Appendix 1: Chronological Factual Background & Documentary History re: Education of Grayson Marchese

Grayson Marchese ("G.M.") is diagnosed with dyslexia (and dysgraphia, dyscalculia, ADD and auditory processing deficits) and has been eligible for special education services through an Individualized Education Program ("IEP") under IDEA since Kindergarten (2001).

In 2008, after waiting seven years for Dry Creek to provide their son with appropriate reading instruction (during which G.M. was rendered functionally illiterate), the Marcheses filed for due process against Dry Creek. Since October 2008, as a result of a Settlement Agreement and IEP, G.M. has received direct reading instruction services in a program with Suzanne Coutchie, M.A., E.T., an educational therapist/reading specialist. (*See,* Appendix 4 ("App. 4"), "Relevant Documentary Evidence and Citations," Exhibit ("Ex.) 1: October 7, 2008 Settlement Agreement and Individualized Education Program ("IEP") signed October 28, 2008 by Kevin Marchese). [1]

Chronology

May 2009 - At G.M.'s annual IEP, Ms. Coutchie made a presentation to the IEP team confirming G.M.'s progress.[2] After Ms. Coutchie's presentation, Dry Creek staff indicated a printer malfunction prevented delivery of the IEP or a written offer of FAPE. In June 2009, after Dry Creek failed and refused to provide an offer of FAPE, the Marcheses filed for due process against Dry Creek on G.M.'s behalf and "stay-put"[3] was invoked. G.M.'s stay-put placement has not changed since that date.

Over the past year and a half, Dry Creek has taken steps to thwart G.M.'s stay-put services and placement, failing to pay the provider on a timely basis (and sometimes not paying the provider at all); failing to reimburse the family for funds they advanced when Dry Creek failed to pay the provider; asserting the provider was in "violation of the law", that it was unlawful for it to contract with her, and otherwise making defamatory comments to the Marcheses and others about Ms. Coutchie. [4]
In the same timeframe, Dry Creek acknowledged in writing the validity of G.M.'s stay-put placement, admitting it was a valid placement, that it included Suzanne Coutchie as the provider, that Dry Creek and the Marcheses had agreed to it in the October 2008 Settlement Agreement and resulting IEP, and that it would not change.

[1] App. 4 documents are identified at their initial reference and designated as "Ex. #."
[2] Following nine months of intervention by Ms. Coutchie, consisting of three hours per day of one-to-one instruction using research-based curriculum and instruction, G.M. had made consistent progress from functional illiteracy to reading independently in mid-third-grade level curriculum.
[3] "Stay-put" refers to a student's "current education placement" under 20 U.S.C. §1415(j).
[4] Dry Creek has never taken steps to pursue its alleged claims, most likely as it has no proof of its claims.

Specifically:

> **07/28/09** - Marcy Gutierrez (Dry Creek's legal counsel) represented to Michael Rosenberg (the Marcheses' Area Board advocate), "The District has communicated with you and the family regarding the District's intent to continue funding the stay put placement with Ms. Coutchie through the date of a decision in this matter." In fact, Ms. Gutierrez insisted the Marcheses' effort to clarify stay-put was "frivolous" and she would seek attorney's fees if the family didn't withdraw its motion to clarify. (*See,* Ex. 2, E-mail, Marcy Gutierrez to Michael Rosenberg, dated July 28, 2009).
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> **07/28/09** - "Opposition to Motion for Stay Put" filed by Ms. Gutierrez on behalf of Dry Creek stated "Petitioner's stay put placement was set forth in a settlement agreement between the parties in 2008. . .", that during 2009-2010 Dry Creek had "implemented the terms of the agreed-upon placement pursuant to this settlement agreement, reimbursing Petitioner's parents for services provided by Suzanne Coutchie" and represented "***there is no dispute regarding Petitioner's stay put placement.***" (*See,* Ex. 3, "Opposition to Motion for Stay Put," dated July 28, 2009).

In the same time period, California's Office of Administrative Hearings ("OAH"), confirmed the stay-put placement was in effect in an Order in the pending due process:

> **08/05/09** - OAH order re: the Marcheses' request for clarification of stay-put specifically noted the family's position regarding stay-put and Dry Creek's agreement: "Student alleges that, although his complaint referred to the need for Student to remain in his last agreed upon placement there is no controversy regarding stay put because Student is in his last agreed upon placement. ***District concurs that Student has remained and will continue to remain in his stay put placement until the dispute is resolved."*** (*See,* Ex. 4, Excerpt of OAH Order by Stella Owens-Murrell, ALJ, dated August 5, 2009).

In addition to OAH's orders (which CDE is obligated to enforce pursuant to its supervisory authority under IDEA (20 U.S.C. §1412(a)(11)), as well as its obligations under 34 CFR §300.151-153), the Marcheses had also filed multiple compliance complaints through CDE's complaint resolution process ("CRP") including complaints related to Dry Creek's failure to support G.M.'s stay-put placement through its failure to pay Ms. Coutchie and its late payment, among other things. CDE issued Compliance Complaint Reports (CCR) which found Dry Creek out of compliance and included corrective actions ordering Dry Creek to comply with stay-put and compensate Ms. Coutchie fully and in a timely fashion.

CDE's CCR's provided:

10/09/09 - #S – 0116 - 09/10 (Bobbi Pooley, Investigator) re: Failure to continue a student's current placement during pendency of any administrative or judicial proceedings re: a due process proceeding (34 CFR §300.518(a)) (*See,* Ex. 5, October 9, 2009 CCR):

> This CCR cited 34 §CFR 300.518(a), concluding the District had failed to meet, and was out of compliance with, the requirements of the regulation. As a corrective action, the CCR required Dry Creek to provide evidence "that it has trained all staff responsible for implementing due process settlement agreements. The training shall include review of 34 CFR Section §300.518(a) requirements."[5]

12/08/09 - #S – 0212 – 09/10 (Bobbi Pooley, Investigator) Failure to continue a student's current placement during pendency of any administrative or judicial proceedings re: a due process proceeding (34 CFR §300.518(a)) (*See,* Ex. 6, December 8, 2009 CCR):

> This CCR again cited 34 CFR §300.518(a) but also stated "When the District agreed to contract with the reading specialist, ***the settlement agreement became the contract and could not be superseded by the District's contract requirements*** that would result in delaying services." CDE further concluded "The District failed to meet the requirements of 34 CFR Section 300.518(a)," again, confirming the training arising from the 10/09/09 CCR either was not provided or failed to achieve its intended purpose.[6]

[5] That Dry Creek, through legal counsel, continued to assert the claim that it could alter the stay-put placement, in direct violation of 20 U.S.C. 1415(j), 34 CFR §300.518(a), and *Joshua A.* (legal precedent which supports §300.518(a) in the 9th Circuit), and contrary to CDE's 10/09/09 CCR demonstrates Dry Creek's continuing noncompliance with CDE's orders. It also indicates that contrary to the intent of CDE's corrective action, Dry Creek either failed to provide the training or failed to benefit from it.

[6] This CCR included a corrective action requiring Dry Creek to fund a membership in a health club or other community recreational services to make up for 7th grade PE services not provided pursuant to the October 2008 Settlement Agreement, with funding to continue through 2009-2010. Thus, these PE services became part of G.M.'s stay-put placement.

February 18, 2010 - OAH issued a decision in Dry Creek's favor in a combined due process proceeding that had been conducted over the past several months. [OAH Case No. 2009060940 and OAH Case No. 2009071109] (*See,* Ex. 7 located at http://www.documents.dgs.ca.gov/oah/seho_decisions/2009060940.pdf#search=Dry%20Creek%20Marson&view=FitH&pagemode=none] The Decision, which the Marcheses received in the last week of February, included the following statement:

> "The parties to this case have the right to appeal this decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)"
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> Accordingly, the Marcheses had ninety (90) days from their receipt of the Decision to decide whether to appeal OAH's Decision (through approximately May 24, 2010). (*See also,* 20 U.S.C. §1415(i)(2)(B)).

March 1, 2010 - Lynn Barberia (Dry Creek Director of Special Education) wrote the Marcheses informing them "effective March 15, 2010, the District will no longer fund provision of Ms. Coutchie's services." (*See,* Ex. 8, Letter, Lynn Barberia to Kevin and Lyndi Marchese).

> Less than a week after the Marcheses had received OAH's Decision, and well before the expiration of the ninety-day period referenced in OAH's Decision, Dry Creek took the position that since the due process proceeding had ended, stay-put had also ended. Dry Creek was unilaterally terminating G.M.'s current educational placement.

March 10, 2010 – Ms. Barberia notified Suzanne Coutchie she should cease services as of March 15, 2010. (*See,* Ex. 9, E-mail, Suzanne Coutchie to Bobbi Pooley (CDE), dated March 10, 2010).

Ms. Coutchie e-mailed Bobbi Pooley (CDE) about Dry Creek's notice re: her services. Ms. Coutchie told Ms. Pooley she had been informed by Michael Rosenberg, the Marcheses' Area Board III advocate, that pursuant to a 9th Circuit case, *Joshua A. v Rocklin School District,* stay-put continued until the case was fully resolved. (Ex. 9) That same day, Ms. Pooley responded to Ms. Coutchie, stating "*an appeal has not been filed. Therefore, the OAH decision stands and stay-put ended with that decision*." (Ibid.)

Week of March 29, 2010 - Michael Rosenberg spoke with CDE's Ana Marsh (Administrator, CDE Focused Monitoring and Technical Assistance) and Ava Yajima (Deputy General Counsel, Legal, Audits and Compliance Branch) regarding Area Board III's concern that CDE was not enforcing stay-put. Ms. Yajima told Mr. Rosenberg that until an appeal was filed in a higher court, stay-put was no longer in place; however, she said that if the family filed an appeal immediately, CDE would enforce stay-put and

disruption of the Student's education could be avoided. (*See,* Ex. 10, Declaration of Michael Rosenberg, dated October 6, 2010).

> CDE did not notify Dry Creek its actions violated 20 U.S.C. §1415(i)(2)(B) and 20 U.S.C. §1415(j). CDE also did not comply with its own supervisory and enforcement obligations regarding its prior orders regarding stay-put. Instead, CDE (through Ms. Pooley and Ms. Yajima) seems to have reinterpreted 20 U.S.C. §1415(j), contradicting the 9th Circuit's interpretation in *Joshua A.,* and 20 U.S.C. §1415(i)(2)(B) (which specifically provide that a party has the "right" to bring a civil action and "shall have 90 days" within which to do so). Essentially, CDE told the Marcheses to file an appeal "early" or CDE would not enforce stay-put.

April 9, 2010 - Michael Rosenberg wrote Ana Marsh to confirm his conversation with her and Ms. Yajima, noting that forcing a family to change a student's placement while they prepared to file for de novo review was contrary to Congress's intent (as clarified in *Joshua A.),* and would leave the student in an unstable and inconsistent educational setting. As it appeared CDE's position was that the family had no stay-put rights "during the pendency of further appeal action," he asked CDE to clarify its position. (*See,* Ex. 11, Letter, Michael Rosenberg to Ana Marsh, dated April 9, 2010).

April 19, 2010 – Ten days later, the Marcheses filed a Complaint against Dry Creek Joint Elementary School District and CDE, et al., in U.S. District Court, Eastern District of California seeking de novo review of OAH's decision. (Case #: 2:10−cv−00944−GEB−GGH) Their Complaint alleged Dry Creek failed to implement G.M.'s stay-put placement and comply with CDE's CCRs with regard to stay-put, as well as claims against CDE for failing to comply with its supervisory and monitoring obligations with regard to LEAs. (*See,* Ex. 12, Citation to COMPLAINT against Dry Creek Joint Elementary School District, et al., PACER Doc. #2, U.S.D.C., E.D. California, https://ecf.caed.uscourts.gov/cgi-bin/ShowIndex.pl). [7] The Marcheses filed the Complaint early so CDE would enforce stay-put as Ms. Yajima had represented. [8]

April 19, 2010 - Lynn Barberia sent Ms. Coutchie a letter reiterating stay-put was no longer in effect and confirmed her services were terminated as of March 12th. However, Ms. Barberia indicated Dry Creek would fund make-up services post March 12th and asked Ms. Coutchie to provide such services and forward her billing for same. (*See,* Ex. 13, Letter, Lynn Barberia to Suzanne Coutchie, dated April 19, 2010).

[7] Due to the voluminous nature of certain court documents, and to save copying costs, where appropriate I have cited to links where documents can be accessed online. Note the Federal Court's PACER system requires an account and bills for access.

[8] Because the Marcheses prepared their Complaint without the assistance of special education counsel, they did not serve it at that time as they wished to clarify certain allegations. An Amended Complaint was filed on August 4, 2010.

Thus, Dry Creek induced Ms. Coutchie to continue to provide and bill for further services for G.M.

April 30, 2010 - Stephen A. Rosenbaum (Attorney, Disability Rights California) wrote Marsha Bedwell (CDE, General Counsel) regarding the stay-put issue and Dry Creek. "We understand that the Department has taken the position that "stay put" is no longer in operation following the administrative phase of review (Office of Administrative Hearings) until such time as an appeal is filed in court. This interpretation is contrary to statute, congressional intent and case law." Mr. Rosenbaum asked CDE to reconsider its position which would potentially affect numerous California special education students. (*See,* Ex. 14, Letter, Stephen Rosenbaum to Marsha Bedwell, dated April 30, 2010).

Mid-May 2010 - Subsequent to filing their appeal, in light of Ms. Yajima's March representation to Michael Rosenberg that if the Marcheses filed the federal court action CDE would enforce stay-put, and in light of the lack of enforcement, the Marcheses made several requests to Ms. Yajima for the status of enforcement against Dry Creek. After several communications with no response from Ms. Yajima, Mr. Marchese provided public comment before the Advisory Commission on Special Education.

May 24, 2010 – Commencing with a letter dated May 24, 2010, Dry Creek, through its legal counsel, Marcy Gutierrez, began sending numerous and contradictory communications to the Marcheses regarding OAH's February 18, 2010 Decision and the status of G.M.'s educational program, including stay-put. (*See,* Ex. 15, Letter, Marcy Gutierrez to Kevin Marchese, dated May 24, 2010). Ms. Gutierrez's first letter insisted the Marcheses "take the necessary steps to fully comply with ALJ Marson's orders," and stated "While you have not yet acknowledged it, ***stay put is the decision issued by ALJ Marson***" which would continue "until such time as you and the District come to a different written agreement regarding G.M.'s placement." She also noted the Decision was final "as the deadline to file an appeal of the decision has expired." Ms. Gutierrez demanded legal fees she said ALJ Marson had assessed against G.M.'s parents.

May 27, 2010 - Ana Marsh (CDE) wrote Dry Creek Superintendent Mark Geyer and the Marcheses noting the Marcheses had appealed OAH's Decision. She confirmed CDE's past statements regarding Dry Creek's obligations with regard to stay-put and directed "*pursuant to 20 U.S.C. §1415(j) (see also 34 C.F.R. 300.518), Dry Creek Joint Elementary School District to enforce stay put as it relates to educational placement and services for [Student].*" (*See,* Ex. 16, Letter, Ana Marsh to Mark Geyer, Kevin Marchese, dated May 27, 2010).

June 8, 2010 - Despite CDE's May 27, 2010 notice to Superintendent Geyer, Ms. Gutierrez wrote the Marcheses and made statements as if stay-put were not in effect. Ms. Gutierrez again demanded legal fees assessed as sanctions and notified the Marcheses that "as a prevailing party, the District is entitled to recover its entire expenses for attorneys' fees in connection with the due process hearing." (*See,* Ex. 17, Letter, Marcy Gutierrez to Kevin and Lyndi Marchese, dated June 8, 2010).
Ms. Gutierrez warned the Marcheses Dry Creek would seek recovery of its attorneys' fees "*in the event that you serve the District with a federal or other complaint or subsequent cause of action in connection with this matter*." She also stated OAH had "established" the Marcheses' original due process "was frivolous, unreasonable, or without foundation" and should the Marcheses "engage in further meritless litigation against the District in federal court" or "*serve a frivolous appeal on the District and proceed with litigating such appeal, the District will file a petition to recover any and all fees from you in the event that the District prevails in federal court*." Ibid. at pgs. 1 – pg. 2.

> Ms. Gutierrez's letter ignored the Marcheses' right to appeal OAH's Decision, which was stayed pending their appeal. It also ignored CDE's May 27, 2010 notice that stay-put was in effect.
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> Ms. Gutierrez's letter also seemed to warn the Marcheses against pursuing their procedural right to appeal under 20 U.S.C. §1415(i)(2)(A), stating that if they did so, she would seek to cause them significant financial harm.
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> Ms. Gutierrez's statement that OAH found the Marcheses' entire due process frivolous grossly misrepresented OAH's Decision, as nothing in the Decision reflected such a claim.[9]
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> Dry Creek failed to acknowledge its obligations to comply with CDE's 05/27/10 letter. At this point, CDE had taken no meaningful steps to ensure actual enforcement, despite its ability to do so and its obligation to ensure LEA compliance.

June 9, 2010 - Ms. Gutierrez again wrote the Marcheses, responding to a letter from Mr. Marchese to Lynn Barberia regarding the IEP process. Ms. Gutierrez's letter provided "formal notice that I represent the Dry Creek Elementary School District" in connection with pending and anticipated litigation regarding G.M. and informed Mr. Marchese that as a member of the bar, he was prohibited "from directly communicating with a party he/she knows to be represented by another attorney." (*See,* Ex. 18, Letter, Marcy Gutierrez to Kevin Marchese, dated June 9, 2010).

[9] While OAH's February 18, 2010 Decision stated certain pleadings Mr. Marchese filed may have been "frivolous," a search of the Decision for the word "frivolous" reveals that nothing in it questioned the validity of the Marcheses' due process filing or claims they asserted on their son's behalf.

> Nothing in the IDEA precludes a parent, who is also an attorney, from participating in the IEP process or communicating with school staff regarding their child's education or pursuant to their procedural safeguards. As a parent of a child with a disability under IDEA, Mr. Marchese is entitled to communicate directly with school staff regarding his son's education, both at IEP meetings as well as through written and other verbal communications. Ms. Gutierrez's reference to Mr. Marchese's livelihood as an attorney and her admonishing reminder implied his actions failed to meet some ethical standard, and as such was an attempt to intimidate Mr. Marchese so that he would not advocate on G.M.'s behalf. Her actions were unwarranted and unprofessional.[10]

Ms. Gutierrez further stated "It is my understanding that your most recent interactions with staff, both at Silverado Middle School and Creekview Ranch Middle School, were less than courteous and were in violation with board policies, in that you interfered with the peaceful conduct of the school environment and disrupted staff." Ibid., pg. 2.

