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August 6, 2020

*Via Certified Mail and E-mail ([speceducation@cde.ca.gov](mailto:speceducation@cde.ca.gov))*

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

**Re: Various Compliance Complaint, 34 C.F.R. §300.153; 5 CCR §3202**  
*On Behalf of John Doe (DOB XX/XX/XXXX) and All Similarly Situated  
Students Against the Bakersfield City School District*

Dear Sir or Madam:

Disability Rights California (DRC) files this various complaint on behalf of John Doe and all similarly situated students in the Bakersfield City School District ("District"). Since at least March of 2020, the District has failed to implement John's speech services or comply with his Individualized Education Program (IEP), parent participation, and reevaluation procedural rights. John's speech skills have regressed and his mother, Jane Doe, has not received any updates or answers from the District.

DRC further alleges that this noncompliance is systemic. On information and belief, the District has not provided specialized academic instruction (SAI) or related services to any students with IEPs since it moved to distance learning in March 2020. We are not aware of any effort by the District to inform parents of its future plans for serving students with IEPs; parents like Ms. Doe remain in the dark regarding when the District is going to resume services, annual IEP meetings, triennial reassessments, and other crucial procedures.

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DRC files this various complaint pursuant to the Individuals with Disabilities Education Act (IDEA) state complaint procedures, 34 C.F.R. §§300.151-153, and corresponding state procedures, 5 CCR §3200 *et seq.* The U.S. Department of Education (USDOE) has long maintained that state education agencies (SEAs) like the California Department of Education (CDE) must investigate complaints that raise systemic allegations. 71 Fed. Reg. 46605.

DRC recognizes that the District faces an unprecedented health crisis. But COVID-19 is not a valid excuse for these alleged IDEA violations. The CDE and USDOE declared months ago that districts must continue to provide a Free and Appropriate Public Education (“FAPE”) to students with disabilities in a manner that protects the health and safety of students and service providers. Many California districts have found a way to strike this balance. The District, which educates over 3,600 students with IEPs, still has not.

Through this complaint, DRC asks the CDE to award compensatory education to John and all affected students as appropriate, and order corrective actions to ensure the appropriate future provision of services for all children with disabilities in the District consistent with the requirements of the IDEA and California’s recent education finance law, Senate Bill 98.

### **I. Facts**

John Doe is a 10-year-old, Latino youth.<sup>1</sup> He resides within the District with his family and attends Franklin Elementary School. John’s older brother, James Doe, is 11 years old and also attends Franklin Elementary. Roberto is eligible for an IEP under the category of autism.

John is eligible for an IEP under the category of Speech and Language Impairment (SLI) and receives 40 minutes per month of speech and language related services. He also has asthma and uses an inhaler in school. John first received an IEP in June 2014, at the age of four. According to his most recent IEP, dated May 6, 2019, John’s articulation deficits continue to impair his ability to share his thoughts and knowledge in the

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<sup>1</sup> John’s and his family’s full contact information is attached as Exhibit A.

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classroom.<sup>2</sup> His mother and teachers report that they still have difficulty understanding his spontaneous speech.

### **a. District Failed to Convene John's May 2020 Triennial IEP and Conduct his Triennial Reassessments**

The District was due to convene John's triennial IEP meeting on or around May 6, 2020. Under this timeline, the District should have produced an assessment plan to John's mother sometime in mid- to late-February.

To date, the District still has not conducted John's triennial re-assessments. On information and belief, the District never provided his mother with an assessment plan. Nor does Ms. Doe recall receiving a notice or phone call for the triennial IEP meeting itself. DRC did not find an assessment plan or triennial IEP meeting notice in John's special education file, which we received from the District on or about July 14, 2020.

Ms. Doe received a new telephone number in late April. She promptly called Franklin Elementary School and left a voice message with her new number on May 1, 2020.

On May 8, 2020, Ms. Doe came home to find a note in her door from John's speech and language pathologist.<sup>3</sup> The note stated that the District held his IEP meeting that morning but were not able to reach Ms. Doe. Her phone rang busy, as the IEP team apparently called her old telephone number. The note further read that the team was "keeping all services and goals the same until school resumes again, then I will be contacting you."

