

John E. Porter  
Deborah Blair Porter  
1156 5<sup>th</sup> Street, Manhattan Beach, CA 90266  
(310) 379-0386 – (310) 372-5795 (fax)

---

August 15, 2012

Deborah Delisle, Assistant Secretary  
Office of Elementary and Secondary Education  
U.S. Department of Education  
400 Maryland Avenue, SW  
Washington, DC 20202

Re: California’s Request for Waiver of Elementary & Secondary Education Act

Dear Assistant Secretary Delisle:

We are parents of two young men who have received their education in California’s educational system during the past two decades. We have become aware of the recent request by California’s State Board of Education (SBE) and State Superintendent of Public Instruction (SSPI) Tom Torlakson, on behalf of all California school districts, for a waiver of certain provisions of the Elementary and Secondary Education Act (“No Child Left Behind” (NCLB)).<sup>1</sup> We understand California is not seeking a waiver in accordance with the U.S. Department of Education’s waiver package offered to states, but instead seeks an alternative waiver of its own devising, which identifies three purported objectives:

1. Ending the ineffective practice of over-identifying schools and districts for program improvement.
2. Giving districts greater spending flexibility to increase student achievement.
3. Transitioning to a single, transparent accountability system.

To achieve these objectives, California seeks a waiver to exempt local education agencies (“LEA”) from certain sections of Title 1 for the 2012-2013 and 2013-2014 academic years. According to Superintendent Torlakson “This request capitalizes on our strengths – our well-established accountability system. It also provides school districts an opportunity to get the relief they deserve now, and the flexibility they need to direct limited funds where they will do the most good.”<sup>2</sup>

We understand that various educational organizations and individuals associated with such organizations have written letters in support of California's request. As concerned parents and as citizens of California who are also concerned about how our tax dollars are being spent, we are writing to express our strong opposition to California's request for a waiver and we urge the U.S. Department of Education to deny its request for the following reasons:

1) We have significant concerns regarding California's request for a waiver, including the validity of the claims it makes in justifying its request;

2) We believe California has persistently failed to ensure meaningful and appropriate progress for students with disabilities, failed to properly assess such students and that its continued delay in developing a proper alternative assessment for such students constitutes a substantive failure of accountability under both NCLB and the "Individuals with Disabilities Education Act" (IDEA); and

3) We believe California's failure to appropriately educate students with disabilities is, in part, a function of its apparently flawed system of service delivery for students with disabilities. At the present time, California provides no guidance to parents, teachers or its LEAs regarding service delivery for students with disabilities. What it has provided in the past has not accurately reflected the law and has led to significant confusion. Complaints by parents and teachers regarding this issue are not being properly addressed or resolved by the California Department of Education (CDE). As a result, students with disabilities are not receiving the appropriate education contemplated by either NCLB or IDEA.

#### 1) Our Concerns regarding California's Waiver Request

California's waiver request claims performance targets established by the law are "unrealistic," yet provides no evidence in support of this claim. It is our understanding that when NCLB was enacted states were well aware performance targets would increase in keeping with the high expectations necessary for continued student improvement. California accepted federal funds under NCLB ostensibly as part of its effort to close the achievement gap in California and was therefore aware of such requirements.

Also, the IDEA states that the education of children with disabilities is made more effective when schools hold high expectations for these children and ensure their access to the general education curriculum in the regular classroom so they can meet not only their developmental goals, but the challenging expectations established for all children and be prepared to lead productive and independent adult lives.<sup>3</sup> In light of California's annual acceptance of federal funds under IDEA, it is undoubtedly aware of such goals and expectations, which are generally applicable to all children. Therefore, the performance targets under NCLB do not seem at all "unrealistic."

Secondly, California claims spending flexibility will somehow increase student achievement, yet again provides no substantive evidence for this claim. The examples of activities for which it claims flexibility is needed, i.e., “targeted tutoring provided by the districts and schools,” “teacher coaching to improve instruction” and “identifying student achievement problems and developing targeted instructional interventions” all appear to be activities that already can be achieved under the law’s requirements. California’s letter seems to supply different titles for what NCLB already requires, e.g., professional development and supplemental educational services.

More problematic in our view is California’s proposal to return funding and control of our children’s education to the same individuals and LEAs that have controlled it in the past and are thus responsible for the current crisis state of California’s educational system. The waiver proposal makes this recommendation without any solid evidence supporting its assurances for improved outcomes, presuming continued funding of NCLB, but with even less accountability than before.

We are aware that significant funds were disbursed to LEAs through federal stimulus dollars a few years ago without significant improvement in outcomes for students with disabilities (or students in the general education population for that matter). To be sure, teachers were retained and jobs saved; but there is no evidence that returning funds to LEAs or giving them greater flexibility will result in improvement for students in California. It would be a different story if LEAs historically spent funds in compliance with both state and federal law and students were experiencing success. Unfortunately, as discussed below, the evidence does not bear this out and these negative results come at a time when anecdotal evidence shows greater numbers of students with disabilities experiencing greater noncompliance at the hands of local education agencies.

California’s third claim is that transitioning back to a “single, transparent accountability system” will somehow improve student achievement. The June 15, 2012 letter’s characterizations themselves belie this notion. Calling it a “robust accountability system that encouraged school improvement” and a “state system that has a proven track record of measuring growth” certainly speaks to this accountability system as a means of measurement, but says nothing of its ability to cause substantive improvement. California provides no evidence that its accountability system - no matter how “robust”- will improve or even affect substantive educational outcomes. In fact, it could be said this “robust” system will do nothing more than enable parents and other stakeholders to watch California’s students with disabilities continue to languish, without making *any* substantive educational progress.

It is the lack of substantive, meaningful educational progress for students with disabilities that California’s waiver letter and its proposals fail to address. We have significant concerns regarding California’s performance in this regard and believe that California’s disability community at large does as well.

