Appendix 2 – Supplemental Points & Discussion re: Noncompliance

Appendix 2 "Supplemental Points" relates to evidence presented in Appendix 1 "Detailed Review & Documentary History re: Education of G.M.," but examines the facts according to issues set forth below. The purpose of Appendix 2 is to supply greater detail and analysis regarding acts by the local education agency ("LEA") and the state education agency ("SEA") and their legal counsel, which confirm their noncompliance in G.M.'s case, and which also provide insight into the tactics that are routinely employed by school districts and their legal counsel to avoid LEA obligations and challenge parents who actively advocate for their students in the manner IDEA contemplates.

Unfortunately, the tactics of Dry Creek Joint Elementary School District ("Dry Creek" or "District") and its legal counsel, as well as the California Department of Education ("CDE") and its legal counsel not only violate the IDEA and appropriate public agency policy and practice, they also violate each agency's fiduciary duty to students and families, and in some cases defy common standards of human decency. Many acts constitute an abuse of power and are clearly against public policy.

Because the letter and its appendices focus on the issue of stay-put and violations which arose from the District's attempts to set it aside, the incidents described here focus primarily on the tactics employed with regard to those issues. The many other tactics engaged in by Dry Creek and its counsel in connection with G.M.'s education are not documented here. If and when a responsible agency steps forward to address the issues presented, the Marchese family can supplement the record with further detail.

However, many school districts across the State of California regularly engage in similar practices against many, many parents on a far too regular basis and do so at the direction and behest of school district legal counsel. While Appendix 2 describes some of the tactics and strategies LEAs and legal counsel employ against students and their families, this is by no means an exhaustive study of such tactics or strategies. Again, if and when a responsible agency steps forward to address the issues presented, they can also address what families are having to endure on a far too regular basis.

<u>Supplemental Point #1</u> – Actions by SEA and LEA Legal Counsel against Public Policy

Introduction

1. Use of attorneys in general - What IDEA says about attorneys

2. Purposes for which LEAs should use attorneys under the IDEA

3. How LEAs actually use attorneys

a. Attorneys represent LEAs in due process, using "scorched earth" litigation tactics designed to wear down and exhaust parents, e.g., attorneys -

Intimidate parents
Threaten parent advocates: Michael Rosenberg
Disparage/defame providers/ witnesses – Suzanne Coutchie
Misrepresent the facts and law

b. Attorneys require parents to waive their rights in settling disputes arising out of mediation and due process.

c. Attorneys pursue challenges to the law's provisions and procedural protections (e.g., stay-put, provision of FAPE, procedural safeguards) on behalf of LEAs (and SEAs), who thus fail to comply with the law, at the same time they seek and receive federal funds based on their assurances of compliance with the law.

d. School district attorneys encourage noncompliance.

e. School district attorney firms also profit from trainings and alerts provided to LEAs, which lead to greater statewide noncompliance and litigation and a network of practice that serves as a stonewall to parents.

4. LEAs (and SEAs) are represented by legal counsel using tax dollars while parents and families do not have access to counsel, despite IDEA's language providing the "right to be accompanied and advised by counsel" in due process.

5. Result - tax dollars received based on LEA assurances of compliance are used to hire attorneys who counsel LEAs on how to avoid their obligations under the law.

6. Lack of accountability for school district attorney-related expenditures at both the local and state level.

Supplemental Point # 2* - *CDE Attorneys and Relationships with LEA Counsel

CDE Legal, Audits and Compliance (LAC) Branch

Brief Outline of CDE Involvement in Marchese Case

Ava Yajima

Marsha Bedwell

Supplemental Point #3* – *Misrepresentations of Fact and Law by Dry Creek & CDE

Dry Creek

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Ms. Coutchie as Provider

Dry Creek's Manner of Documenting the Settlement

Settlement Agreement vs. IEP

B) Ms. Gutierrez and Ms. Cannon's Prior Efforts to Misrepresent and Set Aside Stay-put

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Supplemental Point # 1* - *Actions by SEA and LEA Legal Counsel Against Public Policy

Introduction

Over the past ten years, school districts have increasingly involved legal counsel in special education matters under the IDEA. Paradoxically, at the same time California's budget crisis has deepened, cutting into local education agency ("LEA") resources, LEAs have hired and paid more school district legal counsel who often engage in activities and tactics such as those described here, which do not comply with the IDEA's plain language, an LEA's obligation to ensure students receive a free appropriate public education ("FAPE") or an agency's fiduciary duty to its students, parents and community at large.[1]

At times the actions of such legal counsel seem to indicate they believe they represent *only* the interests of the LEA, i.e., its board and administrators, and not those of a district's students, its parents or its community. More and more, they appear to counsel school districts to engage in noncompliance from which legal counsel then benefit. Since such legal counsel are, in effect, indirect recipients of federal funds and state tax dollars, in representing their school district clients they should be accountable to the same standards and obligations with which LEAs must comply.

LEAs (and state education agencies ("SEA")) receive federal funds based on certain assurances and affirmative obligations: e.g., under Section 504, local education agencies are required to comply with laws prohibiting discrimination. Under IDEA, funds are received by LEAs pursuant to assurances of compliance with state policies and procedures adopted by the SEA, e.g., to ensure FAPE to students and procedural protections to students and their parents, including a student's right to be in his or her least restrictive environment ("LRE"), and to remain in their current educational placement during due process and subsequent judicial proceedings. An SEA also provides assurances it is monitoring and enforcing the requirements of Part B and is maintaining an effective complaint resolution process ("CRP") which properly addresses complaints and claims of noncompliance.

When school district legal counsel engage in activities that do not further IDEA's clearly stated purpose or do not comply with an LEA's affirmative obligations under IDEA, and instead seek to set aside student and parent rights under the IDEA, their actions are against public policy. Such is the case with legal counsel representing Dry Creek and CDE in this matter. Unfortunately, what has happened with Dry Creek is happening in far too many school districts across the State of California.

[1] An analysis of the fiduciary duty of school district legal counsel and how it extends beyond the direct relationship between legal counsel and an agency is analyzed in a treatise entitled "Duties of District Legal Counsel in IDEA," published in LRP's *Special Education Law and Practice: A Manual for the Special Education Practitioner,* Gary M. Ruesch, Editor. (2000)

1. Use of attorneys in general - What IDEA says about attorneys

When school district legal counsel represent LEAs under the IDEA, the law is specific about how they may be involved with public agencies in the education of students with disabilities. According to IDEA, public agencies may use legal counsel for due process proceedings, as follows:

- any party to a hearing "shall be accorded the right to be accompanied and advised by ***counsel.*** . . " (20 U.S.C. §1415(h), 34 CFR §300. 512).

- As part of the due process proceeding, a party or an ***attorney representing a party*** must provide a due process complaint notice that meets certain requirements. (20 U.S.C. §1415(b)(7), 34 CFR §300.508).

- If a parent who attends a resolution session is accompanied by ***counsel,*** the local education agency may also be accompanied by ***counsel***. (20 U.S.C. §1415(f)(1)(B), 34 CFR §300.510).

- Where a parent has requested an independent educational evaluation and a public agency files a due process complaint to show its evaluation is appropriate, the public agency is entitled to be accompanied by ***counsel***, as noted above. (34 CFR §300.502(b))

- IDEA's regulations provide that although "funds under Part B of the Act may not be used to pay ***attorneys'*** fees or costs of a party related to any action or proceeding under section 615 of the Act and subpart E of this part", this does not "preclude a public agency from using funds under Part B of the Act for conducting an action or proceeding under section 615 of the Act." (34 CFR §300.517(b)).[2]

[2] Under 20 U.S.C. §1415(i)(3)(B)(i)(I), a parent of a child with a disability *may be* awarded legal fees. Therefore, a parent's "right" to counsel is dependent upon their prevailing in due process and convincing a judge they should be reimbursed. Compare this to public agencies for which there apparently is no limitation on legal fees they expend, which are paid with taxpayer dollars whether the agency wins or loses. As LEAs have unlimited access to resources to pay legal fees without having to prevail in due process, and don't have to justify their case in order to have access to such resources, most LEAs typically do not undertake any "cost/benefit" analysis prior to proceeding into due process. This often results in LEAs undertaking litigation that is without merit or positive return. When LEAs lose and are required to reimburse parent attorneys' fees, the unnecessary cost to the LEA is even greater.

IDEA specifically prohibits ***attorney's*** fees relating to a meeting of the IEP team, unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation. (20 U.S.C. §1415(k)(d)(3)(ii), 34 CFR §300.517(c)(2)(ii)).

IDEA also provides public agencies the right to ***counsel*** in the event they are subject to U.S. Department of Education hearing procedures related to state eligibility. (34 CFR §§300.181-300.182).

Presuming Congress meant what it said in IDEA, the U.S. Supreme Court, in *Arlington Central School Dist. Bd. Of Educ. V. Murphy* (548 U.S. 291, 126 S.Ct. 2455 (2006)), found that rights and obligations under the IDEA ***are strictly limited to those set forth in the plain language of the statute.*** The Court's decision specifically provides:

> We have "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain*, 503 U. S. 249, 253–254 (1992). When the statutory "language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." [Citations omitted]. (Page 4)
>
> Referencing §1415(d)(2) with regard to legal fees, the Court noted "This provision, which generally requires that parents receive "a full explanation of the procedural safeguards" available under §1415 and refers expressly to "attorneys' fees," makes no mention of expert fees." (Page 6)

The Court clearly noted the significance of notice provided by the procedural safeguards, and also seemed to confirm that as "the terms of the IDEA fail to provide the clear notice that would be needed to attach such a condition to a State's receipt of IDEA funds," (Page 8), the *absence of language* in the IDEA would similarly limit what a State or LEA could do with such funds. Therefore, it seems logical to assume that LEAs would be limited to what the plain language of the law provides in terms of use of attorneys, particularly since no notice of any other use is provided to parents.

Therefore, it would appear local education agencies are limited to using legal counsel to actions under due process procedures; IEP meetings convened as a result of an administrative proceeding or judicial action or, at the discretion of the State; and hearings pursuant to U.S. Department of Education procedures related to state eligibility proceedings.[3] (*See,* the Court's opinion at the following link: http://www.supremecourt.gov/opinions/05pdf/05-18.pdf).

[3] Dry Creek's legal counsel specifically referred to this language in *Arlington v. Murphy* in its October 20, 2010, Memorandum in Support of Defendant's Motion re: Stay Put. (Ex. 34)

2. Purposes for which LEAs should use attorneys under the IDEA

An LEA's primary obligation, according to IDEA's purpose at 20 U.S.C. §1400(d)(1), is to ensure it has policies and procedures in place consistent with SEA policies and procedures under 20 U.S.C. §1412, specifically to ensure students within its jurisdiction:

- Receive free appropriate public education ("FAPE") (20 U.S.C. §1412(a)(1)); and
- Are afforded the procedural safeguards and protections §1415 (20 U.S.C. §1412(a)(6), including, but not limited to:
    - Maintenance of the student's current educational placement during all judicial proceedings which arise out of due process proceedings under 20 U.S.C. §1415(j); and
    - That students receive their education in their least restrictive environment (20 U.S.C. §1412(a)(5)(A)-(B)).

Since an LEA's fundamental obligation is to ensure its students receive FAPE, it seems logical that all legal actions undertaken by LEA legal counsel on behalf of an agency should have that goal as their primary purpose.[4] Legal action for a purpose other than to ensure FAPE is improper and contrary to an agency's obligations under the IDEA. Therefore, where an LEA pursues due process proceedings or further judicial proceedings against a student and parent, if the purpose of such a proceeding is not specifically to ensuring the student receives FAPE, it is for an improper purpose.

Unfortunately, as this case demonstrates, Dry Creek and its legal counsel were not focused on ensuring FAPE. Instead it appears their goal was to deny FAPE by eliminating G.M.'s services and setting aside his procedural and substantive rights. They also sought to deny G.M.'s parents their procedural protections and to intimidate and exhaust them as punishment for having pursued their son's rights under the IDEA.

3. How LEAs actually use attorneys

Unfortunately, far too many LEAs bring legal action for purposes other than ensuring FAPE, while they often claim that FAPE is their goal. Such is the case with Dry Creek and its legal counsel in their actions against G.M. and his parents.

[4] For example, even where the law specifically calls for an LEA to pursue legal action against a student, the purpose and outcome of such an action should *only* be to ensure the student receives FAPE (e.g., as in actions pursuant to 34 CFR §300.502 and EC §56346(f)).

a. Attorneys represent LEAs in due process, using "scorched earth" litigation tactics designed to wear down and exhaust parents, e.g., attorneys -

Intimidate parents

Dry Creek's legal counsel took steps to intimidate G.M.'s parents on several occasions and in several different ways:

- 06/08/10 - 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*." (Ex. 17) [5]

- 06/08/10 – Ms. Gutierrez warned the Marcheses if they should "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*." (Ex. 17 at pgs. 1 – pg. 2).

- 06/09/10 – Ms. Gutierrez 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)

- 06/09/10 – Ms. Gutierrez accused the Marcheses of having interactions with Dry Creek staff that were "less than courteous and were in violation with board policies" and that "interfered with the peaceful conduct of the school environment and disrupted staff." (Ex. 18, pg. 2).

- 06/28/10 – Ms. Gutierrez warned the Marcheses "the District will afford *little tolerance for bad faith* as these proceedings move forward" and stated "Please be advised that if you continue to conduct yourself in *bad faith* the District will diligently seek sanctions against you." (Ex. 20, pg. 4)

- 08/23/10 – Ms. Gutierrez informed the Marcheses' advocate that "it can be gleaned from the [OAH] decision that the District is not limited to seeking an award of fees and/or sanctions only from Mr. Marchese, . . ." but could also seek a motion against any and all parties representing him. (Ex. 69)

[5] Ms. Gutierrez's letter also warned the Marcheses against pursuing their procedural right to appeal. (20 U.S.C. §1415(i)(2)(A)).

- 01/11-02/11 - Dry Creek, through its legal counsel, wrote several letters to the Marcheses threatening to initiate SARB (School Attendance Review Board) proceedings against them based on the false assertion G.M. was "truant," based on its mischaracterization of the December 10, 2010 Order, claiming that it required G.M. to return to Dry Creek. (*See,* Exs. 50, 53, and 59).

Threaten parent advocates: Michael Rosenberg

- 08/23/10 – Ms. Gutierrez wrote Michael Rosenberg (the Marcheses' advocate and Executive Director of State Council on Developmental Disabilities Area Board III), warning the District intended "to seek attorney fees and/or sanctions as redress for any improper or unreasonable actions during the course of the pending due process hearing." Citing numerous OAH cases granting attorneys' fees awarded to districts, Mr. Rosenberg clearly was the target of this threat, which noted "the District is not limited to seeking an award of fees and/or sanctions only from Mr. Marchese, but can properly bring such a motion against any and all parties who represent him" noting the District would move for sanctions or an award of attorneys fees against all who have undertaken representation. (Ex. 69).[6]

Disparage/defame providers/witnesses – Suzanne Coutchie

Dry Creek's legal counsel, Ms. Gutierrez relentlessly attacked Ms. Suzanne Coutchie and her reputation, engaging in vitriolic character assassination based on untrue and unsubstantiated innuendo and claims never presented to Ms. Coutchie or any valid authority so that Ms. Coutchie would have the opportunity to dispute or disprove them. Examples are:

- 06/28/10 - Ms. Gutierrez said 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." (Ex. 20, pg. 3)

[6] Mr. Rosenberg's response on August 25, 2010 highlights the absurdity of Ms. Gutierrez's interpretation of IDEA's "sanctions" provisions in the context of this due process, noting it was an "attempt to intimidate the Area Board." He also pointed out Ms. Gutierrez's letter was convoluted as: 1) It was her firm that brought suit in OAH, not the family or the Area Board; 2) The litigation she brought in OAH was for assessments to which the family had already agreed; 3) Her firm had sought to change the stay-put despite CDE's orders; and 4) The District had refused to participate in mediation or resolution sessions, which were both mandated by IDEA. (Ex. 70) Mr. Rosenberg's letter seems to document Ms. Gutierrez engaging in the practice of "churning," i.e., generating fees through unnecessary litigation of benefit to no one but Ms. Gutierrez and her firm, and clearly to the detriment of the student and the LEA.

- 07/15/10 – Ms. Gutierrez claimed that as the District claimed to be aware of bad faith conduct by Ms. Coutchie, circumstances required a change in service provider. (Ex. 22)

- 10/20/10 – In the "Memorandum in Support of Dry Creek's Motion re: Stay Put," Ms. Gutierrez made scurrilous and unsubstantiated claims about Ms. Coutchie, asserting that during the due process Dry Creek learned Ms. Coutchie had engaged in "deceptive billing practices," failed to "fully execute her duties as an instructor and IEP team member," was "withholding critical information from other members of the IEP team," and otherwise engaged in acts evidencing animus, etc. (Ex. 34, page 4, 5, 8, 14-16) [7]

- 12/06/10 – At the U.S. District Court hearing, Ms. Gutierrez told the Court Ms. Coutchie was unavailable as she was not a "partner" in the process (Ex. 37, pgs. 5 – 9) while Ms. Gutierrez knew Ms. Coutchie WAS available and in fact was currently providing G.M. services based on Dry Creek's requests she do so (Ex. 13 and 24) and still attended and participated in every IEP at Dry Creek's request, which Ms. Barberia confirms she did as a "valuable member" of the IEP team.

- 12/14/10 - 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 repeated submission of invoices "is and will be considered harassment," warning 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 that Ms. Coutchie had communicated with third parties regarding the District and its staff "in a manner that may be considered defamatory." (Ex. 41).

Misrepresent the facts and law

See, Supplemental Point # 3 *below*

[7] Ms. Gutierrez's negative statements about Ms. Coutchie, including her duties as an IEP team member, are directly contradicted by statements made by Ms. Lynn Barberia, Dry Creek's Special Education Director, who recently wrote Ms. Coutchie on April 15, 2011 stating "Dear Suzanne, I am sorry that you will not be able to attend the IEP meeting for Grayson. ***You have been a valuable member of the IEP team in the past.***" (Ex. 71)

b. Attorneys require parents to waive their rights in settling disputes arising out of mediation and due process.

Although LEAs are annually required to provide assurances that they comply with their obligations under the IDEA as a condition of their receipt of federal funds, many districts provide students with only the minimum services, knowing most families have neither the time, ability or financial wherewithal to take a school district to due process. When families, frustrated with their child's lack of progress, begin to advocate for their child through the IEP process, school districts often bring in legal counsel to attend IEPs and engage in various methods of challenging and discouraging parent efforts, fighting the provision of services at the same time LEAs represent they are complying with the laws under which such services are to be provided.

Most families do not pursue due process as they feel ill-equipped to handle the complex demands of the process, as well as the attendant emotional strain of challenging their child's school system. As discussed below, most parents also do not have the financial means to even begin to contemplate hiring legal counsel to fight a taxpayer-funded school district in OAH (a historically unfriendly venue for parents).

For those who do pursue due process, they find school district legal counsel manipulate the system, often dragging out the process and making it a game of endurance where parents end up exhausted in exhausting administrative remedies. Far too often parents end up with little or nothing to show for their efforts on behalf of their child, other than intimidating threats by LEA legal counsel who claim they will pursue attorney's fees against parents who are only trying to obtain appropriate services for their child. (*See,* Ex. 69, pg. 2) In essence, school district legal counsel use IDEA's procedural safeguards to discourage families from pursuing rights under the law.

A well-known LEA legal counsel tactic is to drag out the process and on the eve of hearing, mediate and then settle. After lengthy litigation, Districts finally agree to provide services they should have provided all along, but often just the bare minimum a student needs. Worn out from the process and believing something is better than the nothing their student has received up to this point, families agree to accept the minimum services offered. However, they are then presented with a settlement agreement purporting to document the terms of the settlement, which includes legal provisions requiring that in exchange for services, parents are required to waive their child's rights and their rights, including the right to pursue claims for prior denials of services during the period the district was supposed to be providing FAPE, clearly didn't do so, yet sought and received federal funds as if it had. [8]

[8] More often than not, such settlement payments are not clearly documented on LEA board agendas so that this tactic would be obvious. See the discussion of CalAware below.

As this case demonstrates, even where LEA's appear to be settling, they often fail to properly document Settlement Agreements or IEPs of comply with the express terms of the documents they have drafted ostensibly to settle a dispute, by misinterpreting and simply failing to adhere to stated terms. The result is that the student is left without services, providers go unpaid and the parent is left with continuing noncompliance and the prospect of a continuing dispute requiring further due process or complaint, while they have waived all rights with regard to it.

Waivers Identified in the IDEA

The language of IDEA contemplates waivers in limited circumstances. None of those circumstances relate to the waivers Dry Creek extracted from the Marchese family in the October 2008 Settlement Agreement. The language of the statute, and examples of the waivers Dry Creek required, are set forth below:

In the IDEA, the term "waiver" and references to waivers are as follows:

- The term "Highly Qualified" means teachers have not had special education certification or licensure requirements ***waived*** on an emergency, temporary, or provisional basis (20 U.S.C. §1401(1)(B)(2)).

- The U.S. Department of Education is authorized to grant ***waivers*** of Part B statutory and regulatory requirements for up to 4 years for 15 states related to reduction in paperwork and non-instructional time burdens; however statutory or regulatory requirements relating to applicable civil rights requirements are not ***waived***, and IDEA specifically states this section shall not be construed to affect the right of a child with a disability to receive FAPE or to permit an SEA or LEA to ***waive*** procedural safeguards under Section 1415. (20 U.S.C. §1408(a)(2)).

- SEAs are to establish and maintain qualifications to ensure personnel necessary to carry out Part B are appropriately and adequately prepared and trained, and to ensure that related services personnel who deliver such services in their discipline or profession meet the requirements of clause (i) and have not had certification or licensure requirements ***waived*** on an emergency, temporary, or provisional basis. (20 U.S.C. §1412(a)(14)(B)(ii)).

- Where a State provides clear and convincing evidence that all children with disabilities have available to them a FAPE, the Secretary may ***waive*** the requirements of the prohibition against supplantation. (20 U.S.C. §1412(a)(17)(C)).

- The Secretary may ***waive*** the requirement that States not reduce State financial support for special education and related services below its amount of support for the preceding fiscal year, if the Secretary determines a ***waiver*** would be equitable due to exceptional circumstances (e.g., a natural disaster) or it meets the standard in (17)(C) for ***waiver*** of the requirement to supplement and not supplant funds received. (20 U.S.C. §1412(a)(18)(B)).

- Parents and the LEA can agree in writing to ***waive*** a resolution meeting. (20 U.S.C. §1415(f)(1)(B)(i)(IV)).

- Regarding Personnel Development, the Secretary may reduce or ***waive*** the service obligation requirement for individuals receiving scholarships under proposed projects that they subsequently provide special education and related services to children with disabilities, if the Secretary determines the service obligation is deterring the recruitment of students into special education or a related field. (20 U.S.C. §1463(h)).

Examples of the types of waivers demanded by school district legal counsel are found in the October 2008 Settlement Agreement drafted by Dry Creek's legal counsel Jacqueline S. McHaney (Thurbon & McHaney, L.P.) (Ex. 1.1)

> The "Recitals" portion of the Settlement Agreement noted the parties desired to "finally resolve, settle, compromise and forever discharge as between them any and all claims and issues which were preliminarily raised, or which could have later been raised, in a lawsuit, or which the parties hereto have or may ever have had against each other arising out of the dispute with respect to the time period May 5, 2006 through the date of this Agreement;. . ." (Ex. 1.1, pg.1)
>
> > Dry Creek had no claims or issues against G.M. or his parents. This language attempted to give the impression each party was giving up some right in settling, when that wasn't the case. This language also required a waiver of all past and future claims from 05/05/06 to the present, encompassing three school years while the consideration provided under the agreement did not include services for a corresponding period.
>
> 1. Consideration: G. Upon execution of this Agreement by all parties, Marcheses agree to ***waive*** their right to convene an IEP meeting to make the necessary adjustments to Grayson's IEP to reflect the terms of this Agreement. District shall make the necessary revisions to Grayson's IEP documentation and shall forward the same to Marchese for their review and execution. Assuming the IEP documentation reflects the terms of this Agreement, Marcheses agree to consent

to the IEP and execute the IEP in the designated signature blocks and return same to the District within five (5) business days of receipt. (Ex. 1.1, ¶ 1.G.)

> Parents are not required to waive rights in the IEP process, nor should they be required to waive rights to settle due process proceedings to obtain services, particularly when such a proceeding was brought based on a claim of a prior denial of rights. Nothing in IDEA or California's Notice of Procedural Safeguards provides notice this is the case.
>
> Such a provision is contrary to IDEA's purpose and intent and contradicts an LEA's obligation to provide students with services that ensure FAPE. Dry Creek's requiring such a waiver shows a callous disregard for the rights of a student they are supposed to be ensuring and is against public policy.
>
> This waiver was required in exchange for Dry Creek providing services the parties agreed were necessary, i.e., reading instruction through a qualified provider, Ms. Coutchie. G.M. was entitled to such services as part of the IEP process, where parents and the LEA agree on such services. Here, the Marcheses were required to *waive their rights and G.M.'s rights to what the IDEA entitles them*, in order to get what the IDEA guarantees, i.e., a proper education for their son with properly qualified providers. In fact, what they agreed to didn't begin to address G.M.'s complete education. As the record reflects, Dry Creek failed to comply with the agreement it had drafted.

4. Release and Discharge: Marcheses hereby agree that all their rights under Section 1542 of the Civil Code of the State of California are hereby ***waived*** with regard to the time period May 5, 2006 through the date of execution of this Agreement. . ." [9]

> Again, nothing in IDEA requires a waiver of rights by parents who pursue due process on behalf of their child. Also, school district legal counsel know many parents are not represented by legal counsel and that LEAs have an unfair advantage over parents in negotiating such agreements. They also know many parents will not grasp the significance of their child's rights they may be relinquishing by agreeing to such terms. How can the IDEA ensure appropriate education yet allow such agreements?

[9] This paragraph continues with a lengthy recitation of the requirement that the Marcheses irrevocably and unconditionally release and forever discharge the District with respect to any and all claims and issues ever raised, or ever possibly raised, with language so redundant it clearly demonstrates the District's intent to cut off any and all possible avenues with regard to redressing grievances under its prior acts which clearly failed to comply with its obligations under the IDEA.

As noted above, the IDEA does not contemplate such agreements or waivers in settling disputes. In fact, CADRE, The National Center on Dispute Resolution for Special Education provides a model settlement agreement on its website which clearly shows that substantive consideration in the form of services and compensatory education are provided in exchange for acknowledgments that prior claims made are satisfied and resolved. http://www.directionservice.org/cadre/agree3.cfm That did not happen here.[10] As well, the model agreement contains no language which even begins to approach the substantive waiver of rights Dry Creek included in Ex. 1.1.

Also, the services in the Settlement Agreement could have been provided through an IEP had Dry Creek been proceeding in good faith. What is noteworthy is the CADRE model agreement provides the family direct access to a hearing officer to intervene and resolve problems which may arise. No such resource was in the agreement Dry Creek prepared, so when Dry Creek failed to compensate Ms. Coutchie the Marcheses were left with yet another dispute and yet another complaint process to contend with. That Dry Creek required such waivers, yet failed to comply with the plain terms of the Settlement Agreement it drafted only adds insult to injury.

Requiring a family to waive *any right* in order to get services is an unconscionable violation of IDEA's clear purpose and the LEA's obligations to ensure FAPE and protections under the procedural safeguards. As well, it is a clear violation of public policy. Although releases and waivers may be standard in general business litigation, special education disputes do not involve typical business entities, and instead pit students and parents against a publicly-funded agency which assures a grantor of funds (the U.S. Department of Education) that it is complying with the law and ensuring students a free appropriate public education. Hoodwinking or forcing a family to waive rights to get the services the agency is obligated to provide is a forced waiver that goes against common sense, the IDEA and Congress's clear intent.

[10] A waiver is "The voluntary surrender of a known right; conduct supporting an inference that a particular right has been relinquished." http://legal-dictionary.thefreedictionary.com/waiver. This resource goes on to state "The term waiver is used in many legal contexts. A waiver is essentially a unilateral act of one person that results in the surrender of a legal right. The legal right may be constitutional, statutory, or contractual, but ***the key issue for a court reviewing a claim of waiver is whether the person voluntarily gave up the right.*** If voluntarily surrendered, it is considered an express waiver." From a parent's perspective, particularly since most parents must deal with school districts and their legal counsel without benefit of their own legal counsel, I submit that when a family "waives" rights under an agreement such as Ex. 1.1, it is not a *voluntary* waiver, as they do so knowing that if they don't agree to such a waiver, their child will be left with inappropriate services or no services at all, at the same time they have to continue to deal with a district, such as Dry Creek, that is not proceeding in good faith and has demonstrated no compunction whatsoever about spending education dollars on legal services to deny an education to its students, at the same time it accepts federal and state dollars claiming it is complying with the law.

