Appendix 3 - IDEA Statutory and Regulatory Obligations: State & Local Education Agencies and Related Authorities

Under IDEA, both a State Education Agency ("SEA") and a Local Education Agency ("LEA") have obligations under the law which guide their provision of education services, define the standards for their compliance and set forth conditions they must meet in order to receive federal funds.[1]

The statutory provisions relevant to the agencies discussed in this letter include:[2]

State Education Agency Obligations

20 U.S.C. §1412 (a) In General. A State is eligible for assistance under this part for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets certain conditions, including:

> (1) Free Appropriate Public Education. (A) In General. A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school . . .
>
> (5) Least Restrictive Environment. (A) In General. To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.
>
> (6) Procedural Safeguards. (A) In General. Children with disabilities and their parents are afforded the procedural safeguards required by Section 1415 of this title including:

[1] Although other education statutes have similar obligations and conditions, for purposes of this letter only IDEA's provisions are detailed.

[2] References to the IDEA statute and conforming regulations, as well as related Education Code provisions are from California's Part B application at http://www.cde.ca.gov/sp/se/as/fndapp11.asp on CDE's website.

> 20 U.S.C. 1415(j) Maintenance of Current Educational Placement. Except as provided in subsection (k)(4), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, . ."

> (11) State Educational Agency Responsible for General Supervision.
> (A) In General. The State educational agency is responsible for ensuring that (i) the requirements of this part are met; (ii) all educational programs for children with disabilities in the State, including all such programs administered by any other State agency or local agency–
> (I) are under the general supervision of individuals in the State who are responsible for educational programs for children with disabilities; and (II) meet the educational standards of the State educational agency. . .;

> States are obligated to ensure the requirements of Part B are met, through its responsibility for among other things, general supervision and implementation of procedural safeguards (34 CFR §300.149-150), for ensuring a working and effective complaint resolution process is in place to address complaints addressing issues under the IDEA (34 CFR 300.151-153) and that the state monitors and enforces the requirements of Part B in accordance with its monitoring, technical assistance and enforcement obligations 34 CFR §300.600-300.602 and §300.606-300.608 (20 U.S.C. §1412(a)(11); 34 CFR §300.149).[3]

CDE also has obligations under 20 U.S.C. §1413, i.e., where a local education agency has not or is unable to maintain a program of free appropriate public education which meets the requirements of 20 U.S.C. §1413(a) (and where, as here, it uses education tax dollars to pay for litigation rather than education), the State of California and its SEA, the CDE, shall use payments that would have been available to Dry Creek to provide special education and related services directly to G.M. and to ensure the stay-put provider, Ms. Coutchie, is paid timely, particularly in light of its own CCR corrective actions which have directed same.

IDEA at §1413(g) (34 CFR §300.227) provides,

> (g) Direct Services by the State Educational Agency.
> (1) In General. A State educational agency shall use the payments that would otherwise have been available to a local educational agency or to a State agency to provide special education and related services directly to children with disabilities residing in the area served by that local educational agency, or for

[3] *See also,* Questions and Answers on Monitoring, Technical Assistance and Enforcement (Revised June 2009). http://www2.ed.gov/policy/speced/guid/idea/monitoring-q-a.pdf

whom that State agency is responsible, if the State educational agency determines that the local educational agency or State agency, as the case may be–
(A) has not provided the information needed to establish the eligibility of such local educational agency
or State agency under this section;
(B) is unable to establish and maintain programs of free appropriate public education that meet the requirements of subsection (a);
(C) is unable or unwilling to be consolidated with 1 or more local educational agencies in order to establish and maintain such programs; or
(D) has 1 or more children with disabilities who can best be served by a regional or State program or
service delivery system designed to meet the needs of such children.
(2) Manner and Location of Education and Services. The State educational agency may provide special education and related services under paragraph (1) in such manner and at such locations (including regional or State centers) as the State educational agency considers appropriate. Such education and services shall be provided in accordance with this part.

Local Education Agencies Obligations

20 U.S.C. §1413 (a) In General. A local educational agency is eligible for assistance under this part for a fiscal year if such agency submits a plan that provides assurances to the State educational agency that the local educational agency meets each of the following conditions: . .

(1) Consistency With State Policies. The local educational agency, in providing for the education of children with disabilities within its jurisdiction, has in effect policies, procedures, and programs that are consistent with the State policies and procedures established under Section 1412 of this title. (*See above*).

California has acknowledged its obligations under IDEA in various ways:

1. Annually California provides assurances through its Part B application.

Annually, States submit an application to the U.S. Department of Education to obtain funding for students eligible under Part B of the IDEA. As part of this Application, States provide assurances that their policies, including statutes and regulations, are consistent with the Part B regulations at 34 CFR Part 300.

California's Annual State Application under Part B of the Individuals with Disabilities Education Act (IDEA) for 2011 is to be submitted by May 10, 2011 for FFY 2011 and is on CDE's website:
http://www.cde.ca.gov/sp/se/as/fndapp11.asp which indicates:

> The IDEA, as amended in 2004, changed the content for the state's application. The state plan or description of current policy is replaced with a series of assurances, certifications of federal policies as detailed by the Education Department General Administrative Regulations (EDGAR), a chart indicating the allocation of federal funds, and a list identifying any rule, regulation, or policy that is state-imposed (not required by IDEA or Federal regulations). OSEP requires the state to follow this application process for funding.

