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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)

Case No. **C19-00972**
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 INFLECTION OF
EMOTIONAL DISTRESS;
NEGLIGENT RETENTION AND
SUPERVISION; AND FOR
DECLARATORY AND
INJUNCTIVE RELIEF UNDER

FILED
MAY 13 2 14 3

R. MILLER

PER LOCAL RULE, THIS
CASE IS ASSIGNED TO
DEPT 39, FOR ALL
PURPOSES.

SUMMONS ISSUED

1 Instruction,)
2 CONTRA COSTA COUNTY OFFICE OF)
3 EDUCATION,)
4 FATIMA ALLEYNE,)
5 ANNETTE LEWIS,)
6 VIKKI CHAVEZ,)
7 MIKE MAXWELL, and)
8 SARAH BUTLER, in their official)
9 capacities as members of the Contra Costa)
10 County School Board,)
11 LYNN MACKEY, in her official capacity)
12 as Contra Costa County Superintendent of)
13 Schools,)
14 TOM SCRUGGS, in his official capacity as)
15 Contra Costa County Director of Student)
16 Programs – Special Education,)
17 the FLOYD I. MARCHUS SCHOOL,)
18 DAVE FENDEL, in his official capacities)
19 as CCCOE Coordinator of Social Emotional)
20 Learning Support and former principal of)
21 the Floyd I. Marchus School,)
22 MATT BENNETT, in his official capacity)
23 as principal of the Floyd I. Marchus School,)
24 BECKY ARNOTT, in her official capacity)
25 as a credentialed teacher at the Floyd I.)
26 Marchus School,)
27 DOÑA FOREMAN,)
28 JULIE DUNCAN,)
KYL A 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.)

**CALIFORNIA CODE OF CIVIL
PROCEDURE SECTION 526a**
[JURY TRIAL DEMANDED]

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

5 The “*State Defendants*” consisting of:

- 6 • the State of California;
- 7 • the State Board of Education (“State Board”);
- 8 • the California Department of Education (“CDE”); and
- 9 • Tony Thurmond (in his official capacity as the California Superintendent of
10 Public Education).

11 The “*District Defendants*” consisting of:

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

17 The “*Marchus Defendants*” consisting of:

- 18 • The Floyd I. Marchus School (“Marchus”);
- 19 • Tom Scruggs (in his official capacity as CCCOE Director of Student Programs –
20 Special Education);
- 21 • Dave Fendel (in his official capacities as CCCOE Coordinator of Social
22 Emotional Learning Support and former principal of Marchus);
- 23 • Matt Bennett (in his official capacity as current principal of Marchus and former
24 Vice Principal);
- 25 • Becky Arnott (in her official capacity as a credentialed teacher at Marchus);
- 26 • Kyla Santana (in her individual and official capacity as an occupational therapist
27 at Marchus);

28

- 1 • Julie Duncan, Doña Foreman, Aslam Khan, and Ben Navarro (in their individual
2 capacities and official capacities as instructional assistants, teacher’s aides, and/or
3 employees at Marchus); and
- 4 • Certain unknown actors acting on behalf of Marchus and/or CCCOE (“Doé
5 Defendants 1–10”) (and together with State and District Defendants,
6 “Defendants”).

7 Unless explicitly stated to the contrary, all allegations are based upon information and belief.

8 Plaintiffs allege the following:

9 **I. INTRODUCTION**

10 1. In 2019, it is difficult to accept, but true, that California schools continue to use
11 restraints, seclusion, and isolation excessively on students with disabilities. Contrary to law,
12 these interventions are used to control and punish. California schools that are mandated to teach
13 these children instead routinely restrain, seclude, and isolate them. They use restraints that are
14 banned precisely because they threaten the welfare, well-being, and even the lives of students.
15 Physical restraints are so dangerous and traumatizing that a number of states, including
16 California, specifically outlaw or limit their use. Just this year, California explicitly recognized
17 that “restraint and seclusion are dangerous interventions, with certain known practices posing a
18 great risk to child health and safety” and that those practices “may cause serious injury or long
19 lasting trauma and death, even when done safely and correctly”; that “[t]here is no evidence that
20 restraint or seclusion is effective in reducing the problem behaviors that frequently precipitate
21 the use of those techniques”; and that these practices “do not further a child’s education.” (Cal.
22 Ed. Code, § 49005, subs. (a), (d), (e), (j).) As illustrated in this Action, these risks are not
23 hypothetical. Restraints and seclusion can be a matter of life and death, as evidenced by the
24 devastating death of a 13-year-old child with autism following the use of restraint at a segregated
25 special education school in Northern California on November 28, 2018.¹

26 _____
27 ¹ *Sheriff: Boy with Autism Dies After Being Restrained at El Dorado Hills School During*
28 *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

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

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

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

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

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

7 6. Further, California law makes clear that the obligation to protect this population
8 of students is within the province of the State Defendants, as “[t]he State itself bears the ultimate
9 authority and responsibility to ensure that its district-based system of common schools provides
10 basic equality of educational opportunity.” (*Butt v. State of California* (1992) 4 Cal.4th 668,
11 685.) To enforce this promise, school authorities have a “duty to supervise at all times the
12 conduct of the children on school grounds and to enforce those rules and regulations necessary to
13 their protection” (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861,
14 869 [internal quotation marks and citations omitted].) The affirmative duty of those who “have a
15 special relationship with the district’s pupils” is at its apex when children with physical, mental,
16 emotional, and behavioral disabilities are entrusted to their supervision and care. *Id.* Taken
17 together, the State Defendants bear the responsibility to ensure “the right of all students to a
18 school environment fit for learning,” which “cannot take place without the physical and mental
19 well-being of the students. The school premises, in short, must be safe and welcoming.” (*In re*
20 *William G.* (1985) 40 Cal.3d 550, 563.)