Also, it must be presumed that both Dry Creek's and CDE's legal counsel, as attorneys considered competent to represent public agencies funded by and for the benefit of taxpayers, are aware of "maxims of jurisprudence" (California's Civil Code at §§ 3509 – 3548), and specifically Civil Code §3513 which provides that "Any one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by private agreement." As IDEA is a "law established for a public reason," neither the law nor rights under it can be waived or contravened through a private settlement agreement drafted by school district legal counsel, as much as they might like this to be the case. Yet, Dry Creek and other LEAs in California routinely present such agreements to families in settling disputes, convincing families they must waive their child's rights to get services.[11]

LEAs are taking federal funds and instead of providing appropriate services to students that will ensure progress, they use such funds to subsidize their education budget or when parents challenge an LEA's failure to provide an appropriate education, they hire and pay school district legal counsel to avoid responsibilities LEAs have assured the federal government they are fulfilling. It is a racket that has parents running in circles.

Because of confidentiality provisions LEA counsel often insert into settlement agreements, such counsel convince parents they are prohibited from disclosing the settlement's terms or even discussing the fact they've settled, often leading parents to believe that *any* discussion will invalidate their agreements so that their child will lose services if they discuss it.[12] School district counsel use "confidentiality" to keep their improper provisions and bad acts hidden from the community and from scrutiny by state and federal agencies. Everyone is kept in the dark about their noncompliance and bad acts and the improper agreements surrounding them which result in a further diminution of student rights without accountability. This entire process violates the purpose and intent of IDEA.

School districts seek and receive federal funds based on assurances they are complying with policies and procedures to ensure FAPE and IDEA's procedural protections, while they fail and refuse to provide eligible students with services that will ensure appropriate progress. When parents challenge such failures, instead of acknowledging the problem and working with parents to resolve it, LEAs hire school district legal counsel who fight families, wear them down to the point where they will accept *anything* just to be done with the process, and then require them to sign

[11] During the course of a complaint investigation in connection with a compliance complaint last year, I communicated with CDE at length about this problem. CDE's response was simply to not respond at all, which seems to make them complicit in the problems and practices documented here.

[12] In reality, the only confidentiality of merit is the student's right to privacy and confidentiality. The LEA's expenditure of public funds makes such agreements subject to the Brown Act and California's Public Records Act. *See,* the discussion of CalAware, below.

agreements waiving their rights and the LEA's obligations under the law in a manner the IDEA doesn't contemplate. In essence, the LEA convinces the family to excuse the LEA's prior denials of FAPE by withholding services and then forcing a family to waive their rights under duress in what is nothing more than a contract of adhesion.

How can Dry Creek's legal counsel honestly claim the Settlement Agreement they drafted with the Marcheses was designed to ensure G.M. FAPE when it only provided services that would last less than a school year at the same time the family was required to waive their rights extending back three full school years?

How can an LEA require parents to relieve it of its statutory obligation to comply with a law and provide FAPE to a student for which it is receiving federal funds for such services, based on its assurances that it has, in fact, complied with those obligations, when the dispute based on the student's documented failure to make appropriate progress confirms the denial of FAPE and the failure of the LEA to meet its obligations under the law? When a district acts as Dry Creek has, and fails to comply with the agreement it drafted and then, after-the-fact, claims that the intent of the parties was only to come to a "temporary" resolution, only serves to underscore the bad faith actions of the District and its legal counsel.

Surely this is not how Congress contemplated IDEA working, yet this is exactly what is happening in California as a result of the increased involvement of school district legal counsel in IDEA dispute resolution. The actions of such counsel have co-opted the system from one of dispute resolution in good-faith education to "scorched earth" litigation, where the dispute resolution process has become a money-making venture for legal counsel at the expense of school children and budgets of local education agencies, and where parents are forced to waive substantive rights to get the minimum services.

c. Attorneys pursue challenges to the law's provisions and procedural protections (e.g., stay-put, provision of FAPE, procedural safeguards) on behalf of LEAs (and SEAs), who thus fail to comply with the law, at the same time they seek and receive federal funds based on their assurances of compliance with the law.

When Ava Yajima, CDE's legal counsel, indicated CDE would not enforce against Dry Creek unless and until the Marcheses filed an early appeal of the February 18, 2010 OAH decision, she made it clear CDE was open to "novel" interpretations of the IDEA not supported by the law. (*See,* App. 1, entries for week of March 29, 2010 and April 9, 2010) [13] Although CDE sent its May 27, 2010 letter (Ex. 16) to Dry Creek,

[13] Of course, this assumes there was not a more direct arrangement made between CDE and the Kronick firm through backroom channels arising from Ms. Bedwell's upcoming departure from CDE and employment by the Kronick firm. *See,* Supplemental Point 2, below.

informing the District it was required to comply with G.M.'s current educational placement, after Dry Creek did not comply and CDE failed to enforce again and again, Dry Creek's counsel apparently decided to devise novel interpretations of its own.

A month after CDE again ordered Dry Creek to comply with the stay-put, Ms. Gutierrez sent a June 28, 2010 letter (Ex. 20) asserting claims on Dry Creek's behalf which knowingly challenged IDEA's provisions regarding the maintenance of a student's current educational placement, while Dry Creek accepted federal funds based on its assurances it was complying with the law. Specifically, Ms. Gutierrez claimed that:

- Ms. Coutchie was not the "current placement" (Ex. 20 at pg. 1) (although Ms. Coutchie had been providing services to G.M. for two years pursuant to the Settlement Agreement and IEP (Ex. 1.1 and 1.2) drafted by Dry Creek);

- Dry Creek had "good cause" to remove Ms. Coutchie (Ex. 20 at pg. 3) (although nothing in the IDEA provides for a "good cause" exception to the requirement that a district maintain a student's current educational placement during judicial proceedings pursuant to 20 U.S.C. §1415(j)); and

- Dry Creek had "discretion to change the provider" (Ex. 20 at pg. 12) (when nothing in the IDEA provides districts with such discretion).

Dry Creek's efforts to set aside G.M.'s current placement by removing a provider the District had agreed to pursuant to a Settlement Agreement and IEP was a direct challenge to the District's obligation to ensure a student's procedural safeguards and to ensure FAPE.

On July 21, 2010, Ms. Yajima responded, totally reversing CDE's long-standing requirement that Dry Creek implement the stay-put placement, stating for the first time that CDE believed there was a "dispute" which required resolution in OAH. (Ex. 23). In other words, instead of addressing Dry Creek's failure to comply with CDE's May 27, 2010 letter, CDE now chose to characterize Dry Creek's failure and the Marcheses' concerns about such failure as a "dispute" although nothing in the IDEA contemplates such an interpretation.

On August 30, 2010, when OAH denied Dry Creek's request to remove Ms. Coutchie (Ex. 27), instead of holding the LEA accountable or enforcing the OAH decision as IDEA's regulations require, CDE directed Dry Creek to pursue its efforts to set aside G.M.'s current placement in the U.S. District Court. (Ex. 28). Again, no provision in IDEA authorizes an SEA to present a noncompliant LEA with a continuum of options for avoiding its obligations under the law or to allow LEAs to run amuck as part of CDE's supervisory responsibility.

CDE's new interpretations of IDEA empowered Dry Creek to further pursue its specious challenges to IDEA's clear procedural protections for students who find themselves in the midst of judicial proceedings arising from disputes with their school district. The simple fact that the Marcheses had been in due process with Dry Creek demonstrated an ongoing dispute, which confirmed the requirement that G.M. remain in his current educational placement. Yet, CDE itself challenged the IDEA, failing to ensure LEA compliance, to ensure IDEA's procedural protections for G.M. and his parents, and failing to ensure the maintenance of G.M.'s current educational placement, and that he continued to receive funded services when Dry Creek refused to pay Ms. Coutchie.

Given an LEA's obligation to ensure students receive FAPE, how can Dry Creek's pursuit of litigation focused solely on removing a qualified and agreed-to service provider comply with its obligation to ensure FAPE? Unless litigation is a direct pursuit of FAPE for a student, it is for an improper purpose, as was the case here. That Dry Creek used the due process procedures - the procedural safeguard enacted by Congress to ensure students receive FAPE and their rights are protected - is a cynical abuse of process.

That Dry Creek, through its legal counsel, continued to claim it had the right to alter G.M.'s current educational 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 prior CCRs and letters ordering its maintenance, demonstrates Dry Creek's continuing challenge to the law and CDE's orders. That it did so at the same time it provided assurances of compliance to the U.S. government and accepted federal funds based on same is astonishing.

What is noteworthy is that the litigation which resulted in the 9th Circuit's decision in *Joshua A.* (which also involved the issue of the maintenance of a student's current educational placement under §1415(j)), was litigation pursued by Ms. Gutierrez and her colleagues on behalf of a school district with the sole purpose of setting aside stay-put for that student, despite the fact it is one of IDEA's principal procedural protections. Fortunately, Ms. Gutierrez was unsuccessful in that effort, as evidenced by the 9th Circuit's decision. But apparently that did not faze her and she continued to challenge not only the law but even the 9th Circuit's precedent in G.M's case. (*See*, Supplemental Point # 3.B, below).

The Marchese case and *Joshua A.* demonstrate that Ms. Gutierrez and her colleagues have no compunction about earning legal fees by counseling LEA clients to challenge and otherwise thwart statutory procedural rights, while their LEA clients represent they are ensuring such rights as a condition of their receipt of federal funds. How attorneys who seek to set aside the law's protections can be allowed to benefit from the expenditure of public funds provided by the U.S. government based on an

agency's promise to uphold and ensure the law's protections, when the litigation they pursue does the exact opposite, is unfathomable.

This is not typical business litigation, where attorneys represent their clients by using any aggressive tactic and strategy they can think of or assert novel interpretations of the law, stretching its interpretation before a judge to get their client off the hook. Here, the client is a publicly-funded education agency with legal obligations to students and parents and an obligation to use public taxpayer funds received through assurances of compliance to ensure students receive a proper education. The law they are stretching is the IDEA, with which the client represents it is complying in order to get federal funds. Yet Dry Creek pays its attorneys to challenge these laws.

It is safe to assume few school districts initiate such litigation on their own absent the involvement and direction of legal counsel. If such matters ARE being initiated by school boards and administrators, with legal counsel merely doing what such boards ask, these boards betray their interest in the education of children and the public trust, and possibly do so to retaliate against parents when they challenge a district's failure to properly educate their children.

School district funds intended for education are instead being diverted to law firms which counsel noncompliance with the IDEA so that funds intended for children are instead given over to lawyers to deny services to students and abuse their families. Attorneys who counsel their clients to set aside the law their clients promise compliance with are benefiting financially from the misuse of public funds for noncompliance. A district cannot challenge the law of stay-put and a student's rights under it and also claim to be upholding the law just to get federal funds. That is a misappropriation of public funds, plain and simple.

d. School district attorneys encourage noncompliance.

In addition to challenges to clearly established procedural rights, the record reflects that Dry Creek legal counsel also appear to have encouraged their clients to engage in persistent noncompliance, evidenced by the following:

- Dry Creek failed to comply with multiple CDE CCRs, including those dated 10/09/09 (Ex. 5) and 12/08/09 (Ex. 6). To the extent Dry Creek eventually would comply with a CCR, by paying the provider current, it failed to do so consistently in accordance with the CCR's terms so that the matters complained of continued unresolved.[14]

[14] CDE had a practice where instead of holding Dry Creek accountable for its continuing noncompliance, it would instead open a new complaint, giving the impression that issues were resolved when in fact they were not. It appears that CDE may have engaged in this practice because of its obligations under U.S. DOE monitoring to ensure that LEA noncompliance must be resolved with one year.

- After CDE issued its 05/27/10 letter from Ana Marsh ordering Dry Creek to fund the stay-put placement and provider (Ex. 16), Dry Creek failed to comply.

- On June 28, 2010, despite CDE's orders that it implement the stay-put and pay Ms. Coutchie, Ms. Gutierrez wrote the Marcheses stating Dry Creek was unilaterally terminating Ms. Coutchie based on "more than sufficient good cause" claiming Ms. Coutchie had acted in bad faith and undermined the District's efforts to educate Grayson, when nothing in IDEA contemplates such a unilateral right or a "good cause" basis for removal of a stay-put provider. (Ex. 20, pg. 3)[15]

- In the wake of OAH's Order dated August 30, 2010 (Ex. 27), even after CDE issued its August 31, 2010 letter (Ex. 28) ordering Dry Creek to fund Ms. Coutchie, Dry Creek still failed to comply. CDE ordered Dry Creek to fund the "current educational placement" no later than September 10, 2010, yet Dry Creek ignored CDE's order.

- On 10/11/10, CDE documented its expectation Dry Creek would reinstate G.M.'s program per the 10/28/08 IEP no later than October 13, 2010. (Ex. 30) On 10/12/10, Dry Creek's legal counsel, Michelle Cannon, wrote CDE clearly defying CDE's direct instruction, stating Dry Creek would instead provide documents requested by 10/18/10. (Ex. 31).

- On 10/14/10, Ms. Cannon responded to Ms. Marsh's 10/13/10 letter (Ex. 32), stating that the District had offered placement and services from the last agreed upon IEP but that G.M.'s parents continued to refuse to allow the District to provide these services. (Ex. 33).[16] She repeated the statement in her 10/12/10 letter, that Dry Creek would not provide the requested documents until October 18, 2010. (*See also,* App. 1, pgs. 33-36)

- Despite CDE's continued orders for Dry Creek to provide proof of payment to Ms. Coutchie, on December 10, 2010, after the U.S. District Court issued its order, Dry Creek through Ms. Gutierrez wrote Ms. Coutchie terminating her services (Ex. 41), but also informing her it would not pay for the services which CDE had previously ordered it to pay and which Dry Creek had induced her to provide based on its own representations that it would pay her. (Ex. 13, 24).

[15] Many of Ms. Gutierrez's communications were related to Dry Creek's failure to comply with prior CCRs issued by CDE. IDEA contemplates LEAs using attorneys for due process, however, nothing in IDEA's language gives LEAs the right to use counsel (or utilize tax dollars) for the CRP, particularly when noncompliance has resulted from an LEA's failure to act and thus could be addressed by an LEA employee who would be in a better position to explain how such noncompliance arose in the first place.
[16] Dry Creek was offering a District teacher, not the provider, Ms. Coutchie, documented in the Settlement Agreement as the current educational placement.

- On January 25, 2010, Ms. Gutierrez wrote Ms. Coutchie again confirming Dry Creek would not pay her, despite CDE's prior orders and her prior representations it would do so. Ms. Gutierrez confirmed Dry Creek had paid Ms. Coutchie through June 4, 2010, but stated "Please be advised that any services provided to [G.M.] after June 4, 2010 will not be reimbursed by the District." As a result, Dry Creek has not funded *any educational services for G.M. since June 4, 2010, while it accepts federal funds and pays school district legal counsel*

- Dry Creek has also engaged in misrepresentation of the facts and law to both OAH and the U.S. District Court, as indicated in Supplemental Points # 3.A and 3.B, below.

- Taking legal action to negatively impact G.M.'s educational placement through removal of the agreed-to stay-put provider and forcing G.M. to return to school violated G.M.'s procedural protections under stay-put, his 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 detrimentally impacted G.M.'s right to FAPE.

e. School district attorney firms also profit from trainings and alerts provided to LEAs, which lead to greater statewide noncompliance and litigation and a network of practice that serves as a stonewall to parents.

Many school district legal counsel who represent school districts in special education matters provide trainings and seminars, speaking engagements and publishing of "alerts" through which they purport to train and instruct school district administrators and staff on current practices, court decisions, CDE/U.S. Department of Education advisories and other education and legal trends.

Such trainings and notices often provide "legally defensible" positions and rationales for LEA actions which end up doing more harm than good as they often not only promote noncompliant practices, thus negatively impacting students, but they often bring unforeseen and unnecessary litigation to LEAs. Such trainings and "alerts" also allow such legal counsel to drum up further business.

School districts often seem drawn to law firms who appear successful in reducing student services or challenging parents who advocate, apparently believing the involvement of such counsel will help reduce their district's outlay in terms of services and their costs. In fact, quite often the opposite results, as these firms increasingly counsel acts which lead to greater noncompliance and litigation.

A sampling of the trainings provided by legal counsel representing Dry Creek, including Marcy Gutierrez and her colleagues, is listed below. This sampling provides insight into the frequency of the trainings Dry Creek's counsel provide and how they vary in nature. This sampling is followed by trainings conducted by other legal counsel across California. This is not an exhaustive list and only hints at the broad range of topics such trainings cover, which seems to indicate a broad range of student rights are being impacted.[17]

Past Speaking Engagements By Marcy Gutierrez re:
Legal Issues Panel: Hot Topics
02/25/08 North Eastern SELPA Special Education Workshop
11/14/07 Special Education Issues for Students Working Toward Administrative Credentials
http://www.kmtg.com/data/attorneys/att.php?useSpr=&IDD=1152660989

Past Speaking Engagements by Marsha Bedwell re:
01/14/11 Possible Pitfalls
http://www.kmtg.com/data/attorneys/att.php?useSpr=&IDD=1181938676

The Legal Edge in Special Education
05/02/11 – Marcy Gutierrez
http://www.shastacoe.org/page.cfm?p=4689

May 2011 Training
http://www.caspwebcasts.org/new/index.php?option=com_content&view=article&id=230&Itemid=126

Primer On Student Discipline
http://www.eccsymposium.org/the-conference/sessions/friday-sessions/

Lozano Smith Special Education Consortia and Trainings
http://www.lozanosmith.com/practice_area.php?id=3

> Annually, the firm conducts a series of Special Education Legal Consortia (SELCs) in multiple locations throughout California, attended by more than 1,300 special education professionals.

[17] These listings are not by any means exhaustive lists of the firms or types of trainings that take place. Also, it is unclear how law firms bill the costs of developing such trainings or whether any are billed to LEAs and thus California's taxpayers. Some of these trainings appear to be developed based on the experiences legal counsel have in direct representation of LEAs. Many of them provide such trainings exclusively to public agency staff and refuse admission to such trainings to parents and the general public, even though some of these trainings appear to be subsidized by California's taxpayers.

> The firm has consulted with various Special Education Local Plan Areas (SELPAs) throughout California to develop Joint Powers Authorities (JPAs) and local plans.

Fagan, Friedman & Fulfrost Seminars, including Special Education Symposium
http://www.fagenfriedman.com/page.php?id=7

School district legal counsel encourage noncompliance by school districts, sometimes inadvertently, through "alerts" their law firms periodically make available to school district clients through their websites and e-mail. Purporting to notify and educate school district staff of court decisions and general trends in the law, too often these notifications are misinterpreted by school district staff as hard and fast rules, and in relying on them districts and their staff end up denying student and parent rights.

Two such "alerts" which made the rounds in 2009 illustrate how school district law firms can cause broad-based statewide noncompliance:

Emails Are Not Education Records . . . – 11/09
http://www.fagenfriedman.com/newsflash.php?nf=123

RETAINING EMAILS: THE LATEST NEWS – 11/09
http://www.lozanosmith.com/briefs/pdf/CNB462009.pdf

Circulated ostensibly to inform school districts of a recent case involving e-mail as an education record, these alerts instead have wreaked havoc with a parent's right to access student education records, despite this right clearly documented in IDEA's procedural safeguards and in California's Notice of Procedural Safeguards which confirms the absolute right to access such records. (http://www.cde.ca.gov/sp/se/qa/documents/pseng.pdf#search=procedural%20safeguards&view=FitH&pagemode=none)

Even parents whose children's IEP specifically identifies e-mail as the means by which communication would occur, including for the reporting of IEP goals and behavioral progress, have been denied access to their student's education records by school administrators who fail to understand that the information about the case cited in the alert did not provide a blanket rule. The alerts were problematic for other reasons:

- Both alerts circulated by these law firms specifically discussed the federal case *S.A. v. Tulare County Office of Education*. Yet, in that case the Court actually ordered the school district to produce e-mails, but didn't require the district to produce them in their native form.

- To the extent the case pertained to education records, it was applicable only to that particular student's case, as one of the alerts itself indicated in the fine print. Also, since under IDEA an IEP is to be individualized according to a student's unique needs, including methods of reporting progress on goals, behavior, etc., if an IEP calls for communications via e-mail, such communications are part of a student's record.

- Given advances in technology and the increased use of e-mail to conserve paper and ensure greater communication in the team environment, e-mail is used more frequently, with an increasing number of communications regarding students in e-mail form.

- The draft regulations cited in Lozano Smith's alert at page 1, ¶2, make it clear that in many instances e-mail isn't even covered (e.g., see "Whereas existing regulations require all documents to be classified and retained for various periods before destruction, the proposed regulations would have allowed most emails to be deleted after one year. The *draft included exceptions for emails that constitute student records* and other emails that fell into categories where records must be maintained permanently or for other designated time periods.") In other words, "e-mails that constitute student records" such as IEPs, behavior records, and related communications would be exempted.

- The unspoken message conveyed to district staff by such alerts is that they need only represent to parents LEA staff would communicate with parents by e-mail and by putting ALL communications in e-mail, they could prevent a parent from being privy to in-district communications. Unfortunately, this denies parents the right to know what is happening in their student's education and IEP and contradicts IDEA's clear intent that parents be informed members of the IEP team.

- Both alerts included language which could lead LEAs to believe e-mail is *not* an education record, thus putting LEAs at risk for denying student and parent rights to access, at the same time the law firm is protected through the alert's use of caveat language. (*See* Lozano Smith alert, Page 1, end of paragraph 1; Page 2, end of top paragraph; page 3, all three paragraphs. *See,* FFF alert, Page 2, paragraph 3).

- Such alerts contained warnings that "federal district court decisions, while persuasive, are not binding authority upon other federal district courts or the Ninth Circuit Court of Appeals" (FFF, page 3) or "even if an e-mail is not a 'student record' within the meaning of state or federal law, it may still be a district business record that must be maintained pursuant to California law."

(Lozano Smith, Page 3), which seemed to contradict the message of the alerts, thus sending mixed messages to LEAs.[18]
http://www.lozanosmith.com/briefs/pdf/CNB462009.pdf.
http://www.fagenfriedman.com/newsflash.php?nf=123

- These alerts, with their "caveat" language (i.e., that the information "is necessarily general" and "its application to a particular set of facts and circumstances may vary") (Lozano Smith, page 3, italics) urges LEAs to consult with these law firms, who are able to drum up more business generally, as well as through legal actions resulting from the noncompliance which results from an LEA's reliance on the alert's misleading information.

- It appears many families may have been denied access to student records based on inaccurate alerts all the while LEAs claim to be complying with IDEA's procedural safeguards. Such law firms purport to provide an informal training service which in fact results in a systematic thwarting of IDEA's procedural safeguards enacted to ensure parents have access to student education records.

- CDE has been notified of this issue in another compliance complaint. As a part of its supervisory obligation and to ensure FAPE and IDEA's procedural protections to students and their families, CDE should have taken steps to admonish firms counseling LEA clients to violate critical procedural rules. CDE is in a position to provide systemic improvement of benefit to all students, but unfortunately has failed to take action, and has itself cited *S.A. v. Tulare* in refusing to order an LEA to produce student records.

Access to education records is a critical right which allows parents to be adequately informed regarding their student's education, at a time when the student is outside the parent's custody or control. Such records provide a record of activity going on (or not going on) which enables a parent to gain insight into an LEA's implementation of their student's IEP. Given today's focus on technological advances, it may be the ***only*** record of a school district's activities in regard to a child's IEP.

Failing to require an LEA to produce education records which parents understood they have an absolute right to and which are specifically designed to keep them informed is not only counterintuitive, it thwarts IDEA's clear intent that parents be full participants in their student's education.

[18] These alerts circulate at the same time LEAs provide assurances to the federal government that they are ensuring students and their parents have the protections of IDEA's procedural safeguards, including access to educational records.

These alerts confirm what parents have been experiencing the past several years, i.e., there is a "stonewall" standing between parents and advocates for children with disabilities and the effective education of such children which exists as a result of a network of communication among those who work on behalf of or represent school districts. This network has been built through the efforts of attorneys who work for and in concert with school districts and their associated organizations to intentionally or unintentionally lead LEAs into noncompliance with IDEA and its procedural safeguards.

Given the increased use of technology, including e-mail, and the prevalence of the refusal by school districts to produce education records, CDE should be working hard to hold LEAs accountable for noncompliance on a grand scale. Instead, by confirming the right of LEAs to withhold education records, CDE is part of the problem.

4. LEAs (and SEAs) are represented by legal counsel using tax dollars while parents and families do not have access to counsel, despite IDEA's language providing the "right to be accompanied and advised by counsel" in due process.

IDEA's procedural safeguards at 20 U.S.C. 1415(h) provide that a party to a due process hearing "shall be accorded –

> (1) the ***right*** to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;
>
> (2) the ***right*** to present evidence and confront, cross-examine, and compel the attendance of witnesses; . . ."

Few parents can afford legal counsel to represent them in disputes with an LEA. The "right to be accompanied and advised by counsel" is not a "right" if parents cannot afford it. OAH publishes a "Free/Reduced Cost Special Education Attorney Advocate List," yet few, if any, free or low-cost attorneys are actually available to assist families. The Marcheses contacted numerous attorneys on OAH's list inside and outside their geographical area. None could deliver free or reduced priced services, particularly for so complex a case.

Special education litigation drags on, often for years, with costs too exorbitant for families to bear. Parent advocacy organizations typically take only the most extreme cases or those with systemic or statewide implications and have waiting lists just to consult with families. The Marcheses were fortunate to have the special education expertise of Area Board III advocate, Michael Rosenberg. http://www.documents.dgs.ca.gov/oah/SE/SE%20advocacy%20list.pdf.

At the same time, LEAs have their "right to counsel" funded through a bottomless well of taxpayer dollars from which they draw to hire counsel for due process and other legal actions they undertake against students and their parents. It is not a level playing field and places parents at a significant disadvantage when they contemplate challenging a taxpayer-funded LEA over their child's educational rights.

The "right" to legal fees doesn't begin to address costs associated with expert witnesses, i.e., "individuals with special knowledge or training with respect to the problems of children with disabilities" which parents supposedly also have a "right" to under IDEA's due process procedures. School districts routinely hire and pay such experts using tax dollars, and yet parents are not reimbursed for experts even when they prevail in due process, despite IDEA's plain language which calls it a "right." [19]

Furthermore, LEA legal counsel work full-time fighting parents and are well compensated. On the other hand, parents facing due process often are unrepresented and must also juggle raising their children (including a child with a disability), their employment, homework on a daily basis with their children and in their spare time prepare to do battle with their well-funded public agency adversary represented by legal counsel, with apparently unlimited resources at their disposal.

While IDEA provides the "right" to legal counsel in certain circumstances, e.g., for due process or to ensure FAPE, many LEAs use legal counsel for purposes not contemplated by IDEA. School districts use legal counsel to attend IEPs, draft letters to parents who challenge their child's failure to make progress, or to pursue legal challenges to student rights under the IDEA. These uses contradict IDEA's intent as well as FAPE for students. This is what occurred in G.M.'s case. When legal counsel are paid by LEAs to engage in actions not contemplated by IDEA or not intended to ensure FAPE, it is an improper use of taxpayer funds which creates an unfair advantage for the public agency. When counsel engage in tactics normally seen in "scorched earth" litigation, the playing field is so skewed in favor of the school district, parents and the LEA are not even on the same playing field.

When a school district's legal counsel are the sort representing Dry Creek - who challenge the very laws districts are supposed to comply with, openly defy orders from the SEA and the U.S. District Court, threaten, intimidate and harass the family - it is a nightmare of unimaginable proportions. It is not supposed to be this way. If LEAs used California's tax dollars for education and to provide services, rather than litigation to avoid providing services, it wouldn't be this way.

[19] *See*, *Arlington Central School Dist. Bd. Of Educ. V. Murphy* (548 U.S. 291, 126 S.Ct. 2455 (2006)).