California's most recent Application, above, provides assurances with regard to all of its obligations, noted above. The assurances relevant to this letter and Appendices are:

> "A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled, in accordance with 20 *U.S.C.* 1412(a)(1); 34 *CFR* §§300.101-300.108" (Assurance 1);
>
> An individualized education program, or an individualized family service plan that meets the requirements of section 636(d), is developed, reviewed, and revised for each child with a disability in accordance with 34 *CFR* §§300.320 through 300.324, except as provided in §§300.300(b)(3) and 300.300(b)(4). (20 *U.S.C.* 1412(a)(4); 34 *CFR* §300.112) (Assurance 4);
>
> To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily in accordance with 20 *U.S.C.* §1412(a)(5)(A)-(B); 34 *CFR* §§300.114-300.120. (Assurance 5)
>
> That "Children with disabilities and their parents are afforded the procedural safeguards required by 34 *CFR* §§300.500 through 300.536 and in accordance with 20 *U.S.C.* §1412(a)(6); 34 *CFR* §300.121" (Assurance 6); and
>
> That it is "ensuring that the requirements of Part B are met including the requirements of 34 *CFR* §§300.113, 300.149, 300.150 through 300.153, and 300.175 and 300.176 and that the State monitors and enforces the requirements of Part B in accordance with 34 *CFR* §§300.600-300.602 and 300.606-300.608." (Assurance 11) (See CDE website under Quality Assurance, at http://www.cde.ca.gov/sp/se/as/fndapp11.asp, Items 1 and 6 respectively).

CDE's Part B annual application assurances demonstrate the SEA knows its obligations and assures the U.S. Department of Education that California is complying with them as a condition of its receipt of federal funds under the IDEA.

2. California also periodically reports on its monitoring obligations, including its Effective General Supervision as part of its State Annual Performance Report (APR).

California's most current APR for FFY 2008-09 at Indicator 15 provides:

Indicator 15: General supervision system (including monitoring, complaints, hearings, etc.) identifies and corrects noncompliance as soon as possible, but in no case later than one year from identification. (20 U.S.C. 1416 [a][3][B])

FFY	Measurable and Rigorous Target
2008 (2008-09)	100 percent of noncompliance will be corrected within one year of identification

General procedures for monitoring and correction**:** As noted in Indicator 15 (General Supervision) in the State Performance Plan [SPP], CDE has used multiple methods to carry out monitoring responsibilities. These monitoring activities are part of an overall Quality Assurance Process (QAP) designed to ensure that procedural guarantees of the law are followed and that programs and services result in educational benefits to students with disabilities. The CDE uses all of its QAP activities to monitor for procedural compliance and educational benefit. Formal noncompliance may be identified and corrective action plans developed through a wide variety of means, including data collection and analysis, investigation of compliance complaints and due process hearings, and reviewing policies and procedures in local plans. For example, the CDE uses data collected through the CASEMIS to identify districts that are not completing annual reviews of individualized educational programs (IEPs) in a timely way. **All of these methods result in formal findings of noncompliance citing specific state and federal regulations and require that a corrective action plan be completed.**

http://www.cde.ca.gov/sp/se/qa/ - APR - 2010 (Posted 29-Apr-2010; DOC; 1.73MB; 113pp at pages 75- 76.)

California's LEAs also acknowledge their obligations under IDEA

Annually, California's LEAs also provide assurances:

IDEA, Part B-611, Local Assistance

Local Assistance Entitlement funding is specifically allocated for special education and services to children with disabilities ages five through twenty-one.

Eligible Applicants	Local educational agencies
Required Eligibility Criteria	To receive funds, a local educational agency must submit a local plan (application) that contains assurances to the state education agency that is consistent with federal and state laws and regulations.
Other Eligibility Considerations	Districts must account for these funds as expenditures for pupils with an individualized education plan (IEP) and for the provision of the special education and related services required by students with disabilities in order to benefit from a public education.

http://www.cde.ca.gov/fg/fo/profile.asp?id=1466

These assurances are also reflected in a template form CDE has developed for LEAs and their SELPAs, which such individual local agencies adopt through their governing boards. These assurances track CDE's Part B annual application assurances, and demonstrate LEAs know their obligations and can provide assurances to both the State of California and the U.S. Department of Education that the LEA is complying with these obligations as a condition of their receipt of federal funds under the IDEA. Dry Creek, as a California LEA, has adopted such a document providing such assurances.

http://www.cde.ca.gov/sp/se/ds/documents/sedlp5.doc.

U.S. Department of Education Notices and Guidance to State Education Agencies

California periodically receives oversight and guidance from the U.S. Department of Education specifically with regard to California's continuing obligations and its compliance with such obligations, as well as guidance that is directed to all SEAs with regard to general procedural issues and substantive compliance issues. Communications to California that are relevant to the issues of this letter, include:

1. Notices/Communications received related specifically to California's compliance

- 06/21/00 Letter, Judith Heumann to Alice Parker (Assistant Superintendent of Public Instruction)

- 03/19/01 letter from Patricia Guard (OSEP) to Dr. Alice Parker (Assistant Superintendent of Public Instruction)

2. Notices/OSEP Memoranda related to issues in this matter, listed by topic, include:

SEA Complaint Resolution and Due Process Procedures

- 07/17/00 OSEP Memorandum to Chief State School Officers from Kenneth Warlick (OSEP 00-20)

- 03/30/01 OSEP Letter, Patricia Guard to Dr. Fran Warkomski

Correction of noncompliance in annual performance reporting.

