Office of Education, County Superintendent of Schools: Biography <https://www.cccoe.k12.ca.us/cms/One.aspx?portalId=1077397&pageId=4232816> (as of May 4, 2019).

[52] Contra Costa County Office of Education, Director III, Student Programs – Special Education, p. 1. <https://www.edjoin.org/JobDescriptions/91/dir%20III-stpg-sp.ed.-20140708154451.pdf> (as of May 4, 2019) (job description).

153. For example, Elyse K. repeatedly contacted Scruggs (the Contra Costa County Director of Student Programs – Special Education) and Fendel (the then-principal of Marchus) to share her concerns about the school's use of restraints and seclusion. In an email dated October 13, 2017, she reiterated her concerns that her children "are not safe with some staff on campus" and referenced previous incidents in which her daughter "was held against a wall like a coat hanging on a coat hanger with her feet not touching the ground," and one occasion in which her daughter was placed in five holds in one day, "above the legal limit." In October 2017, Elyse K. also notified a CCCOE administrator and subsequently filed a formal complaint, explaining that she was concerned that the restraints constituted abuse and were traumatizing her children. Elyse K. frequently raised her concerns during her children's IEP meetings. Likewise, Elyse K. filed a complaint with CDE in November 2017 regarding CCCOE and Marchus's use of restraints and seclusion. Elyse K. also has called CCCOE and met with Defendant Fendel and CCCOE officials, including Defendant Scruggs, on multiple occasions.

154. Defendants Fendel and Arnott both have witnessed and participated in the use of extreme restraints and seclusion on Marchus students.

155. On one occasion, Defendant Fendel observed Defendant Navarro holding Kerri K. with her arms wrapped around her neck, while holding her above the ground. On another occasion, Fendel suffered a panic attack after witnessing the use of a violent restraint on Sara S. On yet another occasion, Defendant Arnott assisted Defendant Navarro to pick up Kerri K. and pin her against a set of wall cabinets.

156. At the very least, based on DOE communications, GAO reports, sections 56520–56521.2 of the California Education Code, Student Plaintiffs' IEPs and BIPs, and extensive academic studies, amongst other sources, District Defendants and certain Marchus Defendants should have known that certain Marchus Defendants' inappropriate use of restraints and seclusion would be physically and emotionally harmful.

## H. The State Defendants' Failure to Supervise CCCOE, Marchus, and Marchus's Employees

157. The State Defendants have failed to adequately monitor, police, and/or stop the inappropriate use of restraint and seclusion by the CCCOE, Marchus, and Marchus's employees. Specifically, notwithstanding that the State has ultimate responsibility for public education (see *Butt, supra*), the State Defendants have failed to prevent, proactively monitor, mitigate, or punish the practices and/or procedures of the segregated schools to which students are sent and which employ non-emergency restraints and seclusion.

158. The State Defendants have long known, or should have known, that California school districts that include schools like Marchus use restraint and seclusion on a routine, non-emergency basis.

159. In 2014, DOE OCR released a national report disclosing that students with disabilities "represent 12 percent of the national student population, but 58 percent of those placed in seclusion and 75 percent of those subjected to physical restraint."[53] In California the disparities were even greater, with students eligible for special education services comprising 81% of the students exposed to physical restraint.

160. Further, as documented in the Assembly Education Committee's analysis of AB 2657, "[u]nderreporting is potentially very high, and only comes to light after a complaint is made, followed by an investigation." The report cited an example of a "single complaint on behalf of 'Jane Doe' [that] led to an investigation that showed the district was out of compliance with respect to thirteen additional students. Jane Doe was restrained 43 times in about a month, and 25 of those incidents involved predictable behavior."[54]

161. In April 2015, EdSource Today published an extensive investigative report that documented the lack of state oversight of restraint and seclusion practices (the "EdSource Report"). The report described "a shadow discipline system in many special education classrooms, where minimally trained classroom aides have significant leeway in using

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[53] 2657 Committee Report, footnote 9, *supra,* p. 8 (quoting OCR's 2016 "Dear Colleague" letter).

[54] *Id.* at 7.

emergency interventions to manage disruptive students."[55] These "emergency interventions" typically involve the use of physical force against a child. The data reveals that these incidents climbed from 9,921 in the 2005–2006 school year to 22,043 by 2011–2012, the last year of required reporting.[56]

162. The EdSource Report is consistent with the findings of investigators with Disability Rights California ("DRC"). In 2007, DRC (then Protection and Advocacy, Inc.) released a report reviewing cases of restraint and seclusion in California schools. The report concluded that physical interventions were routinely employed. Further, each of the students in the cases investigated had a history of behavior problems in school, but school personnel did not evaluate the students' problem behavior and failed to develop or revise individualized positive behavior plans. Instead, schools used seclusion or physical restraint as the primary means of intervention. As these events occurred repeatedly over time, restraint and seclusion became routine classroom events. None of the events were reported, and the students' parents or legal guardians were not notified.[57]

163. Even when confronted with widely publicized incidents of excessive and dangerous restraint and seclusion, or investigative reports documenting routine physical restraint and abuse of children, State Defendants have failed, and continue to fail, to proactively monitor or deploy a comprehensive scheme to prevent and stop these practices. State Defendants have not put into place an effective mechanism to prevent the use of these dangerous practices. Even though State Defendants have been on notice, they have failed to proactively take meaningful or effective corrective action in any systemic way.

164. Although BERs are created and stored under state law, they are not reported to CDE, and CDE does not review or assess the information they contain. CDE does not use the

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[55] Adams, *Little Oversight of Restraint Practices in Special Education* (2015) EdSource <https://edsource.org/2015/little-oversight-of-restraint-practices-in-special-education/78040> (as of May 4, 2019).

[56] *Id.*

[57] Disability Rights California, Restraint & Seclusion in California Schools: A Failing Grade (June 2007) <http://www.disabilityrightsca.org/pubs/702301.pdf> (as of May 4, 2019).

BERs to proactively review or investigate reports documenting restraint and seclusion in the absence of an explicit complaint. CDE does not effectively collect, review, analyze, or otherwise use restraint and seclusion data to devise appropriate monitoring or interventions in local school districts regarding the use of emergency interventions despite knowing that these practices are pervasive and dangerous to children.

165. Similarly, State Defendants do not ensure that schools fulfill their obligations under sections 49005–49006.4 of the California Education Code, to report emergency interventions and take prompt follow-up action, both following every incident and on an annual basis State Defendants do not integrate information about the use of emergency interventions into CDE's Quality Assurance Program. State Defendants do not use information about the use of restraints and seclusion to select schools for any of their special monitoring reviews. State Defendants do not identify and intervene to correct schools that are outliers in the routine use of restraints and seclusion. Although CDE monitors a variety of indicators to ensure the provision of a free public education for students with disabilities, it does not include restraint and seclusion in those monitoring efforts.

166. When State Defendants receive reports and complaints about restraint and seclusion, State Defendants fail to adequately investigate and follow up to ensure effective corrective actions are undertaken to eliminate the unlawful practices.

167. State Defendants do not review BERs to determine if a restraint was used to address predictable behaviors, for punishment, or to achieve compliance. Thus, State Defendants do not ensure that restraints are used only as emergency interventions.

