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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ROBERT MOSER,)	CIV-F-99-6273 OWW SMS
)	
Plaintiff,)	ORDER RE: SANCTIONS FOR
)	ATTORNEY'S VIOLATIONS OF
v.)	DUTY OF CANDOR AND NOT TO
)	IMPEDE, OBSTRUCT, OR TO
BRET HARTE UNION HIGH SCHOOL)	VEXATIONOUSLY MULTIPLY
DISTRICT,)	PROCEEDINGS
)	
Defendant.)	
)	
)	
)	

I. INTRODUCTION

This matter is before the court on an Order to Show Cause why sanctions should not be imposed against attorneys of record Elaine Yama ("Yama"), the law firm of Lozano, Smith and their client, Bret Harte Unified School District ("District" or "Defendant"), following their egregious conduct in this appeal from an administrative hearing.

II. BACKGROUND

The Order to Show Cause issued as the culmination of lengthy and contentious proceedings involving an appeal from an administrative hearing by a Bret Harte student, Robert Moser

1 ("Plaintiff"). Plaintiff was a student enrolled at Defendant
2 Bret Harte Union High School District from 1994 - 1998.
3 Plaintiff alleged that Defendant denied him a free and
4 appropriate public education ("FAPE") under the Individuals With
5 Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400 *et seq.*
6 See Docket ("Doc.") #1. On October 13, 14, 15 and 16, 1998, and
7 January 19, 20, 21, 22, 25 and 26, 1999, an administrative
8 hearing was heard before William Reyes, Hearing Officer of the
9 California Special Education Hearing Office. Plaintiff appealed
10 the decision of the Hearing Officer on August 27, 1999.
11 Jurisdiction applied under 20 U.S.C. § 1415(e)(2)(C) and 28 U.S.C.
12 § 1331. See *id.* at ¶2.

13 In 2001, Trial de Novo briefs were submitted by both
14 parties. Docs. 20, 25, 28, 33, 34, 35 & 41. On August 20, 2001,
15 Defendant filed a motion to dismiss the complaint pursuant to
16 rule 41(b) of the Federal Rules of Civil Procedure for failure to
17 comply with court orders. Doc. 37. Defendant also made numerous
18 evidentiary objections. At the November 19, 2001, hearing on the
19 motion to dismiss, the court informed the parties that if they
20 wished to supplement the administrative record they must make a
21 motion to do so. On November 20, 2001, the motion to dismiss was
22 denied. Doc. 53. At a scheduling conference on December 11,
23 2001, the court again reminded the parties of the proper
24 procedure for supplementing the administrative record and a
25 schedule was set for motions to supplement the record. A
26 scheduling conference order issued December 12, 2001, which: 1)
27 acknowledged the administrative record was finally complete and
28 accurate; 2) required the record be sequentially paginated and

1 Bates numbered; 3) set dates for the parties to move to
2 supplement the record; 4) ordered each party submit statements of
3 chronological material and relevant facts and statement of
4 disputed facts or objections to the chronological statements of
5 the opposing party; and 5) established the briefing deadlines for
6 cross-motions for summary judgment. See Doc. 55.

7 The June 14, 2002, Amended Scheduling Order called for any
8 motions to further supplement the administrative record to be
9 filed by June 24, 2002. No party filed such a motion, yet
10 Defendant filed a "Further Opposition To Plaintiff's Motion to
11 Supplement Evidentiary Record" on July 8, 2002. At this time the
12 parties were reminded to comply with the Federal Rules of
13 Procedure and were warned that the case had already been unduly
14 extended over three years as a result of the parties' inability
15 to follow court orders or basic rules of Federal Civil Procedure.

16 Cross-motions for summary judgment, statements of
17 chronological facts, oppositions and reply briefs were filed
18 between June and August, 2002. The evaluation of the matter was
19 significantly delayed due to both parties' repeated incorrect,
20 irrelevant or unsupported citations to the Administrative Record
21 in their Chronological Statements of Facts and Defendant's
22 repeated misstatement of the facts contained in the
23 Administrative Record.

24 A hearing was held on August 9, 2003. On October 17, 2003,
25 a Memorandum Decision and Order granting Plaintiff's motion for
26 summary judgment and denying Defendant's motion for summary
27 judgment was filed. On the same day an Order to Show Cause
28 issued, sua sponte, ordering Ms. Yama, Lozano, Smith and their

1 client, Bret Harte Unified School District to show cause why they
2 should not be sanctioned for misrepresenting facts and law,
3 violating their duty of candor, and willfully and vexatiously
4 multiplying the proceedings, under FRCP Rule 11, 28 U.S.C.
5 § 1927, and the court's inherent power.¹

6 Briefs opposing sanctions were filed by Lozano, Smith and
7 Ms. Yama. Briefs supporting sanctions were filed by Plaintiff.
8 The District did not file any separate briefs opposing sanctions
9 despite being ordered to show cause. A hearing was held on
10 January 26, 2004. Ms. Yama, counsel of record, appeared with
11 independent counsel, James Wilkins. Jerome Behrens of Lozano,
12 Smith appeared on behalf of the District and Lozano Smith.
13 Maureen Graves appeared on behalf of the Plaintiff. At the
14 conclusion of the hearing, parties were given additional time to
15 file supplemental papers. Plaintiff was given permission to
16 submit 15 interrogatories to Defendant, Bret Harte Unified School
17 District, in order to enable the court to evaluate the level of
18 the public entity Defendant's participation in counsel's
19 wrongdoing.

20 21 II. LEGAL STANDARDS

22 The power of federal judges to impose sanctions for abuses
23 of process is quite broad. *Gas-A-Tron of Ariz. v. Union Oil Co.*,
24 534 F.2d 1322 (9th Cir.), cert. denied sub nom. *Shell Oil Co. V.*
25 *Gas-A-Tron of Ariz.*, 429 U.S. 861, 97 S.Ct. 164, 50 L.Ed.2d 139

26
27
28 ¹ The Memorandum Decision and Order of October 17, 2003
(Doc. 102) is incorporated by this reference.

1 (1976). The power to sanction derives from several sources:
2 federal statutes (including federal procedural rules), Local
3 Rules of Court, and the District Court's inherent power. Local
4 Rules of the Eastern District Court provide:

5 Failure of counsel or of a party to comply with these
6 Rules or with any order of the Court may be grounds for
7 imposition by the Court of any and all sanctions
8 authorized by statute or Rule or within the inherent
9 power of the Court.

10 L.R. 11-110.

11 The decision to award sanctions is a matter within the
12 court's sound discretion. See *Dahl v. City of Huntington Beach*,
13 84 F.3d 363, 367 (9th Cir. 1996); *Wages v. Internal Revenue*
14 *Service*, 915 F.2d 1230, 1235 (9th Cir.), cert. denied, 498 U.S.
15 1096, 111 S.Ct. 986, 112 L.Ed.2d 1071 (1991); *Erickson v. Newmar*
16 *Corp.*, 87 F.3d 298, 303 (9th Cir. 1996). "For a sanction to be
17 validly imposed, the conduct in question must be sanctionable
18 under the authority relied on." *Cunningham v. County of Los*
19 *Angeles*, 879 F.2d 481, 490 (9th Cir.) (Internal quotations
20 omitted), cert. denied, 493 U.S. 1035, 110 S.Ct. 757, 107 L.Ed.2d
21 773 (1990).

22 A. Rule 11

23 Federal Rule of Civil Procedure 11 ("Rule 11") gives the
24 court authority to issue sanctions against a party whose attorney
25 of record signs a "pleading, written motion, or other paper" is
26 not well grounded in fact, is not warranted by existing law, is
27 not made in good faith, or is brought for any improper purpose.
28 *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1131 (9th Cir. 2002).
Imposition of sanctions is not limited to attorneys, but may be

1 imposed on parties as well. Rule 11 addresses the problems of
2 frivolous filings and abuse of judicial procedures as a tool for
3 harassment. *Stewart v. American Intel Oil & Gas Co.*, 845 F.2d
4 196, 201 (9th Cir. 1988); *Zaldivar v. City of Los Angeles*, 780
5 F.2d 823, 830 (9th Cir. 1986), *abrogated on other grounds by*
6 *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990).

7 The Ninth Circuit has stated:

8 Under the provisions of Rule 11, when an attorney
9 signs a pleading, he [or she] is certifying that he [or
10 she] has read it and that to the best of his [or her]
11 knowledge, information and belief, formed after a
12 reasonable inquiry, it is well grounded in fact and is
13 warranted by existing law or a good faith argument for
the extension, modification, or reversal of existing
law, and that it is not interposed for an improper
purpose. Rule 11 further provides that if the pleading
is signed by the attorney in violation of the rule, the
court shall impose . . . an appropriate sanction.

14 *Stewart v. American International Oil & Gas Co.*, 845 F.2d 196
15 (9th Cir. 1988).²

16 Rule 11 creates and imposes on a party or counsel an
17 affirmative duty to investigate the law and facts before filing.
18 *Rachel v. Banana Republic, Inc.*, 831 F.2d 1503, 1508 (9th Cir.
19 1987) and further obliges an attorney to dissuade a client from
20 pursuing specious claims, thereby avoiding possible sanctions by
21 the court, as well as unnecessary costs of litigating a worthless
22 claim. *Mohammed v. Union Carbide Corp.*, 606 F.Supp. 252 (E.D.
23 Mich. 1985).

24 Whether to impose sanctions is determined by the
25

26 ² The mandatory nature of sanctions under Rule 11 ("shall")
27 was changed after this case, under the 1993 amendments to the
28 rule. [CITE] A court may impose sanctions under the rule for a
violation but is no longer required to do so.

1 reasonably of inquiry into the law and facts, not the good or
2 bad faith of the signatory. *G.C. & K.B. Investments v. Wilson*,
3 326 F.3d 1096, 1109 (9th Cir. 2003); *c.f. Mars Steel Corp. V.*
4 *Continental Bank N.A.*, 880 F.2d 928, 932 (7th Cir. 1989) (“[A]
5 paper filed in the best of faith, by a lawyer convinced of the
6 justice of his client’s cause, is sanctionable if counsel
7 neglected to make “reasonable inquiry” beforehand.”). A
8 pleading, motion or other paper well grounded in fact and law
9 cannot be sanctioned regardless of subjective intent. *Zaldivar*,
10 *supra*. Conversely, a party is responsible for innocent, good
11 faith mistakes of law or for carelessness of counsel, because
12 reasonable inquiry would reveal a mistake, and counsel who is
13 careless has not made reasonable inquiry. *Lloyd v. Schlag*, 884
14 F.2d 409, 412 (9th Cir. 1989).

15 A filing is frivolous under Rule 11 if it is unreasonable
16 when viewed from the perspective of a competent attorney admitted
17 to practice before the district court. *G.C. & K.B. Investments*,
18 326 F.3d 1096, 1109; *In re Grantham Bros.*, 922 F.2d 1438, 1442
19 (9th Cir.), *Zaldivar*, 780 F.2d at 831. “A district court
20 confronted with solid evidence of a pleading’s frivolousness may
21 in circumstances that warrant it infer that it was filed for an
22 improper purpose.” *Townsend v. Holman Consulting Corp.*, 929 F.3d
23 1358, 1365 (9th Cir. 1990). Sanctions under Rule 11 are not
24 limited to instances in which a pleading as a whole is frivolous,
25 or of a harassing nature. Rather, sanctions may be imposed for
26 improper or unwarranted allegations even though at least one non-
27 frivolous claim has been pled if an attorney has not conducted a
28 “reasonable inquiry” under the circumstances of a case. *Id.* at

1 1362-65. Monetary sanctions may not be awarded against a
2 represented party for a violation of Rule 11 subdivision (b) (2).

3
4 B. Local Rules of the Eastern District of California

5 In addition to L.R. 11-110 cited above, the Local Court
6 Rules of the Eastern District of California provide:

7 In the event any attorney subject to these Rules
8 engages in conduct which may warrant discipline or
9 other sanctions, any Judge . . . may initiate
10 proceedings for contempt under 18 U.S.C. § 401 or Fed.
11 R. Crim. P. 42, or may, after reasonable notice and
12 opportunity to show cause to the contrary, take any
13 other appropriate disciplinary action against the
14 attorney. In addition to or in lieu of the foregoing,
15 the Judge . . . may refer the matter to the
16 disciplinary body of any Court before which the
17 attorney has been admitted to practice.

18 L.R. 83-184(a).³

19 Neither the Local Rules nor the Federal Rules provide clear
20 definition of "other appropriate disciplinary action," for
21 attorney conduct that does not warrant criminal contempt.

22 Nonetheless, district judges have an "arsenal of sanctions" they
23 can impose for unethical behavior, *Erickson v. Newmar Corp.*, 87
24 F.3d at 303, including monetary sanctions, contempt, dismissal
25 and disqualification of counsel. *Id.* The Rules of Professional
26 Conduct and State Bar Rules of California may also be consulted.

27 See L.R. 83-180(e) (adopting California Rules of Professional
28

³ The criminal contempt power under 18 U.S.C. § 401
authorizes punishment by fine or imprisonment, at the court's
discretion, for contempt of its authority, and for misbehavior of
any person in the court's presence "or so near thereto as to
obstruct the administration of justice." Rule 42 punishes as
criminal contempt conduct "the judge saw or heard . . . or []
committed in the actual presence of the court." Fed. R. Crim. P.
42(b).

1 Conduct and decisions of any Court applicable thereto as
2 standards of professional conduct in Eastern District Courts);
3 *see also, e.g., Frazier v. Heebe*, 482 U.S. 641, 645 (1987)
4 (district courts have clear statutory authority to promulgate
5 rules governing the admission and conduct of attorneys who appear
6 before them).

7 Under ABA Model Rules of Professional Conduct, "[a] lawyer
8 shall not knowingly: (1) make a false statement of fact or law to
9 a tribunal or fail to correct a false statement of material fact
10 or law previously made to a tribunal by the lawyer; (2) fail to
11 disclose to the tribunal legal authority in the controlling
12 jurisdiction known to the lawyer to be directly adverse to the
13 position of the client and not disclosed by opposing counsel; or
14 (3) offer evidence that the lawyer knows to be false." American
15 Bar Association Model Rules of Professional Conduct, Rule 3.3
16 (5th Ed. 2003). The consequences of violating these rules depend
17 upon whether the violation was intentional and/or systematic:

18 6.11 Disbarment is generally appropriate when a lawyer,
19 with the intent to deceive the court, makes a false
20 statement, submits a false document, or improperly
21 withholds material information, and causes serious or
potentially serious injury to a party, or causes a
significant or potentially significant adverse effect
on the legal proceeding.

22 6.12 Suspension is generally appropriate when a lawyer
23 knows that false statements or documents are being
24 submitted to the court or that material information is
25 improperly being withheld, and takes no remedial
action, and causes injury or potential injury to a
party to the legal proceeding, or causes an adverse or
potentially adverse effect on the legal proceeding.

26 6.13 Reprimand is generally appropriate when a lawyer
27 is negligent either in determining whether statements
28 or documents are false or in taking remedial action
when material information is being withheld, and causes
injury or potential injury to a party to the legal

1 proceeding, or causes an adverse or potentially adverse
2 effect on the legal proceeding.

3 6.14 Admonition is generally appropriate when a lawyer
4 engages in an isolated instance of neglect in
5 determining whether submitted statements or documents
6 are false or in failing to disclose material
information upon learning of its falsity, and causes
little or no actual or potential injury to a party, or
causes little or no adverse or potentially adverse
effect on the legal proceeding.

7 American Bar Association Standards for Imposing Lawyer Sanctions,
8 Standard 6.1 (1992).

9 Under California law, an attorney may only use methods "as
10 are consistent with truth, and never to seek to mislead the judge
11 or any judicial officer by an artifice or false statement of fact
12 or law." Cal. Bus. & Prof. Code § 6068(d). "In presenting a
13 matter to a tribunal, a member: (A) Shall employ, for the purpose
14 of maintaining the causes confided to the member such means only
15 as are consistent with truth; (B) Shall not seek to mislead the
16 judge, judicial officer, or jury by an artifice or false
17 statement of fact or law; (C) Shall not intentionally misquote to
18 a tribunal the language of a book, statute, or decision; (D)
19 Shall not, knowing its invalidity, cite as authority a decision
20 that has been repealed or declared unconstitutional." California
21 Rules of Professional Conduct, Rule 5-200 (1992).