- 10/17/08 OSEP Memorandum, William W. Knudsen (OSEP) to Chief State School Officers, et al., (OSEP 09-02)

SEAs Holding LEAs Accountable, withholding funds, SEA obligation to provide services.

- 10/28/04 Letter, Stephanie Smith Lee to Honorable Randy L. Dunn

Stay-Put and provision of FAPE, etc. during stay-put.

- 04/12/07 OSEP Letter, Alexa Posny to Mary D. Watson.

Least Restrictive Environment (LRE).

- 10/28/04 Letter, Stephanie Smith Lee to Honorable Randy J. Dunn.

- 11/30/07 OSEP Letter, Patricia Guard to Mr. Tom Trigg.

Specifics with regard to these letters are provided as follows:

DETAIL: 1. Notices/Communications received related specifically to California's compliance

- **06/21/00 Letter, Judith Heumann to Alice Parker (Assistant Superintendent of Public Instruction)**

This letter related to California's long-standing noncompliance with Part B's requirements and ***specifically documented California's history of failing to implement "an effective system for identifying and correcting noncompliance with the requirements of Part B."*** which had serious consequences for children with disabilities. ***CDE was required to demonstrate that it took "effective enforcement actions to ensure compliance when prior corrective measures have not ensured compliance***." (Page 1)

The letter, at pages 6-7 addressed the issue of enforcement and referenced CDE's April 20, 2000 Memorandum to District and County Superintendents, et al., notifying addressees that "prolonged and substantial noncompliance, determined through [individual complaint investigations, CCR, or the quality assurance process] will not be tolerated" and notified recipients of the intent to impose sanctions. (*See,* CDE website http://www.cde.ca.gov/sp/se/lr/om041800.asp).

However, OSEP's letter went on to state "As explained above, CDE has now taken some initial enforcement actions and has informed all public agencies in the State *of* its intent to take necessary enforcement action. However, longstanding noncompliance persists in a number of public agencies in the State, including some of the districts that OSEP visited in April, and it will be critical that CDE take effective action, including enforcement when necessary, to ensure the timely correction of noncompliance." (Letter at page 7)

The letter concluded "CDE cannot yet demonstrate that it is implementing an effective system that consistently identifies and corrects noncompliance" and CDE was required to submit additional reporting to OSEP. (Letter, page 9).

www2.ed.gov/policy/speced/guid/idea/letters/2000-2/parker062100gensup2q2000.doc

Unfortunately, California has a history of failing to ensure compliance by its local education agencies, which the U.S. Department of Education has monitored for years. California is aware of the need to constantly monitor its own compliance in this regard, but has failed to do so here.

- **03/19/01 letter from Patricia Guard (OSEP) to Dr. Alice Parker (Assistant Superintendent of Public Instruction)**

This letter related to California's progress in meeting the requirements of Part B, including a focus on CDE's progress in developing its Quality Assurance Process, the State's system for monitoring local education agencies' compliance with Part B and State requirements which discusses "the very significant improvements that CDE has made over the past several months in the timeliness of CDE's resolution of complaints." The letter also stated CDE was taking steps to "ensure accuracy, effectiveness and consistency in complaint investigations and decisions" and had considered taking "serious enforcement action against . . . districts, including taking the issues to a meeting of the State Board of Education and/or filing a Writ of Mandate against one or both school districts." The letter also noted CDE did file a Writ of Mandate with regard to acts by San Diego Unified School District.

www2.ed.gov/policy/speced/guid/idea/letters/2001-1/parker3192001gensupv.doc

DETAIL 2. Notices/OSEP Memoranda related to issues in this matter, listed by topic, include:

SEA Complaint Resolution and Due Process Procedures

- 07/17/00 OSEP Memorandum to Chief State School Officers from Kenneth Warlick (OSEP 00-20)

This OSEP Memorandum to Chief State School Officers from Kenneth Warlick (OSEP 00-20) addresses the Complaint Resolution Procedures Under Part B of the Individuals with Disabilities Education Act, necessary for "the effective implementation of Part B., and provides:

> "Part B State complaint procedures are critical to each State's exercise of its general supervision responsibilities because they provide parents with an important means of ensuring that their children's educational needs are met and provide the State education agency (SEA) with a powerful tool to identify and correct noncompliance with the IDEA and its implementing regulations. . . . Because of the important role that effective State complaint resolution plays for parents, public agencies, and the SEA in meeting its general supervisory responsibility, each State's complaint procedures are addressed in OSEP's continuous improvement monitoring process. The State complaint procedures, which are *under the direct control of the SEA*, ***have the potential for providing a less costly and more efficient mechanism for resolving disputes than the impartial due process hearing system.***"

> That 300.660[4] [300.151] requires each SEA to adopt written procedures for resolving any complaint, and that pursuant to 300.661 [300.152] that the State's complaint procedures must include "procedures for the effective implementation of the SEA's final decision, if needed, including technical assistance activities, negotiations, and corrective actions to achieve compliance." (300.661(b)(2)) [300.152(b)(2)] (Memo at Pages 2-3)