168. State Defendants' faulty complaint investigations and reversals rely on inadequate and incomplete restraint and seclusion records. This practice does not correct, and in fact encourages, inaccurate recordkeeping. For example, on November 14, 2017, Elyse K. filed a compliance resolution process ("CRP") complaint against Marchus that charged systemic violations of the California Education Code on behalf of her children. The CRP complaint challenged Marchus's failure to implement students' BIPs and its use of restraints and seclusion involving excessive force in violation of obligations to provide a FAPE under the California

Education Code. Rather than read the complaint as alleging systemic violations worthy of a full review of Marchus, CDE focused on one incident of restraint, finding a violation and then reversing itself. The reversal was based on accepting the facts in a BER that CDE identified as the relevant incident. Given the far-reaching nature of the complaint, CDE's review was, at best, superficial. Although CDE initially concluded in its January 12, 2018 Investigation Report that Marchus's staff had "failed to meet the requirements of [Cal Ed. Code] Section 56521.1(d)(3), with regard to the use of force exceeding that which is reasonable and necessary under the circumstances,"[58] the CDE reversed that finding on reconsideration on the ground that Marchus's failure to self-report made it impossible for Elyse K. to identify the specific date of the incident.[59] That is, Marchus's staff have learned through experience that their efforts to cover up their abusive and trauma-inducing conduct will pay off.

169. State Defendants do not effectively review or otherwise monitor the use of segregated schools to educate students with behavioral issues. State Defendants do not require local school districts to develop the capability to serve students with difficult behaviors in the least restrictive environment.

170. State Defendants' failure to prevent, monitor, mitigate, and/or punish the use of restraints and seclusion in segregated schools is an attempt to carve out an exception to its ultimate responsibility for public education. The unmistakable message that State Defendants communicate to children with special education needs who are at segregated schools is that their right to basic educational equality is qualified, and accordingly so is any protection and oversight that the State is required to provide.

## VII. LEGAL FRAMEWORK

### A. California Education Code Section 56000 et seq. and Implementing Regulations

171. Section 56000 et seq. of the California Education Code and its implementing regulations require that students with "exceptional needs" receive a FAPE in the least restrictive

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[58] See CDE Investigation Report, footnote 25, *supra*, p. 5.

[59] See Reconsideration Report, footnote 42, *supra*, p. 6–7.

environment. (Cal. Ed. Code, §§ 56040, 56040.1, 56205, 56206; Cal. Code Regs., tit. 5, § 3000 et seq.)

172. The law requires that "[e]ach individual with exceptional needs is assured an education appropriate to his or her needs in publicly supported programs through completion of his or her prescribed course of study or until the time that he or she has met proficiency standards prescribed." (Cal. Ed. Code, § 56001, subd. (a).) Each "individual with exceptional needs" must be offered "special assistance programs that promote maximum interaction with the general school population in a manner that is appropriate to the needs of both." (*Id.*, § 56001, subd. (g); see also *id.*, § 56040.1.) The statute also requires that students with disabilities be enrolled in "separate schooling" or removed "from the regular educational environment . . . only if the nature or severity of the disability is such that education in the regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." (*Id.*, § 56040.1(b)). The objective is to ensure that, "[t]o the maximum extent appropriate, . . . children in public or private institutions or other care facilities, are educated with children who are nondisabled," (*id.*, § 56040.1(a)), with the intention that students with disabilities are transferred into a less restrictive environment once more restrictive services are no longer needed. (*Id.*, § 56001, subd. (h).)

**B. <u>California Government Code Section 11135</u>**

173. California Government Code section 11135 provides, in relevant part: "[n]o person in the State of California shall, on the basis of . . . disability. . . be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state." (Cal. Gov. Code, § 11135(a).) California Government Code section 11135(b) states that "[w]ith respect to discrimination on the basis of disability, programs and activities subject to subdivision (a) shall meet the protections and prohibitions contained in Section 202 of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12132), and the federal rules and regulations adopted in implementation thereof . . . ."

## C. California Laws Governing Behavioral Interventions in an Educational Setting

### *i.* *California Education Code Section 49005 et seq.*[60]

174. Effective January 1, 2019, California law expressly recognizes that the use of restraints and seclusion in educational settings is dangerous, ineffective, and counterproductive. California law states, "[t]here is no evidence that restraint or seclusion is effective in reducing the problem behaviors that frequently precipitate the use of those techniques," and that "[r]estraint and seclusion may cause serious injury or long lasting trauma and death, even when done safely and correctly." (Cal. Ed. Code, § 49005, subds. (d), (e).) California law further states, "[r]estraint and seclusion . . . do not further a child's education," but are "dangerous interventions . . . posing a great risk to child health and safety." (*Id.*, subds. (a), (j).)[61]

175. In addition to formally codifying these findings, California Education Code section 49005 et seq. expands reporting requirements. In introducing the law prior to its enactment, the author's office noted that, despite existing reporting requirements, "[u]nderreporting is potentially very high, and only comes to light after a complaint is made, followed by an investigation."[62]

### *ii.* *California Education Code Code Section 56520 et seq., and Implementing Regulations*[63]

176. Although California Education Code section 49005 et seq. provides additional protections for students who are not eligible for special education services, it largely tracks existing statutory language governing the use of "emergency interventions" on special needs students, including Plaintiffs. (Compare Cal. Ed. Code, § 49005.4 with *id.*, § 56521.1, subd. (a).)

177. California has long sought to minimize the use of restraints, seclusion, and isolation on children with disabilities in educational settings. Sections 56520–56521.2 of the California Education Code and their implementing regulations govern the use of "behavioral

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60 Cal. Ed. Code, §§ 49005–49006.4.

61 The law also acknowledges that "[s]tudents with disabilities and students of color, especially African American boys, are disproportionately subject to restraint and seclusion." (Cal. Ed. Code, § 49005, subd. (f).)

62 2657 Committee Report, footnote 9, *supra*, p. 7.

63 Cal. Ed. Code, § 56520–56521.2; Cal. Code Regs., tit. 5, § 3051.23.

interventions" with respect to students with "exceptional needs," and section 56520 mandates that "when behavioral interventions, supports and other strategies are used," they must be employed "in consideration of the pupil's physical freedom and social interaction, be administered in a manner that respects human dignity and personal privacy, and . . . ensure a pupil's right to placement in the least restrictive educational environment." (Cal. Ed. Code, § 56520, subd. (b)(3).)

178. The California Education Code further prohibits the use of "procedures for the elimination of maladaptive behaviors" that are "deemed unacceptable under Section 49001 or those that cause pain or trauma." (Cal. Ed. Code, § 56520, subd. (a)(4).) Section 49001, in turn, prohibits the use of "corporal punishment," which is defined as "the willful infliction of, or willfully causing the infliction of, physical pain on a pupil." (*Id.*, § 49001, subd. (a).)

179. In California, "emergency interventions," a subset of behavioral interventions that CDE interprets as including restraints and seclusion,[64] may be used only when necessary to "control unpredictable, spontaneous behavior that poses [a] clear and present danger of serious physical harm to the individual with exceptional needs, or others, and that cannot be immediately prevented by a response less restrictive . . . ." (Cal. Ed. Code, § 56521.1, subd. (a).) California forbids the use of emergency interventions "as a substitute for the systematic behavioral intervention plan that is designed to change, replace, modify, or eliminate a targeted behavior" or "for longer than is necessary to contain the behavior." (*Id.*, § 56521.1, subds. (b), (c).) Except in limited circumstances, California forbids the use of "[l]ocked seclusion," "a device, material, or objects that simultaneously immobilize all four extremities" or "[a]n amount of force that exceeds that which is reasonable and necessary under the circumstances." (*Id.*, § 56521.1, subd. (d).)

180. California expressly prohibits local educational agencies from authorizing, ordering, or consenting to "[a]ny intervention that is designed to, or likely to, cause physical pain," "[a]n[y] intervention that denies adequate . . . physical comfort," and those that are

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[64] See, e.g., Cal. Dept. Ed., Question 6, FAQs for LEAs Behavioral Intervention <https://www.cde.ca.gov/sp/se/ac/bipleafaq.asp> (as of May 4, 2019).