22
23 C. 28 U.S.C. § 1927

24 Section 1927, Title 28 United States Code, provides: "Any
25 attorney . . . who so multiplies the proceedings in any case
26 unreasonably and vexatiously may be required by the court to
27 satisfy personally the excess costs, expenses, and attorneys'
28 fees reasonably incurred because of such conduct."

1 Section 1927 "applies only to unnecessary filings and
2 tactics once a lawsuit has begun." *In re Keegan Management Co.*
3 *Sec. Litig. (Keegan Management Company v. Moore)*, 78 F.3d 431,
4 435 (9th Cir. 1995). For sanctions to apply under 1927, the
5 court must make a determination of recklessness. See *Fink v.*
6 *Gomez*, 239 F.3d 989 (9th Cir. 2001) ("[R]ecklessness suffices for
7 § 1927, but bad faith is required for sanctions under the court's
8 inherent power."); see also, *B.K.B. v. Maui Police Dept.*, 276
9 F.3d 1091, 1107 (2002). Section 1927:

10 [o]nly authorizes the taxing of excess costs
11 arising from an attorney's unreasonable and vexatious
12 conduct; it does not authorize imposition of sanctions
13 in excess of costs reasonably incurred because of such
14 conduct.

15 Similarly, cases that have considered the district
16 court's inherent power to sanction attorneys for
17 litigating in bad faith have related such sanctions to
18 the amount of fees incurred by the opposing party, and
19 have not based sanctions on increased costs experienced
20 by the court.

21 *Blodgett*, 709 F.2d at 610-11 (citations omitted). Section 1927
22 sanctions cannot be imposed on a non-attorney. *Zaldivar*, 780
23 F.2d at p. 831.

24 D. Inherent Authority

25 While the district court should issue sanctions under a rule
26 or statute if possible, *Lockary v. Kayfetz*, 974 F.2d 1166, 1170
27 (9th Cir. 1992); it is not so limited and may rely on its
28 inherent powers to sanction misconduct. *Id.*; *In re Akros*
Installations, Inc., 834 F.2d 1526, 1532 (9th Cir. 1987).

A sanction imposed under the court's inherent power requires
a specific finding of bad faith. *Roadway Express*, 447 U.S. 752,

1 767 (1980); *Primus Auto Fin. Services v. Batarse*, 115 F.3d 644,
2 648 (9th Cir. 1997); *Yagman v. Republic Ins.*, 987 F.2d 622, 628
3 (9th Cir. 1993) (In sanctioning counsel, “[c]ourts may not invoke
4 [inherent] powers without a specific finding of bad faith”);
5 *Zambrano v. City of Tustin*, 885 F.2d 1473, 1478 (9th Cir. 1989)
6 (“To insure that restraint is properly exercised, we have
7 routinely insisted upon a finding of bad faith before sanctions
8 may be imposed under the court’s inherent power.”) Bad faith
9 “does not require that the legal and factual basis for the action
10 prove totally frivolous; where a litigant is substantially
11 motivated by vindictiveness, obduracy, or *mala fides*, the
12 assertion of a colorable claim will not bar assessment of
13 attorneys’ fees.” *Mark Ind., Ltd. v. Sea Captain’s Choice, Inc.*,
14 50 F.3d 730, 732 (9th Cir. 1995) (internal quotation marks and
15 citations omitted).

16 Under the court’s inherent authority, sanctions may be
17 imposed on an attorney or a party to the suit. See *Roadway*
18 *Express*, 447 U.S. at 766.

20 III. ANALYSIS

21 Lozano, Smith’s, Ms. Yama’s, and the District’s actions in
22 these proceedings have greatly increased the work of Plaintiff’s
23 attorney and the Court itself, as well as delayed the just
24 resolution of the case. The objectionable acts fall into four
25 general categories: (1) bad faith, frivolous objections, (2)
26 misstatement and mischaracterization of facts contained in the
27 administrative record, (3) misstatements of the applicable law,
28 and (4) intentional obstruction of the speedy and just resolution

1 of the dispute. Taken as a whole, they show that Defendant and
2 its counsel made a concerted effort to distort, if not outright
3 deceive, the court when shaping the court's view of both the
4 record and applicable law in the case. By consistently
5 presenting untruths and half-truths, Defendant and its counsel
6 obstructed the fair, just, and expeditious resolution of the
7 proceedings. These actions were undertaken in violation of, and
8 with reckless disregard for counsel's duties to the court. When
9 evaluated as a whole, the actions of counsel and the District
10 amount to bad faith and are sanctionable.

11
12 A. Examples of Counsel's Actions

13 The Order to Show Cause detailed some, *but not all*, of the
14 many frivolous objections and misstatements of fact contained in
15 Defendant's Motion for Summary Judgment briefs.⁴ See Doc. 101,
16 October 17, 2003, Order to Show Cause for Sanctions. Counsel has
17 acknowledged these errors, but claims they are innocent mistakes
18 or misunderstandings. The District has not responded in any way.

19
20 1. Frivolous Objections

21 (1) The District "disputes" Plaintiff's statement that
22 "Robert enrolled at Bret Harte Union High School District for 9th
23 Grade" in August 1994. Defendant refuses to admit this
24 "undisputed fact" because, "Plaintiff fails to cite
25 administrative record."

26
27
28 ⁴ Many of these same misstatements are contained in
Defendant's Trial De Novo brief as well. See Docket No. 25.

1 Regardless of Plaintiff's failure to cite the administrative
2 record, it is *indisputable* that Robert enrolled at Bret Harte for
3 9th grade.

4 (2) Plaintiff testified that an accommodation made by Ms.
5 Nanik, "actually increased Robert's workload by shifting from
6 multiple choice to writing assignments." UF 96, Doc. 78.

7 Defendant objects to Plaintiff's undisputed fact: "argument and
8 conclusion. Misstates testimony. J. Moser did not testify that
9 Plaintiff's workload was 'shifting from multiple-choice to
10 writing assignments.'" "

11 Defendant's objection is frivolous. Mrs. Moser testified
12 exactly to that effect: Q[Graves]: "when Ms. Nanik decided to
13 have him do something else, other than taking the test at home,
14 did this involve more writing on Robert's part?" A[Mrs. Moser]:
15 "Yes." AR 1882:17-20. A[Moser]: "And then, they wanted to have
16 Robert, instead of taking the test home, to read the whole
17 chapter, which is fine. That's what he did. But then, to answer
18 all of those questions on the back, which was more than just
19 taking a test, you know, 'because you have like an A or B. It's
20 A, B, or C choice. So, it was a lot easier for him to do that.
21 It took a lot more time and energy, which he really didn't have,
22 to be doing numerous questions and answering all that long
23 stuff." AR 1882:4-11.

24 (3) Defendant's objection to undisputed fact No. 98 once
25 again misstates the obvious. The document speaks for itself.
26 Defendant complains "plaintiff's references to 'long-standing
27 frustration' and 'depression' and 'hired an advocate' are
28 statements not referenced within the document. The document

1 clearly references Robert's frustration and depression as well as
2 Mrs. Moser's frustration. The document does not mention the
3 hiring of an advocate.

4 The document is a letter sent by Mrs. Moser on June 17,
5 1997, to Superintendent Wilamek (received June 18, 1997), Ronald
6 Lewis, Jan Edwards, Principal of Bret Harte High School, and the
7 Bret Harte School Board. Mrs. Moser's letter specifically states
8 Robert was depressed and refusing to participate in class due to
9 this depression, and his frustration with his teachers. AR 3335.

10 Mrs. Moser expressed her frustration with the school directly:
11 "as far as I can tell, the teachers and administration have done
12 absolutely nothing they have been asked repeatedly to do, nor
13 have they done anything to help my son." Mrs. Moser concludes:

14 Just for your information, Robert is not a 'lazy'
15 student, just trying to get out of work. In fact, in
16 spite of his illness, he has gone out of his way to
17 take entry tests in math and English for Columbie
18 College, and, *he has passed both*. He is going for
19 surgery Thursday and even though he should be laid up
20 for 14 days (not to mention 8 weeks of not being able
21 to move his torso), he is still taking classes.

22 To say I am disgusted with the treatment we have
23 received is definitely an understatement. We had to
24 change schools, move our home, and have had continuous
25 conflict with teachers and administration [sic] who are
26 not willing to go a little out of their way to help a
27 student who is truly ill! Why weren't we told from the
28 beginning that, because of Robert's illness, he had a
right to be transported to school? Why weren't we told
about the '504' plan? Why are the teachers and
administration now so difficult and unwilling to
cooperate?

I am asking [for] your help. My son and family
have been through enough. Please intervene and give my
son the help he needs and is entitled to his last two
years of high school. If we do not receive a
satisfactory response and solution by June 30, I will
file a complaint with the O.C.R. [Office of Civil
Rights] and the appropriate State Department.

AR 3334-3336; 3337-3339.

1 (4) A diagnosis of chronic fatigue syndrome and depression
2 is written on a doctor's note dated 9/12/97. Plaintiff contends
3 this note was forwarded to the District. UF 97a, Doc. 78.
4 Defendant objects to whether or not this diagnosis was actually
5 forwarded to the school: "argument and conclusion. Misstates
6 evidence. Fails to cite record." *Id.*

7 Defendant makes no statement as to whether or not the
8 District actually received the doctor's note.

9 Defendant's objection is inexplicable. The 504
10 accommodation plan states *explicitly*, "Robert will meet with Mrs.
11 Haskell weekly on Fridays from 10:00 to 10:30 a.m. They will
12 confer on his progress, and discuss any academic difficulties he
13 may be having."

14 (5) Defendant objects to Plaintiff's undisputed fact #15,
15 which states: "In eighth grade, without an assessment or IEP, it
16 was noted on a parent conference report that Robert would receive
17 "special ed assistance from 1:15-2:00 in Ms. Johnson's room."
18 (Page 3783). Defendant's objection, "Misstates evidence. Page
19 4368 IEP dated 1/13/93 specifically states that 'although student
20 does not qualify for special education services, he will
21 participate in after school study hall three times a week for
22 homework."

23 Defendant's objection is *unintelligible* in context and
24 meritless. The cited form in Plaintiff's undisputed fact, AR
25 3783, states exactly what Plaintiff contends it states:
26 "Vallecito Union School District Parent Conference Report" dated
27 12/93 states "4. Special ed assistance from 1:15-2:00 in Ms.
28 Johnson's room." The form was completed *prior* to the Triennial

1 IEP review where Robert was exited from special education. The
2 IEP form cited by Defendant, *dated one month later*, on 1/13/93,
3 "Formal tests do not suggest the presence of a processing
4 disorder; does not qualify for special education; Robert will
5 participate in after school study hall 3x/wk for homework."

6 The objection obstructs the court's undisputed fact finding
7 process.

8 (6) Defendant objects to Plaintiff's undisputed fact #16,
9 "Robert saw a physician who diagnosed chronic fatigue syndrome."
10 (Page 4259). Defendant's objection: "Disputed. Page 4259 is a
11 doctor's notes [sic] which is signed by the doctor on 6-21-95.
12 Also, see Plaintiff's Fact No. 58, which references page 3383
13 (the same document as 4259), and indicates the appropriate date
14 of 6-21-95.

15 Defendant's objection is confusing at best, misleading at
16 worst. The documents cited (AR 4259 and AR 3383) *both* have
17 8/5/95 as the date "was seen at this office on" and the diagnosis
18 "Chronic Fatigue Syndrome." Under "other" it states, "unable to
19 participate in PE from '95 through '96." The document is signed
20 by the physician, Dr. Lake, on 6/21/95. Plaintiff's Undisputed
21 fact lists 8/94 as the date Robert saw the physician, who
22 diagnosed CFS. Both copies of the document support this
23 statement. The fact that the doctor signed the note in June of
24 1995, to provide an excuse from P.E. has nothing to do with the
25 fact that Robert was seen in August of 1994 and diagnosed with
26 Chronic Fatigue Syndrome at that time, as indicated on both
27 copies of the doctor's note. Defendant's objection to the fact
28 as "disputed" is obstructive, the document speaks for itself;

1 Defendant's reference to when the note was cited is a red
2 herring.

3 (7) The District "disputes" Plaintiff's statement of
4 undisputed fact #21, Doc. 78, that "an assessment was conducted"
5 on 9/10/94. Defendant refuses to admit this "undisputed fact"
6 because, "Plaintiff fails to cite administrative record."

7 It was unnecessary for Plaintiff to cite the administrative
8 record because it is *indisputable* that an assessment was
9 conducted in Sept-Oct of 1994 and that fact was best known to the
10 District. This is a bad faith, unjustified objection.

11 (8) Defendant objects to part of Plaintiff's undisputed
12 fact #27 which states: "9-10-94 The 'concentration, attention
13 span, memory problems of a diverse kind' and diffuse processing
14 problems common in narcolepsy were not explored." (Page 745/line
15 7 - page 1746/line 21). Defendant's objection: "argument and
16 conclusion: misstates testimony of Dr. Patterson, in which there
17 is no reference to 'The concentration, . . . were not explored.'"

18 Again, Defendant's objection is totally without basis. The
19 cited testimony explicitly includes the sentence referenced by
20 Defendant:

21 Graves: I want to um, I'm not sure whether you
22 said what you meant, so I want to make sure that
23 whether, what you meant. I think you said people with
24 narcolepsy often have problems with memory and
25 difficulties and things [unintelligible]. My question
26 was about head injury -

27 Dr. Patterson: - yeah -

28 Graves: - is that what you are talking about -

Patterson: - and head injuries have the same
characteristics. But I was about to say, and in
Robert's case, uh, he was noted in, in an early
assessment as having a visual memory problem. And um,
they really didn't do a lot of definitive testing from
memory in, in any of the assessments. But it, it is
not unusual in kids with head injuries to find,

1 attention-span difficulties, concentration
2 difficulties, uh, memory types of difficulties. And
3 those are not memory difficulties that are necessarily
4 showing up on Wechsler Scales. In other words, you
5 need definitive tests for that, sometimes what are
6 called neuropsychological tests . . . but no visual
7 testing for visual memory per se is, was, was done. No
8 -

9 Graves: - [unintelligible] California Learning
10 Test is an auditory memory?

11 Patterson: Yeah, auditory memory, yes that's
12 correct. And so, in, in this particular case, that
13 would be consistent with brain injury and we've never
14 had a neuro-psych battery administered and we've never
15 even had a neuro-psych screen administered, so we don't
16 really know but that's not a typical independence of
17 the narcolepsy. *But many of the same things are found
18 in narcoleptics; concentration, attention span, memory
19 problems of a diverse kind and sometimes there's this
20 deffuse [sic] problem where they have processing
21 problems but it's hard to put a definitive label on
22 what it is. It's a deffuse [sic] neuro-cognitive or
23 neuro-developmental delay.*

24 (9) Defendant objects to Plaintiff's undisputed fact #30
25 which states: "10/25/97 doctor care e-mails, the special
26 education director, testified that 'it's very difficult to tell'
27 from this document whether Robert was being found eligible for
28 special education (page 48/line 14 - page 51/210). Defendant's
29 objection: "Misstates testimony as cited. K. Mill's testimony
30 states: 'it looks like he does not [qualify] because he's going
31 to participate in a regular program on a full-time basis.' See
32 K. Mills' testimony, page 48:20-21: 'I don't see that he's
33 determined eligible on this document.' See K. Mills' testimony,
34 page 49:1-17; 'it doesn't discuss discrepancy . . . it seems to
35 infer that its lower than expected. But it doesn't indicate a
36 discrepancy.' See K. Mills' testimony, page 50:3-9[.]"

