

**FINAL SETTLEMENT AGREEMENT (“SETTLEMENT AGREEMENT”)  
WITH CONTINUING JURISDICTION OF THE COURT**

**By and Between**

**Kerri K. and Jacob K., through their guardian ad litem, Elyse K.; Sara S., through her guardian ad litem, Zena C.; and Annie T., through her guardian ad litem, Esme T. (“Student Plaintiffs”), on behalf of themselves and a proposed class of similarly situated students (the “Marchus Way Class”); and Elyse K., Zena C., and Esme T., as taxpayers (together with Student Plaintiffs, “Plaintiffs”),**

**and**

**Contra Costa County Office of Education (“CCCOE”)**

**In the Matter of**

***Kerri K., et al. v. State of California, et al.*, Case No. MSC19-00972  
(Super. Ct. Contra Costa 2019).**

**Effective Date: \_\_\_\_\_**

**I. RECITALS**

**A. Overview**

1. On May 13, 2019, Plaintiffs filed their class action complaint and complaint for individual and taxpayer remedies in Contra Costa County Superior Court against Defendant CCCOE, certain individual CCCOE employees (together with CCCOE, “CCCOE Defendants”), and the State of California, State Board of Education, State Department of Education, and Tony Thurmond in his official capacity as State Superintendent of Public Instruction for alleged misconduct related to Floyd I. Marchus School, captioned *Kerri K., et al. v. State of California, et al.*, MSC19-00972 (the “Complete Action”). The matter was assigned for all purposes to The Honorable Edward G. Weil (“the Court”).
2. Plaintiffs’ operative Third Amended Complaint (“TAC”) asserts:
  - a. Class Claims: (1) a claim against Defendant CCCOE by Student Plaintiffs and the proposed Marchus Way Class for alleged violations of Cal. Ed. Code § 56000 *et seq.*; and (2) a claim against CCCOE Defendants by Student Plaintiffs and the proposed Marchus Way Class for alleged violations of Cal. Const. Art. I, § 13. The proposed Marchus Way Class is a proposed class of all Marchus students who are, have been in the last three years (as of May 13, 2019), or will be enrolled at Marchus;

- b. Individual Claims for Damages: (3) a claim against CCCOE Defendants by Student Plaintiffs for alleged negligence; (4) a claim against CCCOE Defendants by Student Plaintiffs for alleged battery; (5) a claim against Defendant CCCOE by Student Plaintiffs for alleged violations of the Unruh Civil Rights Act (Cal. Civ. Code, § 51 *et seq.*); and (6) a claim against Defendant CCCOE by Student Plaintiffs for alleged violations of the Tom Bane Civil Rights Act (Cal. Civ. Code § 52.1); and
- c. Taxpayer Claim for Injunctive Relief: (7) a taxpayer claim against Defendant CCCOE by plaintiffs Elyse K., Zena C., and Esme T. for alleged violations of Cal. Civ. Proc. Code § 526(a), which is necessarily premised upon the Class Claims.

3. Since 2019, Defendant CCCOE has undertaken changes to certain of its practices at Floyd I. Marchus School, some of which are reflected in this Settlement Agreement.

**B.** Defendant CCCOE and Plaintiffs (together, the “Parties”) have entered into this Settlement Agreement to resolve all disputes between them to date related to the Class Claims, the Taxpayer Claim for Injunctive Relief (together with the Class Claims, the “Class Action”), and the Individual Claims for Damages, and to avoid further litigation related to the Complete Action. By Defendant CCCOE entering into this Settlement Agreement, CCCOE Defendants in no way admit any liability or wrongdoing in regards to Plaintiffs, the proposed Marchus Way Class, or the allegations and claims in the Complete Action.

## **II. CLASS ACTION TERMS AND CONDITIONS**

**A.** Defendant CCCOE agrees not to re-implement “the Level System.”

**B.** Enforceable Commitments

- 1. Without accepting the allegations of the TAC, Defendant CCCOE will provide each student at Floyd I. Marchus School a free and appropriate public education (“FAPE”) as required by the Individuals with Disabilities Education Act (“IDEA”) and Cal. Ed. Code § 56000 *et seq.*
- 2. Without accepting the allegations of the TAC, Defendant CCCOE will draft and implement each individual student’s IEP and BIP at Floyd I. Marchus School as required by the IDEA and Cal. Ed. Code § 56000 *et seq.*<sup>1</sup>
- 3. Without accepting the allegations of the TAC, Defendant CCCOE will comply with Cal. Ed. Code §§ 56520 *et seq.* and 49005 *et seq.* at Floyd I. Marchus School.

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<sup>1</sup> For the avoidance of doubt, “IEP” means individualized education plan or individualized education program, and “BIP” means behavior intervention plan.

- a. These agreements are enforceable exclusively for systemic violations.
- b. Allegations that (1) a particular student is not receiving the specific special education and related services, accommodations, modifications, assistive technology, and/or special education instruction according to the student's IEP; (2) a particular student's BIP is not being properly deployed; and/or (3) Floyd I. Marchus School or Defendant CCCOE has not complied with the substantive and/or procedural requirements of the IDEA or Cal. Ed. Code § 56000 *et seq.* as to a particular student will be enforced through the regular IDEA due process procedures.

C. Enforceable Terms Regarding Curriculum Implementation, Incident Review and Reporting, and Related Terms

1. Defendant CCCOE agrees to continue to contract with WestEd, as a consultant, and partner with WestEd to (a) continue to implement an evidenced-based positive behavior interventions and supports program (the "PBIS Program"); and (b) continue to implement Social Emotional Learning Curriculum ("SEL Curriculum") at Floyd I. Marchus School.
  - a. **PBIS Program:** Floyd I. Marchus School has begun implementing and will continue to implement an evidenced-based positive behavior interventions and supports ("PBIS") program that includes Multi-Tiered Support Systems. Tier 1 is a school-wide system, currently referred to as PRIDE. Tier 2 is for students needing behavioral support beyond the school-wide system and is comprised of individualized interventions. These Tier 2 interventions include, but are not limited to, behavior goal(s), FBAs, BIPs, individualized positive behavioral reward plans, short term counseling, small group work, and other interventions to try to prevent behavior from becoming ongoing.<sup>2</sup> Tier 2 interventions may be included in a student's BIP or IEP. Tier 3 interventions, the highest level of support, are for students that need more individualized help beyond the Tier 2 interventions, such as when a particular behavior becomes an ongoing issue. Tier 3 interventions are individualized behavioral and mental health supports, provided through group or one-on-one services, as determined by a student's IEP team. Floyd I. Marchus School has begun working at the systemic level to make sure that its policies, procedures, and training are uniform so that all staff is informed regarding development and implementation of Tier 2 and Tier 3 interventions, and will continue to review its policies, procedures, and training to update them as necessary.
  - b. **SEL Curriculum:** Defendant CCCOE has begun and will continue to implement SEL Curriculum at Floyd I. Marchus School.

