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June 1, 2011

Secretary Arne Duncan
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Re: Grayson Marchese - Dry Creek Joint Elementary School District (CA)

Dear Secretary Duncan:

I am writing regarding the education of Grayson Marchese (hereafter "Student" or "G.M."), son of Kevin and Lyndi Marchese, who reside in Roseville, California, within the jurisdictional boundaries of Dry Creek Joint Elementary School District ("Dry Creek" or "District") and Placer County Special Education Local Planning Area.[1]

Enclosed is a letter to State Superintendent of Public Instruction Tom Torlakson (with accompanying Appendices 1 - 4), detailing the Marcheses' difficulties in obtaining an appropriate education for G.M. due to persistent noncompliance by Dry Creek under the Individuals with Disabilities Education Act ("IDEA") and California's Education Code ("EC"). Dry Creek's noncompliance has been fostered by the actions of school district legal counsel and encouraged by the failure of California Department of Education ("CDE") to supervise, monitor and enforce or otherwise take meaningful action against Dry Creek despite the obligations of both agencies under the law.

Dry Creek's noncompliance has left G.M. without school district funded education services or a current Individualized Education Program ("IEP") for almost an entire school year. Dry Creek has failed to pay the educational therapist/reading specialist in G.M.'s last agreed-upon IEP, Suzanne Coutchie, at the same time Dry Creek seeks and receives federal funds based on assurances it is complying with all applicable laws, but instead pays education funds to school district lawyers to fight the provision of services and fund litigation which seeks to set aside IDEA's rights and protections.

[1] This letter is written with the Marcheses' consent to disclosure of G.M.'s educational history.

The letter and accompanying materials sent to Superintendent Torlakson detail Dry Creek's noncompliance, its challenges to IDEA's procedural protections and substantive rights, and its intentional failure to fund G.M.'s services under his IEP. Also detailed is CDE's failure to hold Dry Creek accountable for its persistent noncompliance, despite CDE's obligation to ensure LEA compliance, procedural protections for students and parents as well as G.M's right to a "free appropriate public education" ("FAPE").

When G.M.'s parents challenged CDE's failure to enforce, instead of taking action against Dry Creek, CDE told the family that they were required to once again go to due process to determine G.M.'s stay-put placement which the parties had already agreed to, about which CDE had already issued orders and which OAH had already confirmed in a prior due process hearing. When OAH once again confirmed the stay-put placement, instead of enforcing, CDE encouraged Dry Creek to file a motion with the U.S. District Court with the effect of setting set aside the stay-put. During this same period, CDE filed a Motion to Dismiss in the Marcheses' federal action, seeking to avoid accountability for its failures.

On December 10, 2010, the Court issued an order giving Dry Creek the option of removing and replacing Ms. Coutchie as G.M.'s educational therapist/reading specialist. Dry Creek removed Ms. Coutchie, ***but failed to propose or provide a replacement in compliance with the stay-put placement, the October 2008 Settlement Agreement and IEP and the Court's order.*** Although CDE told the Court it would enforce the stay-put order, CDE has done nothing to require Dry Creek to replace the provider and itself has failed to ensure services are provided to G.M. as required under 20 U.S.C. §1413 when an LEA is either unwilling or unable to do so.

As a result, Dry Creek has ***failed to fund any educational services for G.M. for almost twelve months (an entire school year),*** and G.M. is presently without any district funded services, at the same time Dry Creek receives state and federal funds based on its assurances it is complying with its obligations under IDEA, and while it expends significant taxpayer dollars on legal fees paid to its legal counsel.

On January 3, 2011, the District Court dismissed CDE from the Marcheses' case. Apparently believing CDE's misrepresentations regarding exhaustion, the Court found the Marcheses had failed to exhaust administrative remedies, despite their having pursued due process with regard to G.M.'s right to FAPE, stating that before the Court would entertain consideration of CDE's accountability, the Marcheses were required to pursue due process proceedings against CDE.