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

25 _____
26 ² California data on the use of physical restraints and seclusion in the 2013–2014 school
27 year indicates that of the estimated 1,953 California students subject to physical restraints or
28 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](https://ocrdata.ed.gov/StateNationalEstimations/Estimations_2013_14)> (as of May 4, 2019).

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

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

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

27 ⁴ Floyd I. Marchus School, 2017–2018 School Accountability Report Card, p. 1
28 <[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](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).

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

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

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

17 ⁵ See, e.g., State of California’s Demurrer at 4–6, *Cruz v. State* (Super. Ct. Alameda
18 County, Aug. 6, 2014, No. RG14727139) (arguing that “[t]he State is not a proper party to th[e]
19 litigation” even though Plaintiffs’ claims were “based on the alleged deprivation of the
20 Constitutional rights of seven public schools based on lack of access to the ‘minimum level of
21 learning time’”); State of California’s Demurrer at 6, *Doe v. State of California* (Super. Ct.
22 L.A. County, Jun. 23, 2011, No. BC445151) (“Because plaintiffs fail to allege any right to relief
23 against the State distinguishable from the Education Defendants acting as its agents, the State is
24 not a proper party in this case as a separately named defendant”); State of California’s
25 Demurrer at 23–24, *Robles-Wong v. State of California* (Super. Ct. Alameda County, Aug. 10,
26 2010, No. RG10515768, 2010 WL 3236453). But see *Butt*, 4 Cal.4th at 681 (“Local districts are
27 the State’s agents for local operation of the common school system . . . and the State’s ultimate
28 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).

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

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

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

27
28 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.

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

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

26 _____
27 ⁹ Assem. Com. on Education Rep. on Assem. Bill No. 2657 (2017–2018 Reg. Sess.)
28 (Apr. 25, 2018), p. 8 (hereafter “2657 Committee Report”).

¹⁰ See *id.*

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

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

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

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

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

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

10 II. GOVERNMENT TORT CLAIMS

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

22 III. PARTIES

23 A. Plaintiffs

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

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

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

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

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

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

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

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

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

26 **B. Defendants**

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

1 16 California school districts “who have been identified with significant emotional and
2 behavioral needs.”¹¹ Marchus receives state financial assistance.

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

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

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

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

27 ¹¹ Footnote 3, *supra*.

28 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).

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

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

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

13 36. **Defendant Ben Navarro**, sued here in his individual and official capacities, has
14 been a non-credentialed “Instructional Assistant and Aide” at Marchus since at least January
15 2017. Defendant Navarro is one of the support room staff whom Defendant Arnott supervises.
16 Defendant Navarro routinely engages in the misuse of restraints and seclusion on elementary
17 school students.

18 37. **Defendant Aslam Khan**, sued here in his individual and official capacities, has
19 been a non-credentialed “Instructional Assistant and Aide” at Marchus since at least December
20 2016. Defendant Khan routinely engages in the misuse of restraints and seclusion on elementary
21 school students.

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

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

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

4 41. **Defendant State Board** and its members are responsible for establishing policies
5 governing California’s schools and for adopting rules and regulations for the supervision and
6 administration of all local school districts. Pursuant to California Education Code sections
7 33030–32, Defendant State Board is required to supervise local school districts to ensure that
8 local school districts comply with state requirements concerning educational services. Defendant
9 State Board is also tasked with “adopt[ing] rules and regulations necessary for the efficient
10 administration [of the State’s special education programs].” (Cal. Ed. Code, § 56100, subd. (a).)

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

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

20 44. **Defendant Tony Thurmond**, sued here in his official capacity, is the State
21 Superintendent of Public Instruction for the State of California, the Secretary and Executive
22 Officer for the State Board of Education, and the Chief Executive Officer of the California
23 Department of Education. As such, he is obligated to take all necessary steps to ensure that
24 school districts comply with the California Constitution and State laws. Pursuant to California
25 Education Code sections 33301–03, he is the Director of Education in whom all executive and
26 administrative functions of CDE are vested. Pursuant to California Education Code section
27 33112, subdivision (a), he is charged with superintending the schools of this State. Defendant
28 Thurmond is responsible for ensuring that children in California receive a FAPE, and for

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

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

7 IV. JURISDICTION AND VENUE

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

11 47. Venue is proper in this Court because the Action arose in this County, and District
12 Defendants and Marchus are situated in this County. (See Cal. Code Civ. Proc., §§ 394(a),
13 395(a).)

14 V. CLASS ACTION ALLEGATIONS

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

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

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

1 51. The Restraint and Seclusion Class and the Reporting Class are referred to,
2 collectively, as the “Classes.”

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

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

- 12 i. Whether State Defendants, District Defendants, and Marchus deny Student
13 Plaintiffs and those similarly situated their rights under section 56000 et seq. of
14 the California Education Code by, among other actions, employing policies and/or
15 practices that:
 - 16 a. Deny Plaintiffs and those similarly situated of their rights to FAPE and the
17 educational and procedural safeguards set forth in section 56000 et seq. of
18 the California Education Code.
 - 19 ii. Whether District Defendants and Marchus have employed in the past, or will in
20 the future employ, policies and/or practices that violate section 56520 et seq. of
21 the California Education Code including:
 - 22 a. Subjecting students to unlawful behavioral interventions in non-
23 emergency situations; and
 - 24 b. Failing to adequately train teachers and staff on how to use appropriate
25 behavioral interventions.
 - 26 iii. Whether State Defendants, District Defendants, and Marchus deny Student
27 Plaintiffs and those similarly situated their rights under section 11135 of the
28