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<sup>2</sup> For the avoidance of doubt, "FBA" means functional behavioral assessment.

- c. **Guidance for IEP Teams:** Defendant CCCOE will ensure that IEP teams address the questions in Appendix A at any IEP meeting held after a student has been subject to Physical Intervention, Seclusion, Support Room Use, or after law enforcement is called for a student. Appendix A provides a reference to guide IEP team discussions about how to appropriately and positively support the individualized needs of the student.
    - i. “Seclusion” as used in this Settlement Agreement is defined as “seclusion” as defined in Cal. Ed. Code § 49005.1(i).
    - ii. “Physical Intervention” as used in this Settlement Agreement is defined as “behavioral restraint” as defined in Cal. Ed. Code § 49005.1(a).
    - iii. “Support Room Use” as used in this Settlement Agreement is defined as when a student is sent to the support room for an incident in which a behavioral emergency report, behavioral incident report, or similar record is prepared as a result, or when a student is sent to the support room when the student is not currently exhibiting any dysregulated behavior, such as starting their day in the support room for conduct from the prior day. This does not include voluntary student trips to the support room, and/or instances where the visit to the support room is specifically permitted or required by the students’ IEP or BIP.
2. Defendant CCCOE agrees and will continue to undertake activities that include, but are not limited to:
- a. Providing training and professional development to Floyd I. Marchus School staff on its PBIS system, including its school-wide Tier 1 program and its Tier 2 and Tier 3 individualized behavioral supports and interventions, including real-time implementation support through registered behaviorists and behaviorist technicians. The required registered behaviorist support shall be for the next three school years, 2022-2023, 2023-2024, and 2024-2025, through the end of the summer extended school year.
  - b. Implementing the concern reporting system set forth in Appendix B in which parents and/or guardians of students may contact the CCCOE Director of Special Education, or their administrative designee, about any concerns regarding behavioral issues, the use of Physical Interventions, Seclusion, Support Room Use, calls to law enforcement for a student, or any alleged deprivation of FAPE caused thereby. There is no time limit for this reporting system. Floyd I. Marchus School will inform students’ parents/guardians of this reporting system in writing at the beginning of each school year and/or upon placement at Floyd I. Marchus School in the

written materials provided and made available pursuant to Section II.C.2.f., *infra*. The Director of Special Education, or their administrative designee, will forward in writing complaints concerning behavioral issues, the use of Physical Interventions, Seclusion, Support Room Use, and calls to law enforcement for a student to a registered behaviorist during the three years they are providing support (*see* Section II.C.2.a., *supra*), and to the school psychologist or social worker assigned to the student at issue through the student's IEP (if any). Upon receiving a complaint in writing through the system, Defendant CCCOE/Floyd I. Marchus School will make a good faith effort to resolve the parent's and/or guardian's concern directly prior to referring the parent and/or guardian to any formal complaint procedure.

- c. Documenting in writing and analyzing each incident involving Physical Intervention, Seclusion, Support Room Use, or a call to law enforcement for a student through its post-incident review process, which is as follows:
  - i. A post-incident review meeting, which shall occur no later than the end of the same school day, unless not reasonably possible due to the time the Physical Intervention, Seclusion, Support Room Use, or call to law enforcement for a student occurred, in which case the meeting shall occur no later than the end of the next school day. At this meeting, staff from Floyd I. Marchus School shall review the incident and confirm the reporting requirements of Cal. Ed. Code § 56521.1 and all others applicable reporting obligations. The school psychologist or social worker assigned to the student at issue through the student's IEP (if any) shall be present at this first meeting.
  - ii. Upon completion of the first meeting, Floyd I. Marchus School will follow up in writing on the incident, including, if necessary, with training, counseling, registered behaviorist consultation, or personnel action, including but not limited to discipline, for the involved staff, if and as appropriate.
  - iii. The case manager of the student involved and a registered behaviorist shall be notified in writing within 24 hours of the incident. If the student at issue is assigned a school psychologist or social worker through their IEP, that person will also be notified with 24 hours of the incident.

- iv. Staff from Floyd I. Marchus School will inform the parent/guardian in writing that it has reviewed the Physical Intervention, Seclusion, Support Room Use, or call to law enforcement for a student within 3 days after such review (if the post-incident review happens on the same day, staff from Floyd I. Marchus School may inform the parent/guardian of the review at the same time that it reports the incident per requirements of Cal. Ed. Code § 56521.1 and all others applicable reporting obligations). The information provided in writing will also include information regarding who the parent/guardian may contact if they have questions or concerns regarding the incident, and will include who to contact if the parent/guardian would like to request an IEP meeting.
- v. Any incident shall be discussed at the next scheduled IEP meeting for the involved student in an effort to review and determine if the incident constitutes a need to modify the IEP or BIP. The school psychologist or social worker assigned to the student at issue through the student's IEP (if any) shall be present at this meeting.
- d. Developing and utilizing the new data collection and tracking system at Floyd I. Marchus School in regards to Physical Interventions, Seclusions, Support Room Uses, and calls to law enforcement for students.
- e. Conducting a root cause analysis of disproportionate Physical Interventions, Support Room Uses, and/or Seclusions by particular Floyd I. Marchus School staff members and taking the appropriate steps to address the root cause.
- f. Making available to parents before the beginning of each academic year, and/or upon placement at Floyd I. Marchus School, the Floyd I. Marchus School Handbook, which shall include the sections as written in Appendix C. The sections set forth in Appendix C shall separately be made available via a direct link on Defendant CCCOE's website related to Floyd I. Marchus School on the "Parent Resources" webpage.