If CDE properly utilized the CRP (set forth in 34 CFR §§300.151 – 300.153) in disputes between parents and LEAs, parents would have the low-cost alternative to litigation Congress intended and a cost-effective means of resolving complaints. If CDE investigated and resolved *all* complaints (including those dealing with FAPE, as OSEP's July 17, 2000 Memo 00-20, and March 30, 2001 Letter to Warkomski contemplate), parents wouldn't have to use due process procedures at all or endure litigation tactics such as Dry Creek's legal counsel engaged in.[20] If CDE enforced against noncompliant LEAs, G.M. would still be receiving services from Ms. Coutchie and the federal court would never have disrupted his IEP and current placement.

Surely, this isn't what Congress intended in enacting the IDEA with the power and funding of a public agency used to abuse the system, the students and families it was established to protect. This has turned the IDEA on its head.

As California school districts presently use tax dollars to fund their statutory "right to be accompanied and advised by counsel" in due process it seems only fair that families required to pursue due process because of an LEA's denial of their student's rights have the same statutory "right," with the same access to funding LEAs enjoy, instead of being left with the empty promise the IDEA currently provides. Otherwise California is fostering a climate where continued noncompliance by LEAs persists without accountability and is condoning a playing field nowhere near level, where California's children with disabilities will never have a fair shot at redressing their grievances arising from an inappropriate education.

LEAs should be prohibited from using legal counsel and taxpayer dollars to fund efforts in special education beyond those clearly defined in the IDEA. Enforcing such a requirement will require greater LEA accountability and transparency regarding LEA legal fee expenditures than is presently the case.[21] Greater statewide accountability for legal fee expenditures is a first step toward achieving such a goal. Until then, such practices will continue without oversight or restraint, to the detriment of our children and our local schools.

[20] Since IDEA does not contemplate the use of legal counsel in the CRP, LEAs should not use such counsel for complaints in that process. This would level the playing field for parents and would also benefit LEAs financially as they wouldn't have to spend education funds on legal fees in due process.

[21] The results of a recent analysis by CalAware (*see below)* discusses the failure of LEAs across the state to produce documents related to just this area of litigation. The type of records requested in CalAware's analysis most likely would document the existence of the type of problems documented here in how school districts handle special education disputes and settlements. The failure (or refusal) to produce public records regarding such settlements by such a large majority of districts reflects the problems with the process, including the unlevel playing field the process presents, the lack of cost-benefit analysis by LEAs prior to commencing litigation, as well as the wholesale waiver of statutory rights, as discussed above.

5. Result - tax dollars received based on LEA assurances of compliance are used to hire attorneys who counsel LEAs on how to avoid their obligations under the law.

Since Dry Creek's fundamental obligation under IDEA is to ensure FAPE, how can it provide assurances of compliance with the law while seeking to set it aside?

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 alter a student's needed services by replacing a well-qualified and highly experienced "educational therapist/reading specialist" agreed to in the Settlement Agreement and IEP, with District staff nowhere near as qualified. The District's past failure to provide qualified staff was why G.M. was functionally illiterate, itself a clear denial of FAPE. Dry Creek's desire to return G.M. to that placement and status, for no other reason than it could, is incomprehensible. Perhaps the more logical explanation is that Dry Creek's attorneys were happy to counsel Dry Creek to pursue senseless noncompliance for they knew, given CDE's past failure to act, they would be able to profit from the litigation that would follow.

Dry Creek chose to use taxpayer dollars to mount frivolous litigation that challenged IDEA's procedural protections instead of using such funds to ensure services to a student it knew needed them. It accepted federal funds based on its assurances it was providing such protections and FAPE, yet it knew it was actually seeking to disrupt G.M.'s education in a manner *20 U.S.C. §1415(j) was enacted specifically to prevent*.[22]

As of the date of this letter, Ms. Coutchie has been removed as the provider, and Dry Creek has failed to propose her replacement. As a result, G.M. is without any district-funded services and since Dry Creek has failed to pay Ms. Coutchie since June 4, 2010, the District *has failed to fund G.M.'s educational services for almost twelve months, yet Dry Creek continues to receive federal and state funds.*

Dry Creek's own Board agenda confirms that while it fails to fund G.M.'s services, the District simultaneously pays significant tax dollars to legal counsel who have counseled Dry Creek to noncompliance, defiance of CDE orders and denial of a student's educational rights.

[22] *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)."(emphasis added) Nothing in this case provides for an LEA to use such procedures for its own benefit or the benefit of its legal counsel.

School district legal counsel appear to have concocted a scheme where they advise LEAs on how to divert education funds to litigation by telling them, "Hire me! I will help you avoid funding student services and you can instead pay me those education funds as legal fees." In California today this scheme seems to be working quite well for the lawyers. Unfortunately, our childrens' education is being sacrificed as a result.

6. Lack of accountability for school district attorney-related expenditures at both the local and state level.

As noted in Appendix 1, "Dry Creek Legal Fees," given the cloak of "confidentiality" surrounding closed session discussion of litigation, it is impossible to know what Dry Creek's Board of Trustees knows about the Marchese litigation. Given the apparent lack of discussion in the Board's public sessions regarding the warrants generally or the legal fees in particular, these fees may not have been given any scrutiny by Dry Creek's community whatsoever. [23]

Given the lack of information and public discussion, Dry Creek's community may not be aware of how the District's tax dollars are being spent. With this "local review" constituting the full extent of accountability for such legal fees in the State of California, and considering the number of school districts across the state which similarly use legal counsel and pay similar fees, the total amount of taxpayer dollars being spent on legal fees on a statewide basis is not known, while legal counsel representing school districts operate without oversight, restraint or accountability. The taxpayers are left in the dark to foot the bill as education dollars paid as legal fees pour out California's schoolhouse doors in unknown amounts.

The results of a recent annual audit by Californians Aware, The Center for Public Forum Rights ("CalAware") of K-12 education agencies confirms the lack of available data resulting from the unwillingness of LEAs to share such information as required by the Brown Act.
https://www.calaware.org/audits/pub_ed/audits_sac.php?cat_id=11&audits_id=5

CalAware's audit focused on the following:

"As for the information sought in this audit, it answers the following questions- all of particular relevance to government financial crises at all levels:

[23] Another aspect of this issue involves funds paid to legal counsel through SELPAs (Special Education Local Planning Areas), or County Offices of Education, which seem to have less public scrutiny than LEAs. Although some SELPA committees, etc. are governed by the Brown Act, financials of such organizations appear to be as closely held as LEA financials and just as lacking in clarity.

- How accessible are school district records - Do districts have a policy for access to their records; what are the copying charges; how difficult is it to make a records request; does the district give a proper and timely response to records requests as the law requires?
- What events or situations lead to threatened lawsuits against districts, and how much public money is paid out to settle them?
- When a records request is presented, does the district accommodate or obstruct it?
- How does each board of education act to reject or to settle a claim? Are these claims (and settlements) being quietly processed in the background, or is the public being made aware of them?"

The results of this audit showed "that over half the districts failed miserably. CalAware used the email addresses provided by the districts on-line, the vast majority coming from a district's own website. Yet a number failed to reply to multiple attempts by the requester, most often to multiple email addresses for administrators at those districts. Many expressed confusion over the request for the "most recent settlement agreement entered into by the district to settle a tort claim presented on behalf of a student." Numerous districts responded that this was "not sufficiently precise" and required more specific information, like a student's name, before they would search for a record. Yet from those performing perfectly, this description presented no confusion and records were produced promptly. A reasonable conclusion might be, If you don't want to do the job, find some way to deflect the request." https://www.calaware.org/audits/pub_ed/subcate_details.php?cat_id=11&id=23&number=1.

The organization's press release, in discussing the audit results, quoted CalAware Executive Director Emily Francke who "noted that the Brown Act and some local district practices combine to make it easy for lawsuit claims and settlements to elude the public's attention. While both claims and settlements are accessible to the public, the Brown Act does not require them to be provided unless a person expressly asks for a copy, that settlements are almost never announced after being approved in closed session, and in some cases the settlements never reach the board of education, either because they are handled by an independent joint powers insurance agency or because the superintendent has been given authority to approve settlements below a defined dollar amount without obtaining board approval.

"Even if they don't always involve large amounts of money, settlements provide snapshots of incidents where school officials' acts or omissions have prompted allegations of injury to students, employees or others in the community," Francke said. "For parents and taxpayers concerned with the safe and effective operation of the schools, settlements can provide real eye-openers. But you have to ask, and as this audit

shows, sometimes you have to keep asking repeatedly to get the information you're entitled to." http://calaware.org/wp-content/uploads/2011/04/K-12release.pdf

Dry Creek was not one of the school districts audited by CalAware, and it cannot be said how it would have responded to the request for information made in the CalAware audit. However, given the lack of discussion of warrants in general, or payment of legal fees in particular, it seems likely there was insufficient discussion to let Dry Creek's community know the District is spending a significant amount of taxpayer dollars on litigation, while it is failing to fund education services for a student, fails to pay its providers and also contemplates teacher layoffs.

If our local communities do not have the full picture of how their school districts are spending tax dollars, citizens cannot challenge the improper use of education dollars for litigation or the resulting negative impact on student services or teacher retention. If we have so little information at the local level, and there is no accounting for such legal fees at the state level (which staff in both the California Legislative Analysts' Office and CDE have confirmed), we cannot begin to know how widespread the tactics and abuses seen in Dry Creek are nor can California report with any confidence how federal funds it is receiving are being used.

Until we have such information, we cannot begin to understand the depth of the noncompliance facing California's children with disabilities nor can there be accountability for it. Until we know the extent of the problem we face, we cannot begin to work toward correcting it.

<u>Supplemental Point # 2</u> - CDE Attorneys and Relationships with LEA Legal Counsel

Parents of students with disabilities in the California typically accept their school district's offer of education services without question, assuming local education agencies ("LEA") are the "experts" when it comes to education and that staff at such agencies have their child's best interests at heart. Should problems arise which require a complaint, parents uniformly assume the California Department of Education ("CDE") as the state education agency ("SEA") responsible for supervising local education agencies and ensuring compliance with the law, will do what the law requires, i.e., open a complaint, investigate their claims and resolve the problems effectively, so that their child can benefit from their education and the parent can go back to being a parent. Most parents do not doubt CDE will do its job expediently, effectively and without bias or self-interest, overseeing and supervising local education agencies through various monitoring processes, including the complaint resolution process (CRP).

Over the past decade, CDE seems to have become less effective in supervising LEAs. Parents who file complaints increasingly find some CDE staff working with LEA staff in a manner which suggests less than the arms-length supervisory relationship one would expect of a state agency responsible for overseeing and monitoring a local agency's compliance with the law. When parents find CDE personnel interacting with LEA staff in a manner which suggests the SEA has a bias in favor of the LEA or is actually helping the LEA out of its predicament, rather than resolving the matter and addressing the student's needs in a way that will prevent such incidents from recurring, parents lose confidence in the CDE. When that bias seems to become outright collaboration, parents are rightfully disillusioned and fearful.

Despite the fact enforcement is one of CDE's mandated responsibilities, enforcement actions against LEAs acting outside the bounds of the law, including those systemically noncompliant, are virtually nonexistent. As CDE fails in this responsibility, parents come to realize CDE is just as out of compliance with IDEA as the LEA.

When the Marcheses turned to CDE for assistance, CDE initially seemed to be helping. However, in 2010 when the Marcheses asked CDE to take steps to enforce against Dry Creek, CDE's assistance suddenly stopped. Based on the record, it appears CDE's legal counsel actually began working with Dry Creek's legal counsel, aligning CDE's interests with those of the LEA against the Marcheses. This analysis details the actions of CDE legal counsel who were most involved in the Marchese case and whose actions appear to have fostered Dry Creek's noncompliance, demonstrating CDE's intentional denial of student and parent rights at the same time CDE provided assurances to the federal government that all was well in California.

On April 19, 2010, when the Marcheses appealed OAH's February 2010 Decision, they also named CDE in their federal complaint due to CDE's failure to effectively comply with its supervisory, monitoring and enforcement obligations under IDEA.[24] CDE had failed to effectively resolve the Marcheses' complaints against Dry Creek or provide meaningful resolution of the ongoing and persistent problems G.M. and his the family had faced due to Dry Creek's failure to comply with IDEA, including maintenance of G.M.'s current educational placement. The District's persistent failure to comply with the law and CDE's numerous directives, was enabled, fostered and perhaps even directed by CDE's failures, overseen by legal counsel in Legal, Audits and Compliance Branch ("LAC").

CDE Legal, Audits and Compliance (LAC) Branch

CDE's "Legal, Audits, and Compliance Branch advises and represents the State Superintendent of Public Instruction, the California Department of Education, and the State Board of Education on legal matters, and takes the lead in the department's coordination of audits, complaints and compliance reviews, including reviews of English learner programs." http://www.cde.ca.gov/re/di/or/lacbranch.asp Within LAC is the Legal Division, which is to "Provide timely, thorough legal advice and representation to the Superintendent of Public Instruction, California Department of Education, and State Board of Education, in furtherance of their official duties and public policy goals."

The actions, relationships and employment history of certain attorneys in CDE's LAC involved in the Marchese dispute with Dry Creek (both presently employed and recently departed), raise questions regarding the propriety and ethical implications of relationships such legal counsel have with LEAs they are supposed to be monitoring and overseeing, in this particular case, Dry Creek and its legal counsel.

The apparent alignment with, and bias in favor of, the interests of LEAs and their legal counsel, over those of students and their parents, whose procedural and substantive rights both the SEA and LEA are supposed to be protecting according to their obligations under IDEA has resulted in a student being left without funded services and an LEA which has failed to provide education services for an extended period, while the LEA continues to receive state and federal funds as if it were fulfilling its obligations. These actions and relationships also call into question CDE's overall ability to supervise, monitor and enforce against local education agencies in accordance with its obligations under the IDEA, as well as the veracity of its representations of compliance to the federal government.

[24] CDE's obligations were clearly articulated in a Memorandum and Decision issued by the U.S. District Court, C.D. in 2004, which CDE had clear notice of as a party to that proceeding. *See,* reference to *Porter v. Board of Trustees, et. seq.,* in the cover letter to Superintendent Torlakson, as well as in Appendix 3, pages 22-23.

Brief Outline of CDE Involvement in Marchese Case

As the SEA responsible for LEA accountability under IDEA, CDE consistently issued Compliance Complaint Reports (CCRs) requiring Dry Creek's compliance with the maintenance of G.M.'s current education placement throughout 2009 and early 2010, including payment of the provider, Suzanne Coutchie. However, despite prior CCRs and orders to Dry Creek to comply with the stay-put, starting in March 2010, CDE's position subtly shifted. By mid-July 2010, CDE had done a complete about-face in its demands to Dry Creek. The following outline excerpts relevant events from the period March 2010 to December 2010 (detailed in Appendix 1), which reflect the involvement of certain CDE legal counsel in that shift.

February 18, 2010 - OAH's Decision in the Marchese/Dry Creek case included the 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).)" Accordingly, the Marcheses had 90 days within to decide whether to appeal OAH's Decision (through approximately May 24, 2010). (*See also,* 20 U.S.C. §1415(i)(2)(B)).

Week of March 29, 2010 – CDE's Ava Yajima told Michael Rosenberg, the Marcheses' Area Board III advocate, that until an appeal was filed in a higher court, stay-put was no longer in place, but 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). Instead of enforcing against Dry Creek for violations of the ninety-day period (20 U.S.C. §1415(i)(2)(B)) and maintenance of a student's current educational placement during judicial proceedings (20 U.S.C. §1415(j)), CDE essentially told the Marcheses they had to file an appeal "early" or CDE would not enforce stay-put.

April 9, 2010 - Michael Rosenberg wrote Ana Marsh noting that forcing a family to change a student's placement as 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. He asked CDE to clarify its position. (*See,* Ex. 11).

April 19, 2010 - 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 review of OAH's decision and including claims against CDE for failing to comply with its supervisory and monitoring obligations with regard to LEAs. (*See,* Ex. 12). The Marcheses filed the Complaint early so CDE would enforce stay-put as Ms. Yajima had represented it would.

April 30, 2010 - Stephen A. Rosenbaum (Disability Rights California) wrote Marsha Bedwell (CDE's General Counsel) regarding stay-put and Dry Creek, noting CDE's position stated by Ms. Yajima that "stay-put" was no longer in effect following OAH hearings until an appeal was filed in court and that such interpretation was "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).

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 27, 2010 – Noting the Marcheses had appealed OAH's Decision, Ana Marsh (CDE) wrote Dry Creek's Superintendent and confirmed CDE's past statements regarding Dry Creek's obligations with regard to stay-put, directing Dry Creek to enforce stay put as it related to G.M.'s placement and services. (*See,* Ex. 16).[25]

Through letters dated **June 8, 2010** (Ex. 17), **June 9, 2010** (Ex. 18), **June 22, 2010** (Ex. 19) and **June 28, 2010** (Ex. 20), Dry Creek's legal counsel Marcy Gutierrez documented Dry Creek's intent not to comply with CDE's May 27, 2010 instruction to enforce G.M.'s current placement and services under the stay-put. In her June 28, 2010 letter, she made it clear Dry Creek would not comply with CDE's order, and would challenge the provision of stay-put itself on various bases, e.g., that the services in the current placement were "temporary;" that the stay-put provider could be removed based on a theory of "good cause;" and that Dry Creek had "discretion to change the services provider." Ms. Gutierrez copied CDE on this letter (her letter incorrectly copied Ava Yajima as "Ava Yamiga.")

Over the next several months, while professing to order Dry Creek to comply with stay-put, CDE signaled its willingness to help Dry Creek through CDE's own "novel legal theories," working to assist Dry Creek to find a way to avoid its legal obligations to G.M. under the IDEA and California law. Ms. Yajima appears to have been the primary CDE employee involved in these efforts.

[25] After the May 27, 2010 letter from CDE, Dry Creek's Assistant Superintendent informed the Marcheses that this letter was only a "suggestion" from CDE. Ms. Yajima subsequently informed the parents that the May 27, 2010 was not a "suggestion" and instead confirmed compliance was mandatory.

July 8, 2010 - Instead of confirming CDE's numerous prior statements and orders to Dry Creek to comply with the law and the stay-put placement, and informing Dry Creek that CDE would enforce the May 27, 2010 letter, Ms. Yajima said she had to *"research"* the issues raised by letters previously sent by Ms. Gutierrez and the Marcheses. (Ex. 21)

July 21, 2010 - Secondly, when Ms. Yajima subsequently wrote Kevin Marchese and Marcy Gutierrez, instead of informing Dry Creek that CDE would enforce the May 27, 2010 letter, for the first time Ms. Yajima stated CDE's new position, 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). In actuality, there was no "factual disputer". Dry Creek was simply failing to pay the stay-put provider and was seeking her ouster so it would no longer have to pay for her services in a manner the law didn't allow.

Thirdly, her July 21, 2010 letter claimed 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, 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" Dry Creek and G.M.'s family had to go to OAH to resolve. There was no dispute or 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 fails to enforce.[26]

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. 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 or less informed administrative or federal courts who might be taken in by its newly-crafted theory of the law. Ms. Yajima also seemed to tell Dry Creek that if they lost in OAH, they should proceed into federal court.[27]

[26] *See,* Memorandum to Chief State School Officers from Kenneth Warlick, (OSEP Memo 00-20), dated 07/20/00, which states "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." (Memo, pg. 4)

[27] This is an even more contradictory position given that federal courts routinely defer to state education agencies based on an agency's presumed knowledge and expertise regarding education than the courts possess. CDE was clearly abdicating its "expertise" role.

August 26, 2010 – In the midst of the period when CDE should have been enforcing, but instead was shifting its position, CDE filed a Motion to Dismiss the Marcheses' federal court action (*See,* Ex. 26) which listed Marsha Bedwell (CDE's General Counsel), Amy Bisson Holloway (Assistant General Counsel), and Ava Yajima (Deputy General Counsel). The Docket Report in the federal action indicates Ms. Yajima was added as lead counsel on August 26, 2010, and is presently the attorney of record for CDE in the federal court action, as well as the 9th Circuit case presently pending. (PACER Doc. # 17)

August 31, 2010 - OAH dismissed Dry Creek's motion seeking to set aside stay-put on August 30th (Ex. 27). Instead of ordering Dry Creek to comply with OAH's order as CDE was obligated to do according to 34 CFR §300.152(c),[28] CDE wrote Dry Creek and instead gave the District a new place to go and a new goal, telling Dry Creek it must implement G.M.'s last agreed upon educational placement with all the agreed upon services, "*until such time as the District seeks an order from the Federal Court modifying* the student's current stay put placement." (Ex. 28) CDE gave Dry Creek until September 10, 2010 to comply with this latest directive.

October 11, 2010 – A month had passed CDE's September 10, 2010 deadline, yet Dry Creek still hadn't complied with CDE's or OAH's directives (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 deadline. Instead of enforcing, CDE wrote Dry Creek, and stated its "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." (Ex. 30)

Based on its August 31, 2010 order, CDE should have enforced against Dry Creek to ensure stay-put was implemented, thus obviating the need for the parties to proceed further. CDE failed to do so, and again urged Dry Creek toward the federal court. As a result, the Marcheses were required to defend against Dry Creek's baseless motion in federal court, filed on October 20, 2010.

October 25, 2010 - Dry Creek was still refusing to comply with stay-put and fund G.M.'s services with Ms. Coutchie, and only 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). Yet, at the October 25, 2010 hearing on CDE's Motion to Dismiss, Ms. Yajima told the Court that ***Dry Creek was in compliance***.

[28] 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."*

> 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)

CDE also represented to the Court 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 only three weeks after its most recent letter ordering Dry Creek to comply with stay-put or be sanctioned, CDE filed its 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).

CDE Deputy General Counsel Ava Yajima

Ava Yajima is CDE's attorney who was most directly involved with the Marchese matter from March 2010 forward. During her involvement, CDE's efforts shifted from appearing to provide assistance to the family, demanding compliance from Dry Creek and enforcing to CDE actually encouraging and fostering Dry Creek's noncompliance, by suggesting Dry Creek only needed to comply if it wasn't pursuing actions in other jurisdictions to set aside G.M.'s current educational placement. As a result, Dry Creek went into the federal court and convinced a judge inexpert in the area of special education to set aside a student's procedural guarantee of stay-put.

Ms. Yajima appears not only to have been directly involved in fostering LEA noncompliance, but in undercutting CDE's compliance obligations to supervise, monitor and enforce against noncompliant LEAs. She was involved in CDE's failure to ensure its CRP effectively resolved the educational issues G.M. and his family were having with Dry Creek, which was why the Marcheses had come to CDE seeking its involvement and assistance in the first place.

As noted above, the Marcheses had tried contacting Ms. Yajima on several occasions to follow up with her regarding CDE's enforcement and the status of the stay-put implementation. In fact, her July 8, 2010 letter responding to their request for such status confirms she asked them for their patience, while she researched ***"Stay-put Implementation."*** It seems her intent was to lead the Marcheses to believe she was taking steps to enforce. (Ex. 21) In retrospect it appears this was simply a ruse.

Instead of enforcing, on July 21, 2010, CDE through Ms. Yajima for the first time claimed there was a dispute, when nothing had changed regarding Dry Creek's noncompliance and the ongoing dispute that had persisted over the past two years. However, Ms. Yajima's insistence on July 21st that there was some new "dispute" regarding what stay-put consisted of is belied by her subsequent statements in a February 10, 2011 letter to the Marcheses following the Court's December 10, 2010 order that Ms. Coutchie could be replaced. In her February 10th letter, Ms. Yajima described the stay-put placement as follows:

> "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." (Ex. 55)

Ms. Yajima's description was 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):

Ms. Yajima's description was also identical to CDE's description of the stay-put placement documented in CDE's August 31, 2010 letter to Dry Creek's Superintendent (Ex. 28), which stated the District was 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."

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)

This confirms that contrary to Ms. Yajima's claim in her July 21, 2010 letter, ***the stay-put placement was never in dispute and never required OAH or federal court determination, as it remained the same as it had always been and was in effect all along.***[29]

Today, G.M.'s 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 G.M. is without funded services.

In addition, on several occasions, Ms. Yajima on CDE's behalf, specifically represented that if certain steps were taken, CDE would, in fact, enforce the stay-put placement and its prior orders:

- During the week of March 29, 2010, when Ms. Yajima told Mr. Rosenberg that if the family filed an appeal immediately, CDE would ***enforce*** stay-put and the disruption of G.M.'s education could be avoided.

- In her 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." (Ex. 23, pgs. 2-3)

- In CDE's November 1, 2010 Nonopposition signed by Ms. Yajima, she stated on CDE's behalf "State Defendants will ***enforce*** the order of this court regarding Student's "Stay-Put" educational program."

[29] 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)

While each step CDE had required was fulfilled, ***CDE still failed to enforce***. As of today's date, CDE has failed even to enforce the Court's December 10, 2010 Order which Ms. Yajima's February 10, 2011 letter confirms requires a replacement provider for Ms. Coutchie whom Dry Creek has removed. Again, because of CDE's failure to enforce, G.M. is without funded services and Ms. Coutchie remains unpaid for services she rendered pursuant to both Dry Creek and CDE's direction.

At every step of the process, Ms. Yajima was involved in misrepresenting the facts and/or the law on CDE's behalf:

- Her July 21, 2010 letter to the Marcheses and Ms. Gutierrez misrepresented the law with regard to the CDE's complaint resolution process and its ability to resolve complaints and noncompliance, telling the Marcheses they were required to go to due process to resolve Dry Creek's noncompliance, when CDE is required to effectively resolve complaints under 34 CFR §§300.151-300.153 and hold LEAs accountable pursuant to its duties under 20 U.S.C. §1412. (*See also,* Fn. 18 above)

- Ms. Yajima signed CDE's August 26, 2010 Motion to Dismiss to the U.S. District Court, claiming the Marcheses were required to exhaust administrative remedies by filing for due process ***against CDE in OAH*** before the Court could hold CDE accountable for its supervisory, monitoring and enforcement obligations, when nothing in the IDEA provides such a requirement. Thus, Ms. Yajima participated in CDE's misrepresentation of the law with regard to the requirements for exhausting of administrative remedies. [30] Regrettably, the Court believed Ms. Yajima's assertions.

- At the October 25, 2010 hearing on CDE's Motion to Dismiss, Ms. Yajima told the Court that Dry Creek was in compliance, despite the fact Dry Creek had failed to comply with the stay-put placement, had failed to compensate Ms. Coutchie, failed to fund G.M.'s educational services and just two weeks prior CDE had threatened Dry Creek with sanctions because of its failure to comply.

- In CDE's November 1, 2010 Nonopposition to Dry Creek's Motion for Stay Put in the federal court, Ms. Yajima failed to inform the Court of Dry Creek's noncompliance or CDE's own obligation to enforce against such noncompliance.

[30] Ms. Yajima also repeated this claim to the District Court in the 10/25/10 hearing on CDE's motion to dismiss. (*See,* Ex. 35, page 7)

As time passed, Ms. Yajima on CDE's behalf, aligned with Dry Creek's interests, doing what she could to assist Dry Creek in avoiding its legal obligations, despite CDE's duty to enforce against the District and instead of assisting the student and his parents.

Ultimately, on December 6, 2010, at the hearing on Dry Creek's Motion for Stay Put, Ava Yajima was present in the courtroom but did not speak on the record other than to initially identify herself. However, near the hearing's end, Ms. Gutierrez noting CDE's Nonopposition, filed November 1, 2010, asked the Court, it appears on CDE's behalf, whether the Court's exercise of jurisdiction over the issue of stay-put meant 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, CDE's legal counsel actually appears to 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's 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).

Ms. Yajima's actions on behalf of CDE, clearly favored Dry Creek, the school district CDE was supposed to be supervising, over the interests of and to the detriment of G.M. and his parents, whose rights CDE was supposed to be protecting and on whose behalf CDE was supposed to be resolving complaints. It is hard to reconcile Ms. Yajima's actions in the context of an SEA's obligations to supervise LEAs and resolve their noncompliance.

However, perhaps Ms. Yajima's evident bias in favor of local education agencies is derived from prior employment which involved her directly representing such agencies. Research in connection with this analysis shows that an individual named Ava Yajima was at one time employed by the law firm Lozano Smith in its San Ramon, California office.[31] [32]

[31] http://www.statelawyers.com/Lawyer/Profile.cfm/AttorneyID:76042. This entry indicates Ava Yajima was practicing education law for Lozano Smith, however, does not indicate the timeframe of her employment there.