As well, the Memorandum provides directive that

> "Under the Part B regulations parents of children with disabilities have two separate means available to them for resolving disputes with public agencies concerning the education of their children – i.e., (1) the State complaint resolution system . . ., and (2) the impartial due process hearing system. . . The State complaint procedures are available for resolving any complaint that meets the requirements of 300.662 [300.153], including: (1) complaints that raise systemic issues, and (2) individual child complaints." (Memo at Pages 3-4)
> "It is impermissible under Part B for an SEA to: (1) have a procedure that removes complaints about FAPE or any other matter concerning the identification, evaluation, or educational placement of the particular child or any other allegation of a violation of Part B or its implementing regulations from the jurisdiction of its State complaint resolution system, or (2) advise or require parents to request a due process hearing before the SEA can initiate a complaint investigation." (Memo at Page 4)

http://www2.ed.gov/policy/speced/guid/idea/letters/2000-3/osep002071700safeguardssec.pdf

This Memo demonstrates CDE had full authority to investigate the complaints brought by the Marchese family and ensure compliance with such complaints, including with regard to the issue of stay-put, the LEA's compliance with same and the compensation of Ms. Coutchie in accordance with the LEA's funding obligations, as well as its obligations to comply with the SEA's stay-put orders.[5]
In other words, CDE could have, and should have, effectively resolved the Marcheses' complaints about their son's education and ensured compliance without their being required to resort to due process or any other jurisdiction for enforcement.

[4] Note that 34 CFR §§300.660-300.662 were moved with the 2004 reauthorization to 34 CFR §§300.151-300.153.

[5] Although this OSEP Memorandum predates the reauthorization of IDEA 2004, it is still listed as current authority on US DOE's website. Also more recent OSEP Letters/Memoranda, i.e., those dated 03/31/08 to Anonymous, 06/02/10 to Linda Brekken and the 01/21/11 OSEP Memo, Melody Musgrove to Chief State School Officers (OSEP 11-07) all reiterate the SEA's obligation to open and resolve all complaints, including those related to the identification, evaluation and placement, and provision of FAPE for students with disabilities. These letters are here:
http://www2.ed.gov/policy/speced/guid/idea/letters/revpolicy/index.html

- 03/30/01 OSEP Letter, Patricia Guard to Dr. Fran Warkomski

This letter related to an SEA's state complaint procedures and whether decisions rendered in cases contained corrective actions to achieve compliance. OSEP's letter noted "it appears that the decisions rendered in x's complaint did not, in all cases, contain corrective actions to achieve compliance. This is inconsistent with the State Complaint Procedures applicable to Part B, at the time of the complaint, ***that require effective implementation of the SEA's decision, if needed, including technical assistance activities, negotiations, and corrective actions to achieve compliance.*** See 34 CFR §§300.660-300.662. [300.151-300.153]." (Letter, page 1)

The letter also noted "The Part B State Complaint Procedures are intended to address both systemic and child-specific violations. In order to meet its general supervisory responsibility under 34 CFR 300.660, PDE must resolve complaints in a way that provides individual relief, when appropriate, and addresses systemically the provision of appropriate services for all children with disabilities." (Letter, pages 1-2)

www2.ed.gov/policy/speced/guid/idea/letters/2001-1/warkomski3302001gensupv.doc

Correction of noncompliance in annual performance reporting.

- 10/17/08 OSEP Memorandum, William W. Knudsen (OSEP) to Chief State School Officers, et al., (OSEP 09-02)

This letter, which was related to "Reporting on Correction of Noncompliance in the Annual Performance Report Required Under Sections 616 and 642 of the Individuals with Disabilities Education Act" makes it clear States have an obligation to rectify previously identified noncompliance and that evidence of correction of noncompliance is factored into the determination of whether the State is demonstrating substantial compliance.

Based on a review of CDE's submissions to the U.S. Department of Education (including those referenced on the CDE's website at http://www.cde.ca.gov/sp/se/qa/), CDE is aware of these obligations as referenced in its most recent submission to the U.S. Department of Education in April 2010, at page 76, cited to above. In light of the facts in the Marchese matter, this indicates that the State of California is out of compliance with its obligations under the IDEA.

www2.ed.gov/policy/speced/guid/idea/letters/2008-4/correction-noncompliance101708apr4q2008.doc

SEAs Holding LEAs Accountable, withholding funds, SEA obligation to provide services.

- 10/28/04 Letter, Stephanie Smith Lee to Honorable Randy L. Dunn.

This letter addressed withholding of LEA IDEA funds pursuant to findings that an LEA or state agency had failed to comply with an applicable Part B requirement and the notice and hearing requirements before the withholding such funds. This letter demonstrates that funds may be withheld if an "LEA or State agency is not complying with a particular Part B requirement. . . ". (Letter, Page 2)

In addition, Question 2 discusses what other mechanisms are available for an SEA to provide special education and related services directly to children with disabilities in an LEA when an SEA has determined that a local education agency is unable or unwilling to do so, noting

> "The regulations provide, at 34 CFR §300 .360(c) [§300.227(b)], that the SEA may provide special education and related services directly, by contract, or through other arrangements, and at 34 CFR §300.361, in the manner and at the location it considers appropriate (including regional or State centers) . However, the manner in which the education and services are provided must be consistent with the Part B statute and regulations (including the least restrictive environment provisions of §§ 300.550-300.560) [300.114-300.120]." (Letter, at pages 2- 3)

http://www2.ed.gov/policy/speced/guid/idea/letters/2004-4/dunn102804compliance4q2004.pdf

Stay-Put and provision of FAPE, etc. during stay-put.

