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September 20, 2021

Rebecca Bond  
Chief, Disability Rights Section  
Shaheena Simons  
Chief, Educational Opportunities Section  
U.S. Department of Justice  
Civil Rights Division  
950 Pennsylvania Avenue, NW  
4CON, 9th Floor  
Washington, DC 20530

Sent via fax and U.S. mail

Re: Systemic ADA Complaint against State of California, the State Board of Education and the California Department of Education

Dear Ms. Bond and Ms. Simons,

This is a civil rights complaint concerning discrimination by the State of California against its students with disabilities. California has adopted a new state law that sharply limits alternatives to in-person classes, leaving families whose children are at higher risk from COVID-19 with only one option: Independent Studies. Alarming, families of students with disabilities have found that California's Independent Study program is effectively closed to them because of the program design or absence of needed accommodations. As a result, the state education system denies disabled students the alternative to in-person classes that state law provides to other students.

This constitutes unlawful discrimination in violation of Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131 et seq. Disabled students and their families now face an intolerable choice: to attend in-person classes (despite the danger of the Delta Variant to vulnerable children), or remain at home without access to their schools and the educational services they need to learn and succeed.

## COMPLAINANTS

Disability Rights California (DRC) and Vanaman German LLP submit this complaint on behalf of the families of six special education students.<sup>1</sup> Some, such as the young son of Complainant Susan Graham, cannot attend in-person classes because of his heightened medical risk and Down syndrome. His school district refuses to approve Independent Study or to provide the accommodations he needs for distance learning. Similarly, Complainant Neelyn Tong's daughter was denied Independent Study because she needs an alternate curriculum. The children of other Complainants were offered Independent Study, but only if they agreed to go without any services and waive their rights under special education and the ADA. Without access to distance learning, the children of the Complainants have been without educational services since the start of school.

This complaint is also brought on behalf of the Disability Rights Education & Defense Fund (DREDF) and the Arc of California. These organizations are concerned about the systemic denial of distance learning to many other California students with disabilities. DREDF operates a Parent Training and Information (PTI) Center that responds to questions from and assists families in counties around the Bay area. The Arc of California is the state chapter of the nation's largest and oldest community-based organization providing services, supports and advocacy with and for people with intellectual and developmental disabilities (IDD) and their families. Its special education advocacy is centered on ensuring students with IDD receive the public education to which they are legally entitled.

This is also a systemic complaint on behalf of the nearly 800,000 California students who receive special education services; all are potentially affected by this discriminatory new law. DRC, Vanaman German LLP and DREDF have been overwhelmed by requests for assistance regarding Independent

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<sup>1</sup> To protect confidentiality, we have listed the children of the Complainants by pseudonym; some parents also wish to proceed by pseudonym because of concerns of retaliation by local school districts. We are providing their confidential declarations and contact information securely by separate cover to the Department and the Respondents. We also attach supporting exhibits and non-confidential declarations.

Study.<sup>2</sup> We are able to respond to only a fraction of the desperate families affected by the new law.

## **RESPONDENTS**

The Respondents are the State of California, the State Board of Education and the California Department of Education. The California Legislature, as an arm of the State, enacted the new limits on distance learning set out in California Education Code § 43511(b), § 51745. On July 9, 2021, Gavin Newsom, the Governor of California, adopted these amendments.

The State Board of Education is responsible for determining the policies governing California's schools and for adopting rules and regulations for the supervision and administration of all local school districts. Pursuant to California Education Code §§ 33030-32, the State Board of Education is required to supervise local school districts to ensure that they comply with State and federal law requirements concerning educational services.

Defendant California Department of Education ("CDE") is the department of California's state government responsible for administering and enforcing laws related to education. Cal. Educ. Code § 33308. Pursuant to California Education Code sections 33300–16, CDE is also responsible for ensuring that children in California receive a free appropriate public education. 20 U.S.C. §§ 1412(a)(1)(A), (a)(11)(A).