Although Appendix 1 relates specifically to G.M.'s case, Appendix 2 details how the actions of school district legal counsel are detrimentally impacting not only G.M.'s right to an appropriate education, but the rights of students throughout the State of California to the education IDEA envisions. Appendix 2 details how LEAs use education funds to hire aggressive legal counsel who seek to eviscerate IDEA's protections; engage in litigation to deny student services; thwart parent involvement in securing appropriate educational services for their children; set aside procedural protections, including stay-put; compromise the State Education Agency's ("SEA") Complaint Resolution Process ("CRP") as well as its overall system of supervision, monitoring and enforcement; and challenge the language and purpose of the IDEA through frivolous legal claims, at the same time parents who have the "right" to be accompanied by counsel, cannot afford counsel to defend against such claims.

This noncompliance goes far beyond standard LEA noncompliance and rises to the level of an intentional denial of services through the use of education funds to hire aggressive legal counsel who utilize "scorched-earth" litigation tactics in the special education context which is supposed to be focused on *securing appropriate services and FAPE*, but instead results in the *denial of FAPE and the elimination of services*.

Although I have written to California's Superintendent Torlakson and Governor Brown asking for their intervention, I am writing to you as Secretary of the U.S. Department of Education ("DOE"), because CDE's actions are not unique to G.M. or Dry Creek and students with disabilities across California are being negatively impacted by districts across the state which regularly use legal counsel for such purposes. Because CDE appears unwilling to enforce against or otherwise effectively hold LEAs accountable, particularly when school districts are represented by legal counsel, CDE is no longer effective in supervising, monitoring or enforcement as LEAs know CDE won't take action against them (and in Dry Creek's case, works with them to thwart parents' efforts and a student's services).

As noted above, not only are students being denied services and FAPE, but CDE's failure to hold LEAs accountable has resulted in districts emboldened to bring frivolous legal challenges designed to set aside IDEA's most fundamental procedural protections. Obviously, this has significant compliance implications for California's students with disabilities, particularly in light of how prevalent the use of school district legal counsel has become in special education. However, this also impacts ALL California students, because education dollars paid to lawyers for litigation instead of for student services and education reduces the funds available for expenditure on ALL California's students.

What is happening to G.M. and his family is strikingly similar to what happened to my son and our family several years ago in our litigation with our school district and CDE.[2] The facts documented in the attached Appendices demonstrate that CDE is simply repeating past mistakes, i.e., failing to hold an LEA accountable under the IDEA and failing to comply with its own obligations under the law; misrepresenting the IDEA's intent and purpose; and failing to ensure the appropriate education of a California student, at the same time state and federal tax dollars are being used to fund and subsidize litigation to fight parents.

While what occurred in my son's case might be considered an isolated incident that wouldn't reoccur, given the Court's findings in our litigation which specifically laid out CDE's obligations and its liability for failing to heed them, what is happening to G.M. and his family shows CDE's past acts were not at all isolated or accidental. Instead, they are part of a pattern and practice CDE engages in with impunity so that what happened to my family occurs again and again to other families, with legal counsel involved in public agency noncompliance which persists without accountability, at both the local and state level.

This should come as no surprise to U.S. DOE. In 2000, the National Council on Disability ("NCD") prepared a report entitled "Back to School on Civil Rights: Advancing the Federal Commitment to Leave No Child Behind" and in its January 25, 2000 cover letter to then President Clinton, noted "that federal efforts to enforce the IDEA over several Administrations have been inconsistent and ineffective" and that "failures to ensure local compliance with Part B requirements continue to be widespread and persist over many years. Enforcement of the law is too often the burden of parents who must invoke formal complaint procedures and request due process hearings to obtain services and supports to which their children are entitled under the law."[3]

In a related article entitled "Ensuring Access to the Legal System" published about the time NCD's report was issued, Lilliam Rangel-Diaz found:

> "The few students with disabilities who get better results are the ones whose parents doggedly fight for their children's statutory rights. With limited access to the legal system, these parents' advocacy for their children is a long and uphill battle. In many cases, it is nearly impossible to achieve what has been guaranteed by law. The irony, of course, is that the Department of Education talks about "empowering" parents and then undermines their efforts at every turn. And if

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[2] *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).

[3] http://www.eric.ed.gov/PDFS/ED438632.pdf

the students and parents are poor, or from non-English-speaking backgrounds, the issues of discrimination, disempowerment, and lack of access to the legal system are even greater.