**D. Other Enforceable Terms**

- 1. Defendant CCCOE will maintain accurate student records for Floyd I. Marchus students as required by law. A student who makes a good faith claim that their records are inaccurate or misleading can seek to have their records changed through Cal. Ed. Code § 49070 and Defendant CCCOE Board Policy 5125.1. If dissatisfied with Defendant CCCOE's final decision on the matter, the parent/guardian may file an administrative writ of mandamus in superior court.

2. Defendant CCCOE will continue to review all students' IEPs and BIPs through the annual IEP process, and as determined necessary in between annual meetings by a student's IEP team and/or as requested by the student's parent or guardian. For IEP meetings requested by a parent or guardian, the IEP meeting shall be convened as soon as possible, but within the timeline prescribed by law.
3. Floyd I. Marchus School reviewed and updated the Floyd I. Marchus School Handbook and other related school documents in light of the new PBIS Program and SEL Curriculum, and will continue to review and update them as needed.

#### E. Implementation, Oversight, and Enforcement

1. At the end of every school quarter, WestEd as principle author, with Defendant CCCOE providing necessary support, will author a progress report in writing evaluating the development and implementation of the PBIS Program and SEL Curriculum. A list of topics to be covered in the quarterly progress reports is attached as Appendix D.
  - a. The reports will be provided to the Parties in writing and made public on Defendant CCCOE's website, except that any information that could reasonably identify a particular student shall be removed from the report prior to publication on Defendant CCCOE's website, and except as provided in Appendix D.
2. At the conclusion of each summer extended school year session during the Term of Section II of the Settlement Agreement (*see* Section II.E.4., *infra*), Defendant CCCOE will provide to Plaintiffs' counsel a report in writing summarizing the data concerning Physical Intervention, Seclusion, Support Room Use, and calls to law enforcement for students as set forth in Appendix D, ¶ 3.a.
3. At the end of each school semester, the WestEd consultant(s) who authored the report will meet with Plaintiffs' counsel and Dr. Mary Jo Dare to discuss the two progress reports authored during that semester. Plaintiffs' counsel will review the progress reports to ensure compliance. The meetings will be scheduled by the Parties through their respective counsel. Counsel for Defendant CCCOE and possibly CCCOE staff will attend the progress report review meetings.
4. Term of Section II, Class Action Terms And Conditions: The term of Section II of this Settlement Agreement, Class Action Terms and Conditions, is two years, except for those provisions of Section II that expressly define their term limit, in which case that express term limit shall control (*e.g.*, Section II.C.2.a., b. (registered behaviorists through the end of the summer extended school year 2024-2025; no time limit for concern reporting system)).

- a. If Floyd I. Marchus School ceases operations and Defendant CCCOE does not open any similar program, Section II of this Settlement Agreement terminates automatically on the last day of operation. If Floyd I. Marchus School ceases operations and Defendant CCCOE opens another program similar to Floyd I. Marchus School or that is intended to serve a similar population as Floyd I. Marchus School, then Section II of this Settlement Agreement shall remain in effect and the obligations shall apply with equal force to the new program.
5. If the quarterly reports show material deficiencies in Defendant CCCOE's satisfaction of Section II's terms in two consecutive progress reports, Plaintiffs have the right to demand a meet and confer with Defendant CCCOE, which must occur no later than 30 days after the demand. If the meet and confer process and commitments arising therefrom have been exhausted and are unsuccessful at resolving the deficiencies identified in the progress reports, Plaintiffs have the right to move to enforce Section II of this Settlement Agreement. Counsel for Plaintiffs and any affected party or beneficiary or their guardian can file a motion to request enforcement of Section II of this Settlement Agreement at any time under Cal. Civ. Proc. Code § 664.6, so long as they comply with the meet and confer process set forth in this provision.

### **III. TERMS AND CONDITIONS REGARDING INDIVIDUAL CLAIMS FOR DAMAGES**

Within 60 days of entry of the Court's order approving the terms of the Settlement Agreement (*see* Section VIII-X, *infra*) and receipt of a W-9 on behalf of each Plaintiff as directed by the Court's order approving the Settlement Agreement, whichever is later, Defendant CCCOE shall pay Five Hundred Thousand Dollars (\$500,000) for the benefit of Student Plaintiffs, with each Student Plaintiff to receive One Hundred and Twenty Five Thousand Dollars (\$125,000) as set forth in the Court's order approving the Settlement Agreement.

### **IV. ATTORNEYS' FEES AND COSTS**

- A. Within 60 days of entry of the Court's order approving the terms of the Settlement Agreement (*see id.*) and receipt of a W-9 for Public Counsel, whichever is later, Defendant CCCOE shall pay attorneys' fees and/or costs incurred by Public Counsel, Sullivan & Cromwell LLP, and Disability Rights Education and Defense Fund in the amount of Eight Hundred Thousand Dollars (\$800,000), payable to Public Counsel. Public Counsel agrees to be responsible for disbursement of the respective attorneys' fees and/or costs.



- B. Such payment will be in full and final settlement of any and all attorneys' fee and/or cost claims that have been, could have been, or could be made in the Complete Action against CCCOE Defendants. Upon receipt of the payment, Plaintiffs and their counsel waive and release CCCOE Defendants and any and all related entities and officials from any and all past, present, and future claims for attorneys' fees and/or costs in the Complete Action against CCCOE Defendants. Defendant CCCOE and its counsel agree to waive and release Plaintiffs from any and all past, present, and future claims for attorneys' fees and/or costs in the Complete Action against CCCOE Defendants. This mutual release is binding on the Parties' heirs, representatives, successors, assigns, agents, and attorneys.

## V. RELEASE OF CLAIMS

- A. In exchange for the consideration set forth in this Settlement Agreement, Plaintiffs hereby waive, release, and forever discharge Defendant CCCOE, including Defendant CCCOE's past and present officers, employees, agents, heirs, spouses, elected officials, or successors, either in their official or individual capacities, from any and all claims, demands, and causes of action of every kind, nature, or description, whether known or unknown, related to the allegations in the Complete Action.

Plaintiffs certify that they have read, and hereby waive the application of, the following provision of Cal. Civ. Code § 1542 to all claims:

**“A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party.”**

Acknowledging Cal. Civ. Code § 1542, Plaintiffs agree to waive the protections of § 1542 in order to relinquish all claims described herein. Specifically, Plaintiffs understand and acknowledge the significance and consequence of this waiver of § 1542, as follows: (1) they may have additional causes of action, rights, or claims and attorneys' fees or costs of which they are not now aware; (2) they may not make a further demand for any such claims, fees, or costs upon each other or their predecessors, successors, board, employees, or agents; and (3) they extend their waiver to include now unknown or later discovered claims, fees, or costs arising or occurring through the Effective Date of this Settlement Agreement.