> Ms. Gutierrez's statements reflect a practice common among aggressive school district legal counsel and LEA administrators who falsely accuse parents or mischaracterize their actions or verbal communications to imply parent(s) have somehow violated civility or other conduct policies. Such claims are designed to intimidate families and discourage advocacy for their students.
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> California school board policies related to civility or conduct require school staff to act in accordance with the policy, i.e., if a complaint is made about an incident, it must be documented and a complaint investigation conducted. Had Dry Creek personnel actually claimed the Marcheses acted in a manner which violated district policy as Ms. Gutierrez claimed, they were required to take appropriate steps in accordance with the policy, i.e., document the incident and conduct an investigation, not just make unfounded accusations as Ms. Gutierrez did, which denies an accused parent their due process rights and the right to know the details of and challenge such accusations.
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> Most parents are not familiar with such policies and when accused in this manner, they feel helpless to defend against such claims. As no such steps were taken to document the "incident" Ms. Gutierrez complained of and as the

[10] Although this was Ms. Gutierrez's first reference to Mr. Marchese's livelihood, unfortunately, it was not the last. Ms. Gutierrez persisted in admonishing Mr. Marchese to "conduct yourself in a good faith manner and in accordance with the California Rules of Professional Conduct," implying he needed reminding, while she ignored her own failure to act in good faith. Ms. Gutierrez's numerous and continued reminders themselves demonstrated unprofessional conduct warranting scrutiny, particularly in light of her ongoing counsel to Dry Creek to not comply with the law, CDE's directives, OAH's orders or GM.'s right to an appropriate education. *See also,* Ex. 20, Letter, Marcy Gutierrez to Kevin Marchese, dated June 28, 2010.

> Marcheses continued to meet with school staff without incident, it is evident Ms. Gutierrez's statements were solely intended to "warn" the Marcheses from exercising their rights under the IDEA to participate in their child's education, in the same manner her prior statements attempted to "warn" them from pursuing their right to appeal an adverse due process decision.

June 22, 2010 - Ms. Gutierrez again wrote Mr. Marchese regarding assessments and the IEP process. (*See,* Ex. 19, Letter, Marcy Gutierrez to Kevin Marchese, dated June 22, 2010). At page 2 of her letter, Ms. Gutierrez noted "until the IEP process is able to be completed, the District will continue to offer Grayson placement at Silverado Middle School, *consistent with ALJ Marson's decision*."

> Ms. Gutierrez and Dry Creek continued to refuse to comply with CDE's May 27, 2010 order requiring Dry Creek to enforce stay-put, not the OAH due process decision which was being appealed. CDE took no steps to enforce its order.

June 28, 2010 - At the same time she acknowledged stay-put was in effect, Ms. Gutierrez began asserting multiple and varied excuses why Dry Creek would no longer abide by "stay-put." She also presented a new, novel legal theory challenging stay-put to justify Dry Creek's noncompliance going forward, i.e., that Dry Creek had the right to set aside the stay-put placement based on a theory of "good cause" without authority in the IDEA or case law and based on unsubstantiated allegations against Ms. Coutchie. (*See,* Ex. 20, Letter, Marcy Gutierrez to Kevin Marchese, dated June 28, 2010).

Ms. Gutierrez stated that "the District is aware that a complaint has been filed" and "[w]hile the District has yet to be served with the complaint, and thus arguably there is no appeal pending, *the District acknowledges the "stay-put" provision of the IDEA is in effect."* Ibid. at pg. 1. Yet, on the very next page, Ms. Gutierrez stated "*the District does not agree that Ms. Coutchie is the "current placement" for purposes of stay-put,"* and cited to cases she claimed supported Dry Creek's position that the October 2008 Settlement Agreement provided for services during the 2008-2009 school year *only,* and the parties intended such services to cease on or before August 15, 2009. Ibid. at page 2.

Ms. Gutierrez further asserted:

- "The intervention services were *temporary*, and, therefore do not constitute stay-put." Ibid.

- "The last agreed upon IEP placement was that which was set forth in the April 29, 2005 IEP." Ibid.

- "Please understand that the District continued to fund Ms. Coutchie's services during the pendency of the due process hearing out of *good faith, not because the settlement agreement, the IEP or the law required it to do so*." Ibid.

  While she cited to the October 2008 Settlement Agreement and IEP (the last agreed upon IEP under which Ms. Coutchie began providing services), Ms. Gutierrez ignored that IEP, and reached back *three years to an outdated IEP from April 2005* to rationalize returning G.M. to a school-based placement. She not only ignored the October 2008 settlement, *she ignored the entire due process in 2008.*

  Ms. Gutierrez seemed to be claiming Dry Creek wasn't obligated to comply with a signed settlement agreement, IEP or IDEA, but did so only because it acted in "good faith," all the while ignoring that failure to comply with a settlement agreement, IEP or the law itself was not a demonstration of "good faith." Ms. Gutierrez also seemed unaware that by continuing to provide services through Ms. Coutchie, at the same time she repeatedly acknowledged Dry Creek was complying with stay-put, Dry Creek had waived any right to assert it did not have to comply with stay-put, as it was now doing.

  By virtue of the fact that ALL IEPs are reviewed annually, covering an annual school year, ALL services provided pursuant to an IEP, including school-based services and those delivered by outside providers are "temporary" in nature. Following her logic, no services provided by an outside provider, NPA or NPS would *ever* be part of a stay-put placement. This is not the case under IDEA or case law which interprets it.

  Ms. Gutierrez also failed to address why CDE had continued to order Dry Creek to comply with the stay-put if Dry Creek was not obligated to do so or if CDE actually believed the claims she made about Ms. Coutchie were accurate.

Ms. Gutierrez's June 28, 2010 letter offered the Marcheses two options for G.M.:

1) The "actual stay-put placement required by law which is . . . set forth in the last agreed upon IEP [04/29/05]"; and

2) "To continue with the placement set forth in the settlement agreement" including reading services and PE; . . . "However, should the District agree to recognize the terms of the settlement agreement as stay-put, *despite no legal requirement to do so,* the District no longer authorizes Ms. Coutchie to serve as the services provider for one-to-one reading intervention services." Ibid. at page 3.

Without citing any legal authority, Ms. Gutierrez appeared to offer the family a choice between two alternative versions of "stay-put" when she had just acknowledged in the first paragraph of her letter that stay-put remained in place.

In reality, Ms. Gutierrez was offering the family *no choice at all*, for she actually offered either:

> 1) a return to the 04/29/05 IEP (i.e., a return to an outdated ***school-based program***, (which was the same program which had led to the dispute and due process resulting in the Settlement Agreement and outside provider in the first place); or
>
> 2) the placement set forth in the Settlement Agreement [which provided for an outside educational therapist/reading specialist], but which the District would only agree to if it was provided by a "teacher employed by the District," i.e., a ***school-based program***.

Ms. Gutierrez's options were a contradiction in terms: if the District recognized the stay-put in the Settlement Agreement, it wouldn't recognize the stay-put in the settlement agreement. Again, how the District had the authority to ignore IDEA's requirements for stay-put is unclear.

As G.M. was making documented progress with Ms. Coutchie, but still needed remediation to close the gap in his reading skills, forcing him to return to a general education placement violated the settlement agreement, IEP and stay-put, as well as his right to be in his least restrictive environment (LRE), at that time one-to-one instruction.

Even assuming the Marcheses were willing to change G.M.'s placement, or that the two options presented were actually "alternatives," Ms. Gutierrez failed to indicate under what authority Dry Creek could unilaterally choose the only two options, essentially dictating not only the student's program, but his placement, without regard to his present levels of performance or his progress toward prior goals and without regard to his parents' right to participate in such decisions.

Ms. Gutierrez also failed to explain how the two options complied with the "stay-put" provisions of §1415(j) or with CDE's direct order for enforcing the stay-put, which included reimbursing Ms. Coutchie and continued payment of her current invoices, with the District obligated to provide copies of invoices and payments going forward. (*See,* Ex. 16, above).

At page 3, Ms. Gutierrez noted Dry Creek had established "more than sufficient good cause" to no longer authorize Ms. Coutchie, the stay-put provider, as "Ms. Coutchie has acted in bad faith and has undermined the District's efforts to educate Grayson." Ibid.

> Ms. Gutierrez failed to provide *any evidence whatsoever* to support her defamatory statements about Ms. Coutchie. Throughout this litigation, Dry Creek has failed to *ever* present claims to Ms. Coutchie or any other valid authority so Ms. Coutchie could have the opportunity to dispute and disprove them.
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> Nothing in IDEA provides for a "good cause" exception to "stay put." This was the starting point of a new phase of Dry Creek's noncompliance. While purporting to confirm and comply with "stay-put," Dry Creek reinterpreted the law to mean stay-put's protections could be removed with impunity, a meaning without basis in IDEA's statute, regulations or case law. Dry Creek, through its aggressive legal counsel, was seeking to subvert the fundamental safeguard of stay-put while it claimed to be complying with the law, took funds that came with assurances of compliance and instead of using them to provide a student's educational services, appears to have misappropriated them to pay to legal counsel to mount specious challenges to IDEA's clear language.
> As G.M. had made progress, which was consistently reported to Dry Creek, it is unclear how Ms. Coutchie could possibly have "undermined the District's efforts to educate Grayson."

Ms. Gutierrez also referred to Mr. Rosenberg's prior citation to *Joshua A.*, stating that she believed that case supported her position regarding the District's right to change the provider during stay-put,[11] as well as other cases she believed were applicable. Ibid.

[11] Nothing in *Joshua A.* supports Dry Creek's claim it could change the provider during stay-put "so long as the nature and level of services remains comparable." (What is noteworthy is that this case, which also involved the issue of stay-put, was brought by Ms. Gutierrez and Michelle Cannon, another attorney involved in Dry Creek's representation, with the clear intent to set aside stay-put, one of IDEA's principal procedural protections. *See,* Exs. 66-68, and App. 2, Supplemental Point 3B. Contrary to Ms. Gutierrez's claim, the Court in *Joshua A.* carefully analyzed the facts and law and concluded ". . . the stay put provision acts as a powerful protective measure to prevent disruption of the child's education throughout the dispute process. It is unlikely that Congress intended this protective measure to end suddenly and arbitrarily before the dispute is fully resolved. . . . Ultimately, refusing to enforce the stay put provision during the appeals process would force parents to choose between leaving their children in an education setting which potentially fails to meet minimum legal standards, and placing the child in private school at their own cost. Congress sought to eliminate this dilemma through its enactment of § 1415(j)." *Joshua A.*, at 3563. *See also, Mangum v. Renton* 111 LRP 7023 (W.D. Washington, 2011), where the Court confirmed a stay-put placement in compliance with IDEA applied to the student's program even where the student had not been identified as eligible under the IDEA and was home-schooled and where it determined stay-put could be determined without an IEP. http://docs.justia.com/cases/federal/district-courts/washington/wawdce/2:2010cv01607/170890/20/.

> The majority of Ms. Gutierrez's case law citations appear to be inapplicable or inaccurate.

Ms. Gutierrez stated that if the family chose to continue the placement set forth in the Settlement Agreement, "the District will ***exercise its discretion*** to change the service provider for good cause and will no longer reimburse or provide direct funding for services by Ms. Coutchie. ***As permitted by law***, the District's new provider will provide services substantially similar in nature and maintain the same level of comparable services." Ibid. at pg. 4.

> Ms. Gutierrez failed to explain where in the IDEA this "discretion to change the service provider for good cause" existed, or how this was "permitted by law."
>
> She also failed to indicate how the District's acts would comply with the Settlement Agreement which required a provider the parents agreed to, or how her position complied with 20 U.S.C. §1415(j), which required that "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 . . "

Ms. Gutierrez again warned the family "the District will afford *little tolerance for bad faith* as these proceedings move forward" noting the family's failure to "formally notify the District that a complaint has been filed." Acknowledging the District *had been* informed of the filing in a May 26, 2010 communication from the Marcheses, she then stated "Please be advised that if you continue to conduct yourself in *bad faith* the District will diligently seek sanctions against you." Ibid.

> Ms. Gutierrez's warnings about "bad faith" acts ignored the fact that by counseling a public agency to unilaterally set aside a student's procedural safeguard of stay-put and violate a Settlement Agreement, IEP, and IDEA, as well as past representations to the family, she was engaging in bad faith actions that appeared to be inducing a public agency to do so as well and went against public policy.
>
> This was the latest of Ms. Gutierrez's many "warnings" issued on Dry Creek's behalf regarding behavior she herself had engaged in. Ironically, while complaining vociferously about the Marcheses' failure to serve her with notice of their appeal and Complaint filed in the District Court, she apparently forgot that her June 8, 2010 letter, three weeks prior, "warned" the family ***against serving her with just such a document,*** and that Dry Creek would seek attorneys' fees "in the event that you serve the District with a federal or other complaint or subsequent cause of action in connection with this matter." (*See,* Ex. 17, at pg. 1)

In closing, Ms. Gutierrez informed the Marcheses Dry Creek would request a final invoice from Ms. Coutchie for services through the end of the 2009-2010 school year and would notify her Dry Creek no longer authorized her services to G.M., terminating funding of her services "consistent with the terms of the prior settlement agreement." She also stated that at the start of the 2010-2011 school year, "the District will provide Grayson with 15 hours per week of non-to-one reading intervention by a credentialed and appropriately trained *teacher employed by the District."* Ibid., pg. 5.

> This reveals Dry Creek and Ms. Gutierrez's true purpose, i.e., the unilateral elimination of Ms. Coutchie as the stay-put provider and G.M.'s forced return to school with services from a District teacher. This contradicted express terms of the Settlement Agreement and IEP, and was contrary to IDEA's stay-put provisions designed to prevent disruption of a student's education. Her efforts from this point forward were not intended to clarify stay-put or confirm it, rather were focused on justifying Dry Creek's unilateral elimination of G.M.'s right to stay-put with appropriate services, as well as its obligation to fund such services.
>
> Even if Dry Creek believed it had the right to change the provider for cause, Ms. Gutierrez's letter confirmed it was to be "consistent with the terms of the prior settlement agreement" so that any replacement provider had to be someone who was an educational therapist/reading specialist qualified to deliver the curriculum G.M. needed. A "teacher employed by the District" which had failed to provide G.M. with an appropriate education did not meet this criteria.
>
> Also, both the Settlement Agreement and §1415(j) confirm the provider had to be someone G.M.'s parents agreed to. As Ms. Coutchie, an educational therapist/reading specialist became involved due to the District's lack of qualified staff to teach G.M. reading and his resulting illiteracy, Dry Creek knew it was highly unlikely his parents would agree to return him to the very placement and teachers that had caused him damage in the first place.[12]
>
> Ms. Gutierrez's letter again failed to mention CDE's May 27, 2010 letter (Ex. 16) or its order for Dry Creek to enforce stay-put, (including reimbursing Ms. Coutchie, and providing proof it was paying her invoices on a current basis). Her letter demonstrated she willfully ignored CDE's orders, as well as Congress's purpose in enacting stay-put (i.e., to prevent the disruption of G.M.'s education while Dry Creek and the Marcheses worked out their dispute), and that she was counseling Dry Creek to do the same.

[12] Nothing in the law requires a parent to sacrifice their child to an education agency which not only does not have qualified staff, but fails to comply with the law in good faith. IDEA and the case law interpreting free appropriate public education confirm this.

> Ms. Gutierrez also gave the clear impression she believed students and their parents were at the whim of school districts and their legal counsel, to be dragged hither and yon while the school district persisted in its noncompliance and its legal counsel profited from the process.

July 8, 2010 - Ava Yajima (CDE Legal, Audits and Compliance Branch) wrote the Marcheses acknowledging their letters and telephone messages, their request for "status of complete stay-put compliance" and Ms. Gutierrez's June 28, 2010 letter. (*See,* Ex. 21, Letter, Ava Yajima to Mr. and Mrs. Marchese, dated July 8, 2010).

Despite CDE's earlier May 27, 2010 direction to Dry Creek "*to enforce stay put as it relates to educational placement and services for [Student],*" "*pursuant to 20 U.S.C. §1415(j) (see also 34 C.F.R. 300.518),"* Ms. Yajima now stated "I am currently ***researching the issues*** both you and the District raise in your letters. . . and will respond within the next several days with CDE's response."

> Nothing regarding the law of stay-put had changed since CDE's May 27, 2010 letter. None of the facts of G.M.'s placement had changed. However, Dry Creek was now openly refusing to comply with stay-put and for the first time was asserting it had the unilateral right to alter stay-put however it pleased.
>
> Contrary to Ms. Yajima's March 2010 assurance to Mr. Rosenberg, that if the Marcheses filed a Complaint in federal court CDE would enforce, CDE did not do so.
>
> Rather than reiterate its May 27, 2010 directive to Dry Creek to comply with the stay-put placement, CDE seemed to be changing its position, claiming it had to "research" the issues.[13]

July 15, 2010 - Marcy Gutierrez again wrote Mr. Marchese regarding various issues, including "stay-put". (*See,* Ex. 22, Letter, Marcy Gutierrez to Kevin Marchese, dated July 15, 2010). Ms. Gutierrez's letter characterized CDE's 12/08/09 CCR corrective actions (which addressed Dry Creek's "Failure to continue a student's current

[13] At some point during 2010, CDE Deputy Superintendent and General Counsel Marsha Bedwell (Legal, Audits and Compliance Branch), left CDE to work in the private sector. Ms. Bedwell's new employer was Kronick, Moskovitz, Tiedemann & Girard (KMT&G) the same law firm representing Dry Creek where both Marcy Gutierrez and Michelle Cannon work. Both Ms. Bedwell and Ms. Gutierrez are listed as "of counsel" to KMT&G. http://www.kmtg.com/data/attorneys/att_listall.php?Offs=0&search. Ms. Bedwell's employment by the same firm representing the noncompliant school district CDE failed to enforce against raises questions regarding CDE's failure to hold Dry Creek accountable as well as whether Ms. Bedwell's anticipated employment with KMT&G was the impetus for CDE's unwillingness to enforce against Dry Creek or its sudden change in position regarding Dry Creek's obligations to comply with the stay-put. *See also,* Appendix 2, Supplemental Points & Discussion re: Ongoing Noncompliance.

placement during pendency of any administrative or judicial proceedings re: a due process proceeding (34 CFR 300.518(a))"), as simply a request for proof of payment for G.M.'s provider. "The only reference to stay-put is CDE's directive that 'should this case continue in stay-put the District shall provide evidence that it has reimbursed the *reading specialist* in a timely manner.'" Yet, she also acknowledged that "Similarly, the May 27, 2010 directive requires the District to provide proof of payment to the *reading specialist* as required by stay-put."

At page 2, Ms. Gutierrez stated "At no point has the District stipulated to Ms. Coutchie as the service provider for stay-put. *The District does however agree to honor the stay-put placement that is identified in the last agreed-upon IEP as required by law, which provides for one-on-one services with an "education specialist."* Therefore the District will continue to fund Grayson's services from an "education specialist" as identified in the last agreed-upon IEP (per the settlement agreement) and as required by law." Yet, in the very next paragraph, she stated "As mentioned in my previous communications . . . *the District has exercised its legal right to change the service provider for good cause*."