37 Defendant's objection is frivolous. The first two lines of
38 the cited testimony, AR 48:14-16, explicitly state:

39 Graves: Okay. Is it your understanding in this

1 IEP meeting Robert was found eligible or ineligible for
2 Special Education services?

3 *Mills: It's very difficult to tell.*

4 (10) In Defendant's objection to Plaintiff's undisputed
5 fact #31, Defendant restates the untrue statement that "Robert
6 had not yet been diagnosed."

7 The citation provided by Plaintiff as his proposed
8 undisputed fact #31 objected to by Defendant is AR 4273,
9 Defendant's IEP report, dated 10/25/94, which states, "Dr. says
10 he now has chronic fatigue syndrome." See additional discussion
11 regarding Ingrid Olson Miller's testimony that she had the
12 diagnosis as of the IEP meeting again via her conversation with
13 Robert's doctor in November '94, *supra*, at p. 11 (N.). The same
14 can be said for Defendant's frivolous objections to Plaintiff's
15 undisputed facts #32 and #33.

16 These objections deterred the finding of genuinely
17 undisputed facts.

18 (11) Defendant objects to Plaintiff's undisputed fact #38,
19 which states, "10/25/94 Robert's mother was understandably
20 confused by the October 1994 process, seeing Robert as 'semi-
21 qualified,' but not 'quite,' and thinking the plan was to 'see
22 what happened.' (Page 1865/line 17-27). Defendant's objection:
23 "argument and conclusion. Misstates testimony of J. Moser."

24 Defendant's objection is frivolous. Mrs. Moser's testimony
25 says exactly what is quoted and cited:

26 Moser: Uh, yeah, they did, they tested him and uh,
27 he semi-qualified, he kind of qualified, but they
28 didn't think he, they didn't think he quite qualified.
I'm not really sure, other than that I wanted to get
whatever service, like he had back when, uh, in Oak
Grove, . . . so, I wanted some kind of service like
that, but they said he really didn't qualify, so, we

1 just had the [sic], see what happened.

2 (12) Bret Harte "disputes" Plaintiff's statement that
3 "Robert was a regular education student at Arnold High School, a
4 very small and remotely located high school, which featured
5 behaviorally challenged students and no special education staff."

6 Defendant refuses to admit this "undisputed fact" because,
7 "Plaintiff fails to cite administrative record."

8 Regardless of Plaintiff's failure to cite the administrative
9 record, it is *indisputable* that Robert enrolled at Arnold High
10 School his second semester and that Arnold was a "continuation"
11 type high school for troubled students and had no special
12 education staff.

13 The above 13 citations are only a few examples of
14 Defendant's and its attorneys' frivolous, vexatious, and
15 obstructive objections to Plaintiff's statement of undisputed
16 facts. Defendant and its attorneys continued to make similar
17 frivolous objections throughout their "amended response and
18 opposition to Plaintiff's chronological statement of facts."
19 Doc. 78. The overall effect of Defendant's and counsel's conduct
20 was to impede and meritlessly increase the work of the Court in
21 the truth ascertainment process.

22
23 2. Misstatement and Mischaracterization of Facts
24 Contained in the Administrative Record

25 (1) Defendant contends "Mrs. Moser only wanted
26 transportation, tracking of progress and some counseling." UF 48
27 & 50, Doc. 72. Defendant contends that "At no time did Mrs.
28 Moser indicate to Mr. Smith that she wanted more accommodations."

1 UF 57, Doc. 72.

2 Mr. Smith's testimony contradicts Defendant's claim.⁵ Mr.
3 Smith testified he believed the accommodations were sufficient,
4 but, in answer to a question, acknowledged that he knew Mrs.
5 Moser would not "feel that [Robert] was getting . . . enough
6 accommodations." AR 1458:9-19.

7 (2) Defendant alleges Ms. Pape-Reynoso, Plaintiff's
8 sophomore learning director, "communicated with Plaintiff's
9 teachers about his special physical health needs and the
10 accommodations required as to assignments." UF 53, Doc. 72.

11 Ms. Pape-Reynoso's testimony contradicts Defendant's
12 claim:

13 Q: About how often would you say you . . . spent
14 working with him [Robert] through the course of the
15 year?

16 A: I didn't see Robert very often. Typically, it was a
17 phone call from home requesting work because he was out
18 and it was coordinating with teachers.

19 AR 917: 16-22.

20 Q: Do you recall being . . . given anything to read
21 about Chronic Fatigue Syndrome?

22 A: At the . . . student study team meeting, Sheila
23 Silcox did . . . share information . . . and there was
24 certainly a long discussion . . . in terms of how that
25 would play out. And, and what kind of support he would
26 need.

27 Q: . . . And, was anyone going to come out of that
28 meeting and share this information with Robert's
regular education teachers to your knowledge?

A: Someone probably was, I can't tell you who that
person was. It wasn't me.

Q: Did teachers talk to you about the Chronic Fatigue
Syndrome diagnosis during Robert's sophomore year?

⁵ Mr. Smith is a school counselor for Defendant.

1 A: Usually the contact had more to do with, 'where is
2 he?' 'Here's the work for him.' 'Mom said she was
3 coming to get the work.' 'She didn't come.' 'Where is
4 it?' and those kinds of things.

4 AR 920:8-26, 921:1-4.

5 (3) Defendant alleges the school counselor, Mr. Smith, met
6 with Robert "more than a couple of times a month." Doc. 72 ¶54
7 at 16.

8 Mr. Smith's testimony shows this is a misrepresentation.
9 Mr. Smith ultimately testified that he met with Robert several
10 times, "probably not more than -- umm -- a couple of times a
11 month." AR 1450:14-15; Doc. 72 ¶54 at 16. Mr. Smith testified
12 that Robert "would never initiate" a meeting and that Mr. Smith
13 himself initiated meetings with Robert "a couple times a
14 semester. But I can't remember exactly." AR 1450:14-26; Doc. 72
15 ¶54 at 16.⁶

16 (4) According to Defendant, "Mr. Smith, the school
17 counselor, and the learning director, Sandra Wimberly, tracked
18 Plaintiff's progress [in 11th grade] . . . Wimberly testified
19 that Plaintiff would have been able to get an 'A' if all his
20 'modified assignments' had been turned in and judged on their own
21 merit." Doc. 72 ¶¶71-72 at 20 (disputed) citing Wimberly, AR
22 133:11-24; Smith AR 1427:18-21; Evaluation Reports, AR 4205-4209.

23 These assertions are contradicted by the record. Learning
24

25
26 ⁶ This blatant misstatement first appeared in Defendant's
27 Trial De Novo Brief and was specifically pointed out to Defendant
28 by Plaintiff in his Reply Brief. See Doc. 25 and 28. Ms. Yama's
explanation that this was merely a "mistake," repeated after
having it specifically pointed out to her, is untenable.

1 Director Wimberly testified that her first contact with Robert
2 was at the end of 11th grade, in May-June, when she mailed out an
3 academic probation letter. AR 133:12-26. Ms. Wimberly testified
4 she had no knowledge at that time about Robert's CFS or why
5 Robert failed two classes and that she "probably" had no further
6 contact with Robert "until the following year." AR 134:4-135:2.

7 Regarding grading, Ms. Wimberly's testimony is cited
8 incompletely which creates a false impression. Her complete
9 testimony shows she really did not know how Robert was graded:

10 A: . . . and my understanding was that if Robert
11 . . . was assigned an essay, for example, at the time,
12 you know, there were no time constraints on it as to
13 due date, then it would be judged on its own merit and
14 would be possible to earn an A on that assignment and
15 because he was doing lesser work than the other
16 students, my understanding was that he would still be
17 able to earn an A based on the number of assignments
18 that he completed and the quality of the assignments.

19 Q: Do you recall any explicit discussions of this
20 question of how the grading will work before yesterday?

21 A: No, I don't. What I remember is that . . .
22 though it was never expressed directly, that the
23 quality of the work is what counted.

24 Q: Do you recall . . . do you know whether in the
25 final calculation of grades in each class, were
26 teachers looking at what percentage of the general
27 assignments Robert had completed, or were they looking
28 at what percentage of his assignments he completed, or
do you know?

A: In some cases, I don't know. In some cases, I
do

AR 393:3-25, 394:1-2.

Q: And what about the other teachers? Do you know how
they were handling the situation?

A: *The best that I can tell you is that I know that
they eliminated assignments, so I made the assumption
that they were grading only on the material that he was
assigned.*

Mr. Smith's testimony does not support Defendant's
contention that Mr. Smith "tracked Plaintiff's progress" during

1 Robert's 11th grade year:

2 A: 97/98 [Robert's 12th grade] I would have been
3 off completely, 96/97 [Robert's 11th grade] I was on
4 partial . . . time - I think it was 50 percent . . . I
5 was only her a certain number of hours a week and I was
6 working mornings . . . and I was seeing only a small
percentage of the typical load that I had.

7 Q: And the year before that [Robert's 10th grade,
8 1996/1997], were you also on some kind of
9 [unintelligible]?

10 AR 1427:2-17.

11 The cite given by Defendant's attorneys to support
12 Defendant's contention that Mr. Smith tracked Robert's progress
13 during his 11th grade year, *actually discusses Robert's 10th*
14 *grade year:*

15 Q: And from 1994 until the end of the 1997 spring
16 semester, did you have the same position throughout
17 that time?

18 A: [] as far as my counseling responsibilities,
19 pretty much. [] Full-time counseling and, [], I had
20 some administrative responsibilities (unintelligible)
21 extra duty things and nighttime things, and all the
22 things that we get to do that are so much fun. [] To
23 help manage lively, young people.

24 AR 1427:18-24.

25 (5) The district argues "Section 504 accommodations were
26 provided to Plaintiff [prior to 12th grade]. Although they were
27 written down and implemented for the past several years, they
28 were not ever written on a formal 504 Service Plan." UF 102,
29 Doc. 72.

30 The District's argument *is directly contradicted by the*
31 *evidence it cites in the record; Superintendent Wilamek did not*
32 *testify that accommodations were "written down and implemented*
33 *for several years."* Superintendent Wilamek testified:

34 [I]t was my understanding at the time I wrote this
35 letter, that some accommodations had been made for him.
36 I wasn't sure whether a complete 504 plan had been

1 written since the person who was employed in the
2 district was on leave of absence from the district, so
3 I don't know what had taken place, and I couldn't find
4 a formalized 504 plan, because usually there's a copy
5 of them in my office. So I didn't find one I
6 knew that we made accommodations as far as graduation
7 requirements and transportation, but I didn't know what
8 else had been done except that I do recall having a
9 conversation with a counselor asking to make sure that
10 accommodations were made in the classroom, etc. . . .
11 but since I couldn't find [a 504 plan], I decided we're
12 going to do it again and do it by the book.

13 AR 308:1-18.

14 (6) Defendant states Plaintiff's English teacher, Vicki
15 Oneto, "provided many accommodations, including . . . tape
16 recording of answers" Doc. 72, UF 136.

17 Ms. Oneto testified:

18 Q [Stephens]: What kind of adjustments did you make?

19 A [Oneto]: . . . One time he made a tape recording of
20 [] identifications.

21 (7) Defendant contends "the IEP team met to discuss
22 Plaintiff's individual transition plan." Doc. 72, UF 145 citing
23 ITP plan, AR 4031-4035.

24 The IEP team and the ITP meeting participants were
25 different. The ITP meeting did not include Dr. Trotter (school
26 psychologist), Deborah Wright (Robert's advocate), any regular
27 education teacher, nor any administrator. The ITP form shows the
28 following five people in attendance (via their signatures):
Robert Moser, Patty Haskell (resource specialist); Glenda Kinnear
(Vocational Tech), Mrs. Moser, and Sandra Wimberly (Learning
Director). AR 4033; AR 2933. By comparison, the October 6,
1997, IEP team meeting included: Mrs. Moser, Dr. Trotter (School
Psychologist), Mr. Wilamek (Administrator/Superintendent), Mr.
Randall (Regular Education Teacher), Dr. Mills (District Director

1 of Special Ed.), Ms. Haskell (Resource Specialist), Ms. Wimberly
2 (learning Director) and Ms. Wright (Robert's Advocate). AR 4084.
3 The IEP team did not meet to discuss Robert's transition plan.
4 The October 6 IEP form puts off discussion of Robert's transition
5 until two months later. See AR 4083.

6 (8) Defendant contends Glenda Kinnea, Vocational
7 Technician, "met with Plaintiff one hour to 45 minutes one time
8 per week to discuss his interests, refer to department of
9 rehabilitation, and obtain work experience." Doc. 72 UF 147
10 citing Kinnear AR 600:23-27; 601:1-6; 604:14; 605:23-27; 606:1-6;
11 608:1-10.

12 Defendant misrepresents its own witnesses' testimony:

13 Q [Graves]: Can you describe your involvement with
14 Robert Moser?

15 A [Kinnear]: I didn't have a lot of involvement with
16 Robert. I was brought into an IEP meeting for him and,
17 I think, it was January. I'd have to check my records.
18 . . . I spent, I would say *from January of 1997 until*
19 *he graduated maybe a total of [] an hour and 45 minutes*
20 *with him.* And that includes what's called an intake
21 meeting with the department of rehabilitation counselor
22 and an exit meeting with the department of
23 rehabilitation counselor.

24 AR 600:23-27, 601:1-3 (emphasis added).

25 (9) Defendant asserts that "on January 13, 1998, the IEP
26 team met to add two periods a day to Plaintiff's schedule for
27 study skills to help with assignments." Doc. 72 UF 159
28 (disputed).

There is no record of a January 1998 IEP team meeting to
address Robert's schedule. The IEP addendum, AR 4001, is dated
1/13/98. The IEP addendum form states, "Considered a part of the
IEP written on '10/6/97.'" AR 4001 (10/6/97 is filled in). The

1 following changes are described on the form, "add two periods a
2 day, 48 minutes a period, five days a week for study skills to
3 Robert's schedule. This change will begin at semester 10/98.
4 Continue with goals from the IEP 10/6/97." AR 4001. The
5 addendum is signed by Mrs. Moser. Ms. Wimberly (listed as
6 "administrator") signed the addendum on 1/16/98. Ms. Haskell
7 signed the addendum on 1/13/98. Ms. Oneto signed the addendum
8 and did not include a date. See AR 4001. Three school officials
9 signed this form, not the entire IEP team. The IEP team which
10 met May 28, 1998, consisted of: Mrs. Moser, Robert Moser,
11 Superintendent Wilamek, Mr. Randall (math teacher), Ms. Haskell
12 (Resource Specialist), Scott Black (Department of
13 Rehabilitation), Nancy Stephens (District's Attorney), Ms.
14 Wimberly (Learning Director), Ms. Graves (Plaintiff's attorney),
15 Sonya Bach (nurse), and Dr. Mills (District's Special Education
16 Director). Mrs. Moser testified that the schedule change did not
17 occur through an IEP meeting, instead she "met with Patti
18 [Haskell] in . . . the classroom." AR 1910:6-12. Ms. Haskell's
19 handwritten notes indicate that the schedule change was made
20 unilaterally: "mom asked about an hr a week. I said the IEP was
21 30 minutes a week and we would change that to 1 hr a day [.]
22 [illegible] mom about addendum to change to 48 minutes a day five
23 x a week[, mom] wants update on classes. Sent home addendum for
24 signature." AR 3998.

25 (10) An IEP "exit meeting" was convened on May 28, 1998.
26 Doc. 72 UF 175. Defendant claims the IEP team determined
27 Plaintiff had met all IEP goals and objectives. Doc. 72 UF 175.

28 Page three (of five) of the 5/28/98 "exit" IEP report

1 contains a copy of the 10/6/97 IEP plan "goals and objectives."
2 Handwritten notes, completed by Patty Haskell, show Robert had
3 not met 3 of the 5 objectives listed under the "study skills"
4 goal section. AR 3834. However, the very next page (#4 of 5 in
5 5/28/98 IEP report), a blank version of the 10/6/97 "goals and
6 objectives" page has the sentence "district believes goals and
7 objectives have been met" scrawled across the page. AR 3835. At
8 best, Defendant misstates the record by only including one of two
9 contradictory sections of the exit IEP report.