- 04/12/07 OSEP Letter, Alexa Posny to Mary D. Watson, dated 04/12/07, related to the proper development of an IEP during stay-put.

This letter provided clarification of IDEA's Part B requirements regarding annual review of a child's IEP while administrative or judicial proceedings regarding a complaint are pending, stating:

"Section 300.518(a) provides that "[e]xcept as provided in §300.533, during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing under §300.507, unless the State or local educational agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement." 34 § CFR 300.518(a). The State and its public agencies must ensure that a free appropriate public education is made available to a child while administrative or judicial

proceedings regarding a due process complaint are pending. 34 CFR §§ 300.101 and 300.17. There is nothing in the regulation at 34 CFR §300.518 that relieves a public agency of its responsibility under 34 CFR §300.324(b)(1) to convene a meeting of the IEP Team, periodically, but not less than annually, to review, and if appropriate, revise, an IEP for a child with a disability, even if the public agency is required to maintain the child's current educational placement while administrative or judicial proceedings are pending."

"If the new IEP that the IEP Team develops for the child for the current school year is different from the IEP developed for the child when pendency attached to the child's current educational placement, the public agency ***must ensure that the child receives the complete program of special education and related services contained in the IEP developed for the child when pendency attached, unless the parents and the public agency otherwise agree."*** (Pages 1-2)

Clearly this does not contemplate removing G.M. from the stay-put placement, refusing to provide a replacement provider when the LEA will no longer pay the current available provider, refusing to provide services altogether and failing or refusing to follow or comply with the IEP process.

http://www2.ed.gov/policy/speced/guid/idea/letters/2007-2/watson041207stayput2q2007.pdf

Least Restrictive Environment (LRE)

- 10/28/04 Letter, Stephanie Smith Lee to Honorable Randy J. Dunn.

This letter addressed withholding of LEA IDEA funds pursuant to findings that an LEA or state agency had failed to comply with an applicable Part B requirement and the notice and hearing requirements before the withholding such funds. This letter demonstrates that funds may be withheld if an "LEA or State agency is not complying with a particular Part B requirement. . . ". (Letter, Page 2)

In addition, Question 2 discusses what other mechanisms are available for an SEA to provide special education and related services directly to children with disabilities in an LEA when an SEA has determined that a local education agency is unable or unwilling to do so, noting

> "The regulations provide, at 34 CFR §300 .360(c) [§300.227(b)], that the SEA may provide special education and related services directly, by contract, or through other arrangements, and at 34 CFR §300.361, in the manner and at the location it considers appropriate (including regional or State centers) . However, the manner in which the education and services are provided must be consistent

with the Part B statute and regulations (***including the least restrictive environment provisions of §§ 300.550-300.560) [300.114-300.120***]." (Letter, at pages 2- 3)

http://www2.ed.gov/policy/speced/guid/idea/letters/2004-4/dunn102804compliance4q2004.pdf

- 11/30/07OSEP Letter, Patricia Guard to Mr. Tom Trigg, dated 11/30/07

This letter related to student placement in accordance with least restrictive environment (LRE) which is not to be based on factors such as an LEA's service delivery configuration. The letter states "The overriding rule is that placement decisions must be determined on an individual, case-by-case basis, depending on each child's unique needs and circumstances and based on the child's IEP. In all cases, however, placement decisions must not be made solely on factors such as category of disability, severity of disability, availability of special education and related services, configuration of the service delivery system, availability of space or administrative convenience."

http://www2.ed.gov/policy/speced/guid/idea/letters/2007-4/trigg113007lre4q2007.pdf at pages 1-2

Dry Creek's efforts to remove the stay-put provider and its subsequent claim that G.M. was required to return to school violates the principle of LRE. CDE's failure to enforce stay-put also resulted in a denial of G.M.'s right to be in his LRE, without access to appropriate services on the full continuum of placements and without services at all.

Despite CDE's multiple complaint investigations, findings and orders for compliance (and perhaps as a result of CDE's serial failures to hold the LEA accountable with meaningful enforcement action),[6] the District's continued failure to honor the stay-put and fund the District's chosen provider, Ms. Coutchie, not only documents and substantiates the LEA's noncompliance, but confirms CDE's failure to take effective steps to enforce IDEA, its assurances to the U.S. Department of Education notwithstanding. It has failed under §1412 (in terms of ensuring policies and procedures, as well as its general supervisory responsibilities), and under §1413 (to ensure funding and payment when an LEA fails to do so), and clearly has failed in its overall monitoring and enforcement pursuant to §1416. The State of California's noncompliance with its obligations under the IDEA is confirmed without question.

