

☪ Deborah Blair Porter ☪  
1156 5<sup>th</sup> Street, Manhattan Beach, CA 90266  
(310) 379-0386 – (310) 372-5795 (fax)  
E-mail: d.blairporter@verizon.net

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June 1, 2011

Tom Torlakson  
State Superintendent of Public Instruction  
California Department of Education  
1430 N Street  
Sacramento, CA 95814

Re: Grayson Marchese – Dry Creek Joint Elementary School District

Dear Superintendent Torlakson:

I am writing to you as the California official responsible for ensuring local education agency (“LEA”) compliance pursuant to California’s supervisory and monitoring obligations under the “Individuals with Disabilities Education Act” (“IDEA”), California’s Education Code (“EC”), and related laws and regulations.

Specifically, I write to ask for your intervention in the education of Grayson Marchese (hereafter “Student” or “G.M.”), son of Kevin and Lyndi Marchese, who reside in Roseville, within the jurisdictional boundaries of Dry Creek Joint Elementary School District (“Dry Creek” or “District”) and Placer County Special Education Local Planning Area.<sup>1</sup>

This past year I have become aware of the Marchese family’s ongoing struggle to obtain an appropriate education for G.M. in the face of persistent noncompliance by Dry Creek. This 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 and otherwise take meaningful action against Dry Creek despite CDE’s obligations under the law.

Dry Creek’s noncompliance has left G.M. without any school district funded education services or a current Individualized Education Program (“IEP”) for almost a 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

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<sup>1</sup> This letter is written with the Marcheses’ consent to disclosure of G.M.’s educational history.

pays education funds to school district lawyers to fight the provision of services and fund litigation which seeks to set aside rights and protections under the IDEA.

This letter and accompanying appendices provide details regarding 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 Individualized Education Program ("IEP"). Also included are details of CDE's involvement, which has contributed to Dry Creek's ongoing noncompliance, despite CDE's obligation to ensure such compliance as well as G.M.'s right to a "free appropriate public education" ("FAPE")

In reviewing the facts of this case, I've noted striking similarities between what is happening to G.M. and his family and what happened to my son and our family several years ago in our litigation with our school district and CDE.<sup>2</sup> Based on these facts, it appears CDE is doing what it did before, i.e., failing to hold an LEA accountable under the IDEA and failing to live up to its obligations under the law; misrepresenting the law'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.

### Background

During the past two years, the Marcheses have had extensive written and verbal communications with Dry Creek and CDE regarding the District's failure to provide G.M. with an appropriate education, properly fund his education and ensure his current educational placement during judicial proceedings, i.e., the procedural safeguard of "stay-put" (20 U.S.C. §1415(j)).<sup>3</sup>

These communications show that:

- Dry Creek has consistently acknowledged its obligation to comply with the stay-put placement and provide reading instruction services through Suzanne Couthie, M.A., E.T., an educational therapist/reading specialist the parties agreed to in an October 2008 Settlement Agreement and IEP which settled a due process proceeding;

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<sup>2</sup> *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 (9<sup>th</sup> Cir. 2002), *cert. denied*, 537 U.S. 1194, 123 S.Ct 1303, 154 L. Ed. 2d 1029 (2003).

<sup>3</sup> 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, . . .

- California's Office of Administrative Hearings ("OAH") has issued at least two orders confirming this stay-put placement;
- CDE has issued numerous compliance complaint reports ("CCR") confirming the stay-put placement and finding Dry Creek out of compliance under IDEA and California law;
- CDE has consistently issued numerous orders and directives requiring Dry Creek to comply with stay-put and fund Ms. Coutchie's services on a timely basis.

Yet, Dry Creek, through its legal counsel, has consistently failed and refused to comply with these orders and CDE has failed to take *any enforcement action* against Dry Creek. As a result, Dry Creek has suffered no negative consequence for its noncompliance.

Because of Dry Creek's refusal to pay Ms. Coutchie, the District is significantly in arrears in payment to Ms. Coutchie. Dry Creek's own documents show it has not paid Ms. Coutchie since June 4, 2010 and presently owes her \$20,877.00 for her services. This past year, Dry Creek has also refused to fund G.M.'s physical education program despite CDE's orders to do so.

Because CDE failed to ensure Dry Creek's compliance with stay-put, and encouraged Dry Creek to file a motion with the U.S. District Court to set aside the stay-put, on December 10, 2010, that Court issued an order giving Dry Creek the option of removing and replacing Ms. Coutchie as G.M.'s educational therapist/reading specialist from the stay-put. Although Dry Creek removed Ms. Coutchie, *it 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 represented to the Court it would enforce the stay-put order, CDE has failed to do so. *As a result, G.M. is without any funded educational services whatsoever.*

As of today, Dry Creek has *failed to fund any educational services for G.M. for almost twelve months (an entire school year)*, at the same time it receives state and federal funds based on its assurances it is complying with its obligations under the law, and while it expends significant taxpayer dollars on legal fees paid to its legal counsel.