Ms. Doe was deeply troubled by the District's actions. She was not aware of the meeting and never received a meeting notice. Ms. Doe tried to call Franklin Elementary that same day and left a voice message. She received a call back from Lena Guerra, the school's Family and Community Engagement Liaison. Ms. Guerra acknowledged Ms. Doe's voice message and said she would receive a return call from Campus Supervisor Garcia. But Ms. Garcia never called back.

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<sup>2</sup> See May 6, 2019 IEP, attached as Exhibit B.

<sup>3</sup> See Note dated May 8, 2020, attached as Exhibit C.

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Since then, Ms. Doe has tried unsuccessfully for months to reconvene the meeting and secure an assessment for her son. For example, while at the school in late May to pick up packets, Ms. Doe asked Ms. Garcia if she received her message requesting another IEP meeting. Ms. Garcia told her nothing was going to happen until the next school year.

In July, Ms. Doe reached out to John's speech pathologist, the same person who left the note in her door. Ms. Doe respects this important IEP team member and hoped she could explain when the District would assess John. Ms. Doe also asked her for a copy of the May 8, 2020, IEP. But the speech pathologist did not know when the assessment would start and did not have a copy of the IEP.

Ms. Doe still does not know if or when the District is going to reconvene her son's IEP team or conduct his overdue reassessments. The only information she has received was a robocall from the District explaining when Franklin Elementary students could pick up their instructional packets.

### **b. The District Has Failed to Implement John's IEP and the IEPs of All District Students with Disabilities**

Ms. Doe alleges that the District has not implemented John's speech services since March 2020, when it first shut down its campuses in response to COVID-19. Nor has the District implemented her son Roberto's IEP. She has not received any updates or communications from the District regarding when her son's services will commence.

On information and belief, the District has not provided SAI or related services to any students with disabilities in that time. DRC has learned from Ms. Doe and other stakeholders that the District's "distance learning" amounts to packets and online resources for parents. The District provides students with IEPs with learning packets marked "special education," but does not individualize them. For example, there is a single special education packet for students with disabilities in grades first through third.<sup>4</sup> Some

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<sup>4</sup> BCSD Distance Learning, *SPED Grades 1-3*, <https://sites.google.com/bcsd.com/distance-learning/students/3rd-grade#h.x8dbrkfmvphx>.

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students have not received any learning packets or any meaningful communication from the District regarding their distance learning programs.

The District acknowledged this complete absence of IEP service delivery in a general Prior Written Notice dated April 1, 2020:

During the pendency of the school closure, no direct instructional services will be provided to any students. Once the District's closure status changes, the District will further inform you regarding how your student's special education supports and services will resume.<sup>5</sup>

As explained below, the District's refusal to serve students with disabilities conflicts with federal and state COVID-19 guidance and violates the IDEA.

### **c. Legal Guidance and Other Authorities During COVID-19**

USDOE and CDE guidance over the past few months make clear that the IDEA is in effect and that COVID-19 does not excuse the District's disregard for John's and other students with disabilities' special education rights.

When schools shut down in March in response to COVID-19, the California Legislature enacted Senate Bill 117 to give districts some flexibility with special education timelines. But even that law explicitly stated that it "does not waive any federal requirements imposed under the federal [IDEA]."<sup>6</sup>

A few days later, on March 21, 2020, USDOE issued a supplemental fact sheet that made clear the IDEA was still in effect, including the procedural requirements to convene IEP meetings annually and conduct reevaluations at least every three years. USDOE affirmed districts' obligation to provide FAPE, including the provision of SAI and related services, consistent with health and safety guidelines:

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<sup>5</sup> On file with DRC.

<sup>6</sup> Sen. Bill 117, §8(e) (2019-20 Reg. Sess.), available at: [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201920200SB117](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB117).