"designed to subject, used to subject, or likely to subject, the individual to verbal abuse, ridicule, or humiliation, or that can be expected to cause excessive emotional trauma." (Cal. Ed. Code, § 56521.2, subds. (a)(1), (3), (4).)

181. Title 5 of the California Code of Regulations implements section 56520 and states that "behavioral interventions shall be designed or planned only by personnel who have" certain appropriate credentials. (Cal. Code Regs., tit. 5, § 3051.23, subd. (a).) The regulations also instruct local educational agencies[65] to ensure that "behavioral intervention[s]" may only be delivered by personnel who meet the advanced licensing qualifications required to design the behavioral interventions, or by individuals who are under the supervision of such personnel and have received "the specific level of supervision required in the pupil's IEP." (Cal. Code Regs., tit. 5, § 3051.23, subd. (b).)

182. The statute also requires that if "a behavioral emergency report is written regarding an individual with exceptional needs who has a positive behavioral intervention plan, an incident involving a previously unseen serious behavior problem, or where a previously designed intervention is ineffective, shall be referred to the IEP team to review and determine if the incident constitutes a need to modify the positive behavioral intervention plan." (Cal. Ed. Code, § 56521.1, subd. (h).)

**D. Mandatory Reporting Laws**

*i. California Education Code Section 56521.1*

183. To ensure that "emergency inventions" are not "used in lieu of planned, systematic behavioral interventions," California requires that a parent or guardian be notified "within one schoolday [*sic*] if an emergency intervention is used," and that a BER, including the name of the staff or other persons involved, a description of the incident, and details of any injuries sustained, be "completed and maintained in the file of the individual with exceptional needs." (Cal. Ed. Code, § 56521.1, subd. (e).)

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65 "'Local educational agency' means a school district, a county office of education, a nonprofit charter school participating as a member of a special education local plan area, or a special education local plan area." (Cal. Ed. Code, § 56026.3.)

*ii.* *Child Abuse and Neglect Reporting Act*[66]

184. California Penal Code sections 11164–11174.4, also known as the Child Abuse and Neglect Reporting Act ("CANRA"), require certain mandated reporters, including teachers, instructional aids, and employees of an organization whose duties require direct contact and supervision of children, to exercise vigilance in identifying and disclosing instances of abuse. (Cal. Pen. Code, §§ 11164, 11165.7.) Under CANRA, "abuse" includes "physical injury . . . inflicted by other than accidental means upon a child by another person," "the willful harming or injuring of a child or the endangering of the person or health of a child," and "unlawful corporal punishment or injury." (*Id.*, § 11165.6.) Further, "'the willful harming or injuring of a child or the endangering of the person or health of a child[]' means a situation in which any person willfully causes or permits any child to suffer, or inflicts thereon, unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of the child to be placed in a situation in which his or her person or health is endangered." (*Id.*, § 11165.3.)

## VIII. EXHAUSTION OF ADMINISTRATIVE REMEDIES

### A. Plaintiffs Have Exhausted, or are Excused from Exhausting, Administrative Remedies

185. No California statute, regulation, or case requires Plaintiffs to exhaust administrative remedies before filing this class action alleging systemic violations of California special education laws. Nevertheless, even if such a requirement exists, Plaintiffs have satisfied this requirement or, alternatively, it is excused.

186. Even when exhaustion of administrative remedies is required, exhaustion is excused when: further administrative actions would be futile; an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law; and relief available through additional administrative efforts would be inadequate to address a plaintiff's claims. All three of these exceptions apply to Plaintiffs' claims.

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[66] Cal. Pen. Code, §§ 11164–11174.4.

187. First, the relief Plaintiffs seek—class-wide reform of State and District Defendants' policies and/or practices to ensure that students with emotional and behavioral disabilities are provided a safe and equal public education—is unavailable under the Individuals with Disabilities Education Act's ("IDEA") due process procedures, and thus cannot be addressed under the IDEA. It is well-established in California that the Office of Administrative Hearings will not decide systemic claims on behalf of a class and, therefore, filing a due process systemic complaint would be futile, inadequate, and contrary to public policy.

188. Second, CDE grossly mishandled Elyse K.'s CRP complaint.[67] Given this history, it would be futile to file additional complaints with CDE.

189. Third, as evidenced by Elyse K.'s experience, CDE accepts as true the circumstances and methods and/or manner of restraint as described in the district's BERs without critical inquiry.

190. Fourth, Plaintiffs are excused from exhausting administrative remedies because the Defendants employ policies and/or practices that are generally applicable to Marchus students with emotional and behavioral disabilities, and that are contrary to law, as described herein.

## IX. CAUSES OF ACTION

## CLAIMS ON BEHALF OF THE CLASSES

### FIRST CAUSE OF ACTION
### Violation of Section 56000 et seq. of the California Education Code
### (Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T., the Restraint and Seclusion Class, and the Reporting Class Against All State and District Defendants, and Marchus)

191. Plaintiffs incorporate by reference the preceding paragraphs of this Complaint as though fully set forth herein.

192. All Plaintiffs and Class members are or will be students with "exceptional needs" within the meaning of the California regulations. (Cal. Code Regs., tit. 5, § 3030, subd. (b).)

193. Defendants are responsible for providing public education to Student Plaintiffs and Class Members.

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[67] See *supra*, ¶ 168.

194. As set forth above, Defendants have deprived students of a FAPE in the least restrictive environment. As a direct and proximate result of Defendants' violations, Plaintiffs have suffered, and the Class Members suffer or will suffer, irreparable harm, including substantial losses of educational opportunities.

195. In addition, emergency interventions, including restraints and seclusion, may be used only when necessary to "control unpredictable, spontaneous behavior that poses [a] clear and present danger of serious physical harm to the individual with exceptional needs, or others, and that cannot be immediately prevented by a response less restrictive . . . ." (Cal. Ed. Code, § 56521.1, subd. (a).) District Defendants and Marchus have additionally violated section 56520 et seq. of the California Education Code with respect to the Restraint and Seclusion Class by their acts or failure to act by, without limitation:

a. Employing, presently or in the past, policies and/or practices that subject students to unlawful behavioral interventions in non-emergency situations or interventions that cause physical pain and can be expected to cause excessive emotional trauma;

b. Failing to adequately train teachers and staff on how to use appropriate behavioral interventions and allowing inappropriate personnel to use emergency interventions; and

c. Unlawfully deploying restraints and/or seclusion in non-emergency situations.

196. The Superintendent of Public Instruction has violated section 56520 et seq. of the California Education Code by failing to monitor and supervise the use of behavioral restraints. (Cal. Ed. Code, §§ 56033, 56521.)

197. To ensure that "emergency inventions" are not "used in lieu of planned, systematic behavioral interventions," a parent or guardian must be notified "within one schoolday [*sic*] if an emergency intervention is used," and a BER, including the name of the staff or other persons involved, a description of the incident, and details of any injuries sustained, must be "completed and maintained in the file of the individual with exceptional needs." (Cal.

Ed. Code, § 56521.1, subd. (e).) Defendants have additionally violated section 56520 et seq. of the California Education Code with respect to the Reporting Class by their acts or failure to act by, without limitation:

a. Employing, presently or in the past, policies and/or practices that violate section 56520 et seq. of the California Education Code by:

b. Failing to document, adequately and accurately, instances in which "emergency" behavioral interventions are used;

c. Failing to adequately, accurately, and promptly notify parents and follow-up with IEP meetings when "emergency" behavioral interventions are used; and

d. Maintaining inaccurate, harmful information in student files.

198. State Defendants' failure to take effective action to identify, correct, monitor, and prevent the systemic use of non-emergency restraint and seclusion in Marchus for students with disability-related behaviors has deprived the Class Members of the educational services to which they are entitled by state law.