10 (11) Defendant alleges Plaintiff provided a diagnosis of
11 narcolepsy "after graduation." Doc. 72 at ¶186.

12 The District had notice of the narcolepsy diagnosis on May
13 28, 1998, as noted on the IEP "health update" dated May 28, 1998.
14 AR 2779: "Health concerns: narcolepsy, recently diagnosed - to be
15 confirmed;" signed by school nurse Sonia Bach.

16 (12) Defendant's Undisputed Fact #7 states, "On April 19,
17 1989, an IEP team determined Plaintiff was eligible for special
18 education services by a resource specialist for 1 hour per week
19 through the 5th grade." (Emphasis added). IEP pp. 4395-4397;
20 IEP May 1991, pp. 4387-4394.

21 The IEP at AR 4394 specifically states Robert is to see the
22 resource specialist "up to 60 min daily," not once per week.

23 (13) Defendant's Undisputed Fact #8 states, "In 6th grade,
24 Plaintiff's services were reduced to 45 minutes" citing IEP, May
25 1992, pp. 4379-4381.

26 AR 4379 states RSP (Resource Services) beginning May 28,
27 1992, ending January 1993 "one 45 min session 5x each week in
28 written language."

1 (14) Defendant's Undisputed Fact #29 states, "During this
2 IEP meeting, Mrs. Moser stated that Plaintiff's physician was
3 considering a diagnoses of chronic fatigue syndrome. Nurse was
4 to communicate with doctor regarding physical condition," citing
5 IEP 10/25/94, 4273; Olsen-Miller 737:17-25; 738:9-11; Harrison
6 1293:12-13; Sylcox 854:15-17; Olsen-Miller Notes, 3825-3826. The
7 gist of this assertion was that no diagnosis of chronic fatigue
8 syndrome had been made as of the October 1994 IEP meeting.

9 Defendant's own 1994 IEP report, written evidence and
10 hearing testimony contradict its claim. The IEP states: "Robert
11 has a history of mono - Dr. Says he now has Chronic Fatigue
12 Syndrome - nurse will communicate [with] Dr. re: his physical
13 condition." AR 4273. Nurse Silcox testified that, *at the*
14 *October 1994 IEP meeting she believed Robert had been diagnosed*
15 *with CFS and was eligible for special education.* AR 854:15-
16 855:14. Nurse Silcox wrote a letter to Robert's doctor, Dr.
17 Lake, on November 1, 1994, which states:

18 I am writing you on behalf of Robert's teachers
19 who continue to be concerned about Robert's apparent
20 tiredness and continued lack of interest in any
21 activity - physical or mental.

22 I was concerned that he [Robert] might be
23 depressed until I talked with his mother and she
24 explained that he had mononucleosis and is now
25 diagnosed with Chronic Fatigue Syndrome. Would you
26 please send us more information on this diagnosis and
27 prognosis

28 If you would rather call than write me please do.
Thank you for your help.

AR 4270.

According to Nurse Silcox, she understood Robert to have CFS
at the *beginning* of his freshman year:

Q: And when he [Dr. Lake] called, do you recollect

1 specifically that he said Chronic Fatigue Syndrome or
2 did he say they were doing further testing?

3 A: *He said Chronic Fatigue Syndrome.*

4 Questions by Defendant's attorney, Ms. Stephens, AR 872:21-24.

5 Q: At this point, was he [Dr. Lake] finished with
6 his testing or was he, was the diagnosis still in
7 progress?"

8 A: *As far as I knew, the diagnosis was inclusive.
9 That he [Dr. Lake] had decided that was his diagnosis.*

10 Questions by Defendant's Attorney, Ms. Stephens, AR 873:22-27.

11 Plaintiff's attorney, Mrs. Graves, elicited the same response:

12 Q: So, when you were speaking with him [Dr. Lake],
13 were you, under the impression that Robert did have
14 Chronic Fatigue Syndrome:

15 A: Yes.

16 AR 880:2-4. Nurse Silcox considered her November, 1994 telephone
17 conversation with Dr. Lake sufficient documentation of the
18 diagnosis:

19 Q: In your letter, do you ask him [Dr. Lake] for a
20 written diagnosis or did you tell him that a phone call
21 would be fine as well?

22 A: I have found that doctors sometimes felt that
23 [the phone] was much more expedient and with
24 documenting what he said over the phone, I felt that
25 was sufficient

26 Q: And, did you push him to put something in
27 writing at that point?

28 A: No.

AR 880:5-22.

Plaintiff points out that in Defendant's June 21, 2001,
Brief at p. 4:22-24 addressing whether Plaintiff's CFS was being
"considered" or was actually diagnosed, in a Further Brief dated
August 20, 2001, the word "inclusive" was changed to
"inconclusive," which misrepresented the status of the CFS
diagnosis.

1 (15) Defendant's undisputed fact #31 states, "Subsequent to
2 IEP meeting, Nurse Silcox contacted Dr. Lake regarding
3 Plaintiff's medical condition and information on diagnoses or
4 prognoses concerning chronic fatigue syndrome. In addition,
5 Nurse Silcox discussed with family regarding vitamin supplements.
6 Ms. Moser indicated she was not interested in vitamin therapy.
7 Defendant's Undisputed Fact #32 states, "In November 1994, Nurse
8 Silcox spoke with Mr. Lake who indicated that he was running a
9 few more lab tests on Plaintiff to make sure he was not anemic.
10 Dr. Lake also indicated that testing of Plaintiff for
11 mononucleosis was not conclusive and that he was continuing
12 testing and the diagnosis was still in progress. They also
13 discussed vitamin therapy." Letter, p. 3393; Silcox 874:1-12.
14 Defendant's undisputed fact #34 states, "district going to
15 provide whatever supports possible until Mom got diagnosis."
16 Defendant's undisputed fact #35 states, "staff was provided
17 information regarding chronic fatigue syndrome." Doc. 72.

18 The statements taken together show Defendant was attempting
19 to misleadingly imply that the CFS diagnosis was still in
20 progress. The letter and Nurse Silcox's testimony were about the
21 mononucleosis diagnosis, not the CFS diagnosis. The letter cited
22 at AR 3393 is a letter from Nurse Silcox dated November 10, 1994,
23 to Mrs. Moser, which states, *in its entirety*:

24 Dear Mrs. Moser: Dr. Lake called and told me he
25 will be running a few more lab tests on Robert to make
26 sure that he is not anemic and that his organs are
27 working properly. He feels that retesting later for
28 mononucleosis is not conclusive as once this test
results show positive, which they will once he has had
mono, they will always show a positive result. In this
case a positive result is not always conclusive or
active disease.

1 I asked Dr. Lake about vitamin supplements for
2 Robert, explaining that you stated he was not a very
3 good eater. He said that a multivitamin tablet without
4 iron would be a good idea for Robert. He stated that
5 he had never heard of the body not producing its own
6 vitamins after having taken a vitamin pill. Please
7 discuss the vitamin issue with Dr. Lake if you continue
8 to have questions regarding their use.

9 Please call me if I can be of further assistance.

10 Nurse Silcox's cited testimony at 874:1-12 is solely about the
11 mononucleosis diagnosis, not the CFS diagnosis.

12 (16) Defendant's undisputed fact #30, listed under 9th
13 grade (1994-1995) states, "In response to parents' concern
14 regarding chronic fatigue syndrome, District staff offered
15 accommodations, including shorter day, no P.E. or electives,
16 transportation, and classes in personal development and study
17 skills taught by special education resource specialist, Ms.
18 Olsen-Miller, in order to monitor Plaintiff's progress and
19 provide assistance with written expression. The personal
20 development class and the study skills class provided by resource
21 specialist who would serve both special education students and
22 "at-risk" regular education students. Olsen-Miller 746:22-26;
23 748:3-5; 759:1-2; 781:4-8; Silcox 863:5-12; Harrison 1288:4-27;
24 Olsen-Miller 759:1-2; 775:22-24; Silcox 881:12-18; Harrison
25 1355:1-4; Olsen-Miller Notes 3825-3826.

26 The record contradicts most of Defendant's claims. Robert
27 was not offered a shortened day until his second semester when he
28 transferred to a small continuation-type high school in Arnold,
closer to home. AR 291; 4262. Robert was not provided
transportation until his *sophomore* year, *after* his mother
specifically requested transportation services, when she *learned*
from a neighbor that Robert had the right to the accommodation.

1 AR 4253; Doc. 72, ¶48 at 13. The school placed Robert in a
2 resource specialist's class held in the early morning, at a time
3 Robert's CFS made it difficult for him to attend. The school was
4 aware of Robert's CFS and its effect upon his ability to attend
5 morning classes. See, e.g., Ingrid-Olsen testimony, AR 750:13.
6 *Robert was not exempted from P.E. until his sophomore year.* AR
7 4226; 867. At Arnold, Robert was required to keep a P.E. log of
8 activity, *the same requirement of every student at Arnold.* AR
9 4262. Plaintiff points out, and the record confirms, that Robert
10 did not receive any special written language instruction from
11 Ingrid Olsen-Miller:

12 Q: Did you - you focused your efforts with him on
13 written language?

14 A: Most of the time it was just progressive works
15 caught up [sic]. He was so overwhelmed at times. And
16 most of it was in a written form. So, there was
17 assistance with that, as well as getting caught up.

18 Q: Did you have time to deal with the spelling
19 concerns particularly the mother had had?

20 A: (unintelligible) Sometimes Robert wasn't
21 always happy with my hovering over his shoulders,
22 typical teenager. (Laughter) Sometimes he wanted to be
23 left alone, but I attempted to assist whenever I could.

24 AR 749:4-13.

25 (17) At the end of his first semester of 9th grade
26 Plaintiff's mother transferred her son from the District High
27 School to Arnold High School without alerting Bret Harte High
28 School staff or discussing her decision with anyone. Smith,
1444:10-19.

The cited testimony does not support this claim:

Graves: Do you recall finding out at any point
why, uh, Robert had transferred to Arnold High School?

Smith: No.

Graves: Do you recall finding out at any point how
they got him in?

1 Smith: Pardon me?
2 Graves: Do you recall ever - at any point
3 receiving anything about how things had gone for Robert
4 at Arnold High School?
5 Smith: Not until he was getting ready to come back
6 to Bret Harte.
7 Graves: And then what did you hear?
8 Smith: Um, that he was coming back.

9 The claim is a direct falsehood. Testimony from Ingrid
10 Olsen-Miller indicates she and Mr. Smith were both aware of
11 Robert's transfer sometime in November or early December:

12 I. Olsen-Miller: Well, he responded and I don't
13 remember if I spoke to him initially in about the
14 middle of November, or the end of November, or the
15 first couple of days in December, but sometime in there
16 I approached him for the first time and it - at that
17 time he informed me that it looked like Robert would be
18 attending Arnold High the second semester at parents
19 request.

20 AR 745:1-6.

21 (18) Defendant's undisputed fact #44 states: "Plaintiff
22 missed 16 days in the 9th grade year, which was 'real good' for
23 Plaintiff." Wilamek 373:18-22.

24 Mr. Wilamek's testimony, AR 373:14-22, states Robert was
25 absent for 16 days *during his second semester* of 9th grade, at
26 Arnold High School:

27 Wilamek: *This is the attendance from Arnold High
28 School.*

Stephens: OK. You can see it's obviously been
sanitized and only Robert Moser's name is left on
there.

Wilamek: Um hum.

Stephens: What was his attendance? How would you
characterize his attendance in the ninth grade?

Wilamek: Real good. I mean, *he was there a
semester and he missed 16 days.*

Stephens: OK. So missing 16 days is average, or

-
Wilamek: Well, a little bit above average. But
for Robert, it's real good.

1 (19) Defendant's undisputed fact #125 states: "October 8,
2 1997, American Government instructor indicates Plaintiff refused
3 to keep notebook. . . ." Notes, p. 4075.

4 This "undisputed fact" is an exaggeration. Mrs. Moser
5 testified:

6 Moser: I never had a problem with Mr. Randall. He
7 provided the work or came over or Robert could call him
8 on the phone. They worked it out with each other, and
9 even if Robert was very sick, he made sure that Robert
10 got the core of what he needed to know, but he didn't
11 have to do any of the extra.

12 Stephens: OK. What is it about those [Mr.
13 Overton's] accommodations that you disagreed with,
14 other than the fact that you did not want to have
15 Robert, uh, ask a friend for the assignment if he were
16 away for one or two days?

17 Moser: And that I would pick it up. Uh, what did
18 you ask me again?

19 Stephens: What other things did you object to in
20 terms of the accommodations that are listed here, other
21 than the one you said before about not wanting Robert
22 to ask a friend for the assignment?

23 Moser: Uh, I don't think I had any, we didn't
24 have any problems in Mr. Overton's class. [Emphasis
25 added].

26 Stephens: It sounds like Patti was kind of like a
27 central figure, uh, in helping to coordinate things,
28 Ms. Haskell, is that correct?

Moser: Very necessary and central person. Yes.
She put a lot of time, was very nice.

Stephens: . . . And then, we have accommodations
from Ms. Oneto on the same page? Did you have
objections to some of those accommodations?

Moser: No. I was wondering why that [sic] notes
weren't put on the, on the American Government class?
But anyways, uh, these aren't, this isn't the 504 plan
that we signed, or we talked about when we met with the
teachers, but, in general, I guess it's the same. Do I
have any problems with any of this?

Stephens: Uh-huh.

Moser: Well, I had to go get, first, the
schoolwork out of it, that brown binder that she talked
about, in the classroom, and that was kind of
difficult, so, eventually, I got, I was able to get
Patti, got the information and then, I, instead of
trying to contact all of these teachers, Patti became
the one that, you know -

Stephens: Okay.

1 Moser: - I think Patti had to contact them, which
I think would make it easier for Patti, it would have
2 been nice if they didn't see Robert, just send it to
Patti, and then, I pick it up.

3 Stephens: Uh-huh. Okay. But as far as the
accommodations of English, you didn't have a problem
4 with that? The last one, of course, is the, uh,
physics program. And I'm not going to go through this
5 again, because I think we spent a lot of time on this,
but these are the accommodations. Uh, you can see at
6 the bottom of the page, uh, that, uh, all of the
teachers signed this document. But you did not sign
7 this document?

8 Moser: No. I've never seen this document until
today.

9 Stephens: So, we have to assume that Ms. Wright
did not share this document with you, would that be
correct?

10 Moser: Yes.

11 Stephens: *If you had seen this document, would
have have signed it?*

12 Moser: No.

13 Stephens: *And the reason?*

14 Moser: *Because I don't agree with, uh, a student
being responsible, and like I said before, if Robert
was not there, I need to get the work as soon as
possible, and, uh, what other reason here? Uh, I must
have lost my train of thought. [Emphasis added].*

15 Stephens: Okay, well, I think you have sort of a
sense, Mrs. Moser, of what you're requesting.

16 Moser: And I would have to have seen Patti on here
be the coordinator on this.

17 ...

18 Stephens: When you met, when you came in to meet
with some of the teachers, did they, uh, discuss some
of these accommodations with you at that time when you
19 came in for a 7:30 a.m. meeting?

20 Moser: Yes, we went over, it was a different
paper, though. We had a different paper.

21 Stephens: . . . Did Ms. Wright, so Ms. Wright
didn't even tell you that that document existed?
That's your testimony?

22 Moser: I don't remember.

23 Stephens: Okay. And you don't have any
recollection that she advised you not to sign it?

24 Moser: *Oh, I know she didn't tell me to sign it or
not, I know I wouldn't sign it by what's in there.*

25 J. Moser, 1979-1983:26.

26 (21) Defendant's undisputed fact #167 states: "Plaintiff
27 believes he has the ability to advocate for himself." R. Moser
28 2232:1-19.

1 The cited testimony does not support this generalized
2 statement as Robert stated he was still uncomfortable about doing
3 it.

4 Hearing Officer: Okay. Okay. Just one last
5 question. Jack Pool today testified that he recently
6 had a meeting with you and your Mom and another
7 counselor at Columbia - Paul, I think his name was.
8 And you talked about, I guess about self-advocacy a
9 little bit.

