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June 1, 2011

Governor Edmund G. Brown, Jr.
State of California
C/o State Capitol, Suite 1173
Sacramento, CA 95814

Re: Grayson Marchese – Dry Creek Joint Elementary School District

Dear Governor Brown:

I am writing to you regarding 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.¹

Enclosed please find a letter directed to State Superintendent of Public Instruction Tom Torlakson, with accompanying Appendices 1 – 4, detailing the difficulties the Marcheses have had 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 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 pays education funds to district lawyers to fight the provision of services and fund litigation which seeks to set aside rights and protections under the IDEA.

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

The letter to Superintendent Torlakson and accompanying materials 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 IEP. These documents also detail CDE's involvement which has contributed to Dry Creek's ongoing noncompliance, despite CDE's obligation to ensure LEA compliance as well as G.M.'s right to a "free appropriate public education" ("FAPE")

Although I have written to Superintendent Torlakson to ask for his direct intervention, I am also writing to you as the chief executive for the State of California because what is occurring under CDE's watch has statewide implications for California's education budget and its overall fiscal soundness. I believe the noncompliance documented here is in part a direct result of school district legal counsel who encourage local education agencies to engage in noncompliance that not only violates both the IDEA and California Education law, but which seeks to challenge procedural protections under the law.

In spite of CDE confirming Dry Creek's persistent noncompliance, CDE has failed to comply with its obligations under the IDEA to enforce against noncompliant school districts, apparently under the guidance of its own legal department. That California and its LEAs annually provide the federal government assurances that they are complying with the IDEA in all respects so that they may continue to receive federal funds, at the same time they knowingly allow this noncompliance to persist, puts the State of California at risk for claims of misappropriation of funds and violations of public policy.

The use of education tax dollars for litigation in the manner described here presents significant moral and budgetary issues. I have detailed these issues and my concerns below so that you will hopefully become involved in addressing these abuses of California's students and our educational system.

Use of Tax Dollars for Legal Fees

The facts of the Marchese case which have been carefully documented raise critical issues of concern to many parents in California. Dry Creek's actions appear to be directed by legal counsel who ignore their fiduciary duty to students, parents and the community and who counsel noncompliance and assert novel legal theories on behalf of the District to thwart the provision of special education services and procedural rights. At the same time Dry Creek accepts federal funds based on its assurances it is providing FAPE to students within its boundaries and ensuring procedural safeguards for students and their parents, it has failed to fund G.M.'s education and instead has used taxpayer dollars intended for education to fund aggressive attorneys who engage in litigation on their behalf. This is obviously contrary to Dry Creek's legal obligations under IDEA.

Under IDEA, special education litigation is to be pursued by public agencies *only* where required to ensure a student receives FAPE (Dry Creek's primary obligation under IDEA). Litigation for any other purpose (e.g., to thwart the provision of services to students, eliminate the law's procedural protections and challenge and discourage parents from advocating for their children) is counter to IDEA and Congress's intent in enacting the law and does nothing to ensure FAPE. Such tactics amount to stonewalling designed to prevent parents from obtaining an appropriate education for their children and have not only thwarted the Marcheses' efforts on G.M.'s behalf, but have encouraged CDE to ignore its supervisory and enforcement obligations under IDEA.

In light of past efforts by Dry Creek's legal counsel to undercut stay-put protections for students (e.g., *see, Joshua A., et al. v. Rocklin Unified School District*, 559 F.3d 1036 (9th Cir. 2009)), their current efforts appear focused on establishing legal precedent to eviscerate stay-put protections for *all* California students receiving services from providers outside an LEA, and using education funds to do so.

CDE's attorneys appear to have encouraged such noncompliance by counseling CDE to not comply with its duties to California students by failing to have an effective complaint resolution process ("CRP") in place, failing to enforce corrective actions against Dry Creek, refusing to ensure delivery of education services to a student when an LEA is unwilling or unable to do so, and misleading the District Court regarding CDE's obligations under IDEA. At the same time California accepts federal funds based on its assurances of compliance, CDE not only fails to hold Dry Creek accountable for its acts, it appears to be complicit in them.

These actions by Dry Creek and CDE and their respective legal counsel violate IDEA's plain language regarding the use of attorneys, as well as the law's spirit and intent. They deny G.M. his right to FAPE and his and his parents' procedural protections under IDEA. *They have caused G.M.'s exclusion from the benefits of any education at all.* By using funds such agencies receive to thwart services they are obligated to provide, these agencies act against public policy and perpetrate a manifest abuse of process.