The State of California, the State Board of Education and CDE are each a "public entity" within the meaning of the ADA, 42 U.S.C. § 12131(1), and 28 C.F.R. § 35.104. Each is, therefore, subject to Title II of the ADA and its implementing regulations.<sup>3</sup> Each provides services, programs, and activities within the meaning of Title II, including by operating a system of public

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<sup>2</sup> See, declarations submitted in support of this complaint from David German, ¶ 9 ("my days have been dominated by attempting to assist clients whose children have been negatively affected by this new law."); Lauren Lystrup, ¶ 6, Robert Borrelle, ¶ 13; Cheryl Theis.

<sup>3</sup> Each respondent also receives federal funding and is also subject to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. The ADA violations described in this complaint also violate parallel provisions of Section 504 and its implementing regulations.

education for elementary and secondary school students. Their contact information is listed on the service list.

## **JURISDICTION**

The events described in this civil rights complaint occurred beginning on July 9, 2021, which was the date that the State adopted its new limits on distance learning in California Education Code § 51745. This date is within 180 days of filing this complaint. 28 CFR § 35.170(b).

The U.S. Department of Justice is authorized under 28 CFR § 35.171 *et seq.* to investigate allegations in a civil rights complaint and to determine whether a public entity has complied with Title II of the ADA and the Title II regulations. The Department is also authorized to issue findings, and, where appropriate, to negotiate and secure voluntary compliance agreements. *Id.* § 35.172-35.175. Furthermore, the Attorney General is authorized under 42 U.S.C. § 12133 to bring a civil action enforcing Title II of the ADA should negotiations fail to secure voluntary compliance.

Although this complaint concerns students in special education, we request that the Civil Rights Division retain jurisdiction because we assert violations of the ADA, rather than the Individuals with Disabilities Education Improvement Act (“IDEA”), 20 U.S.C. §§ 1400 *et seq.* See also, 28 CFR § 35.190(e) (DOJ may exercise discretion to retain and investigate a complaint that may also fall within the jurisdiction of another agency).

## **FACTUAL BACKGROUND**

In 2020, during the height of the COVID-19 pandemic, California enacted new statutes to ensure that school districts offered students access to distance learning.<sup>4</sup> These distance learning provisions had a sunset date of June 30, 2021.<sup>5</sup> In July 2021, California adopted a new statute that allowed funding for distance learning only for students enrolled in the State’s Independent Studies program.<sup>6</sup> The new statute provides that Independent

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<sup>4</sup> Cal. Educ. Code § 43500 *et seq.*

<sup>5</sup> *Id.*, § 43511.

<sup>6</sup> Assembly Bill (AB) 130 (Chapter 44, Statutes of 2021), approved on July 9, 2021.

Studies will be offered to students “whose health would be put at risk by in-person instruction, as determined by the parent or guardian of the pupil.” Cal. Educ. Code § 51745(a)(6). No funding is available to school districts to provide distance learning other than through Independent Study.

However, the new statute also provides that students with disabilities “shall not participate in independent study, unless the pupil’s individualized education program [IEP] ... specifically provides for that participation.” Id. § 51745(c) (emphasis added).<sup>7</sup>

As the Delta Variant surged in California and the beginning of school approached, more parents and caregivers determined that their children were at risk from in-person classes. Due to the new state law, the only way to access the distance learning these families had in the 2020-21 school year was through Independent Study.

However, California’s design and implementation of Independent Study excludes disabled students, as shown by these summaries from the Complainants, who attend different school districts across the state.<sup>8</sup> All have medical conditions that make the possibility of a COVID-19 infection life threatening.