## 2) California Fails to Ensure Meaningful/Appropriate Progress for and Assessment of Students with Disabilities.

California's persistent failure to ensure meaningful and appropriate progress for students with disabilities, to properly assess such students and its continued delay in developing a proper assessment constitute a failure of accountability under both NCLB and the IDEA.

The June 15, 2012 letter states California's current accountability system arose from the "Public Schools Accountability Act of 1999" which, among other things, required schools to demonstrate improvement for all numerically significant student groups, including students with disabilities. Under "Outcomes to Date" it points to a 19% increase in the number of students scoring proficient or advanced in English-language arts over an eight year period (35% in 2003 to 54% in 2011) and a 15% increase in Math (35% in 2003 to 50% in 2011) as "strong progress on closing the achievement gap" for all students. At this rate, it will be 2019 before three-quarters of California students will be proficient in English-language arts and 2027 before ALL students will be proficient in that subject area. In Math, it will take even longer, with hopefully two-thirds of our students proficient in Math by 2019; 80% proficient in 2027 and 2035 before 95% of California's students will score proficient in Math.

Also under "Outcomes to Date," none of the "numerically significant student groups" are specifically mentioned, presumably as they are subsumed in what the letter characterizes as "California's most vulnerable students." This description, telling in its vagueness, confirms that California does not wish to be accountable for the performance of these subgroups or which of these groups is, in fact, its most vulnerable. Yet, California's June 15, 2012 letter claims this undefined group showed "major improvement" and "the percent of students scoring at the lower level of achievement decreased by 13 percentage points [from 2003-2011], from 32 percent in 2003 to 19 percent in 2011." In other words, moving 13% of this "vulnerable" population from "far below basic" to "below basic" over the span of eight years is seen as "major improvement." This may explain why California believes NCLB targets are "unrealistic."

California's record of educating and assessing students with disabilities is dismal despite both state and federal laws enacted to ensure their progress. Its failure to specify data with regard to this subgroup is simply an attempt to avoid identifying how poorly California students with disabilities are actually faring.

### California's History of Assessment of Students with Disabilities

On the 1998 National Assessment of Educational Progress (NAEP), California 8<sup>th</sup> grade students with disabilities scored: 78% Below Basic in reading; 22% At or above Basic; 4% At or above Proficient and those scoring Advanced rounded to zero.<sup>4</sup>

In 1999, California enacted the “Public Schools Accountability Act of 1999” (PSAA). The “primary goal of California’s accountability system is to measure and report on the academic achievement of California’s 6.3 million public school students enrolled in nearly 10,000 schools in more than 1,000 local educational agencies (LEAs)”. Its system is based both on state requirements and federal requirements established by the Elementary and Secondary Education Act.”<sup>5</sup>

According to an August 24, 2000 OSEP Memorandum, Judith Heumann (Assistant Secretary, OSERS) to State Directors of Special Education, “Requirements for including all children in assessments are based on a number of federal laws, including Section 504 of the Rehabilitation Act of 1973 (Section 504), Title II of the Americans with Disabilities Act of 1990 (ADA), Title I of the Elementary and Secondary Education Act (Title I), and the Individuals with Disabilities Education Act Amendments of 1997 (IDEA)”.<sup>6</sup>

In 1999, California also enacted Education Code (EC) §60850(a) authorizing the development of the California High School Exit Examination.<sup>7</sup> This law provided “In California, all high school students must pass a test to earn a high school diploma. The test is called the CAHSEE.” The CAHSEE’s “primary purpose” was “(1) to significantly improve student achievement in public high schools and (2) to ensure that students who graduate from public high schools can demonstrate grade-level competency in reading, writing and mathematics.”<sup>8</sup>

In 2003, SB 964 was passed calling for recommendations for an alternative to the CAHSEE for students with disabilities.<sup>9</sup> In 2006, then SSPI Jack O’Connell’s “Framework for Closing California’s Achievement Gap” (Figure 1) confirmed the continuing substandard performance of students with disabilities, and citing to California’s Standardized Testing and Reporting (STAR) Program for 2006 confirmed that while California’s highest scoring subgroups had upwards of 64% of students reporting Proficient and Above on the California Standards Test (CST) in Reading and 67% in Math, only 13% of students receiving special education scored Proficient in Reading and only 16% reported Proficient in Math, a gap of 51 percent between students with disabilities and California’s highest achieving subgroups.<sup>10</sup>

In 2008, pursuant to a settlement in *Kidd v. California*, SSPI O’Connell commissioned a study to determine why some senior students receiving special education were not passing the CAHSEE.<sup>11</sup> That year, AB 2040 required the convening of a panel to make recommendations regarding alternative means to satisfy the HSEE requirements for eligible pupils with disabilities.<sup>12</sup>

In July 2009, ten years after the CAHSEE’s passage, ABX4 2 enacted EC §60852.3, which beginning in 2009-2010 would exempt an eligible student from meeting the CAHSEE requirement as a condition for graduation until the State Board of Education either implemented

an alternative means for students with disabilities to demonstrate achievement in the standards measured by the CAHSEE or determined an alternative means of assessment was not feasible.<sup>13</sup>

A year later, on July 14, 2010, SBE determined that alternative means to the CAHSEE *were feasible* and in February 2011 adopted regulations extending the implementation regulations date for alternative means from January 1, 2011, to July 1, 2012.<sup>14</sup>

On February 6, 2012, CDE issued an “update” regarding students with disabilities and the CAHSEE stating while SBE had determined in July 2010 that alternative means were feasible and had adopted regulations in February 2011 establishing July 1, 2012 as the implementation date for alternative means, CDE would take proposed regulations to SBE in March 2012 to extend the regulatory implementation date to January 1, 2013 and was also sponsoring legislation to extend the implementation date of alternative means to July 1, 2015.<sup>15</sup>

