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February 23, 2007 **REVISED February 27, 2007**

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***CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGED COMMUNICATION***

Dr. Thomas Bishop, Superintendent  
Del Mar Union School District  
225 Ninth Street  
Del Mar, CA 92104-2716

**Re: Legal Issues Concerning District's Current Enrichment Programs**

Dear Dr. Bishop:

**QUESTION**

You have asked for our legal advice regarding certain aspects of the District's Current Enrichment Program (Enrichment Program). As we understand the program, the District has funded the Enrichment Program and the Del Mar Schools Education Foundation (DMSEF) has historically contributed significant resources to the District's general fund which has allowed the Board of Trustees to offer a program that may have exceeded the District's resources. In addition, two years ago the Board authorized sites to pay for additional Enrichment Program teachers, which has occurred primarily through PTA fund raising at those sites. ~~We also understand that the District may have provided some student's names and addresses to the DMSEF.~~ **On February 27, 2007 we were informed that a single isolated incident of providing approximately 600 Kindergarten student names and addresses to DMSEF occurred in Fall 2006. This was a mistaken release of the information and the District has taken steps to see that this does not occur again.**

**SHORT ANSWERS**

1. The Enrichment Program as currently funded raises concerns about possible violation of the legal principle of a free public education in California;

### Legal Issues Concerning Current Enrichment Program

2. The relationship of the District to the DMSEF raises issues as to whether the DMSEF truly operates as an independent non-profit public benefit corporation, separate and distinct from the District as an example ~~the District practice of providing student's names and addresses to the DMSEF~~ **the joint calculation of the "contribution" per student; [DELETED because of updated information discussed above.]**
3. ~~The release of students' names and addresses may violate privacy laws concerning pupil records; and~~ **[DELETED because of updated information discussed above.]**
4. The Board of Education's sole discretion in accepting gifts or donations to the District, including whether to accept any conditions in the gift, is an issue with those conditions that divert gifts for only the Enrichment Program.

### FACTUAL BACKGROUND

The District has funded Enrichment Program teachers who teach art, music, science, technology (and in some schools, PE) during the regular school day. These enrichment teachers provide release time for a prep time period for regular classroom, special education and enrichment teachers under the collective bargaining agreement. For fiscal year 2005-06, the District paid for the Enrichment Program and the DMSEF donated over \$500,000 to the District general fund.

The DMSEF came into existence in 1999-2000 with Board approval. Its purpose was to raise additional revenue to fund an expanded Enrichment Program. In 2005-06 this allowed the District to provide additional enrichment teachers. In budgeting for the enrichment teachers, the District calculates the average amount of the teacher's salary and benefits for the ensuing school year. Then a calculation is developed by the District and DMSEF dividing the unfunded cost of each teacher by the number of students served which determines the DMSEF "contribution" per student. This results in the DMSEF asking for contributions per pupil. Once the per pupil calculation has been determined, the District notifies principals of the expected amount of parent's contributions per child that is recommended for each school to raise. A DMSEF funded incentive system is provided to reward sites financially for achieving their parent contribution goals by certain dates. If a school does not make its goal, which has not occurred in past years, then the Superintendent with Board approval will provide sufficient District funds to fund the program.

Each fall, a letter is distributed to parents, signed by the co-presidents of the DMSEF and the Superintendent regarding the proposed contributions from parents that would help fund the expanded Enrichment Program. For the 2006-2007 school year, the October 2006 letter states in part, "Our commitment to the district is to raise about 30 percent of their costs [Enrichment Teachers] for the 2006-2007 enrichment teachers at each school or \$660,060 by February 1, 2007. The District currently funds the balance (about 70 percent). We are confident that if EVERY family makes a contribution to the Foundation, we will make our goal of raising enough money to fund our art, music, science and technology teachers at your school ... Please support the Foundation's fall appeal giving drive and write a check to the Foundation today."

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The relationship of the District and the DMSEF is closely intertwined and one could argue the operations are so integrated that the DMSEF may be considered a “alter ego” of the District. The District provides the following resources to the Foundation:

1. Office space in a classroom at a District school;
2. Until December 2006, a half time administrative assistant;
3. Use of District student mail distribution system;
4. Space on the District website and occasional access to the District webmaster;
5. Infrequent access to District “all call” communications technology; and
6. The Superintendent position and one Board member position as ex officio members of the DMSEF Board of Directors who attend the monthly meetings. The ex officio officers do not vote.

### **LEGAL ANALYSIS**

#### **1. California Free Public School System**

The first legal issue raised concerns the legal principle that the California Public School system is a “free” public school system. Article IX, Section 5 of the California Constitution provides:

SEC. 5. The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established.

The leading case interpreting this Constitutional provision is *Hartzell v. Connell* (1984) 35 Cal.3d 899, 201 Cal.Rptr. 601. Because of reduced funding for school districts after the passage of Proposition 13 in 1978, the Santa Barbara School District proposed collecting fees from students participating in extracurricular activities. The District also provided a waiver process for those students who were unable to pay. Parents sued the district alleging the imposition of proposed fees was a violation of the California Constitution.

In its decision the California Supreme Court reaffirmed the curricular studies must be offered for free. “This provision [Article IX, Section 5] entitles the youth of the state ... to be educated at public expense.” (*Ward v. Flood* (1874) 48 Cal.36, 51 cited in *Hartzell v. Connell* at p. 904.) The Court also held that collecting fees for extracurricular activities was in violation of the free public school provisions of the California Constitution. The Court reasoned that extracurricular activities were inherently part of a student’s education experience and as such should be paid provided for free. Recently, districts in San Diego County have settled litigation challenging district fees for

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extracurricular activities such as ASB cards, sport uniforms, band or drama fees for participation, etc.<sup>1</sup>

Based on the California Constitution and the *Hartzell v. Connell* case, the District's Enrichment Program during the school day is clearly a curricular program that must be offered at no charge. The District is precluded from charging a fee. The question then becomes whether the "voluntary" contribution that is assessed per student is actually a fee (for the 2006-2007 school year \$190 per child was calculated by the District).