199. To remedy Defendants' failure to provide an appropriate education in accordance with state law, the Restraint and Seclusion Class and its Class Representatives Kerri K., Jacob K., and Annie T., and the Reporting Class and its Class Representatives Kerri K., Jacob K., Sara S., and Annie T., through their parents and legal guardians, respectively seek preliminary and permanent injunctive relief enjoining the failure to provide a FAPE in the least restrictive environment, as well as the use of discriminatory practices, and ordering the Defendants to promulgate policies and/or practices to assure compliance with state law and provide associated relief.

**SECOND CAUSE OF ACTION**
**Violation of California Government Code Section 11135**
**(Student Plaintiffs Kerri K., Jacob K., Sara. S., and Annie T., the Restraint and Seclusion Class, and the Reporting Class Against State Defendants, District Defendants, and Marchus)**

200. Plaintiffs incorporate by reference the foregoing paragraphs of this Complaint as though fully set forth herein.

201. Defendants CCCOE, Marchus, CDE, and the State Board are state agencies that also operate programs directly funded by the State.

202. Defendants' conduct unlawfully denies Plaintiffs and those similarly situated full and equal access to a public education free from harm and subjects Plaintiffs and those similarly situated to discrimination on the basis of disability.

203. Under the guise of providing "behavioral interventions," Defendants CCCOE and Marchus have adopted a policy and practice of routinely subjecting students with emotional and behavioral disabilities to unnecessary, abusive, counterproductive, and trauma-inducing restraints, seclusion, and isolation in order to control Plaintiffs' behaviors. Defendants CCCOE and Marchus have also denied each of the class members the full and equal access to the benefits of a public education by adopting a policy and practice of prioritizing behavioral conditioning and punishment over academic progress for Marchus students, including by unnecessarily removing Student Plaintiffs and members of the Classes from the educational environment each time a restraint, seclusion, or isolation is implemented inappropriately; failing to provide reasonable accommodations or implement trauma-sensitive practices; impeding Student Plaintiffs and members of the Classes from returning to a more inclusive school setting; and by engaging in dishonest and self-serving recordkeeping, decreasing the likelihood that more inclusive settings will admit former Marchus students.

204. Defendants CCCOE and Marchus have equally discriminated against and consequently denied the Student Plaintiffs' and the Reporting Class's access to education by failing to satisfy mandatory reporting laws, including California Education Code section 56521.1, subdivision (e), and CANRA, California Penal Code sections 11164–11174.4.[68] These statutes set a certain standard that, at minimum, operates to assure that students are not deprived of full and equal access to the benefits of a public education. However, Marchus's dishonest and inadequate recordkeeping has the effect of discriminating against students with disabilities, including Student Plaintiffs and members of the Classes, by making it more difficult for them to

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[68] See *supra*, ¶¶ 183–184.

seek enrollment in a more inclusive educational setting and eliminating opportunities to participate in or benefit from a public education equal to that provided to others.

205. Defendants CDE and the State Board have similarly violated California Government Code section 11135 by providing significant assistance to Defendant CCCOE, an entity that discriminates on the basis of disability, as described above, thereby denying Plaintiffs and the Classes equal access to the benefits of a public education on the basis of disability. Defendants CDE and the State Board have also failed to take the steps necessary to eliminate the use of routine, traumatic, and avoidable restraints, seclusion, and isolation practices on students with emotional and behavioral disabilities.

206. To remedy Defendants' discrimination and deprivation of full and equal access to the benefits of a public education, the Restraint and Seclusion Class and its Class Representatives Kerri K., Jacob K., and Annie T., and the Reporting Class and its Class Representatives Kerri K., Jacob K., Sara S., and Annie T., through their parents and legal guardians, respectively seek preliminary and permanent injunctive relief enjoining these discriminatory practices and ordering Defendants to promulgate policies and/or practices to assure compliance with state law and provide associated relief.

**THIRD CAUSE OF ACTION**
**Violation of Article IX, Sections 1 and 5 of the California Constitution**
**(Student Plaintiffs Kerri K., Jacob K., and Annie T.,**
**and the Restraint and Seclusion Class Against State Defendants)**

207. Plaintiffs incorporate by reference the preceding paragraphs of this Complaint as though fully set forth herein.

208. The State of California has violated the rights of Student Plaintiffs Kerri K., Jacob K., and Annie T., and the Restraint and Seclusion Class to receive basic educational services, pursuant to article IX, sections 1 and 5 of the California Constitution, and to learn in a "system of common schools" that are "kept up and supported" such that students may learn and receive "the diffusion of knowledge and intelligence essential to the preservation of the[ir] rights and liberties."

209. These constitutional provisions impose on Defendants the duty to provide Student Plaintiffs Kerri K., Jacob K., and Annie T., and the Restraint and Seclusion Class an equal opportunity to access educational services adequate to teach them the skills they need to succeed as productive members of modern society. The State of California has failed to meet its constitutional duty to immediately prevent Defendants CCCOE and Marchus from using restraints and seclusions that infringe on the bodily autonomy and integrity of Student Plaintiffs and the Restraint and Seclusion Class, and thereby fully deprive them of access to the classroom, learning, and their education rights.

210. To remedy Defendants' constitutional violations, the Restraint and Seclusion Class and its Class Representatives Kerri K., Jacob K., and Annie T., through their parents and legal guardians, seek preliminary and permanent injunctive relief ordering Defendants to promulgate policies and/or practices to restore students' education rights and provide associated relief.

**FOURTH CAUSE OF ACTION**
**Violation of Art. I, Section 13, California Constitution**
**(Student Plaintiffs Kerri K., Jacob K., and Annie T., and the Restraint and Seclusion Class Against District Defendants and Marchus Defendants)**

211. Plaintiffs incorporate by reference the preceding paragraphs of this Complaint as though fully set forth herein.

212. District Defendants and Marchus have routinely subjected, and employ policies, procedures, and/or practices that ensure the future subjection of Student Plaintiffs Kerri K., Jacob K., and Annie T., and the Restraint and Seclusion Class to being seized within the meaning of article 1, section 13 of the California Constitution.

213. These seizures are objectively unreasonable under the circumstances and in light of the educational objectives sought to be achieved. Such seizures routinely employ excessive and unjustifiable force.

214. Defendants Arnott, Santana, Duncan, Foreman, Navarro, Khan, and Doe Defendants 1–10's utilization of these abusive, traumatizing, and unnecessary "interventions" is not only unreasonable in light of their purported goal—to manage the behavior of students with

emotional and behavioral disabilities—it is counterproductive, significantly exacerbating maladaptive behaviors on both a short-short- and long-term basis.

215. To remedy Defendants' constitutional violations, Class Representatives Kerri K., Jacob K., and Annie T., through their parents and legal guardians, and the Restraint and Seclusion Class seek preliminary and permanent equitable injunctive relief enjoining the use of unnecessary, inappropriate, and traumatizing interventions and ordering Defendants to develop policies and/or practices to address the traumatic consequences of the continual abuse.

**INDIVIDUAL CLAIMS ON BEHALF OF STUDENT PLAINTIFFS**

**FIFTH CAUSE OF ACTION**
**Negligent Retention and Supervision**
**(Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T.**
**Against Defendants CCCOE, Mackey, Scruggs, Bennett, Fendel, and Arnott)**

216. Plaintiffs incorporate by reference the preceding paragraphs of this Complaint as though fully set forth herein.

217. Defendant CCCOE owed and owes a duty of care to use reasonable measures to protect Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T. from foreseeable harm due to third parties, including Marchus's staff members, engaging in extreme restraints and seclusion, either intentionally or negligently.