The NCD report confirms these failures. It states that "enforcement of the law is falling on the backs of parents who too often must invoke formal complaint procedures, including expensive and time-consuming litigation, to obtain the services and supports to which their children are entitled under the law." (*Id.* at 6.) It goes on to say that "many parents, particularly parents with limited resources, are unable to challenge violations successfully when they occur. Even parents with significant resources are hard-pressed to prevail over local education agencies when these agencies and/or their ***publicly-financed attorneys*** choose to be recalcitrant." (*Id.*)" [4]

Unfortunately, the Marchese case confirms that *complaints through California's CRP and due process procedures still don't result in services and supports,* for LEAs make it a practice to avoid providing services, including those ordered by CDE under corrective actions, and instead choose to hire ***publicly-financed attorneys*** who counsel districts on how to fight parents to avoid providing services and delay and defiance of CDE orders.

G.M.'s family has pursued all procedural avenues available to redress grievances under IDEA. Despite confirming Dry Creek's ongoing noncompliance, CDE, the state education agency responsible for resolving such noncompliance, instead essentially linked arms with a noncompliant District to oppose the family. Although the Marcheses' federal case against Dry Creek is pending, trial isn't scheduled until September 2012. In the meantime, CDE has been dismissed from the case and both agencies fail to ensure proper services to G.M. without accountability, while both continue to receive state and federal tax dollars which they use to subsidize their budgets or pay legal counsel to help them avoid their obligations under the law.

Thirty-six years ago, Public Law 94-142 "The Education for All Handicapped Children Act of 1975" was enacted to ensure all children with disabilities "have a right to education," and to "establish a process by which State and local educational agencies may be held accountable for providing educational services for all handicapped children." [5] Millions of dollars in federal grants and assistance have been provided to California, yet educational outcomes for students with disabilities lag significantly behind those of their typical peers. [6] Realistic accountability for noncompliance is virtually nonexistent.

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[4] "Ensuring Access to the Legal System" - Human Rights Magazine, Winter 2000. http://www.americanbar.org/publications/human_rights_magazine_home/irr_hr_hr_winter00humanrights_diaz.html.

[5] *United States Code Congressional and Administrative News 1975* (U. S. C. C. A. N. 1975) at page 1430.

[6] "Executive Summary - A Framework for Closing California's Achievement Gap, Page 3, Fig. 1 http://www.cde.ca.gov/eo/in/pc/documents/yro8es0122.pdf.

As Ms. Rangel-Diaz noted, the majority of parents cannot fight for their student's rights to the extent needed to obtain the most basic educational services. [7] When parents do fight, they suffer retaliation because they dared to assume the law meant what it said in terms of their child's rights. As a result, parents end up believing Congress has played a cruel joke on them by enacting a law with a guarantee of rights and protections that are illusory.

In no other area of education is the enforcement of the most basic rights the burden of those who are supposed to be its beneficiaries, i.e., students with disabilities and their parents. I do not believe this is what Congress intended in enacting the IDEA. By failing to ensure educational services and protections the law is supposed to provide and instead fighting parents, education agencies designated to ensure our children with disabilities have the opportunity to become the productive members of society IDEA envisions instead take steps that ensure our children ***never*** make the academic or social progress the law contemplates, with society left to suffer the loss of significant student and human potential because California and its local education agencies would rather pay education dollars for litigation to fight families than provide students with needed education services.

California's education agencies annually represent to the federal government that funds they receive are expended for the benefit of California's children with disabilities. Instead children are denied the benefit of such funds through the acts of the very agencies empowered to educate them. California's Part B Application to the U.S. DOE, states that CA has in effect policies and procedures to meet all Part B eligibility requirements in Section II.A of its Application (except Item 8, re: confidentiality of records and information). In light of Dry Creek's and CDE's noncompliance, California's assurances are nothing more than diversionary window-dressing. http://www.cde.ca.gov/sp/se/as/fndapp11.asp

California's Part B Section III - Description of Use of Funds Part B of IDEA estimate of how California plans to use Part B funds is not yet available (the final 2011 allocation is to be available after California's 2011 state budget is approved). Until then, the FFY 2010 Use of Funds Part B of IDEA is used. Nowhere does that Use of Funds indicate the extent to which California and its LEAs are using education funds to pay school district attorneys. The veracity of California's representations regarding its supervisory, monitoring and enforcement obligations, as well as its obligations under its CRP, are wholly suspect and are in grave need of review considering the noncompliance documented here.