- **Complainant Susan Graham and her son, M.G.**

M.G. is ten-years old and in the 5<sup>th</sup> grade in a California school district. He has Down syndrome; his IEP provides educational supports, including access to an alternative curriculum, so that he was able to participate

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<sup>7</sup> Cal. Educ. Code § 57149.5(a)(7) includes similar language: “An individual with exceptional needs, as defined in Section 56026, shall not participate in course-based independent study, unless the pupil’s [IEP] developed pursuant to [the state special education statute] specifically provides for that participation.”

<sup>8</sup> The Complainants’ stories are not unique. Recent news articles describe families with disabled children who are facing the same denial of distance learning. See, J. Hong, “*Students with Disabilities across California stuck in limbo*,” CalMatters, September 20, 2021, <https://calmatters.org/education/k-12-education/2021/09/special-education/>; Rosales, “Independent study frustrates California parents who enrolled children,” EdSource, September 10, 2021, <https://edsources.org/2021/independent-study-frustrates-california-parents-who-enrolled-children/661009>.

successfully in distance learning last year. M.G.'s disability and additional respiratory problems put him at higher risk of health complications if exposed to COVID-19, and he is too young to be vaccinated. Ms. Graham asked for distance learning as an alternative to in-person classes. Her IEP team told her that the only option was Independent Study, but that they could not provide the alternative curriculum that her son needs as an accommodation. A recorded webinar from their school district provided the same the advice to the public: Independent Study is the only alternative to in-person classes, but it is only for students who "can follow a general education curriculum" and who only need a general education teacher, not a special education teacher or other special education service provider.<sup>9</sup> Without an agreement on distance learning, M.G. has been home for a month with no instruction.<sup>10</sup>

- **Complainant Neelyn Tong and her daughter, C.B.**

C.B. is 13 years old, and is starting 8<sup>th</sup> grade in a California middle school. She has medical conditions - asthma and hemiparesis – that place her at higher risk of health complications if exposed to COVID-19. C.B. has an IEP because she has a developmental disability and needs modification to her curriculum and other supports to learn. When in-person classes started in August 2021, Ms. Tong explained that C.B. could not attend in-person and needed to continue in distance learning. School staff said the only option was Independent Study but denied C.B. permission to enroll because of her disability. Since the beginning of the school year, she has been at home with no live instruction and no educational support other than Ms. Tong herself.<sup>11</sup>

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<sup>9</sup> Declaration of Lauren Lystrup, ¶ 16 (providing link to school district webinar and partial transcription of school official statements).

<sup>10</sup> See Declaration of Susan Graham. The special education director for her son's school district also said in the webinar that the home-hospital program was only for students who are "medically fragile" such that they "cannot go outside." Lystrup declaration, ¶ 17. Staff told Ms. Graham that even if they approved M.G. for Home-Hospital, he would get academic support but no other services – not the speech, occupational therapy and adapted physical education that he had received through distance learning last year. Graham Declaration, ¶ 8.

<sup>11</sup> See Declaration of Neelyn Tong.

- **Complainant Y.K and her son, R.C.**

R.C. is 18 years old and has a developmental disability and other medical conditions. He is at higher risk of health complications if exposed to COVID-19, so his mother wants him to continue in distance learning. He has an IEP and attended a non-public school last year that offered him an alternative curriculum and additional supports during distance learning. His school was ready to provide him distance learning when school resumed in August 2021. Instead, the district intervened, saying that R.C. could not continue in distance learning at the non-public school that had served him so well. His mother was told that all students who did not attend in-person classes must enroll in Independent Study; special education students such as her son had to first attend an IEP meeting. Eventually the IEP team met but refused to approve Independent Study or distance learning with her son's previous non-public school. R.C. is still at home with no educational services.<sup>12</sup>

- **Complainant M.H. and her daughter, H.H.**

H.H. is 21-years-old and has developmental disabilities and a tracheostomy tube for Tracheomalacia and Chronic Lung Disease. She has an IEP and last year attended the same non-public school as R.C., which was also happy to continue distance learning for her starting in August 2021. After one day, the school canceled H.H.'s classes, explaining that the state education agency would not allow non-public schools (which are only for students with disabilities) to offer virtual options. Later, the district agreed that H.H. could enroll in very limited distance learning hours through Independent Study or home-hospital but without any of the services in her IEP.<sup>13</sup> This student has been at home with no educational programming for almost a month.<sup>14</sup>

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<sup>12</sup> See Declaration of Y.K.