On February 15, 2012, AB 1705 was introduced in California’s Assembly to delay implementation of the CAHSEE alternatives until July 1, 2015. An analysis of the CDE-sponsored legislation acknowledges that “Pupils with disabilities encounter particular difficulties in meeting the high school exit exam requirement for high school graduation,” and citing the CAHSEE 2011 Evaluation Report noted while there had been “some improvement” for students in special education, less than one quarter met the CAHSEE requirement in grade 10 and “only 53% of pupils receiving special education services in the Class of 2010 met the CAHSEE requirement by the end of their senior year.”<sup>16</sup> While AB 1705 would delay implementation until July 1, 2015, the SBE retained the ability, through regulation, to extend this date two years further, through 2017.<sup>17</sup>

California’s current 2011 NAEP results for 8<sup>th</sup> grade students with disabilities show that 80% score Below Basic in reading; 20% score At or above Basic; 3% score At or above Proficient and those scoring Advanced round to zero. Comparing California’s 2011 results with the 1998 scores of 8<sup>th</sup> grade students with disabilities in reading shows that this subgroup has regressed.<sup>18</sup> A May 11, 2012 draft report presented to the SBE and California’s Advisory Commission on Special Education (ACSE) by Tom Parrish (American Institutes for Research) confirmed these figures and stated “California ranks 48<sup>th</sup> nationwide with 24% of students with disabilities having a basic or advanced status in 4<sup>th</sup> and 8<sup>th</sup> grade reading and mathematics.”<sup>19</sup>

California’s 2011 CAHSEE results (the measure used for NCLB), corroborates the lack of progress by students with disabilities receiving special education: statewide only 39% of special education students passed the English-Language Arts (ELA) portion and only 40% of these students passed the Math portion of the CAHSEE. In comparison, 82% of “All Students” passed the ELA portion, while 83% of “All Students” passed the Math portion, reflecting a gap of 43% percent between students receiving special education and “All Students.” (Even English Learners, the next lowest performing group did better than students receiving special education, scoring 44% (ELA) and 56% (Math), respectively).<sup>20</sup> Perhaps it is this continued poor

performance of students with disabilities that is behind California's removal of the CAHSEE as a measure of accountability for students with disabilities, despite California's original intent in enacting the CAHSEE and its use as part of California's accountability under NCLB.

Despite this documented poor performance, California's APR FFY 2010 (submitted April 2012 to U.S. DOE) states "In school year 2009–10, approximately seventy-four percent (74.4%) of students with disabilities graduated with a high school diploma."<sup>21</sup> The APR further states "The data show that there was a significant increase in the graduation rate for students with disabilities from 64.8 percent in 2008–09 to 74.4 percent in 2009–10. This 74.4 percent graduation rate meets the fixed growth target (67.06%) and the variable growth target (66.98%). The CDE continues to support schools and LEAs with ongoing technical assistance in a variety of areas that support increased graduation rates including graduation standards, standards-based IEPs, transition to higher education planning models, and curriculum and instructional strategies."

California's APR asserts that "The requirements to graduate with a regular diploma in California are *the same for all students*. In addition to meeting the district's requirements for graduation, *all students are required to pass the California High School Exit Exam (CAHSEE) to earn a public high school diploma. [EC 60850 (a)]*" (emphasis added) Unfortunately, nowhere does California's APR explain how California's students with disabilities can continue to perform so poorly, failing to pass the assessment which "all" California students are required to pass, and yet such a high percentage of them are graduating from California's high schools.

Earlier this year, the California Association Parent Child Advocacy (CAPCA) expressed concerns to the legislature regarding how CAHSEE exemption provisions intended to protect students with disabilities from tests that did not actually measure their subject matter competency have been transformed in practice into overreaching policies of issuing "diplomas" to students who do not have, and in some cases do not have the capacity to acquire, the skills California has designated as essential for high school graduation.<sup>22</sup> CAPCA noted that "While some districts continue to respect the distinction between certificate of completion and diploma tracks, and fulfill their obligation under federal law to continue services for students past normal secondary school age who have not yet met, or cannot meet, traditional diploma requirements, others are taking advantage of the extended exit exam suspension to terminate services prematurely. This is happening both for students who need a little more time to complete graduation requirements legitimately, and for students for whom diplomas never would have been considered five or ten years ago due to the severity of their disabilities."

On February 21, 2012, CDE issued "Findings of Emergency" regarding the CAHSEE Alternative Means, noting the SBE found an emergency existed and emergency regulations were necessary to "avoid serious harm to the public peace, health, safety, or general welfare, especially for students with disabilities (SWD)." Calling such regulations a "crucial component" of the process SBE was undertaking to implement an alternative means to the CAHSEE to allow

such pupils to demonstrate competency in reading, writing, and mathematics, these “Findings” noted various actions SBE had taken during the two year period May 2009 to October 2011, while it still failed to devise an alternative assessment.<sup>23</sup>

Ironically, the emergency regulations also state “Students with disabilities who have IEPs are required by the IDEA to participate in statewide assessments” and “extending the implementation date through the emergency regulations will enable local education agencies (LEAs) to meet the requirements of the Individuals with Disabilities Education Act (IDEA).” It is unclear how delaying implementation of the alternative assessment, i.e., *continuing to deny students with disabilities access to an appropriate assessment*, meets the IDEA requirement for the participation of students with disabilities in statewide assessments.

Under “Facts Explaining the Failure to Address the Situation Through Nonemergency Regulations” CDE noted “the need of local education agencies (LEAs) to prepare timely IEPs and remain in compliance with the federal IDEA,” and that it was “necessary to implement regulations extending the present July 1, 2012 timeline to January 1, 2013.” Again, CDE apparently does not see any contradiction in the resulting denial of FAPE under IDEA, the violation of Section 504, or in the substantive failure to ensure students can make progress the delay itself creates. Nowhere does CDE address the “serious harm” to the lives of students with disabilities and their families from its failure to do its job during the past 14 years by ensuring these students can make adequate progress in the curriculum and participate in assessment of that progress in a manner that ensures accountability.