[6] CDE received subsequent complaints from the parents reaffirming that past violations supposedly addressed and corrected were still ongoing. When receiving notice of such continuing violations, CDE classified them as *new* violations, opened *new* complaints and addressed them with *new* timelines. This was CDE's attempt to create the impression of resolution, while ignoring the ongoing nature of the noncompliance and only further delayed meaningful resolution. It also gave the appearance of compliance, both for the LEA and CDE, when the exact opposite was the case. It also emboldened the LEA to ignore any sort of compliance directive out of CDE as meaningless.

California Guidelines to LEAs with Regard to Obligations for Funding and Compliance

California has guidelines for the provision of local education agency grants.

http://www.cde.ca.gov/sp/se/as/leagrnts.asp

Like the U.S. DOE, California also routinely provides notice of and guidance to LEAs regarding their obligations to comply with IDEA and CA Education Code requirements.

http://www.cde.ca.gov/sp/se/lr/ofclmem.asp and
http://www.cde.ca.gov/sp/se/lr/sspim032709.asp.

Specific letters which reflect California LEA obligations relevant to the facts of G.M.'s education include:

- April 18, 2000 – Letter, from Dr. Alice D. Parker, Assistant Superintendent to Special Education Local Plan Area (SELPA) and State-operated Programs (SOP) Directors/Administrators, Special Education Administrator at County Offices (SEACO)

This letter includes the following statement:

> CDE currently monitors local education agency (LEA) compliance through individual compliance complaint investigations, the coordinated compliance review, and the quality assurance process. This is to advise you that prolonged and substantial noncompliance, determined through any of these methods of monitoring or investigation, will not be tolerated.
>
> CDE intends to implement appropriate sanctions as a means to ensure compliance with required corrective actions, including:
>
> > Withholding state and/or federal special education funds (5 *CFR* section 4670(a)(1); 20 *USC* section 1413(d)(1).)\
> >
> > Disapproving a local plan (*EC* section 56205).
> >
> > Seeking court enforcement of corrective actions *Code of Civil Procedures* section 1085; 5 *California Code of Regulations* section 4670(a)(3).
> >
> > http://www.cde.ca.gov/sp/se/lr/om041800.asp.

CDE had full authority to implement appropriate sanctions in this matter, but failed to do so, despite its statements to LEA of its intent to do so and despite assurances, noted above, provided to the U.S. Department of Education.

- 03/27/07 Letter, Mary Hudler To: Special Education Local Plan Area (SELPA) and State-operated Programs (SOP) Directors/Administrators

This letter related to special education and related services/designated instruction and services required to ensure a free appropriate public education for children with disabilities noted the responsibility of the State Superintendent of Public Instruction for the provision of services to children with disabilities and also stated:

> "Individuals with exceptional needs may not be denied access to programs and services due to any agency's failure to act or due to an issue of fiscal resources. [20 U.S.C. 1412(a)(12) and 34 *C.F.R*. 300.154]"
>
> http://www.cde.ca.gov/sp/se/lr/om032707.asp,

Presumably, an "agency" would include both Dry Creek and CDE, however, as of today's date, G.M. has been "denied access to programs and services" due to the failure to act by both Dry Creek and CDE.

- 03/27/09 Letter, Jack O'Connell to County and District Superintendents, Charter School Administrators, Principals, Special Education Local Plan Area Directors, and Nonpublic School Directors

This letter from the State Superintendent of Public Instruction related to "Service Delivery for Students with Disabilities" indicated:

> "In a desire to close the achievement gap and meet federal and state requirements, many districts and schools are implementing the latest research-based practices that ensure students are successful in school. . . This letter provides clarification about delivering services to students with disabilities and how to effectively implement laws and regulations to meet compliance requirements.
>
> **Basic Legal Requirements**
>
> Local decisions concerning changes in service delivery must be guided by, but not limited to, the following legal requirements:

- All individuals with exceptional needs, as defined in California *Education Code* (*EC*) Section 56026, *must receive a free appropriate public education (FAPE)* ***in the least restrictive environment (LRE)*** (*EC* Sections 56000[a] and [b], 56040, and 56040.1)

- *Any changes to services provided to students with IEPs must be* determined by the IEP team, ***agreed to by the parent*** and documented in the IEP. . .

- *Procedural safeguards must be provided as required in state statute and regulations* [*EC* Sections 56500 through 56509 and Title 5, *California Code of Regulations (CCR*), Sections 4600 through 4670]. You can find a brief summary of procedural safeguards for students with disabilities receiving special education services on the California Department of Education (CDE) Parents' Rights Web page at http://www.cde.ca.gov/sp/se/qa/pssummary.asp

- The local educational agency (LEA), county office of education (COE), and Special Education Local Plan Area (SELPA) must meet all applicable state and federal laws, regulations, and policies (*EC* Section 56205)

- *Each SELPA shall ensure that a* ***continuum of program options*** *is available* to meet the needs of individuals with exceptional needs for special education and related services (*EC* Sections 56360 through 56361)

  http://www.cde.ca.gov/sp/se/lr/sspim032709.asp

This letter confirmed G.M.'s right to continue to receive services in his LRE, particularly as that was his stay-put placement and his progress in closing his reading gap was ongoing. Dry Creek failed to comply with this significant right and in fact took steps to eliminate it.