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

- 3 a. Deny Plaintiffs and those similarly situated the opportunity to participate
4 in or benefit from a public education equal to that provided to others and
5 free from harm;
- 6 b. Deny Plaintiffs and those similarly situated the opportunity to participate
7 in or benefit from an education that is as effective as that provided to other
8 non-disabled students;
- 9 c. Deny Plaintiffs and those similarly situated the opportunity to return to a
10 more inclusive educational environment;
- 11 d. Fail to incorporate reasonable accommodations or modifications to ensure
12 students are able to meaningfully access their education; and/or
- 13 e. Utilize methods of administration that have the effect of subjecting
14 Plaintiffs and those similarly situated to discrimination on the basis of
15 disability.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- 1 v. Whether the duties, manners, and methods of proper reporting have been
2 communicated to Marchus's staff and/or are included in Marchus's operating
3 policies and/or practices;
- 4 vi. Whether certain Defendants have received feedback that their reports are
5 inaccurate;
- 6 vii. Whether Defendants' reporting policies and/or practices are designed and/or
7 deployed to cover up their own misconduct;
- 8 viii. Whether certain Defendants review these reports in order to assess and improve
9 their conduct and/or the adequacy of their reporting practices;
- 10 ix. Whether Defendants' reliance on or use of the records created in accordance with
11 Defendants' policies and/or practices have inhibited students from enrolling in
12 other schools, especially those with more inclusive settings;
- 13 x. Whether the accurate and compliant maintenance of academic and behavioral
14 records provides students greater opportunities for integration into more inclusive
15 settings and/or those best suited to students' educational and behavioral needs;
16 and
- 17 xi. Whether there are better policies and/or practices that may ensure reporting
18 compliance, result in accurate records, and mitigate the harm Plaintiffs have
19 suffered and will continue to suffer as a result of Defendants' reporting practices.

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

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

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

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

9 VI. STATEMENT OF CLAIMS

10 A. Marchus Improperly Uses Dangerous and Traumatizing Behavioral Interventions

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

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

26 _____
27 ¹³ Catherine E. Lhamon, Dear Colleague Letter: Restraint and Seclusion of Students with
28 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](https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201612-504-restraint-seclusion-ps.pdf)> (as of May 4, 2019).

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

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

9 **1. Restraints**

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

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

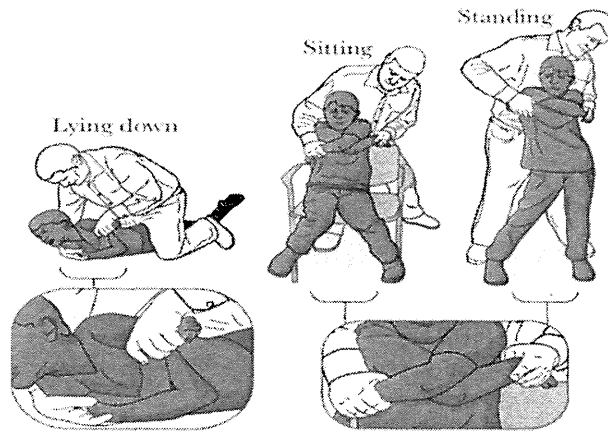
18 63. **Basket Hold.** The basket hold, or child's control position, involves one or more
19 adults "holding [a] child's crossed arms" across his or her torso in a standing, seated or lying
20 down position.¹⁶ (See Fig 1.) No fewer than 14 states ban this kind of restraint, which obstructs
21 a child's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

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25 ¹⁴ *Id.*, p. 3.

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

27 ¹⁶ *Id.*, p. 6.

28 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).



Basket Hold

Figure 1: Basket Hold¹⁸ 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.

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.*

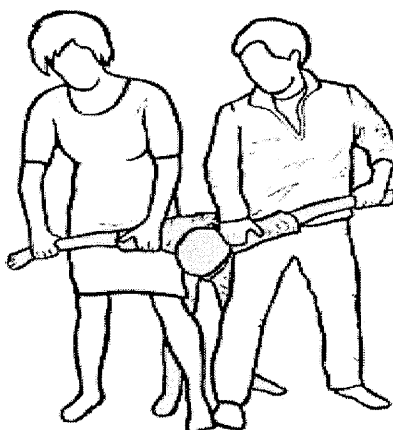
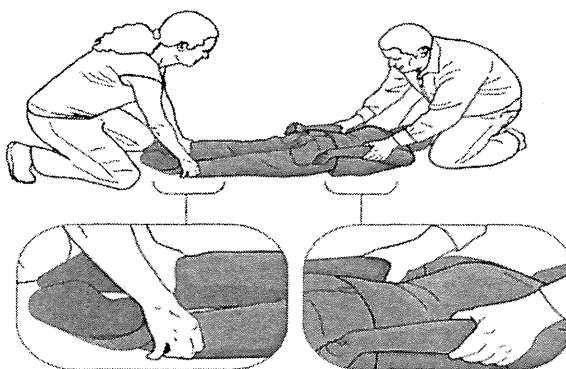


Figure 2: Team Control Position

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.)



Prone Hold

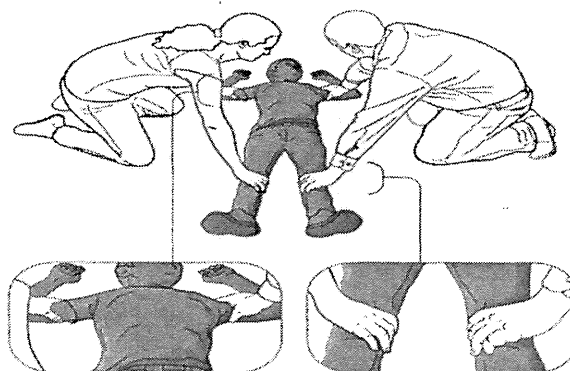
Figure 3: Prone Restraint²²

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

²² Vogell, footnote 18, *supra*.