<sup>13</sup> On September 5, 2021, M.H. filed complaints about her daughter's treatment with the California Department of Education, which is a respondent in this claim. The Department has opened an investigation, but has 60 days to respond, and up to an additional 90 days if either party seeks reconsideration. Borrelle Decl., ¶ 14; Lystrup Decl., ¶ 11. This is too long for families to go without services for their children.

<sup>14</sup> See Declaration of M.H.

- **Complainant A.J. and her daughter, E.E.**

E.E. is 6 years old and has an intellectual disability. Her IEP provides extensive services such as a full-time behavior aide and speech, language and occupational therapy. E.E. has a twin sister who is typically developing. E.E. is at higher risk of health complications if exposed to COVID-19, so the twin's mother requested distance learning for both children. The school district approved Independent study for the non-disabled twin, but required prior approval from E.E.'s IEP team. At the IEP meeting, district staff said that E.E. would lose all her support services if enrolled in Independent Study. When the parent protested that E.E. needed these to learn, she was told that her only choice was to take E.E. to in-person classes, regardless of the risk. Because of this impasse, E.E. has been home with no access to classes since school began. In contrast, her non-disabled twin has been enrolled in Independent Study from the beginning.<sup>15</sup>

- **Complainant K.N. and her son, L.N.**

L.N. is a 9-year-old student with developmental disabilities secondary to significant medical conditions. He is at extreme risk of complications if he contracts COVID-19. During the 2020-2021 school year, L.N. was able to safely access his educational program through distance learning, and his mother believed this would continue in current school year. But shortly before the school year began, she was informed that they would need to convene an IEP meeting first and that, even if L.N. qualifies for Independent Study, he will not receive any of his special education services. District staff suggested that K.N obtain a doctor's note authorizing home/hospital instruction for her son, but cautioned that if approved, he would not receive any of his IEP services and only 1 hour a day of instruction. To date, the school district has not offered a date for L.N.'s IEP, and has not offered any form of interim instruction. School staff have also told K.N. that they expect her son to attend school in person until his IEP is held, despite their acknowledgement that it is not safe for him to do so because of his medical conditions.

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<sup>15</sup> See Declaration of A.J.

### **Exclusion of students with more severe disabilities because they cannot learn independently**

First, as these summaries show, the design of Independent Study excludes many disabled students, especially those with more severe disabilities who are studying on an alternative curriculum. The California Education Code states that “Independent study shall not be provided as an alternative curriculum.” Cal. Educ. Code § 51745(a)(3). For example, M.G.’s large urban school district announced in a town hall meeting that Independent Study will only offer the general education curriculum without any special education services.<sup>16</sup> Other districts take the same position. One FAQ from a virtual “Office Hours” with the Los Angeles County Office of Education, joined by the California Department of Education on September 7, 2021, states flatly:

Question: “How can a very involved student in a self-contained class requiring a one-on-one assistant “independently” be recommended for an independent study program?” Answer: “The IEP team will need to make the determination. However, the term “Independent Study” implies that a child will be able to complete the work independently or with minimal adult help.”<sup>17</sup>

The California Department of Education endorsed this FAQ<sup>18</sup> and offers the similar advice in its own Independent Study FAQ webpage, which was updated on August 23, 2021.<sup>19</sup> The CDE FAQ states “[p]upils in independent study shall have the ability to work independently and maintain satisfactory educational progress” as defined under the California Education Code. Further, “success in independent study requires motivation and a strong commitment on the part of the student and, especially for a young student, his or her parents/guardians/caregivers. It also requires sufficient academic preparation to enable the student to work

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<sup>16</sup> Lystrup Declaration, ¶ 16.