10 R. Moser: Um-hum.

11 Hearing Officer: Do you feel that you know where
12 to go to get help when you need it at Columbia?

13 R. Moser: Um, I think I know where to go, yeah.

14 Hearing Officer: Okay. There were some discussion
15 [sic] about you needed [sic] to talk to your
16 instructors -

17 R. Moser: Yeah.

18 Hearing Officer: - if you have a problem or if
19 you need an accommodation. Do you feel more
20 comfortable doing that now or -

21 R. Moser: I feel a little more comfortable. I'm
22 still uncomfortable about doing it.

23 Hearing Officer: Um-hum. Have you done that this
24 semester with your instructors?

25 R. Moser: I've done it with one of my instructors.

26 Hearing Officer: And how did it work out?

27 R. Moser: It's working out good.

28 (22) Defendant's undisputed fact #169 states, "Mr. Randall
saw Plaintiff 2 to 3 times per week and 1 to 2 times per week
after school and on weekends. Randall, 1790:3-9.

The cited testimony is from Dr. Patterson and deals with
what Dr. Patterson would have done: ". . . Well and included uh,
information. Now because there is the possibility that Robert
might have been other health impaired, uh, knowing what we know
from the record at this point in time, I probably would have
talked to some teachers and, uh, asked to come in to view Robert
across the day a couple of times, I would have attained his
attendance records to see is there a . . ."

(23) Defendant's undisputed fact #171 states, "Algebra II

1 was not particularly challenging, so Plaintiff was advanced to
2 trigonometry. Plaintiff understood concepts of trigonometry very
3 well. In fact, if Plaintiff attended college, he could take pre-
4 calculus." Randall 1390:24-26; 1391:14-16; 1400:2-11; Randall
5 1401:1-3.

6 The cited testimony is as follows:

7 Randall 1390:24-26:

8 Randall: I'm gonna guess 15-20. Mainly were
9 relatives.

Stephens: Did he have friends there, too?

10 Randall. Yes.

11 Randall, 1391:14-16:

12 Randall: Yes. He was in a regular algebra 2 class
13 and math is one of the areas where I think Robert has a
14 strong aptitude. And, the course wasn't particularly
15 challenging for him. That's one of the reasons . . .

16 1400:2-11:

17 Randall: Yeah. Um, the concern I had with what he
18 has done in trig is that the material for which he was
19 present for which he did work, he grasped it very well.

20 Uh, but there were - because of the absences and
21 because of the homework, there were some topics, some
22 chapters that he had huge holes. And I did not
23 penalize him for not having that material, but
24 evaluated him based on the materials he did achieve.

25 Stephens: Did he have the opportunity to, uh,
26 contact you to - for some tutoring to make up these
27 deficits?

28 Randall: Yes.

1401:1-3:

29 Randall: Yes. We discussed that. He and I
30 discussed it where when he went to college that the
31 course to continue with would probably be a pre-
32 calculus class, and that some of the topics would be
33 ones that he saw . . .

34 Testimony not cited does indicate Robert was advanced to
35 trigonometry without meeting the prerequisite (AR 1391:17-23).

36 (24) Defendant's undisputed fact #173 states, "Plaintiff
37 was on medications during his senior year which changed 5-7
38

1 times, but failed to inform school. J. Moser 1938:21-24.

2 This statement is untrue. The cited testimony does not
3 support the contention that Plaintiff did not inform the school.
4 The citation also ignores Ms. Stephens' comments and Mrs. Moser's
5 testimony just prior, where Mrs. Moser specifically states she
6 told the school about the medication changes. The cited
7 testimony is:

8 Stephens: At this point, I don't think I need
9 them. How many times would you say that the
10 medications were changed during Robert's senior year?

11 Moser: Five or seven times.

12 The entire exchange, including the cited testimony, is:

13 Ms. Stephens: I think that there's evidence that,
14 uh, Mrs. Moser testified earlier that, uh, Dr. Stoke
15 had prescribed various medications to deal with
16 depression and some of these, uh, medications, I think
17 were, what I would call, heavy-duty medications in
18 terms of psycho-tropic, uh, drugs and that schools
19 should be notified that the child is going to be taking
20 these kinds of drugs. So, that's why I wanted to know
21 if there was ever any attempt to contact the schools
22 about this.

23 Hearing Officer: You may answer the question.

24 Moser: Uh, I know that I wrote a letter asking him
25 to, uh, the school asked me to do something like that,
26 so, I wrote a letter and I think only Dr. Lee responded
27 to the school. *And then, when, when he started taking
28 different medication, I came in and told Sandy as it
went along like we're changed to a different
medication, 'cause she was very, Sandy is very kind and
I felt like she cared, if I came in and told her what
was going on. She was a very nice counselor. So, I
have the names of the drugs if you want them.*

29 Stephens: At this point, I don't think I need
30 them. How many times would you say that the
31 medications were changed during Robert's senior year?

32 Moser: Five or seven times.

33 Stephens: *Five to seven?*

34 Moser: *I couldn't tell you exactly. [Emphasis
35 added].*

36
37 (25) Defendant's Undisputed Fact #197 states, "Based on Dr.
38 Trotter's review of records and conversations with the Mosers, he

1 believes that since Robert was within normal expectations for his
2 grade level, he probably would not be afforded special education
3 services under other health impairment criteria, but he would
4 perhaps be eligible probably for 504 plan accommodations."
5 Trotter, 283:22-24; 284:10-16.

6 Defendant mis-cites testimony and omits Dr. Trotter's
7 comments just prior to the cited testimony where he says he is
8 speaking "in generalities" and "hypothetically" as to "if Robert
9 was doing within normal expectations for his grade level . . ."
10 Dr. Trotter *does not state* that "he believes that since Robert
11 was within normal expectations for his grade level." Trotter,
12 283:22-24, states:

13 Graves: Okay. Based on your review of the records
14 and conversations with the Mosers, how long do you
15 think Robert would have been eligible to be treated as
16 an OHI student under IDEA?

17 Trotter: Well, as long as he was in school, and
18 then I don't know how the junior college component -
19 how they - how their student services . . .

20 Trotter, 284:10-16, states:

21 Graves: The general testing?

22 Trotter: Yeah, he was functioning, you know,
23 despite his illness, he was managing to process more
24 information quite well. We can only conjecture if he
25 wasn't, how well he would be doing. But he still met
26 the threshold of average performance.

27 Graves: Okay.

28 Trotter: In my understanding, we're saying that he
wouldn't be lost in a [regular class].

Not cited by Defendant are the prior lines of testimony on
page 284, by Dr. Trotter:

Graves: Oh, I'm talking about before you came on
board. How long - how many - at one point do you think
he became eligible as an OHI student?

Trotter: Well, again, it's based on the - you
know, again I can only talk hypothetically, not
specifically to Robert's case. *But if he was doing
within normal expectations for his grade level, he*

1 probably would not be afforded special ed services
2 under OHI, but he would perhaps be eligible for
3 probably 504 plan accommodations. *But these are
4 generalities, okay, not specific to this case, because
5 I was not part of the IEP team. [Emphasis added].*

6 (26) Defendant's Undisputed Fact #217 states, "deficit in
7 spelling did not affect plaintiff's writing competence" and cites
8 "Patterson, 1279:1-12."

9 Dr. Patterson was Plaintiff's expert. The cited testimony
10 was from Michael Harrison, Defendant's school psychologist, not
11 Dr. Patterson. Michael Harrison's full testimony on the issue,
12 at AR 1279:12-27, 1280:8-12, does not support Defendant's
13 generalized claim:

14 Harrison: There seemed to be a deficit in
15 spelling, but it did not seem to be having a
16 significant effect on his writing competence. It
17 seemed to be more related to spelling itself.

18 Graves: Okay. *And did you notice errors in his
19 writing itself?*

20 Harrison: *Um - that would have been scored by the
21 resource specialist. And when I look at just the
22 results of that testing, um, what was told to me and
23 what was demonstrated by the formal results of the test
24 was that his writing skills were within the average
25 range.*

26 Graves: Okay. *Was he making any grammatical
27 errors that you're aware of?*

28 Harrison: *That would - that would need to be, I
29 would want the resource specialist, the person who had
30 actually given that test to speak to -*

31 Graves: Okay. *And were you able to review the
32 actual sample of the writing he had produced for that
33 test?*

34 Harrison: *Hm hmm. Hmm. I saw, um, copies of a -
35 Graves: Okay. And do you know where those will
36 be now?*

37 Harrison: *I think I passed them up even*

38 Harrison: *I don't believe that I was given any of
39 that in preparation for this, um, it would be typical
40 in an IEP meeting that I would look over the results
41 the resource specialist had, um, I think the only thing
42 I've seen written out is just results of the - the from
43 the previous ability test, (unintelligible) tests that
44 has been given.*

45 ///

1 3. Misstatements and Mischaracterizations of
2 Applicable Law

3 (1) Counsel stated in her July 31, 2002, brief:

4 Procedural flaws do not automatically require a finding
5 of a denial of FAPE. (See, *W.G. v. Board Trustees of*
6 *Target Range School District*, 960 F.2d 1479, 1484 (9th
7 Cir. 1992). In fact, the U.S. Supreme Court defined
8 what is meant by a 'free appropriate public education'
9 and concluded that the IDEA does not require that a
10 student be provided with the best available special
11 education services or that the services maximize each
12 child's potential. It also concluded that the basic
13 floor of opportunity provided by the Act consists of
14 access to education which provides some educational
15 benefit.

16 Doc. 80, Def.'s Memo re Summary Judgment, at 31:15-21.

17 Defendant's partial presentation of IDEA case law ignores
18 and obfuscates the central role procedural safeguards play, which
19 counsel, as an educational law specialist, should know are the
20 basic tenets of established IDEA case law. The case counsel
21 cites does say that procedural defects are not per se violations,
22 but the *complete citation* states: "Procedural flaws do not
23 automatically require a finding of a denial of a FAPE. However,
24 *procedural inadequacies that result in the loss of educational*
25 *opportunity, or seriously infringe the parents' opportunity to*
26 *participate in the IEP formulation process clearly result in the*
27 *denial of a FAPE."* *W.G. v. Board of Trustees of Target Range*
28 *School Dist. No. 23*, 960 F.2d 1479, 1484 (9th Cir. 1992)
 (emphasis added).

 Counsel's selective partial citation is misleading and
attempts to obscure the rule regarding procedural safeguards and
instead create the false impression that minimal educational
benefit is the *only* measure of what constitutes a FAPE, when the

1 applicable case law says no such thing:

2 When a district fails to meet the procedural
3 requirements of the Act by failing to develop an IEP in
4 the manner specified, the purposes of the Act are not
5 served, and the district may have failed to provide a
6 FAPE. The significance of the procedures provided by
7 the IDEA goes beyond any measure of a child's academic
8 progress during the period at issue. As the Court in
9 *Rowley* said, "Congress placed every bit as much
10 emphasis upon compliance with procedures giving parents
11 and guardians a large measure of participation" at
12 every step "as it did upon the measurement of the
13 resulting IEP." *Rowley*, 458 U.S. at 205-06.

14 *W.G. v. Board of Trustees of Target Range School Dist. No. 23*,
15 960 F.2d 1479, 1485 (9th Cir. 1992). Plaintiff's portrayal of
16 *Rowley* as simply requiring a minimum of "some educational
17 benefit" to the exclusion of procedural safeguards severely
18 mischaracterizes the law, in what can only be interpreted as an
19 intentional attempt to mislead the court. Counsel's conduct goes
20 far beyond the vigorous advocacy of distinguishing cases or
21 holdings harmful to its position; counsel actively misrepresents
22 the basic standard by which IDEA cases are judged.

23 (2) Counsel stated in her brief of June 4, 2001, that
24 Plaintiff could not be reimbursed for the purchase of a computer,
25 internet access fees, and counseling because "20 U.S.C.
26 § 1412(a)(10)(C)(iii) requires that the parents give written
27 notice to the District before they can be reimbursed for
28 educational services unilaterally purchased." Doc. 25, Def.'s
29 Brief re De Novo Review, at 36:21-26. Counsel repeats this claim
30 in its opposition to Plaintiff's Motion for Summary Judgment.
31 See Doc. 87 at 34:5-10.

32 Review of the citation from the IDEA and the context in
33 which it is made reveals that counsel seriously mischaracterized

1 the law. First, the cited text only discusses a situation where
2 the child is enrolled in private school without the consent of
3 the public agency. 20 U.S.C. § 1412(a)(10)(c). Second, there
4 may be a denial of reimbursement for private school fees if the
5 parents did not notify the public agency prior to the child's
6 *removal from public school*. 20 U.S.C. § 1412(a)(10)(C)(ii and
7 iii). Third, the parents have to be notified of the requirements
8 under this section. 20 U.S.C. § 1412(a)(10)(C)(iv). Plaintiff
9 did enroll in private school; he was not removed from public
10 school; he was not seeking private school fees; and there is no
11 evidence his mother received any kind of notice from Defendant
12 about the requirements. The cited portion of the IDEA does not
13 say what Counsel suggests it says. Plaintiff explained in detail
14 why counsel's statement of the law was wrong in the reply of
15 October 15, 2001. See Doc. 44, Pl.'s Answer to Evidentiary
16 Objection at 55:1-22. Yet, on August 15, 2002, Defendant's
17 counsel reiterated the identical (wrong) characterization of the
18 law in the exact same language, verbatim. See Doc. 87, Def.'s
19 Opposition re Summary Judgment at 34:5-10.

20 Lozano, Smith attempts to explain away this
21 mischaracterization as a mere "mistake." Lozano, Smith's
22 explanation is untenable given the repeating of this misstatement
23 of law after it was challenged.

24 (3) Counsel also suggests that accommodations that satisfy
25 Section 504 of the Rehabilitation Act would satisfy IDEA
26 requirements. Doc. 41, Def.'s Further Brief re Do Novo review,
27 at 12:7-11 ("There is no law preventing regular education
28 accommodations, being developed as part of a Section 504 plan, to

1 be written as a document separate and away from the IEP process.
2 Moreover, the 504 accommodations were subsequently adopted by the
3 IEP team as part of Plaintiff's IEP"). Defendant attempts to
4 perpetuate this deception in the opposition to Plaintiff's Motion
5 for Summary Judgment by claiming the District provided a FAPE
6 based upon those accommodations allegedly made under Section 504
7 of the Disability Act. See Doc. 87, at 24:4-20.

8 This is plainly not the law as discussed in detail in the
9 Memorandum Decision and Order. See Doc. 102. A school has no
10 leeway to substitute a 504 Plan for required IEP/IDEA services.
11 "Both sections 504 and IDEA have been interpreted as requiring
12 states to provide a free appropriate public education to
13 qualified handicapped persons, but only IDEA requires development
14 of an IEP and specifically provides for transition services to
15 assist students [to] prepare for a post-high school environment.
16 See 20 U.S.C. § 1401(a)(20). Under the statutory scheme, the
17 school district is not free to choose which statute it prefers."
18 *Yankton School District v. Schramm*, 93 F.3d 1369, 1376 (8th Cir.
19 1996). "[T]he District should have devised an IEP to meet [the
20 student's] unique needs in compliance with the provisions of the
21 IDEA, and its proposed plan under § 504 of the Rehabilitation Act
22 was not an adequate substitute." *Muller ex rel. Muller v.*
23 *Committee on Special Educ.*, 145 F.3d 95, 105 (2d Cir. 1998).

24
25 (4) Adaptive Physical Education Requirements (APE)

26 Defendants argued in their June 4, 2001, brief at p. 26:18-
27 22:

28 APE is the most restrictive form of physical education

1 and is not provided unless (1) a student cannot
2 participate in regular physical education classes to
3 support his equal participation; (2) modifications
4 cannot be made to the student's regular physical
5 education; and (3) specially designed physical
6 education would not be appropriate.