> Ms. Gutierrez acknowledged Dry Creek would comply with stay-put, but then misstated the law, claiming it allowed the District to unilaterally replace the "education specialist" with someone of its own choosing contrary to the plain language of 20 U.S.C. 1415(j), the Settlement Agreement, and the IEP process.
>
> Ms. Gutierrez's use of the phrase "per the settlement agreement" demonstrates the District knew its obligations and that the Settlement Agreement specifically identified Ms. Coutchie. Unfortunately, Dry Creek intentionally ignored the law to come up with a new interpretation, i.e., that it had a "legal right to change the service provider for good cause." None of the cases Ms. Gutierrez cited in prior correspondence provided legal support for such a claim.
>
> Notably, Ms. Gutierrez no longer claimed the last agreed upon IEP was April 2005.[14]

At page 2 of her July 15, 2010 letter, Ms. Gutierrez stated "Now that the District is aware of Ms. Coutchie's bad faith conduct, as acknowledged by ALJ Marson, such as withholding assessment results and other pertinent information from Grayson's IEP team, circumstances require a change in service provider."

> As before, Ms. Gutierrez asserted a claim not supported by the prior due process Decision.[15] She did so to justify Dry Creek's attempt to unilaterally remove Ms. Coutchie in violation of stay-put.

[14] Note that this once again changed with Dry Creek's due process filing with OAH in August 2010.

July 21, 2010 – On this date, CDE wrote the Marcheses and Marcy Gutierrez with the results of its "research." Rather than require Dry Creek to comply with its obligations under stay-put as it had in the past, the letter from CDE recharacterized Dry Creek's failure to comply with stay-put as a "*dispute*" requiring resolution in OAH (despite both CDE and OAH having issued prior findings and orders confirming the "stay-put" placement). It appears CDE's efforts to enforce Dry Creek's compliance with stay-put came to an end and CDE itself went in a new direction. In so doing, CDE joined Dry Creek in its noncompliance. (*See,* Ex. 23, Letter, Ava Yajima to Kevin Marchese and Marcy Gutierrez, dated July 21, 2010).

> CDE's actions at this juncture, including giving a school district an avenue to attempt to validate its noncompliant position using due process procedures Congress enacted to protect students and their families, was not only a change in direction on CDE's part, it was a cynical manipulation of the procedural safeguards for the benefit of a noncompliant LEA.
>
> CDE in effect admitted its failure to maintain an effective CRP and to supervise LEAs and essentially delegated its statutory authority to supervise LEAs and address noncompliance to another state agency, OAH.

Ms. Yajima stated "It appears that both parties (Parents and District) [sic] a factual dispute regarding the content of "stay-put" as it affects the free appropriate public education of G.M." Her letter laid out a "'Stay-Put' History," reiterating occasions Dry Creek had acknowledged stay-put was in place, assured it would take no action to terminate the placement, stated its intent was "to continue funding the stay-put placement" and "concurred with the stay put as outlined by the student." (*See,* Ex. 23, at pgs. 1-2)

However, at page 2 of her letter, Ms. Yajima noted that although "District and Parents appear to agree that "stay-put" services are to be provided . . . there appears to be *divergent ideas* as to what constitutes the "last agreed-upon educational placement."" Ibid.

> "Stay-put" was not in "factual dispute." Dry Creek and CDE were legally obligated under IDEA to ensure FAPE to all students, such as G.M., as well as IDEA's procedural protections, including the "stay-put" placement in 1415(j). Both had previously acknowledged what it consisted of.

[15] A word search of the February 2010 Decision for the words "bad" and "bad faith" do not result in any references to Ms. Coutchie. Ms. Gutierrez's regular use of hyperbole to justify her misrepresentation of both the facts AND the law is indefensible.

> As Dry Creek disavowed its obligations under stay-put by refusing to fund the provider and comply with the Settlement Agreement or last agreed upon IEP, there were "divergent ideas." However, this was not about what constituted the "last agreed upon educational placement" which hadn't changed since the June 2009 due process filing, and had been confirmed by OAH, CDE, and Dry Creek. The "divergent ideas" arose from Dry Creek's openly defiant noncompliance, evidenced by the newly-developed rationales Dry Creek had asserted for the first time in Ms. Gutierrez's June 28, 2010 letter (Ex. 20), documenting Dry Creek's attempt to unilaterally rid itself of the cost of Ms. Coutchie's services and return G.M. to school without the Marcheses' consent, while it claimed to be complying with "stay-put." Naturally, the Marcheses challenged these actions because they did not comport with IDEA's plain language and were nothing more than the District's poorly-disguised attempt to avoid its responsibilities under stay-put, set aside the Settlement Agreement and IEP the District itself had unilaterally drafted in October 2008. Unfortunately, Ms. Yajima's letter ignored all this.
>
> Ms. Yajima's letter also ignored that Dry Creek was failing to comply with CDE's May 27, 2010 letter which had clearly and directly reiterated CDE's earlier directives regarding stay-put and had ordered Dry Creek to implement G.M.'s educational placement with Ms. Coutchie. (*See,* Ex. 16)

At pg. 2 of her July 21, 2010 letter, Ms. Yajima claimed to document the parties' positions (Ex. 23 at pg. 2):

- The District contended a settlement agreement does not automatically constitute "stay put" and "the agreement by the parties was temporary and specified the end date of services."

- The Marcheses contended that Dry Creek, through its actions, including changing G.M.'s middle school placement, make-up hours, extended school-year hours and by failing to pay the provider, "had unlawfully changed the placement of their son."

Ms. Yajima then stated "It is clear that there is *currently a dispute* between the District and G.M.'s parents as to what constitutes "stay-put". It is also evident to CDE, given the above, that a final determination as to what "stay-put" consists of must be made by OAH. . . which has the authority to make a determination of what "stay put" is for a particular student." Ibid.

> Again, the so-called *current dispute* was not about what constituted stay-put, which had been confirmed numerous times. Instead it was the result of Dry Creek's new theories regarding the Settlement Agreement and the "temporary" placement based on its desire to challenge and remove Ms. Coutchie. As it was

Dry Creek's obligation to comply with the law, not challenge it to a student's detriment, this "dispute" confirmed Dry Creek's continuing noncompliance.

Ms. Yajima chose to ignore Dry Creek's noncompliance as the contributing factor to the "dispute." In concluding that what stay-put consists of "must be made by OAH," Ms. Yajima ignored CDE's prior CCR findings and directives on stay-put (although she cited to them at pages 1-2) which reached conclusions and corrective actions which should have resulted in compliance by the LEA and when they did not, should have resulted in CDE enforcement against the LEA.

Ms. Yajima also ignored OAH's prior determinations regarding stay-put (while citing to them). OAH had confirmed the stay-put placement in prior orders, which up to now CDE had confirmed. Thus, OAH would have no jurisdiction over such a "dispute" as it was a matter OAH had already decided and was now CDE's obligation to enforce.

Instead of reiterating CDE's May 27, 2010 directive or prior CCR orders to Dry Creek to comply with the current educational placement, CDE's present claim the "dispute" required resolution by OAH seemed to indicate CDE believed it had no authority to make such a determination, despite previously doing so on several occasions, in accordance with the IDEA, its regulations at 34 CFR §§300.151-153, and guidance from the U.S. Department of Education. [*See,* OSEP Memorandum to Chief State School Officers from Kenneth Warlick, *(*OSEP Memo 00-20), dated July 20, 2000; *see also,* U.S. DOE Memo to Alice Parker, dated October 27, 2003]. [16] [17]

Although it was "evident to CDE . . . that a final determination as to what 'stay-put' consists of must be made by OAH", neither IDEA nor its regulations governing CRP requires enforcement of a compliance complaint through due process. In fact, OSEP Memo 00-20, provides:

[16] *See,* Appendix 3: IDEA Statutory and Regulatory Obligations: State & Local Education Agencies and Related Authorities, including relevant OSEP Memoranda to state education agencies.

[17] At the same time CDE took the position with the Marcheses that they had to go to OAH to resolve this "dispute," CDE took the same position with a Southern California family in another compliance complaint. In that matter, CDE ordered a corrective action for LEA noncompliance that required the LEA to either provide the student with an IEP the family would agree with (i.e., comply with the law) or file for due process against the family. [Compliance Complaint # S-0599-09/10] In both instances, CDE essentially admitted its CRP was ineffective, as it had neither the will nor the ability to ensure compliance through the complaint process, at the same time a condition of its receipt of federal funds is its maintenance of an effective CRP. Both families had to endure two separate complaint processes with two separate timelines, because CDE was unwilling to enforce against an LEA. Confronted by recalcitrant school districts, CDE chose a "third way" not contemplated by the statute or regulations.

> "It is impermissible under Part B for an SEA to: (1) have a procedure that removes complaints about FAPE or any other matter concerning the identification, evaluation, or educational placement of the particular child or any other allegation of a violation of Part B or its implementing regulations from the jurisdiction of its State complaint resolution system, or (2) advise or require parents to request a due process hearing before the SEA can initiate a complaint investigation." [OSEP Memo 00-20, pg. 4]

While a parent has the ***right*** to choose due process, when a parent alternatively chooses to use the CRP, they should be able to rely on CDE's assurances it can effectively investigate the complaint, resolve it and implement its orders, as IDEA requires and CDE promises it does. Families should be able to assume CDE will take all appropriate measures to ensure implementation, not give an LEA a way to avoid its compliance obligations, as it did here.[18]

Ms. Yajima's reference to a "final determination" of stay-put also seemed to be a ruse to justify removal of the issue to OAH. CDE had previously confirmed G.M.'s current educational placement was with Ms. Coutchie as of the due process filing in June 2009, a fact confirmed by Dry Creek and OAH. "Stay-put" meant G.M. was to ***stay put*** where he was. By now saying a "final determination" was needed, CDE switched its position to enable Dry Creek and its legal counsel to pursue a new "determination" of stay-put, different than the current placement, using IDEA's due process procedures enacted to protect students and their families, to instead strip away IDEA's protections. Not only was Ms. Yajima's claim without legal foundation, it seemed to be a "go-ahead" signal to Dry Creek to take its noncompliance as far as it could.

Ms. Yajima knew the Marcheses had appealed into federal court, yet she directed the parties to OAH. (Given OAH's negative treatment of the Marcheses during their hearing the past year, as well as its positive findings for the District at the same time CDE had documented Dry Creek's continuing noncompliance, perhaps CDE sent the matter to OAH hoping to be done with the matter once and for all. Perhaps CDE hoped OAH could do what CDE was unwilling to, i.e., hold an LEA accountable.

[18] At the October 25, 2010 hearing in the federal court on CDE's Motion to Dismiss, Ms. Yajima not only confirmed the validity of the CRP as a process unto itself, but acknowledged it was designed to ensure ***resolution*** of ***compliance*** issues, telling the Court "There are two avenues a parent can use to basically complain about or bring resolution to an issue they're having with the school district, and one of them is the due process hearing under the Office of Administrative Hearings, and the other is the CRP, or the compliance resolution procedure." (*See,* Ex. 35, pg. 8, L.8 – 14) Her statements also make it clear parents are not obligated to go pursue due process, which confirms the CRP is supposed to be capable of resolving compliance issues.

> In the face of aggressive "push back" and oddball legal theories asserted by Dry Creek's legal counsel, CDE seems to have been searching for a way out by abdicating its supervisory responsibility and obligation to hold a noncompliant school district accountable.
> CDE's actions call into question its own CRP under IDEA (which requires that it "(2) Include procedures for *effective implementation of the SEA's final decision, if needed,* including— . . .(iii) Corrective actions to achieve compliance)." (34 CFR §300.152(b)(2)). Such procedures, while needed and required under 20 U.S.C. §1412 and 34 CFR §300.151-153, were nowhere to be found. CDE's actions also raised questions with regard to its ability in general to supervise LEAs, pursuant to IDEA's requirements and OSEP's clear directives.[19]
>
> Dry Creek's receipt of federal funds is conditioned upon its compliance with the IDEA, including the procedural safeguard of stay-put. By asserting its new and novel legal theory, through which it hoped to alter G.M.'s stay-put, Dry Creek openly flouted its obligations under the IDEA and openly defied CDE's supervisory authority.
>
> CDE was also out of compliance for failing to hold Dry Creek accountable and for failing to ensure the stay-put placement. At this point, both Dry Creek and CDE seemed to believe they could act without accountability and with impunity. Through its actions, CDE became complicit in Dry Creek's noncompliance.

At page 2 of her July 21, 2010 letter, Ms. Yajima stated a decision by OAH would "provide a greater potential to resolve the issue but will also create a record for the parties in the event that one party decides to appeal the decision."

> How a new OAH decision would provide greater potential for resolution when CDE simply ignored prior OAH findings already issued is unclear. How an OAH decision would provide greater resolution than CDE's resolution through its CRP is also unclear. Ms. Yajima blithely ignored the "record" already developed through CDE's own findings, and prior OAH findings and decisions,

[19] *See*, OSEP 00-20, Letter to Chief State School Officers, which states that Part B's State complaint procedures are critical to each State's exercise of its general supervision responsibilities because they provide parents with an important means of ensuring the educational needs of their children are met and provide the State educational agency ("SEA") with a powerful tool to identify and correct noncompliance with the IDEA and its implementing regulations. As part of its general supervisory responsibility, an SEA must implement complaint resolution procedures in a manner that meets the requirements of §§300.660-300.662 [now §§300.151-300.153] (see Section I). Because of the important role that effective State complaint resolution plays for parents, public agencies, and the SEA in meeting its general supervisory responsibility, each State's complaint procedures are addressed in OSEP's continuous improvement monitoring process. http://www2.ed.gov/policy/speced/guid/idea/letters/2000-3/osep002071700safeguardssec.pdf. *See also,* Appendix 3.

while she purported to document such findings in her "Stay Put History." Also, she ignored that the case was in federal court.

At pg. 2 – pg. 3 of the July 21, 2010 letter, Ms. Yajima stated "The Department will enforce any order of "stay-put" issued by OAH unless either party seeks and obtains an order from a court of competent jurisdiction staying the execution of the order from OAH. It is incumbent upon the parties to request OAH to issue an order as to what "stay put" is for the student."

OAH had made several findings in this regard. Ms. Yajima's statement that the parties needed to go to OAH, *yet again*, to determine stay-put, despite CDE's prior directives and OAH's prior findings, has no authority in the law and does not accord with 34 CFR §300.152(c) (2) and (3) which provides that -

> " If an issue raised in a complaint filed under this section has previously been decided in a due process hearing involving the same parties—
> (i) The due process hearing decision is binding on that issue; and
> (ii) The SEA must inform the complainant to that effect.
>
> (3) A complaint alleging a public agency's failure to implement a due process hearing decision must be resolved by the SEA."

Ms. Yajima seemed to indicate it was CDE's position to not enforce what until now had been a clearly defined and agreed to "stay-put" if a school district decided to challenge it. The plain language of the law is that stay-put is in place *throughout all judicial proceedings until the merits of the case are addressed*. Either Ms. Yajima didn't understand the meaning of stay-put, particularly in light of CDE's prior orders, or this was a clear signal to a rogue LEA that if it wanted to take a shot at changing the stay-put, CDE would step aside so they could fire away.

Perhaps the most ironic statement in her letter was Ms. Yajima's assertion CDE would "enforce any order of stay-put," even though CDE had failed to enforce its own stay-put orders, as well as OAH's prior orders and had failed to enforce despite Ms. Yajima's March representation to Michael Rosenberg. Her letter evidenced CDE's current failure and refusal to do just that and essentially said CDE *would not enforce.*[20]

[20] That this assurance was nothing but an empty promise is confirmed by a similar assurance CDE provided to the federal court in its November 1, 2010 Nonopposition to Dry Creek's motion re: stay put (*See,* Ex. 36) and its failure to enforce that order. Despite both OAH and the U.S. District Court issuing orders with regard to stay-put, and despite Ms. Yajima's assurances on behalf of CDE in March 2010, July 22,. 2010 and November 1, 2010, ***CDE has failed to enforce any order of stay-put***.

At page 3, Ms. Yajima stated "Parents view the current "stay-put" as an issue involving FAPE," and referred to EC §56501(a)(1) (where a parent or public agency may request a hearing where there is a "proposal to initiate or change the . . . educational placement of a child. . .") She then stated that since FAPE was at issue, "the most appropriate venue for the resolution of both parties' claims is a due process hearing" before OAH.

> CDE acknowledged Dry Creek's failure to comply with stay-put and pay the provider negatively impacted G.M.'s right to FAPE; yet rather than enforce against the noncompliant District, it allowed the family to be dragged off to another jurisdiction, when nothing in the CRP provides for such a process and when it only delayed the resolution CDE had been obligated to provide but had failed to for over a year.
>
> Ms. Yajima's letter confirms her view of the District's noncompliance and its asserting new ways to thwart the procedural safeguards as if it were a valid "proposal" by an LEA to change a student's educational placement. This takes noncompliance to a whole new level.
>
> Ms. Yajima's interpretation ignored Dry Creek's noncompliance, but also reflected a lack of understanding of the law or was a cynical ploy designed to thwart the law's plain language and help a noncompliant LEA avoid its responsibilities.
>
> It also contradicted the language of stay-put, that "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,. . ." Any "proposal to change" G.M.'s placement on the part of Dry Creek required the family's agreement. That CDE now believed there was a "dispute" demonstrates ***there was no agreement***. Therefore, the student's placement could not be changed and CDE should have enforced it as it had ordered in the past.

As of July 21, 2010, Dry Creek was openly and willfully defying CDE's valid authority to enforce under the IDEA, as well as CDE's orders and directives. Rather than address this defiance, CDE seemed to willingly join Dry Creek in its noncompliance. CDE's failure to uphold the stay-put, and to require LEA compliance in general, enforce OAH's prior findings and its own directives pursuant to its CRP, constituted a failure of CDE's duties and obligations, all of which are conditions for its receipt of federal funds. For this noncompliance there was and continues to be no accountability.

CDE's failure to hold Dry Creek accountable not only paved the way for Dry Creek's novel legal theories, it emboldened the District to try them out in new venues, i.e., OAH and when they failed there, in the U.S. District Court. Ultimately, CDE would take a

new "neutral" position, wholly negating "stay-put" as well as its supervisory and enforcement obligations under the IDEA.[21]

Despite Ms. Yajima's claim that there was a "dispute" and that it was "incumbent" upon the parties to have OAH determine stay-put, it was not in G.M.'s or his parents' interest to do so. G.M. was in his "stay-put" placement, i.e., the last agreed-to education placement he had been in since October 2008, when Dry Creek and G.M.'s parents had agreed to this placement pursuant to their Settlement Agreement and IEP. It was also the placement in which G.M. had been "stay-put" since his parents filed due process on his behalf in June 2009. It appears Ms. Yajima intended to lead the Marcheses to believe she was taking appropriate steps to enforce or implement the stay-put, when in fact she was simply delaying to give Dry Creek time to pursue other strategies. (S*ee,* Ex. 21, July 8, 2010 letter from Ms. Yajima where she told the Marcheses she would appreciate their patience, in the context of a letter titled '*"Stay-put" implementation'*).

While Ms. Yajima's July 21, 2010 letter insisted a "dispute" existed as to G.M.'s last agreed upon educational placement necessitating OAH and/or federal court involvement to resolve, her claim is belied by her subsequent statements in a February 10, 2011 letter to the Marcheses (*see,* Ex.55), (following the Court's December 10, 2010 order regarding stay-put), where she quoted from the Settlement Agreement and IEP to ***identify the stay-put placement exactly as the Marcheses had always claimed it was***. This demonstrates Ms. Yajima's claim that there was a "dispute" was nothing but a ruse to enable Dry Creek to avoid its obligations under the law.