CDE's persistent failure to ensure compliance and enforce its own orders has emboldened Dry Creek and its legal counsel to further noncompliance. CDE appears to have directly encouraged Dry Creek to such noncompliance by directing Dry Creek to other jurisdictions - first OAH and then the U.S. District Court - in search of a forum where Dry Creek might be successful in setting aside or eliminating its obligation to provide Ms. Coutchie as part of G.M.'s stay-put placement, because CDE did not want to take enforcement action.

As Dry Creek has failed to fund G.M.'s education services since June 2010, his parents have had to bear the cost, despite Dry Creek's and CDE's assurances Ms. Coutchie would be paid. *This is not "free appropriate public education." This is what IDEA's stay-put provision was enacted to prevent.*

The Appendices accompanying this letter synopsise aspects of Dry Creek and CDE's noncompliance over the past two years; provide supplemental points regarding their noncompliance and relevant state and federal legal authority. Also included are G.M.'s relevant education records and communications between the Marcheses, Dry Creek, CDE staff and their respective legal counsel:

- Appendix 1: Chronological Factual Background & Documentary History re: Education of G.M.
- Appendix 2: Supplemental Points & Discussion re: Dry Creek and CDE Noncompliance.
- Appendix 3: Citations: IDEA Statutory and Regulatory Obligations: State & Local Education Agencies and Related Authorities.
- Appendix 4: Relevant Documentary Evidence and Citations.

As CDE has already issued numerous findings regarding Dry Creek's noncompliance, and in light of Dry Creek's willful defiance of CDE's orders as detailed here, it is clear a standard complaint investigation will not suffice. CDE has failed to enforce against Dry Creek and refused to ensure G.M.'s services, despite its obligations under U.S.C. §1413(h). As a first step CDE I am asking you to:

- Ensure the services G.M. is entitled to under the October 2008 Settlement Agreement and IEP (including a qualified educational therapist/reading specialist per the Court's December 10, 2010 Order). Alternatively, Ms. Coutchie should be reinstated pursuant to stay-put under 20 U.S.C. §1415(j).
- Ensure development of an IEP for G.M. in accordance with IDEA, California's Education Code, and U.S. Department of Education OSEP Letter to Watson, dated April 12, 2007, related to proper development of an IEP during stay-put.
- Ensure Ms. Suzanne Coutchie is paid her outstanding billings for services rendered to G.M. under the IEP and Settlement Agreement in accordance with Dry Creek's assurances and CDE's directives. <sup>4</sup>

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<sup>4</sup> Despite the District Court's December 10, 2010 Order, Dry Creek was obligated to pay for G.M.'s educational services pursuant to its obligations under 20 U.S.C. §1413, particularly as it received federal funds in that period. Alternatively, CDE is obligated to pay for such services pursuant to California's

The State of California should also investigate:

- Dry Creek's ongoing noncompliance with its obligation to fund and provide an education to G.M. at the same time it continues to receive federal funds.
- Dry Creek's use of education funds for legal fees to fight the provision of services to G.M. and to challenge IDEA's procedural safeguards, while it provides assurances it is complying with the law, yet fails to fund education services and also prepares to lay off district teachers.
- The denial of special education services by LEAs across the state, assisted and encouraged by school district legal counsel, so that education funds are used for litigation without accountability, while school districts are in crisis, students face across-the-board cuts in services and school districts lay off teachers.
- The failure of CDE staff, including legal counsel, to enforce against a noncompliant LEA, and instead working with that District and its legal counsel against the family so that Dry Creek's noncompliance has been allowed to persist for over two years while California provides assurances to the U.S. Department of Education it resolves noncompliance within one year.

By copy of this letter I am providing this information to the state and federal officials copied below to request their input and guidance regarding where the Marcheses can go to obtain accountability for the violations documented here and resolution of G.M.'s educational issues.

### California's Financial Emergency

On January 6, you stated California's schools were in a "state of financial emergency," launched a department-wide review and asked "Californians to come to the aid of schools across the state."<sup>5</sup>

On March 9, 2011, you wrote California's county superintendents asking for assistance in compiling information about pink slips and lay-off notices being issued and program cuts being proposed by the LEAs in their jurisdictions, noting it is "vital for the public to know the full impacts of the worst-case budget scenario."<sup>6</sup>

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obligations under 20 U.S.C. §1413(h). (See, OSEP Letter to Dunn, dated October 28, 2004). While Ms. Coutchie was owed \$20887.10 as of December 2010, she has continued to provide services to G.M. under the terms of the Settlement Agreement and October 2008 IEP, because Dry Creek has failed to provide the Marcheses with a replacement provider after Dry Creek purported to remove Ms. Coutchie after the Court's December 10, 2010 and because the stay-put placement remains unchanged pending the Marcheses appeal of the Court's December 10, 2010 Order. At the present time, the amount due Ms. Coutchie is significantly more than the amount that was due as of December 2010.