218. Defendant CCCOE was on notice based on DOE's documentation of the harms associated with the use of restraints and seclusion, the California Education Code, applicable Student Plaintiffs' IEPs and BIPs, and other sources demonstrating that the use of restraints and seclusion would be physically and emotionally harmful to Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T., and counterproductive to their learning. In fact, Kerri K.'s records specifically acknowledge that the use of restraints and seclusion are ineffective and "enrage" her, Sara S.'s records emphasized the need to provide her with a sense of safety and support, and Annie T.'s records noted that timeouts and scolding are known triggers.

219. Further, Defendant CCCOE was on notice of the use of restraints and seclusion by Marchus's staff members, because CCCOE was the subject of a CDE investigation resulting from a parental complaint about the use of restraints and seclusion on the children in their care.

CCCOE officials, including Defendant Scruggs, also personally met with at least one Marchus parent (Elyse K.) regarding Marchus's use of restraints and seclusion.

220. Defendant CCCOE breached its duty of care by failing to take reasonable action to protect Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T. from the violence to which Marchus subjects the children in its care and about which CCCOE knew or should have known. Specifically, Defendant CCCOE failed to take reasonable action to train, supervise, discipline, or terminate Marchus's staff members who facilitated, encouraged, ordered, consented to, or engaged in these abusive and trauma-inducing practices.

221. As both district employees and supervisory personnel, Defendants Mackey, Scruggs, Bennett, Fendel, and Arnott owed and owe a duty of care to use reasonable measures to protect Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T. from foreseeable harm due to third parties, including Marchus's staff members, engaging in extreme restraints and seclusion, either intentionally or negligently.

222. Defendants Mackey, Scruggs, Bennett, Fendel, and Arnott were on notice of Marchus's staff members' use of extreme restraints and seclusion and, in fact, enabled their conduct. Defendants Fendel, Bennett, and Arnott each personally observed the use of extreme restraints and seclusion, and Defendant Arnott has personally participated in multiple incidents of the use of restraint. Defendants Scruggs, Bennett, Fendel, and Arnott also were on notice based on DOE's documentation of the harms associated with the use of restraints and seclusion, Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T.'s IEPs and BIPs, and other sources demonstrating that the use of restraints and seclusion would be physically and emotionally harmful to Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T., and counterproductive to their learning.

223. Defendants Mackey, Scruggs, Bennett, Fendel, and Arnott breached their duty of care by failing to take reasonable action to protect Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T. from the violence to which Marchus subjects the children in its care and about which CCCOE knew or should have known.

224. Defendants Mackey, Scruggs, Bennett, Fendel, and Arnott intentionally or negligently failed to train, supervise, discipline, or terminate Marchus's staff members who facilitated, encouraged, ordered, consented to, or engaged in the inappropriate use of restraints and seclusion.

225. Defendant CCCOE is vicariously liable for the torts of its employees, including Defendants Mackey, Scruggs, Bennett, Fendel, and Arnott, who were acting within the scope of their employment when they intentionally or negligently failed to train, supervise, discipline, or terminate Marchus's staff members who facilitated, encouraged, ordered, consented to, or engaged in the use of restraints and seclusion.

226. Based on information and belief, the use of such restraints and seclusion on Student Plaintiffs Jacob K., Kerri K., and Annie T. is ongoing.

227. As a direct and proximate cause of Defendants' conduct, Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T. have each suffered and/or will each continue to suffer damages, including physical harm and severe emotional distress, in an amount to be proven at trial, but exceeding the minimum jurisdictional limits of this Court.

**SIXTH CAUSE OF ACTION**
**Negligent Infliction of Emotional Distress**
**(Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T.**
**Against District Defendants and Marchus Defendants)**

228. Plaintiffs incorporate by reference the preceding paragraphs of this Complaint as though fully set forth herein.

229. All Defendants owed and owe a duty of care to use reasonable measures to protect Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T. as Marchus students from foreseeable harm, as well as to provide to Student Plaintiffs a safe learning environment in which the well-being of each student is considered and protected.

230. All Defendants were on notice based on DOE's documentation of the harms associated with the use of restraints and seclusion, the California Education Code, applicable Student Plaintiffs' IEPs and BIPs, and other sources demonstrating that the use of restraints and seclusion on elementary school-aged children is likely to cause physical harm and emotional

trauma. In fact, Kerri K.'s records specifically acknowledged that the use of restraints and seclusion are ineffective and "enrage" her, Sara S.'s records emphasized the need to provide her with a sense of safety and support, and Annie T.'s records noted that timeouts and scolding are known triggers.

231. Defendant CCCOE breached its duty of care by enabling, facilitating, and promoting the inappropriate and counterproductive use of restraints, seclusion, and isolation in non-emergency situations. Defendant CCCOE knew or should have known of Marchus's abuse against Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T., but failed to take reasonable action to intervene.

232. Defendants Mackey, Scruggs, Bennett, Fendel, and Arnott breached their duty of care by enabling, facilitating, promoting, and engaging in the use of inappropriate restraints, seclusion, and isolation in non-emergency situations while acting within the scope of their employment. Specifically, Defendants Mackey, Bennett, Scruggs, Fendel, and Arnott personally observed, authorized and, with respect to Defendants Fendel and Arnott, participated in the use of restraints and seclusion against Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T. Defendants Fendel, Bennett, and Arnott failed to take reasonable action to intervene.

233. Defendants Santana, Duncan, Foreman, Navarro, and Khan breached their duties of care by engaging in the use of restraints and seclusion in non-emergency situations and in contravention of Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T.'s IEPs and BIPs, while acting within the scope of his employment.

234. Doe Defendants 1–10 breached their duty of care by enabling, facilitating, promoting, and engaging in the use of restraints and seclusion in non-emergency situations and in contravention of Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T.'s IEPs and BIPs, while acting within the scope of their employment.

235. All Defendants breached their duty of care by facilitating and/or creating a traumatic educational environment in which the students in their care are exposed to and threatened by the inappropriate use of non-emergency restraints and seclusion, thereby disregarding the right of the students in their care to a safe and welcoming school premises.

236. Defendants' conduct foreseeably caused Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T. each to suffer emotional distress. DOE has documented the harms associated with the use of restraints and seclusion and Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T.'s IEPs and BIPs specifically stated that the use of those techniques could exacerbate their psychological, emotional, and behavioral disabilities, and cause trauma or re-traumatization. Defendants personally observed the counterproductive and harmful effects of the use of restraints and seclusion, as demonstrated by their repeatedly restraining and secluding Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T., sometimes multiple times in a single school day.

237. Defendant CCCOE is vicariously liable for the torts of its employees, including Defendants Mackey, Bennett, Scruggs, Fendel, Arnott, Santana, Duncan, Foreman, Navarro, Khan, and Doe Defendants 1–10, while acting within the scope of their employment.

238. In addition, Student Plaintiffs Kerri K. and Jacob K., who are related by birth, were present and witnessed the other being subjected to extreme restraints and seclusion and, as bystanders, suffered, and will continue to suffer, severe emotional distress.

239. Based on information and belief, the use of such restraints and seclusion on Student Plaintiffs Jacob K. and Kerri K. is ongoing.

240. As a direct and proximate result of Defendants' conduct, Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T. have each suffered, and/or will each continue to suffer, emotional distress, in an amount to be proven at trial, but exceeding the minimum jurisdictional limits of this Court.

**SEVENTH CAUSE OF ACTION**
**Negligence Per Se for Failure to Comply with**
**California Education Code Section 56521.2 and its Implementing Regulations**
**(Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T.**
**Against District Defendants and Marchus Defendants)**

241. Plaintiffs incorporate by reference the preceding paragraphs of this Complaint as though fully set forth herein.

242. Under California Evidence Code section 669, subdivision (a), negligence is presumed where the defendant violates a statute, the violation directly and proximately causes

the plaintiff's harm, the harm caused is of the kind the statute is designed to prevent, and the plaintiff is a member of the class of persons the statute was designed to protect.