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[7] This is especially true where LEAs and their legal counsel routinely tell parents *Rowley* guarantees students only the "floor of opportunity" or "some educational benefit," as if that were *all the education* kids with disabilities were entitled to, at the same time LEAs and even CDE claim all students are entitled to reach their "highest potential." *See,* http://www.cde.ca.gov/eo/in/pc/documents/yro8es0122.pdf at page 1.

I ask for your assistance and intervention, not only on G.M.'s behalf, but on behalf of all California students who are similarly being deprived of their rights under IDEA. I would like to know:

- What agency is responsible for holding an SEA accountable when the SEA fails to comply with its obligations to ensure student rights, as provided under IDEA and other education laws?[8]

- Where do families turn when their LEA fails to comply with an SEA's orders and provide funded services and the SEA fails or refuses to enforce against the LEA?

- Where do families turn when the LEA and SEA actually work together to effectively eliminate services documented in a student's IEP?

- Where do families turn when LEAs and SEAs use taxpayer funds to hire legal counsel to fight parents, eliminate services or otherwise avoid their obligations under the law?

- What do families do when the SEA uses IDEA's due process procedures against the family, forcing parents to defend litigation that would be unnecessary if the SEA fulfilled its obligation to supervise, monitor and enforce?[9]

- What can families do when the LEA and SEA through legal counsel misrepresent facts and law to courts in order to avoid accountability?

- How is it a parent's "right to be accompanied by legal counsel" in due process when parents cannot afford counsel, at the same time LEAs and SEAs use state and federal tax dollars to hire legal representation to fight families?

- Why are LEAs and SEAs allowed to hire legal counsel for purposes other than what the IDEA expressly provides, particularly when families are unrepresented and their children are denied needed services as a result?

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[8] The ed.gov website re: OSEP Part B and C State Monitoring and Formula Grants states "The Office of Special Education Programs (OSEP) is responsible for ensuring states' compliance with the *Individuals with Disabilities Education Act (IDEA). IDEA* guarantees the free appropriate public education (FAPE) of children with disabilities in the least restrictive environment (LRE). To assist states in meeting the needs of students with disabilities, OSEP has developed a continuous improvement monitoring process." http://www2.ed.gov/policy/speced/guid/idea/monitor/index.html.

[9] *See,* OSEP Memorandum #00-20 (July 17, 2000) which describes CRP regulations as providing "a less costly and more efficient mechanism for resolving disputes than the impartial due process hearing system" and also states a prohibition on forcing families to use due process. http://www2.ed.gov/policy/speced/guid/idea/letters/2000-3/osep002071700safeguardssec.pdf

- Why does DOE continue to pay federal tax dollars in grants to LEAs and SEAs when it knows they are persistently out of compliance?

- How can DOE allow such noncompliance to persist, year after year?

- How is it that LEAs and SEAs can seek and receive federal and state tax dollars based on their assurances of compliance, but instead use education funds for litigation and attorneys to avoid their compliance obligations, deny student services and pursue legal challenges to the law they are required to uphold, and DOE does nothing about it?

These are questions I am also posing to DOE's Office of Inspector General as California's noncompliance documented here appears to be involve a clear misuse of public funds.

I am also copying the U.S. Department of Justice ("DOJ") and ask that DOE work with DOJ as it did in my son's case to assist the Marcheses whose experiences with noncompliance are similar to what we experienced. I would also ask that both DOE and DOJ look into CDE's and Dry Creek's misrepresentations to the Court, including CDE's misrepresentations regarding the state of Dry Creek's compliance, CDE's obligations under the law and what IDEA requires for "exhaustion of administrative remedies," which led to CDE's dismissal from the Marcheses' case, and CDE's continuing failure to ensure services for G.M.

I am also requesting an investigation into the attacks by Dry Creek's legal counsel on G.M.'s student services, as well as legal counsel's harassment of Mr. and Mrs. Marchese. Legal counsel are paid by the taxpayers to ensure local agencies comply with their legal obligations. The actions by Dry Creek's legal counsel and their continued harassment and threats against the family constitute retaliation on behalf of Dry Creek and are a clear abuse of power that unfortunately is a far too common occurrence in California.