<sup>5</sup> <http://www.cde.ca.gov/nr/ne/yr11/yr11rel04.asp>

<sup>6</sup> <http://www.cde.ca.gov/nr/el/le/yr11ltr0309.asp>

On March 11, 2011, you warned “school districts to plan for the worst,” noting you had taken steps “to tally the impacts on California schools if the state's temporary taxes expire July 1,” and stating "Before we miss the chance to help our state's 6.2 million schoolchildren weather this financial emergency, people have a right to know the consequences." <sup>7</sup>

This letter responds to your call for Californians to aid California’s schools, but brings the message that every dollar California can save from litigation or expenditure on attorneys who counsel school districts to challenge and thwart the law is a dollar better spent on critical student services, quality teachers and ensuring positive outcomes for California’s students.

California’s Part B Application to the U.S. Department of Education which provides assurances as a condition of its receipt of federal funding under IDEA, 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). <http://www.cde.ca.gov/sp/se/as/fndapp11.asp> In light of Dry Creek’s and CDE’s noncompliance documented here, California’s assurances seem to be diversionary window-dressing.

California’s Part B [Section III - Description of Use of Funds Part B of IDEA](#) estimate of how California intends 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 to be used. Yet, nowhere does that Use of Funds indicate the extent to which California and its LEAs are using education funds to pay school district attorneys.

*Education funds are being diverted to litigation in a manner contrary to law, to be spent on attorneys to challenge the IDEA or thwart the provision of services to students with disabilities. This does not comply with either California’s or Dry Creek’s obligation to ensure FAPE to California’s students, 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). Our tax dollars are better spent *educating our students and ensuring the availability of quality teachers*. These expenditures on litigation and legal fees are a gross misuse of public funds.<sup>8</sup>*

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<sup>7</sup> <http://www.cde.ca.gov/nr/ne/yr11/yr11rel23.asp>

<sup>8</sup> Appendix 2 provides in-depth analyses of issues related to education agency legal counsel, and how such counsel, at both the local and state level are encouraging significant noncompliance by California

## California's Continuing Noncompliance

What CDE has allowed to happen to G.M. and his family is unconscionable, particularly as it isn't the first time CDE has engaged in this sort of conduct. CDE is still under the jurisdiction of the U.S. District Court in our son's case. We endured years of noncompliance by our school district, encouraged by school district attorneys who counseled noncompliance and challenges to the IDEA resulting in years of delay in our son's receipt of an appropriate education.<sup>9</sup>

Our district's noncompliance was compounded by CDE's failure to effectively monitor and enforce against the district, and CDE's own noncompliance. After six years of litigation, in an order related to summary judgment motions finding against both public agencies, the Court clearly documented CDE's obligations and its liability for failing to live up to them, 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)].

I find it hard to believe CDE has forgotten Judge Feess' statements regarding its obligations, particularly since these have always been CDE's obligations. Also, CDE's recently-departed General Counsel Marsha Bedwell was directly involved in both our case and the Marchese case. When confronted by noncompliant LEAs, especially those

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education agencies and negatively impacting the rights of California's students with disabilities to FAPE and the positive outcomes IDEA envisions.

<sup>9</sup> A history and analysis of this noncompliance is found in the "Memorandum and Order Regarding Plaintiffs' Motions for Summary Judgment, etc." issued by Judge Gary Allen Feess on December 20, 2004 (U.S. District Court, Central District, California, Case No. CV-00-8402 GAF (RNBx)), excerpted below.

represented by aggressive legal counsel, CDE seems to take the path of least resistance, aligning with LEAs and becoming just another brick in the stone wall LEAs raise to block access to services. Although we had hoped our litigation would end such a practice, this letter and its enclosures prove that a mere five years later CDE is doing the very same thing to another student and his family.

CDE's practice of misrepresenting the law to courts to avoid accountability hasn't changed either. A decade ago, when we filed our federal court complaint, CDE's counsel (including Marsha Bedwell), filed "State Defendants' Joinder to Local Defendants Motion to Dismiss" in which it misrepresented the law regarding exhaustion of administrative remedies by claiming that despite our already having pursued due process, we still had to exhaust using CDE's CRP. In the Marchese case, CDE legal counsel (led by Marsha Bedwell) again misrepresented the law, this time claiming the law regarding exhaustion was completely different than what CDE had claimed ten years earlier. Now CDE claims that despite the Marcheses having pursued due process, they *haven't exhausted because they didn't sue CDE*.