Dry Creek seemed intent on halting the progress G.M. was having in his current educational placement by removing Ms. Coutchie, the only instructor who had helped him make academic progress. CDE seemed intent on helping Dry Creek do so. Why would they do this?

July 26, 2010 - Lynn Barberia wrote Suzanne Coutchie regarding her bill and payment, as well as the status of stay-put hours and their use for extended school year (ESY) services. Ms. Barberia noted G.M. was still entitled to 51 hours of instruction, but that "the parents have been informed that the District will be utilizing a different service provider beginning with the 2010-2011 school year." (*See,* Ex. 24, Letter, Lynn Barberia (Director of Special Education, Dry Creek) to Suzanne Coutchie, dated July 26, 2010).

> CDE's May 27, 2010 directive ordering Dry Creek to fund Ms. Coutchie as the current stay-put provider going forward was still in effect (Ex. 16), yet Dry Creek claimed it would only pay Ms. Coutchie for "make-up hours" and unilaterally changed the provider, violating the stay-put, the Settlement Agreement and IEP.

[21] *See,* Appendix 2: Supplemental Points/Discussion re: Ongoing Noncompliance for discussion of the relationship Ms. Yajima, as well as other CDE legal counsel, appear to have with attorneys for LEAs.

August 4 - 5, 2010 – The Marcheses filed and served their "First Amended Complaint" against CDE, Dry Creek, Jack O'Connell, et al., in the federal court action. (*See,* Ex. 25, citation to FIRST AMENDED COMPLAINT against CDE, Dry Creek Joint Elementary School District, Jack O'Connell, et al., PACER Doc. # 13-14, U.S.D.C., E.D. California, https://ecf.caed.uscourts.gov/cgi-bin/ShowIndex.pl).

August 9, 2010 - Dry Creek filed a request for due process against G.M., including a motion for stay-put in which Dry Creek sought a determination "the District has "good cause" to change service providers." It also sought a finding the stay-put placement was "15 hours per week of 1:1 reading intervention provided by an educational specialist ***employed by the District*** as a credentialed teacher" which would exclude Ms. Coutchie. (*See,* Ex. 27, OAH Order Denying Motion for Stay Put," dated August 30, 2010). [22]

> IDEA provides no "good cause" exception to the procedural safeguard of "stay put" and its protections.
>
> As the last agreed-to placement per the 2008 Settlement Agreement and IEP included an educational therapist/reading specialist the family had agreed to (per §1415(j)'s requirement for parent agreement), the District was seeking to replace the well-qualified and highly-experienced educational therapist/reading specialist the Marcheses and Dry Creek had agreed to with a District teacher they hadn't agreed to of unknown qualification.

[22] Taking legal action to negatively impact G.M.'s educational placement through removal of the agreed-to stay-put provider and force him to return to school not only threatened G.M.'s procedural protections under stay-put, it violated G.M.'s right to be in his LRE (which Dry Creek and G.M.'s parents had agreed was direct instruction with a qualified educational therapist/reading specialist) and impacted G.M.'s right to FAPE. That Dry Creek did so using due process procedures, a procedural safeguard enacted by Congress to ensure students receive FAPE and their rights are protected, is a cynical abuse of process as well as Dry Creek's obligations under 20 U.S.C. §1413. Since Dry Creek's fundamental obligation under IDEA is to ensure FAPE, how can removing a provider of needed services ensure FAPE? Dry Creek used taxpayer dollars to mount frivolous litigation challenging IDEA's procedural protections, at the same time it accepted federal funds based on its assurances it was ensuring these protections and FAPE, under the IDEA. Dry Creek ignored its obligation to ensure G.M.'s rights and sought to disrupt his education in a manner *20 U.S.C. §1415(j) was enacted specifically to prevent* just so it could eliminate Ms. Coutchie as his provider. *See, Lake Washington School District No. 414 v. Office of Superintendent of Public Instruction*, (9th Cir. No. 09-35472, 02/22/11) ("Congress's intent in providing IDEA procedural protections is quite clear. Section 1415, which contains the procedural safeguards at issue here, states that *the procedures shall be established and maintained "to ensure that* ***children with disabilities and their parents*** *are guaranteed procedural safeguards with respect to the provision of a free appropriate public education*." 20 U.S.C. § 1415(a). As the Sixth Circuit observed: "Simply put, the procedural safeguards articulated in § 1415 were enacted so that parents with disabled children could enforce their child's right to a FAPE." *Traverse Bay Area Intermediate Sch. Dist. v. Mich. Dep't of Educ.*, 615 F.3d 622, 629 (6th Cir. 2010).") (emphasis added)

> It appears Dry Creek was trying to return G.M. to the District despite its failure to ensure G.M.'s progress in reading, which had led to the original due process, October 2008 Settlement Agreement and IEP; despite the fact that requiring such a return while G.M. was still working toward closing the gap between where the District's special education program had left him (so far behind grade-level standards he was functionally illiterate), and his current grade level standards violated his right to be in, and receive services in, his LRE.
>
> Dry Creek was aware of the Marcheses' federal court action, but pursued a decision setting aside stay-put in another jurisdiction. In light of the District's prior success against the family in OAH, Dry Creek apparently believed OAH was a sure bet.

August 16, 2010 - The Marcheses filed an opposition to Dry Creek's Motion. (*See,* Ex. 27, Order Denying Motion for Stay Put," dated August 30, 2010).

August 26, 2010 - In the midst of the period when it should have been enforcing, but instead was doing an about-face, CDE filed a Motion to Dismiss the Marcheses' federal court action. (*See,* Ex. 26, citation to PACER Doc. # 17). Hearing was set for October 25, 2010. (Note: this is the last pleading in this action listing Ms. Bedwell's name). https://ecf.caed.uscourts.gov/cgi-bin/ShowIndex.pl)

August 30, 2010 - OAH issued an "Order "Denying Motion for Stay Put," (Ex. 27). ALJ Marson noted that on April 19, 2010, Student had filed an appeal of decisions issued on February 18, 2010 (Student I and District I) to U.S. District Court, E.D. California and that "[b]ecause of that federal filing, the stay put rule is in effect. (*Joshua A. v. Rocklin Unified School Dist. (*9th Cir. 2009) 559 F.3d 1036)." ALJ Marson noted Dry Creek as moving party had the obligation to establish the facts and law entitling it to the order it seeks, but that "[i]t has failed to do so." Ibid., pg. 2. Marson further noted the District identified the stay-put placement as the April 29, 2005 IEP but neither provided the IEP nor described any provision in it related to instruction in reading.[23] Ibid.

ALJ Marson also found the District did not make an adequate legal showing and that:

> "***Stay put is now in effect because there is a pending proceeding in the federal district court***, not because the District later filed a request for due process hearing with OAH. Although the issues in the two matters are different, the stay put placement is identical. ***The stay put rule "functions as an 'automatic' preliminary injunction.***" (*Joshua A., supra,* 559 F.3d at p. 1037) In *Joshua A.,* an appeal from an OAH special education decision was pending before the district

[23] That Dry Creek's counsel would make such an obviously false assertion to an administrative court demonstrates the lengths they will go to, to achieve their goals and justify their noncompliance.

> court. ***Stay put was automatically in effect, as it is here, because of the pendency of the federal case. The district court resolved a dispute about the stay put placement by determining that the continued employment of a particular service provider was part of that placement.*** (*Joshua A. v. Rocklin Unified School Dist.* (E.D. Cal.) 2007 WL 2389868 (Order Granting Plaintiff's Motion for Stay Put, etc., Aug. 20, 2007). Ibid.

In closing, ALJ Marson noted "the District has not established that OAH has concurrent jurisdiction to define or alter the stay put placement while it is a part of an automatic order deemed issued by the federal district court." Ibid.

Dry Creek still had not complied with CDE's May 27, 2010 directive regarding stay-put (Ex. 16) and OAH had confirmed it yet again, finding stay-put was already in effect. Ms. Coutchie was not removed nor was stay-put set aside as Dry Creek had hoped. According to Ms. Yajima's assurance in her July 21, 2010 letter, that "The Department will enforce any order of "stay-put" issued by OAH unless either party seeks and obtains an order from a court of competent jurisdiction staying the execution of the order from OAH,"CDE should have taken steps to enforce upon Dry Creek. Instead, CDE actually encouraged Dry Creek to pursue its noncompliance in the federal court.

August 31, 2010 – Ana Marsh (CDE) wrote Mark Geyer (Dry Creek Superintendent) issuing yet another requirement and another deadline. (*See,* Ex. 28, Letter, Ana Marsh to Mark Geyer, dated August 31, 2010, sent September 2, 2010). Noting Dry Creek's August 9, 2010 due process request to modify stay-put and OAH's August 30, 2010 decision denying its Motion, Ms. Marsh stated "until such time as the District seeks an order from the Federal Court modifying the student's current stay-put placement, the District must implement the student's last agreed-upon educational placement with all the agreed-upon services." Dry Creek was directed to implement stay-put as defined by G.M.'s IEP consented to October 28, 2008 by Kevin Marchese, with Dry Creek to:

> . . . fund 15 hours per week of individual instruction following the district's academic calendar and 80 hours of extended year services from the educational specialist selected by the parents. Grayson will attend Creekview Ranch Middle School for one period per day-8th period for P.E. [physical education]."[24]

Ms. Marsh's letter ended "If the Student's "current educational placement" is not in place, as soon as possible but no later than September 10, 2010, CDE will open a complaint investigation and will issue corrective actions of the District to do so.[25]

[24] CDE noted that although the parents and District had agreed to place G.M. at a martial arts academy as 8th period PE had not been available, it was not clear if that was still available or if that agreement was still in place and therefore ordered PE at Creekview as the 10/08 IEP originally stated.

[25] Why CDE had to open another complaint investigation and start yet another 60-day timeline, when it already had sent letters and directives pursuant to prior complaint investigations and corrective actions,

The District is directed to provide evidence to the CDE that it is providing the "stay put" program as specified above and has been doing so since December 2009."[26]

> Why did CDE give Dry Creek the option of "seeking an order from the Federal Court modifying the student's current stay-put placement", particularly when OAH specifically found "***Stay put was automatically in effect, as it is here, because of the pendency of the federal case"?*** Why would CDE help Dry Creek perpetuate its noncompliance by removing the stay-put provider?
>
> Nowhere did CDE address or acknowledge Dry Creek's claim that stay-put was "temporary" or that it extended only through the 2008-2009 school year as the District claimed in Ms. Gutierrez's June 28, 2010 letter. As is documented below, the eventual federal court Order did not modify the "stay-put placement."

Again, CDE failed to take meaningful or effective action to ensure its prior orders were followed or that they resulted in compliance. Instead of ordering Dry Creek to comply with OAH's orders, according to 34 CFR §300.152(c),[27] CDE sent Dry Creek off to the federal court, a jurisdiction which prefers that state agencies exercise their authority and use their expertise to resolve disputes given the court's lack of expertise. CDE also forced the Marcheses to deal with further legal proceedings CDE's appropriate intervention and enforcement would have rendered unnecessary.

September 10, 2010 - CDE's August 31, 2010 letter resulted in no meaningful change on Dry Creek's part and no meaningful or effective steps by CDE to enforce its orders.[28] Dry Creek still had not complied with CDE's May 27, 2010 directive, reiterated on August 31, 2010 in conjunction with the notice of OAH's order. In light of Dry Creek's continuing noncompliance, rather than open a new complaint investigation with a new timeline, CDE could have proceeded with sanctions, as its prior notices had warned and as it was authorized to do. Instead, CDE warned "do this or else," but otherwise took no meaningful steps to address Dry Creek's continuing noncompliance.

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is unclear, although this is a practice CDE regularly engages in, which may be its way of avoiding the claim that noncompliance persists beyond the one-year time assurance that is part of the federal monitoring requirement. CDE's actions underscore its ineffectiveness in securing LEA compliance and makes a greater case for why it should have issued sanctions against Dry Creek.

[26] Ms. Marsh noted Dry Creek provided evidence the stay-put provider had been paid through July 2010. Ms. Gutierrez's letters confirm payment stopped as of June 2010. *See,* Ex. 49, dated 01/25/11, pg. 1.

[27] Under 34 CFR 300.152(c)(2)(i) a due process hearing decision is binding and (ii) The SEA must inform the complainant to that effect; and (3) A complaint alleging a public agency's failure to implement a due process hearing decision **must be resolved by the SEA**. Such was the case with OAH's 08/30/10 decision which stated, "*Stay put was **automatically in effect**, as it is here, because of the pendency of the federal case."*

[28] As of the filing of this document, while CDE claimed to have opened a complaint investigation in September 2010 and purportedly conducted an investigation of Dry Creek's latest failure (and allegedly assigned Case # S-0142-10/11), it has refused to provide any of the documents related to this "investigation" to the Marcheses, at the same time it has shared documents with Dry Creek's counsel.

September 29, 2010 - Marcy Gutierrez wrote the Marcheses and Ms. Coutchie regarding "recent communications regarding payment on invoices submitted by Ms. Coutchie for the 2010-2011 school year" informing them "Ms. Coutchie is no longer the service provider for G.M.'s stay-put reading intervention services and therefore will not be reimbursed by the District for such services." She also stated Dry Creek had changed providers with good cause and that new providers had been available since the first day of the 2010-2011 school year on August 10. At the end of her letter she stated Dry Creek would bring the issue of stay-put before the U.S. District Court, "the sole authority with jurisdiction to enter a judgment on this issue." (*See,* Ex. 29, Letter, Marcy Gutierrez to Kevin & Lyndi Marchese and Suzanne Coutchie, dated September 29, 2010).

> Once again Dry Creek and its legal counsel claimed the District had discretion to unilaterally change the stay-put provider as it first claimed on June 28, 2010 (Ex. 20). Dry Creek blithely ignored the results of its own OAH motion regarding stay-put and OAH's August 30, 2010 finding that "***Stay put was automatically in effect, as it is here, because of the pendency of the federal case."*** (*See.* Ex. 26) Ms. Gutierrez on Dry Creek's behalf also ignored that Ms. Barberia, Dry Creek's Director of Special Education, on at least two occasions had instructed Ms. Coutchie to continue to provide services and submit invoices for same. (*See,* Exs. 13 and 24)
>
> Ms. Gutierrez also ignored that on several occasions, including May 27, 2010 (Ex. 16) and August 31, 2010 (Ex. 28), CDE had specifically directed Dry Creek to comply with stay-put by submitting proof of payment of Ms. Coutchie's invoices, which it appears Dry Creek did not do.
>
> As Ava Yajima was copied on this letter, CDE had notice Dry Creek and its counsel were refusing to comply with CDE's orders in direct contravention of Ms. Marsh's directive on August 31, 2010 (Ex. 28).

October 11, 2010 - One month after CDE's September 10, 2010 deadline (set in its August 31, 2010 letter, Ex. 28), Dry Creek still had not complied with CDE's May 27, 2010 directive (Ex. 16), OAH's August 30, 2010 Order (Ex. 26) CDE's August 31, 2010 directive (Ex. 28) or met CDE's September 10, 2010 deadline. CDE again wrote Dry Creek's legal counsel, but appears to have been responding to a prior letter from Michelle Cannon, another Dry Creek legal representative. (*See,* Ex. 30, Letter, Ana Marsh to Michelle Cannon (KMT&G)).

Ms. Marsh noted receipt of Ms. Cannon's September 17, 2010 letter which claimed Ms. Marsh's August 31, 2010 letter (Ex. 28) contradicted Ms. Yajima's July 21, 2010 letter (Ex. 23).[29] Ms. Marsh disagreed, recounting Ms. Yajima's letter, Dry Creek's August 9, 2010 due process hearing request, as well as OAH's August 30, 2010 Decision (Ex. 25) in which the ALJ stated, "[s]tay put is now in effect because there is a pending proceeding in the federal district court,"(citing to *Joshua A.,* and noting that *Joshua A.* provided "the continued employment of a particular service provider was part of that placement.") Ms. Marsh also stated that her 08/31/10 letter "directed the District to provide the Student with the current educational placement."

Instead of enforcing, Ms. Marsh stated her "understanding that the District will file a motion before the U.S. Western [sic] District Court to resolve any disputes regarding the "stay-put" placement. Until the District Court decides otherwise, it is CDE's expectation that the District will reinstate Student's program as defined in Student's Individualized Education Program consented to on October 28, 2008 by Kevin Marchese."

CDE's October 11, 2010 letter warned sanctions would be imposed "should the District not reinstate Student's education program" and set yet another new deadline. It insisted "Proof thereof will occur immediately but no later than October 13, 2010. Failure to fulfill these obligations later than October 13, 2010, will result in CDE implementing appropriate sanctions." Ms. Marsh copied Mark Geyer, Dry Creek's Superintendent, Marcy Gutierrez, Mr. Marchese and CDE's Deputy General Counsel, Ava Yajima.

- The "Notice of Sanctions for Noncompliance" CDE enclosed advised Dry Creek:

    - That CDE as the SEA, was required to "enforce local compliance with the laws that guarantee children with disabilities a free appropriate public education;"
    - "That prolonged and substantial noncompliance. . . will not be tolerated";
    - That "CDE intends to implement appropriate sanctions as a means to ensure compliance with required corrective actions, including "withholding state and/or federal special education funds (5CFR Section 4670(a)(1); 20 USC 1413(d)(1)" and "[s]eeking court enforcement of corrective actions (Code of Civil Procedures Section 1085; Title 5, California Code of Regulations, Section 4670(a)(3)."

[29] The Marcheses have never been given a copy of Ms. Cannon's September 17, 2010 letter or related documents, which may be part of the "Compliance Complaint" CDE has purportedly opened but refused to provide to the Marcheses.

- That the District would be "notified in advance of CDE's intent to impose any or all of these sanctions on your LEA if you have not fulfilled your corrective actions by the due date [10/13/10]." (Ex. 30 at pg. 3)

CDE's "understanding" was apparently a signal to Dry Creek to proceed with its specious challenges to IDEA's stay-put in the federal court. Although Ms. Yajima had previously claimed Dry Creek should address the "dispute" in OAH (even though there was no dispute, only noncompliance), when OAH did not oblige Dry Creek by removing Ms. Coutchie, instead of enforcing OAH's order as CDE had promised and was obligated to do under IDEA's regulations, CDE actively encouraged Dry Creek to pursue its challenges elsewhere, all the while CDE purported to demand compliance, but failed to follow up its empty words with meaningful action.

CDE's failure to act and enforce emboldened Dry Creek to greater noncompliance, just as a parent's empty threats in the face of a child's misbehavior actually encourages further misbehavior. Had CDE taken action to effectively ensure compliance, there would have been no further federal court action in which Dry Creek misrepresented the facts and the law to the federal court.

CDE's failure to act in accordance with its obligations as an SEA directly contributed to the Court making an order which effectively enabled Dry Creek to remove Ms. Coutchie and left G.M. without a properly funded and qualified provider and without any services at all.