California claims assessment of students with disabilities is “feasible,” yet it wants to push assessment off as far as 2017, despite the fact that such assessment is foundational to California’s participation in NCLB as well as CA’s own accountability measures of student progress. This means an entire school generation of children born at the time of the 1999 passage of the CAHSEE will have passed through California’s K-12 system and yet California is *still* incapable of measuring all our students’ access and progress in the state standards. Students with disabilities are being denied a right routinely enjoyed by their typical peers, i.e. a diploma that means something.

Since students with disabilities are “exempted” from passage of the CAHSEE and the only “alternative” has been continually delayed, where is there accountability for California’s abject failure to educate its students with disabilities? What evidence do parents have that California has even begun to appropriately address the needs of students with disabilities or that it is *providing these children with any appropriate instruction at all?*

This is not only a failure of accountability under NCLB; this is evidence of a denial of the rights of California’s students under the IDEA. That students with disabilities are not learning sufficiently to pass the CAHSEE means they have not learned what they need to in order to successfully progress from grade to grade and master California’s most basic standards (reading,



writing, math) and/or they are not receiving sufficient or appropriate accommodations per their disability including through an alternative assessment. Even by the relatively low standard set in *Rowley*, a seminal special education case which measures a student's receipt of a FAPE by their successfully passing from grade to grade, California's failure to remedy this problem for students with disabilities seems a *prima facie* showing of denial of FAPE for every such student in California who has been unable to pass the CAHSEE. A condition of California's receipt of federal assistance under IDEA is that it provides assurances FAPE is available to every student receiving special education. This cannot be the case in California under these circumstances. It is difficult to understand how California continues to receive federal funding under both NCLB and IDEA as if it were compliant with both laws.

In OSEP Memorandum 00-24, dated August 24, 2000, Judith Heumann stated: "Assessment is often associated with direct individual benefits such as promotion, graduation, and access to educational services. *In addition, assessment is an integral aspect of educational accountability systems that provide valuable information which benefits individual students by measuring individual progress against standards or by evaluating programs. **Because of the benefits that accrue as the result of assessment, exclusion from assessments on the basis of disability generally would violate Section 504 and ADA.***"<sup>24</sup> (emphasis added)

California's record is one of exclusion, delay, and avoidance of accountability while California's students with disabilities fail to make progress. Fourteen years after the CAHSEE was enacted, California is no closer to meaningful assessment for students with disabilities or accountability for their lack of documented progress. That California's June 15, 2012 letter fails to even mention students with disabilities in this context is evidence of its avoidance of accountability. Its request for a waiver should be denied on that basis alone.

We believe California's request for a waiver suggests California has been emboldened by the historical lack of accountability it enjoys despite its poor record in educating and assessing California's students with disabilities. By seeking this waiver, it is now proposing to use the same sort of "delay tactics" in the education of general education students and other struggling subgroups, pushing off accountability while continuing to receive federal funds to solve its budget crisis.

### 3) California's System of Service Delivery for Students with Disabilities is Flawed.

California's persistent failure to appropriately assess students with disabilities has been compounded by California's lack of leadership and abdication of responsibility in its delivery of special education services to students with disabilities. This has resulted in the denial of services to a vast number of California students with IEPs.

Recent problems with service delivery issues in California revolve around "specialized academic instruction," (SAI). Ostensibly based on the IDEA regulation 34 CFR §300.39, the

term SAI, in the words of one teacher group, has been “hijacked” in a manner that is detrimental to California’s students with disabilities and their teachers.<sup>25</sup>

During the 2010-2011 school year California’s ACSE reported stakeholder groups were expressing “concern about the struggles school districts are having with budget constraints while implementing changes in the delivery of appropriate special education instruction to students with disabilities.” ACSE’s 2011 Annual Report noted “specialized academic instruction (SAI)” was one of the new models of service delivery districts were exploring and both stakeholders and ACSE commissioners felt these new models were creating confusion about appropriate service delivery.<sup>26</sup>

ACSE recommended that CDE issue guidance to explain and clarify the continuum of special education services, the purposes of consultant teacher services, resource specialist programs, specialized academic instruction, etc., in the education of students with disabilities.<sup>27</sup> ACSE’s Annual Report linked to CDE’s guidance paper.<sup>28</sup> ACSE stated that given the importance of effective and appropriate service delivery, it would continue to monitor this issue during the 2011-2012 school year.

On January 28, 2011, in response to ACSE’s request, CDE’s Special Education Division posted, “Specialized Academic Instruction (Final).”<sup>29</sup> CDE’s “guidance” identified SAI as “a way of delivering instructional services to students with disabilities,” and an instructional delivery model, not a program, used to describe instructional services on the IEP. It stated the definition of SAI came from IDEA’s 2006 federal regulations (Federal Register/Vol. 71, No. 155/Monday, August 14, 2006, Rules and Regulations, page 46761, 34 CFR §300.39(b)(3)); that “SAI is interchangeable with “Specially Designed Instruction” in the federal regulations;” the term was added to CDE’s CASEMIS data collection system in the 2006-2007 school year; and in 2008-2009, CDE saw an increase in districts using the SAI designation.

CDE’s SAI guidance paper posed the following question: “Can a district collapse the Resource Specialist Program (RSP) and move all of these students to general education to receive SAI from general and special education teachers?”