[32] A search of the State Bar's site for "Ava Yajima" turned up only one record for an attorney with this name in the State of California, State Bar Number 218008. That is the number listed next to Ms. Yajima's name at the top of CDE's pleadings, including its Notice of Nonopposition (Ex. 36). This seems to confirm that Ava Yajima presently in CDE's LAC is the same person previously employed by Lozano Smith.

Many parents of students receiving special education in the State of California are unfortunately familiar with the firm Lozano Smith. One of the more well-known law firms representing local education agencies in special education disputes against students and families, it is perhaps best known for having been sanctioned by the U.S. District Court, E.D., California, for what the Court characterized as violations of ethical obligations in its pursuit of litigation on behalf of a school district.

Following are articles documenting Lozano Smith's actions for which it was held in contempt by a California court and for which every attorney in the firm was ordered to undergo ethics training. The Sanction Order itself is included:

- **Lozano Smith** Law Firm Sanctioned! Jan 30, 2005 **... Lozano Smith** "Attorneys at Law" SANCTIONED for LYING! www.ed**ethics**.org/**lozano_smith**_law_firm_sanctioned!.htm

- **Lozano Smith** Sanctioned - American Society for **Ethics** in Education: Monterey Herald (January 20, 2005) http://www.edethics.org/lozano_smith_law_firm_sanctioned.html

- California Federal Judge Sanctions Law Firm For Lying - Parent **...** Jan 18, 2005 **...** Fresno's **Lozano Smith**, attorney ordered to train in **ethics**. http://www.parentadvocates.org/index.cfm?fuseaction=article&articleID=5375

- 2005 **Ethics** Roundup - Los Angeles County Bar **...** by JW Amberg **- Lozano Smith** http://www.lacba.org/showpage.cfm?pageid=6336

- Moser v. Bret Harte Union HS District (CIV-F-99-6273 OWW SMS) Order re: Sanctions for Attorney's Violations of Duty of Candor and Not to Impede, Obstruct, or to Vexatiously Multiply Proceedings, http://www.californiaspecialedlaw.com/wiki/sanctions/moser-v-bret-harte-union-high-school-district-sanction-order.

The sanction order (above) indicates Bret Harte Union HS District was ordered to "show cause why they should not be sanctioned for misrepresenting facts and law, violating their duty of candor, and willfully and vexatiously multiplying the proceedings under FRCP Rule 11, 28 U.S.C. §1927, and the court's inherent power. [Fn omitted]" [Order at page 4]. The Court noted:

> "Federal Rule of Civil Procedure 11 ("Rule 11") which gives the Court authority to issue sanctions against a party whose attorney of record signs a "pleading, written motion, or other paper" [that] is not well grounded in fact, is not warranted by existing law, is not made in good faith, or is brought for any

> improper purpose. *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1131 (9th Cir. 2002). Imposition of sanctions is not limited to attorneys, but may be imposed on parties as well. Rule 11 addresses the problems of frivolous filings and abuse of judicial procedures as a tool for harassment. [Citations omitted]."
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The Order's conclusion stated:

> The totality of the sanctioned conduct visits an unendurable burden on the justice system in the name of misguided advocacy. It is appropriate that a public record be made of this conduct for the purpose of deterrence, particularly as it implicates unacceptable written advocacy and obstruction which violates rules of court and professional conduct, forcing an opposing party and the court to spend inordinate time addressing such issues.

"Misrepresenting facts and law", "violating their duty of candor," and "willfully and vexatiously multiplying the proceedings" all describe Dry Creek's actions, as well as CDE's actions in Appendix 1. It's as if the *Bret Harte* Order were written specifically regarding Dry Creek, CDE and their legal counsel.

The *Bret Harte* sanctions order was issued in January 2005, approximately six years ago. As noted above, it is unclear when Ava Yajima worked at Lozano Smith. If CDE's Ava Yajima is not the same Ava Yajima employed by Lozano Smith, it is a striking coincidence. If it is the same Ava Yajima, but she was not employed by Lozano Smith during the timeframe of the sanctions, it would indicate the Court-ordered ethics training did little to remove ingrained practices from Lozano Smith and that such practices persisted to be passed along to new attorneys subsequently employed by the firm. If it is the same Ava Yajima and she was at the firm then, it appears that despite the ethics training, she brought such tactics with her to CDE.

What is indisputable is that Dry Creek's counsel, both Ms. Gutierrez and Ms. Cannon, were able to engage in a strikingly similar pattern of abuse of process and judicial procedures which were, as the *Bret Harte* court characterized, a "tool of harassment," and they were given free rein to do so by Ms. Yajima and CDE.

CDE General Counsel Marsha Bedwell

Although she was the CDE individual most involved in the Marchese case, Ms. Yajima did not operate without oversight and supervision. Ms. Yajima's actions were supported by other CDE counsel, including CDE's General Counsel Marsha Bedwell.[33]

Besides Ms. Yajima, Marsha Bedwell was the other CDE attorney who appears to have been most involved in the Marchese matter is. The documentary record does not conclusively indicate how directly involved Ms. Bedwell was with the Marchese case, but given her supervisory role over LAC, including Ms. Yajima who had the most direct involvement, it seems that as General Counsel, Ms. Bedwell would have had some supervisory role if not direct involvement in the matter along with Ms. Yajima. As director of CDE's legal affairs, she clearly would have known about the Marchese matter.

Unlike Ms. Yajima, Ms. Bedwell had been at CDE for quite some time prior to the Marchese matter. Ms. Bedwell became CDE's General Counsel in March 2003 and was considered an essential member of the team "whose goal it is to ensure educational equity for all our students." http://www.cde.ca.gov/nr/ne/yr03/yr03rel13.asp Prior to assuming that position, Ms. Bedwell was CDE's acting General Counsel and served as Assistant General Counsel. "She has also served as an Assistant Superintendent and Director of CDE's School and District Accountability Division and was responsible for policy development and management oversight of CDE's compliance related functions." [34]

Ms. Bedwell acted as head of CDE's Legal Office which "is responsible for advising the State Board of Education, the State Superintendent of Public Instruction, and the California Department of Education staff on all legal matters." In, July 2009, Ms. Bedwell also had the title Deputy Superintendent. http://www.cde.ca.gov/nr/el/le/yr09em0626.asp. Ms. Bedwell apparently left CDE sometime within the past year.[35]

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[33] While Amy Bisson Holloway was Assistant General Counsel at the time, her name does not appear in the record except for reference on the pleadings or in one letter (Ex. 74). As well, it was Ms. Bedwell as CDE's General Counsel (whom Ms. Bisson Holloway replaced) whose departure from CDE and direct connection with Dry Creek raises questions here, and thus is the focus of discussion.

[34] Ms. Bedwell is also listed as CDE's Assistant General Counsel on CDE's "State Defendants' Joinder in Local Defendants' Motions to Dismiss" filed October 17, 2000 in *Porter v. Board of Trustees of Manhattan Beach Unified School District,* which resulted in that case being dismissed and appealed through the 9th Circuit and back to the District Court before it was resolved in 2005. *See, 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).

[35] CDE's website does not indicate specifically when Ms. Bedwell left CDE, however, a search of the website shows the last documents referencing her involvement are dated August 24, 2010 and August 9,

It was Ms. Bedwell, CDE's General Counsel, to whom Stephen A. Rosenbaum (Disability Rights California) wrote on April 30, 2010 requesting CDE reconsider its position that "stay put" was no longer in effect following OAH hearings until an appeal was filed in court, because such a position would potentially affect numerous California special education students. (*See,* Ex. 14). Thus, Ms. Bedwell was aware of the Marcheses' ongoing dispute with Dry Creek and CDE's involvement in the case, particularly in light of the significant legal position CDE was taking with regard to stay-put. Also, Mr. Rosenbaum's April 30, 2010 letter specifically referenced Dry Creek and copied Mr. Marchese, and Marcy Gutierrez, Dry Creek's counsel.

Ms. Bedwell's name as CDE General Counsel was also listed at the top of CDE's August 26, 2010 Motion to Dismiss in the Marcheses' federal court action, (*See,* Ex. 26), followed by Amy Bisson Holloway as Assistant General Counsel, and Ava Yajima as Deputy General Counsel. Also, the Docket Report in the federal action (PACER Doc. # 17) indicates Ms. Yajima was added as lead counsel on August 26, 2010, and presently is attorney of record for CDE in that action, as well as the 9th Circuit case presently pending. The August 26, 2010 Motion may have been Ms. Bedwell's last official court involvement with this case. [36]

From May 2010 through Fall 2010, the Marcheses wrote CDE constantly, insisting that the agency fulfill its obligations under IDEA and hold Dry Creek accountable for its persistent noncompliance, which CDE had confirmed during 2009-2010 in numerous compliance complaints and reiterated in its May 27, 2010 letter to Dry Creek. As detailed in Appendix 1, and above, on July 8, 2010, CDE suddenly began an about-face from its prior directives to Dry Creek to enforce the stay-put and pay Ms. Coutchie. On July 21, 2010, CDE's about-face was complete when it took a position which contradicted IDEA's statute and regulations and OSEP guidance letters and informed the Marcheses and Dry Creek they would need to go to due process to resolve their "dispute" regarding stay-put.

Why CDE's sudden about-face, which not only tolerated, but actually encouraged Dry Creek's noncompliance by giving the LEA several avenues through which it could set aside a student's valid current educational placement? Why would CDE risk claims it had failed to comply with its oversight, supervisory and enforcement obligations?

2010. *See,* http://www.cde.ca.gov/be/mt/ms/documents/pra082410.doc and http://www.cde.ca.gov/re/lr/ga/execsumcahsee.asp, respectively.

[36] On CDE's November 1, 2010 Notice of Nonopposition only Ms. Bisson Holloway and Ms. Yajima's names are reflected (which seems to indicate Ms. Bedwell departed CDE at some point between August 26, 2010 and November 1, 2010.

When one examines the events at the end of Ms. Bedwell's career at CDE and where her career path took her, it becomes obvious why Dry Creek's noncompliance was allowed to persist and how CDE failed in its duties to G.M. and his family. Ms. Yajima may have come to CDE with a bias based on her former employment with Lozano Smith, yet it appears she found support for her views in Ms. Bedwell, whose post-CDE choice of employment itself reflected a similar bias, i.e., in favor of school districts.

While the record reflects Ms. Bedwell received Stephen Rosenbaum's April 30, 2010 letter expressing concern about Dry Creek's noncompliance in the Marcheses case, it is unclear whether she ever responded. Just four months later, on August 26, 2010, as CDE's General Counsel, she moved to dismiss the Marcheses' case against CDE. A mere two months after that, it appears Ms. Bedwell had departed CDE to work in the private sector for Sacramento law firm Kronick, Moskovitz, Tiedemann & Girard ("KMT&G") a "full-service law corporation with offices located in Sacramento, Bakersfield, Roseville, San Luis Obispo and Walnut Creek" representing "a large and diverse mix of private business and public sector clients throughout California in a wide range of legal disciplines." ***Most notable among KMT&G's public sector clients: Dry Creek Joint Unified School District***, which CDE had purportedly spent the past year and a half communicating with, ostensibly attempting to get Dry Creek to comply with CDE's CCR orders regarding stay-put, but failing to do so with any consistency. ***Among KMT&G's attorneys: Marcy Gutierrez and Michelle Cannon, who represented Dry Creek during the period of ongoing noncompliance***.[37]

During the period the Marcheses were endeavoring to get CDE to follow through on its claim of enforcing against Dry Creek, CDE's General Counsel, Marsha Bedwell was apparently preparing to leave CDE to work for the very law firm that represented, and continues to represent, Dry Creek, the noncompliant school district CDE claimed to be enforcing against, but failed to. Soon after Ms. Bedwell arrived at her new employment, CDE filed a Nonopposition to Dry Creek's Motion seeking to set aside the stay-put provider, so that CDE essentially supported a knowingly noncompliant school district against a student CDE knew was not receiving funded services.

These events raises troubling questions regarding CDE's failure to comply with its obligations under IDEA's statute and regulations, as well as its effectiveness in holding local education agencies accountable in general, its ability to maintain an

[37] Ms. Gutierrez is also associated with The Gutierrez Group (http://www.gutierrezlawgroup.com/) which claims "GLG is a leader in education law. By providing excellent legal counsel, and combining it with efforts to reach out to public education agencies and other stakeholders in the field of education, GLG provides our public schools with needed support, advocacy, and progressive legal counsel, resulting in better schools and educational programming for children."

effective complaint resolution process ("CRP"), and its potential for making decisions based on obvious bias, self-interest and conflict of interest.

Although it may not be unusual for public agency officials to leave the public sector to seek employment in the private sector, including in private law firms, Ms. Bedwell's choice of employer and the timing of her departure, raises questions regarding what was going on at the end of her tenure at CDE in light of events in the Marchese case, particularly where CDE's compliance efforts came to a sudden halt and made a complete about-face in holding Dry Creek accountable:

- As CDE's General Counsel, what was Ms. Bedwell's role in the Marchese matter in general?

- What was Ms. Bedwell's role in: CDE's claim that Dry Creek's noncompliance, and the Marcheses' challenge to such noncompliance, was a "dispute" requiring OAH involvement? CDE's about-face in holding Dry Creek's accountable for its persistent noncompliance? CDE's decision not to enforce OAH's Decision and instead to direct Dry Creek to pursue a motion in federal court?

- Was CDE's about-face related to Ms. Bedwell's potential/future employment with KMT&G? How long prior to her departure was Ms. Bedwell negotiating with KMT&G for employment? What impact did Ms. Bedwell's pursuit of her new employment (or KMT&G's pursuit of her) and her knowledge of her pending departure from CDE have on CDE's overall decision-making regarding Dry Creek and the Marchese case?

- Were CDE's decisions in the Marchese case a form of currying favor with Ms. Bedwell's potential employer to improve her chances of employment? Was it a reward for KMT&G hiring her? Was it an effort to improve her status/stature at her new job by affecting the outcome of a significant case involving one of KMT&G clients?

- How can CDE claim to maintain a supervisory role given its less than arms-length relationship with an LEA's legal counsel?

- What is Ms. Bedwell's current role on Dry Creek matters at KMT&G?

- How has CDE's staff been impacted by CDE's General Counsel mid-case departure from CDE to work for the law firm representing a noncompliant school district CDE was supposed to be supervising and enforcing against, but failed to? How has this influenced CDE staff decisions, both before and after Ms. Bedwell's departure?

Given how events have unfolded in the Marchese matter, it seems highly unlikely Ms. Bedwell's pending employment did not influence her or CDE's decisions regarding the Marchese litigation. In light of her tenure at CDE, one can't help but believe her relationships with, and influence over, former colleagues at CDE in turn has influenced, and will continue to influence, CDE's actions and decisions going forward.

In light of the Motion to Dismiss CDE from the Marcheses' federal court action and CDE's representations to the Court that Dry Creek was in compliance, despite its clear and persistent noncompliance, it is evident CDE and its staff were more focused on getting CDE out of its predicament (and Dry Creek out of its predicament), than on complying with the SEA's supervisory obligations under the IDEA. As General Counsel for CDE, and in particular the individual directly responsible for compliance issues for CDE, Ms. Bedwell bore ultimate responsibility for those acts.

It also must be noted that CDE is not just a public agency, but is also a regulatory enforcement agency with its own compliance obligations which require that it supervise and ensure compliance by LEAs. Accordingly, the problems presented by the facts described above go beyond just an appearance of impropriety to questions of conflict of interest, attorney ethics and violations of the public trust. Ms. Bedwell left an active case in which CDE was supposed to be enforcing against a noncompliant school district to join the firm representing that noncompliant district, thus abandoning CDE's duty to the child, and its duty to its own compliance obligations under the law.

As the Marcheses struggled with the effects of Dry Creek's persistent noncompliance, CDE gave the outward appearance of supervising, monitoring and otherwise holding Dry Creek accountable, at the same time, it is now clearly evident, it was assisting Dry Creek in circumventing IDEA's compliance requirements. Coming as this did as Ms. Bedwell pursued employment with KMT&G (or herself was being pursued by that law firm), one can't help but believe that CDE's assistance, through its relaxed efforts toward Dry Creek and its diversionary tactics with the Marcheses, was directly connected to Ms. Bedwell's potential and eventual employment with KMT&G or at the very least, an effort to help a firm and its client in a manner that perhaps would improve her position if she eventually ended up there. Even were her actions completely unrelated to her future employment at KMT&G, they knowingly fostered noncompliance by an LEA and its legal counsel whom CDE was supposed to be holding accountable to the law, but failed to.

When Ms. Bedwell joined KMT&G, she joined Ms Gutierrez as "of counsel," and Ms. Cannon as a "shareholder." KMTG's website shows all three among the firm's staff specializing in "education law." [38] In "special education," KMTG's staff includes Ms.

[38] http://www.kmtg.com/data/wwd/practice.php?useSpr=&IDD=1073578923

Bedwell, Ms. Gutierrez and one other attorney.[39] This means Ms. Bedwell is most likely be in direct contact and communication with Dry Creek's legal counsel on a regular basis. This means she most likely has direct contact and communication with CDE staff. This also seems to indicate Ms. Bedwell's knowledge, experience and expertise from her years at CDE are now probably being used to directly benefit Dry Creek, which CDE has documented to be out of compliance, but against which it has failed to enforce, as well as other LEAs similarly out of compliance.

California annually provides assurances in its IDEA Part B Application that it is meeting its obligations under the IDEA to ensure students receive FAPE, to ensure students and their parents are afforded IDEA's procedural protections and that it supervises, monitors and enforces with regard to California's LEAs, and based on such assurances seeks and receives federal funds. The Marchese case demonstrates that CDE has wholly failed to do what it claims it is doing with regard to this particular student and the LEA in which he resides. How many other California students with disabilities is CDE similarly failing to protect in how many other LEAs that are out of compliance?

When CDE's General Counsel leaves California's state education agency in the middle of a case in which the agency has not only failed to exercise appropriate supervision and enforcement over an LEA, but has actively assisted an LEA in avoiding its responsibilities under the law, this raises serious doubts with regard to CDE's general ability and effectiveness in doing its job. It also raises doubts about CDE's assurances to the federal government.

When CDE's General Counsel who is responsible for the agency's "management oversight of CDE's compliance related functions" is the individual leaving the agency, who goes to work for the law firm representing the noncompliant LEA in a case, when CDE knows the law firm has actively and aggressively counseled noncompliance on the part of the LEA, any faith in the effectiveness of CDE's oversight abilities disappears altogether.

Suffice it to say that most parents whose children receive special education services in California and who rely on CDE to do its job in overseeing LEAs will be appalled at this information. At best this appears to be a defection to the enemy camp, or perhaps Ms. Bedwell was simply saying "If you can't beat them, join them." Truth be told, it appears CDE is admitting "We've met the enemy and he is us."[40] Whatever the case, instead of being part of the solution, Ms. Bedwell is now officially part of the problem. Perhaps she was even before she left CDE.

[39] http://www.kmtg.com/data/wwd/practice.php?useSpr=&IDD=1092258498
[40] http://en.wikipedia.org/wiki/Pogo_(comic_strip)#.22We_have_met_the_enemy....22

Over the past several years CDE seems to have increasingly adopted positions which favor LEAs over the interests of students, despite what often appears to be clear evidence of wrongdoing and violations of the law. Perhaps the antics and bad practices of school district legal counsel have insinuated themselves into the CDE through its hiring of attorneys who were former school district legal counsel. It is unclear how many former school district legal counsel are now working for CDE. What is clear is that in G.M.'s case, it only took one to have a significantly negative impact for a student. That California's tax dollars are being used to pay the salaries of legal counsel employees who may not be working in the best interests of California's students or California's state education agency is beyond troubling to parents and should be of significant concern to anyone involved with CDE's compliance obligations under IDEA.

Also, that the relationship between CDE legal staff and school district legal counsel is as "cozy" as it appears - so that CDE's General Counsel (or any CDE legal counsel for that matter) could leave in the middle of a case to go to work for the law firm that represented the LEA CDE was supposed to be enforcing against but failed to – would cause most parents and advocates to lose faith in CDE's ability to fulfill its obligations under IDEA, including its ability to effectively investigate and resolve complaints and provide meaningful remedies for students, including taking *whatever steps are necessary* to ensure that remedies are, in fact, delivered to students.

This loss of faith in CDE's ability under the IDEA doesn't begin to address the ethical considerations involved with attorneys who work for public agencies ostensibly to ensure compliance, but whose actions are clearly contrary to that purpose. As is the case with Dry Creek's legal counsel, whose fiduciary duty is not just to the public agency it represents, but also to the students served by that public agency, their parents and their community in general, CDE's fiduciary duty is not just to the State of California or CDE, but to the students for whom it is to ensure FAPE, the protections of the procedural safeguards and overall compliance. Ms. Yajima and Ms. Bedwell's actions do not appear to meet that standard.

In the end, it's as if school district legal counsel have become CDE and CDE has become school district legal counsel, so they are acting as one and the same, with aligned interests that appear diametrically opposed to those of California's students with disabilities and their families. It is a symbiotic relationship that has resulted in damage to G.M. and his parents. What needs to be determined is how many other California students have been similarly damaged?

Supplemental Point #3* – *Misrepresentations of Fact and Law by Dry Creek & CDE

Supplemental Point #3.A – Dry Creek and Its Legal Counsel Misrepresented the Terms of the October 2008 Settlement Agreement and IEP

In 2008, after waiting seven years for Dry Creek to provide their son with appropriate reading instruction to ensure his appropriate progress, the Marcheses filed for due process against Dry Creek. In July 2008, Dry Creek and the Marcheses agreed to settle the due process.

In October 2008, Dry Creek presented the Marcheses with a formal Settlement Agreement the District said the Marcheses had to sign. As Dry Creek was already late in paying Ms. Coutchie for services she had begun to deliver under their agreement, the Marcheses felt compelled to enter into the written Settlement Agreement. The Settlement Agreement was accompanied by an IEP that was to reflect the terms of the Settlement Agreement. Both the Settlement Agreement and the IEP were drafted by District's legal counsel. (*See,* Appendix 4 ("App. 4"), Ex. 1.1 and 1.2: October 7, 2008 Settlement Agreement and IEP signed October 28, 2008 by Kevin Marchese).

The Settlement Agreement purportedly addressed the dispute regarding the 2005-2006, 2006-2007 and 2007-2008 school years and included among its terms:

> For the 2008-2009 school year District will contract with Suzanne Coutchie, Educational Therapist/Reading Specialist, to provide fifteen (15) hours per week of direct one-to-one reading intervention services to Grayson, per the District's standard in-session school calendar for students beginning on the first day of school, August 11, 2008. (Ex. 1.1, ¶ 1.A.)
>
> [T]he District and Marchese also agree to convene an IEP meeting for the annual IEP meeting in May 2009 for the purpose of discussing/monitoring [Student's] current educational placement and, as appropriate, making necessary adjustments thereto and planning for future educational services for [Student] that will eventually allow for him to gradually reintegrate into the traditional school setting for a full-school day. (Ex. 1.1, ¶ 1.E.)
>
> Upon execution of this Agreement by all parties, Marcheses agree to waive their right to convene an IEP meeting to make the necessary adjustments to Grayson's IEP to reflect the terms of this Agreement. District shall make the necessary revisions to Grayson's IEP documentation and shall forward the same to Marchese for their review and execution. Assuming the IEP documentation reflects the terms of this Agreement, Marcheses agree to consent to the IEP and execute the IEP in the designated signature blocks and return same to the District within five (5) business days of receipt. (Ex. 1.1, ¶ 1.G.)

Ms. Coutchie as Provider

Under "Consideration," the Settlement Agreement provided that Ms. Coutchie would be service provider for G.M. Dry Creek also required the Marcheses to waive their rights under the IDEA to participate in drafting the IEP and making necessary changes to it in order to obtain Ms. Coutchie. However, Dry Creek represented it would make "necessary revisions" to the IEP and as a result, the IEP documentation would reflect "the terms of this Agreement."

Yet, when Dry Creek began challenging the provider, Ms. Suzanne Coutchie, as part of the stay-put in June 2010, asserting it could replace her with another District teacher, the District represented in papers it filed with both OAH and the U.S. District Court that ***the IEP document did not specify a particular provider or type of provider,*** claiming Ms. Coutchie was not part of the IEP or G.M.'s current educational placement, was not the stay-put provider and could be removed.

Dry Creek also exploited language it left in the form IEP relating to G.M.'s education and placement from the period prior to the 2008 due process. Relying on this language, which predated the due process, resulting settlement and Settlement Agreement, Dry Creek subsequently misrepresented the intent of the settling parties, claiming the intent was to return G.M. to school immediately at the end of the 2008-2009 calendar year to receive services. This ignored the purpose of the Settlement Agreement, i.e., 1) to resolve a dispute over past denials of FAPE which dated back three school years; and 2) to ensure the continuing delivery of qualified services to a Student according to his unique needs with the purpose of closing the significant gap in his reading resulting from the District's failure to provide appropriate services.

Dry Creek also claimed that a reference in the IEP to a Dry Creek-employed resource specialist, services which again predated the settlement, referred to the provider the parties had agreed would deliver the services documented in the settlement, when the Settlement Agreement, which clearly names Ms. Coutchie, demonstrates this was not the case.

Essentially, Dry Creek failed to properly document the terms of the settlement agreement as it promised to do as consideration in the settlement (and as it was obligated to do under the IDEA), failed to develop an appropriate IEP (also an IDEA obligation), and then relied on those failures in attempting to get OAH and then the U.S. District Court to remove Ms. Coutchie as the provider the parties agreed to, despite the parties' clear agreement evidenced by the Settlement Agreement and IEP Dry Creek's legal counsel drafted.

Specifically, in its October 20, 2010 "Motion Regarding Stay Put services during the pendency of these proceedings" Dry Creek represented to the U.S. District Court that:

- The October 2008 IEP signed by the Marcheses pursuant to the October 2008 Settlement Agreement did not specifically name a provider or require a specific instructor for individual instruction (*See,* Ex. 34, CDE Motion regarding Stay Put, Doc. #s 27-31, PACER, Memorandum at page 8, Lines 11-13);

- 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); and

- That 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 to the Court were misrepresentations, ignoring *express provisions* of the October 2008 Settlement Agreement and that the IEP, which Dry Creek and its counsel unilaterally drafted, was by the Settlement Agreement's language, supposed to properly reflect settlement terms (at ¶1.G) providing that:

> 1) The parties agreed Suzanne Coutchie was the independent educational therapist/reading specialist who would be the provider of services;
>
> 2) As a condition of the settlement, Dry Creek unilaterally reserved the right to draft the IEP that was to document the settlement terms, and required the Marcheses to waive their rights under the IDEA to participate in its drafting; and
>
> 3) Paragraph 1.G. of the Settlement Agreement specifically stated the IEP was to reflect the Settlement Agreement's express terms and language, including Ms. Coutchie, and the Marcheses were only required to agree to the IEP if it did so.

As Dry Creek, in settling, had demanded the right to unilaterally document the settlement's terms in an IEP, it was obligated to do so properly, in accordance with its obligation under the Settlement Agreement, as well as its obligations under IDEA. Had Dry Creek done so, the IEP would have included Ms. Coutchie's name and her position. As a result, there would have been no question that Ms. Coutchie was part of the "last agreed to IEP," and Dry Creek would not have been able to exploit its omission of her name to misrepresent G.M.'s stay-put or hoodwink the federal court into removing her as service provider.

Whether it did so inadvertently or intentionally, Dry Creek omitted Ms. Coutchie's name in documenting the terms in the IEP. Dry Creek, through its legal counsel (who have made it a practice to set aside stay-put placements, as discussed in *Supplemental Point # 3.B, below)* exploited its failure or omission to claim G.M.'s most current placement did not include Ms. Coutchie. Dry Creek's actions were either an attempt to perpetrate a fraud on the family in settling the due process or a later fraud through its knowing misrepresentation of the IEP and its exploitation of its failure to ensure it properly documented the Settlement Agreement's terms.

Unfortunately, parents regularly experience similar situations in IEPs, where they believe an LEA is properly and in good faith documenting the discussion and representations to the family, only to later discover the many services and supports their LEA said would be available for their child didn't find their way into the final IEP document or that the inclusion or omission of one word (e.g. the term "as needed") meant that desperately needed services were not a part of the IEP. Parents depend on the competency and good faith of LEAs, their staff and their legal counsel. Here, Dry Creek's misrepresentations to the Court claiming Ms. Coutchie was not the provider because her name was not in the IEP it had drafted compounded its prior failure with Dry Creek adding insult to injury.