October 12, 2010 - Dry Creek's legal counsel, Michelle Cannon, responded to Ana Marsh's October 11, 2010 letter stating "The matter of the District's compliance with stay put is under the jurisdiction of the U.S. District Court, Eastern District of California due to the appeal filed with that court. The District will be filing a motion regarding stay put this week." She noted stay-put was also being addressed in CDE's Case No. S-0142-10/11 (referencing a 09/21/10 letter from Ms. Pooley) [30] and that the deadline for providing documents under that case was extended to 10/18/10. Ms. Cannon indicated Dry Creek would proceed with filing the motion and would provide the documents by October 18, 2010. (*See,* Ex. 31, Letter, Michelle Cannon to Ana Marsh, dated October 12, 2010).

[30] The Marcheses have not been given access to Ms. Pooley's September 21, 2010 letter or any of the related correspondence, and were only aware of them through passing references in letters such as this.

Dry Creek seemed to take the position that CDE had no authority over an LEA which chose to not comply with its legal obligations or which proceeded into federal court in pursuit of specious claims to avoid those obligations. Ironically, when the court finally issued a decision, Dry Creek, with legal counsel's willing involvement, didn't comply with that order either, demonstrating Dry Creek's belief that *no agency or court has authority to require it to comply with the law.*

This letter again reflects Dry Creek's willingness to comply with CDE's proposed alternatives to compliance, but not to comply with stay-put itself. As such, CDE is directly responsible for Dry Creek's frivolous federal court filings.

October 13, 2010 - Ms. Marsh responded to Ms. Cannon's October 12, 2010 letter, informing her the extension Ms. Pooley had granted was only for providing evidence re: Case No. S-0142-10-11, and "Ms. Pooley's extension does not impede the stay put requirement. Therefore, please be reminded that it is expected that Dry Creek Joint Elementary reinstate Student's program" as defined by the October 8, 2008 IEP and provide evidence that day. (*See,* Ex. 32, Letter, Ana Marsh to Michelle Cannon, dated October 13, 2010).

October 14, 2010 - Ms. Cannon again replied to Ms. Marsh. (*See,* Ex. 33, Letter, Michelle Cannon to Ana Marsh, dated October 14, 2010). Regarding CDE's instruction to reinstate G.M.'s program and provide invoices reflecting funding for Ms. Coutchie's services, Ms. Cannon stated Dry Creek would provide the requested information by October 18, 2010, but was also readying its Motion regarding Stay Put for filing in federal court. Ms. Cannon then stated:

"Regarding the educational placement and services for G.M., the District is complying with stay put by continuing to offer the placement and services from the last agreed upon IEP. However, the parents of G.M. continue to refuse to allow the District to provide these services."

Ms. Cannon appears to be referring to Ms. Gutierrez's letter dated September 29, 2010 (Ex. 29), in which the family was informed Ms. Coutchie was no longer the service provider, that Dry Creek would offer G.M.'s "current placement" for the duration of stay-put, but that "current placement" was an offer of a District teacher, not the provider the family had agreed to or anyone with Ms. Coutchie's qualifications or experience.

As the placement Dry Creek offered wasn't the stay-put placement, didn't comply with past orders regarding stay-put, and instead offered a return to a placement without a qualified provider, the Marcheses understandably refused to agree to it.

> Ms. Cannon's letter showed she was as adept at misrepresenting the facts and ignoring the law as her colleague Ms. Gutierrez.
>
> Once again, CDE threatened sanctions. Once again, CDE failed to live up to its word. At the end, it appears CDE's letters were drafted for the sake of appearance only, as CDE never intended to enforce and apparently was only buying time to enable Dry Creek to file in federal court.

Over a five month period, at ***least four written orders*** were issued to Dry Creek confirming the District's obligation to implement the Student's stay-put placement and ordering it to comply with CDE's orders and Dry Creek's obligations under 20 U.S.C. 1415(j) stay-put. CDE's orders required Dry Creek to pay Ms. Coutchie as it had agreed in the Settlement Agreement (and as it had assured her it would on numerous occasions), on a current and timely basis or CDE would enforce sanctions. Dry Creek failed to comply with CDE's directives and did not reinstate the stay put on October 13, 2010. In fact, Dry Creek *has never reinstated the stay-put.*

Although CDE repeatedly acknowledged the terms of the stay-put, as well as CDE's authority and obligation to require compliance and enforce against Dry Creek by implementing sanctions, and repeatedly ordered Dry Creek to comply with the law, when Dry Creek persisted in its refusal to comply, CDE did *absolutely nothing* but write more letters containing threats as empty as previous ones. CDE's continuing orders to Dry Creek, its empty threats of enforcement followed by its repeated failure to follow up with meaningful action holding Dry Creek accountable for the damage it was causing the Student and Ms. Coutchie, constituted "paper compliance," which simply emboldened the school district and its legal counsel. In effect, CDE's failure to act engendered greater noncompliance.

However, a careful review of communications in the months preceding Dry Creek's federal court motion confirms that while CDE appeared to be ordering Dry Creek to comply with stay-put, it actually assisted Dry Creek in finding a way to avoid its obligations to G.M. under the law.

This is first evidenced by Ms. Ava Yajima's July 8, 2010 letter, where instead of confirming CDE's numerous prior statements and orders to Dry Creek to comply with the law and "stay-put," Ms. Yajima stated she had to *"research"* the issues. (Ex. 21)

Next, Ms. Yajima's July 21, 2010 letter to Kevin Marchese and Marcy Gutierrez stated for the first time that there was *"a factual dispute" regarding the content of stay-put, as to what constituted the "last-agreed-upon educational placement,"* (Ex. 23 at pg. 1) when in fact there was no dispute. Instead, Dry Creek, which was failing to pay the stay-put provider and thus was out of compliance, was seeking Ms. Coutchie's ouster in a manner the law didn't allow so it wouldn't have to pay for her services any longer.

Thirdly, by claiming in her July 21, 2010 letter that "*It is also evident to CDE, . . . that a final determination as to what "stay-put" consists of must be made by OAH"* (Ex. 23 at pg. 2) Ms. Yajima on CDE's behalf first pointed Dry Creek in the direction of OAH as a possible alternative, characterizing Dry Creek's *failure to comply with the law* as a "dispute" that Dry Creek and G.M.'s family were required to go to OAH to resolve. As noted above, there was no dispute nor any provision in the law requiring resort to due process when an LEA refuses to comply with CDE's corrective actions arising out of the CRP process and CDE simply failed to enforce.[31] In fact, there was no question what stay-put consisted of (as documented by CDE on several occasions, both before the Court's order (*see* its 10/09/09 Compliance Complaint Report (Ex. 5), its 12/08/09 Compliance Complaint Report (Ex. 6) and its May 27, 2010 letter to Dry Creek (Ex. 16)), and after the Court's order, as Ms. Yajima confirmed in her February 10, 2011 letter to the Marcheses. (*See,* Ex. 55, page 1, paragraph 2).

Fourthly, in Ms. Yajima's July 21, 2010 letter, she indicated CDE would enforce "*unless either party seeks and obtains an order from a court of competent jurisdiction staying the execution of the order from OAH,"* (Ex. 23 at pg. 2- pg. 3) telegraphing CDE's willingness to withhold enforcement if Dry Creek pursued a claim before OAH and if needed, the U.S. District Court.[32] Rather than ensure compliance, CDE encouraged Dry Creek to go elsewhere to see if its novel legal interpretations might fly in other jurisdictions before less expert and/or less informed administrative or federal courts who might be taken in by its newly-crafted theory of the law."[33] Ms. Yajima also seemed to be telling Dry Creek that if the District lost in OAH, it should proceed into federal court.[34]

Furthermore, Ms. Marsh's August 31, 2010 letter (Ex. 28) (citing to OAH's August 30, 2010 Order "which denied District's motion to modify[35] stay put," (Ex. 26), instead of unconditionally ordering Dry Creek to comply with OAH's order as it was

[31] *See,* Appendix 3, and OSEP Memo 00-20, Letter Kenneth Warlick to Chief State School Officers which provides that the SEA is required to accept and resolve any complaint and ensure compliance with same.
[32] It is obvious the Marcheses would not pursue an order "staying" G.M.'s stay put in either OAH or the federal court. G.M.'s *stay-put placement was in effect, according to the CDE and as such, should have been enforced by CDE.*
[33] It is ironic that in its Motion to Dismiss as well as the October 25, 2010 hearing, CDE represented to the U.S. District Court that the Marcheses were required to exhaust administrative remedies against CDE in OAH, when nothing in the IDEA requires due process for the SEA to comply with its obligations under 20 U.S.C.§1412 and where CDE had ample opportunity to address the issues, which is the purpose of the administrative exhaustion requirements. *See also,* App. 2, Supplemental Point 3.C. The July 21, 2010 letter alone demonstrates the Marcheses repeatedly turned to CDE to resolve Dry Creek's noncompliance that CDE had ample opportunity to resolve issues the family complained of, and yet failed to do so.
[34] This is an even more ironic given that federal courts routinely defer to state education agencies based on an education agency's presumed knowledge and greater expertise than what the courts possess. CDE clearly abdicated its "expertise" role.
[35] Ms. Marsh's use of the term "modify" belies Dry Creek's claim that it wasn't seeking to modify stay-put, when removing the only provider who had delivered services to the student for the past two years could constitute nothing but a modification of the placement.

obligated to do according to 34 CFR §300.152(c),[36] instead gave Dry Creek a new place to go and a new goal, telling the District it must implement G.M.'s last agreed upon educational placement with all the agreed upon services, (proving without question that both Dry Creek and CDE knew what constituted stay-put and that there was no "dispute") "*until such time as the District seeks an order from the Federal Court modifying* the student's current stay put placement."

On October 11, 2010, Ms. Marsh again urged Dry Creek toward the federal court, noting her "*understanding that the District will file a motion with the U.S. Western* [sic] *District Court to resolve any disputes regarding the "stay-put" placement.* Until the District Court decides otherwise, it is CDE's expectation that the District will reinstate Student's program." (Ex. 30) CDE was aware of at least two OAH orders confirming the stay-put, in addition to its August 30, 2010 Order, which was only the latest of several CDE orders. (Ex. 26) Based on this latest order alone, CDE should have enforced against Dry Creek, and thus obviated the need for the parties to proceed further. CDE failed to do so and as a result, the Marcheses had to defend against Dry Creek's baseless motion in federal court. Had CDE complied with its obligation to ensure the LEA's compliance, there would be no need to proceed further, no subsequent order by the federal court and G.M. would still be receiving services.

Throughout this process, while professing to order compliance, CDE signaled its willingness to help Dry Creek through CDE's own "novel legal theories." Perhaps, CDE hoped it would no longer have to deal with trying to get Dry Creek to comply. Perhaps it hoped it would no longer have to confront its own noncompliance arising from its failure to hold Dry Creek accountable under its general obligations to ensure FAPE, as well with regard to CDE's CRP, which had been proven wholly ineffective.

That in this time period, CDE's General Counsel left CDE for employment at the law firm representing Dry Creek raises troubling questions re: CDE's motives and its compliance with its supervisory obligations under the IDEA. (*See,* App. 2, Supplemental Point #2)

October 20, 2010 – Dry Creek filed a "Motion Regarding Stay Put services during the pendency of these proceedings" with the U.S. District Court. (*See,* Ex. 34, CDE Motion regarding Stay Put, Doc. #s 27-31, PACER, https://ecf.caed.uscourts.gov/cgi-bin/ShowIndex.pl).

[36] Under 34 CFR 300.152(c)(2)(i) a due process hearing decision is binding and (ii) The SEA must inform the complainant to that effect; and (3) A complaint alleging a public agency's failure to implement a due process hearing decision **must be resolved by the SEA**. Such was the case with OAH's 08/30/10 decision which stated, "*Stay put was **automatically in effect**, as it is here, because of the pendency of the federal case."*

Dry Creek's motion sought an order "regarding [Student's] **right to stay put services** (which were never in question) during the pendency of these proceedings pursuant to 20 U.S.C. 1415(j)" (Notice of Motion) and also sought "a determination from the Court regarding [Student's] **proper stay put placement** (even though the propriety of the stay put placement had never been at issue) during the pendency of these judicial proceedings."

In its October 20, 2010 Motion papers, Dry Creek cited to 20 U.S.C. §1415(j) (Ex. 34, Memorandum of Points & Authorities, pages 1 and 7). Dry Creek also cited to *L.M. ex rel. Sam M. v. Capistrano USD*, 556 F.3d 900 (9th Cir. 2009) for the proposition that the "then current educational placement" was typically the placement in the child's most recently implemented IEP. (Ex. 34, Memorandum at page 7, Lines 25-26).

However, Dry Creek and its legal counsel then asserted that G.M.'s stay-put placement was "fifteen hours per week of individual instruction from a reading specialist provided by the District and one period of P.E. per day, provided by the District" with the "District of Service" as the provider." (Ex. 34, Memorandum at Page 8, Lines 9-13). At page 9, Lines 2-5, Dry Creek claimed "Such placement includes fifteen hours per week of individual instruction from a *District provided reading specialist* and one period per day of P.E. *provided by the District.*"

> Dry Creek and its legal counsel appeared to represent G.M.'s stay-put placement as what they wanted it to be, rather than what was reflected in the Settlement Agreement and IEP, which OAH and CDE and Dry Creek had previously confirmed.[37]

Dry Creek also claimed the IEP did not specifically name a provider or require a specific instructor for individual instruction (Ex. 34, Memorandum at page 8, Lines 11-13) and that the Court did not have to look outside the four corners of the IEP to define the "then current educational placement." (Ex. 34, Memorandum at page 9, Lines 11-13) Dry Creek further claimed stay-put required implementation of the last agreed-upon IEP, not the terms of a settlement agreement. (Ex. 34, Memorandum at page 15)

> Dry Creek's statements flirted with fraud, for they failed to acknowledge provisions of Ex. 1.1, the October 2008 Settlement Agreement (at ¶1.G) which provided that:
>
> > 1) The parties had agreed Suzanne Coutchie was the independent educational therapist/reading specialist outside the District who would be the provider of services;

[37] *See,* App. 2, Supplemental Point #3.A for a detailed analysis of Dry Creek's misrepresentations to the Court regarding the terms of the Settlement Agreement and IEP.

> 2) As a condition of the settlement, Dry Creek unilaterally reserved the right to draft the IEP which was to document the terms of the settlement, and had required the Marcheses to waive their rights under the IDEA to participate in its drafting; and
>
> 3) Paragraph 1.G. of the Settlement Agreement provided the IEP was to reflect the express terms and language of the Settlement Agreement, including Ms. Coutchie as provider, and that the Marcheses were only required to agree to the IEP if it did so.[38]
>
> In the settlement, Dry Creek had reserved for itself the right to draft an IEP that was supposed to reflect the Settlement Agreement's terms and required the Marcheses waive their rights under IDEA to participate in its development. Yet, Dry Creek failed to properly document the settlement's terms and include Ms. Coutchie's name or her position in the IEP and then relied on its failure and omissions to claim G.M.'s most current placement did not include Ms. Coutchie. Dry Creek's actions can only be interpreted as an attempt to perpetrate a fraud on the family in settling their due process dispute and a fraud on the court by misrepresenting the terms of the IEP.

Again, Dry Creek through its legal counsel made unsubstantiated claims regarding Ms. Coutchie.

> This was part of its ongoing effort to smear Ms. Coutchie's reputation in general, as well as in the Court's eyes, apparently to justify its claim of "good cause" to remove her, although nothing in the law provides for removal of a stay-put provider for "good cause" and it failed to ever substantiate any of its claims.
>
> Dry Creek filed its motion in federal court *with the specific intent of setting aside one of the preeminent procedural safeguards of the IDEA* in order to remove the educational therapist/reading specialist who was part of G.M.'s current educational placement for the past two years and had provided educational therapy and reading instruction to G.M. In doing so, Dry Creek made knowingly false factual representations to the Court and also asserted spurious claims regarding the provider. It also asserted the untenable legal position it had the right to pursue litigation challenging IDEA's procedural safeguard of stay-put, while it accepted federal funds based on its representation it upheld the law.

[38] Dry Creek and its legal counsel essentially had required the Marcheses to waive their rights and G.M.'s rights under the IDEA, in order to get appropriate services. Nothing in the IDEA requires such a waiver as part of the IEP process, nor with regard to resolution of any disputes. As such, this requirement is against public policy. *See,* App. 2, Supplemental Point #3.A.

> Dry Creek's motion to eviscerate G.M.'s right to stay-put by removing Ms. Coutchie as provider which resulted in disruption to G.M.'s services was for no valid reason under the IDEA.[39]

After Dry Creek filed its motion regarding stay-put, CDE's efforts and orders purporting to require Dry Creek to enforce stay-put ceased completely. Dry Creek was still not complying with CDE's orders or funding G.M.'s education, yet CDE's Legal Department abruptly dropped any pretense it was trying to get the District to comply.

October 25, 2010 - While Dry Creek still refused to comply with the stay-put placement and fund G.M.'s services with Ms. Coutchie, and as recently as two weeks prior to the hearing CDE had ordered Dry Creek to comply with the current educational placement or be sanctioned (Ex. 30 and 32), at the hearing on CDE's Motion to Dismiss, Ms. Yajima on CDE's behalf told the Court Dry Creek was ***in compliance***.

> COURT: . . . And plaintiff is indicating that the superintendent and the district know that they don't anticipate compliance with their orders, and the district is therefore running amuck. And that's what he is saying is the plaintiffs's claim.
>
> MS. YAJIMA: And the state defendants would disagree. Although plaintiffs do make the claim that CDE has not enforced, they don't cite to what it is that we haven't enforced. In fact, we have written investigation reports, we've submitted directives, orders, corrective actions, and the district has been in compliance. (*See,* Ex. 35, Excerpt of Reporter's Transcript of Hearing, dated October 25, 2010, at Pg. 41, Lines 10 – 16)
>
> So CDE ordered the district to submit invoices, comply with the stay-put. They did that during the entire process -- the OAH process, due process hearing, which is when he gets the stay-put -- as he calls it, the stay-put facility. (Ex. 35, Pg. 41, Line 25 – Page 42, Line 4)

[39] In light of an LEA's obligation to ensure its students receive FAPE, Dry Creek's pursuit of litigation to remove a qualified provider of educational services it had agreed to pursuant to a Settlement Agreement is contrary to public policy. Because Dry Creek *can* hire attorneys and litigate, doesn't mean it should or that its litigation was for a proper purpose under the IDEA, particularly when its singular goal was to replace a well-qualified and highly-experience "educational therapist/reading specialist" called for by the Settlement Agreement and IEP, with a District employee without similar qualifications. Dry Creek's past failure to provide qualified staff was how G.M. ended up almost functionally illiterate, a clear denial of FAPE. Dry Creek's desire to force G.M. to return to that status, for no valid reason is incomprehensible. Perhaps the logical explanation is that Dry Creek's attorneys were happy to counsel Dry Creek to senseless noncompliance knowing that in light of CDE's persistent failure to intervene they would profit from the litigation that would ensue.