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“[T]hese exceptional circumstances may affect how all educational and related services and supports are provided . . . the provision of [FAPE] may include, as appropriate, special education and related services provided through distance instruction provided virtually, online, or telephonically . . . schools may not be able to provide all services in the same manner that they are typically provided . . . federal disability law allows for flexibility in determining how to meet the individual needs of students with disabilities. The determination of how FAPE is to be provided may need to be different in this time of unprecedented national emergency.”<sup>7</sup>

On April 27, 2020, Secretary DeVos of USDOE reaffirmed this position and declined to recommend that Congress waive the FAPE requirements of the IDEA, concluding that “individualized education must take place for all students, including students with disabilities.” She further “determined there is no reason that a student's access to FAPE cannot continue online, through distance education or other alternative strategies.”<sup>8</sup>

In sum, there was no valid legal reason for the District’s refusal to implement IEPs or honor the IDEA procedural requirements during the spring semester.

Nor is there a valid excuse for the District not to implement IEPs this coming school year. On June 28, 2020, the California Legislature enacted Senate Bill 98, an education omnibus trailer bill that set requirements for distance learning.<sup>9</sup> First, the bill amended the Ed. Code to require IEPs to include a

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<sup>7</sup> USDOE, *Supplemental Fact Sheet Addressing Risk of COVID-19 in Preschool, Elementary & Secondary Schools* (Mar. 21, 2020) <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf>.

<sup>8</sup> USDOE, *Secretary DeVos Reiterates Learning Must Continue for All Students, Declines to Seek Congressional Waivers to FAPE, LRE Requirements of IDEA*, dated April 27, 2020, at <https://www.ed.gov/news/press-releases/secretary-devos-reiterates-learning-must-continue-all-students-declines-seek-congressional-waivers-fape-lre-requirements-idea>.

<sup>9</sup> CDE, *2020 Budget Act and Special Education* (Jul. 15, 2020), <https://www.cde.ca.gov/sp/se/lr/om071520.asp>.

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description of how schools will provide special education in emergency conditions, i.e. school closures of more than ten days. Ed. Code §56345(a)(9)(A-C). Second, the bill defined “distance learning” to include “[s]pecial education, related services, and any other services required by a pupil’s [IEP]...with accommodations necessary to ensure that [IEP] can be executed in a distance learning environment.” Ed. Code §43503(b)(4).

## **II. Allegations**

Ms. Doe alleges that the District has committed the seven IDEA and/or California Education Code violations detailed below. These violations, individually and in the aggregate, denied John a FAPE.<sup>10</sup>

Ms. Doe further alleges that all of the allegations raise systemic violations because they stem from the District’s unlawful policies and practices during this period of school closures. The CDE must investigate them as such and order systemic remedies as appropriate. See 34 C.F.R. §300.151(b)(2) (“In resolving a complaint in which the SEA has found a failure to provide appropriate services, an SEA...must address...[a]ppropriate future provision of services for all children with disabilities”).

### **1. Failure to Implement John’s IEP, Ed. Code §56043(i)**

Federal and State special education law require school districts to implement IEPs “as soon as possible following the [IEP] team meeting.” Ed. Code §56043(i); 34 C.F.R. §300.323(c)(2). Here, the District has not provided speech services to John since at least March of 2020. He has missed four months of services, 160 minutes total, and stands to lose even more time if the District continues its current distance learning practices into the fall.

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<sup>10</sup> USDOE’s longstanding policy is that SEAs must resolve state complaints that allege a denial of FAPE. “If a parent believes that the program offered or provided to his or her child with a disability does not constitute FAPE and files a State complaint instead of a due process complaint, the SEA must resolve the State complaint.” OSERS, *Dispute Resolution Procedures under Part B of the IDEA* at 19 (2013), <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/acccombinedosersdisputeresolutionqafinalmemo-7-23-13.pdf>

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Further, on information and belief, the District has not provided SAI or related services to any students with disabilities since it closed campuses. The CDE must investigate this systemic allegation because all students with IEPs in the District are at risk of service disruption and regression come the fall.