Notably, at the December 6, 2010 federal court hearing on stay-put, Ms. Marcy Gutierrez, Dry Creek's legal counsel, brazenly misrepresented this issue to the Court:

> 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 ***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. <u>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</u>.*** Those are the express terms, district of service as the provider for that instruction. (*See,* Ex. 37, Pg. 10, Lines 7 – 23)

Dry Creek's Manner of Documenting the Settlement

In addition to misrepresenting the terms of the Settlement Agreement and IEP to the Court, the manner in which the settlement was documented presents troubling issues in light of parent rights under the IDEA. Although it's wholly proper for settlement terms to be documented in an IEP, what was unusual and in fact improper, was Dry Creek's insistence that:

1) The Marcheses "waive their right to convene an IEP meeting to make the necessary adjustments to [Student's] IEP to reflect the terms of this Agreement"; and

2) "District shall make the necessary revisions to Grayson's IEP documentation and shall forward the same to Marchese for their review and execution. Assuming the IEP documentation reflects the terms of this Agreement, Marcheses agree to consent to the IEP. . ." (Ex. 1.1, pg. 2, ¶1.G)

Such terms might not seem problematic in an agreement with a district which is acting in good faith. However, given Dry Creek's subsequent misrepresentation of the plain terms of the agreement related to Ms. Coutchie and the fact that Dry Creek obviously was NOT acting in good faith, requiring such a term as consideration raises serious questions regarding Dry Creek's motives. A parent's right to participate in the drafting of their student's IEP is a fundamental right under the IDEA. Why would Dry Creek require a parent to waive such a fundamental right?

Since Dry Creek was responsible for making "the necessary revisions," it appears Dry Creek ***unilaterally determined it wasn't necessary*** to include the name of the provider it had agreed with the Marcheses would be involved in delivering education services to G.M., a student eligible for special education. Such an omission was clearly more than just a procedural error, particularly in light of Dry Creek's subsequent effort to remove Ms. Coutchie based on its failure to include this "*necessary revision.*"

It is now obvious Dry Creek insisted on the right to unilaterally draft the IEP and "document" the settlement's terms so it could characterize those terms however it wished in the IEP, including drafting it ambiguously and with gaping omissions. However, the right to draft an IEP, particularly one that is to document the terms of settlement of a dispute under IDEA's due process procedures, comes with responsibility for accuracy and compliance with the law. Dry Creek failed to do its job properly and then shamelessly took advantage of its own failure to document the terms accurately, exploiting it to the detriment of the student. Unfortunately, the Court has allowed them to get away with it.

Nothing in IDEA requires a family to waive their rights or their child's rights under the law to ensure that their child receives appropriate services. Parents are not required to waive rights as part of the IEP process. Nor should they be required to do so in settling a due process proceeding, particularly when such a proceeding was brought based on their claim of a prior denial of rights. Certainly, nothing in the IDEA or California's procedural safeguards gives parents notice this is the case.

Such a provision is contrary to IDEA's purpose and intent and also contradicts an LEA's obligation under the law to provide students with appropriate services that will ensure FAPE. Dry Creek's requirement of such a waiver is against public policy.

Also, by agreeing in the Settlement Agreement to properly document the settlement's terms in the IEP, including Ms. Coutchie as provider of services, Dry Creek agreed she was the appropriate individual to deliver educational therapy/reading instruction services to G.M. As the service provider the parties had agreed to, she should have been identified in the IEP until the IEP team, including G.M.'s parents, decided otherwise. Dry Creek's failure to properly document Ms. Coutchie as provider doesn't change the fact that Dry Creek agreed to her as the proper provider. The District is therefore obligated to ensure her availability to provide G.M. with the services he needed, without regard to its failure in documenting the IEP.

Ironically, the Settlement Agreement itself acknowledges what was G.M.'s "current educational placement" at ¶E, specifically providing the Marcheses would execute a Mutual Release of Information to allow Dry Creek to communicate with Ms. Coutchie as the District deemed necessary to monitor G.M.'s current educational program and for planning future educational services for G.M. To that end, the ***District and the Marcheses agreed*** to "convene an IEP meeting for the annual IEP meeting in May 2009 for the purpose of discussing/monitoring [G.M.'s] ***current educational placement*** and as appropriate, making necessary adjustments thereto and for planning for future educational services. . ." (*See,* Ex. 1.1, pg. 2) [41]

The planning was to involve "**future educational services for [G.M]** that would ***eventually*** allow for him to ***gradually*** reintegrate into the traditional school setting for a full-school day." Ibid. There is no language indicating Ms. Coutchie's services would end, ***particularly within less than a year from the time the parties settled.*** This makes sense as the parties were settling a dispute dating back ***three years*** regarding the lack of appropriate services the parents claimed had resulted in a denial of FAPE and a due process filing.

[41] To the extent Dry Creek failed to document this IEP, it is a procedural violation that has clearly significantly impacted a student's right to education and FAPE, particularly in a school district with a history of noncompliance.

Also, the resolution of this dispute included agreement for a provider with proven success in addressing G.M.'s lack of progress under the District's instruction. Considering how far behind grade level G.M. was in reading and his resulting need for services, and in light of Dry Creek's requiring the Marcheses to waive all claims dating back three school years, a qualified provider was clearly consideration for resolving the dispute. Presumably, it would have been the parties' intent to ensure continuity of appropriate services through the agreed-upon provider to remedy G.M.'s lack of progress and resulting lack of FAPE, unless, Dry Creek was not proceeding with G.M.'s interests or its compliance with IDEA's language and purpose in mind.

"As appropriate," "making necessary adjustments" and "planning for future educational services" do not imply a provider's services will end any time soon, and certainly not within seven to eight months, as Dry Creek subsequently represented to the Court. In fact, the language in the Settlement Agreement told the Marcheses the exact opposite, i.e., that in light of the seriousness of G.M.'s needs and as the family was giving up past claims to obtain the services of a qualified provider, Dry Creek was going to address G.M.'s needs. Unfortunately, that isn't what happened.

However, the October 2008 Settlement Agreement also included the following terms:

7. NO MODIFICATION

> This Agreement sets forth the entire Agreement between the parties and may not be altered, amended, or modified in any respect except by written instrument, duly executed by the party to be charged. All earlier understandings, oral agreements, and writings are expressly superseded by this Agreement and are of no further force or effect. (Ex. 1.1, pg. 4, ¶7)

8. CONSTRUCTION

> This Settlement Agreement shall be construed in accordance with its fair meaning and shall be interpreted, enforced and governed by the laws of the State of California and the IDEA. Because this Agreement has been fully negotiated by and between the parties, no language herein shall be construed against the drafter, as drafting services have been provided as a courtesy to all parties. In the event any provision(s) of this Agreement is held to be ineffective or invalid the remaining provisions shall nevertheless be given full force and effect. Any cross-reference in this Agreement shall, unless specifically directed to any other agreement or document, refer to provisions within this Agreement. (Ex. 1.1, pgs. 4-5, ¶8)

Since the IEP was supposed to reflect the Settlement Agreement's terms, it either did so in accordance with ¶ 7 or it was drafted to perpetrate a fraud on the family. The Court specifically cited to, and relied on, Dry Creek's claim that it wasn't required to use Ms. Coutchie as the provider since "[t]he IEP does not designate a specific instructor and thus does not require that the District use Coutchie." (*See,* Ex. 38, at pg. 2, Lines 21-23). Yet, ¶7 demonstrates the Settlement Agreement, which specified Ms. Coutchie as the provider the parties agreed to, "may not be altered, amended, or modified except by written instrument." Dry Creek's attempt to misrepresent the Settlement Agreement through its inartfully drafted IEP to mean something other than what the parties had agreed to was an attempt to alter G.M.'s ***current educational placement*** by removing his provider through a fraud.

Also, ¶8 indicated the Settlement Agreement "shall be construed in accordance with its fair meaning and shall be interpreted, enforced and governed by the laws of the State of California and the IDEA." Under that provision alone, Ms. Coutchie should have remained in place as the stay-put provider. But the Marcheses were dealing with a school district which apparently was not proceeding in good faith and legal counsel on a mission to set aside stay-put for as many school district clients as possible, in total contravention of the obligations of both the District and legal counsel to the students whose rights they were supposed to be protecting.

Settlement Agreement vs. IEP

It is interesting to observe Ms. Gutierrez's representations to the Marcheses and the Court regarding the validity of settlement agreements vs. IEPs in determining a current educational placement and how they evolved over time. It is also interesting to note how Dry Creek's focus and emphasis changed when it became apparent the Settlement Agreement itself ***actually confirmed G.M.'s current educational placement*** was with Ms. Coutchie.

June 28, 2010 – In the early stages of her efforts to set aside the educational placement, Ms. Gutierrez initially stated the following with regard to settlement agreements:

> "Case law provides that a placement established through a settlement agreement does not automatically constitute stay-put placement. Instead, the law indicates that ***the stay-put effect of a settlement agreement depends on the terms of the agreement and the agreement of the parties***. [Citations omitted]."
>
> Federal courts have also held that a special education settlement agreement is considered a contract. [Citations omitted]. In California, contracts are interpreted based on principles set forth in the Civil Code. (Civil Code, §1635.) Those ***statutory principles require a contract to be 'interpreted. . . to give effect***

> ***to the mutual intention of the parties as it existed at the time of the contracting, so far as the same is ascertainable and lawful***." (Civ. Code, § 1636.) ***If the contractual language is clear and explicit, that language governs its interpretation.*** (Civ. Code, §1638.) ***When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone***, if possible. (Civ. Code, §1639.)" (Ex. 20, at pg. 2)

October 20, 2010 – Subsequently, in the "Memorandum in Support of Dry Creek's Motion for Stay Put," Ms. Gutierrez presented a contrary, less positive view of settlement agreements, as compared to the IEP in which Dry Creek had failed to properly document Ms. Coutchie as the provider and which included irrelevant placement information predating the due process and settlement:

> "The IEP identifies the 'District of Service' as the provider and does not expressly name or require a specific instructor for individual instruction. [Citation omitted] [42]
>
> Although the settlement agreement between the parties names Coutchie as the instructor, the settlement agreement is a contract comprised of terms bargained for and agreed to by the parties, including a term that limited the scope of the agreement to the 2008-2009 school year.
>
> Therefore, the settlement agreement *is irrelevant to a determination of Plaintiff's placement after the 2008-2009 school year.* [43] (Ex. 34, Memorandum of Points & Authorities, Pg. 8, Lines 11-18)

Ms. Gutierrez's June 28, 2010 letter cited case law which actually demonstrates that a settlement agreement, if clearly documented, would establish a student's current education placement, ***even if an IEP were never developed in relation to it***. In fact, as noted above, ¶E of the Settlement Agreement clearly documented G.M.'s ***current educational placement,*** and stated that "the District and Marchese also agree" to

[42] The IEP listed the District of Service as provider because Dry Creek's legal counsel failed to properly document the IEP according to the terms of the Settlement Agreement and left inapplicable language in the IEP which predated the settlement.

[43] According to IDEA (20 U.S.C. 1414(d)), IEPs are reviewed annually and routinely cover a one-year period. As stay-put is routinely based on the current education placement set forth in the last agreed to IEP, ***which routinely only covers one school year***, Ms. Gutierrez's assertion that the Settlement Agreement's reference to the 2008-2009 school year limited services to that school year alone and stay-put didn't apply is absurd. This is particularly true given that the agreement wasn't even finalized until October 2008, which means Dry Creek fooled G.M.'s family into agreeing to only 7-8 months of services in exchange for a waiver of three years of claims. *See also,* 5 CCR §3069 "Annual Review of Individualized Education Program" which provides "Review of the pupil's individualized education program shall be conducted ***at least annually*** by the public education agency," meaning an IEP can be reviewed more often than annually.

convene an IEP to discuss, monitor and as appropriate, make adjustments to it. In other words, the Settlement Agreement confirmed what was G.M.'s ***current educational placement*** and that the parties were in agreement about it. The language of the Settlement Agreement also makes it clear this placement was a part of the IEP process, without regard to whether an IEP, proper or not, was created by Dry Creek to reflect its terms. It also confirmed that, as is the case with all IEPs, any "adjustments" to the IEP, including the ***current educational placement,*** required the parents' involvement as members of the IEP team.[44]

Ms. Gutierrez's later claim that the Settlement Agreement was "irrelevant" was an obvious sham and attempt to divert attention from the fact the Settlement Agreement stood on its own, plainly documenting G.M.'s ***current educational placement*** and services, including Ms. Coutchie, all of which would, in fact, continue after the 2008-2009 school year, as is the case with all IEPs, until the educational services G.M. needed addressed his reading deficits and the IEP team collaboratively agreed to changes.

Ms. Gutierrez also claimed that because the IDEA did not define "current educational placement" the Court was required to defer to the interpretation of the agency charged with administering the statute, the U.S. Department of Education (USDOE), and regulations related to a student's placement in general, 34 CFR §300.116(b).[45] (Ex. 34, Pg. 9, Lines 13-26). Ms. Gutierrez chose to pick language she thought served her purpose, overlooking the plain language of IDEA in the procedural safeguards, which states the relevant principle of "current educational placement" and provides 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,. . ." (20 U.S.C. §1415(j)).

Ms. Gutierrez also chose to overlook IDEA's language regarding settlement agreements arising out of mediations and dispute resolution which does not support her claim that settlement agreements are "irrelevant" if they do not include an IEP. On the contrary, this language (new under IDEA 2004), provides that written settlement agreements, such as the one Dry Creek drafted, are enforceable in any court of competent jurisdiction. (*See* 20 U.S.C. §§1415(e)(2)(f) and 1415(f)(1)(B)(iii)). Under such language, when Dry Creek failed to pay Ms. Coutchie, the Marcheses could have gone

[44] This is particularly true when it is a stay-put under §1415(j), which requires the student to stay-put in his current educational placement unless the parents agree otherwise.

[45] Ms. Gutierrez apparently didn't see the inconsistency of her argument that the Court was required to show *Chevron* deference to U.S. Department of Education regulations, at the same time she failed to show any deference whatsoever to the SEA or its multitude of decisions which had determined Ms. Coutchie was part of the current educational placement and had ordered Dry Creek to comply with and implement it, and ensure payment to Ms. Coutchie under it.

directly into court to enforce their agreement and stop Dry Creek's nonsense. Instead, they asked for help from CDE, the SEA responsible for ensuring LEA compliance. Rather than require Dry Creek to comply with its orders, CDE let the District run amuck and actually became complicit in its misdeeds, filing a Nonopposition to Dry Creek's stay-put motion and collaborating with Dry Creek to remove CDE's enforcement obligations.

Another citation missing from Ms. Gutierrez's analysis is Title 5 California Code of Regulations, Section 3087, "Decision by Settlement," also under the Procedural Safeguards section of the regulations, which provides:

> 3087. Decision by Settlement.
> Notwithstanding Government Code section 11415.60 of the Administrative Procedure Act, a decision by **settlement** may be issued on terms the parties determine are appropriate ***so long as the agreed-upon terms are not contrary to the law.*** [46]

Dry Creek's actions, and those of its legal counsel, in leading a family to believe they were settling their dispute so their son would receive services and requiring the family to waive their rights under the law as consideration for such services, only to then draft an ambiguous and improper IEP and represent to a federal judge that the settlement agreement is *irrelevant* are contrary to public policy. Dry Creek's actions, on the whole, were contrary to the law in general.

As documented in Appendix 1, from the moment the Marcheses settled with Dry Creek, the District did everything in its power to force Ms. Coutchie to stop providing services to G.M., from slow payment to nonpayment, to defamatory statements and outright threats. When Ms. Coutchie wouldn't quit providing services to G.M., Dry Creek devised a novel means of reinterpreting the Settlement Agreement and the IEP it was responsible for drafting. From then on, Dry Creek and its counsel worked to remove Ms. Coutchie as the provider it had agreed to for purpose of the IEP and misrepresented both documents to OAH and the federal court.

Dry Creek's actions from the outset demonstrated an intent to hoodwink the family by requiring them to waive rights in a manner the IDEA does not contemplate and then exploiting the waiver of their right to participate in the development of the IEP to write an IEP which failed to document the parties' agreement or the Student's needs and which only served Dry Creek's nefarious purposes. Since the LEA is responsible for ensuring FAPE, but its actions in removing the stay-put provider essentially worked

[46] Authority cited: Sections 56100(a) and (j) and 56505, Education Code. [Reference: Sections 56500-5607, Education Code; Section 11415.60, Government Code; Sections 1415(b)(2) and (c), U.S. Code, Title 20; and Sections 300.506-300.513, Code of Federal Regulations, Title 34].

against that goal, Dry Creek's failure to properly document the provision of services was a fraud on G.M.'s parents, and was itself a denial of FAPE and contrary to law.

That Dry Creek sought to set aside the provider it had agreed to and disrupt G.M.'s educational services guaranteed under stay-put, based on its misrepresentation of the documents it was responsible for drafting, goes beyond simple violations of the IDEA and public policy obligations. Dry Creek's actions and those of its legal counsel are intentional and despicable acts, and an attack on a Student whose rights they are legally obligated to protect and ensure. This is particularly so given Dry Creek's intentional failure to fund *any services to G.M. for the past twelve months,* with a damaging impact to G.M. and his family.

Supplemental Point #3.B - Ms. Gutierrez and Ms. Cannon's Prior Efforts to Misrepresent and Set Aside Stay-put

As noted in Appendix 1, the effort to remove Ms. Coutchie and disrupt G.M.'s current educational placement began in earnest in June 2010, when Dry Creek's legal counsel, Marcy Gutierrez, began asserting new legal theories on behalf of the District to justify its decision to unilaterally terminate Suzanne Coutchie as G.M.'s service provider. (*See,* App. 1, June 28, 2010 et seq., and Ex. 20, Letter, Marcy Gutierrez to Kevin Marchese, dated June 28, 2010).

On August 9, 2010, Dry Creek filed a motion for stay-put in OAH, seeking a determination "the District has 'good cause' to change service providers" and 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).

OAH denied Dry Creek's motion, noting 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 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.

The case *Joshua A.*, which the ALJ cited to, was an action involving a student in the Rocklin Unified School District. In that case, the school district was represented by the firm Kronick, Moskovitz, Tiedemann & Girard, specifically Marcy Gutierrez, the same attorney that presently represents Dry Creek and the instigator of the present effort to set aside G.M.'s current educational placement.

In G.M.'s case, Ms. Gutierrez was seeking to set aside stay-put based on the theory that the District had "good cause" to change the service provider, which was not an issue in *Joshua A.* However, a review of correspondence from the *Joshua A.* case as compared to correspondence in the Marcheses' case displays a pattern in her approach,

as well as striking similarities between her earlier, unsuccessful effort to set aside a student's current educational placement (20 U.S.C. 1415(j)) and her later successful effort in the Marchese matter.

In a July 10, 2007 letter to Bob Varma (the attorney representing Joshua and his family), Ms. Gutierrez:

Represented the District would implement the last agreed-upon placement

"I informed you that the Rocklin Unified School District ("District") will implement the last agreed-upon placement." (Ex. 66, pg. 2)

Cited to the law

"Under the stay put provisions of federal and state special education law, a special education student is entitled to remain in the current educational placement pending the completion of due process hearing procedures, unless the parties agree otherwise. [Citations]

"The relevant statute provides, in pertinent part:

"(d) Pursuant to subsection (a) of Section 300.514(a) [sic][47] of Title 34 of the Code of Federal Regulations, during the pendency of the hearing proceedings, including the actual state-level hearing, or judicial proceedings regarding a due process hearing, the pupil shall remain in his or her present placement, . . . unless the public agency and the parent or guardian agree otherwise. (EC 56505(d))

"For purposes of stay put, the "current educational placement" is the last agreed-upon educational placement prior to the dispute arising. (*Thomas v. Cincinnati Board of Education,* 918 F.2d 218 (6th Cir. 1990).) While federal law does not define "educational placement," state law defines "educational placement" as "that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to an individual with exceptional needs, as specified in the individualized education program. (CAL. CODE REGS., tit. 5, §3042(a).)

"The determination of a student's stay put must be made on a case-by-case basis and requires a close examination of all relevant facts."[48] (Ex. 66, pg. 2)

[47] Ms. Gutierrez's reference to 300.514 is incorrect. EC 56505(d) refers to 34 CFR 300.518, "Child's Status During Proceedings".

[48] Presumably this would be the Settlement Agreement which required a certain provider and that the IEP document the express terms of the Agreement.

Stated the last agreed upon placement

"In this case, it is my understanding that the parties agreed that the last agreed-upon placement is set forth in the IEP dated October 15, 2004. Pursuant to that IEP, the parties agreed that the District would fund its proportional share of in-home services through a nonpublic agency ("NPS") consistent with the terms of the MOU between the District and the Alta California Regional Center." (Ex. 66, pgs. 2-3)

Stated the District would fund the placement, but unilaterally change provider.

"During the pendency of this appeal, the District will continue to fund its proportional share of the 40 hours per week of in-home services. However, please be advised that, effective August 7, 2007, the District will offer such services through a different NPA other than Therapeutic Pathways. The District will provide you with further information in this regard during the week of July 23." (Ex. 66, pg. 3)

In letters to the Marcheses' during 2010, Ms. Gutierrez made similar claims:

September 29, 2010: Ms. Gutierrez represented the District would implement the last agreed to placement, stating:

> "As noticed in the District's June 4, 2010 letter to Mr. and Mrs. Marchese, as well as several subsequent communications to both the Marcheses and Ms. Coutchie, the District acknowledges that the stay put provision of the IDEA is in effect and therefore will continue to offer Grayson's current placement for the duration of stay put." (Ex. 29, pg. 1)

June 28, 2010: Ms. Gutierrez cited to the law regarding stay put (although at this time she asserted that "a placement established through a settlement agreement does not automatically constitute stay-put placement"[49]) (*See,* Ex. 20, pg. 2).

June 28, 2010: Ms. Gutierrez identified what she asserted was the last agreed upon placement, i.e., the April 29, 2005 IEP (which unfortunately inaccurately identified an IEP which predated the 2008 due process and resulting October 2008 Settlement Agreement and IEP by three years). (*See,* Ex. 20, pg. 2 and pg. 3, fn. 4)

However, Ms. Gutierrez also offered a "second option" to the 04/29/05 IEP, which would "continue with the placement set forth in the settlement agreement which includes 15 hours per week of one-to-one reading interventions services and one period of P.E.", (Ex. 20, pg. 3) but that "should the District agree to recognize the terms of the

[49] Simultaneously acknowledging that "stay put" had been *established* through the October 2008 Settlement Agreement, and ignoring that the Settlement Agreement's terms were documented by the District's legal counsel in a corresponding IEP, which was a valid document under the IDEA.

settlement agreement as stay-put, despite no legal requirement to do so, the District no longer authorizes Ms. Coutchie to serve as the service provider for one-to-one reading intervention services", claiming the District had "established more than sufficient good cause to do so" and that "Ms. Coutchie has acted in good faith."[50]

Most interesting, is that Ms. Gutierrez seemed to dismiss the relevance of the 9th Circuit's decision in *Joshua A.**, a case she was instrumental in bringing***, which clearly established that stay-put applied in cases where a non-school provider was supplying services. (*See,* Ex. 68). In her June 28, 2010 letter to the Marcheses, she stated "While the District agrees that the holding in that case is particularly helpful in determining the application of the stay-put rule during the pendency of an appeal, the District finds it equally as informative on the District's *right to change* the provider during stay-put so long as the nature and level of services remains comparable." (Ex. 20, at pg. 3).[51]

Here there was no "irreparable harm" to the student. Ms. Coutchie was available and has continued to faithfully provide appropriate services in the face of Dry Creek's continuing attempts to disrupt her services by its bad faith failure to pay her in a timely manner in accordance with proper education agency policies.

Furthermore, Dry Creek's efforts in *Joshua A.,* as in G.M.'s case, were not to ensure FAPE - ***the only reason an education agency should be pursuing litigation -*** but were for the opposite purpose, i.e., to remove a provider and so disrupt a student's education it can only result in a denial of FAPE. As such, Dry Creek's efforts and those of its legal counsel were for an improper purpose and against public policy.

More importantly, at the time of the decision in *Joshua A.,* the 9th Circuit noted "No Ninth Circuit cases address the issue. The only published circuit court decision addressing the issue is a nineteen year-old opinion from the D.C. Circuit. *See Andersen ex rel. Andersen v. District of Columbia*, 877 F.2d 1018, 1023-24 (D.C. Cir. 1989)." Ex. 68 at pg. 3560) But this was not the case at the time of Ms. Gutierrez's efforts in G.M.'s case. Instead, at the time Ms. Gutierrez began her quest to remove G.M.'s provider, there was

[50] Ms. Gutierrez appears to clearly state Dry Creek's belief it had "no legal requirement" to comply with Settlement Agreements it drafted and entered into or the IDEA under which the District developed the Settlement Agreement.

[51] A review of *Joshua A.* does not support her belief that Districts have such a "right" to make such a "change." In fact, a word search for "right" and "change" in *Joshua A.,* indicates in discussing the *Honig* case, that the 9th Circuit addressed a District's claim of an exigency exception that would allow schools to suspend or exclude disabled students posing a danger to their peers, noting that "The Court rejected the school district's contention, holding that in order to *change* a disabled student's placement (beyond a ten-day suspension) schools must seek the help of the courts through the procedures of the IDEA. *Id.* at 326" and "the Court held that a court can *change* a child's placement notwithstanding the stay put provision *only upon a showing 'that maintaining the child in his or her current placement is substantially likely to result in injury either to himself or herself, or to others*.' *Id.* at 328." (emphasis added) (Ex. 68 at pg. 3561)

a clearly defined 9th Circuit precedent she was aware of and should have heeded, particularly considering her significant role in the evolution of that case.

Despite her lack of success in setting aside the stay-put rights of a student in the neighboring Rocklin Unified School District, Ms. Gutierrez apparently was able to convince Dry Creek it was worth the expenditure of taxpayer dollars to try and set aside stay-put for G.M., despite the fact that his stay-put was confirmed not just in a Settlement Agreement but also in an IEP that Dry Creek's own legal counsel had drafted. How Dry Creek rationalized such expenditure in light of its obligations to the Student and its duty to comply with the IDEA is hard to fathom.

Ms. Gutierrez's statements purporting to honor and implement the last agreed upon placement, citing to the law, and yet asserting the right to swap out the provider evidence a pattern and practice exercised on behalf of school districts which seek to set aside clearly defined procedural rights, without regard to the disruption such efforts cause. Seeking to unilaterally switch out providers who are presently providing services to which the parents agreed and the District agreed, and thus are readily available, makes no sense at all. The total disregard for the harm caused to students is only matched by the harm and disregard such efforts show for the meaning and efficacy of the procedural safeguards under 20 U.S.C. §1415.

Since the District Court and the 9th Circuit clearly reaffirmed *Joshua A.*'s right to stay-put, one can't help but wonder why Dry Creek decided to challenge such a clearly defined precedent and seek to change a student's successful current educational placement that was clearly documented in a Settlement Agreement drafted by its own legal counsel?

One also wonders how this benefits Dry Creek. The District is clearly obligated to ensure FAPE to its students, to see that they make adequate progress so that they can be prepared for "further education, employment, and independent living." (20 U.S.C. §1400(d)(1)(A)). How does removing a provider who had documented success with the Student and forcing that Student to return to a District whose staff had caused his failure to make appropriate progress in the first place further that purpose?

To the extent that there was any perceived benefit to Dry Creek through its unilateral removal of the provider and the elimination of the financial obligation to fund her services, that benefit would be short-lived and wholly negated by the continuing financial burden of the cost of the continuing litigation, not to mention the potential burden to Dry Creek for its continuing noncompliance and its persistent denial of G.M.'s right to FAPE, its failure to fund his services and education and the

impact such failures will have on his long-term ability to make appropriate progress and become what the IDEA contemplates, i.e., a productive member of society.[52]

The reality is that Dry Creek isn't benefiting from this endeavor. ***The only beneficiaries of this litigation are Dry Creek's legal counsel, Ms. Gutierrez and her colleagues*** who counsel school districts to pursue senseless noncompliance, sure in the knowledge that districts will need legal counsel to lead them out of the quagmire of litigation, at the same time legal counsel profit from the noncompliance they counseled.[53]

As Exs. 64 and 65 demonstrate, such litigation costs Dry Creek a significant amount of taxpayer dollars while students go without services and teachers confront possible layoffs. As Appendix 1 confirms, in the space of a month and a half alone Ms. Gutierrez and attorneys who counseled Dry Creek to defy CDE orders and pursue frivolous litigation to set aside procedural safeguards in defiance of 9th Circuit precedent were paid over $30,000.00 in legal fees by Dry Creek's Board of Trustees *at the same time G.M. went without funded services, Ms. Coutchie, who Dry Creek had promised to pay, went uncompensated and Dry Creek's teachers faced layoffs.*

Unfortunately, this entire exercise is not about the right to a free appropriate public education for a student who receives special education services. It is about profiting off of that student's misfortune in attending school in a district represented by such legal counsel. This case, as well as *Joshua A.,* demonstrates that legal counsel such as Ms. Gutierrez and her associate Ms. Cannon, who also works for the Kronick firm, seek to earn legal fees by counseling their LEA clients to engage in noncompliance and set aside significant statutory procedural rights and protections their client districts are required to ensure as a condition of their receipt of federal funds.