243. Sections 56520–56521.2 of the California Education Code govern the use of behavioral interventions in schools that cater to students who have special needs.

244. California Education Code section 56521.2 prohibits schools from authorizing, ordering, or consenting to "any intervention that is designed to, or likely to, cause physical pain," "intervention[s] . . . designed to subject, used to subject, or likely to subject, the individual to verbal abuse, ridicule, or humiliation, or that can be expected to cause excessive emotional trauma," and interventions that deny adequate "physical comfort."

245. Defendant CCCOE wrongfully authorized and consented to prohibited interventions. Defendant CCCOE was the subject of an investigation resulting from a parental complaint regarding Marchus's use of restraints on a child in Marchus's care. CCCOE officials, including Defendants Scruggs, met with Marchus parents regarding Marchus's use of restraints and seclusion. Defendant CCCOE ratified Marchus's abusive practices by failing to take reasonable action to intervene.

246. Defendants Mackey, Scruggs, Bennett, Fendel, and Arnott wrongfully authorized, and consented to the use of, prohibited interventions and intentionally or negligently failed to take reasonable action to protect Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T. from foreseeable harm.

247. Defendants Mackey, Scruggs, Bennett, Fendel, and Arnott's failure to take reasonable action to protect Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T. from the use of restraints and seclusion was likely to cause, and did cause, Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T. to suffer physical harm and emotional distress.

248. Defendants Santana, Duncan, Foreman, Khan, Navarro, and Doe Defendants 1–10 engaged in the use of prohibited interventions, including extreme restraints and seclusion, in contravention of Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T.'s IEPs and BIPs, while acting within the scope of their employment. In addition, after using restraints, Defendants continued to use restraints and seclusion to punish Student Plaintiffs Kerri K., Jacob K., Sara S.,

and Annie T., deliberately increasing their use of force to intensify Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T.'s pain and compel their compliance. Defendants Navarro, Santana, Duncan, Foreman, Khan, and Doe Defendants 1–10 routinely used restraints and seclusion, including holds that are known to be dangerous, ineffective, and counterproductive, and thereby denied Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T. adequate physical comfort. For example, Kerri K. was held in a dangerous "higher-level" child control position and told a Marchus staff member that she could not breathe; Jacob K. was restrained using the child control position, and believed Marchus staff was trying to kill him; and Sara S. was held by five Marchus staff members in the seated team control position, despite shouting "you are hurting me."

249. Defendants Santana, Duncan, Foreman, Khan, Navarro, and Doe Defendants 1–10's engaging in the use of restraints and seclusion, as well as their persistence in doing so despite Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T.'s pleas for help and obvious signs of pain and discomfort, was likely to cause, and did cause, Plaintiffs to suffer physical harm and emotional distress.

250. CCCOE is vicariously liable for the wrongdoings of its employees acting within the scope of their employment.

251. Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T. have each been diagnosed as having significant emotional and behavioral needs and have been found to be eligible for special education. As such, each is a member of the class of persons California Education Code section 56521.2 was designed to protect.

252. Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T. suffered physical harm and psychological and emotional trauma of the kind the statutes were intended to prevent. For example, Kerri K. sometimes wakes up in the middle of the night screaming "let her go, let her go," and wets the bed. Jacob K.'s own statements, such as "[y]ou like hurting me . . . Call the police; they are trying to kill me," indicate the traumatic effect of restraints and seclusion on his psyche. Sara S. has developed anxiety and depression, does not sleep at night, and "is losing her grip on the outside world." Sara S. was hospitalized as a result of Marchus's use of extreme

restraints and seclusion and is currently in a residential placement. Annie T. experiences extreme anxiety and believes she is disliked, worthless, and deserving of isolation.

253. Under California Evidence Code section 669, subdivision(a), Defendants' breach of California Education Code section 56521.2 gives rise to a presumption of negligence.

254. Based on information and belief, the Defendants' use of restraints and seclusion on Student Plaintiffs Jacob K., Kerri K., and Annie T. is ongoing, in violation of California Education Code section 56521.2.

255. As a direct and proximate cause of Defendants' conduct, Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T. have each suffered and/or will each continue to suffer damages, including physical harm and emotional distress, in an amount to be proven at trial, but exceeding the minimum jurisdictional limits of this Court.

**EIGHTH CAUSE OF ACTION**
**Negligence Per Se for Failure to Comply with Mandatory Reporting Laws**
**(Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T.**
**Against District Defendants and Marchus Defendants)**

256. Plaintiffs incorporate by reference the preceding paragraphs of this Complaint as though fully set forth herein.

257. Under California Evidence Code section 669, subdivision (a), negligence is presumed where the defendant violates a statute, the violation directly and proximately causes the plaintiff's harm, the harm caused is of the kind the statute is designed to prevent, and the plaintiff is a member of the class of persons the statute was designed to protect.

258. California Education Code section 56521.1, subdivision (e) requires that a parent or guardian be notified "within one schoolday if an emergency intervention is used," and that a behavioral emergency report, including the name of the staff or other persons involved, a description of the incident, and details of any injuries sustained, be "completed and maintained in the file of the individual with exceptional needs." The purpose of this reporting requirement is to "prevent emergency interventions from being used in lieu of planned, systematic behavioral interventions."

259. CANRA further requires certain "mandated reporters," including teachers, instructional aides, teacher's assistants, "classified employee[s] of a public school," and "administrator[s], board member[s], or employee[s] of a public or private organization whose duties require direct contact with and supervision of children," to report known or reasonably suspected child abuse or neglect. (Cal. Pen. Code, §§ 11164; 11165.7, subd. (a)(8); 11166.)

260. Defendants Mackey, Scruggs, Fendel, Bennett, Arnott, Santana, Duncan, Foreman, Khan, Navarro, and Doe Defendants 1–10 are mandated reporters because they are administrators, teachers, instructional aides, or are otherwise employees of an organization whose duties require direct contact and supervision of children. Specifically, Defendants Mackey, Scruggs, Bennett, and Fendel are administrators. Defendant Arnott is a teacher and the supervisor of Marchus's support rooms. Defendant Santana is an occupational therapist, and Defendants Foreman, Khan, and Navarro are instructional aides. Defendant Duncan and Doe Defendants 1–10 are employees of an organization whose duties require direct contact with and supervision of children.

261. Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T. were subjected to behavioral interventions within the meaning of the California Education Code, and suffered abuse within the meaning of CANRA, because each was subjected to extreme restraints and seclusion, and the use of such extreme restraints and seclusion was neither reasonable nor necessitated under the circumstances.

262. Defendants knew or should have known of the use of extreme restraints and seclusion by Marchus's staff members. Defendants CCCOE, Fendel, and, Arnott were notified of the use of extreme restraints and seclusion. Defendants Fendel and Arnott observed the use of extreme restraints and seclusion, and Defendant Arnott participated in multiple incidents of restraint. Defendant CDE received at least one complaint regarding Marchus's use of restraints. Defendant CCCOE was the subject of an investigation as a result of that complaint. CCCOE officials, including Defendant Scruggs, met with Marchus parents regarding Marchus's use of restraints and seclusion. Defendant Navarro, the self-proclaimed "bouncer" of Marchus, participated in many instances of extreme restraints and seclusion.

263. Defendants were required, but frequently failed, to notify Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T.'s parents or legal guardians within one school day of the use of any emergency intervention and complete and file a behavioral emergency report.

264. Defendants were required, but failed, to report under CANRA.

265. Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T. are particularly vulnerable children, and each has been diagnosed as having significant emotional and behavioral needs and found to be eligible for special education. As such, each is within the class of persons protected by the California Education Code and CANRA.

266. Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T. were each subjected to abusive and traumatizing restraints and seclusion as a method of first resort, in lieu of planned, systematic behavioral interventions. Further, the restraints to which Kerri K., Jacob K., Sara S., and Annie T. were subjected, and to which Kerri K., Jacob K., and Annie T. continue to be subjected, are abuse within the meaning of CANRA. As such, the harm each suffered is of the kind that those statutes were designed to prevent.

267. Under California Evidence Code section 669, subdivision (a), Defendants' breach of the California Education Code and CANRA gives rise to a presumption of negligence.

268. Defendant CCCOE is vicariously liable for the negligence of its employees, including Defendants Scruggs, Fendel, Bennett, Arnott, Santana, Duncan, Foreman, Navarro, Khan, and Doe Defendants 1–10, while acting within the scope of their employment.

269. Based on information and belief, the use of such restraints and seclusion on Student Plaintiffs Kerri K., Jacob K., and Annie T., and Defendants' failure to notify their parents or legal guardians, failure to prepare and maintain required behavioral emergency reports, and failure to report such incidents, is ongoing.

270. As a direct and proximate cause of Defendants' conduct, Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T. have each suffered, and/or will each continue to suffer, damages, including physical harm and emotional distress, in an amount to be proven at trial, but exceeding the minimum jurisdictional limits of this Court.

**NINTH CAUSE OF ACTION**
**Battery**
**(Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T. Against Defendants CCCOE, Santana, Duncan, Foreman, Khan, Navarro, and Doe Defendants 1–10)**

271. Plaintiffs incorporate by reference the preceding paragraphs of this Complaint as though fully set forth herein.

272. Defendants Santana, Duncan, Foreman, Khan, Navarro, and Doe Defendants 1–10 subjected Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T. to offensive physical contact on a regular basis through the use of extreme physical restraints, while acting within the scope of their employment—specifically, in their official capacities to administer "behavioral interventions."

273. Defendants Santana, Duncan, Foreman, Khan, Navarro, and Doe Defendants 1–10 intended to harm and offend Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T. through the use of extreme restraints.

274. Defendants Santana, Duncan, Foreman, Khan, Navarro, and Doe Defendants 1–10 intentionally and willfully disregarded Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T.'s right to be free of such offensive physical contact.

275. Defendants' conduct violates California Education Code section 56521.2.

276. Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T. were each harmed by Defendants' conduct.

277. A reasonable person in Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T.'s position would be harmed and offended by Defendants' conduct.

278. Defendant CCCOE is vicariously liable for the negligence and intentional torts of its employees, while acting within the scope of their employment. Specifically, Defendants Santana, Duncan, Foreman, Khan, Navarro, and Doe Defendants 1–10 subjected Student Plaintiffs Kerri K., Jacob K. Sara S., and Annie T. to harmful and offensive physical contact pursuant to Marchus's policy and/or practice of using restraints and seclusion to control the children in their care.

279. Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T., through their parents and legal guardians, did not consent to such harmful and offensive contact. In the alternative,

Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T. did not provide adequate informed consent to use such "behavioral interventions," or could not lawfully consent to the use of extreme restraints and seclusion in non-emergency situations, in contravention of each student's IEP or BIP, and in violation of California Education Code section 56521.2 because such practices are deemed to be beyond the scope of consent to an integrated education program. In the alternative, Elyse K. withdrew consent in numerous IEP meetings when she filed the reports with CDE and CCCOE, and in communications with Marchus and CCCOE personnel.

280. Based on information and belief, the use of such restraints and seclusion on Student Plaintiffs Kerri K., Jacob K., and Annie T. is ongoing.

281. As a direct and proximate result of Defendants' wrongful actions, Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T. have each suffered and/or will each continue to suffer damages, including physical harm and emotional distress, in an amount to be proven at trial, but exceeding the minimum jurisdictional limits of this Court.

**TENTH CAUSE OF ACTION**
**Violation of the Unruh Civil Rights Act (Cal. Civ. Code, § 51 et seq.)**
**(Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T.**
**Against Defendants CCCOE and Marchus)**

282. Plaintiffs incorporate by reference the preceding paragraphs of this Complaint as though fully set forth herein.

283. California Civil Code section 51, subdivision (b) et seq., also known as the Unruh Civil Rights Act, provides that all persons in California are entitled to the "full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever," regardless of disability. Under California Civil Code section 51, subdivision (e)(1), "disability" is defined as "any mental or physical disability as defined in sections 12926 and 12926.1 of the Government Code." Under California Government Code section 12926, subdivision (j)(2), a "mental disability" includes a mental or psychological condition that requires special education or related services. A violation of the right of any individual under the federal Americans with Disabilities Act of 1990 (Public Law 101–336) also constitutes a violation of this section. (Cal. Civ. Code, § 51 (f).)

284. Student Plaintiffs Kerri K., Jacob K., Annie T., Sara S., and Annie T. are disabled children who have significant emotional and behavioral needs and have been found to be eligible for special education. As such, each is within the class of persons protected by California Civil Code section 51, subdivision (b).

285. CCCOE and Marchus are business establishments within the meaning of California Civil Code section 51 et seq.[69]

286. Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T. sought educational services—a service that CCCOE, through Marchus, provides to the public.

287. Through its action and inaction, Defendants CCCOE and Marchus have denied, aided, incited a denial of, discriminated, or made a distinction that denied full and equal advantages, privileges and services to Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T. based on their disabilities and, therefore, violated, and continue to violate, California Civil Code section 51, subdivision (b). Accordingly, Plaintiffs are entitled to recover a civil penalty authorized by California Civil Code section 52, subdivision (a).

288. Marchus's staff members and administrators, under the supervision of CCCOE, denied Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T. equal access to education in the least restrictive environment, and instead provided them a separate, different, and inferior education, including by (1) maintaining and operating segregated special education programs, including, but not limited to Marchus, in which extreme restraints and seclusion are used routinely, often in non-emergency situations; and (2) failing to provide the supports and services to prepare Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T. for return to the least restrictive environment, resulting in their being isolated from their non-disabled peers and deprived of the benefits of "normal" socialization, as well as subjected routinely to extreme restraints and seclusion in non-emergency situations.

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[69] See *Sullivan* v. *Vallejo City Unified School District* (E.D.Cal. 1990) 731 F.Supp. 947, 953 ("[S]ince public schools were among those organizations listed in the original version of the Unruh Act, it must follow that for purposes of the Act they are business establishments as well.").

289. Based on information and belief, the denial of Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T.'s right to a full and equal education solely by reason of their disabilities is ongoing.

290. As a direct and proximate cause of CCCOE's and Marchus's misconduct, Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T. have each suffered and/or will each continue to suffer damages, including physical harm and emotional distress, in an amount to be proven at trial, but exceeding the minimum jurisdictional limits of this Court.

**ELEVENTH CAUSE OF ACTION**
**Violation of the Tom Bane Civil Rights Act (Cal. Civ. Code, § 52.1)**
**(Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T.**
**Against District Defendants and Marchus)**

291. Plaintiffs incorporate by reference the preceding paragraphs of this Complaint as though fully set forth herein.

292. California Civil Code section 52.1, known as the Tom Bane Civil Rights Act, prohibits interference with Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T.'s constitutional or statutory rights accompanied by actual or attempted threats, intimidation, or coercion.

293. Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T. have been subjected to extreme restraints and seclusion, techniques that Marchus's staff use to "control" the children in their care, despite those techniques being widely recognized as dangerous, ineffective, and counterproductive when deployed in non-emergency situations. The use of such techniques has threatened, intimidated, and coerced Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T.