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

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



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22
Supine Hold

*Figure 4: Supine Hold*²⁸

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

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

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

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

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

²⁸ Vogell, footnote 18, *supra*.

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

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

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

18 **B. Restraints and Seclusion Cause Tangible Trauma and Harm**

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

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

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

27 ³⁴ See *id.* at 236 (“Schools have developed a wide variety of names for the locations where
28 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.

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

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

13 79. These practices create a chaotic and violent atmosphere that undermines trust
14 between students and staff and fails to teach students important adaptive behaviors, including
15 how to engage in positive, self-directed activities and meaningful alternative ways of
16 communicating and interacting. The resulting trauma Marchus students have suffered prevents
17 them from learning and otherwise engaging in their education. Every minute that Marchus
18 restrains or secludes students is a minute that Marchus denies the students access to the
19 classroom and learning. Moreover, Marchus’s emphasis on behavioral interventions comes at
20 the cost of focusing on students’ emotional and learning disabilities and ensuring they advance
21 through the grade levels. Marchus has failed to properly assess its students for learning
22 disabilities or to deliver necessary individualized interventions, such as assistive technology
23 support or dyslexia-trained teachers. As a result, students have not learned foundational skills in
24 reading, writing, and math that are necessary parts of a basic education, and are multiple grade
25

26
27 ³⁶ Perry et al., *Childhood Trauma, the Neurobiology of Adaptation, and “Use-dependent”*
28 *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).

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

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

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

7 *i. Plaintiff Kerri K.*

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

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

19 83. Kerri K. has both an IEP and a Behavior Intervention Plan ("BIP"). Kerri K. has
20 had an IEP since June 2, 2016 and a BIP since May 2017. Marchus's staff is well aware of
21 Kerri K.'s diagnoses, and that using restraint as a behavioral intervention is not in her best
22 interest but, instead, is counterproductive. Notes from an IEP team meeting on May 27, 2017
23 reflect that "[Kerri K.] seems to like having her hands rubbed to help her calm down" and that
24 she "does better with autonomy." In the same notes, the school psychologist recommended
25 "working to decrease and ultimately completely stop all hands on restraints." According to Kerri
26 K.'s May 26, 2017 IEP, "[o]nce angered to the point of aggression, it can be very difficult for
27 this child to re-regulate. Typical means of physical control (i.e., CPI holds for an acting-out
28

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

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

7 (Italics added.)

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

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

- 20 • **February 21, 2017:** Kerri K. became frustrated with her math assignment, a
21 specifically identified behavioral “trigger” described in Kerri K.’s IEP.³⁷ Kerri K.
22 reacted to this trigger by tearing her math book and kicking a classroom trash can.
23 Despite the fact that this trigger was identified in her IEP, and that Kerri K.’s IEP
24 cautions against the use of restraints, Marchus did not deploy any positive
25 behavioral intervention or alternative strategies. Instead, Marchus used a child
26 control restraint, notwithstanding this restraint’s known dangers, including
27

28 ³⁷ Kerri K.’s Individualized Education Program (IEP) (May 26, 2017).

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

- 3 • **April 12, 2017:** Marchus’s staff restrained Kerri K. in the child support position
4 for being “argumentative” and “pushing dividers” around the support room.
- 5 • **Approximately June 2017:** As Kerri K. cowered in the corner of one of the
6 support rooms crying, Navarro, who refers to himself as “the bouncer,” entered
7 the room. Kerri K. asked Defendant Navarro to go away (which would seem
8 reasonable in a support room). Instead, Navarro moved toward her in a
9 threatening manner. Kerri K. again begged Navarro to stop approaching her and
10 asked him to leave the room, where other staff were also present. Disregarding
11 her multiple requests, Navarro continued to approach her. In response, Kerri K.
12 threw a half-empty water bottle in Navarro’s direction (which did not come close
13 to hitting anyone and landed on the floor). Kerri K. then returned to a huddled
14 position on the floor, crying. Kerri K. did not try to pick up any other object or
15 approach any adult. In apparent anger, Navarro exclaimed “that’s it” and
16 motioned for Arnott to join him. Arnott clarified: “We’re restraining?” and
17 Navarro affirmed. Navarro and Arnott lifted Kerri K.—at the time just four-and-
18 a-half feet tall and weighing approximately 72.5 pounds—and pinned her against
19 the wall cabinets, with Arnott on one side and Navarro on the other. Kerri K.’s
20 feet were dangling off the ground. They then forcibly spread her legs apart using
21 their own legs, before each placing one of their own legs over Kerri K.’s. Having
22 pinned Kerri K. against the wall, they bent her head between her legs, effectively
23 creating an airborne version of the team control position.³⁸ Kerri K.’s legs were
24 dangling off the floor. One of her shoes fell off. Kerri K. repeatedly exclaimed
25 that she was in pain and her legs were not touching the floor. At least three times
26 Kerri K. also said, “I’m hot,” as her voice got fainter. Navarro and Arnott yelled
27

28 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.

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

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

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

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

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

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

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

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

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

27 _____
28 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.

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

13 92. In November 2017, Elyse K. filed a compliance complaint with CDE, asking the
14 State to investigate the use of abusive restraints on Kerri K. Although CDE initially concluded
15 that Marchus's staff had "failed to meet the requirements of California Education Code section
16 56521.1(d)(3), with regard to the use of force exceeding that which is reasonable and necessary
17 under the circumstances,"⁴¹ CDE's finding was reversed on reconsideration on the ground that
18 Marchus's failure to self-report made it impossible for Elyse K. to identify the specific date of
19 the incident.⁴²

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

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

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

28 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").