Why are school districts allowed to pay legal counsel who benefit from the expenditure of public funds, while the public agencies fail to use the funds provided by the federal government to ensure student services? How can LEAs pay legal counsel at the same time they fail to fund ANY educational services for the student? Unless LEAs and their legal counsel are held accountable for such acts, they will continue with impunity and no California student will be guaranteed stay-put under the IDEA.

[52] Unfortunately, left unaddressed is the impact Ms. Gutierrez's unsubstantiated and defamatory statements have had on Ms. Coutchie and her reputation. Such negative and unfounded comments and other tactics are increasingly used by districts and legal counsel in an attempt to discourage providers from working with students whose parents are in a dispute with a district. These acts are nothing more than retaliation against providers for having worked with a student. Fearful for their reputations and livelihoods, many providers will no longer work for certain students, attend IEPs or testify at due process, and have essentially been bullied by LEAs and their counsel for having worked with children with disabilities.

[53] Ironically, CDE's former General Counsel, Marsha Bedwell, is sharing in this benefit through her employment with KMT&G.

Supplemental Point #3.C – CDE Has Misrepresented and Presented Contradictory and Inconsistent Interpretations of "Exhaustion of Administrative Remedies"

Introduction

In 2009, the Marcheses filed for due process against Dry Creek regarding their son G.M.'s right to FAPE. Dry Creek also filed for due process against the Marcheses. On February 18, 2010, the Office of Administrative Hearings ("OAH") issued a Decision finding in Dry Creek's favor. At the end of the Decision was the 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).)" (Ex. 7, last page)

The Marcheses had exhausted administrative remedies under IDEA regarding issues related to G.M.'s education and right to FAPE, and as a party "aggrieved" under 20 U.S.C. §1415(i)(2)(A), they had the right to appeal into court.

During 2009, the Marcheses also brought numerous compliance complaints against Dry Creek under California's CRP, only four of which CDE opened, investigated and issued CCRs, with at least two additional complaints CDE refused to open or investigate. Of the four CDE investigated, Dry Creek was found out of compliance. Despite issuing CCRs with corrective actions requiring compliance, Dry Creek failed to comply and CDE failed to enforce against Dry Creek so G.M. received meaningful remedy in the form of appropriately funded services and so that Dry Creek's noncompliance was addressed so as to ensure appropriate future provision of services for all children with disabilities (under 34 CFR §300.151(b)). As a result, CDE violated its obligations under IDEA to monitor and supervise LEAs, to ensure FAPE for students through monitoring and enforcement and to have an effective CRP resulting in appropriate remedies for California's students.

In light of CDE's failure to enforce its own orders (including orders related to the stay-put placement in effect as a result of the due process), and monitor and supervise Dry Creek, when the Marcheses appealed OAH's decision into federal court they also named CDE as a defendant because of its failure to comply with its IDEA obligations. Appendix 1 and 2 (Supplemental Points 1 and 2), demonstrate that after the Marcheses filed their federal Complaint, CDE, despite previously requiring Dry Creek to enforce stay-put, made an about-face and no longer required Dry Creek to implement stay-put or fund Ms. Coutchie. Instead, CDE actually directed Dry Creek to pursue litigation against G.M. and his family to remove Ms. Coutchie, first in OAH and when that was unsuccessful, in the federal court where Dry Creek used its motion to unilaterally remove Ms. Coutchie and not replace her, contrary to the Court's eventual Order.

During this timeframe, CDE filed a Motion to Dismiss the Marcheses' claims against CDE. (*See,* Ex. 26, CDE Motion to Dismiss Doc. # 17, PACER U.S.D.C., E.D. California). CDE's Motion to Dismiss, filed August 26, 2010, claimed the Marcheses had *failed to exhaust administrative remedies against CDE* and specifically stated that *parents are required to file for due process against the CDE* in OAH, a state agency CDE appointed to hear due process claims under the IDEA.

IDEA contains no requirement that parents file for due process against an SEA for it to comply with its obligations under the law or for it to be held accountable to such obligations. Nor does IDEA state that a parent's failure to do so means they have failed to exhaust administrative remedies under IDEA. CDE misrepresented the law to the federal court and improperly obtained dismissal based on its misrepresentations, which led to its knowing and continuing denial of education services to G.M., a student eligible under the IDEA.

This Supplemental Point discusses claims CDE made in its Motion to Dismiss and how its Motion misrepresented IDEA's law and procedures to the Court, CDE's obligations under the IDEA and the general state of the law of exhaustion of administrative remedies. CDE's Motion also demonstrates that CDE abdicated its responsibility under IDEA to ensure California's students receive FAPE, IDEA's procedural protections, including maintenance of a student's "stay-put" under §1415(j), and an effective complaint resolution process ("CRP") in California, even as California continues to accept federal funds based on its assurances that it is complying with IDEA in all respects.

This Supplemental Point also demonstrates that contrary to what it represented to the Court, California was very much aware that the standard for "exhaustion" is quite different, as reflected in CDE's procedural safeguards presented annually to California families and through its public website; that it was also very much aware of its obligations under the law as CDE has been in this situation before, so that in the Marchese case it has knowingly taken a position which directly contradicts its obligations under IDEA and California's Education Code.

<u>CDE's August 26, 2010 Motion to Dismiss</u>

CDE's Motion to Dismiss represented that:

> "Plaintiffs' FAC against CDE and SSPI fails for several reasons. First, plaintiffs have failed to exhaust their administrative remedies with respect to all the educationally-related claims against State Defendants. <u>Before filing a federal lawsuit, plaintiffs were obligated to resolve their educational claims with respect to the CDE through due process procedures</u>." (Motion, at pg. 2, Lines 9-12)

"Plaintiffs fail to establish that this Court has subject matter jurisdiction. It is well settled that before a plaintiff can seek relief from the courts on an issue related to IDEA, he must first exhaust the administrative remedies provided under IDEA. 20 U.S.C. § 1415(l); *Robb v. Bethel School District*, 308 F.3d 1047, 1048 (9th Cir. 2002); *Witte v. Clark County School District*, 197 F.3d 1271, 1274 (9th Cir. 1999). If the parent desires to make a claim on behalf of his/her child against any educational agency, ***state or local,*** for some alleged failure to provide FAPE pursuant to IDEA, he must first raise the issue in a due process proceeding. 20 U.S.C. § 1415." (Motion, pg. 7, Lines 19-28)

"The exhaustion requirement applies equally to cases in which a plaintiff seeks recovery against the state educational agency ("SEA"), such as CDE, under a theory that the SEA has failed to comply with its statutory supervisory responsibilities under IDEA. *B.H. v. Southington Board of Education*, 273 F.Supp.2d 194, 200 (D. Conn. 2003). The IDEA exhaustion requirement also applies to those cases where the SEA is not named in the administrative hearing but plaintiffs are seeking recovery from the SEA for a procedural violation. *Whitehead v. School Board for Hillsborough County*, 932 F.Supp. 1393, 1396 (M.D. Fl. 1996)." (Motion, at pg. 7, Line 25 –pg. 8, Line 3)

"It is clear that plaintiffs' claims against the State Defendants (Claims II, III, IV, XII, XIII, and XIV) are brought as education related claims under IDEA; however plaintiffs have not sought administrative remedies against the State Defendants. Specifically, plaintiffs allege that State Defendants: failed to enforce an action against the district's "unlawful termination of stay-put" (FAC, ¶ 79); entered into a conspiracy with the district to deny student his rights under the IDEA. (FAC, ¶ 80.); failed to investigate IDEA violations by district submitted by plaintiffs (FAC, ¶¶ 81-83, 85-87.); failed to provide FAPE to student (FAC, ¶¶ 87, 191-192) including math instruction (FAC, ¶ 93.); failed to enforce the settlement agreement (FAC, ¶¶ 96-102.); and failed to supervise and monitor the district (FAC, ¶ 205.). Plaintiffs also allege (Claim XIII) procedural violations of IDEA against all defendants however do not allege any claims specifically against CDE. (FAC, ¶¶ 195-201.)." (Motion, pg. 8, Lines 8-17) (emphasis added).

Standard for exhaustion of administrative remedies

IDEA at 20 U.S.C. §1415(l), provides:

> (l) Rule of Construction. Nothing in this title shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, [42 USC § 12101] title V of the Rehabilitation Act of 1973, [29 USC § 790] or other Federal laws protecting the rights of children with disabilities,

> except that before the filing of a civil action under such laws seeking relief that is also available under this part, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this part.

A concise summary of exhaustion of administrative remedies in the context of federal law can be found in the federal practice manual published by The Sargent Shriver Center on Poverty Law:

"Exhaustion of federal or state administrative remedies is required when Congress explicitly requires exhaustion as a prerequisite to bringing an action in federal court.[fn omitted] Such an expression must be specific and clear.[fn.] For example, 42 U.S.C. § 1997e(a), part of the Prison Litigation Reform Act, provides: "No action shall be brought with respect to prison conditions…until such administrative remedies are exhausted." The Supreme Court has held this language reflected Congress' intent to require exhaustion in all cases and to eliminate any discretion to permit exceptions. [fn.]

"The interpretive question in cases with an explicit exhaustion requirement is the breadth of the statutory exhaustion provision. [fn.] For example, the Individuals with Disabilities Education Act provides that, "before the filing of a civil action ... seeking relief that is also available under [the Act], the procedures ...of this section shall be exhausted."[54] Most courts have held that an IDEA plaintiff cannot avoid exhaustion simply by requesting relief, such as money damages, that the IDEA cannot provide. As a result, many of these cases turn on subtle, fact-based inquiries into whether a due process hearing could redress to some degree the injury alleged./[55]. . .

"Without an explicit statutory requirement for exhaustion, "courts are guided by congressional intent in determining whether application of the doctrine would be consistent with the statutory scheme."[56] Thus, implied exhaustion requirements are often determined by resort to "sound judicial discretion," based on statutory interpretation and legislative history.[57] In these circumstances, "courts play an important role in determining the limits of an exhaustion requirement and may impose

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[54] 260. **Individuals with Disabilities Education Act**, 20 U.S.C. §§1415(i)(2)A), (l).

[55] 261. **Blanchard v. Morton Sch. Dist.**, 420 F.3d 918, 920-22 (9th Cir. 2005); **Covington v. Knox County Sch. Sys.**, 205 F.3d 912 (6th Cir. 2000); **Witte v. Clark County Sch. Dist.**, 197 F.3d 1271 (9th Cir. 1999); **W.B. v Matula**, 67 F.3d 484 (3d Cir. 1995) (no exhaustion); **Payne v. Peninsula Sch. Dist.**, 598 F.3d 1123, 1127-28 (9th Cir. 2010); **S.E. v. Grant County Bd. of Educ.**, 544 F.3d 633, 642-43 (6th Cir. 2008), **cert. denied**, 129 S. Ct. 2075 (2009); **Cave v. East Meadow Union Free Sch. Dist.**, 514 F.3d 240, 246-47 (2d Cir. 2008); **Frazier v Fairhaven Sch. Comm.**, 276 F.3d 52 (1st Cir. 2002); **Charlie F. v. Bd. of Educ.**, 98 F.3d 989 (7th Cir. 1996); **N.B. v. Alachua County Sch. Bd.**, 84 F.3d 1376 (11th Cir. 1996) (requiring exhaustion).

[56] 267. **Patsy**, 457 U.S. at 502, n.4.

[57] 268. **McCarthy**, 503 U.S. at 144.

such a requirement even where Congress has not expressly so provided."[58]"
http://federalpracticemanual.org/node/22

Discussion

Analysis of 20 U.S.C. §1415(l)

CDE's Motion to Dismiss claimed the Marcheses failed to exhaust administrative remedies by failing to file for due process *against CDE,* which they claim was required by 20 U.S.C. §1415(l). Specifically, CDE stated "If the parent desires to make a claim on behalf of his/her child against any educational agency, ***state or local,*** for some alleged failure to provide FAPE pursuant to IDEA, he must first raise the issue in a due process proceeding. 20 U.S.C. §1415." (Motion, pg. 7, Lines 19-28) (emphasis added)

An examination of §1415(l) and related statutory provisions makes it clear: ***IDEA does not require parents to pursue due process against an SEA in order for it to be held accountable to its compliance obligations under the law, including its obligations related to supervising, monitoring and enforcing against LEAs. The IDEA also does not require parents to sue the SEA in order meet the requirement to "exhaust administrative remedies" under 20 U.S.C. §1415(l).***

20 U.S.C. §1415(l) provides "that before the filing of a civil action under such laws seeking relief that is also available under this part, ***the procedures under subsections (f) and (g) shall be exhausted*** to the same extent as would be required had the action been brought under this part." (emphasis added)

The relevant procedures under 20 U.S.C. §1415(f) provide:

- "Whenever a complaint has been received under subsection (b)(6) or (k), the parents or the local educational agency involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency." 20 U.S.C. §1415(f)(1)(A).

- Resolution Session. Preliminary Meeting. Prior to the opportunity for an impartial due process hearing under subparagraph (A), the local educational agency shall convene a meeting with the parents and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the complaint. 20 U.S.C. §1415(f)(1)(B)(i)

[58] 269. *Alacare Inc. v. Baggiano*, 785 F.2d 963, 966 (11th Cir. 1986) (quoting **Patsy**, 457 U.S. at 501).

  - Both provisions clearly state the only parties "involved in such complaint" are parents or an LEA. Nowhere does it indicate an SEA is a party to a due process hearing.

- 20 U.S.C. §§1415(f)(3)(C) Timeline for Requesting Hearing and 1415(f)(3)(D) Exceptions to the Timeline refer to the "parent or agency" and the "local educational agency's withholding of information from the parent", respectively, in referring to the action forming the "the basis of the complaint". Thus, according to §1415(f)(1)(A) above, would include only "the parents or the local education agency".

- *See, also* 20 U.S.C. 1415(f)(3)(E) "Rule of Construction. Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section."

- *See, also* 20 U.S.C. 1415(f)(3)(F) "Rule of Construction. Nothing in this paragraph shall be construed to affect the right of a parent to file a complaint with the State educational agency."

  - Again, this confirms that §1415(f) applies to local education agencies and that parents can also file against the LEA using a state's CRP.

  - Both this subpart, as well as 20 U.S.C. §1415(f)(1)(A), demonstrates Congress *could have* identified a state educational agency as a participant in the process identified in 20 U.S.C. §1415(f)(1)(A), *but did not do so.*

  - Further, this language confirms filing for due process is a parent's right, and not an obligation other than as set forth in 20 U.S.C. §1415(l).

The relevant procedures under 20 U.S.C. §1415(g) provide:

- Appeal. (1) In General. If the hearing required by subsection (f) is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency.

- (2) Impartial Review and Independent Decision. The State educational agency shall conduct an impartial review of the findings and decision appealed under paragraph (1). The officer conducting such review shall make an independent decision upon completion of such review.

- Subsection (g) applies to two-tier states where an appeal from the LEA is made to the SEA. California is a one-tier state where, after hearing, the losing party can appeal to state or federal court.

The plain language of IDEA makes no reference to parents pursuing due process against the SEA or the requirement that they do so to ensure the SEA complies with its obligations under IDEA or that exhaustion is met as a result. CDE's claim that the Marcheses failed to exhaust administrative remedies because they failed to file for due process against CDE as required by 20 U.S.C. §1415(l) is false.

Case law Cited By CDE in Support of Exhaustion Claim

CDE cited several cases in its Motion in support of its claim the Marcheses were required to pursue due process proceeding against CDE before they could proceed against CDE in federal court. Yet, the cases CDE cited do not appear to support its claim and in many instances appear to be inapplicable or distinguished from the facts in the Marchese matter. The cases and propositions for which CDE cited them are discussed below:

Citation #1) "It is well settled that before a plaintiff can seek relief from the courts on an issue related to IDEA, he must first exhaust the administrative remedies provided under IDEA. 20 U.S.C. § 1415(l); *Robb v. Bethel School District*, 308 F.3d 1047, 1048 (9th Cir. 2002); *Witte v. Clark County School District*, 197 F.3d 1271, 1274 (9th Cir. 1999)."

Robb v. Bethel School District related to suit against a local education agency and did not involve a suit brought against a state education agency. *Robb* also involved a family that had not filed for due process or used the due process procedures at all, but instead had filed a claim directly in federal court under 42 U.S.C. §1983. *Robb* addressed the issue "whether a plaintiff who seeks only money damages is required to exhaust administrative remedies before instituting a claim under 42 U.S.C. §1983 predicated on a violation of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1485."[59]

Although *Robb* applies to IDEA's general exhaustion requirement which relates to an LEA, it is inapplicable in the Marchese case where the family has pursued due process (and had due process filed against them by the LEA) regarding the issue of FAPE, utilized the CRP and seeks accountability on the SEA's part for its failure to hold a noncompliant LEA accountable under its general IDEA obligations.

[59] http://archive.ca9.uscourts.gov/ca9/newopinions.nsf/3B8434AA2CA0F32C88256C590053196C/$file/0135823.pdf?openelement at page 2.

Witte v. Clark County School District involved a student who suffered abuse at the hands of LEA staff and whose claim was for money damages alone. Unlike the Marcheses' case, the student had not used the due process procedures. The 9th Circuit found that "Because Plaintiff seeks only monetary damages, which is not "relief that is available under" the IDEA, and because all educational issues already have been resolved to the parties' mutual satisfaction through the IEP process, Plaintiff is not "seeking relief that is also available" under the IDEA, 20 U.S.C. S 1415(l). That being so, under the plain words of the statute, exhaustion of administrative remedies is not required. See W.B. v. Matula, 67 F.3d 484, 495 (3d Cir. 1995) (holding that, by its terms, the IDEA "does not require exhaustion where the relief sought is unavailable in an administrative proceeding"; under the IDEA, monetary damages are not available, so exhaustion is not required)."[60]

Witte doesn't even seem to stand for the principle for which CDE cited it. The Marcheses pursued due process and had due process filed against them by Dry Creek, thus meeting IDEA's exhaustion requirement. Also, where a remedy "is unavailable in an administrative proceeding," e.g., SEA accountability under 20 U.S.C. §1415(l), "exhaustion is not required." Therefore, this case adds nothing to CDE's argument.

Citation #2) "The exhaustion requirement applies equally to cases in which a plaintiff seeks recovery against the state educational agency ("SEA"), such as CDE, under a theory that the SEA has failed to comply with its statutory supervisory responsibilities under IDEA. *B.H. v. Southington Board of Education*, 273 F.Supp.2d 194, 200 (D. Conn. 2003)." (Motion, at pg. 7, Line 25 – 28)

B.H. v. Southington Board of Education involved a student with pervasive developmental disorder and absence epilepsy whose parents brought suit against the Connecticut State Department of Education and local board of education under IDEA and §1983 alleging they violated their child's rights by failing to implement his IEP. The district court held the parents' failure to submit to a due process hearing deprived the court of subject matter jurisdiction and notice to the state department was insufficient to hold defendant's liable for failure to supervise the child's individualized program.[61]

This case is distinguished from the Marcheses' case as *B.H.'s* family did not pursue a due process proceeding against the LEA nor did it take steps to notify the SEA as the Marcheses did.

[60] http://law.justia.com/cases/federal/appellate-courts/F3/197/1271/546477/.
[61] http://www.ctd.uscourts.gov/Opinions/072503.SRU.BH.pdf

In a further "Order on Request for Reconsideration" the Court noted:

> ". . . plaintiffs failed to properly notify the State Defendants prior to bringing suit against them that the Board Defendants had failed to implement B.H.'s IEP. In so holding, the court determined that the plaintiffs had "never requested a due process hearing to resolve this claim, presented this claim at the due process hearing, or even included the State Defendants at the due process hearing." B.H., 273 F. Supp.2d at 200 (D. Conn. 2003). In addition, the court noted that the *plaintiffs failed to notify the State Defendants of the Board Defendants' failure to implement B.H's IEP via the complaint procedure described in 34 C.F.R. 300.662*. See id. at 201-02."[62] (emphasis added)

The failure to exhaust referred to in this case was the family's failure to request a due process hearing or present a claim against the LEA. The Court's language "or even included the State Defendants at the due process hearing" indicates the SEA's involvement was for notice, not exhaustion purposes, and was considered supplemental to presenting a claim at due process against the LEA. Of significance is the Court's note that plaintiffs also failed to notify State Defendants via the complaint procedure at 34 CFR §300.662 [now §300.153]. Contrary to *B.H.,* the Marcheses did pursue due process, and filed over four complaints in CDE's CRP and both exhausted administrative remedies and also did "notify the State Defendants of the Board Defendants' failure."

Citation #3) The IDEA exhaustion requirement also applies to those cases where the SEA is not named in the administrative hearing but plaintiffs are seeking recovery from the SEA for a procedural violation. *Whitehead v. School Board for Hillsborough County*, 932 F.Supp. 1393, 1396 (M.D. Fl. 1996)." (Motion, at pg. 7, Line 28 - pg. 8, Line 3)

> *Whitehead v. School Board for Hillsborough County* involved a student with Down Syndrome born in 1987 and educated in Florida. At due process, a hearing officer identified violations of law related to bad faith, denial of FAPE, disability discrimination, and retaliation for asserting rights. Subsequently, the parents filed a complaint for fees and named the Florida Department of Education seeking attorneys' fees, costs and damages. Noting "Plaintiffs allegations against Defendant DOE essentially involve a demand for attorney's fees due as prevailing party in the dispute with Defendant School Board" and as DOE was not a party to the dispute, Plaintiffs were not entitled to attorney's fees as a prevailing party.

62 http://ct.findacase.com/research/wfrmDocViewer.aspx/xq/fac.%5CFDCT%5CDCT%5C2004%5C20040107_0000008.DCT.htm/qx

This case does not seem to stand for the proposition to which CDE cites. Also, while this family did pursue due process, when they sought attorney's fees they simply tacked Florida DOE onto the complaint. The Court found that Plaintiffs may not "attempt to piggyback the DOE claim on a favorable outcome previously reached against a subordinate agency," in order to get fees.

Why CDE would cite to a district court case from Florida dating back fifteen years (prior to IDEA's reauthorizations in 1997 and 2004) for a case referencing an SEA's accountability for legal fees is unclear, particularly when a similar case from the 9th Circuit in which CDE had been a defendant and where exhaustion was not required by or discussed by the court with regard to the state education agency, was available.[63]

CDE Characterized the Marcheses' Claims as Education Related IDEA Claims

According to CDE's Motion, the Marcheses' claims were "education related claims under the IDEA." In its Motion, CDE noted that the Marcheses claimed that State Defendants:

- failed to enforce an action against the district's "unlawful termination of stay-put" (FAC, ¶ 79);
- entered into a conspiracy with the district to deny student his rights under the IDEA. (FAC, ¶ 80.);
- failed to investigate IDEA violations by the district submitted by plaintiffs (FAC, ¶¶ 81-83, 85-87.);
- failed to provide FAPE to student (FAC, ¶¶ 87, 191-192) including math instruction (FAC, ¶ 93.);
- failed to enforce the settlement agreement (FAC, ¶¶ 96-102.); and
- failed to supervise and monitor the district (FAC, ¶ 205.). (Motion, pg. 8, Lines 8-17) (emphasis added).

[63] *See*, *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).

These are not "education related claims" such as those which are typically brought against LEAs in due process or the CRP. CDE is correct "These allegations raise the question of whether G.M. received the appropriate special education services for his disabling conditions," but CDE is being disingenuous. Whether G.M. received such services was at issue only because Dry Creek had failed to provide such services, which is why the Marcheses had *already pursued due process proceedings and numerous compliance complaints with regard to the appropriate special education services for G.M.'s disabling conditions.*

More importantly, the Marcheses made these allegations in their Complaint against CDE because when Dry Creek failed to comply with its IDEA obligations under 1) the Settlement Agreement, 2) compliance complaints and 3) its general obligation to ensure students within its boundaries receive FAPE, ***Dry Creek's failure was allowed to persist as a direct result of CDE's failure to oversee, monitor and enforce against Dry Creek***. These allegations were not just about the underlying services, but about CDE's failure to ensure G.M. received such services and that G.M., as a California student, received the free appropriate public education to which he was entitled to pursuant to 20 U.S.C. §§1412 and 1416

Other CDE Statements and Citations re: Exhaustion

CDE disingenuously cited *Hoeft v. Tucson Unified School District*, 967 F.2d 1298, (9th Cir. 1992) "Exhaustion of the administrative process allows for the exercise of discretion and educational expertise by state and local agencies, affords full exploration of technical educational issues, furthers development of a complete factual record, and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children." *Id*. at 1303. Requiring plaintiffs to exhaust their administrative remedies would allow the complete development of the record on the issue of whether the CDE has failed to address the procedural violations committed by district. *Id*." (Motion, pg. 8, Lines 19-27) [64]

However, the documentary record confirms nothing prevented CDE from its "exercise of discretion and educational expertise," or having a "full exploration of technical educational issues," and "development of a complete factual record," (as Appendix 1 clearly documents). Unfortunately, rather than doing these things, CDE

[64] At the October 25, 2010 hearing on CDE's motion, besides misrepresenting the status of Dry Creek's compliance to the Court (*see,* Supplemental Point #2 above), Ms. Yajima also misrepresented the law regarding exhaustion and CDE's obligations under it. (*See,* Ex. 35, pgs. 5-8, 42-44). Ms. Yajima further failed to inform the Court that CDE's Legal Department had notice of the Marchese due process filings, including the issues the family was having with Dry Creek, and thus had ample opportunity to exercise its "discretion" and "educational expertise," as both the June and July 2009 due process complaints were served on CDE's Legal Unit, pursuant to 34 CFR §300.508(a)(2) and CDE's legal counsel corresponded with the Marcheses. (*See,* Exs. 72 and 73, Statement of Services, dated June 11, 2009 and July 21, 2009, respectively; Exs. 74 and 76, letters from Amy Bisson Holloway and Gregory Rousseve, respectively).

actually acted against "judicial efficiency" by failing to correct Dry Creek's shortcomings and noncompliance, and instead pushed Dry Creek toward the courts: first OAH and then the federal Court, where that Court's inexperience in special education, in conjunction with CDE's failure to exercise its so-called "expertise," led it to set aside G.M.'s current education placement, including the educational therapist/reading specialist who had been providing him services for over two years.[65]

A more relevant citation to *Hoeft* is found in a 9th Circuit case from California also involving CDE, i.e., the 9th Circuit's decision in *Porter.* Approximately ten years ago, we pursued due process against our LEA claiming it had denied our son's right to FAPE. We obtained a decision the LEA failed to implement. After a year without implementation and letters of complaint to CDE without resolution, we filed a complaint in the U.S. District Court for the Central District of California against both the LEA and CDE.

As in the Marchese case, CDE moved to dismiss in our case, claiming we had failed to exhaust administrative remedies. But in our case, instead of claiming we had to go to due process to exhaust, CDE claimed we had to exhaust CDE's CRP. In December 2000, the Court accepted the misrepresentations of the law by both the CDE and the LEA and dismissed our case against both, agreeing that we should exhaust by going to CDE's CRP. We appealed to the 9th Circuit and also pursued a compliance complaint with CDE as the Court ordered.