<sup>17</sup> Lystrup Declaration, ¶ 19.

<sup>18</sup> Lystrup Declaration, ¶ 19.

<sup>19</sup> California Department of Education, *Independent Study: Frequently Asked Questions* (updated August, 23, 2021), <https://www.cde.ca.gov/sp/eo/is/faq.asp>.

independently.”<sup>20</sup>

Since Independent Study is the only way to access distance learning, this framework excludes students who need adult supports to learn, such as those with intellectual and developmental disabilities, as do the children of the Complainants here.

### **No CDE guidance re accommodations in Independent Study**

Second, California’s implementation of Independent Study permits school districts to enroll disabled students on the condition that they give up their rights to accommodations, including their rights under IDEA. Under the earlier distance learning statute in effect in the 2020-21 school year, each student had a distance learning plan that listed the accommodations they needed.<sup>21</sup> IEP teams are refusing to offer these same services through Independent Study. These IEP teams make a single offer of a Free and Appropriate Public Education (“FAPE”), which is through in-person classes only.<sup>22</sup> If families insist that their child needs distance learning, districts often offer Independent study but without the services listed in the student’s IEP.<sup>23</sup> In one-sided negotiations, districts often compel families to sign agreements waiving their rights under IDEA and the ADA.<sup>24</sup>

CDE has issued minimal guidance regarding Independent Study and students with IEPs.<sup>25</sup> This guidance only reiterates that a student’s IEP

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<sup>20</sup> Id.

<sup>21</sup> The former distance learning statute, Cal. Educ. Code § 43503(b)(4) (which has now sunset), required that distance learning include “[s]pecial education, related services, and any other services required by a pupil’s [IEP.]”

<sup>22</sup> See declarations of German, ¶ 8; Lystrup, Borrelle, and those of the Complainants.

<sup>23</sup> Declarations of M.H, A.J. See also, Rosales, “*Independent study frustrates California parents who enrolled children*,” fn. 8; Fensterwald & Rosales, *Quarantines and teacher shortages: a double whammy for California districts*, EdSource, August 27, 2021, available from <https://edsources.org/2021/quarantines-and-teacher-shortages-a-double-whammy-for-california-districts/660337>. See also declarations of German, ¶ 8; Lystrup, Borrelle, and those of the other Complainants.

<sup>24</sup> See footnote above.

<sup>25</sup> California Department of Education, Frequently Asked Questions re Independent Study, <https://www.cde.ca.gov/sp/eo/is/faq.asp>; Borrelle Decl., ¶ 7.

team must determine if Independent Study is appropriate. It fails to ensure that disabled students have equal access to distance learning.

CDE has supported districts that offer Home Hospital instruction as an alternative “work-around” for disabled students.<sup>26</sup> This is an option under California law for students who have a “temporary disability that makes attendance in the regular day classes or alternative education program impossible or inadvisable.” Cal. Educ. Code § 48206.3. But few students with an IEP actually qualify for Home Hospital instruction, which is generally offered for only 5 hours per week.<sup>27</sup> The school districts that have approved home hospital have told families that they will receive minimal instruction and few or none of the services in the child’s IEP.<sup>28</sup>

### **No rationale for giving disabled students fewer rights and protections in Independent Study, versus distance learning or quarantines**

The State treated students with disabilities far better during distance learning and in emergency quarantines, both of which mandate special education rights. From March 2020-June 2021, the State guaranteed that students with disabilities could participate in distance learning with special education and related services required by the student’s IEP. Cal. Educ. Code § 43503(b)(4); Cal. Educ. Code § 43511(b). The State also required all IEPs include a plan for service delivery in the event of qualifying emergencies where schools cannot deliver services in person. Cal. Educ. Code § 56345(a)(9).