- B. Subject to the terms of this Settlement Agreement, Defendant CCCOE hereby waives and releases any right to appeal any part of the Complete Action, including but not limited to the judgment that will be entered pursuant to the terms of the Settlement Agreement in accordance with Cal. Civ. Proc. Code § 664.6(a) (*see* Section VIII-X, *infra*).

**VI. NO RELEASE OF FUTURE CLAIMS**

Nothing in this Settlement Agreement shall be deemed a release, settlement, or waiver of claims by Plaintiffs related to or arising out of acts or omissions by Defendant CCCOE after the Effective Date of this Settlement Agreement.

**VII. NO CERTIFICATION OF SETTLEMENT CLASS AND NO BINDING EFFECT OF SETTLEMENT AGREEMENT ON PROPOSED MARCHUS WAY CLASS**

The Parties agree that certifying a settlement class is unnecessary, and that Section II of this Settlement Agreement (Class Action Terms And Conditions) is intended to serve third-party beneficiary current and future Floyd I. Marchus School students. Section II of the Settlement Agreement will remain enforceable even after the individual Student Plaintiffs no longer attend Floyd I. Marchus School, but only for the two year term of the terms and conditions set forth in Section II of this Settlement Agreement. Notwithstanding that third parties may benefit from this Settlement Agreement, this Settlement Agreement does not bind any members of the proposed Marchus Way Class other than Student Plaintiffs.

**VIII. CONTINUING JURISDICTION OF THE COURT**

The Parties agree to dismiss the Complete Action against CCCOE Defendants with prejudice with respect to Plaintiffs' claims, and to dismiss without prejudice the claims of the proposed Marchus Way Class, other than Student Plaintiffs, against CCCOE Defendants. The Parties expressly agree that the Court will retain jurisdiction under Cal. Civ. Proc. Code § 664.6. The motion for the Court to enter judgment pursuant to the terms of the Settlement Agreement and retain jurisdiction related thereto pursuant to Cal. Civ. Proc. Code § 664.6(a) shall expressly state that the Settlement Agreement is conditioned upon continued Court jurisdiction to enforce the settlement until performance in full of the terms of the Settlement Agreement.

**IX. APPROVAL OF MINOR'S COMPROMISE**

Given that this Settlement Agreement includes the compromise and release of claims by Student Plaintiffs, who are minors, this Settlement Agreement is expressly conditioned upon Plaintiffs filing for and obtaining the Court's approval of this Settlement Agreement pursuant to Cal. Civ. Proc. Code § 372, Cal. Prob. Code §§ 3500, 3600-13, or as otherwise directed by the Court. Plaintiffs shall make a motion for approval of this Settlement Agreement as a minor's compromise at the same time that the Parties file the motion to enter judgment pursuant to Cal. Civ. Proc. Code § 664.6.

**X. EFFECTIVE DATE OF SETTLEMENT AGREEMENT**

The Settlement Agreement's "Effective Date" shall be when the Court, upon motion of the Parties for the Court to enter judgment and retain jurisdiction related thereto under Cal. Civ. Proc. Code § 664.6(a) and to approve the Settlement Agreement pursuant to Cal. Civ. Proc. Code § 372, Cal. Prob. Code §§ 3500, 3600-13, or as otherwise directed by the Court, enters judgment pursuant to the terms of the Settlement Agreement and retains jurisdiction related thereto in accordance with Cal. Civ. Proc. Code § 664.6(a), and approves the Settlement Agreement pursuant to Cal. Civ. Proc. Code § 372, Cal. Prob. Code §§ 3500, 3600-13, or other Court direction.

**XI. DUTY OF COOPERATION**

Each Party covenants to take, and to cause its related parties to take, all such actions and to execute all such documents as may be reasonable and necessary or desirable to implement the provisions of this Settlement Agreement fully and effectively.

**XII. VOLUNTARY AGREEMENT**

- A. The Parties represent that they have read this Settlement Agreement in full and understand and voluntarily agree to all the provisions herein, free from fraud, coercion, or duress.
- B. The Parties, including Student Plaintiffs through their guardians ad litem, further represent that they have the legal capacity to understand, agree to, and sign this Settlement Agreement.
- C. Each of the Parties has made such investigation of the facts pertaining to this Settlement Agreement and of all the matters pertaining thereto as it deems necessary.
- D. Each of the Parties hereto acknowledges that no other party or any representative or attorney of any of the parties has made any promise, representation, or warranty whatsoever, express or implied, not contained herein concerning the subject matter hereof to induce any Party to execute this Settlement Agreement in reliance upon any such promise, representation, or warranty not contained herein.
- E. The Parties hereby acknowledge that they have discussed the Settlement Agreement with their respective legal representatives, and each of them acknowledge that they understand all of the terms and conditions of this Settlement Agreement and that this is a total and final settlement and compromise of all claims under or any other claims related to Plaintiffs' educational programs that arise from any acts or omissions prior to the Effective Date of this Settlement Agreement and could have been brought in the Complete Action.

### **XIII. NON-ADMISSION OF LIABILITY**

It is understood and agreed by the Parties that this Settlement Agreement is a compromise of disputed claims, and that the terms of this Settlement Agreement provided herein and any judgment entered pursuant to Cal. Civ. Proc. Code § 664.6 are not to be construed as an admission of any liability, wrongdoing, or violation of rights by either CCCOE Defendants or Plaintiffs, nor shall this Settlement Agreement be admissible as evidence of any liability, wrongdoing, or violation of rights as alleged arising prior to the Effective Date of this Settlement Agreement.

### **XIV. WAIVER**

No delay or failure by any Party to exercise its rights under this Settlement Agreement shall be construed to be a waiver thereof, unless memorialized by written instrument signed by the Parties. The agreed waiver of any covenant, condition, or agreement to be performed under this Settlement Agreement shall not be construed to be a continuing waiver of the same covenant, condition, or agreement, or the waiver of a different covenant, condition, or agreement. Furthermore, the agreed waiver of any breach of this Settlement Agreement shall not be considered to be the agreed waiver of a different or subsequent such breach.