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

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

6 *ii. Plaintiff Jacob K.*

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

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

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

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

25 99. Marchus's staff began to use restraints on Jacob K. in March 2017, about two
26 months after he enrolled at Marchus. After frequently witnessing Marchus's staff members
27 subject Kerri K. to restraints in 2017, Jacob K. asked to be restrained as well, feeling confused as
28 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

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

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

- 6 • **November 15, 2017:** Marchus’s staff restrained Jacob K. using a Marchus-
7 invented, untested, and unsafe technique involving forceful compression (a “hug”
8 restraint), even though Marchus’s records acknowledged that Jacob K.’s supposed
9 maladaptive behavior had already stopped.
- 10 • **February 28, 2018:** Jacob K. was subjected to two restraints. According to the
11 school’s own records, the first restraint was initiated in response to Jacob K.’s
12 frustration with a math problem, leading to his attempt to pull a desk towards him.
13 In response, the staff attempted to physically remove him from the room. This
14 physical intervention frightened him, and he supposedly kicked at the staff’s shins
15 to get away. Jacob K. was then placed into a full-blown restraint, which further
16 exacerbated his distress. As he attempted to kick himself free, Jacob K. was
17 brought down into a child control restraint on the floor, despite the danger of the
18 child control position and the fact that the floor variation includes the same
19 dangers as the floor prone restraint, which Marchus’s staff is not permitted to
20 perform.⁴³ After that experience, Jacob K. began engaging in self-harm,
21 including hitting himself, hitting his head against the wall and saying that he
22 wanted “to die,” at which point he was again placed in the child control position.
23 Jacob K. subsequently told his mother that he believed the staff thought he was a
24 “dangerous black boy” and that this is why his father does not want to see him.
- 25 • **March 6, 2018:** Elyse K. attended a four-hour IEP meeting at Marchus for
26 Jacob K. and Kerri K. Two members of the IEP team, social worker Vanessa
27

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

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

6 • **May 3, 2018:** Jacob K. was restrained in the child control position. Jacob K.
7 became upset and yelled, “[y]ou enjoy hurting me” and “[c]all the police, they are
8 trying to kill me.” The staff did, in fact, call the police, but only in an attempt to
9 “5150” Jacob K.⁴⁴ The police determined that Jacob K. was not a threat and left.
10 Elyse K. received a text message from Vanessa Castillo saying that the police had
11 been called because Jacob K. was threatening suicide. However, neither
12 Marchus’s report nor the statement from the principal included any mention of
13 threatened suicide.

14 • **March 15, 2019:** Jacob K. received conflicting directions as to whether he could
15 continue using a computer. A few minutes after being given permission to play a
16 computer game by one teacher, another teacher told Jacob K. that he could not
17 stay on the computer. Having received these conflicting directions, Jacob K. did
18 not stop using the computer. Instead of resolving the situation, staff began putting
19 computers away. Jacob K., frustrated that his teacher failed to acknowledge that
20 he was given permission to stay on the computer, started engaging in self-harm.
21 According to the behavioral emergency report that was sent to Elyse K. on
22 March 18, 2019, Defendant Navarro, along with another Marchus staff member,
23 restrained Jacob K. in a transport position after he began hitting himself. After
24 being taken to a support room in the transport position, four Marchus staff
25 members, including Defendants Navarro and Arnott, proceeded to bring Jacob K.
26 down into a child control position on the floor. This restraint lasted 26 minutes

27 _____
28 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.)

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

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

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

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

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

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

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

28

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

3 *iii. Plaintiff Sara S.*

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

12 110. Sara S. has had an IEP since January 23, 2017 and a BIP since September 2017.
13 Marchus's staff were aware of Sara S.'s diagnoses and specific vulnerabilities, but used
14 "behavioral interventions," such as extreme physical restraints, that were contrary to her best
15 interests. According to Sara S.'s August 11, 2017 IEP, Sara S. "needs to have access to a safe
16 place where she can decompress and receive emotional, behavioral support." Sara S.'s March 2,
17 2017 IEP similarly documents that Sara S.'s psychiatrist at the UCSF Benioff Children's
18 Hospital in Oakland ("Benioff"), whom she has seen weekly for multiple years, "believes
19 consistency and providing a safe place for [Sara S.] is paramount when building a relationship
20 with her. Having someone at school she can trust and rely on when she is struggling would
21 definitely help [Sara S.] to be more successful at school." Sara S.'s IEPs also reflect the
22 extensive trauma Sara S. has endured, as well as the devastating loss of her legal guardian's
23 partner.

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

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

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

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

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

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

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

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

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

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

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

9 118. As a result of Marchus’s use of restraints and seclusion on Sara S., as well as the
10 failure of State Defendants, District Defendants, and certain Marchus Defendants to supervise
11 and monitor Marchus’s practices, Sara S. has developed severe anxiety and depression and was
12 unable to attend any other school or receive any academic instruction for the remainder of the
13 2017–2018 school year, resulting in her making no academic progress. Sara S. currently
14 operates at the second grade level in reading, writing, and math, and is currently enrolled in a
15 residential placement. As a result of both the traumatizing interventions and her subsequent
16 isolation, Sara S. has become extraordinarily dysregulated and antisocial. In the January 25,
17 2018 letter, Sara S.’s Benioff psychiatric team noted: “it is clear that the lack of any daytime
18 structure, school instruction, socialization or normal educational routine is having a negative
19 impact also on Sara S.’s motivation, learning and self-esteem as each day goes by.” To this day,
20 Sara S. reflects on being “body slammed” by the adults who were supposed to care for her.