7 Plaintiff rejoined that 5 Cal. Cr. C. § 30515 in truth
8 provides:

9 [c]onsultative services may be provided to pupil,
10 parents, teachers, or other school personnel for the
11 purpose of identifying supplementary aids and services
12 of modifications necessary for successful participation
13 in the regular education program or specially designed
14 physical education programs [in special day classes].

15 Defendant's argument that APE services required Robert be
16 exempted rather than aided by APE to access physical education
17 was at the least a distortion, if not a misrepresentation of the
18 law, which encourages APE services to teach students to work
19 around limitations to facilitate participation activities with
20 non-disabled peers.

21 (5) Standard for Entitlement to Extended School Year
22 Services.

23 Defendant, in opposition to summary judgment at p. 27:9-12,
24 argued that extended school year services are only warranted for
25 students who face regression, in the event that services are
26 interrupted. Defendant argued that Robert did not need
27 "extensions" into the summer and should be judged by what he
28 completed by the end of the school year, based on Defendant's
claim that California's ESY regulation provides that "ESY
services are provided when 'an interruption of the pupil's
educational programming may cause regression.'"

To the contrary, regulation does not require proof of

1 regression and in substance calls for extended school year
2 services to be provided to each individual with exceptional needs
3 who has unique needs and requires special education and related
4 services in excess of the academic year. Such individuals have
5 handicaps likely continued indefinitely or for a prolonged period
6 and interruption of the pupil's educational programming may cause
7 regression, when coupled with limited recoupment capacity,
8 rendered impossible or unlikely the student will attain the level
9 of self-sufficiency and independence that would otherwise be
10 expected in view of his or her handicapping condition. The lack
11 of clear evidence of such factors may not be used to deny an
12 individual an extended school year program if the Individual
13 Education Program team determines the need for such a program and
14 includes extended school year in the individualized education
15 program pursuant to subsection (f). As Plaintiff correctly
16 notes, under federal law, regression-recoupment is not the
17 standard for availability of ESY services. *Johnson by and*
18 *through Johnson v. Independent School Dist. No. 4 of Bixby, Tulas*
19 *County, Okla.*, 921 F.2d 1022, 1027-28 (10th Cir. 1990) (citing
20 *Alamo Heights Ind. Et. School Dist. v. State Board of Education*,
21 790 F.2d 1153, 1158, fn.3 (5th Cir. 1986).

22 (6) Whether Robert's Parents Were Barred From Reimbursement
23 By Failure to Provide Notice To the District Before
24 Making Expenditures On Robert's Behalf.

25 Defendant argued that 20 U.S.C. § 1421(1)(10)(C)(iii)
26 requires parents to give written notice to the District before
27 they can be reimbursed for educational services unilaterally
28 provided and that Robert's parents did not give Defendant

1 District such notice. Brief filed June 4, 2001, p. 36:24-26.
2 The reference section does not require advance written notice
3 before reimbursement for educational services unless the student
4 previously received special education and related services under
5 the authority of a public agency and are removed by parents to be
6 enrolled in a private elementary or secondary school without the
7 consent of or referral by the public agency, and the parents seek
8 reimbursement for the cost of that enrollment. The written
9 notice requirement only applies if parents have been given notice
10 of the requirement. Here, there is no showing Defendant ever
11 gave such notice. 20 U.S.C. § 1412(a)(10)(c)(iv)(IV).

12 This section of law did not become applicable in California
13 until January 1, 1999, after it was added to federal law by
14 Stats. 198, c. 691 (S.B. 1686). After notice of the error,
15 Defendant continued to advance the argument.

16 B. Attacks on Plaintiff and Plaintiff's Counsel.

17 Separate from the distortions and misrepresentations
18 detailed above, Ms. Yama and Lozano Smith engaged in ad hominem
19 attacks on Plaintiff, suggesting he had a bad attitude and was a
20 malingerer. They also attacked Plaintiff's counsel with
21 accusations she was mischaracterizing the record and falsely
22 attributed arguments in the federal case to Plaintiff that
23 Plaintiff's counsel did not advance.

24 C. Elaine Yama

25 Ms. Yama has submitted a separate brief and declaration
26 which attempts to explain that the misstatements and frivolous
27 objections were due to either mistake, misunderstanding, or
28 carelessness. See Yama Decl., Doc. 132 and Yama Supplemental

1 Decl., Doc. 154. Ms. Yama contends she misunderstood the nature
2 of the proceedings and did not realize they were to be conducted
3 as a "standard summary judgment motion," with separate statements
4 of undisputed facts. *Id.* Ms. Yama contends she believed she was
5 merely submitting a statement of chronological facts, and that in
6 this statement she could state "any fact which had a scintilla of
7 evidence in support of it," regardless of credibility issues or
8 the strength of evidence to the contrary. *Id.*

9 In support of this explanation, Ms. Yama points to her
10 December 7, 2001, letter to the Court where she proposed an
11 alternate method of proceeding with summary judgment. See Doc.
12 132, Exh. B. Ms. Yama proposed that:

13 Each party submit a 'Chronological Statement of
14 Material and Relevant Facts,' following a format
15 similar to that set forth in this Court's Local Rule
16 56-260. The Chronological Statement of Material and
17 Relevant Facts shall enumerate discretely each specific
18 material and relevant fact and cite the particular
19 portions of the administrative record relied upon to
20 establish that fact.

21 Yama Decl., Doc. 132, Ex. B, at 2. The letter also made two
22 other substantive proposals: "Chronological Statement of Material
23 and Relevant Facts will be filed with a Brief" and "Failure to
24 support a fact or disputed fact by appropriately citing to the
25 administrative record, will result in a finding that the fact is
26 unsupported and it will be disregarded by the Court." Yama
27 Decl., Doc. 132, Ex. B, at 2.

28 By this letter, Ms. Yama sought to create an unorthodox
procedure which she claims partially excuses two areas of
improper conduct. Ms. Yama points to her suggestion that all
facts had to be cited to the administrative record, as

1 justification for her patently frivolous objections to
2 Plaintiff's statement of simple, indisputable background facts.
3 Ms. Yama also explains her misstatements and mischaracterizations
4 of the administrative record and law were based on her "belief"
5 that the existence of some faintly colorable evidence was
6 sufficient to substantiate a "fact" for inclusion in the
7 Chronological Statement of Material and Relevant Facts in the
8 face of much stronger evidence contradicting that "fact." As she
9 has stated, "I understood that the parties were not submitting
10 *undisputed* facts, as would normally be the case with a summary
11 judgment motion. Accordingly, I never referred to my statement
12 of facts as 'undisputed' facts." Yama Decl. Doc. 132 at 2:20-22
13 (emphasis in original).

14 Ms. Yama also states without explanation that she "assumed
15 that the Court agreed and understood that the statements would
16 not constitute a true effort to set forth 'undisputed facts.'"
17 See P&A by Yama, Doc. 134 at 23-25. As a seventh year associate
18 Ms. Yama should have had enough experience with the courts to
19 know that once she proposed a significant and unproductive
20 departure from the Federal Rules of Civil Procedure, by informal
21 correspondence to the court, she had no basis to "assume" the
22 court's lack of response to her letter request was acceptance of
23 that proposal, absent a court order. Counsel may not offer:
24 "here is my proposition, if I don't hear from you within x number
25 of days I will assume you agree or have no objections." Ms.
26 Yama's contention that she believed she had court approval of her
27 unprecedented request is untenable. Ms. Yama's explanation
28 ignores that in her very same December 11, 2001, letter to the

1 court, she also suggested that the parties be limited to 50 facts
2 and 15 pages. Yet her submission of Defendant's chronological
3 statement of facts included 221 facts in 30 pages. This
4 submission indicates that either Ms. Yama was picking and
5 choosing which of her December 11, 2001, suggestions she
6 "assumed" the court had accepted, or she is simply attempting to
7 excuse the inexcusable by presenting this letter as a *post hoc*
8 rationalization.

9 The latter is more likely true given Ms. Yama's letter to
10 the court, dated July 26, 2002, which accompanied Defendant's
11 submission of an *amended* Response to Plaintiff's Separate
12 Statement of Chronological Facts.⁷ See Doc. 155. On July 26,
13 2002, Ms. Yama states:

14 After reading the Court's most recent decision,
15 Defendant's *counsel now understand that they*
16 *misinterpreted the Court's order.* Defendant's counsel
17 believed that the procedure to be utilized in this
18 review of the hearing officer's decision was a format
19 of modified summary judgment. *However, it now*
20 *understands that the Court ordered a formal summary*
21 *judgment procedure.* Defendant's counsel apologize for
22 its misinterpretation and any inconvenience to the
23 Court or Ms. Graves that our misinterpretation may have
24 caused.

25 To conform to the Court's order, Defendant
26 therefore provides the enclosed Amended Response to
27 Plaintiff's Statement of Chronological Facts

28 The Amendment consists of exchanging the words,
"No Response" to "Undisputed." Also, the Amendment
consists of adding the word "Disputed" prior to all
other responses, to which Defendant objected and/or
responded.

24 *Id.*

25 Ms. Yama's letter admits she knew that the proceedings were

27 ⁷ Ms. Yama inexplicably neglects to include a copy of this
28 correspondence with her declaration in response to the Order to
Show Cause, another omission of relevant facts.

1 governed by the FRCP applicable to summary judgment. Ms. Yama
2 modified Defendant's Response to Plaintiff's Separate Statement
3 of Chronological Facts based upon her understanding. Defendant's
4 modified response continues to include the many frivolous and
5 vexatious objections listed by the Court in both its Memorandum
6 Opinion on the Motion for Summary Judgment (Doc. #102) and the
7 Court's Order to Show Cause (Doc. #101). Ms. Yama could have
8 corrected Defendant's Response and Objections to Plaintiff's
9 Statement of Chronological Facts and Defendant's own Separate
10 Statement of Chronological Facts by submitting a similarly
11 amended statement or an errata, to correct those statements of
12 fact that were not supported by the record. She consciously
13 chose to do neither.

14 For example, one of the "disputed facts" pointed out in Ms.
15 Yama's July 26, 2002, letter is fact #16, which Defendant
16 "changed from 'no response' to 'disputed' because Defendant did
17 not realize the conflict in the date referenced." See Doc. 155.
18 This very objection is noted in the Order to Show Cause (Doc. #6
19 at 27) as "confusing at best and misleading at worst" because the
20 date on the doctor's P.E. excuse note clearly states Mr. Moser
21 was seen August 1994, yet Defendant's amended response attempts
22 to suggest the diagnosis was on the date the doctor's note was
23 signed, in 1995. This was done despite unequivocal reference to
24 the diagnosis date as August 1994. It is impossible to interpret
25 this objection as anything other than intentionally misleading,
26 especially when combined with the letter to which it is attached.

27 Ms. Yama's attempts to excuse her behavior by contending she
28 was operating under the assumption that the hearing officer

1 "accurately described" the facts in the administrative record is
2 not credible. See Doc. 134 at 10:10-16. The review was "de
3 novo;" Ms. Yama knows the standards governing de novo review and
4 the case law which holds that while deference is given a hearing
5 officer's fact findings, that deference is only given if the
6 hearing officer does a thorough and complete job. *Adams v.*
7 *Oregon*, 195 F.3d 1141, 1145 (9th Cir. 1999); see also, Doc. 102
8 at 114. Any deference due the hearing officer's decisions
9 regarding the law is irrelevant to Ms. Yama's misstatements of
10 fact. Any deference due the hearing officer's findings of fact
11 is made moot by Ms. Yama's *actual knowledge* that her
12 characterizations of factual issues she included in the Motion
13 for Summary Judgment pleadings were, at a *minimum*, highly
14 suspect. By the time Ms. Yama received Plaintiff's complaints
15 about her misstatements in the Trial De Novo briefs, as well as
16 two letters requesting Defendant correct the record with the
17 Court, she waived any entitlement to rely upon allegedly
18 incorrect findings of fact provided by the hearing officer.⁸

19 Assuming, *arguendo*, that Ms. Yama's reliance on the SEHO
20 hearing officer was in good faith, a party is responsible for
21 innocent, good faith mistakes of law or for carelessness of
22

23 ⁸ Neither Ms. Yama nor Lozano Smith point out which
24 misstatements they made that were allegedly repeated from the
25 Hearing Officer's decision. The bulk of facts contained in the
26 Hearing Officer's opinion are in his "Background Section," not in
27 the "Findings of Fact and Conclusions of Law" to which Ms. Yama
28 and Lozano Smith contend deference is owed. Given that the
briefs cite the administrative record in support of the misstated
facts, and not the Hearing Officer's opinion, the argument is
specious.

1 counsel, because reasonable inquiry would reveal a mistake, and
2 counsel who is careless has not made reasonably inquiry. *Lloyd*
3 *v. Schlag*, 884 F.2d 409, 412 (9th Cir. 1989). Ms. Yama's alleged
4 "reliance" on the SEHO officer's recitation of the record is also
5 not reasonable under the circumstances, given: 1) the Hearing
6 Officer apparently wrote his decision without the benefit of a
7 transcript of the hearing; and 2) Defendant's misstatements of
8 fact *cite the transcript* (administrative record), not the Hearing
9 Officer's erroneous decision. See, e.g., Doc. 68.

10 Ms. Yama contends she "made a number of mistakes" in the
11 papers she submitted, but that these were "honest mistakes
12 resulting from her confusion, misunderstandings, incorrect
13 assumption, and her failure to double check her factual
14 citations." Doc. 134 at 1:24-28. However, taken as a whole, Ms.
15 Yama's pattern of practice does not support the position that she
16 was merely negligent in her reading of the record. Plaintiff's
17 counsel made numerous objections to Plaintiff's statements (some
18 correct, many incorrect) citing to the text of the administrative
19 record. To then turn around and claim that defense counsel's own
20 mischaracterizations are due to her lack of familiarity with the
21 record or a failure to carefully cite to the record is
22 disingenuous.

23 While isolated errors or misstatements might be excused
24 given the size of the record, the sheer volume of misstatements
25 coupled with the fact that they universally favor the Defendant
26 suggests a concerted attempt to distort the record to make it say
27 what it does not. For example, in addressing the sample of
28 issues listed in the Order to Show Cause, Ms. Yama admits she

1 overstated or incorrectly stated the evidence at least seven
2 times and made a mistake in her interpretation, reading, or note
3 taking with regard to the administrative record approximately
4 *seventeen times*. Ms. Yama admits her objections to Plaintiff's
5 facts were "hyper technical," i.e., *frivolous*, improper or
6 unclear at least six times. She acknowledges that on at least
7 four occasions she objected to obviously indisputable facts
8 simply because Plaintiff did not cite to the record, based on her
9 self-suggested assumption that the proceedings would not be
10 subject to the federal rules of civil procedure governing a
11 summary judgment motion (an assumption which has since been
12 disproved by Ms. Yama's July 26, 2002, letter acknowledging she
13 understood the nature of the proceedings).

14 Taken as a whole, Ms. Yama admits she made mistakes,
15 misinterpreted the evidence, overstated the facts or made hyper-
16 technical or improper objections approximately *thirty-four* times.
17 These examples are limited to the instances of problems listed in
18 the Order to Show Cause. The only reasonable inference that can
19 be drawn is that Ms. Yama and her law firm intended to obstruct
20 at every step and stand education law on its head. A filing is
21 frivolous under Rule 11 if it is unreasonable when viewed from
22 the perspective of a competent attorney admitted to practice
23 before the district court. *G.C. & K.B. Investments*, 326 F.3d
24 1096, 1109; *In re Grantham Bros.*, 922 F.2d 1438, 1442 (9th Cir.);
25 *Zaldivar*, 780 F.2d at 831.

26 A negligent or too attenuated examination of the record
27 would not result in the extremely skewed view of the record Ms.
28 Yama presented. Her presentation was carefully constructed to

1 omit or minimize adverse facts, e.g., portions of transcripts
2 were cited out of context to support made-up facts, that, when
3 viewed in their entirety, contradict the true record. It is
4 obvious Ms. Yama clearly scrutinized the record to explicitly
5 cite only portions of it, or to refer to testimony favorable to
6 the District, but was only "mistaken" when she misrepresented the
7 remainder of the record, her explanations are not credible. "A
8 district court confronted with solid evidence of a pleading's
9 frivolousness may in circumstances that warrant it infer that it
10 was filed for an improper purpose." *Townsend v. Holman*
11 *Consulting Corp.*, 929 F.2d 1358, 1365 (9th Cir. 1990).