294. District Defendants and Marchus have interfered with Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T.'s rights by facilitating, encouraging, enabling, or engaging in the use of extreme restraints and seclusion in violation of California Education Code section 56521.2.

295. District Defendants and Marchus have interfered with Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T's rights by denying them the benefit of a FAPE solely by reason of their disabilities. District Defendants and Marchus have failed to provide Student Plaintiffs

Kerri K., Jacob K., Sara S., and Annie T. with a FAPE in the least restrictive environment appropriate to meet their needs pursuant to section 56000 et seq. of the California Education Code. District Defendants and Marchus specifically designed a program for students with emotional, behavioral, and trauma-related disabilities that emphasizes behavioral modification at the expense of academic instruction and relies on dangerous, ineffective, and counterproductive behavioral intervention.

296. District Defendants and Marchus have interfered with Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T.'s rights to receive basic educational services, pursuant to article IX, sections 1 and 5 of the California Constitution, to learn in a "system of common schools" that are "kept up and supported" such that students may learn and receive "the diffusion of knowledge and intelligence essential to the preservation of the[ir] rights and liberties."

297. As a result of District Defendants' and Marchus's interference with Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T.'s rights, Kerri K. and Jacob K. have made little academic progress, Sara S. has been forced to enter into a residential placement, and Annie T. struggles to read beyond a first-grade level and do basic math, such as count money.

298. Based on information and belief, the denial of Student Plaintiffs Kerri K., Jacob K., and Annie T.'s rights is ongoing.

299. As a direct and proximate cause of District Defendants' and Marchus's conduct, Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T. have each suffered and will each continue to suffer damages, including physical harm and emotional distress, in an amount to be proven at trial, but exceeding the minimum jurisdictional limits of this Court.

## INDIVIDUAL CLAIM ON BEHALF OF TAXPAYER PLAINTIFFS

### TWELFTH CAUSE OF ACTION
### Violation of California Code of Civil Procedure Section 526a
### (Taxpayer Plaintiffs against Public Entity Defendants)

300. Plaintiffs incorporate by reference the preceding paragraphs of this Complaint as though fully set forth herein.

301. Taxpayer Plaintiffs Elyse K., Zena C., and Esme T. have been assessed and found liable to pay a tax in the State of California, and/or have paid an assessed tax in the State of California in the last year.

302. Defendants' expenditure of county, municipal, and/or state taxpayers' funds to administer a system of education that discriminates against students with emotional and behavioral disabilities and that subjects those students to unlawful, abusive, and traumatizing behavioral interventions, as challenged herein, is unlawful. Taxpayer Plaintiffs have a well-recognized interest in enjoining the unlawful expenditure of tax funds. (See Cal. Code Civ. Proc., § 526a, subd. (a) ["An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a local agency, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax that funds the defendant local agency, including . . . [a] sales and use tax . . . ."].)

303. There is an actual controversy between Taxpayer Plaintiffs Elyse K., Zena C., and Esme T., on the one hand, and Defendants, on the other, concerning their respective rights and duties in that Taxpayer Plaintiffs contend that the policies and/or practices of Defendants directly contribute to systemic discrimination on the basis of disability and deny students with disabilities access to a FAPE in the least restrictive environment, and that Defendants have failed to satisfy their duty to act, as alleged herein, whereas Defendants are likely to contend in all respects to the contrary.

304. Unless and until Defendants' unlawful policies and/or practices, as alleged herein, are preliminarily and permanently enjoined by order of this Court, they will continue to cause great and irreparable injury to Taxpayer Plaintiffs Elyse K., Zena C., and Esme T.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully request:

1. A determination by this Court that class action treatment for the Classes is appropriate.

2. A declaration that Defendants, through the actions, omissions, policies, practices, and/or procedures complained of, violate:

For the Classes:

a. Section 56000 et seq. of the California Education Code;

b. Section 11135 of the California Government Code;

c. Article IX, sections 1 and 5 of the California Constitution, and;

d. Article I, section 13 of the California Constitution.

For Individual Plaintiffs:

a. California common law protections against negligent retention and supervision, negligent infliction of emotional distress, negligent failure to comply with statutes and/or mandatory duties, battery, the Unruh Civil Rights Act, the Tom Bane Civil Rights Act, and California Code of Civil Procedure section 526a.

3. Preliminary and permanent injunctive relief for the Classes and Taxpayer Plaintiffs:

A. Preliminary and permanent injunctive relief, on behalf of the Restraint and Seclusion Class, requiring Defendants, their successors in office, agents, employees, and assigns, and all persons acting in concert with them, to promulgate policies and/or practices that end non-emergency physical restraint and seclusion and remedy the effects of non-emergency physical restraints and seclusion, and ensure an equal educational opportunity, including by:

a. Implementing evidence-based policies and/or practices, including effectively training and supervising staff to ensure that effective positive behavioral supports and interventions are in place;

b. Implementing a system of accountability policies and/or practices, and to remove staff members who are unable to effectively employ positive alternatives to physical restraint and seclusion;

c. Ending the facilitation, promotion, and deployment of inappropriate and/or non-emergency restraints;

d. Ending the inappropriate use of seclusion;

e. Developing and implementing policies and/or practices for reporting and evaluating the psycho-educational impact of previous behavioral interventions on Marchus students, and ensuring positive educational outcomes;

f. Developing policies and/or practices to ensure class-wide services to address the consequences of Marchus's continual and ongoing abuse;

g. Ensuring education in the most integrated setting appropriate; and

h. Enjoining enrollment of new students at Marchus until such time as Defendants have complied with the above requirements;

B. Requiring Defendant CDE to promulgate policies, procedures, and practices to monitor and ensure that school districts, including CCCOE, end the practice of routine, non-emergency restraints and seclusion, including, but not limited to, reviewing all placement referrals to segregated behavior-based schools to ensure that students could not be educated in a less restrictive environment with supports and services; conducting unannounced on-site inspections of all segregated special education settings, including verification of school policies and procedures for restraint and seclusion, review and analysis of all behavioral emergency reports, individually and as data set; providing robust technical assistance to school districts, including CCCOE, on positive behavioral supports and interventions and alternatives to segregation, restraint, and seclusion; and creating a complaint system that assesses complaints of inappropriate restraint and/or seclusion on an expedited basis;

C. Implementing court-supervised monitoring, with participation of counsel for Plaintiffs, until such time as the violations cited herein are fully remedied;

D. Preliminary and permanent injunctive relief, on behalf of the Reporting Class, requiring Defendants, their successors in office, agents, employees and assigns, and all persons acting in concert with them to:

a. Immediately cease the use of, reliance on, or publication of inaccurate and/or retaliatory academic and behavioral records from Marchus;

b. Implement policies and/or practices to ensure compliance with reporting statutes; and

c. Develop policies and/or practices to ensure class-wide compensatory services to address the consequences of educational deprivation and trauma caused by the routine use of restraint and seclusion.

4. Damages for the Individual Student Plaintiffs:

A. Compensatory damages and restitution in an amount to be determined at trial, plus interest accruing between the date the respective Plaintiff first attended Marchus, or the date the respective Plaintiff was first restrained, and the date of judgment;

B. Statutory damages under the Unruh Civil Rights Act and Tom Bane Civil Rights Act;

C. Punitive damages, according to proof;

5. Reasonable attorneys' fees, statutory costs, and expenses, as provided under California Civil Code section 52 and California Code of Civil Procedure section 1021.5, or any other law permitting such payments; and

6. For such other and further relief as the Court may deem just and proper.

Dated: May 13, 2019

Respectfully submitted,

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**JURY DEMAND**

Plaintiffs request a trial by jury on all issues raised in the Complaint that are properly triable to a jury.

Dated: May 13, 2019

Respectfully submitted,

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