Now, even though all IEP teams have planned for emergencies where they cannot deliver services in person, the State has limited distance learning emergency plans to students in quarantine. Cal. Educ. Code § 46393. The State requires that students with disabilities who quarantine may participate in Independent Study and must have access to their distance learning emergency plan. *Id.* This already-existing distance learning system for

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<sup>26</sup> See Lystrup Decl., attachment B (LACOE Independent Study Considerations for Students with Disabilities)

<sup>27</sup> See footnote 10, *supra*, re: school official’s statement that Home Hospital is only for students “who cannot go outside.”

<sup>28</sup> See, e.g., declarations of German, Lystrup, M.H.

quarantined students demonstrates that it is a reasonable modification to provide distance learning to all students with disabilities. See Borrelle Decl., ¶ 10. There is no justifiable rationale for denying this to students who are not quarantined but still need distance learning to ensure their health and safety from the pandemic.

### **Long delays in accessing Independent Study**

Disabled students also faced discriminatory delays in enrollment because they first had to convene their IEP team to consider their request for Independent Study, a process that can take up to 30 days and meant they have missed the first weeks of school. Some students are still awaiting an IEP team meeting, more than month after the start of school. Non-disabled students could register immediately and did not face this delay. The delays also mean that disabled students were late to register for Independent Study and thus more likely to end up on district waiting lists for Independent Study.<sup>29</sup>

In addition, students do not have the benefit of “stay put,” the IDEA provision that enables students to remain in their placement until a dispute is resolved.<sup>30</sup> The new law explicitly bans their participation in Independent Study until they have an IEP that “specifically provides for that participation.” Cal. Educ. Code § 51745(c).

## **LEGAL CLAIMS - VIOLATION OF THE ADA**

### **1. Exclusion from distance learning and denial of accommodations**

The ADA regulations provide that “[n]o qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity. 28 C.F.R.

§ 35.130(a). Further, a public entity may not “[d]eny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service.” 28 C.F.R. § 35.130(b)(1)(i).

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<sup>29</sup> See, e.g., declarations of Borrelle; Lystrup; German.

<sup>30</sup> Borrelle Decl., ¶ 15.

Here, California is denying access to distance learning and alternatives to in-person classes to students with disabilities. It has done so by setting up Independent Study as the only way to access distance learning and the only alternative to in-person classes. The State defines Independent Study as appropriate only for students who can work independently.<sup>31</sup> This necessarily excludes many students with disabilities, especially those with moderate to severe disabilities and those with intellectual and developmental disabilities. These students are thus denied access to their entire education because they cannot safely attend in-person classes and must have an alternative.

The fact that some disabled students are able to participate in Independent Study does not lessen the ADA violation. Instead, this is an example of discrimination based on severity of disability, which also violates the ADA. See, e.g., *Lovell v. Chandler*, 303 F.3d 1039, 1054 (9th Cir. 2002) (“The State’s appropriate treatment of some disabled persons does not permit it to discriminate against other disabled people under any definition of “meaningful access.”); *Amundson ex rel. Amundson v. Wisconsin Dep’t of Health Servs.*, 721 F.3d 871, 874 (7th Cir. 2013); *Nelson v Milwaukee County*, 2006 WL 290510 at \*5 (E.D. Wis. 2006); *Martin v. Voinovich*, 840 F.Supp. 1175, 1191–92 (S.D. Ohio 1993); *Jackson v. Fort Stanton Hosp. & Training Sch.*, 757 F.Supp. 1243, 1299 (D.N.M. 1990), rev’d on other grounds, 964 F.2d 980 (10th Cir. 1992); *Garrity v. Gallen*, 522 F.Supp. 171, 214–15 (D. N.H. 1981); *Lynch v. Maher*, 507 F.Supp. 1268, 1278–79 n.15 (D.Conn.1981); *Messier v. Southbury Training Sch.*, No. 3:94-CV-1706(EBB), 1999 WL 20910, at \*10 (D. Conn. Jan. 5, 1999) (“Courts hold repeatedly that the ADA and Section 504 prohibit discrimination on the basis of severity of disability.”).