### **XV. ENTIRE AGREEMENT**

This Settlement Agreement is the entire agreement and understanding of the Parties. There are no oral understandings, terms, or conditions. All prior understandings, terms, or conditions, written, oral, express, or implied, are superseded by this Settlement Agreement. This Settlement Agreement cannot be changed or supplemented orally and may be modified or superseded only by a written instrument executed by the Parties.

### **XVI. BINDING EFFECT**

This Settlement Agreement is for the benefit of and shall be binding on all Parties, and their respective successors, heirs, and assigns upon the Effective Date of this Settlement Agreement.

### **XVII. SEVERABILITY**

All individual provisions in this Settlement Agreement shall be severable. If any one or more such provision of this Settlement Agreement is held to be void, voidable, or unenforceable, that part shall nevertheless be enforced to the extent permissible to effect the intent of the Parties, and the remaining parts shall remain in full force and effect.

## **XVIII. GOVERNING LAW**

This Settlement Agreement is entered into, and shall be construed and interpreted in accordance with, the laws of the State of California without giving effect to principles of conflicts of laws that would require application of the laws of any other jurisdiction.

## **XIX. ENFORCEMENT AND INTERPRETATION OF THIS SETTLEMENT AGREEMENT**

This Settlement Agreement is to be construed fairly, and not in favor of or against any Party, regardless of which Party or Parties drafted or participated in the drafting of its terms. Any rule of construction that a document is to be construed against the drafting Party shall not be applicable in this Settlement Agreement.

## **XX. EXECUTION BY FACSIMILE COUNTERPARTS**

This Settlement Agreement may be executed in counterparts such that the signatures may appear on separate signature pages. A copy of an original, with all signatures appended together, shall be deemed a fully executed agreement. A facsimile, PDF, or scanned version of any Party's signature shall be deemed an original signature. Each counterpart shall be deemed an original and the same document for all purposes.

## **XXI. HEADINGS**

The section headings appearing in this Settlement Agreement are for convenience of reference only and do not constitute a part of this Settlement Agreement and will not be deemed to give substantive meaning or significance to the terms of this Settlement Agreement or limit, characterize, or in any way affect any provision of this Settlement Agreement, and all provisions of this Settlement Agreement will be enforced and construed as if no heading had been used in this Settlement Agreement.

***Signed in Agreement to the Above Terms***

**Plaintiffs**

KERRI K., through her guardian ad litem  
ELYSE K., *Plaintiff*

By: Elyse K  
Dated: 3/3/23

JACOB K., through his guardian ad litem  
ELYSE K., *Plaintiff*

By: Elyse K  
Dated: 3/3/23

SARA S., through her guardian ad litem  
ZENA C., *Plaintiff*

By: \_\_\_\_\_  
Dated: \_\_\_\_\_

ANNIE T., through her guardian ad litem  
ESME T., *Plaintiff*

By: \_\_\_\_\_  
Dated: \_\_\_\_\_

ELYSE K., *Plaintiff*

By: Elyse K  
Dated: 3/3/23

ZENA C., *Plaintiff*

By: \_\_\_\_\_  
Dated: \_\_\_\_\_

ESME T., *Plaintiff*

By: \_\_\_\_\_  
Dated: \_\_\_\_\_

**Plaintiffs' Counsel**

PUBLIC COUNSEL

By: \_\_\_\_\_  
Mark Rosenbaum  
Dated: \_\_\_\_\_

SULLIVAN & CROMWELL LLP

By: \_\_\_\_\_  
Michael H. Steinberg  
Dated: \_\_\_\_\_

**Signed in Agreement to the Above Terms**

**Plaintiffs**

KERRI K., through her guardian ad litem  
ELYSE K., *Plaintiff*

By: \_\_\_\_\_

Dated: \_\_\_\_\_

JACOB K., through his guardian ad litem  
ELYSE K., *Plaintiff*

By: \_\_\_\_\_

Dated: \_\_\_\_\_

SARA S., through her guardian ad litem  
ZENA C., *Plaintiff*

By: Zena C.

Dated: 2/14/2023

ANNIE T., through her guardian ad litem  
ESME T., *Plaintiff*

By: \_\_\_\_\_

Dated: \_\_\_\_\_

ELYSE K., *Plaintiff*

By: \_\_\_\_\_

Dated: \_\_\_\_\_

ZENA C., *Plaintiff*

By: Zena C.

Dated: 02/14/2023

ESME T., *Plaintiff*

By: \_\_\_\_\_

Dated: \_\_\_\_\_

**Plaintiffs' Counsel**

PUBLIC COUNSEL

By: \_\_\_\_\_

Mark Rosenbaum

Dated: \_\_\_\_\_

SULLIVAN & CROMWELL LLP

By: \_\_\_\_\_

Michael H. Steinberg

Dated: \_\_\_\_\_

*Signed in Agreement to the Above Terms*

Plaintiffs

KERRI K., through her guardian ad litem  
ELYSE K., *Plaintiff*

By: \_\_\_\_\_

Dated: \_\_\_\_\_

SARA S., through her guardian ad litem  
ZENA C., *Plaintiff*

By: \_\_\_\_\_

Dated: \_\_\_\_\_

ELYSE K., *Plaintiff*

By: \_\_\_\_\_

Dated: \_\_\_\_\_

ESME T., *Plaintiff*

By: Esme T.

Dated: 2/24/23

JACOB K., through his guardian ad litem  
ELYSE K., *Plaintiff*

By: \_\_\_\_\_

Dated: \_\_\_\_\_

ANNIE T., through her guardian ad litem  
ESME T., *Plaintiff*

By: Esme T.