The guidance responded:

Some service delivery issues and guidance are given in the memorandum from Jack O’Connell, dated March 27, 2009 located at the CDE Web page <http://www.cde.ca.gov/sp/se/lr/sspiofclmem.asp>. “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. As a means to effectively utilize personnel, some special education teachers are being asked to instruct students with and without an Individualized Education Program (IEP). If there are changes occurring in the manner of how instructional programs are delivered, including special education

services, it is necessary that these practices remain compliant with federal and state laws and regulations. This letter provides clarification about delivering services to students with disabilities and how to effectively implement laws and regulations to meet compliance standards.”<sup>30</sup>

On May 2, 2011, CDE updated State Superintendent O’Connell’s guidance letter with a memorandum signed by Fred Balcom, Director of Special Education regarding “Service Delivery for Students with Disabilities.”<sup>31</sup> This May 2, 2011 Memo reiterated SSPI O’Connell’s March 29, 2009 letter regarding districts and schools implementing the latest research-based practices, as well as the increasing practice of LEAs having special education teachers instruct students with and without an IEP. Again, CDE warned that changes in the manner of delivery of instructional programs, including special education, had to remain compliant with federal and state laws and regulations, including caseload and credentialing requirements.

CDE’s May 2, 2011 Memo specifically discussed the “specialized academic instruction field” which described “instructional time a student is removed from the regular class of either less than 21 percent or more than 60 percent of the school day.”<sup>32</sup>

Unfortunately, it appears CDE’s “guidance” has been ineffective. Continuing problems have been raised by teacher groups in California. In the “Winter 2012” Edition of the California Association of Resource Specialists (“CARS+”) “Special Educator” magazine, Editor Robert Hamilton discussed these problems in an article “SAI: educational Darwinism or the next dragon to slay?” Noting tighter education budgets, CARS+ reported activities seen in the evolution of RtI by LEAs looking for creative ways to make education dollars stretch further:

“In no time at all, this [RtI] was “creatively” altered to mean putting a group of lower-performing students into a Special Education classroom, and expecting the single Resource Specialist to provide a wide range of remedial services as well as fulfill his or her own students’ IEP goals.

“More recently, the popular acronym has been SAI, or “Specialized Academic Instruction.” SAI began as a term meaning neither more nor less than what it says, which describes exactly what we as Special Educators do every day. But, like RtI, without a specific definition, it became the tool for districts to push through all kinds of “creative” ideas.

“CTA has data from 5600 members collected in a recent survey, as well as 2000 personal testimonies from California educators, which indicate this is a growing and pervasive issue in California schools. CARS+ Region Directors also receive a stream of inquiries and complaints about the ways that schools are using SAI to change the fundamental structure of Special Education Services.”<sup>33</sup>

In May 2012, the California Teachers Association (“CTA”) published an article on its website detailing programs and services for students with disabilities disappearing to save money, all under the guise of districts having a “new way” of doing business; examples of districts arbitrarily changing a student’s IEP without notifying members of the IEP team or doing so after the fact; and warned of districts engaging in such activities after hiring outside firms ostensibly to “evaluate” special education programs or after administrators had attended conferences on cutting costs in special education.<sup>34</sup>

CTA’s article was even more to the point: “By changing the name of a special education program to Specialized Academic Instruction, districts can circumvent requirements regarding services, resources and limits on student numbers. Educators say districts “hijacked” the term to replace programs like resource specialist programs, which are more expensive.”

CTA further described SAI as “a catch-all to describe a variety of instructional services on a student’s IEP. Districts are cutting programs, moving most special education students to general education classes and labeling it SAI, as if it were really a program. The end result: General education teachers are assigned students with disabilities without receiving the proper training, a manageable class size or supports like paraprofessionals to help them.”<sup>35</sup> CTA also prepared a report, “Special Education in California,” posted on its website detailing the problems being experienced by educators and students in California.<sup>36</sup>

CDE’s response has been a perplexing lack of leadership for a state educational agency. As of July 2012, CDE’s “SAI FAQ” guidance paper prepared per ACSE’s request for clarification has been removed from CDE’s website, and in its place the message: “The requested web page was **NOT FOUND** on the California Department of Education Web site. There is either a misspelling in the Web site address you entered, or the requested Web page has moved or is no longer available.”<sup>37</sup> SSPI O’Connell’s March 2009 Letter has also been removed<sup>38</sup> as has Director Balcom’s May 2, 2011 letter.<sup>39</sup> Both of these web pages state “The preceding letter is no longer current or accurate – an update will be available June 2012. (Updated 03-Apr-2012)”. An e-mail inquiry to CDE regarding when these pages would be updated was sent in early July. On July 5, 2012, CDE staff responded “The page you are interested in is still being updated. A new statement regarding the anticipated availability of that document will be posted soon.”

CDE has removed the vast majority of California’s public “guidance” on service delivery for students with disabilities from its website to be “updated” and “posted soon.” Most likely, this is due to increasing complaints by stakeholders, ACSE, California’s resource specialists and teachers among others. Unfortunately, this leaves parents and educators in the dark, particularly since what remains on CDE’s website regarding SAI is at best misleading and as the complaints have stated “confusing.” The following are two forms remaining on CDE’s website which deal with SAI:

1) CDE form “Environment for Services” (January 2012)

This document purports to provide a “graphic representation of an IDEA-based continuum of potential service environments.” It references “Specialized Academic Instruction based on students’ IEP goals” and lists such services in the “Special Classes” column and the most restrictive environment, “Special classes serving students with disabilities.” It also identifies “Academic instruction based on state standards” under the columns headed “Regular education classes.”<sup>40</sup>

This form purports to address “potential service environments” to ensure all students have access to a free appropriate public education in the least restrictive environment and lists the continuum ranging from “Inclusion” to “Special Classes.” Yet, according to this form SAI is only available in “special classes” serving students with disabilities, giving the impression SAI would not be available in the general education classroom.