## **2. Denying students needed accommodations in Independent Study.**

The ADA regulations state that it is unlawful discrimination for a public entity to “[p]rovide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the

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<sup>31</sup> See pp. 8-9, *supra*, listing examples.

same result, to gain the same benefit, or to reach the same level of achievement as that provided to others.” 28 C.F.R. § 35.130(b)(1)(iii). In addition, “[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.” 28 C.F.R. § 35.130(b)(7)(i).

Here, California has failed to ensure that disabled students who wish to participate in Independent Study have access to the accommodations, aids and services they need to benefit equally from their education. As the declarations from the complainants and other students attest, school districts that do allow students with IEPs to enroll in Independent Study then often require they waive the special education services and modifications they need to learn.<sup>32</sup> Without these services, students cannot access their education.

Yet this result is consistent with the new California statute, although it violates the ADA. Students with IEPs cannot participate in Independent Study unless their IEP team agrees. Cal. Educ. Code § 51745. IEP teams consistently make a single offer of special education services, which is only in-person. When families reject in-person classes, they feel fortunate to be accepted in Independent Study. But when they ask for accommodations in the curriculum or additional supports, the school districts refuse.

### **3. Adopting discriminatory methods of administration – the State’s failure to ensure that disabled students have a safe alternative to in-person classes**

The ADA regulations provide that a public entity may not “[u]tilize criteria or methods of administration that have the effect of defeating or substantially impairing the accomplishment of the objectives of the public entity’s program with respect to individuals with disabilities.” 28 C.F.R. § 35.130(b)(3)(ii).

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<sup>32</sup> See Declarations of M.H. and A.J.

Here, the respondents – the State of California, the State Board of Education and the California Department of Education – are responsible for providing special education services to disabled students. Yet in administering their special education program, they have failed to ensure that students with IEPs have a safe alternative to in-person classes. They have issued FAQs, but failed to ensure that disabled students had the same access to distance learning enjoyed by other students. That this has occurred during a dangerous surge in COVID-19 cases as a result of the Delta Variant makes their inaction even more objectionable.

In this case, the State’s failure to act has led to outcomes as discriminatory as if it flatly denied students access to distance learning. “The methods-of-administration regulation makes clear that a know-nothing, do-nothing policy of non-administration is a privately actionable violation of the ADA.” *Dunn v. Dunn*, 318 F.R.D. 652, 665 n.12 (M.D. Ala. 2016), modified on other grounds sub nom. *Braggs v. Dunn*, No. 2:14CV601-MHT, 2020 WL 2395987 (M.D. Ala. May 12, 2020).<sup>33</sup>

Although local school districts make the decision to deny supports and accommodations to a particular student, the State of California, the State Board of Education and the California Department of Education are still responsible. Under the ADA, these state agencies must ensure that the agencies they supervise and with which they contract do not discriminate. “A public entity, in providing any aid, benefit, or service, may not, directly or

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<sup>33</sup> See also, *Lewis v. Cain*, 324 F.R.D. 159, 176 (M.D. La. 2018) (state correctional agency’s failure to adequately train prison employees, and to adopt procedures for requesting accommodations violated the ADA); *Day v. D.C.*, 894 F. Supp. 2d 1, 20 (District’s failure to adopt a plan to move residents out of nursing facilities and to inform them of community alternatives and discharge planning violated the ADA); *State of Conn. Office of Prot. & Advocacy for Pers. with Disabilities v. Connecticut*, 706 F. Supp. 2d 266, 276–78 (denying motion to dismiss where complaint alleged that the state “failed to adequately assess and identify the long-term care needs of Plaintiffs and the Class they represent,” and “failed to inform Plaintiffs and the Plaintiff Class members of the availability of alternatives to nursing home care”); *Kathleen S. v. Dep’t of Pub. Welfare of Com. of Pa.*, 10 F. Supp. 2d 460, 471–73 (E.D. Pa. 1998) (state agency’s “failure to initiate” discharge planning from a hospital and “failure to adequately plan for the community placements” violated the ADA).