CDE also represented to the Court that CDE was in compliance as well:

> So, again, we would argue -- state defendants argue that plaintiffs haven't submitted any facts to allege that we haven't done what we were supposed -- we weren't -- we haven't done what we were supposed to do, and that we haven't enforced our orders. (Ex. 35, Pg. 42, Lines 9-13)

November 1, 2010 – One week later, and a mere three weeks after its most recent letter ordering Dry Creek to comply with stay-put or be sanctioned, CDE filed a nonopposition to Dry Creek's stay-put motion, stating "State Defendants take no position as to the merits of District's Motion." (*See,* Ex. 36, "State Defendants' Non-Opposition to Dry Creek Joint Elementary School District's Motion for Stay Put," dated November 1, 2010).

> Ignoring CDE's multiple orders and notices of sanction issued to Dry Creek over the past two years, CDE failed to inform the Court of Dry Creek's persistent and continuing noncompliance. Despite ordering Dry Creek to comply with stay-put and pay G.M.'s educational provider again and again, CDE abdicated its supervisory and enforcement responsibilities under IDEA. As a result, not only Dry Creek was out of compliance, so was CDE.
>
> Ironically, Ms. Yajima gave the District Court the same assurances she had given G.M.'s parents earlier, stating "State Defendants will enforce the order of this court regarding Student's "Stay-Put" educational program." ***As of the date of this filing, CDE has not enforced the Court's order.***

December 6, 2010 – The Court held a hearing on Dry Creek's motion regarding stay-put. (*See,* Ex. 37, Excerpt of Reporter's Transcript of Hearing re: Motion regarding Stay Put). From the record it appears Dry Creek's legal counsel felt compelled to resort to misleading the court so Dry Creek could set aside an appropriate provider and justify Dry Creek's unilateral, unlawful termination of the stay-put funding and its denial of G.M.'s right to FAPE and funded educational services in general.

> Ms. Gutierrez acknowledged Dry Creek's obligation to ensure FAPE and the stay-put placement (Ex. 37, Pg. 41) -
>
> > But admitted Dry Creek had unilaterally terminated G.M.'s funding and the stay-put placement (Ex. 37, Pg. 11). She failed to mention Dry Creek and its counsel had ignored and refused to comply with CDE's numerous CCRs and directives for reinstating stay-put funding.

Ms. Gutierrez claimed Ms. Coutchie was ***not available*** because she was not a "partner" in the process (Ex. 37, pgs. 5 – 8) –

> Ms. Gutierrez knew Ms. Coutchie WAS available, was currently providing G.M. services based on Dry Creek's inducements to do so (Ex. 13 and 24) and still attended and participated in every IEP at Dry Creek's request.

Ms. Gutierrez made spurious allegations about Ms. Coutchie arising out of the OAH hearing (Ex. 37, Pgs. 7-9) –

> At the same time Dry Creek and its counsel had failed to either present or prove such claims to Ms. Coutchie or any authority and in fact, Dry Creek continued to do business with Ms. Coutchie.

As Dry Creek and counsel did in their Motion papers (*see,* October 20, 2010 entry, above), at the hearing Ms. Gutierrez misrepresented the terms of the IEP and Settlement Agreement to the Court, claiming that because Ms. Coutchie's name was not reflected in the IEP, a District provider was the stay-put provider. As discussed above (and at App. 2, Supplemental Point #3.A), Ms. Coutchie's name was not in the IEP only because Dry Creek failed to properly document the Settlement Agreement as the Settlement Agreement required it to do.

> MS. GUTIERREZ: . . .Notably, the IEP document that was signed in October 2008 specifically does not reference Ms. Coutchie as the provider of the reading intervention, while the settlement agreement does –
>
> THE COURT: I'm sorry, I need that repeated. Either you can tell me again or I can have it reread.
>
> MS. GUTIERREZ: I can repeat it, perhaps not verbatim, but <u>while the settlement agreement itself does identify Ms. Coutchie as the provider of reading intervention, the IEP that was developed to reflect the terms of the settlement agreement does not identify Ms. Coutchie as the provider, it simply indicates educational specialist, district of service as the provider. The IEP itself does not include the name Ms. Coutchie as the provider for reading intervention. And, in fact, leaves that up to the district of service. Those are the express terms, district of service as the provider for that instruction. (</u>*See,* Ex. 37, at pg. 10, Lines 7 – 23)

Ms. Gutierrez also misrepresented Dry Creek's August 2010 request for due process, when it first sought to oust Ms. Coutchie, as simply a request for clarification; and OAH's August 30, 2010 Order confirming stay-put as simply denying that request. (*See,* Ex. 37, at pg. 15, Line 12 – pg. 16, Line 2).

> Yet Ex. 26, *above* confirms ALJ Marson noted that on April 19, 2010, Student had filed an appeal of decisions issued on February 18, 2010 (Student I and District I) to U.S. District Court, E.D. California and that ***"[b]ecause of that federal filing, the stay put rule is in effect.*** (*Joshua A. v. Rocklin Unified School Dist. (*9th Cir. 2009) 559 F.3d 1036)."
>
> ALJ Marson also cited to *Joshua A.,* noting "Stay put is now in effect because there is a pending proceeding in the federal district court, not because the District later filed a request for due process hearing with OAH. Although the issues in the two matters are different, the stay put placement is identical. The stay put rule "functions as an 'automatic' preliminary injunction." (*Joshua A., supra,* 559 F.3d at p. 1037) In *Joshua A.,* an appeal from an OAH special education decision was pending before the district court. ***Stay put was automatically in effect, as it is here, because of the pendency of the federal case."*** (Ex. 26, at pg. 2)
>
> ALJ Marson ***didn't*** say Dry Creek needed to pursue its frivolous efforts to set aside the stay-put provider in federal court. He said that since the parents had filed an appeal, ***stay-put was in effect***.

At the hearing, CDE's counsel Ava Yajima was present in the courtroom, but she did not speak in the record other than to initially identify herself. However, it appears that near the end of the hearing, Ms. Gutierrez, noting CDE's Nonopposition, proffered questions to the Court on CDE's behalf regarding whether the Court's exercise of jurisdiction over the matter of stay-put would mean CDE no longer would have jurisdiction to issue an order regarding stay-put. (*See,* Ex. 37, pg. 51, Line 7 – pg. 52, Line 16).

> Rather than acting in its supervisory capacity or holding the LEA accountable, it appears that CDE's legal counsel actually may have collaborated with Dry Creek's legal counsel in an attempt to relieve CDE of its oversight responsibilities over Dry Creek regarding stay-put. The Court responded:
>
> > ". . . it appears that you're asking me to give a specific ruling that a state agency lacks jurisdiction. Now, why would I give that ruling? That's not within the call of your motion." (Ex. 37, pg. 51, Line 23 – pg. 52, Line 1).

December 10, 2010 – The U.S. District Court issued an Order regarding stay-put. (*See,* Ex. 38, U.S. District Court Order (re: Stay-Put) (Doc. #41, PACER, U.S.D.C, E.D. California, https://ecf.caed.uscourts.gov/cgi-bin/ShowIndex.pl)

By law and practical experience, courts routinely show deference to educational agencies such as Dry Creek and CDE, which deference the agencies here unfortunately exploited to G.M.'s detriment. The December 10, 2010 Order confirms federal courts can be (and quite often are) misled by agency legal counsel who will take all possible liberties in order to set aside clear rights under the IDEA. This is especially true where an SEA, such as CDE, rather than exercising its "expertise," instead partners with the LEA and is complicit in its noncompliance. For example:

> The Order took a position regarding stay-put which contradicted IDEA's plain language (20 U.S.C. §1415(j)), but at the same time cited directly to the law.
>
> > The Order stated "The preservation of the status quo ensures that the student remains in the last placement that the parents and the educational authority agreed to be appropriate" (Ex. 38, pg. 4, Line 5-8). However, the Court then found that Ms. Coutchie was not G.M.'s "current educational placement". (Order, page 4)
>
> The Order cited two separate inapplicable cases involving:
>
> > 1) a student whose placement was specified as "temporary" in a settlement agreement (while G.M.'s did not) (Ex. 38, pg. 3, Line 16 – pg. 4, Line 2); and
> >
> > 2) a student who was in a general education placement (while G.M. was in a direct instruction private placement per the Settlement Agreement and IEP), (Ex. 38, pg. 4, Line 24 – 28).
>
> The Order contradicted *Joshua A.,* precedent in the 9th Circuit (and precedent in this court), which OAH had understood and cited to:
>
> > ***"Because of that federal filing, the stay put rule is in effect.*** (*Joshua A. v. Rocklin Unified School Dist. (*9th Cir. 2009) 559 F.3d 1036);" and
> > "Stay put was automatically in effect, as it is here, because of the pendency of the federal case. The district court resolved a dispute about the stay put placement by determining that the continued employment of a particular service provider was part of that placement. (*Joshua A. v. Rocklin Unified School Dist.* (E.D. Cal.) 2007 WL 2389868 (Order Granting

Plaintiff's Motion for Stay Put, etc., Aug. 20, 2007)." (Ex. 26, August 30, 2010 Order Denying Motion for Stay Put). [40]

The Court also ignored that all parties had acknowledged and agreed in writing on numerous occasions that Ms. Coutchie was the stay-put provider and that the stay-put was in effect.

The Court ignored that OAH and CDE each had issued multiple findings, CCRs and orders confirming Ms. Coutchie as the stay-put placement and provider, and had required that her services be funded on that basis, thus failing to give deference to such agency findings and orders and expertise.

The Court concluded "the stay-put provision in 20 U.S.C. §1415(j) does not require the District to use Coutchie's reading instruction services." (Ex. 38, Pg. 5, Lines 5-7).

Because CDE failed to enforce its own orders and encouraged Dry Creek to pursue a motion for the improper purpose of eliminating G.M.'s provider (thus denying him FAPE, while its obligation was to ensure FAPE), the Court was in the position of making findings that ignored the law and concluded that Ms. Coutchie, the last agreed to provider in the Settlement Agreement and IEP was not part of the current educational placement.

Because Dry Creek's Dry Creek's legal counsel had successfully hoodwinked the court about the law of stay-put and the duration of stay-put under a Settlement Agreement as compared to the annual IEP, the Court was convinced to validate Dry Creek's noncompliance.

While Dry Creek misrepresented the terms of the Agreement and the IEP to obtain an order to allow Dry Creek to force G.M. to return to the District (to work with the staff who had failed to teach him in the first place), the Court did not adopt Dry Creek's position that G.M. had to return to Dry Creek or that Dry Creek staff was the proper provider. It merely found "the stay-put provision in 20 U.S.C. §1415(j) does not require the District to use Coutchie's reading instruction services."

The Court's Order actually created more confusion than it resolved.

[40] Dry Creek's legal counsel was aware of the precedent of *Joshua A.*, *as they were the legal counsel who brought that litigation* where their efforts focused on the very same goal, i.e., setting aside a student's stay-put provider, were rebuffed by the Court. (*See,* Exs. 66-68 and App. 2, Supplemental Point #3.B).

The Court's Order did not result in any benefit to G.M. Nor, for that matter, did it benefit Dry Creek or even CDE. The only beneficiaries of this entire process were Dry Creek's legal counsel who had urged a local education agency to noncompliance, frivolous litigation and further denials of FAPE, contrary to their obligations under the law so that legal counsel and their firms could benefit financially from the District's continuing noncompliance.

At about the same time as the Court's Order in Marchese, a district court also in the 9th Circuit took a more child-focused view of stay-put. In *Mangum v. Renton*, 111 LRP 7023 (W.D. Washington, 2011) (*see,* Fn. 11, above), the court stated "Taken literally, the stay-put provision amounts to an automatic injunction against any change in a "student's current educational placement" while any of the numerous § 1415 proceedings are resolved."[41] The court in *Mangum* confirmed stay-put in a manner which complied with IDEA's purpose and Congress's intent, even where the student had not yet been identified eligible under the IDEA and did not have an IEP.

Unfortunately, the Court in G.M.'s case did not appear concerned about the disruptive impact a change to stay-put would have on G.M., who had received instruction from Ms. Coutchie for *two years pursuant to the express terms of a Settlement Agreement.* Instead, the Court decided *stay-put did not require the District to use her.*

> Although the Court's December 10, 2010 Order stated Dry Creek was not required to use Ms. Coutchie beyond the 2008 – 2009 school year, it seemed to state the stay-put placement, with the particular services from an "educational specialist" pursuant to the terms of the Settlement Agreement reached between the District and the parents, had not changed. (Ex. 38, pgs. 4-5)
>
> Nothing in the Court's Order indicated Ms. Coutchie was not to be compensated for educational services she had rendered to G.M. up to and through the date of the Court's order, particularly as she had done so based on Dry Creek's and CDE's assurances of payment. [42]

[41] http://docs.justia.com/cases/federal/district-courts/washington/wawdce/2:2010cv01607/170890/20/ - Pg. 4, Lines 13-15.

[42] *See also, Joshua A.* at 3563, which states "Ultimately, refusing to enforce the stay put provision during the appeals process would force parents to choose between leaving their children in an education setting which potentially fails to meet minimum legal standards, and placing the child in private school at their own cost. Congress sought to eliminate this dilemma through its enactment of § 1415(j). *See Susquenita Sch. Dist. v. Raelee S. ex rel. Heidi S.*, 96 F.3d 78, 87 (3d Cir. 1996) ("Without interim financial support [provided through a motion for stay put], a parent's 'choice' to have his child remain in what the state has determined to be an appropriate . . . placement amounts to no choice at all."). Allowing the District to terminate the child's placement during the appeals process, while the District continues to receive federal education funding, runs counter to the purpose of § 1415(j). The case is REMANDED to the district court to determine what the school district owes Joshua for the cost of his education during the pendency of his appeal." Even where a family ultimately fails to prevail in their underlying litigation, stay-put services

> Also, nothing in the Order relieved CDE of its obligations under the IDEA to continue to supervise, monitor and enforce against noncompliant LEAs, despite Dry Creek's requests on CDE's behalf.

Despite IDEA's comprehensive protections, 9th Circuit precedent in *Joshua A.,* Dry Creek's numerous prior admissions that stay-put was in place, and CDE's findings and orders, the District Court was bamboozled by Dry Creek's misrepresentations and misconstrued legal theories, and ordered that a provider who had worked with the student for over two years could be removed at the whim of the noncompliant school district and yet the stay-put placement remained.

Not surprisingly, Dry Creek acted immediately on the Court's Order, informing the Marcheses and Ms. Coutchie she was removed as provider. Not satisfied to just remove her, and continuing its tendency toward noncompliance and bad faith conduct, Dry Creek's legal counsel began misinterpreting and misusing the Court's December 10, 2010 order it had worked so hard to obtain to mean what they wanted, i.e., that it required G.M. to return to Dry Creek; and that Dry Creek didn't have to pay Ms. Coutchie for her services rendered in good faith.

CDE's failure to enforce led to the Court's December 10, 2010 Order. While stay-put was not "modified," the ONLY provider of services for G.M. was removed. Because Dry Creek was failing to proceed in good faith, no new provider was put in Ms. Coutchie's place. As a result, G.M. would be left with NO provider at all and the qualified provider who had delivered services during the past two years at Dry Creek and CDE's direction would be left uncompensated. But for CDE's failure to ensure stay-put was enforced, none of this would have occurred.

Given CDE's November 1, 2010 Nonopposition, its collaboration at the December 6, 2010 hearing, and now the Court's Order, Dry Creek was apparently quite confident ***no one would do anything to hold them accountable.***

December 10, 2010 - Ms. Gutierrez wrote the Marcheses claiming "The District is in compliance with Judge Burrell's Order by offering to provide G.M. with 15 hours per week of 1:1 reading intervention by a teacher *employed by the District*." (*See,* Ex. 39, Letter, Marcy Gutierrez to Kevin Marchese, dated December 10, 2010).

> The Court's Order cited directly to Ms. Gutierrez's declaration which had stated the IEP provided that G.M. "will receive 15 hours per week of individual instruction following the district's academic calendar ***from an educational specialist pursuant to the terms of the Settlement Agreement reached between***

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provided during the pendency of the proceedings are still paid by the education agency as it continues to receive federal funds and thus is obligated to continue to fund the Student's education.

the district and the parents." (Ex. 38, pg. 3, Lines 5-9) Ms. Gutierrez showed that she had no compunction about taking a position ***which now contradicted her sworn statement to the Court.***

Ms. Gutierrez was acting as if what she had asked both OAH and the federal court to grant (to return G.M. to Dry Creek), which both had rejected, had been granted. (*See,* Ex. 25, OAH Order)

Ms. Gutierrez had counseled Dry Creek to use education funds on legal fees to obtain a Court order removing Ms. Coutchie and then, instead of replacing Ms. Coutchie with a qualified provider in accordance with the Court's Order and her own sworn affidavit, she just had the District ignore the Order.

Ms. Gutierrez could have simply counseled Dry Creek to fail to fund G.M.'s services and saved Dry Creek legal fees. Of course that wouldn't have been as lucrative for her and her firm as filing specious legal motions to set aside IDEA's procedural safeguards, which Dry Creek received federal funds to ensure. Dry Creek's counsel appeared to be concerned only with their own bottom line and not the lack of services for G.M., the further state of noncompliance in which its actions placed the District or the effect the District's expenditure on legal fees had on Dry Creek's teaching staff or its overall fiscal welfare.

December 13, 2010 - Ms. Coutchie sent Lynn Barberia an invoice for services rendered in attending an IEP per Ms. Barberia's request. She included a November 18, 2010 e-mail from Ms. Barberia which confirmed Ms. Coutchie would be paid. Ms. Coutchie noted her invoices for August through November were seriously overdue. (*See,* Ex. 40, Letter, Ms. Coutchie to Lynn Barberia, dated December 13, 2010).

December 14, 2010 - Ms. Gutierrez wrote Ms. Coutchie re: the Court's December 10, 2010 Order, stating "[T]he District will not fund any services from you, and will not issue you payment for any invoices submitted to the District." She stated that repeated submission of invoices "is and will be considered harassment" and warned Ms. Coutchie if she requested payment for services, "the District will consider taking legal action against you to prevent you from further improper conduct." Ms. Gutierrez also claimed Dry Creek had been informed Ms. Coutchie had communicated with third parties regarding the District and its staff "in a manner that may be considered defamatory." (*See,* Ex. 41, Letter, Marcy Gutierrez to Suzanne Coutchie, dated December 14, 2010).

Although Ms. Gutierrez herself had represented Dry Creek was obligated to fund G.M.'s services and that stay-put had continued, she now reneged on her assurances, *retroactively* claiming the District didn't have to fund G.M.'s education. Ms. Gutierrez did not copy CDE on this letter. (Ex. 41, at pg. 2)

Ms. Gutierrez used the Court's December 10, 2010 Order for an improper purpose, i.e., to cheat Ms. Coutchie out of sums Dry Creek owed her for services provided in good faith based on Dry Creek's assurances of payment. While the Court said Dry Creek didn't have to use Ms. Coutchie, it didn't say Dry Creek could cheat the provider it was choosing to remove.