This letter also confirmed the importance of parent agreement to the IEP process in general (including with regard to the IEP developed pursuant to the Settlement Agreement which the Marcheses were denied the right to participate in), as well as with regard to the principle of stay-put which highlights the significance of the protection parent agreement is to ensuring the maintenance of the then-current placement. Again, both Dry Creek and CDE wholly disregarded the guidance of this document.

As well, Dry Creek and CDE's failure to ensure that G.M. continued to receive direct instruction in the private placement the parties agreed to through the pendency of proceedings documented a failure to make available the full continuum of program options.

- 12/24/10 Letter, Fred Balcom (Director, Special Education Division) to County and District Superintendents, Special Education Local Plan Area Directors, Special Education Administrators at County Offices, Charter School Administrators, Principals and Nonpublic School Directors.

This letter has already been addressed in App. 1, related to LEA Responsibilities for Ensuring the Continuous Delivery of Mental Health Services for Students with Disabilities. (*See,* App. 1 at pages 50-54). It was the latest in a series of letters first issued on 08/02/04 from Alice Parker and then subsequently updated on 03/05/10 by Mary Hudler, with recent notices issued by Fred Balcom in connection with the *A.C. v. Schwarzenegger* litigation on 10/18/10, 11/05/10 and 12/24/10. from Alice Parker from http://www.cde.ca.gov/sp/se/lr/om122410.asp, Update: LEAs' Responsibilities for Ensuring the Continuous Delivery of Mental Health Services to Students with Disabilities).

As noted in App. 1, CDE came out forcefully in assuring it would take steps against noncompliant LEAs, including the use of sanctions. This same situation was applicable in the Marcheses' case, but no enforcement or sanctions were ever utilized, despite letters by the Marcheses to Fred Balcom and directly to the Superintendent of Public Instruction seeking their assistance and intervention.

California's Quality Assurance Process

As part of its Quality Assurance Process (pursuant to its compliance obligations routinely monitored by the U.S. Department of Education) CDE provides notice to the general public that it is ensuring that students with disabilities receive the programs and services they need, positive results are achieved and procedural safeguards are provided. http://www.cde.ca.gov/sp/se/qa/.

Specifically, it identifies the Quality Assurance Process (Updated 16-Dec-2010). http://www.cde.ca.gov/sp/se/qa/qap.asp, which notes that "The CDE utilizes a comprehensive data system to collect, monitor, and analyze alleged violations to ensure state and federal laws and regulations are implemented including school district complaint (PDF; 49KB; 2pp. | DOC; 66KB; 2pp.) and due process histories. These data are then utilized by the CDE and school districts for SESR and VR processes."

This page also details what the state does when it finds "substantial noncompliance" – i.e., an incident of significant failure to provide a child with a disability with a FAPE, an act which results in the loss of an educational opportunity to the child or interferes with the opportunity of the parents or guardians of the pupil to participate in the formulation of the individual education program, a history of chronic noncompliance in a particular area, or a systemic agency-wide problem of noncompliance. In essence, sanctions are available when noncompliance is related to an individual student or system-wide failures.

Sanctions

When a district, SELPA, or county office of education fails to comply substantially with a provision of law regarding special education and related services, the State Superintendent of Public Instruction may apply sanctions (e.g., special conditions, withholding funds, writ of mandate).

> "Substantial noncompliance" means an incident of significant failure to provide a child with a disability with a FAPE, an act which results in the loss of an educational opportunity to the child or interferes with the opportunity of the parents or guardians of the pupil to participate in the formulation of the individual education program, a history of chronic noncompliance in a particular area, or a systemic agency-wide problem of noncompliance (California *Code of Regulations* Section 3088.1, Outside Source).
>
> http://weblinks.westlaw.com/result/default.aspx?action=Search&cfid=1&cnt=DOC&db=CA%2DADC&eq=search&fmqv=c&fn=%5Ftop&method=TNC&n=1&origin=Search&query=CI%28%225+CA+ADC+S+3088%2E1%22%29&rlt=CLID%5FQRYRLT26468235215182&rltdb=CLID%5FDB65218235215182&rlti=1&rp=%2Fsearch%2Fdefault%2Ewl&rs=GVT1%2E0&service=Search&sp=CCR%2D1000&srch=TRUE&ss=CNT&sskey=CLID%5FSSSA99234235215182&sv=Split&tempinfo=FIND&vr=2%2E0

Although 3088.1 says that the State Superintendent of Public Instruction "may apply sanctions" thus indicating it is not mandatory, what is mandatory is the SEA's obligation to ensure compliance as the QAP confirms ("QAP verifies that students with disabilities receive the programs and services they need, positive results are achieved, and procedural safeguards are provided. This process evolved as the result of a visionary effort to **ensure students with disabilities receive a free appropriate public education (FAPE).** QAP consists of Data Review, Special Education Self-Reviews (SESR), Verification Review (VR), Sanctions, and Technical Assistance.) http://www.cde.ca.gov/sp/se/qa/qap.asp

Therefore, if a student's needs are not being addressed, or his services are not being provided, it is assumed that would constitute the sort of noncompliance that would require the SEA to take all appropriate steps to ensure. The question is why CDE failed to do so and why that failure continues to today, despite its public claims.