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

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

28

1 *iv. Plaintiff Annie T.*

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

15 122. According to Annie T.'s psycho-educational assessment, attached to her IEP since
16 2013, "time-out[s], scolding her, and others trying to explain what happened," are three triggers
17 that worsen the behaviors that interfere with Annie T.'s ability to learn. Nonetheless, Annie T. is
18 regularly punished by being sent to the support room for "non-compliance" and being "out of
19 area," as well as for her "disrespectful/negative attitude." In the support room, Annie T. often
20 has been forced to write dozens of times sentences such as "I will follow directions," "I will stay
21 in my area," and "I will do my work"—an ineffective and counter-productive behavioral
22 intervention. Annie T.'s IEP has reflected "delayed social skills" as a central problem since at
23 least 2014, but she is removed from the classroom so often that she has been unable to develop
24 age-appropriate socialization.

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

28

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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28 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,

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

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

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

21 **E. Marchus’s and CCCOE’s Perversion of Their Reporting Obligations: The Cover-**
22 **Up**

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

26 supported a conviction of felony child abuse, even though the child testified that the “slaps did
27 not hurt”); *Cline v. Superior Ct.* (1982) 135 Cal.App.3d 943, 949 (finding that evidence,
28 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).

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

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

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

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

20 142. Similarly, although Marchus's records reflect that Sara S. was restrained at least
21 13 times, multiple staff reported to Zena C. that Sara S. was restrained almost daily.

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

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

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

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

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

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

23 **F. Educationally Appropriate Behavioral Interventions**

24 149. Restraints, seclusion, and in-house suspension are not only harmful, but less
25 effective than alternative approaches, such as positive behavioral supports, for addressing
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27 ⁴⁸ Civil Rights Data Collection, Floyd I. Marchus School 2015–2016 School Year,
28 Discipline, Restraints/Seclusion, Harassment/Bullying <[https://ocrdata.ed.gov/
Page?t=s&eid=521338&syk=8&pid=2498](https://ocrdata.ed.gov/Page?t=s&eid=521338&syk=8&pid=2498)> (as of May 4, 2019).

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

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

17 150. "[A] school district and its employees have a special relationship with the
18 district's pupils . . . arising from the mandatory character of school attendance and the
19 comprehensive control over students exercised by school personnel, 'analogous in many ways to
20 the relationship between parents and their children.'" (*William S. Hart Union High School Dist.*
21 (2012) 53 Cal.4th at 869 [quoting *Hoff v. Vacaville Unified School Dist.* (1998) 19 Cal.4th 925,
22 935].) As such, "the duty of care owed by school personnel includes the duty to use reasonable
23 measures to protect students from foreseeable injury at the hands of third parties acting
24 negligently or intentionally." (*Id.* at 870.) "School principals and other supervisory employees,

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26 ⁴⁹ See OSEP Tech. Assistance Ctr., *Positive Behavioral Interventions & Supports, Multi-*
27 *tiered System of Support (MTSS) & PBIS*, <<http://www.pbis.org/school/mtss>> (as of May 4,
28 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.*

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

5 151. As Contra Costa County Superintendent of Schools, Defendant Mackey is
6 responsible for overseeing the administration of all of the schools in Contra Costa County and is
7 responsible for “all hiring and human resource decisions at the CCCOE.”⁵¹ Defendant Mackey
8 is further required to monitor and supervise the use of behavioral restraints. (Cal. Ed. Code
9 §§ 56033; 56521.) As Director of Student Programs – Special Education, Defendant Scruggs’s
10 job description includes: “plan[ning], organiz[ing], control[ing] and direct[ing] the educational
11 operations, activities, sites and services of Special Education for the County
12 Office; . . . coordinat[ing] and direct[ing] communications, information, personnel, resources,
13 curriculum and budgets . . . [; and] supervis[ing] and evaluat[ing] the performance of assigned
14 personnel.”⁵² As Marchus’s principal, Defendant Fendel was, and Defendant Bennett is,
15 “responsible for the supervision and administration of his school.” (Cal. Code Regs., tit. 5,
16 § 5551.) As the teacher in charge of the support rooms, Defendant Arnott is responsible for the
17 supervision and administration of non-credentialed Marchus staff members, including Defendant
18 Navarro.

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

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

28 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](https://www.edjoin.org/JobDescriptions/91/dir%20III-stpg-sp.ed.-20140708154451.pdf)> (as of May 4, 2019) (job description).

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

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

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

21 156. At the very least, based on DOE communications, GAO reports, sections 56520–
22 56521.2 of the California Education Code, Student Plaintiffs’ IEPs and BIPs, and extensive
23 academic studies, amongst other sources, District Defendants and certain Marchus Defendants
24 should have known that certain Marchus Defendants’ inappropriate use of restraints and
25 seclusion would be physically and emotionally harmful.

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1 **H. The State Defendants' Failure to Supervise CCCOE, Marchus, and Marchus's**
2 **Employees**

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

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

12 159. In 2014, DOE OCR released a national report disclosing that students with
13 disabilities “represent 12 percent of the national student population, but 58 percent of those
14 placed in seclusion and 75 percent of those subjected to physical restraint.”⁵³ In California the
15 disparities were even greater, with students eligible for special education services comprising
16 81% of the students exposed to physical restraint.

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

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

27 ⁵³ 2657 Committee Report, footnote 9, *supra*, p. 8 (quoting OCR's 2016 “Dear Colleague”
28 letter).

⁵⁴ *Id.* at 7.