2) CDE Form ASP-01a “California Special Education Management Information System (CASEMIS) Service Descriptions” (Rev. May 2012)

At page 2 of this form Code 330 references “Specialized Academic Instruction: [A]dapt[ing], as appropriate to the needs of the child with a disability, the content, methodology, or delivery of instruction to ensure access of the child to the general curriculum, so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children.”<sup>41</sup>

The column marked “Compliance Standard (Legal Requirement)” cites to 34 CFR §300.39(b)(3).

This CASEMIS “Service Description” definition of “Specialized Academic Instruction” purports to cite to 34 CFR §300.39(b)(3), “Specially designed instruction,” but actually only incorporates one subsection of this regulation, i.e., §300.39(b)(3)(ii), omitting §300.39(b)(3)(i), (language underlined below):

“34 CFR 300.39(b)(3) *Specially designed instruction* means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—

(i) To address the unique needs of the child that result from the child’s disability;  
and

(ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.”

In other words, CDE’s guidance omits that part of the regulation which makes it clear that adapting of the content, methodology and delivery of instruction is not only to ensure access to the general curriculum, but also *to address the unique needs of the child resulting from the child’s disability*. This omission seems significant, particularly in light of IDEA’s language related to the purpose of a child’s measurable annual goals in the IEP process:

34 CFR §300.320(a)(2)(i) provides that an IEP is a written statement for a child with a disability developed, reviewed and revised in a meeting in accordance with §§300.320 through 300.324, that must include—

A statement of measurable annual goals, including academic and functional goals designed to—

(A) Meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum; and

(B) Meet each of the child’s other educational needs that result from the child’s disability; . . .”

It is unclear what impact the omission of this language has had on the implementation of the service delivery model CDE has devised. However, as the “Environment for Services” form noted in item 1) above seems to indicate SAI can only be delivered in “special classes,” while “Academic instruction based on state standards” are primarily delivered in “Regular education classes,” at the same time CDE’s definition of SAI incorporates *only* that part of 34 CFR §300.39(b)(3) pertaining to accessing the general curriculum (typically delivered in the general education classroom), it is not surprising educators are confused.

It is also obvious that CDE’s January 2011 “Guidance” paper on SAI, which states: 1) “the definition of SAI came from IDEA’s 2006 federal regulations (Federal Register/Vol. 71, No. 155/Monday, August 14, 2006, Rules and Regulations, page 46761, 34 CFR §300.39(b)(3));” and 2) that “SAI is *interchangeable* with “Specially Designed Instruction” in the federal regulations” is wrong on both counts.

In fact, it appears SAI is more than just a “hijacked” term, it is something of a hybrid misnomer not found anywhere in the law. It isn’t really “*specially designed instruction*” at all, for it appears to limit where students can receive their services, and thus does not comport with the IDEA’s definition of “special education.”<sup>42</sup>

The CDE's failure to accurately cite or interpret the IDEA, combined with its lack of clear guidance, now missing from CDE's website, not only leaves educators confused and frustrated, it leaves parents puzzled, questioning what it means when so much of their child's IEP services are identified as "specialized academic instruction", a vague term found nowhere in the law. It appears CDE may itself be the source of the confusion in the delivery of special education services for students with disabilities.

By failing to provide clear guidance on what service delivery is to school teams and educators, CDE not only has abdicated its legal responsibility as SEA, it leaves educators without the tools they need to effectively plan for their students. It also leaves school districts vulnerable to private outside firms and organizations which exploit this lack of guidance and leadership to create a "new way" of doing business that considers only the financial aspect of education, and not the well-being of students for whom our schools bear responsibility. Such firms have no vested interest or obligation in meeting the unique needs of California's students with disabilities, rather seek to profit by exploiting an LEA's desperate focus on reducing their bottom line at all costs, which unfortunately often includes sacrificing the individualized needs of its students.

CDE's own documents show it is aware of the problems teachers and students are experiencing in school districts across the state when LEAs engage in questionable practices in the delivery of services to students with disabilities. When parents or teachers complain, it is unclear that CDE has been able or willing to properly investigate and resolve such complaints. Instead it simply pulls its confusing guidance.

California's education officials now seek a waiver and flexibility from federal oversight for the very same LEAs which fail to comply with federal and state law, purporting to use "innovative" plans and methods just as they've done with SAI. Approval of California's waiver request will only allow CDE and its LEAs to continue to utilize improper practices and unproven educational techniques, but this time ALL of California's students will experience the same lack of accountability students with disabilities have been subjected to for many years.

### Conclusion

ESEA documents issued this past January 2012 as support for states in their flexibility requests included a PowerPoint entitled "Addressing Students with Disabilities and English Learners."<sup>43</sup> At the very first page of that document, it states: "SEAs Must: Describe how they meaningfully engaged and solicited input from diverse communities and appropriate stakeholders." The guidance also included "Ways SEAs May Strengthen Requests: Actively engage stakeholders at the outset: Flexibility work groups; Consultation action plan."

It does not appear, based on a review of the letters California filed in support of its recent waiver request, that California followed this guidance, as these letters do not appear to reflect input or involvement of any California group which has as their specific focus students with

disabilities, their families or advocates.<sup>44</sup> Given the lack of substantive reference to students with disabilities in the June 15, 2012 letter, there is no evidence California either engaged or solicited input from stakeholders representing the broad range of students with disabilities, their families, parents, teachers and providers who work with them on a daily basis as U.S. DOE suggested.

We have made informal inquiries to individuals associated with various California disability organizations and groups, including ACSE, California Area Boards, California's parent training organizations and others in the disability community. None of those with whom our members have spoken indicate they were consulted regarding the waiver request. In fact, many were surprised to learn of it.<sup>45</sup>

Therefore, California's assertion that it provided educational stakeholders in the state with notice and a reasonable opportunity to respond does not measure up to the standard reflected in U.S. DOE's support for states documentation. In fact, California's assertion is inaccurate and misleading. Unfortunately, at the same time California's action in this regard is consistent with its enduring record of "disappearing" students with disabilities from the discussion. In light of how poorly such students are faring under California's current educational programs, this is not surprising.