It appears that this is a fee in that each student's family is expected to contribute the money to the DMSEF in order for their school to meet its "goal" and fund its allocation for Enrichment Program teachers. Secondly, while the contribution per child is made to the DMSEF, the calculated contribution and incentives have jointly been determined by the District and DMSEF. If the school does not meet its goal through the DMSEF contributions, then the District may make up the shortfall. In a June 6, 2006 memo to principals, it states the projected enrollment at each site, and that the DMSEF will "ask" for \$190 per student with a total goal for each District school. The District memo also sets forth incentives for the DMSEF for achieving the goal at earlier periods during the year.

#### **2. Relationship between District and DMSEF**

A second legal issue is the nature of the relationship between the District and the DMSEF. A private public non-profit benefit corporation, commonly referred to as a Section 501(c)(3) corporation under the Internal Revenue Code, is established for charitable purposes in order to qualify as tax exempt organization. It must serve the purposes of a charitable organization such as the DMSEF's purpose to provide contributions to the non-profit public Del Mar School District. Without reviewing the DMSEF Articles of Incorporation and Bylaws, we assume that the DMSEF meets the criteria for being a private non-profit public benefit corporation. However, as described above, the operation of the Foundation and the District are so intertwined that they appear not to be separate legal entities operating independent of one another.

As discussed under the first legal issue above, the District funds and DMSEF contributes to the District general fund for the curricular Enrichment Program offered during the school day. The District and DMSEF each have an integral and critical relationship to the other's collaborative participation in the Enrichment Program. Or in other words, the Current Enrichment Program would not exist without the united effort of the District and DMSEF. The relationships, District financial support and DMSEF's close cooperation with the District, appear to make them alter egos of one another for Current Enrichment Program purposes.

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<sup>1</sup>There are certain very limited statutory exemptions to the free public school principle, such as fees may be charged for bus transportation under Education Code 39807.5. While districts are mandated to provide a free education, districts have the discretion whether to provide transportation. Districts may also decide whether to assess transportation fees.

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#### **3. Board Control over Donation or Gifts to District Fund Schools.**

A third legal issue is that contributions, or gifts, from the DMSEF are meant to enable District to offer an expanded Enrichment Program. Also site PTAs can and have raised monies to fund additional site Enrichment teachers beyond the District funded Enrichment Program.

It is solely the District Board's prerogative whether to accept gifts and whether to accept gifts with conditions. Under Education Code section 41032, a school board has the authority to accept a gift or bequest or to invest such gifts and to determine whether any conditions will be accepted as attached to the gift. This is also reflected in the Del Mar Board policy 3290. The policy states in pertinent part:

The Board shall carefully evaluate any conditions or restrictions imposed by the donor in light of the district's philosophy and operations. If the Board feels the district will be unable to fully satisfy the donor's conditions, the gift shall not be accepted. ... All gifts ... shall become district property. Donors are encouraged to donate all gifts to the district rather than to a particular school. At the superintendent's or designee's discretion, a gift may be used at a particular school.

The District Board may want to consider this policy as it reviews its authorization for sites to allow the PTA to raise funds to pay for additional Enrichment Program teachers at the particular site. These contributors are dictating gift conditions that the Board may want to reconsider.

The Board may also want to evaluate gifts to a particular site in terms of how the gift may effect the equity of programs among all the District's schools. This is a policy decision for the Board. The law does not require each school to have identical programs; it allows schools to offer unique programs different from those at other schools. As has already occurred with the Enrichment Program, some sites have customized their use of the Enrichment Program teachers. For example, schools reallocated the science enrichment teacher position to a physical education teacher position.

Also, if the PTA promotes fund-raising activities as a means of financing additional enrichment teachers, this could also appear to be a fee for operating a curricular program.

### **RECOMMENDATIONS**

Based on the analysis above, we recommend the District:

1. Discontinue the practice of determining a per pupil donation as a goal at each school site to raise funds through the DMSEF to expand the District's curricular Current Enrichment Program. The District can provide financial information to stakeholders to encourage

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Del Mar Union School District

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contribution/gifts to support and augment District programs. The DMSEF could then solicit general contributions for the District.

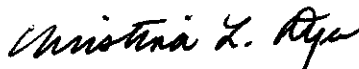
2. Take steps to clearly define the District responsibilities and roles as separate and distinct from the responsibility and roles of the DMSEF. These steps may include no longer having the Superintendent cosign the fall DMSEF letter seeking contributions, **and the District and DMSEF jointly calculating the "contribution" per student.** ~~and the District providing any student's names and addresses to the DMSEF. Discontinuing these two practices will resolve any legal issues regarding possible violation of the privacy rights concerning pupil records laws; and~~ **[DELETED because of updated information discussed above.]**

3. Have the Board reaffirm its policy regarding gifts and its authority to solely determine under what conditions gifts may be accepted, for such as the District funded and PTA site funded Enrichment Teachers.

Please feel free to call if you have any questions regarding the above.

Yours very truly,

STUTZ ARTIANO SHINOFF & HOLTZ  
A Professional Corporation



Christina L. Dyer

CLD:p