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

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

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

22 164. Although BERs are created and stored under state law, they are not reported to
23 CDE, and CDE does not review or assess the information they contain. CDE does not use the
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25 ⁵⁵ Adams, *Little Oversight of Restraint Practices in Special Education* (2015) EdSource
26 <<https://edsource.org/2015/little-oversight-of-restraint-practices-in-special-education/78040>> (as
of May 4, 2019).

27 ⁵⁶ *Id.*

28 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).

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

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

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

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

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

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

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

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

22 VII. LEGAL FRAMEWORK

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

24 171. Section 56000 et seq. of the California Education Code and its implementing
25 regulations require that students with "exceptional needs" receive a FAPE in the least restrictive
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28 ⁵⁸ See CDE Investigation Report, footnote 25, *supra*, p. 5.

⁵⁹ See Reconsideration Report, footnote 42, *supra*, p. 6-7.

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

3 172. The law requires that “[e]ach individual with exceptional needs is assured an
4 education appropriate to his or her needs in publicly supported programs through completion of
5 his or her prescribed course of study or until the time that he or she has met proficiency standards
6 prescribed.” (Cal. Ed. Code, § 56001, subd. (a).) Each “individual with exceptional needs” must
7 be offered “special assistance programs that promote maximum interaction with the general
8 school population in a manner that is appropriate to the needs of both.” (*Id.*, § 56001, subd. (g);
9 see also *id.*, § 56040.1.) The statute also requires that students with disabilities be enrolled in
10 “separate schooling” or removed “from the regular educational environment . . . only if the
11 nature or severity of the disability is such that education in the regular classes with the use of
12 supplementary aids and services cannot be achieved satisfactorily.” (*Id.*, § 56040.1(b)). The
13 objective is to ensure that, “[t]o the maximum extent appropriate, . . . children in public or
14 private institutions or other care facilities, are educated with children who are nondisabled,” (*id.*,
15 § 56040.1(a)), with the intention that students with disabilities are transferred into a less
16 restrictive environment once more restrictive services are no longer needed. (*Id.*, § 56001,
17 subd. (h).)

18 **B. California Government Code Section 11135**

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

1 **C. California Laws Governing Behavioral Interventions in an Educational Setting**

2 i. California Education Code Section 49005 et seq.⁶⁰

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

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

16 ii. California Education Code Code Section 56520 et seq., and Implementing
17 Regulations⁶³

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

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

25 ⁶⁰ Cal. Ed. Code, §§ 49005–49006.4.

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

28 ⁶² 2657 Committee Report, footnote 9, *supra*, p. 7.

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

1 interventions” with respect to students with “exceptional needs,” and section 56520 mandates
2 that “when behavioral interventions, supports and other strategies are used,” they must be
3 employed “in consideration of the pupil’s physical freedom and social interaction, be
4 administered in a manner that respects human dignity and personal privacy, and . . . ensure a
5 pupil’s right to placement in the least restrictive educational environment.” (Cal. Ed. Code,
6 § 56520, subd. (b)(3).)

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

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

24 180. California expressly prohibits local educational agencies from authorizing,
25 ordering, or consenting to “[a]ny intervention that is designed to, or likely to, cause physical
26 pain,” “[a]n[y] intervention that denies adequate . . . physical comfort,” and those that are
27

28 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).

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

4 181. Title 5 of the California Code of Regulations implements section 56520 and states
5 that “behavioral interventions shall be designed or planned only by personnel who have” certain
6 appropriate credentials. (Cal. Code Regs., tit. 5, § 3051.23, subd. (a).) The regulations also
7 instruct local educational agencies⁶⁵ to ensure that “behavioral intervention[s]” may only be
8 delivered by personnel who meet the advanced licensing qualifications required to design the
9 behavioral interventions, or by individuals who are under the supervision of such personnel and
10 have received “the specific level of supervision required in the pupil’s IEP.” (Cal. Code Regs.,
11 tit. 5, § 3051.23, subd. (b).)

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

18 **D. Mandatory Reporting Laws**

19 *i. California Education Code Section 56521.1*

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

26
27
28 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.)

1 ii. Child Abuse and Neglect Reporting Act⁶⁶

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

15 **VIII. EXHAUSTION OF ADMINISTRATIVE REMEDIES**

16 **A. Plaintiffs Have Exhausted, or are Excused from Exhausting, Administrative**
17 **Remedies**

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

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

27
28

66 Cal. Pen. Code, §§ 11164–11174.4.

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

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

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

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

17 IX. CAUSES OF ACTION

18 CLAIMS ON BEHALF OF THE CLASSES

19 FIRST CAUSE OF ACTION

20 **Violation of Section 56000 et seq. of the California Education Code**
21 **(Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T., the Restraint and Seclusion**
22 **Class, and the Reporting Class Against All State and District Defendants, and Marchus).**

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

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

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

⁶⁷ See *supra*, ¶ 168.

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

5 195. In addition, emergency interventions, including restraints and seclusion, may be
6 used only when necessary to "control unpredictable, spontaneous behavior that poses [a] clear
7 and present danger of serious physical harm to the individual with exceptional needs, or others,
8 and that cannot be immediately prevented by a response less restrictive" (Cal. Ed. Code,
9 § 56521.1, subd. (a).) District Defendants and Marchus have additionally violated section 56520
10 et seq. of the California Education Code with respect to the Restraint and Seclusion Class by
11 their acts or failure to act by, without limitation:

- 12 a. Employing, presently or in the past, policies and/or practices that subject
13 students to unlawful behavioral interventions in non-emergency situations
14 or interventions that cause physical pain and can be expected to cause
15 excessive emotional trauma;
- 16 b. Failing to adequately train teachers and staff on how to use appropriate
17 behavioral interventions and allowing inappropriate personnel to use
18 emergency interventions; and
- 19 c. Unlawfully deploying restraints and/or seclusion in non-emergency
20 situations.