*In both cases, to avoid accountability for failing to ensure compliance, CDE's legal counsel misrepresented the very law California assures the federal government it is upholding.* In both cases, CDE's motions were successful and CDE was dismissed. However, in our case CDE's dismissal was eventually overturned by the 9<sup>th</sup> Circuit <sup>10</sup> and CDE was held to account by Judge Feess, who still retains jurisdiction over CDE. I have no doubt the Marcheses will eventually have a similar experience.<sup>11</sup> But what damage will this process and the resulting delay have on this student? What has CDE or the State of California gained as a result? At what cost to California's children? These are questions the Marcheses and parents of special needs children throughout California want answered.

While what occurred in my son's case might be viewed as 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 has happened to the Marcheses shows that CDE's past acts were not isolated or accidental. Rather, they appear to be part of a pattern and practice CDE engages in with impunity and what happened to our family occurs again and again, with the involvement of legal counsel in public agency noncompliance persisting without accountability, at both the local and state level.

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<sup>10</sup> *Porter v. Board of Trustees of Manhattan Beach Unified School District*, 307 F.3d 1064 (9<sup>th</sup> Cir. 2002), *cert. denied*, 537 U.S. 1194, 123 S.Ct 1303, 154 L. Ed. 2d 1029 (2003)

<sup>11</sup> On May 10, 2011 the 9<sup>th</sup> Circuit indicated it had accepted the stay-put issue for appeal, ordering a briefing schedule on the Marcheses' appeal of the District Court's December 10, 2010 Order.

By failing to ensure LEA compliance and to comply with its own obligations under IDEA, CDE compounds the noncompliance California's children, such as G.M., suffer at the hands of districts such as Dry Creek and its legal counsel. How can California claim to comply with IDEA when it knowingly fails to hold LEAs accountable and stands by while LEA legal counsel pursue litigation against families that is contrary to IDEA's purpose, all the while lining their pockets with California's education dollars?

### Conclusion

I know you only recently became Superintendent of California's education system and most likely are not aware of my son's case or the court's findings of liability against CDE. Most likely you also are not aware of the persistent noncompliance of certain LEAs and CDE's failure to properly and effectively address it. It is important that you know CDE is acting in this manner and that it is failing to hold Dry Creek accountable with G.M.'s rights and education unaddressed.

It is also critical that you are aware that while this noncompliance persists, both CDE and Dry Creek continue to represent to the U.S. Department of Education that they are, in fact, complying with their obligations under the IDEA and ensuring a free appropriate public education ("FAPE") to their students so that California and its education agencies can continue to receive federal education dollars. That both agencies continue to seek and receive federal funds while they engage in these practices is beyond deceptive.

G.M.'s family has pursued all procedural avenues available to families to redress their grievances under IDEA. Despite identifying and confirming Dry Creek's systemic ongoing noncompliance, CDE as the state education agency ("SEA") responsible for resolving such noncompliance has instead essentially linked arms with a noncompliant LEA to oppose the family, to G.M.'s continuing detriment. Although the Marcheses' federal court action against Dry Creek is pending, trial isn't scheduled until September 2012. In the meantime, both agencies fail to provide services without accountability and the Marcheses bear the burden of public agency obligations, i.e., the costs of G.M.'s education.

Again, I ask that you review the details of G.M.'s case documented in the enclosed appendices and intervene on behalf of G.M. and his family. Please know that the length of this letter and the detail of the supporting materials is a direct result of the level of disingenuousness and noncompliance demonstrated by Dry Creek, CDE and their respective legal counsel. The reality is that what has been described here doesn't begin to address the various of acts of noncompliance this family has had to endure.

I appreciate your time in reviewing this material. I hope to hear from you soon with a positive resolution for G.M. and his family.

Most sincerely,

*Deborah Blair Porter*

Deborah Blair Porter

Enclosures

Cc: Governor Edmund G. Brown, Jr.  
Attorney General Kamala Harris  
Eric Holder, U.S. Attorney General  
Arne Duncan, U.S. Secretary of Education  
Alexa Posny, Assistant Secretary, OSERS  
Kathleen Tighe, Inspector General, U.S. Department of Education  
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  
Assemblywoman Beth Gaines  
Assemblywoman Betsy Butler  
Assemblywoman Mariko Yamada  
Michael Rosenberg, Area Board III  
Suzanne Coutchie  
Kevin and Lyndi Marchese