Dated: 2/24/23

ZENA C., *Plaintiff*

By: \_\_\_\_\_

Dated: \_\_\_\_\_

Plaintiffs' Counsel

PUBLIC COUNSEL

By: \_\_\_\_\_

Mark Rosenbaum

Dated: \_\_\_\_\_

SULLIVAN & CROMWELL LLP

By: \_\_\_\_\_

Michael H. Steinberg

Dated: \_\_\_\_\_



***Signed in Agreement to the Above Terms***

**Plaintiffs**

KERRI K., through her guardian ad litem  
ELYSE K., *Plaintiff*

By: \_\_\_\_\_

Dated: \_\_\_\_\_

JACOB K., through his guardian ad litem  
ELYSE K., *Plaintiff*

By: \_\_\_\_\_

Dated: \_\_\_\_\_

SARA S., through her guardian ad litem  
ZENA C., *Plaintiff*

By: \_\_\_\_\_

Dated: \_\_\_\_\_

ANNIE T., through her guardian ad litem  
ESME T., *Plaintiff*

By: \_\_\_\_\_

Dated: \_\_\_\_\_

ELYSE K., *Plaintiff*

By: \_\_\_\_\_

Dated: \_\_\_\_\_

ZENA C., *Plaintiff*

By: \_\_\_\_\_

Dated: \_\_\_\_\_

ESME T., *Plaintiff*

By: \_\_\_\_\_

Dated: \_\_\_\_\_

**Plaintiffs' Counsel**

PUBLIC COUNSEL

By: Mark Rosenbaum

Mark Rosenbaum

Dated: 3/8/2023

SULLIVAN & CROMWELL LLP

By: \_\_\_\_\_

Michael H. Steinberg

Dated: \_\_\_\_\_

***Signed in Agreement to the Above Terms***

**Plaintiffs**

KERRI K., through her guardian ad litem  
ELYSE K., *Plaintiff*

By: \_\_\_\_\_

Dated: \_\_\_\_\_

JACOB K., through his guardian ad litem  
ELYSE K., *Plaintiff*

By: \_\_\_\_\_

Dated: \_\_\_\_\_

SARA S., through her guardian ad litem  
ZENA C., *Plaintiff*

By: \_\_\_\_\_

Dated: \_\_\_\_\_

ANNIE T., through her guardian ad litem  
ESME T., *Plaintiff*

By: \_\_\_\_\_

Dated: \_\_\_\_\_

ELYSE K., *Plaintiff*

By: \_\_\_\_\_

Dated: \_\_\_\_\_

ZENA C., *Plaintiff*

By: \_\_\_\_\_

Dated: \_\_\_\_\_

ESME T., *Plaintiff*

By: \_\_\_\_\_

Dated: \_\_\_\_\_

**Plaintiffs' Counsel**

PUBLIC COUNSEL

By: \_\_\_\_\_

Mark Rosenbaum

Dated: \_\_\_\_\_

SULLIVAN & CROMWELL LLP

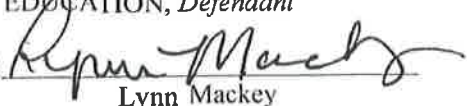
By:  \_\_\_\_\_

Michael H. Steinberg

Dated: February 9, 2023

Defendants

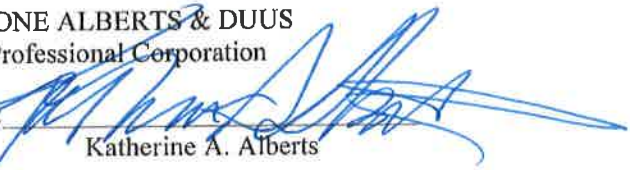
CONTRA COSTA COUNTY OFFICE  
OF EDUCATION, *Defendant*

By:   
Lynn Mackey  
County Superintendent of Schools

Dated: 3/8/23

Defendants' Counsel

LEONE ALBERTS & DUUS  
A Professional Corporation

By:   
Katherine A. Alberts

Dated: March 8, 2023

# Appendix A

**IEP QUESTIONS FOR IEP TEAM MEETING FOLLOWING INCIDENT INVOLVING  
PHYSICAL INTERVENTION, SECLUSION, SUPPORT ROOM USE,<sup>1</sup> OR  
A CALL TO LAW ENFORCEMENT FOR A STUDENT**

- 1) Has the IEP team reviewed the A/B/C analysis (antecedent, behavior, and consequence) related to the incident or concern?
- 2) Was the student interviewed about the incident or otherwise offered an opportunity to provide input on what happened? If so, what did the student say? If not, why not?
- 3) If a student has services with a registered behaviorist in their IEP, has the student been observed in the classroom recently by the registered behaviorist? If so, what were their recommendations? If not, is an observation necessary?
- 4) Has there been an FBA? Does it include behaviors related to the behavior incident?
- 5) Does the student have a current BIP? Does the BIP reflect the student's strengths? Does it evidence positive supports and preventative supports? Does it need to be revised?
- 6) Does the FBA, BIP, and IEP address the behavior and interventions that led to the incident?
- 7) Was the BIP followed? If not, why not?
- 8) What else would help the IEP team understand the student's situation/behavior?
  - a. Are new assessments and/or evaluations needed? Consider needs related to:
    1. Academic needs (unmet reading or other learning needs);
    2. Sensory/motor difficulties;
    3. Mental health needs, including trauma;
    4. Attention concerns, attention deficit hyperactivity disorder, distractibility, and focus;
    5. Speech and language issues; and/or
    6. Other disabilities, including but not limited to autism spectrum. Are there potentially unidentified disabilities?
  - b. Does there need to be a new FBA or a first one?
  - c. Does there need to be a new BIP or a first one?

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<sup>1</sup> "Physical Intervention," "Support Room Use," and "Seclusion" are defined in Section II.C.1.c. of the Settlement Agreement. All other capitalized and/or abbreviated terms not defined herein have the same meaning as used in the Settlement Agreement.

- 9) Does the student need different individualized accommodations, modifications, or individualized supports? Consider:
  - a. Specialized academic instruction, i.e. the need for more intensive academic instruction and/or varied instruction such as pre-teaching, engaging curriculum, differentiation, instruction aimed at the student's learning style, and multi-sensory supports;
  - b. Workload and behavior accommodations and modifications;
  - c. Movement and break accommodations and modifications; and/or
  - d. Individualized positive behavioral supports.
- 10) Does the BIP address how Floyd I. Marchus School and parent(s)/guardian(s) will communicate about progress until behaviors are not a concern?
- 11) Is the student involved in IEP planning? If not, why not? Is the student attending the IEP meeting? If not, why not?
- 12) Has there been a meaningful opportunity to solicit family input on whether the BIP and/or IEP is helpful and whether changes need to be made to positively support the student in the school environment?