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

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

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

- 4 a. Employing, presently or in the past, policies and/or practices that violate
5 section 56520 et seq. of the California Education Code by:
- 6 b. Failing to document, adequately and accurately, instances in which
7 “emergency” behavioral interventions are used;
- 8 c. Failing to adequately, accurately, and promptly notify parents and
9 follow-up with IEP meetings when “emergency” behavioral interventions
10 are used; and
- 11 d. Maintaining inaccurate, harmful information in student files.

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

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

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

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

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

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

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

19 204. Defendants CCCOE and Marchus have equally discriminated against and
20 consequently denied the Student Plaintiffs' and the Reporting Class's access to education by
21 failing to satisfy mandatory reporting laws, including California Education Code section
22 56521.1, subdivision (e), and CANRA, California Penal Code sections 11164–11174.4.⁶⁸ These
23 statutes set a certain standard that, at minimum, operates to assure that students are not deprived
24 of full and equal access to the benefits of a public education. However, Marchus's dishonest and
25 inadequate recordkeeping has the effect of discriminating against students with disabilities,
26 including Student Plaintiffs and members of the Classes, by making it more difficult for them to
27

28 _____
⁶⁸ See *supra*, ¶¶ 183–184.

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

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

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

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

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

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

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

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

8 **INDIVIDUAL CLAIMS ON BEHALF OF STUDENT PLAINTIFFS**

9 **FIFTH CAUSE OF ACTION**

10 **Negligent Retention and Supervision**

11 **(Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T.**

12 **Against Defendants CCCOE, Mackey, Scruggs, Bennett, Fendel, and Arnott)**

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

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

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

27 219. Further, Defendant CCCOE was on notice of the use of restraints and seclusion by
28 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.

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

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

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

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

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

28

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11 249. Defendants Santana, Duncan, Foreman, Khan, Navarro, and Doe Defendants
12 1–10’s engaging in the use of restraints and seclusion, as well as their persistence in doing so
13 despite Student Plaintiffs Kerri K., Jacob K., Sara S., and Annie T.’s pleas for help and obvious
14 signs of pain and discomfort, was likely to cause, and did cause, Plaintiffs to suffer physical
15 harm and emotional distress.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

28

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,

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

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

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

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

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

20 283. California Civil Code section 51, subdivision (b) et seq., also known as the Unruh
21 Civil Rights Act, provides that all persons in California are entitled to the “full and equal
22 accommodations, advantages, facilities, privileges, or services in all business establishments of
23 every kind whatsoever,” regardless of disability. Under California Civil Code section 51,
24 subdivision (e)(1), “disability” is defined as “any mental or physical disability as defined in
25 sections 12926 and 12926.1 of the Government Code.” Under California Government Code
26 section 12926, subdivision (j)(2), a “mental disability” includes a mental or psychological
27 condition that requires special education or related services. A violation of the right of any
28 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).)

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

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

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

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

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

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26
27 ⁶⁹ See *Sullivan v. Vallejo City Unified School District* (E.D.Cal. 1990) 731 F.Supp. 947,
28 953 (“[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.”).

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

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

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

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

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

22 **INDIVIDUAL CLAIM ON BEHALF OF TAXPAYER PLAINTIFFS**

23 **TWELFTH CAUSE OF ACTION**

24 **Violation of California Code of Civil Procedure Section 526a**
25 **(Taxpayer Plaintiffs against Public Entity Defendants)**

26 300. Plaintiffs incorporate by reference the preceding paragraphs of this Complaint as
27 though fully set forth herein.
28

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

3 For the Classes:

- 4 a. Section 56000 et seq. of the California Education Code;
- 5 b. Section 11135 of the California Government Code;
- 6 c. Article IX, sections 1 and 5 of the California Constitution, and;
- 7 d. Article I, section 13 of the California Constitution.

8 For Individual Plaintiffs:

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

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

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

- 22 a. Implementing evidence-based policies and/or practices, including
23 effectively training and supervising staff to ensure that effective positive
24 behavioral supports and interventions are in place;
- 25 b. Implementing a system of accountability policies and/or practices, and to
26 remove staff members who are unable to effectively employ positive
27 alternatives to physical restraint and seclusion;

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- 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;

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

- 4 a. Immediately cease the use of, reliance on, or publication of inaccurate
5 and/or retaliatory academic and behavioral records from Marchus;
6 b. Implement policies and/or practices to ensure compliance with reporting
7 statutes; and
8 c. Develop policies and/or practices to ensure class-wide compensatory
9 services to address the consequences of educational deprivation and
10 trauma caused by the routine use of restraint and seclusion.

11 4. Damages for the Individual Student Plaintiffs:

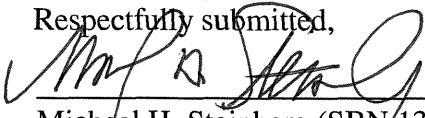
- 12 A. Compensatory damages and restitution in an amount to be determined at
13 trial, plus interest accruing between the date the respective Plaintiff first attended
14 Marchus, or the date the respective Plaintiff was first restrained, and the date of
15 judgment;
16 B. Statutory damages under the Unruh Civil Rights Act and Tom Bane Civil
17 Rights Act;
18 C. Punitive damages, according to proof;

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

22 6. For such other and further relief as the Court may deem just and proper.
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Dated: May 13, 2019

Respectfully submitted,

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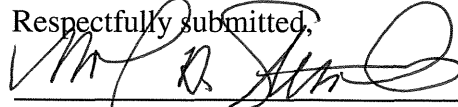
Attorneys for Plaintiffs

1 **JURY DEMAND**

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

4 Dated: May 13, 2019

5 Respectfully submitted,



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