12 Counsel found ways to ostensibly conform record references
13 to support Defendant's case by misreading context, omitting
14 critical facts, and sometimes by simply stating the opposite of
15 what was in the record. This kind of disinformation is insidious
16 because it was provided by an officer of the court. It created a
17 greater burden on plaintiff and the court. Defendant's counsel
18 treated the law with the same contempt for accuracy. Attorneys
19 have a duty to actively advocate on behalf of their clients but
20 they have no duty to misrepresent facts or misstate law. Rule 11
21 creates and imposes on a party or counsel an affirmative duty to
22 investigate the law and facts before filing; *Rachel v. Banana*
23 *Republic, Inc.*, 831 F.2d 1503, 1508 (9th Cir. 1987) and further
24 obliges an attorney to dissuade a client from pursuing specious
25 claims, to avoid possible sanctions by the court, as well as
26 unnecessary costs of litigating a worthless claim. *Mohammed v.*
27 *Union Carbide Corp.*, 606 F.Supp. 252 (E.D. Mich. 1985).

28 Ms. Yama repeatedly states that the administrative record

1 and the appeal process was so difficult and confusing that these
2 factors significantly contributed to her "mistakes." While the
3 administrative record was voluminous and in many cases
4 duplicative, the standards by which a district court reviews a
5 hearing officer's decision are clearly set out in easily
6 accessible case law, as is evidenced by Defendant's invocation of
7 one (but not all) of those standards in its summary judgment
8 brief. It is not credible to suggest a seventh year associate,
9 practicing for three years in education law, could not keep the
10 record straight and address the issues raised by Plaintiff.

11 It is difficult to ascertain whether counsel has taken
12 seriously the duty of honesty and candor owed to the Court.
13 Every time a party submits a filing, the attorney personally
14 certifies the contents both as to reasonable factual
15 investigation and legal research. See Fed. R. Civ. Pro. 11(b).
16 This professional responsibility transcends the role of advocate
17 and duty to the client if the two conflict.

18 Ms. Yama's declaration and brief in response to the Order to
19 Show Cause give the impression she is a neophyte lawyer who was
20 unable to grasp the complexity of the case or record and made a
21 few errors due to her misunderstanding of the specialized nature
22 of the law, the proceedings and the record. This portrayal is
23 belied by the history of the case and Ms. Yama's experience. Ms.
24 Yama is not a first year attorney, she is a *seventh* year attorney
25 - in some firms she would already be a principal. She has been
26 practicing in the area of education law for over three years, for
27 a law firm which holds itself out as a leading specialist in
28 California in this area of law.

1 Assuming, *arguendo*, that a seventh year attorney is somehow
2 not experienced enough to understand the nature of a summary
3 judgment proceeding or to verify the record facts or the law
4 underlying her legal arguments, as an attorney licensed to
5 practice law in the State of California, Ms. Yama had an ethical
6 obligation to ask for help and get instructions from her
7 superiors if she truly could not deal with the "complexities" of
8 the case. Rule 11 creates and imposes on a party or counsel an
9 affirmative duty to investigate the law and facts before filing.
10 *Rachel v. Banana Public, Inc.*, 831 F.2d 1503, 1508 (9th Cir.
11 1987).

12 What is hard to understand is Ms. Yama's alleged inability
13 to understand the background of the case before submitting
14 briefs, verifying statements of fact against the record, and
15 asking for help, if she needed it. All of these actions, Ms.
16 Yama now contends she will take in the future, are actions that
17 should be second nature to a seventh year associate. It should
18 not require an Order to Show Cause proceeding and prospect of
19 sanctions to actuate professional responsibilities.

20 Ms. Yama's contention that this is not a situation where she
21 "knowingly concealed material facts or knowingly asserted a
22 frivolous position," (Doc. 134 at 12-13) is simply untrue given
23 the evidence discussed in this order. Ms. Yama still does not
24 candidly accept responsibility for her actions, instead she
25 repeatedly states only that "mistakes were made." See Doc. 134.
26 Her assertions that the "pressure of private practice" requires
27 that mistakes will inevitably be made, demonstrate her complete
28 lack of understanding of her ethical responsibilities as an

1 officer of the court or the serious nature of this proceeding and
2 the allegations against her. Ms. Yama's contention that while
3 the "mistakes" she made "may be the result of a certain degree of
4 carelessness, they do not involve the type of recklessness
5 required to warrant [Sect.] 1927 sanctions," is contradicted by
6 the evidence. Ms. Yama made more than a few "mistakes" and was
7 much more than simply "careless." She was reckless. She
8 systematically distorted the record and repeatedly ignored
9 Plaintiff's objections and warnings that she was doing so.

10 In fact, Ms. Yama's declaration in response to the Order to
11 Show Cause, in at least two instances evidences that she still
12 doesn't "get it." Ms. Yama contends Defendant's Fact #37 is
13 supported by the testimony of Mr. Smith, that he, himself, was
14 not aware of Robert's transfer to Arnold High School. Doc. 134
15 at 17:5-15. Defendant's fact #37 states: "[a]t the end of his
16 first semester of 9th grade Plaintiff's mother transferred her
17 son from Bret Hart High School to Arnold High School without
18 alerting Bret Harte High School staff or discussing her decision
19 with anyone." Ms. Yama's explanation ignores the actual language
20 used in reciting this fact - defendant doesn't say *Mr. Smith* was
21 not alerted, Defendant says: 1) *none* of Bret Harte's staff was
22 alerted; and 2) *Mrs. Moser didn't discuss* her decision to
23 transfer Robert "*with anyone*." Citing to Mr. Smith's testimony
24 does not excuse the falsity of this statement. Ms. Olsen-Miller
25 had actual knowledge of Robert's transfer. Whether or not she
26 actually discussed it with Mr. Smith, and whether that creates
27 some conflict in the facts, is irrelevant. Defendant claimed "*no*
28 *one knew of the transfer*," however Defendant's own employee, Ms.

1 Olsen-Miller expressly admitted she knew of Robert's transfer to
2 Arnold in at least November or December. This is a direct
3 falsehood; Ms. Yama's explanation only exacerbates it.

4 Regarding Plaintiff's fact #96, Ms. Yama admits her
5 objection was "overly technical" because she believed "it was
6 proper to object to Plaintiff's contentions if they did not
7 constitute a verbatim recitation of the evidence." Ms. Yama now
8 realizes that if the statement she objected to was substantively
9 supported by the evidence, she should not have objected to it.
10 Ms. Yama attributes her "over technical" objection to her
11 "limited experience." A seventh year associate's explanation
12 that this error was due to limited experience is patently
13 unreasonable.

14 Taken as a whole, Ms. Yama's repeated misstatements of the
15 facts, frivolous objections, and mischaracterizations of law,
16 when combined with the fact that she was placed on notice of her
17 transgressions no less than four times by Plaintiff's counsel,
18 throughout the painful progress of trying to get the summary
19 judgment motions before the court for decision,⁹ cannot be
20 interpreted as anything other than a bad faith attempt to mislead
21 the Court, obscure the real facts of the case, to obstruct,
22 and/or harass the Plaintiff. This was an effort to either wear
23 down the Plaintiff or to win a victory for Lozano Smith's client
24 that was clearly unjustified by either the facts or the law.

25
26 ⁹ In many instances, Plaintiff provided very specific
27 examples of misstatements and citation to the correct section of
28 the record, which provided Ms. Yama, Lozano Smith and Defendant
with an easy guide to correct these misrepresentations.

1 These actions violated provisions of Rule 11(b)(1), (3), and (4),
2 as well as § 1927.

3 Ms. Yama has been involved in at least four other special
4 education cases. Graves Decl., Doc. 151, at 1:23. In
5 California, Lozano Smith is a self-proclaimed major firm in the
6 education law field. It can only be hoped that these practices
7 are not the standard mode of operation for Lozano Smith
8 attorneys, due to their potential to materially harm other
9 special education plaintiffs.

10 Ms. Yama's protestations that she never meant to submit any
11 incorrect, improper, or misleading pleading (Doc. 134 at 2:18-
12 24), nor did she mean to harass opposing counsel, rings hollow,
13 given: 1) the express notice she was given that she was doing
14 so; 2) the numerous opportunities she had to review and correct
15 the falsifications contained in the pleadings repeatedly pointed
16 out by opposing counsel; and 3) the repetitive nature and extent
17 of her "errors."

18 Ms. Yama's claim that there was no other Lozano Smith
19 attorney to help her understand the administrative record is
20 equally unavailing. See Doc. 134 at 4:6-8. According to the
21 District's responses to Plaintiff's interrogatories, Ms. Yama
22 made no attempt to contact the District's attorney who handled
23 the administrative hearing and was presumptively intimately
24 familiar with that record. At least two other Lozano Smith
25 attorneys were "of record" on the pleadings. There is no
26 suggestion the District's attorney was unavailable for
27 consultation over the course of this litigation.

28 Ms. Yama states she is unlike those attorneys who have

1 received Rule 11 sanctions for ongoing or repeated conduct and
2 she does not believe in "pushing the ethical envelope." This
3 case is entirely about Ms. Yama, Lozano Smith and Bret Harte
4 Unified School District "pushing the ethical envelope" and
5 engaging in ongoing and repeatedly deceptive and obstructive
6 conduct throughout the case's several year history.

7 Ms. Yama claims that she acknowledged responsibility for her
8 mistakes by accepting, without objection, the corrective measures
9 voluntarily imposed upon her by the Lozano Smith firm. However,
10 in this order to show cause proceeding, she repeatedly attempts
11 to attribute her breaches to inexperience and confusion (as a
12 seventh year associate specializing in education law). This
13 calls into question the bonafides and true extent of her
14 acceptance of responsibility for her conduct.

15 When an attorney repeatedly and vexatiously presents "facts"
16 and "law" to the Court that are plainly wrong or misleading,
17 which needlessly prolong and multiply the summary judgment
18 proceedings and materially increase the burden on the Court, bad
19 faith can be inferred. Appropriate sanctions can be imposed
20 under the authority of both 28 U.S.C. § 1927 and the inherent
21 authority of the Court. Ms. Yama's admissions that she did not
22 review the pleadings or the record before submitting her
23 objections and misstatements of disputed facts, shows she acted
24 unreasonably. Any competent attorney would have made such an
25 investigation, as required under Rule 11 to determine the
26 accuracy of the statements of undisputed facts, the law, and
27 grounds for objections. The substance of Ms. Yama's opposition
28 is not that she has fully and unequivocally accepted

1 responsibility for her breaches of duty and the rules of
2 professional conduct.

3 Sanction authority exists under Rule 11(b) (1), (3) and (4)
4 for the frivolous objections, misstatements of fact and law
5 contained in her Summary Judgment pleadings under 28 U.S.C.
6 § 1927 and the Court's inherent power, for her steadfast refusal
7 to correct these errors when faced with repeated objections and
8 explicit notice that her papers were inaccurate and misleading,
9 in violation of her duty of truth and candor to the Court. It is
10 reasonable to infer that Ms. Yama should have known that her
11 efforts amounted to obstruction of the just resolution of the
12 case and harassment of the Plaintiff.

13
14 D. Lozano Smith

15 Lozano Smith characterizes itself as a "recognized leader"
16 in special education law in California and that it provides
17 training seminars for special education attorneys and
18 administrators. Mr. Fulfrost, the managing partner of Lozano
19 Smith's Santa Monica Office was heavily involved in the early
20 stages of this case and is an expert in special education and
21 students with disabilities. See www.lozanosmith.com, accessed
22 October 11, 2004. Mr. Smith is a former Senior Deputy County
23 Counsel for Fresno County Schools and has been practicing law for
24 24 years. *Id.* Mr. Sklar was admitted to the bar in 1995 and
25 lists his specialty as Education Law. *Id.* Ms. Yama practices
26 law with a primary focus in special education and has assisted
27 school districts with IEP meetings, mediation and due process
28 hearings and has presented at workshops related to special

1 education in California. *Id.* Mr. Fulfrost, Mr. Smith, and Mr.
2 Sklar further all actively worked on this case at various times
3 as detailed by Plaintiff's submission filed February 25, 2004,
4 pp. 2:5-4:4, and the submission filed November 5, 2003, pp. 5:23-
5 6:10 and 7:17-8:12.

6 Lozano Smith contends that the mistakes made in this case
7 are the result of Ms. Yama's actions and Ms. Yama's actions
8 alone. See Doc. 137, Lozano Smith Memo re OSC, 3:7-15. Mr.
9 Smith has stated that Ms. Yama was an experienced attorney who he
10 felt (based on an active working relationship over a four year
11 period) could handle the case and submit pleadings without direct
12 supervision. See Smith Decl., 2:3-3:2. Lozano Smith appears to
13 argue that because it previously provided Ms. Yama with
14 "sufficient training" and "supervision," the firm has not engaged
15 in bad faith sanctionable conduct. Lozano Smith ignores the fact
16 that Ms. Yama was not the only attorney who signed misleading
17 pleadings and it ignores the repeated objections and warnings
18 from Plaintiff about its malfeasance.

19 The various papers filed with the Court were signed by no
20 less than three Lozano Smith attorneys: Edward Sklar, Elaine Yama
21 and Michael Smith, a founding shareholder. In fact, Ms. Yama
22 states she did not write, but merely incorporated, the distorted
23 and incorrect legal arguments from the Trial De Novo brief
24 written by Mr. Sklar.¹⁰ See Doc. 154. This raises question
25 whether a culture of misrepresentation and deception exists at
26

27 ¹⁰ Such actions violate Rule 11. See *Rachel*, 831 F.2d at
28 1508.

1 Lozano Smith, if an attorney more senior than Ms. Yama (who
2 already has seven years experience), submitted the previously
3 discussed misleading and inaccurate legal papers.

4 Lozano smith contends, without citation, that recklessness
5 alone is not enough for sanctions under 28 U.S.C. § 1927. Doc.
6 136 at 5:11 and at 6:9-11. This is not entirely accurate. Under
7 *Fink v. Gomez*, 239 F.3d 989 (9th Cir. 2001), the Ninth Circuit
8 recently reconciled its prior cases and stated: "[R]ecklessness
9 suffices for § 1927, but bad faith is required for sanctions
10 under the court's inherent power." *Id.* (Emphasis added.)

11 Lozano Smith appears not to fully recognize the severity of
12 the problems created by its lack of professionalism or still
13 believes that it and Ms. Yama have not "really" breached their
14 professional responsibilities. Lozano Smith argues Ms. Yama's
15 actions were careless or inadvertent, but not in bad faith,
16 because she did not knowingly or recklessly raise a frivolous
17 argument or argue for the purpose of harassing her opponent.
18 Doc. 136 at 5:20-23. This argument is untenable given the
19 substantial evidence that Ms. Yama had ample notice and
20 opportunity to correct the mistakes which were expressly
21 identified by Plaintiff's counsel, yet repeatedly submitted by
22 Defendant's counsel to the Court.

23 Lozano Smith also reiterates Ms. Yama's specious argument
24 that she relied on the Hearing Officer's characterization of the
25 facts of the case. *Id.* at 5:24-27. Contrary to this assertion,
26 Ms. Yama cited to the administrative record and the hearing
27 transcript, not the hearing officer's decision, to support her
28 misstatements of fact. Their claim is specious that it is the

1 hearing officer's fault. Lozano Smith and Ms. Yama were not
2 entitled to rely on the hearing officer's errors in reciting
3 facts, when the available evidentiary record was to the contrary
4 and should have been their reference source for de novo judicial
5 review.