# **Appendix B**

## CONCERN REPORTING SYSTEM<sup>1</sup>

### Essential Components:

1. Ease of Access
  - a. Parent(s)/guardian(s) shall report concerns through written “complaints” submitted via a web link made available on Defendant CCCOE’s website related to Floyd I. Marchus School on the “Parent Resources” webpage.
2. Confidentiality
  - a. Confidentiality shall be preserved to the extent possible within legal reporting requirements.
3. Outline of Review Process/Steps
  - a. All complaints will be sent to the Director of Special Education, or their administrative designee, who will be responsible for investigation and follow-up. Any such designee will be publically identified on the webpage for, and/or through, the website link.
  - b. The Director of Special Education, or their administrative designee in the event the Director of Special Education is out of the office, will also forward in writing complaints concerning behavioral issues, the use of Physical Interventions, Seclusion, Support Room Use, or a call to law enforcement for a student to a registered behaviorist during the three years they are providing support and to the school psychologist or social worker assigned to the student at issue through the student’s IEP (if any) as required by this Settlement Agreement (*see* Section II.C.2.b.).
4. Reviewer Access Guidelines
  - a. Access must be restricted to administrators, and all reviewers must understand their confidentiality requirements.
5. Investigative Follow-up Procedure
  - a. Within one school day of receiving the complaint, the Director of Special Education, or their administrative designee in the event the Director of Special Education is out of the office, will review the complaint to:
    - i. Determine whether a mandated report to Child Protective Services and/or the police must be made; if so, any internal investigation will be conducted pursuant to agency and/or police direction;

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<sup>1</sup> All capitalized and/or abbreviated terms not defined herein have the same meaning as used in the Settlement Agreement.



- ii. Determine whether the complaint triggers a more formal complaint process, such as Title IX (20 U.S.C. §§ 1681-88) or the Uniform Complaint Procedures (Cal. Code Regs. tit. 5, § 4600 *et seq.*); if so, the timelines and procedures for that formal process govern the investigation and follow-up; or
- iii. Determine whether the complaint arises from an incident involving Physical Intervention, Seclusion, Support Room Use, or a call to law enforcement for a student.
  - 1. If so, the Director of Special Education or their administrative designee (if applicable) shall ensure that the post-incident steps agreed to in this Settlement Agreement (*see* Section II.C.2.c.) have been followed to the extent applicable.
    - a. If the post-incident steps did occur, the Director of Special Education or their administrative designee will follow the steps in ¶ 5.c. below; or
    - b. if the post-incident steps did not occur, the Director of Special Education or their administrative designee shall initiate the post-incident steps (*see* Section II.C.2.c.).
- b. If the complaint triggers any of the above procedures, the complainant will be notified of the process and timeline, unless prohibited by law enforcement.
- c. For all other complaints, i.e. those regarding behavioral issues and the deprivation of FAPE caused by Physical Intervention, Seclusion, Support Room Use, or a call to law enforcement for a student (*see* Section II.C.2.b.), no later than seven school days from receiving the complaint, the Director of Special Education, or their administrative designee in the event the Director of Special Education is out of the office, will:
  - i. Contact the parent(s)/guardian(s) to discuss the complaint and obtain further information;
  - ii. Contact relevant Floyd I. Marchus staff to obtain further information; and
  - iii. Review any relevant documentation or data, such as any BERs, IEPs, and/or BIPs.
- d. Once the investigation is complete, the Director of Special Education or their administrative designee (if applicable) will:
  - i. Meet with relevant staff to develop next steps in order to address any identified issues;
  - ii. Receive and distribute information appropriately;

- iii. Promptly identify student needs requiring support and determine whether those identified students require any changes to their IEP and/or BIP, or other environmental changes; and
  - iv. Contact the parent(s)/guardian(s) to discuss the status of the investigation and any next steps, including if appropriate, to provide notice of a date and time for an IEP meeting.
- e. All complaints and follow-up actions will be logged and documented.
- i. California Department of Education reporting guidelines will be followed.

# Appendix C

### **Non-Violent Crisis Intervention**

The Marchus School follows the Crisis Prevention Institute's ("CPI") Non-Violent Crisis Intervention Program as a tool to prevent the escalation of acting out behaviors. All instructional staff, counseling staff, support room staff and school nurses shall be trained in Non-Violent Crisis Intervention. The training will consist of an initial 8-hour certification course taught by certified CPI instructors followed by annual 3-6 hour refresher course. The School Principal has the discretion to add additional trainings for the school or individual staff as necessary.

Staff will make every attempt to de-escalate a student using the CPI Crisis Development Model and the Verbal Escalation Continuum. These two models provide a framework for our staff to be able to respond to student needs when they are in crisis. The training teaches staff to be mindful of their non-verbal and verbal communications while maintaining a safe, non-threatening, supportive stance. We consider setting reasonable and manageable limits while engaging in empathic listening. Our goal is to return to open communications, finding shared understanding and identifying opportunities for growth.

Physical interventions and seclusion may be used only as emergency interventions to prevent serious bodily harm to the student or others.

Physical intervention, the term used in this handbook, refers to "behavioral restraint" as defined in California Education Code § 49005.1. Seclusion as used in this handbook is defined in California Education Code § 49005.1(i).

## **Emergency Procedures**

For the purposes of this section, a behavioral emergency is defined as a student behavioral episode that results in the use of physical intervention or seclusion.

### Physical Intervention

A physical intervention is when staff limit the student's freedom of movement to include limiting the movement of their limbs.

Physical intervention may only be deployed by trained staff. Only the amount of physical intervention necessary to prevent serious bodily harm may be used. Emergency responders may be called in situations where staff feel that they are unable to safely use physical intervention. Physical interventions are a last resort emergency measure to prevent serious bodily injury and shall not be used to protect property.

Physical interventions shall not include an amount of force that exceeds that which is reasonable and necessary under the circumstances. Further, no emergency intervention shall be employed for longer than is necessary to contain the behavior. A situation that requires prolonged use of an emergency intervention shall require the staff to seek assistance of the school site administrator or law enforcement agency, as applicable to the situation. The applicable law may be found at [California Education Code §§ 56520-56525](#) and [California Education Code §§ 49005-49006.4](#).

### Seclusion

Seclusion means the involuntary confinement of a pupil alone in a room or area from which the pupil is physically prevented from leaving. Like physical intervention, seclusion is a last resort emergency measure and may only be used as necessary to prevent serious bodily harm.

The applicable law may be found at [California Education Code §§ 56520-56525](#) and [California Education Code §§ 49005-49006.4](#).