LEAs have always had flexibility to improve student achievement, but have failed to do so. Instead of focusing on best practices to improve student outcomes and the needs of their students, they focus on the bottom line, seeking to cut costs at any cost. They use methods that do not serve students or support improved outcomes, but instead result in service delivery systems that do not comply with state and federal law and violate the rights of students and teachers alike. Often, they do so based on the notion that special education is somehow depriving general education, which time and again has been proven false, most recently by the study presented by Tom Parrish to California's SBE.<sup>46</sup> Ironically, both the CARS and CTA articles and reports cited here confirm that these same LEAs spend education funds to pay third parties to come up with these "innovative" methods which violate the law and students' rights.

U.S. DOE is aware of the state of education for students with disabilities in California, as well as California's failure to ensure their access to and progress in California's curriculum and appropriate assessment of same, as data provided annually as part of California's accountability pursuant to NCLB and IDEA demonstrates California's students with disabilities have languished for the past fifteen years. Just a month ago, U.S. DOE issued its annual determination on California's State Performance Plan, finding that while last year California "needed assistance," this year California "needs intervention."<sup>47</sup>

While parents welcome such "intervention," it is far too little and for many students who have been passed along and graduated out of the system, far too late. Also, while DOE's oversight seems focused on the end game, i.e., transition and services and supports of the



transition process (Indicator 13), it ignores the significant and continuing failure of a generation of California's students with disabilities to access the curriculum, make meaningful progress and demonstrate progress sufficient for them to graduate and become the productive members of society the IDEA contemplates. (Indicator 1).<sup>48</sup>

As stated previously, we view this current waiver request as nothing more than California's attempt to apply the methods that have proven so successful in delaying accountability for its historical failure to ensure progress for students with disabilities to the education of ALL of California's students, using misrepresentations and false promises it knows it cannot keep. Approval of California's waiver request will only allow CDE and its LEAs to continue to utilize improper practices and unproven educational techniques without accountability. We strongly urge U.S. DOE not to allow California to do so.

We believe that California's students with disabilities and such students throughout the United States deserve the meaningful enforcement and protections Congress intended under both NCLB and the IDEA and wonder when that enforcement and protection will truly be forthcoming? U.S. DOE needs to hold California accountable under both NCLB and the IDEA and take meaningful steps toward enforcement of California's compliance obligations before it considers any other steps. To do otherwise will allow California to continue to avoid accountability and California's students will suffer as a result.

For all the reasons above, we oppose California's request for a waiver and urge the U.S. DOE to deny it.

Very truly yours,

/s/

Deborah Blair Porter  
California Parent

/s/

John E. Porter  
California Parent

Cc: Arne Duncan, U.S. Secretary of Education  
Michael Yudin, Acting Assistant Secretary, OSERS  
Melody Musgrove, Director, OSEP  
Russlyn Ali, Assistant Secretary, Civil Rights  
U.S. Senator Tom Harkin  
Congressman George Miller  
Tom Torlakson, California Superintendent of Public Instruction  
Michael W. Kirst, President, California State Board of Education  
Fred Balcom, Director, Special Education Division  
Edmund G. Brown Jr., Governor