Further, I am requesting that DOJ look into the issue of persistent noncompliance by LEAs unaddressed and unenforced by SEAs at the same time California continues to receive federal funds based on assurances of compliance DOE apparently presumed are accurate and true.

Another area of investigation should focus on how LEAs use attorneys who litigate using IDEA's due process procedures (established to protect students and families and to ensure FAPE), as a weapon against families, through which they assert novel legal challenges to the IDEA, eliminate student services and deny FAPE to California's students. Section 504 of the Rehabilitation Act states that no qualified individual shall be "excluded from participation in, be denied the benefits of, or be

subjected to discrimination under any program or activity receiving Federal financial assistance." As such, it appears these acts by school district legal counsel constitute discrimination on the basis of disability.

The actions of these agencies and their legal counsel are specifically intended to deny students needed services and the benefit of education IDEA was enacted to ensure. As the denial of education services inevitably results in a denial of FAPE, such actions cause the denial of educational benefit and the opportunity to experience the success in their school community and life in general routinely enjoyed by their typical peers.

California and Dry Creek's actions contradict California's "Guiding beliefs, principles, and performance benchmarks" http://www.cde.ca.gov/eo/mn/mv/, as well IDEA's purpose "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. §1400(d)(1)(A).

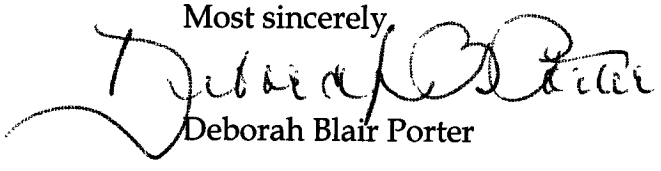
Where public agencies fail to provide appropriate services and use the power of the taxpayer-funded purse to thwart parents' efforts to redress the deprivation of their child's rights; where state agencies fail and refuse to hold LEAs accountable for persistent noncompliance; and where the judicial system fails to thoroughly research and consider Congressional intent in the context of the law's purpose, children needlessly suffer a loss of educational benefit. G.M.'s case and my own son's case are both examples of the loss of educational benefit.[10] Unfortunately, in California, there are many other examples.

I am also copying members of Congress so that they know how the plain language of IDEA is being manipulated and the law itself is being abused in California, where free appropriate public education is nothing but an illusion; where parents are in the untenable position of trying to enforce the law at the same time they raise a child with a disability in an often hostile education context; and where parents must fight taxpayer-funded education agencies represented by legal counsel who have forgotten that their fiduciary duty extends beyond the agency to its students, parents and community and who pursue litigation against families on the most unlevel playing field in courts which fail to understand Congressional intent or choose to ignore it altogether, at the same time these agencies continue to seek and receive federal funds based on their assurances of compliance with the law.

[10] Another recent example of loss of educational benefit is found in the 9th Circuit's recent decision in *Mark H. v. Hamamoto,* (No. 09-15754, 9th Circuit Court of Appeals, August 26, 2010).

By failing to ensure LEA compliance and itself failing to comply with its supervisory, monitoring and enforcement obligations under IDEA, CDE compounds the noncompliance California's children, such as G.M., suffer at the hands of LEAs such as Dry Creek and its legal counsel. Using education funds for litigation is unconscionable, for it deprives all California students of needed education and puts teachers at risk, particularly in this time of significant budgetary crisis for California's schools. As DOE ultimately is responsible for compliance under the IDEA, I implore you to investigate these matters and help resolve them for G.M. and his family, and all California's students.

Most sincerely,



Deborah Blair Porter

Enclosures

Alexa Posny, Assistant Secretary, OSERS
Kathleen Tighe, Inspector General, U.S. Department of Education
Eric Holder, U.S. Attorney General
United States Senator Tom Harkin
United States Senator Dianne Feinstein
United States Senator Barbara Boxer
U.S. Representative George Miller
U.S. Representative Tom McClintock
U.S. Representative Mike Thompson
U.S. Representative Jane Harman
Kevin and Lyndi Marchese