### **2. Failure to Provide Assessment Plan, Ed. Code §56321(a)**

School districts must develop a written assessment plan before conducting triennial reassessments and provide it to parents within 15 days of the referral. Ed. Code §56321(a); see also 34 C.F.R. §300.300(c) (requiring districts to obtain informed consent from parents before conducting reevaluations). Here, the District should have provided Ms. Doe with an assessment plan sometime in mid- to late-February, well before the Legislature enacted Senate Bill 117, which paused assessment plan timelines. The District, however, failed to produce an assessment plan or make any efforts to obtain Ms. Doe's consent to the reevaluation.

### **3. Failure to Conduct Reevaluations At Least Every Three Years, 34 C.F.R. §300.303**

The IDEA requires school districts to reassess a student with a disability at least once every three years. 34 C.F.R. §300.303(b)(2). Here, John's last triennial reevaluation occurred on or around May 3, 2017. To date, more than three years later, the District has yet to conduct his triennial reassessment. This violates the IDEA assessment procedures and warrants an investigation into the District's broader triennial reassessment practices.

### **4. Failure to Provide IEP Meeting Notice, 34 C.F.R. §300.322(a)**

The IDEA requires districts to take steps to ensure that the parents are present at each IEP Team meeting or afforded the opportunity to participate, including: (1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and (2) Scheduling the meeting at a mutually agreed on time and place. 34 C.F.R. §300.322(a).

Here, the District did not provide Ms. Doe with advanced notice of the IEP meeting on May 8, 2020. DRC did not observe an IEP notice in John's



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special education file. This failure violated Ms. Doe's IDEA parental rights and prevented her from attending or rescheduling the meeting.

### **5. Failure to Ensure Ms. Doe's Participation in the May 8, 2020, IEP meeting, 34 C.F.R. §300.322(d)**

A district can only hold an IEP meeting without a parent in attendance if it is unable to convince the parent to attend. For proof, it must keep a record of its attempts to arrange a mutually agreed on time and place, such as:

- (1) Detailed records of telephone calls made or attempted and the results of those calls;
- (2) Copies of correspondence sent to the parents and any responses received; and
- (3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

The Ninth Circuit has held that a district denies FAPE when it convenes an IEP meeting without a parent without first proving it was unable to convince that parent to attend. *See Doug. C. v. Hawaii Dept. of Educ.*, 720 F. 3d 1038, 1047 (9th Cir. 2013).

Here, the District has not shown that it was unable to convince Ms. Doe to attend the meeting. Ms. Doe has always been an active participant in her children's IEP teams and would not have refused to attend. In fact, she was not even aware of the meeting because the District did not provide her with a meeting notice.

The District apparently made phone calls the morning of the meeting to Ms. Doe's old telephone number and was unable to reach her. Ms. Doe provided her new number to the District the week before, so it had ample opportunity to contact her. Further, phone calls the morning of the meeting do not meet the robust "failure to convince" standard of §300.322(d); the District should have called earlier or engaged in written correspondence. Had the District provided a lawful IEP notice, Ms. Doe would have had a full 30 days to plan and ensure she could attend the meeting on May 8<sup>th</sup>.

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In sum, the District did not take adequate steps to ensure Ms. Doe's attendance at the IEP meeting on May 8, 2020, and in turn violated John's right to a FAPE under the IDEA.

### **6. Failure to Provide Ms. Doe with a Copy of her IEP, 34 C.F.R. 300.322(f)**

The IDEA requires school districts to give the parent a copy of the child's IEP at no cost. 34 C.F.R. §300.322(f). Here, the District and its staff have failed to provide Ms. Doe with a copy of the IEP despite her repeated requests. The District further failed to provide a copy of that IEP to DRC when we requested John's special education records in July 2020.

### **7. Failure to Convene IEP Meeting at Least Annually, 34 C.F.R. §300.324(b)(1)(i)**

In the alternative, if the District did not convene a valid IEP meeting for May 8, 2020, then the District still failed to meet its obligation to convene John's IEP team at least annually. 34 C.F.R. §300.324(b)(1)(i).