LEGAL CASE CITATIONS

A.C. v. Schwarzenegger -

A.C., et al. v. Schwarzenegger, et al., Case No. 2:10-cv-07956-GW-(AGRx),

http://www.publiccounsel.org/tools/assets/files/Stipulation-re-TRO-with-CDE.pdf

http://www.publiccounsel.org/tools/assets/files/District-Court-Order-Re-Stipulated-TRO-with-Local-Defendants.pdf

http://www.publiccounsel.org/press_releases?id=0017

http://www.cde.ca.gov/sp/se/lr/ofclmem.asp

G.M. et al. v. Dry Creek Joint Elementary School District, et al.

G.M. et al. v. Dry Creek Joint Elementary School District, et al., U.S. District Court, Eastern District of CA (Case #: 2:10−cv−00944−GEB−GGH)

"First Amended Complaint" against California Department of Education, Dry Creek Joint Elementary School District, Jack O'Connell, et al. Doc. # 13-14, PACER, U.S.D.C., E.D. California, https://ecf.caed.uscourts.gov/cgi-bin/ShowIndex.pl

See also, OAH Decision in OAH Case No. 2009060940 and OAH Case No. 2009071109, Charles Marson, ALJ. http://www.documents.dgs.ca.gov/oah/seho_decisions/2009060940.pdf#search=Dry%20Creek%20Marson&view=FitH&pagemode=none]

Joshua A.

*Joshua A. v. Rocklin Unified School Dist. (*9th Cir. 2009) 559 F.3d 1036.

http://www.ca9.uscourts.gov/datastore/opinions/2009/03/19/0815845.pdf

http://caselaw.findlaw.com/us-9th-circuit/1214399.html

Mangum v. Renton

> *Mangum v. Renton*, 111 LRP 7023 (W.D. Washington, 2011)
>
> http://docs.justia.com/cases/federal/district-courts/washington/wawdce/2:2010cv01607/170890/20/.

Porter v. Manhattan Beach

> *Porter v. Board of Trustees of Manhattan Beach Unified School District,* 123 F. Supp 2d 1187 (C.D. Cal. 2000); *Porter v. Board of Trustees of Manhattan Beach Unified School District,* 307 F.3d 1064 (9th Cir. 2002), *cert. denied*, 537 U.S. 1194, 123 S.Ct 1303, 154 L. Ed. 2d 1029 (2003).
>
> http://archive.ca9.uscourts.gov/ca9/newopinions.nsf/ADB50EE10F052FC488256C4B007B949E/$file/0155032.pdf?openelement

Also, as noted in the cover letter to Superintendent Torlakson, in a "Memorandum and Order" filed on December 20, 2004 by Judge Gary Allen Feess in *Porter v. Board of Trustees of Manhattan Beach Unified School District,* (unpublished), related to summary judgment motions finding against the public agencies, the Court documented CDE's obligations and its liability for failing to live up to them, stating both CDE and the LEA were found to have clear obligations under the law and were liable when those obligations were not met.

Specifically, at pages 51 et seq., the Court reiterated these obligations stating:

> . . . Under the law, ***the ultimate responsibility for making sure that students in the State of California receive a FAPE rests with the CDE***. . .
>
> . . . The IDEA, regulations promulgated thereunder, and legislative history all make clear that the state educational agency, in this case ***the CDE, has the ultimate responsibility for ensuring that all children within the State of California receive a FAPE*** [citing statute and cases]
>
> . . .***[T]he CDE has the obligation to monitor and enforce compliance with the IDEA,*** including provision of a FAPE by local educational agencies.[Citing statutes]
>
> . . .Upon receipt of notice that a local educational agency has taken, or refused to take action as required by the IDEA, ***a state educational agency may be held liable under the IDEA for its failure to thereafter ensure that the***

local educational agency complies with the IDEA [December 20, 2004 "Memorandum and Order," Part VI,A, pp. 51-52; citing *Gadsby v. Grasmick*, 109 F.3d 940, 953 (4th Cir. 1997)].[7]

Conclusion

Without question, both the SEA and LEA know their obligations, as well as their duty to uphold those obligations, particularly as they relate to their continued receipt of federal funds based on assurances that they are, in fact, complying with the law and living up to their obligations.

While the presumption is that the SEA and LEA make their representations of compliance in good faith, and use the taxpayer dollars they receive, including federal funds, in accordance with the IDEA's requirements, the evidence demonstrates that, in fact, they have not done so through to the present. As a result public funds are being spent for purposes other than what they were intended, without compliance with the laws pursuant to which they are being provided, so that the children for whose benefit the funds were appropriated are not, in fact, benefiting from their use.

This is a matter which demands scrutiny from both the State of California, as well as the U.S. Department of Education, not only for the benefit of this one particular child whose educational rights have been denied, but for the sake of our state's fiscal soundness, for the benefit of the systems that were created to address longstanding denials of the right to appropriate education and for all our children, who are the future of this state and our nation.

[7] With systemically challenged LEAs such as Dry Creek, it appears the SEA fails to take appropriate action as a matter of *policy* to avoid its mandatory duty to ensure compliance under the IDEA. Considering the Court's findings and warning on this point, as well as CDE's persistence in misrepresenting these obligations in many of the cases it subsequently has been involved in (*see,* App. 2, Supplemental Points), CDE appears contemptuous of any authority which seeks to effect compliance and is engaging in a pattern and practice of disregard for the law as well as the rights of California's children under the law.