Ms. Gutierrez claimed the right to retroactively override OAH and CDE's prior orders requiring payment, and avoid Dry Creek's responsibilities in inducing Ms. Coutchie to render services. (*See* Exs. 13 and 24) These services included services Ms. Gutierrez herself had admitted to the Court in the December 6, 2010 hearing were make-up hours Ms. Coutchie had properly billed. (*See,* Ex. 37, at pgs. 13-14)

Ms. Gutierrez again maligned Ms. Coutchie as she had in the prior due process proceeding, the stay-put motion, and in the December 6, 2010 hearing, without ever bringing *any official action in which she would have to substantiate her claims or ever presenting such claims to Ms. Coutchie so she had the opportunity to challenge and refute them.* Ms. Gutierrez, who had represented to Ms. Coutchie in prior communications that she would be paid for her services, now reneged on her own promises, adding insult to injury.

While she failed to explain how requesting payment for services was "improper conduct," Ms. Gutierrez "warned" Ms. Coutchie against submitting billings for her time, characterizing it as "improper conduct" that would lead to legal action. She also accused Ms. Coutchie of defaming Dry Creek staff. Ms. Gutierrez's warnings were similar to her earlier warnings to the Marcheses about communications with school staff and were nothing more than intimidation.[43]

December 17, 2010 - Ms. Coutchie wrote Ana Marsh (CDE) forwarding invoices she had previously submitted to Dry Creek, noting she was currently owed $20,877.00, but that Dry Creek's counsel had advised her the District was "not required" to use her services. (*See,* Ex. 42, Letter, Suzanne Coutchie to Ana Marsh with attached 12/14/10 Letter,

[43] On January 25, 2011, Ms. Gutierrez again wrote Ms. Coutchie reiterating the Court's December 10, 2010 order and stating Dry Creek didn't need to use Ms. Coutchie's services. (*See,* Ex. 48, Letter, Marcy Gutierrez to Suzanne Coutchie). Her letter included a copy of CDE's December 31, 2010 letter, which Ms. Gutierrez claimed showed CDE supported the Court's Order and had "withdrawn all corrective actions and abandoned the sanctions process." (*See,* Ex. 44, Letter, Ana Marsh to Michelle Cannon, dated December 31, 2010). She also stated, "[Y]ou have been paid in full for all services provided through June 4, 2010. *Please be advised that any services provided to Grayson after June 4, 2010 will not be reimbursed by the District."* Ms. Gutierrez documented Dry Creek's failure to fund G.M.'s education for at least the past eight months. This also confirms that CDE's representations to the Court, both oral and written, regarding Dry Creek's compliance under its CCRs were false. Again, CDE was not copied on this letter.

Gutierrez to Coutchie; Coutchie Invoices dated 09/01/10, 10/01/10, 11/09/10, 12/01/10, 12/17/10). In her letter, Ms. Coutchie stated:

> "That the District does not want to use my services *prospectively* does not change the fact that the ***District did use and had the benefit of my services up to the date of the decision. . ."***
>
> "I provided services to G.M. pursuant to the California Department of Education's orders and directives which indicated payment for these services be directed to me. Since December 8, 2009, CDE has consistently provided that the district was obligated to pay me as the stay put provider. I relied upon these aforementioned State instructions as well as District instructions to provide educational services to G.M. I am entitled to be paid for these services rendered and accepted."

Ms. Coutchie informed Ms. Marsh of Ms. Gutierrez's December 14, 2010 letter, its statement that Dry Creek would not pay her and that her request for payment was "considered harassment," noting that asking to be paid for services rendered per CDE's instructions was "neither harassment nor improper conduct." She noted "CDE is ultimately responsible under IDEA for the lawful obligations of its LEA, and this billing and account has been accepted by the CDE as an obligation pursuant to its own orders and directives." Ms. Coutchie requested payment from CDE within ten calendar days. (Ex. 42 at pg. 2)

December 31, 2010 - Ms. Marsh e-mailed Ms. Coutchie acknowledging receipt of her December 17, 2010 letter. (*See,* Ex. 43, E-mail, Ana Marsh to Ms. Coutchie, dated December 31, 2010) Ms. Marsh stated "We respectfully decline your request for payment for the invoices submitted to Dry Creek. . ." and urged Ms. Coutchie to "contact the District and work out any disputes as to the payment of your bill. Any arguments between you, the District and the parents must be resolved by the parties involved."

> Ms. Marsh's suggestion that Ms. Coutchie contact Dry Creek to resolve "any disputes" was problematic for several reasons. Just six months before, when there was a "dispute" CDE had sent the parties to due process. Also, CDE's failure to implement the stay-put under OAH's decision led to the Court's order and the current problem of nonpayment, when the Order said nothing about relieving Dry Creek of its obligation to pay Ms. Coutchie, particularly as Dry Creek continued to receive federal funds during that period.

> Ms. Marsh's response also showed a cynical disregard for Ms. Coutchie's situation, in light of the fact her predicament was a direct result of CDE's failure to ensure Dry Creek complied with CDE orders, as well as her awareness that Ms. Gutierrez was threatening legal action if Ms. Coutchie contacted the District further.
>
> Ms. Marsh also ignored CDE's obligation under 20 U.S.C. §§1412 and 1413 to ensure services were provided to G.M. if the LEA failed to provide them.
>
> Like Dry Creek, CDE ignored its obligations to Ms. Coutchie, as well as its prior inducements in its orders regarding the stay-put. Ironically, ***Ms. Coutchie is the only individual who ever complied with CDE's orders,*** yet she was left uncompensated for her efforts.
>
> Ms. Marsh's acknowledgement of the amounts Ms. Coutchie was owed by Dry Creek and the "disputes" regarding payment exposed Ms. Yajima's October 25, 2010 assurances to the Court regarding Dry Creek's payment and its compliance as a sham and a fraud on the Court. CDE also ignored its role as SEA to resolve such disputes and hold LEAs accountable.

Also, on this date, Ana Marsh wrote Michelle Cannon regarding CDE's Case No. S-0142-10/11. (*See,* Ex. 44, Letter, Ana Marsh to Michelle Cannon, dated December 31, 2010). Ms. Marsh stated "Pursuant to the United States District Court's order that the District is not required to use Ms. Coutchie as part of the "stay put" placement, the California Department of Education is amending the investigation report (case S-0142-10/11), corrective action one."

> CDE has refused to produce documents regarding this complaint. It can be presumed that "corrective action one" and the complaint as a whole, dealt with CDE's past orders requiring Dry Creek to comply and ensure payment of G.M.'s educational services through Ms. Coutchie. CDE, while still obligated to ensure compliance up to and beyond the December 10, 2010 order, apparently was stepping away from that obligation. As well, it had no compunction about altering documents, either because it no longer felt obligated to enforce or perhaps because it wished to cover up the fact it had failed to do so all along.

January 3, 2011 - On this date, the District Court issued an order dismissing CDE and Jack O'Connell from the federal court action. (*See,* Ex. 45, "Order Granting Motion to Dismiss," dated January 3, 2011). The Court apparently believed CDE's claim that the Marcheses were obligated to first file for due process against the CDE in OAH in order for CDE to be required to comply with its supervisory, monitoring and enforcement obligations. It also found the Marcheses could have filed for due process to force Dry Creek to obey the CRP orders or to force CDE to require Dry Creek to do so.

The Court failed to understand that due process is a right, not an obligation. Parents do not have to pursue due process in order for their state education agency ("SEA") to be required to comply with its obligations under the IDEA (under 20 U.S.C. §1412 and 1413 and related regulations) or to ensure that the SEA takes appropriate steps to resolve noncompliance. (*See* App. 2, Supplemental Point #3.C. *See also,* 20 U.S.C. §1415 and OSEP Memo 00-20, dated 07/20/00, at Fn. 19, above). Nothing in the IDEA states such a requirement.

Also, due process is a tool available to families and LEAs to ensure appropriate services for students. Its use is not required to ensure state education agencies do what IDEA requires. Although parents, unfortunately, have been required to enforce the IDEA, the Court's interpretation complicated that enforcement obligation by inserting yet another step in the process the law didn't require. Nothing in IDEA's language requires a family to pursue due process to get a state education agency to do its job under the law.

The Court also seemed to fail to grasp the purpose of "exhaustion." While noting exhaustion was required because "agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer [citations omitted]" (Ex. 45 at pg. 11, Lines 12-15), and to "provide state agencies an opportunity to resolve system defects without unnecessary judicial involvement" (Ex. 45 at pg. 14, Lines 19-21), the Court ignored that CDE had this "opportunity to resolve" on numerous occasions through multiple CDE CCRs and extensive communications with regard to Dry Creek's noncompliance. CDE had notice of ongoing, persistent noncompliance, and abundant opportunity to address it, but failed and refused to act on that opportunity, despite its obligation to do so under 20 U.S.C. §1412 and 34 CFR 300.151-153. The Marcheses' situation was an exemplar for the principle of "futility."

CDE was dismissed from the federal court action based on misrepresentations to the Court that the Marcheses hadn't exhausted against CDE. But the Marcheses had gone to due process against Dry Creek, which CDE was notified of, and thus had "exhausted" according to IDEA's plain language. IDEA has no requirement that parents file for due process against CDE in OAH (a state agency CDE appointed), to get CDE to fulfill its obligations under the IDEA, particularly since CDE annually assures the federal government it is already doing so as a condition of its receipt of federal funds. Nothing in California's procedural safeguards provides notice of such a requirement. (*See* App. 2, Supplemental Point 3.C for a more detailed discussion).

> Unfortunately, this is not the first time CDE has attempted to mislead a court on the issue of exhaustion. [44]
>
> Nothing in the Court's Order relieved CDE of its IDEA obligations to continue to supervise, monitor and enforce against noncompliant LEAs. Yet because of CDE's lack of will to do so, the Marcheses have been left on their own to continue to procure and fund educational services for their son, while Dry Creek continues to receive federal funds and instead pays them to legal counsel to avoid compliance under the law. This is not IDEA's promise of a free appropriate public education.

At this point, the Marcheses were unclear as to where they should turn. The LEA had refused to honor the stay-put placement or fund any education services for G.M. since June 2010 (at that point almost seven months) and had just convinced a federal court it was not obligated to use Ms. Coutchie. The SEA, to whom families typically turn to ensure compliance by LEAs and to which the Marcheses had turned for assistance, had not only aligned itself with the LEA, it had convinced the Court the Marcheses were required to "exhaust administrative remedies" against CDE, so that before the family could bring their claims against the SEA to federal court (the only jurisdiction IDEA provides for parents to take such claims) they were required to file for due process against CDE in OAH, a jurisdiction which routinely refuses to entertain claims against CDE. Yet, at the same time both the LEA or SEA continued to accept federal funds all the while funding the services of attorneys to fight the provision of services.

A.C. v. Schwarzenegger

While this was taking place in G.M's case, another case was filed against CDE in the U.S. District Court, Central District, California based on IDEA, Section 504 of the Rehabilitation Act ("Section 504") and the Americans with Disabilities Act ("ADA"), also involving stay-put. That case is enlightening as CDE's response to the children and families there was wholly different than what the Marchese family experienced. As a result of CDE's involvement in that case, the affected students have largely continued to receive services, with all the protections IDEA and the State of California can extend, while G.M. is ***still without funded services*** and no public agency has stepped up or taken accountability.

[44] *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).

A.C. v. Schwarzenegger arose out of the October 8, 2010 veto by Governor Arnold Schwarzenegger of all state funding for educationally-related mental health services provided through AB 3632. As a result of the veto, on October 20, 2010, Public Counsel and other advocacy groups served a Demand Letter on various agencies outlining the impact these cuts were having on students eligible under IDEA and subsequently filed a Complaint against Governor Schwarzenegger, CDE, the State Superintendent of Public Instruction and other individuals and agencies, titled *A.C., et al. v. Schwarzenegger, et al.,* Case No. 2:10-cv-07956-GW-(AGRx). (http://www.mhas-la.org/AB3632/DemandLetter10.20.10.pdf), (*http://www.mhas-la.org/AB3632/Complaint.pdf*). [45]

While this Complaint included claims under IDEA (¶¶ 54-64) and allegations regarding CDE and Mr. O'Connell (¶¶ 34-35), it did not allege exhaustion, or excuse from exhaustion, regarding any state agency (including named local education agency, Torrance Unified School District). CDE's response to this Complaint and its actions in the wake of its filing demonstrate CDE knows what to do in cases of noncompliance, as distinguished from what it did in the Marcheses' case.

The *A.C.* Complaint, at paragraph 7, states that "An official with one Defendant agency – the California Department of Education – has stated that "the Governor's unconscionable cuts to mental health services to students under the provisions of AB3632 have created a state of chaos." (*http://www.mhas-la.org/AB3632/Complaint.pdf*). This referred to a statement made by CDE's Fred Balcom, Director, Special Education Division, in an October 18, 2010 letter regarding the impact of the Governor's veto. http://www.cde.ca.gov/sp/se/lr/om101810.asp. (*See,* Ex. 46, selected documents re: *A.C., et al. v. Schwarzenegger, et al.,* at pg. 6).

On October 28, 2010, Plaintiffs in *A.C.* filed an "Ex Parte Application for Temporary Restraining Order (TRO)" against a number of Defendants, including Jack O'Connell. On October 29, 2010, the next day, Mr. O'Connell announced CDE was releasing $76 million in federal special education funds reserved for state-level activities to be allocated under 20 U.S.C. §1411(d)(2)(c)(iii) to county offices of education for educationally-related mental health services. As a result, Plaintiffs and State Education Defendants agreed the request for relief under the Complaint was addressed and was therefore moot. CDE also expressed the intent to "issue new directives in the next seven days regarding the obligation of LEAs to provide or pay for related mental health services" and that when notified of non-compliance by a local education agency, "the State Education agencies will continue to exercise the authority delineated in relevant statutes and regulations to ensure compliance regarding access to related mental health services." (Ex. 46, pgs. 9-10)

[45] Internet citations are provided, however, most of the documents referenced, except the Complaint, are included in Appendix 4 as Ex. 46, "Documents re: *A.C. v. Schwarzenegger, et al.* Case No. 2:10-cv-07956-GW-(AGRx)".

http://www.mhas-la.org/AB3632/Stipulation-re-TRO-with-CDE.pdf at pgs. 2-3

On November 5, 2010, CDE through Fred Balcom issued another letter to County and District Superintendents, et al. Noting his prior communication provided "relevant legal citations" and that "CDE is contemplating serious action, up to and including all available administrative and judicial actions, if necessary," Mr. Balcom stated "The ***CDE's primary interest and responsibility is to ensure that the special education and related services documented in a child's individualized education program (IEP) are provided by the responsible parties. Continuation of services is vital while the specifics of funding are resolved either through the courts or through legislative action.***" Finally, Mr. Balcom stated "The CDE will continue to investigate and enforce corrective actions for any violations of state and federal laws and regulations pertaining to students with disabilities." http://www.cde.ca.gov/sp/se/lr/om110510.asp (Ex. 46, pgs. 12-13)

On December 24, 2010, CDE circulated another letter with the heading and text below:

UPDATE: LEAs' RESPONSIBILITIES FOR ENSURING THE CONTINUOUS DELIVERY OF MENTAL HEALTH SERVICES TO STUDENTS WITH DISABILITIES

On December 20, 2010, in the federal class action *A.C., et al. v. Schwarzenegger, et al.*, Case No. 2:10-cv-07956-GW-(AGRx), the Honorable George H. Wu heard plaintiffs' motions for a preliminary injunction and a statewide "stay put" order under 20 *U.S.C.* § 1415j requiring all special education students to remain in their current educational placements.

The CDE emphasizes that it is essential that all LEAs take immediate and urgent steps to secure and ensure the continued provision of services for their special education students without interruption.

Serious Consequences for LEAs' Failure to Comply With Obligations

If a LEA fails to comply with its obligations outlined above, there are potentially very serious consequences. The CDE has significant enforcement authority under both federal and state law. The IDEA is a federal program subject to the requirements of the General Education Provisions Act, 20 U.S.C. §1221, et seq. Under § 1232c(b), "to enforce the federal requirements of the program, the State may--(1) withhold approval, in whole or in part, of the application of a local agency for funds under the program until the State is satisfied that such requirements will be met…(2) suspend payments to any local agency, in whole or in part, under the program if the State has reason to believe that the local agency has failed substantially to comply with any of such requirements…(3) withhold payments, in whole or in part, under any such program if the State finds, after reasonable notice and opportunity for a hearing before an impartial hearing officer, that the local agency has failed substantially to comply with any of such requirements." The

withholding of payments under subsection (3) "shall continue until the State is satisfied that there is no longer a failure to comply substantially with any of such requirements.

Under the UCP, Title 5, *CCR*, § 4650(a)(7)(E), the State may also directly intervene where a complaint alleges a violation by a LEA of IDEA. If, following investigation, the LEA is found by the CDE to be in violation, under § 4670(a) the CDE shall notify the LEA that it must take corrective action. If the LEA fails to comply with the corrective action, the CDE may use any means authorized by law to effect compliance, including "(1) The withholding of all or part of the local agency's relevant state or federal fiscal support in accordance with state or federal statute or regulation." http://www.cde.ca.gov/sp/se/lr/om122410.asp (Ex. 46, pgs. 14-15)

On March 22, 2011, Public Counsel issued a press release announcing "they have achieved their immediate objectives in the federal lawsuit they filed regarding termination of state funding for educationally related mental health services for California special education students, and have filed a notice of voluntary dismissal without prejudice, . . ." http://www.publiccounsel.org/press_releases?id=0017 (Ex. 46, pgs. 16-17)

The press release further noted that, "Within weeks of this stipulated temporary restraining order, all four named plaintiffs began receiving the services to which they were entitled from their individualized education programs" and "[i]n December 2010, District Court Judge George H. Wu took the additional step of ordering the California Department of Education to issue a letter to all school districts in California, directing them to immediately step in to provide educationally-related mental health services as they are required to do under federal law."

CDE's actions and response to the AB 3632 litigation stand in stark contrast to its actions and response to the Marchese litigation. In *A.C. v. Schwarzenegger, et al.*:

- CDE acknowledged the problem presented with regard to possible noncompliance by education agencies.
- CDE documented the need to ensure the "special education and related services documented in a child's individualized education program (IEP)" were provided and CDE's interest in doing so. (*See,* Ex. 46, pg. 12)
- CDE acknowledged its obligations under the law, i.e., that it understood it was to supervise and monitor LEAs, including holding LEAs accountable for noncompliance.

- CDE didn't represent to the *A.C.* court that each individual plaintiff was required to "exhaust administrative remedies" against the CDE in OAH before CDE was obligated to hold a local education agency accountable under the law.[46]

- CDE recognized the protections of "stay-put" for students under IDEA and communicated its requirements to all state educational agencies.

- CDE communicated its intent to enforce against noncompliant LEAs.

- CDE understood its right and the necessity to enforce with sanctions and expressed a clear intent to do so.