Two years later, in October 2002, the 9th Circuit overturned the dismissal and reinstated our suit against both the LEA and CDE and articulated the exhaustion requirement stating "Here, the Porters exhausted California's due process procedure regarding their initial complaint, receiving a SEHO order in their favor." (*Porter v. Board of Trustees of Manhattan Beach Unified School District,* 307 F.3d 1064 (9th Cir. 2002)). [66]

The 9th Circuit noted CDE's claim, that "because the state's CRP is available to enforce the SEHO order. . ., the Porters must exhaust that process before bringing a court action," (9th Circuit, page 13) however, concluded "the district court erred in basing its exhaustion requirement on a policy analysis independent of the IDEA's requirements. If a statute ***does not*** provide for exhaustion of administrative remedies, a district court ***may*** require exhaustion in the exercise of its discretion. *Hoeft*, 967 F.2d at

[65] Also, at pg. 13, Lines 3-9 of its Motion in the Marcheses' case, CDE cited to 20 U.S.C. §1415(f), Cal. Ed. Code §56501 and 34 CFR §§300.506-300.508 regarding the right to a due process hearing before *an independent and impartial hearing* officer, noting, "Thus, by law CDE has no role in the hearings." This confirms that §1415(l), as well as 1415(f) and (g), involve parents and schools and NOT parents and the SEA.

[66] http://archive.ca9.uscourts.gov/ca9/newopinions.nsf/ADB50EE10F052FC488256C4B007B949E/$file/0155032.pdf?openelement at page 12.

1302. "The IDEA, however, does provide administrative appeal procedures to be pursued before seeking judicial review." *Id.*; *see* 20 U.S.C. § 1415. Where Congress has provided for the exhaustion of administrative procedures, Congress' intent "is of paramount importance . . . because Congress is vested with the power to prescribe the basic procedural scheme under which claims may be heard in federal courts." *Patsy v. Bd. of Regents*, 457 U.S. 496, 501 (1982)." *Porter,* at pg. 14. (emphasis added) [67]

The 9th Circuit further analyzed CDE's claim that we were required to pursue additional exhaustion via CDE's CRP, stating:

> "Our starting point is the text of the IDEA. When Congress provides a "detailed exhaustion scheme," courts generally lack discretion to add additional exhaustion requirements to the scheme. *Patsy,* 457 U.S. at 509-511. . . The exhaustion scheme provided in § 1415 of the IDEA establishes "elaborate and highly specific procedural safeguards," evidencing that "Congress placed every bit as much emphasis upon compliance with procedures . . . as it did upon the measurement of the resulting IEP against a substantive standard." *Rowley*, 458 U.S. at 205. Like that under the APA or the CRIPA, the IDEA's exhaustion scheme was carefully designed to balance the individual complainant's interest in retaining prompt access to a judicial forum and the countervailing institutional interests favoring exhaustion. *See Hoeft*, 967 F.2d at 1303 (discussing policies served by the IDEA's exhaustion requirement); *cf. McCarthy,* 503 U.S. at 145-149 (describing the balance of interests applicable in exhaustion determinations). ***Courts therefore may not, consistent with the intent of Congress, impose exhaustion requirements that "merely add additional steps not contemplated in the scheme of the Act."*** *Antkowiak v. Ambach*, 838 F.2d 635, 641 (2nd Cir. 1988) (holding that state could not conduct *sua sponte* review of unappealed due process hearing order); *Diamond v. McKenzie,* 602 F. Supp. 632, 639 (D.D.C. 1985) (holding that state may not "subject children and their parents to an additional step not required by the EHA"). (Ibid. pages 14-15) (emphasis added)

In *Porter*, while we had pursued due process against our LEA, w***e never brought a due process proceeding against CDE nor did the 9th Circuit require one, as nothing in IDEA's plain language or its exhaustion scheme requires it.*** The due process procedure was considered complete, administrative remedies were exhausted and as such, our case was appealable into federal court. No further step was necessary to require CDE to comply with its obligations to enforce against our school district.

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67 http://archive.ca9.uscourts.gov/ca9/newopinions.nsf/ADB50EE10F052FC488256C4B007B949E/$file/0155032.pdf?openelement at page 14.

The Marcheses also had pursued due process against Dry Creek which had cross-filed against them and had a due process decision under which the Marcheses were "aggrieved." According to IDEA's plain language and its exhaustion scheme, they were not required to take any additional steps, including filing for due process against CDE in order for it to do its job under 20 U.S.C. §1412.[68]

When CDE filed its Motion to Dismiss, it had access to the *Porter* case law and analysis, in fact more directly than most, as CDE was the SEA defendant in *Porter*. Instead of examining the 9th Circuit's analysis in a case in which it had been directly involved and acknowledging its failure to comply with IDEA's obligations and California's Education Code, CDE set about crafting a new and novel legal theory based on IDEA at §1415(l), but intentionally misconstruing it to convince the Court the Marcheses should be forced to surmount additional hurdles beyond IDEA's exhaustion scheme. Rather than point to precedent in its own backyard and admit it was repeating past behaviors for which it was previously taken to task, CDE instead attempted to divert attention from its current noncompliance by misrepresenting the law through citation to inapplicable and outdated cases from across the country.

California's Documentary Record Regarding Exhaustion

In light of its obligation to ensure FAPE to California's students, notice to their parents of their rights under the law, and CA's responsibility to ensure LEAs are sufficiently knowledgeable about IDEA to comply with it, CDE of all California's agencies, should not be confused about what constitutes exhaustion. CDE's documents and public website confirm it is, in fact, very much aware of what constitutes exhaustion under the IDEA, further demonstrating that CDE's assertion in its Motion to Dismiss of its "novel legal theory" which required exhaustion of administrative remedies against an SEA was a purposeful strategy to steer the court off track and thereby avoid accountability for its own failure to comply with the law.

Notice of Procedural Safeguards

The IDEA provides that a State is eligible for assistance if it submits a plan which provides assurances to the federal government that it has in effect policies and procedures to ensure the State meets certain conditions, including:

[68] Beyond procedures in 20 U.S.C. §1415, the only other provisions of IDEA where an SEA's fulfillment of its obligations are discussed are at 20 U.S.C. §1412, State Eligibility and 20 U.S.C. §1416, Monitoring, Technical Assistance and Enforcement. The former outlines a state's requirements for eligibility for assistance, the latter sets forth procedures for enforcement by U.S. DOE. Nowhere in the statute is there language setting forth a process or remedial scheme through which parents can enforce against SEAs who fail to comply with IDEA's requirements. Such enforcement is only available through 20 U.S.C. §1415(l) which provides resort to the courts once subparts (f) and (g) are complied with.

Procedural Safeguards.

In General. Children with disabilities and their parents are afforded the procedural safeguards required by Section 1415. (20 U.S.C. §1412(a)(6))

20 U.S.C. §1415(d) requires that parents are provided a copy of California's Procedural Safeguards Notice. The contents of this Notice are set forth at §1415(d)(2)(a) – (l), and in relevant part provide:

> **(2) Contents**. The procedural safeguards notice shall include a full explanation of the procedural safeguards, written **in the native language of the parents** (unless it clearly is not feasible to do so) and **written in an easily understandable manner**, available under this section and under regulations promulgated by the Secretary relating to–. . .
>
> (E) the opportunity to present and resolve complaints, including–
> (i) the time period in which to make a complaint;
> (ii) the opportunity for the agency to resolve the complaint; and
> (iii) the availability of mediation;
> (F) the child's placement during pendency of due process proceedings;. . .
>
> (I) due process hearings, including requirements for disclosure of evaluation results and recommendations;
> (J) State-level appeals (if applicable in that State);
> (K) civil actions, including the time period in which to file such actions; and
> (L) attorneys' fees.

IDEA's regulation 34 CFR §300.504 provides even more specific language regarding what parents should be told about their opportunity to present and resolve complaints, including the due process procedures:

> §300.504 Procedural safeguards notice. . . .
>
> (c) Contents. The procedural safeguards notice must include a full explanation of all of the procedural safeguards available under §300.148, §§300.151 through 300.153, §300.300, §§300.502 through 300.503, §§300.505 through 300.518, §300.520, §§300.530 through 300.536 and §§300.610 through 300.625 relating to-. . .
>
> (5) Opportunity to present and resolve complaints through the due process complaint and State complaint procedures, including—
> (i) The time period in which to file a complaint;
> (ii) The opportunity for the agency to resolve the complaint; and

> (iii) The **difference between the due process complaint and the State complaint procedures**, **including the jurisdiction of each procedure, what issues may be raised,** filing and decisional timelines, and relevant procedures; . . .
>
> (7) The child's placement during the pendency of any due process complaint; . . .
>
> (10) Hearings on due process complaints, including requirements for disclosure of evaluation results and recommendations;
> (11) State-level appeals (if applicable in the State);
> (12) Civil actions, including the time period in which to file those actions; and
> (13) Attorneys' fees.

As the "Procedural Safeguards Notice" is how parents are informed of their rights, as well as the processes they must follow in order to pursue such rights, any process that is obligatory, such as exhausting administrative remedies prior to proceeding into federal court, would have to be documented there to ensure parents have the requisite notice of such a process and to ensure the SEA has complied with its obligations under 34 CFR §300.504 requiring that it provide such notice.

California's Procedural Safeguards Notice is found on CDE's Quality Assurance website at http://www.cde.ca.gov/sp/se/qa/documents/pseng.pdf. This document, at pgs. 6 - 9 discusses "How Disputes Are Resolved" and due process procedures in detail. The State Complaint Procedures under 34 CFR §§300.151-300.153 are at pg. 12.

Both 20 U.S.C. §1415 and 34 CFR §300.504 confirm that the procedural safeguards notice is to provide "**a full explanation** of the procedural safeguards, written **in the native language of the parents . . .** and **written in an easily understandable manner**, available under this section and under regulations promulgated by the Secretary." Therefore, if families are obligated to pursue due process against an SEA to ensure it complies with its obligations under 20 U.S.C. §1412, such a requirement would have to be set forth in California's Procedural Safeguards form in an easily understandable manner. This is particularly true since 34 CFR §300.504 specifically provides that the procedural safeguard notice had to explain "The **difference between the due process complaint and the State complaint procedures**, including the jurisdiction of each procedure, what issues may be raised, . . ." etc. 34 CFR §300.504(c)(5)(iii).[69]

[69] A model form made available by the U.S. Department of Education can be accessed at idea.ed.gov at http://idea.ed.gov/download/modelform_Procedural_Safeguards_June_2009.pdf. *See*, pgs. 14, 18-20. Note that the language of this form confirms the parties to such complaints are parents and school districts and that it reflects no requirement for bringing a due process proceeding against an SEA.

The language of California's Procedural Safeguards form on its Quality Assurance website tracks the language of §1415, discussed above, in describing the parties to such a proceeding:

> "Prior to filing for a due process hearing, the school district shall be provided the opportunity to resolve the matter by convening a resolution session, which is a meeting between the parents and the relevant members of the IEP team who have specific knowledge of the facts identified in the due process hearing request. (20 *USC* 1415[f][1][B]; 34 *CFR* 300.510)"

There is no terminology used on this website that indicates a family is obligated to file for due process ***against the SEA*** to ensure that it complies with its obligations under the IDEA. Therefore, CDE cannot claim to have provided any notice of such a requirement.

In addition, CDE's Notice of Procedural Safeguards, at page 12, states:

> To obtain more information about dispute resolution, including how to file a complaint, contact the CDE, Special Education Division, Procedural Safeguards Referral Service, by telephone at (800) 926-0648; by fax at 916-327-3704; or by visiting the CDE Web site at http://www.cde.ca.gov/sp/se.[70]

The facts documented in Appendix 1 and reflected in Appendix 4 documents confirm the Marcheses had regular and extensive communication with CDE staff, including written communications and numerous telephone conversations with Bobbi Pooley, Ana Marsh, Nan Jackson, Susan Westaby, Paul Lacey, and Ava Yajima.[71] Many communications pertained to the Marcheses' many complaints and their dissatisfaction with CDE's failure to enforce G.M.'s stay-put and Dry Creek's noncompliance. As California's Procedural Safeguards Notice states CDE could be contacted regarding "dispute resolution," were the Marcheses actually required to file a due process complaint against CDE to obtain enforcement or to ensure CDE's accountability for its obligations to supervise, monitor and enforce against LEAs as part of IDEA's exhaustion requirements, CDE staff had plenty of opportunity to notify the Marcheses of such requirements. Nowhere in the record is there any indication CDE ever did so.

CDE attorneys did discuss due process and exhaustion with the Marcheses. One CDE attorney, Paul Lacey, had discussions in the context of the Marcheses' claim to CDE and OAH regarding G.M.'s math services (OAH dismissed the claim and CDE did

[70] The website reference http://www.cde.ca.gov/sp/se/ navigates to CDE's main page, from which the "Quality Assurance" page discussed above can be accessed.

[71] During the period March 2010 to July 2010, the Marcheses wrote numerous letters to CDE insisting that the SEA enforce against Dry Creek and regularly inquiring about the status of CDE's enforcement efforts. Given the number of such communications, most of these documents are not included in Appendix 4, but can be made available upon request.

not open a compliance complaint regarding the matter). Mr. Lacey never told the Marcheses they needed to file for due process against CDE in order to get CDE to comply with its IDEA obligations and in fact actually told them they had "exhausted" with regard to that issue, so that the issue of "exhaustion" was discussed.

The Marcheses and their advocate Michael Rosenberg also communicated with Ava Yajima regarding the Marcheses' appeal into federal court. Mr. Rosenberg spoke with Ms. Yajima in March 2010 when she claimed the Marcheses had to file an appeal in order for CDE to enforce G.M.'s current placement. At no time did Ms. Yajima indicate the family should first file for due process against CDE if it was unhappy with CDE's failure to enforce or that such a filing was required under IDEA's exhaustion scheme.

In addition, CDE's May 27, 2010 letter to Dry Creek (Ex. 16) specifically acknowledged that "Mr. and Mrs. Marchese filed an appeal with the U.S. District Court, Eastern District of California regarding a decision rendered by the Office of Administrative Hearings, Special Education Decision on February 18, 2010," confirming CDE knew of the complaint the Marcheses had filed which listed CDE as a defendant. Were the Marcheses required to file a due process complaint against CDE to obtain enforcement or to exhaust administrative remedies under IDEA, CDE should have notified them of such a requirement, so that they could have complied with such a requirement. CDE did not do so.

In July 2010, Ms. Yajima communicated with the Marcheses and Dry Creek about pursuing due process with regard to the stay-put placement, and urged them both to file for due process regarding that issue. Dry Creek filed against the Marcheses and the issue of stay-put was addressed, so that again, exhaustion was accomplished. At no time during this process did Ms. Yajima or anyone at CDE tell the Marcheses they had to file for due process against CDE, even though by this time CDE had received the Marcheses First Amended Complaint again naming CDE as defendant, and had discussed and communicated with the Marcheses directly about due process, so that there was ample opportunity to inform them of such a requirement.

Given CDE's obligation to ensure parents have notice of their procedural safeguards, including due process requirements, were the Marcheses required to pursue due process against CDE for it to enforce or comply with its obligations under IDEA, CDE was obligated to inform the Marcheses of the requirement to pursue due process against CDE, particularly once CDE knew it was a defendant in the Marcheses complaint. CDE said nothing and was either remiss in its duties to the Marcheses (and to all California families given the absence of ANY information about such an exhaustion requirement) or CDE was stonewalling, planning to hoodwink the Marcheses (and the Court) with its "novel" claim the Marcheses were required to file for due process against CDE in order to "exhaust administrative remedies" under the IDEA.

November 5, 2010 Fred Balcom Letter

Another CDE document which disproves CDE's claim that parents are required to bring a due process complaint against CDE to "exhaust administrative remedies" before CDE can be held accountable for its obligations under the IDEA, is a November 5, 2010 letter from Fred Balcom (CDE's Director of Special Education) regarding continuous delivery of special education under AB 3632. In his letter, Mr. Balcom makes several statements:

> "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. . .
>
> "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. . .
>
> "I advise LEAs to inform their student's parents and guardians that although the LEA cannot control the actions of a CMH agency, parents and guardians have the right to file a request for a due process hearing against the CMH agency. In addition, a student's parents or guardians may file a special education due process complaint and name either or both the CMH agency and the LEA as parties to the complaint." **http://www.cde.ca.gov/sp/se/lr/om110510.asp**

Nowhere in his letter did Mr. Balcom notify families they were required to bring a due process claim against CDE in order for it to "investigate and enforce corrective actions for any violations of state and federal laws and regulations pertaining to students with disabilities." Of note is Mr. Balcom's claim that CDE's "primary interest and responsibility" was to ensure continuation of vital services in a child's IEP. Unfortunately, CDE's self-interest in G.M.'s case meant it would fail to live up to this responsibility with regard to G.M.'s services and his IEP.

CDE Pamphlet on Special Education Complaint Process

Finally, a pamphlet on CDE's website provides general information to families with regard to the complaint process under IDEA, stating:

> Due process for students in special education is a procedure to use when there is a disagreement between the parents and the education agency regarding assessment, identification, or placement of a student. All requests for a due process hearing must be in writing to:

Office of Administrative Hearings (OAH)
Special Education Unit
2349 Gateway Oaks, Suite 200
Sacramento, CA 95833-4231
Phone: (916) 263-0880
Fax: (916) 263-0890

The pamphlet also states:

> The CDE, SED is responsible for monitoring all special education programs in the state and for investigating complaints at the state level.
>
> For further information, please contact one of the following offices in your area:
>
> 1. School District Director of Special Education
> 2. County Office of Education
> 3. SELPA
>
> You may also call the CDE, SED, Procedural Safeguards Referral Service, at (800) 926-0648, or visit the CDE's Web site at http://www.cde.ca.gov/sp/se/qa/

http://www.cde.ca.gov/sp/se/qa/documents/cmplntproc.pdf

This pamphlet ostensibly gives parents notice and information about the complaint process, yet it contains no language which indicates parents must file for due process against CDE to ensure its accountability for obligations under the IDEA or that failure to do so means they have failed to "exhaust administrative remedies" under IDEA.

OAH Guide to Understanding Special Education Due Process Hearings

Also, there is a "Guide" provided by OAH on its website to assist parents in navigating due process, which includes the following statements:

> "Definitions of terms used in the guide: **. . .** The term "school district" includes local educational agencies, which includes all educational agencies involved in educational decisions regarding a student with a disability, such as school districts and county offices of education. The term "school district" also may include a county mental health department if it provides services to a student with a disability, a special education local plan area (SELPA) or a charter school. The term "party" means a person or entity (a school district, for example)

> involved in a due process proceeding that is affected by its actions or outcomes." (page v)

Under "What is the Office of Administrative Hearings (OAH)?" the "Guide" states:

> "The Special Education Division provides dispute resolution services in California for special education due process proceedings. OAH conducts hearings, mediation, and settlement services throughout the state to parties involved in special education disputes, including parents of students with disabilities, school districts, special education local plan areas (SELPAs), county mental health departments and charter schools. . . " (page vi)

There is no reference in this "Guide" to the "state education agency." However, a word search of this "Guide" for the term "state" (searching for references to "state education agency") and "exhaust" resulted in the following references: [72]

- If you disagree with the judge's findings, you may file an appeal within 90 days to **state** or federal court. (Page 2)

- If one of the parties disagrees with the written decision, due process includes the right of the party to appeal the decision to **state** or federal court for review. (Page 5)

- If you do not agree with the decision and want to challenge it, you may file an appeal in federal or **state** court within 90 days from the date the decision is issued. (Page 49)

- Special education law comes from the *Individuals with Disabilities Education Act* (IDEA), a federal law that provides **states** with special education funding if certain conditions are met. The IDEA begins at title 20 United States Code section 1400. The IDEA sets forth the categories of disability that qualify an individual for special education, the responsibility of school districts and others to provide a free appropriate public education, the rights and responsibilities of parents or guardians, the types of placements and services that may need to be provided for students, and the procedures that apply when there is a dispute about special education eligibility or services. The United **States** Department of Education, which oversees giving federal money to the states for special education, has also developed regulations that apply to the implementation of the IDEA. The regulations begin at title 34 Code of Federal Regulations, part 300.1.

[72] There were no references to the term "exhaust".

The **state** of California has its own set of statutes and regulations about special education. The state laws and regulations are generally consistent with the federal laws. They are found in the California Education Code, beginning at section 56000, and in title 5 of the California Code of Regulations, beginning at section 3000. The special education sections of the California Code of Regulations were developed by CDE to apply to the implementation of the *IDEA*. Links to the California statutes and regulations can be found on the OAH and CDE Web sites. (Page 52)

- As a general rule, the decisions of the Supreme Court of the United **States** must be followed by everyone, making them the most persuasive. The same is true for the Ninth Circuit Court of Appeals cases since California is part of that circuit, and federal district courts in California. However, decisions of circuits other than the Ninth Circuit of the United **States** Court of Appeals and federal district courts in California are highly persuasive; cases from the United **States** District Court are less persuasive than the above, and even less so when they are not published. (Page 53)

- OSEP US Office of Special Education Programs - A federal office charged with assuring that the various **states** comply with IDEA. (Page 60)

- **SEA State Education Agency** i.e., California Department of Education - Means the **state** board of education or other agency or officer primarily responsible for the **state** supervision of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the governor or by **state** law. (20 U.S.C. § 1401(32); 34 C.F.R. § 300.41.) (Page 62)

http://www.documents.dgs.ca.gov/oah/SE/SE%20Guide%20to%20understanding%20DPH.pdf

Although OAH's "Guide" relates to due process procedures established pursuant to California's duties under the 20 U.S.C. §1412, and ostensibly gives parents notice and information about such procedures, ***it contains no information or reference which indicates parents must file for due process against CDE to ensure it complies with its obligations under IDEA or that a failure to file for due process against CDE means the family has failed to "exhaust administrative remedies" under IDEA.***

Clearly, CDE's notice of procedural safeguards as well as its public website documents do not provide "notice" of any requirement that parents must bring due process proceedings against CDE for it to be held accountable for its obligations under IDEA of that failure to do so means they haven't exhausted administrative remedies.

As noted in Supplemental Point #1 above, presuming Congress meant what it said in the statute, the U.S. Supreme Court in its decision in *Arlington Central School Dist. Bd. Of Educ. V. Murphy* (548 U.S. 291, 126 S.Ct. 2455 (2006)), found that rights and obligations under the IDEA are strictly limited to those set forth in the plain language of the statute. This would seem to indicate that unless IDEA plainly states such an obligation so parents can have proper notice of it, parents are not to be held to such a requirement.

If as CDE claimed, parents that they are obligated to pursue administrative remedies against the SEA before they can bring an action to hold them accountable for their IDEA obligations, parents cannot be required to do so unless they are given notice of such a requirement by CDE. The reality is that CDE cannot give such notice because nothing in the IDEA provides such a requirement. That CDE is fully aware of that is demonstrated by the position CDE regularly takes in cases filed against it in OAH.

CDE in OAH

What is perhaps most disturbing for parents of children with disabilities is that while they assume their LEA and CDE both comply with the law, as well as their assurances of compliance, these public agencies are actually doing everything possible, including lying to federal court judges, to avoid all accountability for the obligations for which they have received untold millions in state and federal tax dollars.

While CDE knowingly represented to the federal court in the Marchese case that "Before filing a federal lawsuit, plaintiffs were obligated to resolve their educational claims with respect to the CDE through due process procedures" (Motion, at pg. 2, Lines 9-12; *see also* Motion, pg. 8, Lines 8-17), it was regularly and consistently taking the exact opposite and contradictory position before OAH, and seeking dismissal from due process proceedings filed with that agency by parents who were seeking accountability for the failure of their LEA to ensure the delivery of services to their student.

Attached as Ex. 75.1 – 75.4, are four separate Orders from OAH, each of which pertain to the CDE's dismissal from due process proceedings brought by parents and caregivers on behalf of students. The following excerpts reference relevant language from each order reflecting CDE's request for dismissal due to OAH's lack of jurisdiction.

OAH Case No. 2009060483 – Parents on Behalf of Student v. LAUSD and CDE (Ex. 75.1)

On June 16, 2009, Katherine Starn Legrand, Deputy General Counsel for CDE, filed a Motion to Dismiss CDE as a party (Motion). On June 18, 2009, District filed a Non-Opposition to CDE's Motion. OAH has received no response from Parents.

Student's Complaint alleges that CDE violated Student's right to a FAPE by "denying appropriate funding to the District to provide services." Student also asserts that CDE is liable for the acts of the District. All of the factual allegations in the Complaint relate to District's alleged failure to comply with a March 12, 2009 Settlement Agreement between Student and District. ***Student fails to allege facts to establish that: CDE is a public agency providing special education services to Student; and CDE made decisions regarding Student's special education program. Accordingly, CDE is not an appropriate party***.[73]

OAH Case No. 2010110533 – Parents on Behalf of Student v. LAUSD, Valley Charter School and CDE (Ex. 75.2)

On December l4, 2010, the attorney on behalf of the California Department of Education (CDE) filed a motion to dismiss CDE as a party to this complaint (motion), ***alleging that it is not an educational agency responsible for providing special education and related services to Student***, nor is it mentioned anywhere in the factual contentions of the complaint.

In this matter, ***Student names CDE as a party to his complaint. It appears that this is due to CDE's supervisorial oversight of special education programs as the Statewide Educational Agency (SEA) under the Individuals with Disabilities Education Act (IDEA), as the SEA has the responsibility for the general supervision and implementation of IDEA. (20 U.S.C. § 1412(a)(11)(A); 34 C.F.R. § 300.149(a)(2006).)*** The complaint, however, raises no claims against CDE which indicate that it was involved in Student's IEP process or that it specifically has denied Student a FAPE. In fact, the complaint provides no factual allegations whatsoever against CDE, and requests no relief from CDE either.

Additionally, the IDEA defines and limits the hearing officer's jurisdiction in due process proceedings. The issue of CDE's oversight of local education agencies to ensure their compliance with relevant special education law and regulations is outside the scope of OAH's jurisdiction.

Accordingly, CDE is not a necessary or proper party to the complaint.[74]

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http://www.documents.dgs.ca.gov/oah/SEHO_Orders/2009060483%20Order%20Granting%20Motion%20to%20Dismiss%20CDE%20as%20a%20Party%20072209.pdf#search=2009060483&view=FitH&pagemode=none

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http://www.documents.dgs.ca.gov/oah/SEHO_Orders/2010110533%20Order%20Granting%20Motion%20to%20Dismiss%20CDE.pdf#search=2010110533&view=FitH&pagemode=none

OAH Case No. 2010110885 – Educational Rights Holder on Behalf of Student v. Saddleback Valley Unified School District, OCHCA and CDE (Ex. 75.3)

On December 9, 2010, CDE filed a Motion to Dismiss itself as a party to the action, alleging that it is not a responsible educational agency.

CDE seeks to be dismissed as a party as it asserts that it is not a public agency responsible for providing Student with special education services. In the complaint, ***Student alleges that CDE is an appropriate party because of its supervisorial oversight of special education programs as the Statewide Educational Agency (SEA) under the IDEA as the SEA has the responsibility for the general supervision and implementation of IDEA. (20 U.S.C. § 1412(a)(11)(A); 34 C.F.R. § 300.149(a)(2006).)*** The complaint contends that CDE is an appropriate party because of the District's and OCHCA's refusal to provide Student with mental health services, especially continued funding for her placement in a residential treatment center, because of the Governor's October 8, 2010 veto of state funding to county mental health agencies to provide mental health services for special education students pursuant to Government Code sections 7570, et seq. ***Student contends that because the District and OCHCA refuse to comply with their legal duty to provide Student with a FAPE due to the Governor's veto, the ultimate responsibility falls upon CDE to provide Student with a FAPE.***

The complaint raises no claims against CDE that it denied Student a FAPE and seeks no remedies from CDE, other than for CDE to exercise its supervisorial authority to ensure that Student receives a FAPE. Further, the complaint makes no claims that CDE is a public agency involved in the provision of special education services or decisions regarding Student.*.** . . In this case, Student has a responsible adult who resides within the District boundaries, and the District has provided Student with special education services. ***Accordingly, CDE is not a necessary or proper party to the complaint, and its motion to dismiss as a party is granted. [75]

OAH Case No. 2010120931 – Parent On Behalf of Student v. Irvine Unified School District and CDE (Ex. 75.4)

A party has the right to present a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a) [party has a right to present a complaint regarding matters involving proposal or refusal to initiate or change the identification, assessment, or educational placement of a child; the provision of a FAPE to a child; the refusal of a parent or guardian to consent to an assessment of a child; or a disagreement between a parent or

75 http://www.documents.dgs.ca.gov/oah/SEHO_Orders/2010110885%20Order%20Granting%20Motion%20to%20Dismiss.pdf#search=2010110885&view=FitH&pagemode=none

guardian and the public education agency as to the availability of a program appropriate for a child, including the question of financial responsibility].) ***The jurisdiction of OAH is limited to these matters.*** [citation omitted] ***OAH does not have jurisdiction to entertain claims based on section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 701 et seq.[section 504]) or section 1983 of Title 42 United States Code [section 1983].)***[76]

These cases demonstrate that before, during and after CDE filed and argued its Motion to Dismiss in the Marchese case, claiming the Marcheses had to pursue due process proceedings against it, it was taking a wholly contradictory position with OAH, i.e., that CDE wasn't an agency that handled education-related issues and that OAH had no jurisdiction over CDE. This not only shows CDE was speaking out of both sides of its mouth with regard to its obligations under the law, it took contradictory positions in two separate jurisdictions to convince each jurisdiction to relieve CDE of its obligations under the law. In other words, CDE was seeking to avoid accountability altogether!