*through contractual*, licensing, or other arrangements, on the basis of disability” discriminate against individuals with disabilities. 28 C.F.R. § 35.130(b)(1) (emphasis added). Further, a public entity may not “[a]id or perpetuate discrimination . . . by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity’s program[.]” 28 C.F.R. § 35.130(b)(1)(v).

As regards the California Department of Education in particular, under state and federal law special education law, it is responsible for the oversight and supervision of local school districts. 20 U.S.C. § 1412(a)(11)(A); 34 C.F.R. § 300.149(a); see also Cal. Ed. Code §§ 56100 and 56205. See also, *Emma C. v. Eastin*, 985 F. Supp. 940, 948 (N.D. Cal. 1997) (complaint adequately alleged that CDE “failed to monitor [the district’s] compliance with state and federal laws” and perpetuated this discrimination.”).

## CONCLUSION

Complainants urgently request that the Department of Justice issue a findings letter that California and its agencies have violated the ADA by failing to ensure that students with disabilities have equal access to distance learning and alternatives to in-person classes. This State could achieve this by instructing districts to implement the distance learning plans that disabled students had in the 2020-21 school year, or by other means that achieve a comparable result.

Respectfully Submitted,

DISABILITY RIGHTS CALIFORNIA  
VANAMAN GERMAN LLP



Melinda Bird  
Robert Borrelle  
Lauren Lystrup  
Disability Rights California



David German  
Vanaman German LLP

CC: Attached service list

Declarations in support of Complaint:

1. Complainant Susan Graham\*
2. Complainant Neelyn Tong\*
3. Complainant Y.K.\*
4. Complaint M.H.\*
5. Complainant A.J.\*
6. Complainant K.N.\*
7. Declarant J.F.G.\*
8. Declarant J.F.\*
9. Attorney David German
10. Attorney Robert Borrelle
11. Attorney Lauren Lystrup
12. Attorney Nidya Paredes
13. Advocate Cheryl Theis

\*These declarations are redacted to protect the privacy of families and children. Confidential, executed declarations from the Complainants and declarants are being submitted under separate cover, along with their contact information.

### **Service List**

U.S. Department of Justice  
Civil Rights Division  
950 Pennsylvania Avenue, NW  
4CON, 9th Floor  
Washington, DC 20530  
Attn: Rebecca Bond  
Chief, Disability Rights Section  
[Rebecca.bond@usdoj.gov](mailto:Rebecca.bond@usdoj.gov)  
Sent via fax to 202-307-1197  
Attn: Shaheena Simons  
Chief, Educational Opportunities Section  
[Shaheena.simons@usdoj.gov](mailto:Shaheena.simons@usdoj.gov)  
Sent via fax to 202-514-8337

### **Respondents**

Rob Bonta, Attorney General  
Office of the Attorney General  
State of California  
1300 "I" Street  
Sacramento, CA 95814-2919  
Phone: (916) 445-9555

Brooks Allen, Executive Director  
Judy M. Cias, Chief Counsel,  
State Board of Education  
1430 N Street, Room 5111  
Sacramento, California 95814  
[sbe@cde.ca.gov](mailto:sbe@cde.ca.gov)  
Telephone: 916-319-0827 or Fax: 916-319-0175

Tony Thurmond, State Superintendent of Public Instruction  
Amy Bisson Holloway, Virginia Jo Dunlap, Todd Smith  
Chief Counsel II, Legal Division  
California Department of Education  
1430 N Street  
Sacramento, CA 95814-5901

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General: 916-319-0800  
Office of Legal Counsel: 916-319-0860  
Fax: 916-322-2549