When a behavioral emergency occurs and results in the use of physical intervention, seclusion, support room use<sup>1</sup> or calls to law enforcement for a student, the following procedures will be followed:

- Parents/guardians must be notified as soon as possible or within one school day. Parents/guardians will also be notified within one school day when serious property damage occurs as the result of serious behavioral misconduct even if physical interventions are not used.
- A behavioral emergency report shall immediately be forwarded, via paper form and by email, to the Marchus School Principal and the CCCOE Director of Student Programs, Special Education.
- The case manager of the student involved and a registered behaviorist shall be notified in writing within 24 hours of the incident. If the student at issue is assigned a school psychologist or social worker through their IEP, that person will also be notified with 24 hours of the incident.
- A post-incident review meeting shall occur no later than the end of the same school day, unless not reasonably possible due to the time the behavioral emergency occurred, in which case the meeting shall occur no later than the end of the next school day. At this meeting, staff from Marchus School shall review the incident. The school psychologist or social worker assigned to the student at issue through the student's IEP (if any), shall be present at this meeting.
- Within 3 days after the post-incident review meeting, the parents/guardians will be informed in writing that the Marchus School has reviewed the behavioral emergency.

The parents/guardians will also be informed who the parent/guardian may contact if they

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<sup>1</sup> "Support room use" is defined as when a student is sent to the support room for an incident in which a behavioral emergency report, behavioral incident report, or similar record is prepared as a result, or when a student is sent to the support room when the student is not currently exhibiting any dysregulated behavior, such as starting their day in the support room for conduct from the prior day. This does not include voluntary student trips to the support room, and/or instances where the visit to the support room is specifically permitted or required by the students' individualized education program ("IEP") or behavioral intervention plan.

have questions or concerns regarding the incident and who to contact if the parent/guardian would like to request an IEP meeting.

In addition to the above post-incident review, the student's IEP will be reviewed as follows:

- If a behavioral emergency report is written regarding an individual with exceptional needs who does not have a behavioral intervention plan, the designated responsible administrator shall, within two days, schedule an IEP team meeting to review the emergency report, to determine the necessity for a functional behavioral assessment, and to determine the necessity for an interim plan. The IEP team shall document the reasons for not conducting the functional behavioral assessment, not developing an interim plan, or both, if applicable.
- 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, it shall be referred to the IEP team to review and determine if the incident constitutes a need to modify the positive behavioral intervention plan.

Any behavioral emergency shall be discussed at the next scheduled IEP meeting for the involved student in an effort to review and determine if the incident constitutes a need to modify the IEP or behavioral intervention plan. The school psychologist or social worker assigned to the student at issue through the student's IEP (if any) shall be present at this meeting.

The parents/guardians shall have the right and opportunity to examine all school records of his or her child and to receive copies of them within five business days after the request is made by the parent/guardian, either orally or in writing.

### **Concern Reporting System**

Parents/guardians may report concerns regarding behavioral issues, the use of physical interventions, seclusion, support room use, calls to law enforcement for a student, or any alleged deprivation of education caused thereby, to the Director of Special Education, or their administrative designee, through written complaints submitted via a web link made available on the website related to the Marchus School on the [Parent Resources](#) webpage. The complaint will then be investigated and discussed with the parents/guardians.



# Appendix D

## LIST OF TOPICS TO BE COVERED IN THE QUARTERLY PROGRESS REPORT

1. Data that is publicly available to include as background:
  - a. Demographics of students (number in total student body) to include: race, grade level, disability category, free and reduced-price meals, English learners, and/or foster youth; and
  - b. School staffing (teachers, registered behaviorists, psychologists, paraprofessionals, etc.).
2. Certify that the registered behaviorists and behaviorist technicians are still under contract and working (*see* Section II.C.2.a.).
3. Data and analysis for each grade level on the use of Physical Interventions, Seclusion, Support Room Use,<sup>1</sup> and calls to law enforcement for students, without identifying students (Elementary & Secondary).
  - a. Summary analysis of the use of Physical Interventions, Seclusion, Support Room Use, and calls to law enforcement for students. The summary analysis will include (1) review and reporting of data required to be collected pursuant to the Settlement Agreement (*see* Section II.C.2.d.); (2) a description of the number of times Physical Interventions, Support Room Use, Seclusion, and calls to law enforcement for students occurred; (3) a general description of factors that related to the use of these Physical Interventions, Seclusion, Support Room Use, and calls to law enforcement for students; and (4) recommendations to decrease the use of these Physical Interventions, Seclusion, Support Room Use, and calls to law enforcement for students. This summary analysis will be public.
  - b. In addition, the following information will be made available to Plaintiffs' counsel but will not be public:
    - i. Description of whether there has been repeated use of Physical Interventions, Seclusion, Support Room Use, and calls to law enforcement for students on a particular individual or individuals without identifying students;
    - ii. Description of incidents of Physical Interventions, Seclusion, Support Room Use, and calls to law enforcement for students, and analysis of events that led up to incidents;
    - iii. Analysis of whether there is any disproportionate use of Physical Interventions, Seclusion, Support Room Use, and calls to law enforcement for students based on race or disability category; and

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<sup>1</sup> All capitalized and/or abbreviated terms not defined herein have the same meaning as used in the Settlement Agreement.

- iv. Review of any reporting concern system complaints (*see* Section II.C.2.b.; *see also* App'x B) about Physical Interventions, Seclusion, Support Room Use, and calls to law enforcement for students without identifying students.
4. Implementation of PBIS Program and SEL Curriculum review and analysis:
- a. General description of PBIS supports provided in Floyd I. Marchus School's Multi-Tier Support System ("MTSS") and an analysis of implementation by grade level.
    - i. Include interventions/positive behavioral supports being used;
    - ii. Include general description of students' needs as related to MTSS (*e.g.*, how many students are receiving small group instruction in Tier 2) and whether any students are receiving accommodations of school-wide tiered supports within each Tier (*e.g.*, if a student is not able to benefit from a school-wide practice, how are the student's needs being accommodated?); and
    - iii. Address the use of PBIS as it relates to Physical Interventions, Support Room Use, Seclusion, and calls to law enforcement for students.
  - b. General description of the SEL Curriculum by grade level and analysis of implementation by grade level.
  - c. Address the use of SEL Curriculum as it relates to Physical Interventions, Support Room Use, Seclusion, and calls to law enforcement for students.
  - d. Include description of how registered behaviorists are engaged in PBIS Program and SEL Curriculum.
5. Recommendations