It is still unclear to Ms. Doe and DRC whether the District convened a valid IEP meeting on May 8, 2020. In our view, it did; per the note left on Ms. Doe's door, the team met and decided to "keep[] all services and goals the same until school resumes again." However, the District has yet to provide any documents related to that meeting.

If the CDE determines that an IEP meeting did not occur, then we urge it to find that the District failed to convene the required annual IEP team meeting. The District's actions on May 8, 2020, regardless of which procedure they implicate, violated the spirit and letter of the IDEA by preventing Ms. Doe from participating in the formation of her son's IEP. *See Doug C.*, 720 F.3d at 1044 ("procedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA").

## **III. Proposed Resolution**

1. The CDE shall conduct a full and comprehensive investigation of this complaint in accordance with the Office of Special Education

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Program's *Letter to Reilly*<sup>11</sup> and issue appropriate corrective actions regarding all relevant policies and practices of the District. The CDE investigation shall treat each of the complainant's allegations as raising systemic violations. See 71 Fed. Reg. 46605 ("An SEA is required to resolve any complaint that meets the requirements of §300.153, including complaints that raise systemic issues[.]").

2. The CDE shall order the District to provide John with compensatory speech services in the exact amount that he has missed. At this time that is about 200 minutes, but it will likely be more by the time the CDE produces an investigation report.
3. The CDE shall order the District to implement John's IEP from the start of the 2020-21 school year. If Franklin Elementary is closed when school starts, the District shall provide his speech services via distance learning in a manner consistent with Senate Bill 98.
4. The CDE shall order the District to provide Ms. Doe with an assessment plan for a full triennial reassessment within 10 school days of the start of the 2020-2021 school year.
5. The CDE shall order the District to immediately begin providing students with disabilities a FAPE consistent with the IDEA and Senate Bill 98. See 34 C.F.R. §300.151(b)(2) (requiring SEAs, when resolving state complaints, to address the "[a]ppropriate future provision of services for all children with disabilities").
6. The CDE shall determine the extent of the District's failure to provide a FAPE to students with disabilities during the period of school

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<sup>11</sup> "[O]nce a State complaint is properly filed, it is solely the SEA's duty to investigate the complaint, gather evidence, and make a determination as to whether a public agency violated the IDEA. It is not the burden of the complainant – or any other party – to produce sufficient evidence to persuade the SEA to make a determination one way or another. Rather, the SEA must independently review and weigh the evidence, generally by reviewing student and school records, data and other relevant information, and come to a determination supported by relevant facts." OSEP, *Letter to Reilly* (2014), <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/acc-13-020871r-me-reillystatecomplaints.pdf>

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closures. Where appropriate, the CDE shall order the District to make individualized determinations as to whether and to what extent it will provide compensatory services to each student with an IEP that did not receive SAI and related services during the school closures.

7. The CDE shall determine the extent of the District's failures to conduct triennial reassessments and convene annual IEP meetings. Where appropriate, the CDE shall order the District to provide assessment plans and/or convene IEP meetings to remedy prior failures to do so.

### **IV. Conclusion**

Thank you in advance for your attention to this complaint. We look forward to receiving notice of the assigned investigator and reserve the right to submit additional documentation. See 5 CCR §4663(b). We also ask that the investigator conduct a phone interview with Ms. Doe.

Finally, per OSERS recent COVID-19 guidance on IDEA dispute resolution procedures,<sup>12</sup> please notify DRC in writing if you determine that "exceptional circumstances" exist that warrant an extension of the 60-day timeline.

Please contact me with any questions or concerns.

Sincerely,



Robert Borrelle  
Supervising Attorney

Enclosures

Cc: Shirley Nicholas, Special Education Director ([nicholass@bcasd.com](mailto:nicholass@bcasd.com))

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<sup>12</sup> USDOE, *Part B Dispute Resolution in COVID-19 Environment Q-&-A Document* (June 22, 2020)

<https://sites.ed.gov/idea/idea-files/part-b-dispute-resolution-in-covid-19-environment-q-a-document-june-22-2020/#Q2>