Instead of supervising the LEA or in any way taking steps to ensure the student received services, CDE would essentially turn and run, heading out the door as it called "Not my job!" over its shoulder. We are left to wonder: ***what exactly is CDE doing***? While CDE seeks and accepts federal funds based on its assurances of compliance with the law, CDE misrepresents the law it is sworn to uphold to the federal court to obtain dismissal from that court so it can avoid accountability for failing to hold an LEA accountable. In so doing it has failed to live up to its most fundamental obligation, i.e., ensuring a student receives appropriate educational services. As discussed below with regard to the *Porter* case, this is not the first time CDE has done this.

<u>Exhaustion Met Both Procedurally and Substantively</u>

Exhaustion of administrative remedies under 20 U.S.C. §1415(l) was clearly met in the Marcheses' case, both procedurally and substantively, and the purpose of exhaustion, i.e., to give the SEA notice of and the opportunity to resolve problems complained of, was also met.

CDE was given more than sufficient notice of the problems the Marchese family was facing as a result of Dry Creek's noncompliance and related issues regarding G.M.'s education. Also, CDE had more than ample opportunity to resolve such issues and keep the dispute between the Marcheses and Dry Creek from going into court.

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76 http://www.documents.dgs.ca.gov/oah/seho_decisions/2010120931%20Order%20Granting%20Motion%20to%20Dismiss.pdf

Instead, CDE chose not to do anything to resolve the issues and in fact was instrumental in forcing the dispute into administrative and federal jurisdictions.

As well, under 34 CFR §§300.151-153 and CDE's complaint resolution process, the Marcheses' federal court complaint served on CDE itself should have been considered a "complaint" which CDE should have opened, investigated and resolved.

The 9th Circuit's analysis in *Porter* is helpful:

> Our statement in *Hoeft* that the CRP may serve as a substitute for due process system exhaustion is consistent with the traditional exception to exhaustion requirements based on futility or inadequacy. *See Honig*, 484 U.S. at 327. Where the challenge is to a facially invalid policy, and the state refuses to alter the policy after a CRP complaint, then further exhaustion may be excused because "the administrative body is shown to be biased or has otherwise predetermined the issue before it." *McCarthy*, 503 U.S. at 148. Exhaustion of a CRP may also render the due process hearing futile where all the educational issues are resolved, leaving only issues for which there is no adequate administrative remedy. *See Witte v. Clark County Sch. Dist.*, 197 F.3d 1271, 1275-76 (9th Cir. 1999). Thus, we agree with the statement in *Hoeft* that there may be instances when exhaustion of the CRP may be a *substitute* for exhaustion of the due process hearing. *Cf.* Office of Special Education Programs Memorandum 94-16, 21 Disab. Educ. L. Rep. 85 (March 22, 1994) (describing the CRP regulations as establishing a process that may be used "in lieu of the due process hearing system"). (*Porter,* at pg. 20)

The Marchese federal court Complaint challenged CDE's facially invalid policy of failing to enforce against noncompliant school districts, in this case when that school district failed to implement G.M.'s current educational placement during judicial proceedings arising out of a due process (20 U.S.C. §1415(j)). CDE refused to alter that policy after the Marcheses' numerous compliance complaints and its actions, set forth in this document and the Appendix 1, demonstrate that CDE is "biased or has otherwise predetermined the issue before it."[77]

[77] CDE's relationships with LEA legal counsel only further confirm this bias or predetermination. As well, CDE's failure to enforce rendered any due process proceedings futile, for there was "no adequate administrative remedy" under such a due process. OAH had no authority to make CDE do anything, particularly as it really exists only by virtue of, and at the behest of, CDE. *See,* *http://www.documents.dgs.ca.gov/oah/SE/Scope%20of%20Work%20CDE-OAH%20IA%202008-2011.pdf*.

CDE Has Been Here Before

This is not the first time CDE has engaged in this sort of conduct nor the first time CDE has aligned with an LEA against a student and his family, contrary to both agency's obligations. As discussed above, ten years ago our family pursued due process against our school district and exhausted administrative remedies. After waiting a year for our district to implement the decision, we filed a complaint in federal court against the LEA and CDE.

The LEA filed a Motion to Dismiss and CDE filed "State Defendants' Joinder in Local Defendants' Motion to Dismiss" claiming we had failed to exhaust administrative remedies by failing to utilize CDE's CRP. Two months later, the District Court, clearly believing the agencies, dismissed our case against both CDE and the LEA, requiring us to spend the next two years pursuing an appeal in the 9th Circuit while our son was without critical educational services.

Fortunately, the U.S. Department of Education and U.S. Justice Department filed an amicus brief with the 9th Circuit on our son's behalf, clarifying that IDEA's provisions regarding due process and exhaustion do not require the additional steps CDE claimed. [78] (In light of CDE's annual assurances that it is complying with IDEA as a condition of its receipt of federal funds, it is ironic such clarification was even required).

As indicated above, the 9th Circuit eventually clarified exhaustion, and the procedures CDE is supposed to be operating under, overturned the District Court's dismissal and reinstated our son's case. Eventually, both the LEA and CDE were held accountable by the U.S. District Court and although our case settled in 2005, the Court retained jurisdiction over both the LEA and CDE.

That CDE, still under that federal court's jurisdiction would once again attempt to mislead a federal court and fail in its accountability to its students demonstrates that it is an agency which believes it can fail to comply with and misrepresent the law with impunity and *be accountable to no one.* California children such as G.M. suffer as a result of CDE's lack of compliance with its obligations under the IDEA and its willing collaboration with LEAs against students and their families, all the while it continues to seek and accept federal funds, as well as California tax dollars for the job that it is failing to do.

[78] http://www.justice.gov/crt/about/app/briefs/porter.pdf

As documented in Appendix 1 with regard to *A.C. v. Schwarzenegger,* CDE clearly knows its obligations and how to comply with them. In that case it took steps to ensure continuity of services to students affected by cuts to AB 3632 and afforded those students all the protections IDEA and the State of California can extend, without requiring unnecessary exhaustion or due process proceedings against CDE (and in fact without requiring *any exhaustion at all*). This demonstrates that CDE picks and chooses when to comply and when not to. Why CDE failed to do so for G.M. is unclear. Whatever the reason, its actions were intentional, unconscionable and despicable, as CDE left G.M. without recourse, without funded services, with no state education agency taking accountability and his parents forced to pursue further unnecessary judicial proceedings in the 9th Circuit.

Dismissal of Marchese Federal Complaint Claims vs. CDE

On January 3, 2011, the U.S. District Court, E.D. California dismissed the Marchese complaint against CDE. (*See,* Ex. 45) The Court's order seems to confirm it accepted the accuracy of CDE's characterizations and citations regarding IDEA and the requirements of its exhaustion scheme. However, the Court's order also misconstrues IDEA's language and case law. [79] For example:

At page 11, Lines 23 – 26, the Marchese Court stated:

> "The IDEA states that administrative remedies and judicial review applies to "[a]ny State educational agency, State agency, or local educational agency that receives assistance under this subchapter[.] 20 U.S.C. § 1415(a)."

This is an inaccurate and incomplete reading of §1415(a), which takes the language of the statute out of context. 20 U.S.C. §1415(a) actually reads as follows:

> **(a) Establishment of Procedures**. Any State educational agency, State agency, or local educational agency that receives assistance under this part shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies.

[79] This fact alone highlights the significance of CDE's failure to utilize its expertise in resolving the issue of Dry Creek's noncompliance. Had CDE done what it is required to do under IDEA, there would have been no need to ever involve the federal court.

The Court misstated §1415(a) in a manner that extends the requirement of "exhaustion" beyond the law's plain language or intent to apply to those agencies that are merely required to have policies and procedures in place. This inaccurate citation is relied on by the Court to come to its conclusion that IDEA's administrative remedies must be exhausted with an SEA. Just because an SEA is among those responsible for establishing and maintaining procedures (such as due process and the CRP) does not mean it is a required part of IDEA's statutory exhaustion scheme.

The Marchese Court also found that "The IDEA's exhaustion requirement applies to any civil action brought by a plaintiff under "the Constitution, the Americans with Disabilities Act, title V of the Rehabilitation Act or other Federal laws protecting the rights of children with disabilities" that "seek[s] relief that is also available under" the IDEA. 20 U.S.C. § 1415 (l)." (Ex. 45, Page 11, Line 26 – Page 12, Line 3)

Although this is an accurate **excerpt** of the language of §1415(l), it is incomplete and fails to consider exhaustion in the context of a complete reading of §1415(l), which includes procedures under subparts (f) and (g).

> **"Rule of Construction.** Nothing in this title shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this part, *the procedures under subsections (f) and (g) shall be exhausted to the same exten*t as would be required had the action been brought under this part."

As discussed earlier, neither subpart (f) or (g) requires a student or his family to exhaust administrative remedies against a State education agency in order for that agency to be held accountable to its obligations under the law.

The Marchese Court also noted "The dispositive question in determining whether exhaustion is required for a particular claim "is whether the plaintiff has alleged injuries that could be redressed to any degree by the IDEA's administrative procedures and remedies. If so, exhaustion of those remedies is required." *Robb v. Bethel School Dist. No. 403*, 308 F.3d 1047, 1050 (9th Cir. 2002)." (Ex. 45, pg. 12, Lines 10 – 15).

As subparts (f) and (g) confirm, IDEA's administrative procedures do not require due process or exhaustion against an SEA. Thus, "the administrative procedures and remedies" under IDEA are inapplicable for redressing CDE's failure to comply with its obligations under the law.

The Marchese Court cited to *Kutasi v. Las Virgenes Unified School Dist.,* 494 F.3d 1162, 1168 (9th Cir. 2007) for the proposition that "The [IDEA's] exhaustion requirement is not . . . a rigid one. Plaintiffs need not seek [an IDEA administrative] due process hearing where resort to the administrative process would either be futile or inadequate. But a party that alleges futility or inadequacy of IDEA administrative procedures bears the burden of proof." (Ex. 45, pg. 12, Line 4-10)

What is ironic is that while the Court ultimately concluded it was not futile for the Marcheses to pursue due process (*See,* Ex. 45 Order, pg. 14), in coming to its conclusion the Court ignored multiple examples the Order itself cited regarding the Marcheses' efforts to obtain CDE's assistance in resolving Dry Creek's noncompliance, including numerous allegations regarding the impact such noncompliance had on G.M.'s education:

> Four separate compliance complaints and eight violations of law among them. (Ex. 45, Pgs. 5 – 6),
>
> Plaintiffs' claims "arising out of . . . Defendants' failure to substantively enforce Plaintiffs' IDEA entitlements and other legal rights,. . . "
> (Ex. 45, pg. 6, Lines 22-23)
>
> Plaintiffs' argument that "[t]hese factual allegations establish that the State Defendants engaged in a policy or custom (of non-enforcement) that was the moving force behind the deprivation of the Plaintiffs' legal rights."
> (Ex. 45, pg. 6, Line 28 – pg. 7, line 3)
>
> "Plaintiffs explained at the hearing on Defendants' motion that they are alleging in the instant federal lawsuit that Defendants have a responsibility to supervise the District and to enforce the IDEA, and that Defendants have not fulfilled those duties. This argument indicates that all of Plaintiffs' claims against Defendants are based on the Defendants' alleged failure to supervise the District in a manner that ensured that the District provided G.M. with FAPE." (Ex. 45, pg. 7, Line 27 – pg. 8, Line 5)
>
> That "CDE and its Superintendent became aware through the process of receiving complaints from the Plaintiffs . . . , that the District was serially violating the law with respect to" Plaintiffs . . . (Ex. 45, pg. 8, Lines 12 – 15)
>
> That the Department already determined "in a CRP that the District was in violation of law," and then did nothing to enforce that determination. (Opp'n 31:8-15.)" (Ex. 45, pg. 13, Line 27 – pg. 14, Line 1).

The Court's recitation conclusively demonstrates futility, for had the Marcheses pursued due process against CDE it would have been a futile exercise since CDE's actions evinced a clear intent to fail or refuse to comply with its obligations to resolve Dry Creek's ongoing and persistent noncompliance.

At pages 12 and 13, the Marchese Court recounted CDE's assertions, including that "Defendants argue that Plaintiffs claims should be dismissed for failure to exhaust their administrative remedies because the CDE "was never individually named in the underlying request for due process[.]" (Mot. 9:17-18.)" (Ex. 45, pg. 12, Lines 17-20)

> Yet, the Court did not cite to where in CDE's papers this argument was supported with legal citation, nor itself cite to the IDEA to support this claim.

The Court further enumerated additional steps it believed the Marcheses could have taken:

> "Plaintiffs could have sought another due process hearing to force the [District] to obey the [CRP] order[s], or to force the [CDE] to require the [District] to obey the order[s]. M.O. v. Indiana Dep't of Educ., No. 2:07-CV-175-TS, 2008 WL 4056562, at *19 (N.D. Ind. 2008)." (Ex. 45, pg. 14, Lines 12-15)
>
> Plaintiffs could have filed for another due process hearing and "named as respondents both the [District], for failing to obey the [CRP] order[s], and the [CDE], for failing to make the [District] carry out the [CRP] order[s]." Id. (Ex. 45, pg. 14, Lines 16-19)
>
> "A purpose of requiring exhaustion of remedies is to provide state agencies an opportunity to resolve system defects without unnecessary judicial involvement. It is this opportunity that Plaintiffs denied Defendant [Department of Education] by failing to include the [CDE] in the initial dispute." Whitehead v. School Bd. for Hillsborough County, 932 F. Supp. 1393, 1396 (M.D. Fla. 1996). (Ex. 45, pg. 14, Lines 12-24)
>
> > Yet, the Court seemed to overlook the fact that the Marcheses had utilized ***every single administrative process IDEA provides***, giving CDE every possible opportunity to "resolve system defects without unnecessary judicial involvement," to no avail. It was also apparently unaware that CDE itself had caused the "unnecessary judicial involvement" of the Court by instructing Dry Creek to bring its motion regarding stay-put, rather than resolving the issue through enforcement.

Ironically, the Marchese Court then listed <u>additional examples</u> of the Marcheses turning to CDE for assistance which had CDE ignored:

"Plaintiffs also argue "exhaustion of the CRP may be a substitute for exhaustion of the due process hearing." (Opp'n 7:9-14.) Plaintiffs contend "[g]iven the extensive formal contact and communications Plaintiffs have had with State Defendants regarding the District's ongoing noncompliance, State Defendants have had ample notice and opportunity to take measures contemplated by [Cal. Code Regs. tit. 5,] § 4670 [, permitting the CDE to "use any means authorized by law to effect [the District's] compliance"]." Id. 17:12-15. Plaintiffs argue "the State of California [was] aware of the District's failure to implement the Plaintiffs' IDEA rights through the numerous letters and communications with the parents . . . , [and] the CDE itself issued orders and directives to the District ordering it to comply with CDE's orders, which orders have not been complied with even today[.]" Id.19:24-20:3." (Ex. 45, pg. 14, Line 25 – pg. 15, Line 10)

Then citing to *Porter,* the Marchese Court stated:

"[D]istrict courts may choose to require or to accept exhaustion of the [complaint resolution procedures] `as a substitute for exhausting IDEA procedures in challenges to facially invalid policies.'" *Porter v. Bd. of Trustees of Manhattan Beach Unif. Sch. Dist.*, 307 F.3d 1064, 1073 (9th Cir. 2002) (quoting *Hoeft v. Tucson Unif. Sch. Dist.*, 967 F.2d 1298, 1308 (9th Cir. 1992)). (Ex. 45, pg. 15, Lines 11-16).

Yet, the Marchese Court's citation was incomplete, and omitted the 9th Circuit's point:

> "The IDEA, however, does provide administrative appeal procedures to be pursued before seeking judicial review." *Id.*; *see* 20 U.S.C. § 1415. ***Where Congress has provided for the exhaustion of administrative procedures, Congress' intent "is of paramount importance . . . because Congress is vested with the power to prescribe the basic procedural scheme under which claims may be heard in federal courts." P****atsy v. Bd. of Regents*, 457 U.S. 496, 501 (1982)." *Porter,* at pg. 14.

More importantly, the Court ignored *Porter* at pages 19-20 where the 9th Circuit contemplated exhaustion through the CRP when due process was not applicable, as is the case here, stating:

"We stated that exhaustion is required even though due process hearing officers are not authorized to adjudicate questions of statutory compliance because "administrative exhaustion may be necessary to give the state a reasonable opportunity to investigate and correct such policies." *Id*. In accord with this rationale, we suggested that the filing of a CRP complaint may be sufficient to meet the exhaustion requirement "where the only purposes served by exhaustion

> are to notify the state of local noncompliance and to afford it an opportunity to correct the problem." *Id.* at 1308."

In addition to their due process through which the Marcheses exhausted administrative remedies, they also gave CDE "reasonable opportunity to investigate and correct" the LEA's policy of noncompliance, by using the CRP and obtaining multiple CCRs which confirmed Dry Creek's noncompliance. CDE could have, but didn't, correct Dry Creek's noncompliance. CDE could have, but didn't, hold Dry Creek accountable at any time during the process, despite the fact it is their obligation under the law. Under the 9th Circuit's language in *Porter,* where exhaustion is simply for the purpose of notifying the state of LEA noncompliance so that it can correct the problem, the filing of multiple CRP complaints by the Marcheses with CDE would have clearly met such an exhaustion requirement.

The Marchese Court also ignored the 9th Circuit's discussion of the CRP as a preferable alternative for resolving disputes, which would eliminate the need for due process altogether:

> "According to the Department, the CRP is intended to "*allow* [parents and school districts] to resolve differences without resort to more costly and litigious resolution through due process,". . . Assistance to States for the Education of Children With Disabilities, 64 Fed.Reg. 12,406, 12,646 (March 12, 1999) (comment) (emphasis added); *see also* Office of Special Education Programs Memorandum 00-20 (July 17, 2000) ("OSEP Memorandum 00-20") (describing CRP regulations as attempt to provide "a less costly and more efficient mechanism for resolving disputes than the impartial due process hearing system"); *cf. Lucht*, 225 F.3d at 1028-29 (describing CRP regulations)."

In other words, had CDE complied with its obligations under 34 CFR §§300.151 – 300.153 and resolved the Marcheses' complaints by ensuring meaningful remedies, and supervised, monitored and enforced Dry Creek's compliance, pursuant to its duties under 20 U.S.C. §1412, the Marcheses would never have had to resort to due process or go into federal court at all.

Finally, the Marchese Court stated "Nevertheless, the Ninth Circuit has held that in such circumstances another purpose of exhaustion is still relevant, "namely, giving the state an opportunity to fix the allegedly unlawful policy." *Christopher S.*, 384 F.3d at 1211. (Order, Page 15, Lines 24-27)

> But this was merely restating what the 9th Circuit stated in *Porter*, above at 1308. As the Marchese Court itself confirmed, CDE had had multiple opportunities to "fix the allegedly unlawful policy" and hold Dry Creek accountable to the stay-put, to require its compliance and to do its job and enforce its own orders. It

> failed to do so throughout the compliance complaint process, as well as through its interactions with Dry Creek and the Marcheses during 2009-2010. It apparently successfully convinced the Court it didn't have to do anything at all.

Where, as here, the statute provides a clear path for parents to follow, courts may not impose their own solutions in place of clear procedures in the law. Nor may such Courts lay down additional roadblocks for parents who have followed the law's procedures to obtain appropriate educational services for their child but who have been rebuffed by the agencies and challenged by LEA and SEA legal counsel who conjure up additional exhaustion requirements beyond the statute's plain terms. Families challenged by such actions by their LEA and SEA look to the Court to properly interpret the statute as it is written, not reinvent it or find in it new obligations Congress did not envision.

As the 9th Circuit noted in *Porter*: "When Congress provides a "detailed exhaustion scheme," courts generally lack discretion to add additional exhaustion requirements to the scheme. *Patsy,* 457 U.S. at 509-511" and "Courts therefore ***may not***, ***consistent with the intent of Congress, impose exhaustion requirements that "merely add additional steps not contemplated in the scheme of the Act***." *Antkowiak v. Ambach*, 838 F.2d 635, 641 (2nd Cir. 1988)." (*Porter,* pages 14-15) Unfortunately, despite the 9th Circuit's clear language, the Marchese Court did just that.

IDEA's Legislative History re: Exhaustion

The U.S. Department of Education and U.S. Justice Department's amicus brief in *Porter* confirms that further exhaustion and additional procedures are not permitted:

> "When Congress identifies with specificity the exhaustion requirements that must be met before a court obtains jurisdiction, ***courts are not permitted to impose additional requirements***. See *Darby* v. *Cisneros*, 509 U.S. 137, 146-147 (1993). On its face, *recourse to the state regulatory procedure administered by the California Department of Education to comply with the CRP regulations is* ***not a procedure under subsections (f) or (g) of Section 1415*** of the IDEA. Thus, the plain language of the IDEA makes unambiguous that the CRP procedures need not be exhausted before suit is filed to enforce the IDEA."
> (http://www.justice.gov/crt/about/app/briefs/porter.pdf , pg. 18)

Unfortunately, as the Court's Order demonstrates, often missing from analyses of "exhaustion" is a realistic application of the principle of "futility." Routinely, when courts apply this principle to the efforts parents have undertaken, as in the Marchese case or in *Porter,* courts routinely conclude that, despite clear evidence families have availed themselves of every *possible administrative procedure* and have made *every effort to*

assert their child's rights and involve the appropriate SEA, families still haven't sufficiently established it would be futile to pursue due process procedures.

However, IDEA's legislative history demonstrates it was Congress's intent that the bar of "futility" be set quite low. In amendment and passage of the Handicapped Children's Protection Act of 1985-1986 (following the Supreme Court's decision in *Smith v. Robinson*), in discussing amendments to 20 U.S.C. §1415(l) (specifically whether the IDEA contemplated 42 U.S.C. §1983 as a means of redressing the rights of handicapped children), the Report of the Committee on Education and Labor discussed the issues of exhaustion and futility, in the following manner:

> "Typically, a parent is required to exhaust administrative remedies where complaints involve the identification, evaluation, education placement, or the provision of a free appropriate public education to their handicapped child. However, ***there are certain situations in which it is not appropriate to require the use of due process and review procedures set out in section 615(b) and (c) of EHA before filing a law suit***.
>
> "These include complaints that: (1) it would be ***futile*** to use the due process procedures (e.g., ***an agency has failed to provide services specified in the child's individualized educational program*** (IEP) or ***an agency has abridged a handicapped child's procedural rights such as the failure to make a child's records available***); (2) an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law; (3) it is improbable that adequate relief can be obtained by pursuing administrative remedies (e.g., the hearing officer lacks the authority to grant the relief sought); and (4) an emergency situation exists (e.g., the failure to take immediate action will adversely affect a child's mental or physical health)."[80]

According to Congress, "it would be futile to use the due process procedures" if an LEA fails to implement a student's IEP by providing services or if an LEA fails to produce education records. This is presumably so, because an LEA which has already refused to comply with IDEA's most basic provisions most likely will not comply when ordered to do so by a hearing officer.

If Congress's standard were the norm, instead of the impossible standard utilized by federal courts, parents across the United States would be able to file claims directly in federal court. In light of the noncompliance that is the norm today, the result would be federal courts flooded with complaints by parents across America whose children's IEPs are regularly unimplemented. Perhaps then the desperate state of

[80] 99th Congress *1st Session* – House of Representatives/Report 99-296, HANDICAPPED CHILDREN'S PROTECTION ACT OF 1985, Committee on Education and Labor Report with Supplemental Views (H.R. 1523), at page 7

special education in America would be obvious and courts and the Congress would take meaningful action against noncompliant LEAs and SEAs.

Until that day, parents such as the Marcheses are left without recourse, excluded from the courts, the only avenue of redressing student grievances pursuant to 20 U.S.C. 1415(l), by the courts themselves. In the meantime, the LEA continues to run amuck, egged on by school district legal counsel who profit in the process, while CDE joins them in their misadventure.

Conclusion

Because CDE failed to enforce against Dry Creek, and in fact undertook efforts on Dry Creek's behalf, directing it first to OAH and then to the federal court in pursuit of a means of setting aside its obligations, CDE actually abdicated its responsibility, and its role of "expertise," by directing Dry Creek to file a motion with a federal judge inexpert in special education who looked to CDE for expertise, but who instead was fooled by CDE which chose to mislead the Court about IDEA's rules of exhaustion.

Instead of complying with its obligations, CDE litigated against the Student it is supposed to ensure receives services and FAPE, filing a Motion to Dismiss based on inapplicable and distinguished cases from circuits clear across the country. Its purpose was to avoid accountability under IDEA and it assisted the LEA in avoiding its obligations as well. CDE obtained dismissal by intentionally misrepresenting the law of exhaustion, when its most fundamental obligation is to uphold that law, and by claiming it didn't have sufficient notice of issues involved or the opportunity to resolve them when letters from CDE attorneys show such notice and more than sufficient opportunity. (*See,* Ex. 76, Letter, Gregory Rousseve, CDE Deputy General Counsel to Kevin Marchese, dated September 17, 2009). This is not the first time CDE has engaged in such deceptive practices. Most likely, it will not be the last. CDE must explain and be held accountable for its actions.

By accepting CDE and Dry Creek's misrepresentations of facts and law at face value, the Court allowed itself to be duped into setting aside IDEA's procedural protections of stay-put and dismissing CDE, relieving that agency of its responsibility and accountability for Dry Creek's noncompliance, despite specifically refusing to do so in the December 6, 2010 hearing on stay-put. (*See,* Ex. 37, pg. 51, Line 23 – pg. 52, Line 1). The Court also ignored clearly articulated precedent in the 9th Circuit in *Porter* and in *Joshua A.,* not to mention G.M.'s rights under the law.

Since the Court's December 10, 2010 Order on stay-put and its dismissal of CDE on January 3, 2011, G.M.'s educational placement has been eliminated by Dry Creek based on its claim that the December 10 Order allows it to remove the provider and not replace her. This has been done with CDE's apparent cooperation, leaving Dry Creek accountable to no one.

What Dry Creek, CDE and now the Court have done is the opposite of what Congress intended. The Marcheses have been forced to undertake a burden that Congress expressly intended to avoid:

> "[N]either I nor others who wrote the law intended that parents should be forced to expend valuable time and money exhausting unreasonable or unlawful administrative hurdles to gain for their children an education which meets their individual needs." [Remarks of Congressman Miller from California; 131 Congressional Record 31376, 11/12/85].

By preventing the Marcheses from utilizing §1415(l) in the manner the statute provides and allowing their case to proceed, the Court has denied the Marcheses the very avenue Congress intended parents to utilize to redress a student's grievances beyond the administrative process, giving them no recourse but to pursue a costly and unnecessary appeal. At this point, the Court is no longer part of the solution, but has joined CDE as part of the problem.

Over ten years ago, on October 17, 2000, when CDE filed its "State Defendants' Joinder in Local Defendants' Motion to Dismiss" in the *Porter* action, CDE's Marsha Bedwell was listed on the pleading as Assistant General Counsel. In that pleading, CDE claimed we were required to exhaust administrative remedies by pursuing a complaint in CDE's CRP, when nothing in the IDEA provides such a requirement.

Ten years later, on August 26, 2010, CDE filed its "Motion to Dismiss" in the Marchese matter, this time with Ms. Bedwell at the very top of the pleading as CDE's General Counsel. In that pleading CDE claimed the Marcheses were required to exhaust administrative remedies by pursuing due process against CDE, when nothing in the IDEA provides such a requirement. ***Both times, CDE as the state education agency misrepresented the very law they were supposed to be upholding, in order to avoid accountability for the agency's lack of compliance with the law***.

Two months after filing CDE's Motion to Dismiss in the Marchese case, Ms. Bedwell had departed CDE to go to work for the law firm and attorneys which represent the noncompliant school district. There is no better evidence that school district legal counsel have led CDE astray to the detriment of California's children with disabilities.