- 
- <sup>1</sup> California’s June 15, 2012 letter: <http://www.cde.ca.gov/nr/el/le/yr12ltr0615.asp>.
- <sup>2</sup> “California Seeks State-Defined Waiver to Provide Relief from Unworkable Mandates of ‘No Child Left Behind,’” CDE Press Release, May 10, 2012. <http://www.cde.ca.gov/nr/ne/yr12/yr12rel45.asp>
- <sup>3</sup> 20 U. S. C. §1400(c)(5)(A).
- <sup>4</sup> <http://www.cde.ca.gov/ta/tg/nr/careshlts.asp> - See Table 10-B, Eighth Grade Reading Snapshot.
- <sup>5</sup> <http://www.cde.ca.gov/ta/ac/ar/cefaccountability.asp>
- <sup>6</sup> [http://www.wrightslaw.com/law/reports/osep\\_memorandum\\_assessment\\_000824.pdf](http://www.wrightslaw.com/law/reports/osep_memorandum_assessment_000824.pdf) citing to <http://www2.ed.gov/policy/speced/leg/idea/0929-97.pdf>.
- <sup>7</sup> <http://www.cde.ca.gov/ta/tg/hs/cefcahsee.asp>.
- <sup>8</sup> Ibid.
- <sup>9</sup> AB 1705 Assembly Bill – Bill Analysis - [http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab\\_1701-1750/ab\\_1705\\_cfa\\_20120409\\_163201\\_asm\\_comm.html](http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_1701-1750/ab_1705_cfa_20120409_163201_asm_comm.html)
- <sup>10</sup> “Executive Summary – A Framework for Closing California’s Achievement Gap, Pg. 3, Fig. 1 <http://www.cde.ca.gov/eo/in/pc/documents/yro8es0122.pdf>.
- <sup>11</sup> <http://www.sfgate.com/education/article/State-asked-to-study-special-ed-exam-failures-3219709.php>
- <sup>12</sup> [http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab\\_1701-1750/ab\\_1705\\_cfa\\_20120409...](http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_1701-1750/ab_1705_cfa_20120409...)
- <sup>13</sup> <http://www.cde.ca.gov/ta/tg/hs/cahseeabx4.asp>.
- <sup>14</sup> <http://www.cde.ca.gov/ta/tg/hs>
- <sup>15</sup> <http://www.sandi.net/cms/lib/CA01001235/Centricity/Domain/121/Status.of.Alt.Means.Exmpt.2.9.12.pdf>
- <sup>16</sup> [http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab\\_1701-1750/ab\\_1705\\_cfa\\_20120409...](http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_1701-1750/ab_1705_cfa_20120409...)
- <sup>17</sup> Note: Assembly Education Committee staff recommended limiting this extension to one year beyond July 1, 2015.
- <sup>18</sup> <http://www.cde.ca.gov/ta/tg/nr/careshlts.asp> - see Table 10-B, Eighth Grade Reading Snapshot.
- <sup>19</sup> <http://www.cde.ca.gov/sp/se/as/aceag0512.asp> See Item 3, presentation.
- <sup>20</sup> <http://dq.cde.ca.gov/dataquest/cahsee/ExitProg1.asp?cLevel=State&cYear=2010-11&cChoice=ExitProg1&cAdmin=C&tDate=000000&TestType=E&cGrade=10&Pageno=1>
- <sup>21</sup> <http://www.cde.ca.gov/sp/se/qa/documents/aprffy2010.doc>
- <sup>22</sup> AB1705 Assembly Bill – Bill Analysis - [http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab\\_1701-1750/ab\\_1705\\_cfa\\_20120409\\_163201\\_asm\\_comm.html](http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_1701-1750/ab_1705_cfa_20120409_163201_asm_comm.html)
- <sup>23</sup> <http://www.cdcan.info/sites/default/files/2012-03-09%20-%20California%20Department%20of%20Education%20-%20Finding%20of%20Emergency%20-%20CA%20High%20School%20Exit%20Exam.pdf>,
- <sup>24</sup> [http://www.wrightslaw.com/law/reports/osep\\_memorandum\\_assessment\\_000824.pdf](http://www.wrightslaw.com/law/reports/osep_memorandum_assessment_000824.pdf)
- <sup>25</sup> <http://www.cta.org/en/Professional-Development/Publications/2012/05/May-Educate>.
- <sup>26</sup> [http://www.calstat.org/publications/pdfs/EDge\\_Sum11\\_final\\_Insert\\_ACSE\\_report2011\\_web.pdf](http://www.calstat.org/publications/pdfs/EDge_Sum11_final_Insert_ACSE_report2011_web.pdf)
- <sup>27</sup> Ibid.
- <sup>28</sup> [www.cde.ca.gov/sp/se/lr/saifaq.asp](http://www.cde.ca.gov/sp/se/lr/saifaq.asp). (Resulting page states “Page Not Found.”)
- <sup>29</sup> CDE’s guidance document was originally posted at [www.cde.ca.gov/sp/se/lr/saifaq.asp](http://www.cde.ca.gov/sp/se/lr/saifaq.asp). Although the link says “Page Not Found,” this document was located on a non-CDE website [http://api.ning.com/files/\\*B42KAeBiEzqdLLd7v5UDQDufDs5ZtcpgkPE3ud7tG4xZ4oVfccOp-LjXmfora--oWNzqBAPL23LiZolHb66LIR1rYE8XdN/Specialized\\_Academic\\_Instruction\\_final1.pdf](http://api.ning.com/files/*B42KAeBiEzqdLLd7v5UDQDufDs5ZtcpgkPE3ud7tG4xZ4oVfccOp-LjXmfora--oWNzqBAPL23LiZolHb66LIR1rYE8XdN/Specialized_Academic_Instruction_final1.pdf)
- <sup>30</sup> Note that <http://www.cde.ca.gov/sp/se/lr/sspiofclmem.asp> goes to a page which states the preceding letter is no longer current or accurate – an update will be available June 2012 (Updated 03-Apr-2012).
- <sup>31</sup> <http://www.cde.ca.gov/sp/se/lr/om05012011.asp>.
- <sup>32</sup> This “field” appears to refer to fields on the CASEMIS data system, as set forth in CDE’s document entitled CASEMIS “Service Descriptions”. See endnote 41 below)
- <sup>33</sup> “Winter 2012” Edition of the California Association of Resource Specialists (CARS+) “Special Educator” magazine, page 4

---

<sup>34</sup> <http://www.cta.org/en/Professional-Development/Publications/2012/05/May-Educate>.

<sup>35</sup> Ibid.

<sup>36</sup> <http://www.cta.org/specialeducationincalifornia>.

<sup>37</sup> [www.cde.ca.gov/sp/se/lr/saifaq.asp](http://www.cde.ca.gov/sp/se/lr/saifaq.asp)

<sup>38</sup> <http://www.cde.ca.gov/sp/se/lr/sspiofclmem.asp>

<sup>39</sup> <http://www.cde.ca.gov/sp/se/lr/ofclmem.asp>

<sup>40</sup> <http://www.cde.ca.gov/sp/se/ac/documents/srvcarrayfgre.doc>

<sup>41</sup> <http://www.cde.ca.gov/sp/se/ds/documents/asp01a.xls>

<sup>42</sup> “Special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including—(i) Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings and (ii) Instruction in physical education.” 34 CFR §300.39.

<sup>43</sup> <http://www.ed.gov/esea/flexibility/support-for-states>.

<sup>44</sup> <http://www.cde.ca.gov/nr/el/le/documents/supportletters.pdf>

<sup>45</sup> Although CTA, which submitted a letter in support of California’s waiver, includes many teachers who work with students with disabilities, it is not generally considered a stakeholder representative for students with disabilities.

<sup>46</sup> “Special Education Expenditures, Revenues and Provision in California”, Draft dated May 11, 2012.

<http://www.cde.ca.gov/sp/se/as/acseag0512.asp> See Item 3, presentation

<sup>47</sup> <http://www2.ed.gov/fund/data/report/idea/partbspap/2012/ca-aprltr-2012b.pdf>

<sup>48</sup> DOE’s Table responding to California’s 2010 SPP/APR is here:

<http://www2.ed.gov/fund/data/report/idea/partbspap/2012/ca-4response-2012b-final.pdf>. California’s State Performance Plan and Annual Performance Report for the same period can be found here:

<http://www.cde.ca.gov/sp/se/qa/>