Why CDE acted properly in the *A.C.* matter, but failed to do so in the Marchese case is unclear. What is clear is that because CDE failed to act in a similar fashion in G.M.'s case, G.M., unlike the students receiving AB 3632 services, is now *without any funded services* and essentially in limbo, without any education agency accepting responsibility for his education or exercising responsibility for oversight of noncompliance.

Unlike what happened to the AB 3632 students and their families in the *A.C.* case, when G.M.'s family turned to CDE for help, rather than decry the "unconscionable" acts of the local education agency, Jack O'Connell and CDE turned their backs on the family, while CDE staff, including legal counsel, gave tacit consent to the LEA's unconscionable acts which violated the Student's rights and his family's rights under the law, and joined in such acts. Apparently CDE didn't have an "interest" in ensuring the "special education and related services" documented in G.M.'s IEP or feel it was unnecessary to bother with an LEA's failure to ensure the education of this one California child.

January 10, 2011 - The Marcheses appealed the Court's dismissal of CDE, as well as the December 10, 2010 Order regarding stay-put. (G. M. v. DRYCREEK JOINT ELEMENTARY SCHOOL DISTRICT; et al, No. 11-15085 (D.C. No. 2:10-cv-00944-GEB, Eastern District of California, Sacramento).

> As they disagreed with the Court's order regarding stay-put, and in light of the Court's subsequent order dismissing CDE from the federal action, the Marcheses decided to appeal the Court's decision to the 9th Circuit Court of Appeals.

[46] In fact, it appears none of the plaintiffs were required to exhaust administrative remedies against their LEA, which the IDEA specifically requires, while CDE's letters contemplated that might be a necessity in instances of LEA noncompliance.

Dry Creek's misrepresentations with regard to the December 10, 2010 Order, which began soon after that order, continued. Ms. Gutierrez insisted Dry Creek didn't have to replace Ms. Coutchie with another qualified "educational therapist/reading specialist" and instead only had to provide a District teacher and that G.M. had to return to Dry Creek for instruction. When the Marcheses challenged her claim and refused to agree with her, she began threatening them with SARB proceedings.

Dry Creek's misrepresentations, through its legal counsel, began with its December 10, 2010 letter (Ex. 39) and continued with letters dated January 25, 2011 (Ex. 49), February 8, 2011 (Ex. 53), February 17, 2011 (Ex. 59), and March 1, 2011 (Ex. 62). In her letters, Ms. Gutierrez said Dry Creek didn't have to select a provider the parents agreed to (as the last agreed-to Settlement Agreement and IEP provided and as §1415(j) specifically states), but instead could choose whom it pleased to replace Ms. Coutchie; that it had chosen a District employee; and G.M. was required to return to Dry Creek for his education. (*See,* Ex. 39, Letter, Marcy Gutierrez to Kevin Marchese, dated December 10, 2010; Ex. 49, Letter, Marcy Gutierrez to Kevin Marchese, dated January 25, 2011; Ex. 53, Letter, Marcy Gutierrez to Kevin Marchese, dated February 28, 2011; Ex. 59, Letter, Marcy Gutierrez to Kevin Marchese, dated February 17, 2011; Ex. 62, Letter, Marcy Gutierrez to Kevin Marchese, dated March 1, 2011).

> Nothing in the December 10, 2010 Order required G.M. to return to Dry Creek. Dry Creek's statements confirm its intent to not comply with the Court's order, just as it failed to do with CDE's orders. Dry Creek removed Ms. Coutchie from providing funded services for Grayson, but failed to offer an alternative provider who met the terms of the Court's order, the Settlement Agreement, the IEP and §1415(j). As a result, G.M. was left with *no District funded education services at all, while the District continued to receive federal funds.*

The Marcheses have notified Dry Creek they disagree with its misinterpretation of the December 10, 2010 Order, through several letters sent to Ms. Gutierrez. (*See,* Ex. 51, Letter, Kevin and Lyndi Marchese to Marcy Gutierrez, with copy to CDE, dated January 28, 2011; Ex. 57, Letter, Kevin and Lyndi Marchese to Marcella Gutierrez, dated February 10, 2011; and Ex. 60, Letter, Kevin and Lyndi Marchese to Marcella Gutierrez, dated February 18, 2011).

CDE is also aware of the position Dry Creek and its counsel have taken regarding the Court's Order, through letters the Marcheses sent CDE or on which CDE was copied. (*See,* Ex. 50, Letter, Kevin Marchese to Ana Marsh, dated January 25, 2011; Ex. 51, Letter, Kevin and Lyndi Marchese to Marcy Gutierrez (copied to CDE), dated, January 28, 2011; Ex. 54, Letter, Kevin and Lyndi Marchese to Ana Marsh, dated February 10, 2011; Ex. 56, Letter, Kevin and Lyndi Marchese to Ava Yajima, dated February 10, 2011; and Ex. 58, Letter, Kevin and Lyndi Marchese to Ana Marsh and Ava Yajima, dated February 15, 2011).

CDE clearly understands the intent of the Court's December 10, 2010 Order, as Ava Yajima has confirmed in her February 10, 2011 letter to the Marcheses (*See,* Ex. 55). Yet, CDE has done nothing to ensure Dry Creek's proper implementation of the December 10th Order, despite CDE's general obligation to ensure its LEAs comply, as well as its written assurances in its November 1, 2010 Nonopposition that:

> "***State Defendants will enforce the order of this court regarding Student's "Stay-Put" educational program."*** (State Defendants' Nonopposition, Page 1, Lines 24-25) (Ex. 36)

Since the December Order, the Marcheses have asked Dry Creek to propose a provider they can consider and approve, per the terms of the stay-put, the Settlement Agreement and IEP. Dry Creek's counsel has failed to do so. The Marcheses want G.M. to receive instruction in his stay-put placement and LRE, as he needs direct instruction to continue to close the gap in his reading skills, which a qualified replacement provider could supply. Since Dry Creek has failed to comply with the December 10th Order and propose a provider, the Marcheses have arranged for G.M. to continue receiving instruction from Ms. Coutchie at their expense rather than curtail needed services to return him prematurely to Dry Creek, the agency that caused his significant reading deficits in the first place. As G.M.'s education is Dry Creek's responsibility, this is a clear denial of FAPE.

Dry Creek through legal counsel, has written several letters to the Marcheses threatening to initiate SARB (School Attendance Review Board) proceedings by falsely asserting G.M. is "truant," based on its misrepresentation that the December 10, 2010 Order requires G.M. to return to Dry Creek. (*See,* Exs. 50, 53, and 59, above).

CDE is aware Dry Creek and its counsel have made SARB threats, through letters dated February 3, 2011, from Michael Rosenberg, Area Board III Director to Tom Torlakson (copied to Ana Marsh) (*see,* Ex. 52, Letter, Michael Rosenberg to Tom Torlakson); as well the Marchese's letters to CDE at Exs. 50 (01/25/11 Ana Marsh), Ex. 54 (02/10/10 Marsh), and Ex. 56 (02/10/11 Yajima). Mr. Rosenberg's letter specifically sought the assistance of Superintendent of Public Instruction Tom Torlakson in addressing Dry Creek's noncompliance, its denial of payment to Ms. Coutchie, as well as Dry Creek's threats to initiate SARB proceedings. As of today's date, Superintendent Torlakson has failed to respond to Mr. Rosenberg. This letter and supporting materials reiterates Mr. Rosenberg's requests on behalf of G.M. and the Marcheses.

Ms. Yajima's February 10, 2011 letter itself refers to Dry Creek's SARB threats, stating "CDE, Special Education Division does not investigate truancy matters. Truancy matters are handled at the local level. Please contact your local School Attendance Review Board." (Ex. 55 at pg. 3) Ms. Yajima's response demonstrates CDE's failure to hold its LEA accountable as well as its deliberate indifference to the Marcheses' plight

in the face of Dry Creek's continuing noncompliance and abusive acts. Despite CDE's assurances in its November 1, 2010 Nonopposition that it would enforce the court's Order and numerous letters from the family to CDE requesting assistance, CDE has failed to do anything.

On March 14, 2011, Dry Creek's counsel, Ms. Gutierrez and Ms. Cannon, submitted papers in the Marcheses' 9th Circuit appeal which clearly confirmed Dry Creek's understanding of its obligations under the December 10, 2010 Order, i.e., that Dry Creek was to make available an alternative provider in accordance with the last agreed upon IEP, and that stay-put hadn't changed, but for the removal of Ms. Coutchie. [Appellee's Response to Appellants' Memorandum and Election to Show Cause, page 3, Lines 5 - 8].

Yet, within the same time frame, Dry Creek sent the Marcheses letters threatening to initiate SARB proceedings because G.M. hadn't come to school and was "truant." In other words, Dry Creek's legal counsel appears to have *intentionally misrepresented the Order* in letters to the Marcheses, but *correctly stated the Order's terms to the 9th Circuit court*. This confirms the disingenuous acts of Dry Creek and its legal counsel, and conclusively demonstrates their awareness of the District's obligation to secure a replacement provider to deliver services to Grayson pursuant to the last agreed-upon IEP, *and their intentional failure to do so and instead make false SARB claims for no other purpose than to harass and retaliate against the family.*

Dry Creek's filings with the 9th Circuit also misrepresented the state of G.M.'s education, claiming the Court's order was ***unlikely*** to have serious or irreparable consequences as "The Appellant's (student's) services under the last implemented IEP ***continue through these proceedings***, with the *only difference* being that the *services are rendered by a different instructor. There is no change to the services to be provided or the hours of instruction each week*." Dry Creek's legal counsel failed to mention ***that the District was presently providing no funded education services to G.M. at all and has failed to do so for the past ten months.***

CDE is aware of Dry Creek's misrepresentations to the 9th Circuit since CDE was served with copies of Dry Creek's 9th Circuit filings and in fact, may have collaborated with Dry Creek in drafting the Opposition. Again, CDE has done nothing to correct or challenge these misrepresentations.

CDE has repeatedly acknowledged the terms of the stay-put, its authority and its obligation to require compliance with it and enforce against Dry Creek through sanctions and has repeatedly ordered Dry Creek to comply with stay-put per §1415(j). Yet, when Dry Creek refused to comply, CDE did nothing but write more letters with more empty threats, and based on its false claim there was a "dispute," suggest new avenues for Dry Creek to pursue to stay the execution of or modify stay-put in venues CDE thought Dry Creek's novel interpretations would receive a more friendly hearing.

When Ava Yajima wrote the Marcheses on February 10, 2011 (Ex. 55) she included a description of the stay-put placement:

> "The Courts have defined the "then-current educational placement" as the last agreed upon IEP. In your particular case, the last agreed upon IEP was dated August 2008 and signed in October 2008. With regard to individual instruction, the IEP provided that: ". . . [the District would] fund 15 hours per week of individual instruction following the district's academic calendar and 80 hours of extended year services from the educational specialist selected by the parents."

Her description was virtually identical to Ms. Gutierrez's description of the stay-put placement in her July 15, 2010 letter (Ex. 22):

> "The District does however agree to honor the stay-put placement that is identified in the last agreed-upon IEP as required by law, which provides for one-on-one services from with an "education specialist." Therefore the District will continue to fund Grayson's services from an "education specialist" as identified in the last-agreed upon IEP (per the settlement agreement) and as required by law." (Ex. 22):

Her description was also identical to CDE's description of the stay-put placement its August 31, 2010 letter to Dry Creek (Ex. 28), which stated the District will:

> " . . . fund 15 hours per week of individual instruction following the district's academic calendar and 80 hours of extended year services from the educational specialist selected by the parents."

This very same description appeared in CDE's October 11, 2010 letter to Dry Creek's legal counsel Ms. Cannon, reiterating Dry Creek's obligation to comply with the stay-put placement or it would be sanctioned. (Ex. 30)

Contrary to what Ms. Yajima claimed in her July 21, 2010 letter, ***the stay-put placement was never in dispute and never required an OAH or federal court determination, as it remained the same and was in effect all along.*** [47] Today, stay-put ***remains exactly as it did before,*** except that Dry Creek, encouraged by CDE to seek the involvement of the federal court, filed a frivolous motion resulting in an uninformed and unenforced judicial order that would have never been issued but for CDE's failure to adequately enforce the law. As a result, Ms. Coutchie has been removed and is unpaid and G.M. is without funded services.

[47] A finding OAH had made in its August 30, 2010 order, that: ***"Because of that federal filing, the stay put rule is in effect.*** (*Joshua A. v. Rocklin Unified School Dist. (*9th Cir. 2009) 559 F.3d 1036);" and "Stay put was automatically in effect, as it is here, because of the pendency of the federal case." (Ex. 27)

Dry Creek Legal Fees

Besides negatively affecting G.M.'s education, Dry Creek's actions in this matter have detrimentally impacted its teachers, its students and its community. At the same time Dry Creek faces funding shortages, budget cuts and teacher lay-offs, it continues to pay school district legal counsel to pursue noncompliance and frivolous litigation on the District's behalf and appears to have done so without opposition or even discussion.

At Dry Creek's February 3, 2011 Board of Trustees' Meeting, Dry Creek's Board considered and approved Consent Agenda Item 3.2 Warrants: December 10 – January 31, 2011. The listing of checks included the following amounts paid to legal counsel:

12/10/10	Ch. # 85160009	Gutierrez Law Group	$ 4,975.37
12/17/10	Ch. # 85161563	Gutierrez Law Group	$ 9,501.25
01/21/11	Ch. # 85166672	Kronick, Moskovitz, et al.	$ 6,232.00
01/28/11	Ch. #85167914	Gutierrez Law Group	$12,538.75
		Total	$33,247.37[48]

In the space of a month and a half, attorneys who had counseled Dry Creek in its noncompliance, defiance of CDE orders and pursuit of frivolous litigation to set aside procedural safeguards were paid over $30,000.00 in fees by Dry Creek's Board of Trustees *while G.M. went without funded services and Ms. Coutchie, whom Dry Creek promised to pay, was uncompensated.*[49] (*See,* Ex. 64, Excerpt, Board of Trustees Meeting Agenda/Back-up, February 3, 2011). Funds that should have gone to student services and educational compliance were instead paid by Dry Creek to lawyers to avoid providing educational services, leaving education needs unmet and the District out of compliance.[50]

[48] This is not an exhaustive list of legal fees incurred by these firms and does not include fees that may have been paid to other law firms for special education services. It is intended to show fees paid at the same time Dry Creek pursued frivolous litigation and considered laying off staff. A more thorough analysis needs to be done to determine the impact of Dry Creek's annual legal fees on the LEA's finances.
[49] What Ms. Gutierrez's firm alone made in this 1 ½ month period would have compensated Ms. Coutchie in full for services it owed her for services she had rendered from June 2010 to December 2010.
[50] This is just one board agenda, which appears to cover a period of only a month and a half. It is apparent Dry Creek's legal fee expenditures are far more greater than what is reflected here.

On March 3, 2011, Dry Creek's Board of Trustees met again. This time Minutes of the meeting reflect consideration of Item 4.0 Human Resources Resolutions for reduction and layoff of classified and certificated staff "Due to Lack of Funds". The Minutes

reflect questions from audience members regarding the number of teachers to receive layoff notices. The Deputy Superintendent stated it was difficult to say the exact number. Board members stated "The decisions to make cuts involving layoffs are very difficult for all involved. Staff is doing everything they can to keep staff members employed." (*See*, Ex. 65, Excerpt of Board of Trustees Meeting Minutes, dated March 3, 2011).

Given the cloak of "confidentiality" surrounding closed session discussion of litigation, it is impossible to discern what Dry Creek's Board of Trustees knows about the Marchese case. Assuming they have some knowledge of the case, are they aware of the actions and tactics employed by their legal counsel? Are they aware G.M. is without services as a result? Does their continued funding of legal fees indicate they condone these actions?

The apparent lack of discussion in the Board's public session regarding the warrants generally or the legal fees in particular seems to indicate these fees may not have been given any scrutiny whatsoever. It also appears Dry Creek's teachers, who face losing their jobs at the same time such fees are being paid, have no idea Dry Creek's education funds which could be used to retain teachers are instead being used to pay attorneys to deny services to a student and compensation to his reading specialist.

Given this apparent lack of information and public discussion, Dry Creek's community may not be aware this is how their tax dollars are being spent. With this sort of "local review" constituting the full extent of accountability for legal fees in the State of California, and considering the number of school districts across the state which similarly use legal counsel and pay such fees, it appears that an unknown amount of taxpayer dollars are being spent on legal fees while legal counsel representing school districts operate without oversight, restraint or accountability, and no one has a clue what they are up to. California's taxpayers are left in the dark while they foot the bill and watch education dollars paid as legal fees pour out the schoolhouse door.

If Dry Creek's Board of Trustees and the State of California's Board of Education know of and consent to the litigation tactics their legal counsel have engaged in, it is a travesty of the worst sort and a fraud on the taxpayers. If they are not aware of such tactics, then such legal counsel are acting without oversight, accountability or control and truly are "running amuck" as Judge Burrell suggested, with California's children and the taxpayers in general forced to suffer the consequences.

Conclusion

As of the date of this letter, Dry Creek has not paid Ms. Coutchie for her services and has not funded G.M.'s PE services for almost twelve months, beyond a full school year.[51] As a result, in this time period Dry Creek *has failed to fund any educational services for G.M.* yet it continues to accept federal funds based on its assurances it is providing FAPE to students within its boundaries, protects student and parent rights through the procedural safeguards and complies with the IDEA in general.

Dry Creek has also failed to implement the last agreed upon placement, per the Settlement Agreement and IEP, and the Court's Order. CDE has full knowledge this is the case but has done nothing to either enforce the stay-put, the Court's orders or ensure Ms. Coutchie is paid in accordance with 20 U.S.C. §§1412 or 1413.

This letter and accompanying Appendices are being filed with Superintendent Torlakson, as well as those copied on the cover letter, as the family has been improperly excluded from the only jurisdictions in which they can make a record of what has occurred in their son's education and redress their grievances. The Marcheses need direction with regard to where they can present their claims for resolution.

CDE's website includes a link to "Official letters from the California Department of Education, State Director of Special Education providing program clarification on procedural and/or implementation issues." Among these letters is an April 18, 2000 letter "Notice of Sanctions for Noncompliance." Having this document on its public website which describes CDE utilizing sanctions against noncompliant school districts gives California families the misimpression CDE effectively addresses noncompliance or employs sanctions to do so, when this just isn't the case.
http://www.cde.ca.gov/sp/se/lr/ofclmem.asp.
http://www.cde.ca.gov/sp/se/lr/om041800.asp.

California's recent Part B Application under the IDEA, with its assurances of compliance with the IDEA in order to receive federal funding is just as misleading, as it gives the impression the entire state of California, including its local school districts, are in compliance. http://www.cde.ca.gov/sp/se/as/fndapp11.asp. These assurances of compliance amount to nothing more than window-dressing and empty promises to California's children with disabilities and their families.

[51] 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.

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 school districts such as Dry Creek and its school district legal counsel. What does it take for CDE to live up to its obligations? How can it claim compliance with the IDEA when it knowingly avoids holding school districts accountable and does nothing while their legal counsel line their pockets with California's education dollars?

These are questions the Marcheses, as well as parents of special needs children throughout California, want answered.