Dry Creek's school board documents confirm it pays legal fees to attorneys who counsel noncompliance at the same time G.M.'s services are unfunded, Ms. Coutchie is unpaid and Dry Creek's teachers face layoffs. Dry Creek seeks and receives federal funds based on assurances of compliance with the law, yet openly defies the law by refusing to fund needed services to G.M., instead paying attorneys who counsel it to avoid providing services it knows he needs. It appears that Dry Creek has either diverted or misappropriated federal and state tax dollars for purposes other than what the law intended.

California's Lack of Accountability for School District Legal Fees

Although LEAs account for legal fees for special education at the local level, information typically provided in the public record is not sufficiently detailed to allow for accurate identification of amounts being spent on special education litigation. California Legislative's Analyst Office staff and CDE personnel have confirmed to me that there is no state-level accounting for funds expended by LEAs on legal fees, generally or with regard to special education. As a result, California LEAs can and do litigate - rather than educate as Congress intended - spending legal fees with virtually no state-level oversight or accountability, while engaging in practices described here with impunity.²

Given the lack of state-level accounting with regard to such legal fees, *California cannot say with certainty how much we are spending annually on school district legal fees, while taxpayer dollars intended for education are being siphoned away to line the pockets of school district legal counsel.* Since we have no sense of the fiscal impact of such expenditures, it is impossible to even begin to estimate what negative educational impact this is having on children with special needs who are being deprived of appropriate services because of such litigation.

On January 6, 2011 Superintendent Torlakson stated that 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." On March 9, 2011, he 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." On March 11, 2011, he warned "school districts to plan for the worst," noting he 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."³

The enclosed letter is a response to Superintendent Torlakson's 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.*

² <http://calaware.org/wp-content/uploads/2011/04/K-12release.pdf>;

https://www.calaware.org/audits/pub_ed/subcate_details.php?cat_id=11&id=23&number=1.

³ <http://www.cde.ca.gov/nr/ne/yr11/yr11rel04.asp>

<http://www.cde.ca.gov/nr/el/le/yr11ltr0309.asp> <http://www.cde.ca.gov/nr/ne/yr11/yr11rel23.asp>

California's Part B Application to the U.S. Department of Education which purports to provide 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.

Even if we determine the statewide total of such legal services is small in comparison to California's overall education budget, *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. Such expenditures 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.⁴

At the end of the day, Dry Creek continues to receive federal funds based on assurances of compliance with the IDEA, while it actually pays education dollars to legal counsel to fight services, initiate baseless litigation and frivolous claims to avoid its obligations under the law and engage in ongoing harassment of parents while such legal counsel benefit financially from such actions. California continues to receive federal funds based on its assurances of compliance, while it fails to hold LEAs accountable; fails to ensure the services the LEA has failed to provide; and compensates its employees, including Legal, Audits & Compliance Branch attorneys, to direct the LEA and its legal counsel in how to avoid their legal obligations and mislead the federal court with regard to the SEA's obligations.

⁴ 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 encourage significant noncompliance by California's education agencies, thus negatively impacting the rights of California's students with disabilities to FAPE and the positive outcomes IDEA envisions.

I do not believe this is what Congress intended in enacting the IDEA nor is it what Californians expect for their children's education. This is a fraud, where agencies responsible for ensuring services pay attorneys who counsel them on how to *avoid providing services*. Such legal counsel feed off California's education system, causing greater fiscal and educational damage to our children and education system than we can imagine.

The use of LEA funds in this fashion is not limited to Dry Creek and its impact is widespread, having become more prevalent as school district legal counsel have become more involved in special education. We cannot know how widespread the practice is in California or be able to estimate the number of children whose education is being negatively impacted until we can account for legal fees paid in connection with special education on a statewide basis. Until we do so, abuses such as those documented here will continue, with an unknown fiscal and educational impact on California's special education children and California's children and budget in general.

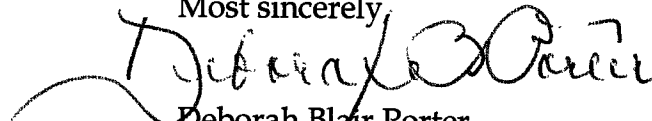
Therefore, I am asking that the State of California conduct a statewide audit of school district legal fees expended on special education matters and also institute a statewide system of accounting for such expenditures so that we know what amounts are at issue and can begin to address the propriety of such expenditures. Also, as I wrote to Superintendent Torlakson, the State of California must 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, and working with that District and its legal counsel 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 is resolving noncompliance within one year.

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. I implore you to investigate these matters and help resolve them for G.M. and his family, and all California's students.

Thank you for your time and effort on behalf of all Californians.

Most sincerely,



Deborah Blair Porter

Enclosures

Cc: Attorney General Kamala Harris
Superintendent Tom Torlakson
Assemblywoman Beth Gaines
Assemblywoman Betsy Butler
Assemblywoman Mariko Yamada
Michael Rosenberg, Area Board III
Suzanne Coutchie
Kevin and Lyndi Marchese