6 Lozano Smith contends that it was entitled to rely upon the
7 Hearing Officer's legal and factual conclusions based on 5 C.C.R.
8 3085¹¹ and, therefore, because the Hearing Officer reached a
9 "legal conclusion" that the accommodations provided under Section
10 504 of the Rehabilitation Act of 1973 . . . fulfilled the
11 District's obligations under the Individuals With Disabilities
12 Education Act," the law firm engaged in no wrongful conduct by
13 arguing that 504 accommodations satisfy IDEA. See Doc. 150 at
14 2:4-7. Lozano Smith's post hoc explanation does not accurately
15 describe the errors included in its Motion for Summary Judgment
16 brief nor does it accurately describe the Hearing Officer's
17 findings.

18 The Hearing Officer never determined "that the
19 accommodations provided under Section 504 of the Rehabilitation
20 Act of 1973 . . . fulfilled the District's obligations under the
21 Individuals With Disabilities Education Act." See Doc. 150 at
22 2:4-7. The Hearing Officer determined the District denied Robert
23 a FAPE, i.e., the District did not fulfill its obligations under
24

25
26 ¹¹ Lozano Smith incorrectly cited this statute simply as
27 "section 3085 of the California Code of Regulations," requiring a
28 search through the entire Code outline and multiple sub-outlines
to eventually find the statute referred to by Lozano Smith. The
correct citation is 5 C.C.R. 3085.

1 IDEA. See AR 2243-2253a at 2251. The Hearing Officer went on to
2 say that, despite this denial of a FAPE, "Robert suffered no
3 education prejudice from the District's failure," and Robert was
4 therefore "not entitled to relief in the form of compensatory
5 education." The Hearing Officer concluded (erroneously) that
6 Robert was performing at the college level and was therefore not
7 in need of compensatory education. At no point did the Hearing
8 Officer find that Section 504 accommodation fulfills IDEA
9 requirements - with respect to Robert, or in general.

10 The offending presentation of law and facts regarding this
11 particular issue begins on page 30 and continues through page 31
12 of Defendant's Points and Authorities in Support of its Motion
13 for Summary Judgment, Doc. 80. Lozano Smith states, "While the
14 Hearing Officer did determine that there was a 'procedural'
15 denial of a FAPE in Plaintiff's sophomore and junior years . . . ,
16 substantively, the finding was made that Plaintiff was provided a
17 FAPE based on the accommodations and services provided to
18 Plaintiff under Section 504 of the Rehabilitation Act of 1973."
19 (Emphasis in original). Lozano Smith then states IDEA promises
20 Plaintiff no more than "an educational benefit." *Id.* at 31:10.
21 Under a section headed "The Law" Lozano Smith provides citations
22 regarding the appropriate measure of compensation under IDEA and
23 then continues:

24 In the case at bar, Plaintiff was provided with
25 services that allowed him to graduate from high school
26 in the standard four-year time period. The Hearing
27 Officer, after considering and carefully evaluating all
28 of the evidence, determined that the Plaintiff suffered
no educational detriment and was afforded an
educational benefit. The IDEA promises him no more.
Recent special education decisions deny a remedy
where, despite procedural error, there was no adverse

1 educational impact. South Portland School Dept., 22
IDEL4256 (Me, 2000) . . .

2 *Procedural flaws do not automatically require a*
3 *finding of a denial of FAPE. (See, W.G. v. Board of*
4 *Trustees of Target Range School District, 960 F.2d*
5 *1479, 1484 (9th Cir. 1992). In fact, the U.S. Supreme*
6 *Court defined what is meant by a 'free appropriate*
7 *public education' and concluded that the IDEA does not*
8 *require that a student be provided with the best*
9 *available special education services or that the*
10 *services maximize each child's potential. It also*
11 *concluded that the basic floor of opportunity provided*
12 *by the Act consists of access to education which*
13 *provides some educational benefit.*

14 Under Gregory K., the Ninth Circuit upheld the
15 appropriateness of a District's placement if it was
16 reasonably calculated to provide a student with
17 educational benefits. Gregory K., *supra*, at 1314.

18 Doc. 80, Def.'s Memo re Summary Judgment, at 31:7-23 (emphasis
19 added).

20 Under the next section headed, "Eligibility," Lozano Smith
21 states:

22 At the hearing, Defendant did not believe
23 Plaintiff was eligible for special education services
24 under any criteria of IDEA, Plaintiff's disability of
25 CFS was recognized as a disability which actively
26 limited Plaintiff's ability to learn. As such,
27 disability is defined under Section 504 of the
28 Rehabilitation Act of 1973 [citation]. Based on this
disability the District believed it provided Plaintiff
a FAPE, by implementing appropriate accommodations and
services to meet his unique needs, as required by the
Rehabilitation Act. [Citation]. Nonetheless, whether
Plaintiff was receiving educational assistance pursuant
to the IDEA or Section 504 of the Rehabilitation Act,
the question remains: was the student receiving an
educational benefit from the District which addressed
Plaintiff's unique needs? Here, Plaintiff's disability
has always been symptoms based upon his chronic fatigue
syndrome. His needs are no different under the IDEA or
the Rehabilitation Act of 1973. In fact, the FAPE
requirement of the Rehabilitation Act is similar to the
requirements of the IDEA. The Hearing Officer
determined that Plaintiff was eligible under the IDEA
and then appropriately examined the evidence to
determine whether Plaintiff received an educational
benefit or whether he was owed compensatory education
services. The facts clearly show, and the Hearing
Officer correctly found[,] that [sic] District

1 implemented the necessary accommodations and services,
2 and Plaintiff was provided an educational benefit.
3 Thus, he does not require any additional education.

4 *Id.* Lozano Smith went beyond mere vigorous advocacy for its
5 client. It intentionally omitted the full citation as discussed
6 *infra*,¹² which contained law contrary to its position and it
7 intentionally argued that 504 accommodations were equal to
8 Compliance under the IDEA.

9 The Memorandum Opinion and Order in the underlying action,
10 Doc. 102, thoroughly discusses a school district's complete lack
11 of discretion to not comply with the IDEA as opposed to
12 substituting alleged performance under Section 504 of the
13 Rehabilitation Act. See Doc. 102 at 159-160. This is more than
14 coincidence - legal interpretations hold section 504 simply
15 cannot replace IDEA: "Both section 504 and IDEA have been
16 interpreted as requiring states to provide a free appropriate
17 public education to qualified handicapped persons, but only IDEA
18 requires development of an IEP and specifically provides for
19 transition services to assist students [to] prepare for a post
20 high school environment. See 20 U.S.C. § 1401(a)(2). Under the
21 statutory scheme, the school district is not free to choose which
22 statute it prefers." *Id.* at 1376. See also *Muller v. Committee*
23 *on Special Education of the East Islip Union Free Sch. Dist.*, 145

24 ¹² "Procedural flaws do not automatically require a finding
25 of a denial of a FAPE. However, procedural inadequacies that
26 result in the loss of educational opportunity, or seriously
27 infringe the parents' opportunity to participate in the IEP
28 formulation process clearly result in the denial of a FAPE." *W.G. v. Board of Trustees of Target Range School Dist. No. 23*,
960 F.2d 1479, 1484 (9th Cir. 1992) (emphasis added).

1 F.3d 95, 105 (2d Cir. 1998) (once a student is entitled to
2 benefits under IDEA, the district "should have devised an IEP to
3 meet [the student's] unique needs in compliance with the
4 provisions of IDEA, and its proposed plan under Section 504 of
5 the Rehabilitation Act was not an adequate substitute.").

6 It is difficult to comprehend what part of "no choice"
7 Lozano Smith does not understand when it states there is a
8 "dearth of definitive guidance from the courts as to whether
9 Section 504 accommodations could under any circumstances provide
10 FAPE in lieu of services written into an IEP, particularly in the
11 Ninth Circuit."¹³ Doc. 150 at 3. While Lozano Smith claims
12 justified deference to the Hearing Officer's decision on the
13 issue, the section of its brief subject to sanctions does not
14 quote an explicit misstatement of law by the Hearing Officer that
15 Lozano Smith repeats; Lozano Smith independently mischaracterizes
16 the law, including an intentional exclusion of applicable case
17 law stating the opposite principle. Lozano Smith intentionally
18 asserted 504 accommodations are legally *equivalent* to compliance
19 under the IDEA, despite clear law to the contrary. Lozano
20 Smith's argument that Ms. Yama's and its own actions are not bad
21 faith evidences a failure to understand or acknowledge the
22 history of this case and to refuse to accept responsibility for
23 what occurred.

24
25
26 ¹³ The cases cited above are not from the Ninth Circuit,
27 however, they provide explicit guidance on the issue and cannot
28 be interpreted to mean anything other than what they say. Lozano
Smith's "no guidance" argument is specious and provides no basis
for misstating the law or mischaracterizing the facts.

1 Lozano Smith had actual notice as early as 2001 that there
2 were issues regarding its potential wrongdoing in this case. On
3 November 8 and November 26, 2001, Plaintiff's attorney notified
4 Lozano Smith attorneys Edward Sklar, Elaine Yama and Michael
5 Smith, of their multiple transgressions with respect to misciting
6 the administrative record. See Graves Decl. Regarding Evidence,
7 Doc. 151, Exh. D and E. Plaintiff twice explicitly requested
8 that Lozano Smith correct its misstatements to the court and at
9 least one time Plaintiff threatened to submit a motion for
10 sanctions on the issue.¹⁴ *Id.* Yet Lozano Smith took absolutely
11 no action in response and continued to misrepresent the record in
12 its later Summary Judgment briefs.

13 Many of the misstatements of law and fact are incorporated
14 in both sets of Defendant's briefs - and the first set was
15 apparently not written by Ms. Yama. At least one of the
16 documents (cited above for misstating facts and law) was
17 personally signed by Michael Smith, a founding shareholder of
18 Lozano Smith. See Doc. 87, Def.'s Opposition re Summary Judgment
19 at 30. Mr. Smith's statement that he simply "glanced at the
20 document," made editorial changes and signed it violates Rule 11.
21 The rule is designed to "eliminate the defense of personal
22 ignorance of defects in a paper challenged as unmeritorious."
23 See *Zaldivar*, 780 F.2d at 830 ("The Rule admits of no exceptions
24 to the requirement that all reasonable attorneys will read a
25 document before filing it in court.").

26
27 ¹⁴ Plaintiff's warnings were directed to Defendant's Trial
28 De Novo briefs - apparently submitted by Mr. Sklar.

1 More importantly, the problems with counsel's conduct were
2 referenced by Plaintiff in his filings throughout the course of
3 the case, yet Lozano Smith made no investigation or attempt
4 whatsoever to correct the problems, despite Plaintiff's direct
5 requests that it do so. When Lozano Smith faxed to the District
6 a copy of Ms. Grave's November 8, 2001, letter threatening
7 sanctions if the firm did not correct its misrepresentations to
8 the court, Mr. Sklar of Lozano Smith, stated to the District,
9 "Received from Maureen Graves. Nothing really to respond to, but
10 call me if any questions." See attachments to Doc. #150.

11 It is incomprehensible that none of the three defense
12 attorneys of record paid any attention to Plaintiff's letters
13 accusing Lozano Smith and its client of misconduct and
14 threatening a sanctions motion. It is equally incomprehensible
15 that: 1) Mr. Sklar felt there was "nothing to respond to" in
16 Plaintiff's letter threatening a sanctions motion for Lozano
17 Smith's abusive practices; and 2) that the same misstatements
18 made in the Trial De Novo briefs were repeated in the Summary
19 Judgment briefs despite Plaintiff's detailed complaints.

20 Lozano Smith's and Ms. Yama's culpability is aggravated by
21 the fact that their one and only response to Plaintiff's
22 accusations of misconduct came in their Reply Brief where they
23 assert that they have been "nothing but honest and candid with
24 the court." Doc. 91 at 1:20-23. Lozano Smith and Ms. Yama
25 reviewed the Plaintiff's accusations and dismissed them. Such
26 conduct is inconsistent with their proclaimed sincerity,
27 characterizing the misstatements made in the briefs as "mistakes"
28 or due to a "misunderstanding" or "confusion" surrounding the

1 procedures and the large administrative record.

2 Lozano Smith is a purported expert in this area of law; it
3 knows the laws, knew its client had no legitimate legal basis for
4 its position, and apparently believed the Court would accept
5 their misrepresentations and rubber stamp the Hearing Officer's
6 erroneous decision.

7 Ignorance is no defense. *Zaldivar*, 780 F.2d at 830. Lozano
8 Smith's malfeasance was clearly and repeatedly drawn to their
9 attention by Plaintiff. Yet Lozano Smith deliberately ignored
10 the notice it received, assuming the Court would be too busy or
11 too indifferent to take the time necessary to find the truth.

12 Based on the totality of the circumstances, there is no way
13 to interpret Lozano Smith's submissions of multiple misleading
14 pleadings under the signature of no less than three attorneys as
15 anything other than a bad faith attempt to mislead the Court
16 about the facts and the law to gain the advantage of prevailing
17 without regard to the true facts and accurate statements of the
18 law. Given Lozano Smith's steadfast refusal to address any of
19 Plaintiff's repeated complaints about its malfeasance (other than
20 to flatly deny it in one Summary Judgment brief, see Doc. 91 at
21 1), no other conclusion can be drawn but that its actions were in
22 bad faith to harass the Plaintiff and to obstruct the
23 ascertainment of truth in this case. That Lozano Smith is an
24 expert in this area of law only compounds the severity of its
25 violations. See *Worrell v. Uniforms To You & Co.*, 673 F.Supp.
26 1461, 1465 (N.D. Cal. 1987) ("That counsel with extensive
27 experience in the area of labor and employment law could assert
28 such an erroneous view of the law regarding Title VII raises a

1 strong inference that there was an improper purpose behind the
2 pleadings."). Lozano Smith assigned Jerome Behrens, Esq., a
3 respected and competent member of their firm to address the Order
4 to Show Cause proceedings. Mr. Behrens had no knowledge of or
5 participation in any of the conduct nor did he have any
6 responsibility for the firm's handling of the case. This,
7 however, does not excuse the firm's ethical obligations.

8 Lozano Smith's actions are sanctionable under Rule 11(b) (1),
9 (3) and (4) for submitting pleadings asserting meritless
10 objections and false statements of facts. Lozano Smith's actions
11 are also sanctionable under 28 U.S.C. § 1927 and the Court's
12 inherent power, for bad faith attempts to mislead the Court, and
13 to obstruct and multiply the proceedings, and to harass the
14 Plaintiff.¹⁵

15 Lozano Smith is being sanctioned under Rule 11 for the
16 frivolous objections, misstatements of fact and law contained in
17 its Trial De Novo and Summary Judgment pleadings. Lozano Smith
18 is being sanctioned under 28 U.S.C. § 1927 and the Court's
19 inherent power, for its bad faith steadfast refusal to correct
20 these errors when faced with repeated, explicit notices that it
21 was conducting itself unethically, in violation of its duty of
22 truth and candor to the Court, and its efforts to harass the
23 Plaintiff.

24
25
26 ¹⁵ At a minimum, Lozano Smith's actions amount to
27 sanctionable recklessness and knowing conduct in that it ignored
28 repeated warnings it was misrepresenting the facts and in fact is
was misrepresenting the facts.

1 E. Defendant, Bret Harte Unified School District

2 Defendant Bret Harte Unified School District chose not to
3 submit its own briefs regarding the Order to Show Cause, or to
4 separately appear, despite it being named in the Order to Show
5 Cause.¹⁶ Defendant did, however, answer fifteen interrogatories
6 authorized by the Court and propounded by Plaintiff, which
7 document the District's significant involvement in this case and
8 actual knowledge of and receipt of notice during the proceedings,
9 of its attorneys' misconduct.¹⁷

10 In answer to Interrogatories 3 and 13, Defendant admits it
11 received Ms. Graves' November 8, 2001, letter, the first of the
12 two by Plaintiff calling upon Defendant to stop misstating the
13 record and to correct its misstatements with the Court. This
14 letter threatens a motion for sanctions absent corrective action
15 by Lozano Smith. See Graves Declaration Regarding Evidence, Doc.
16 151, Exh. G at 6 and 19. However, in direct contradiction to its
17 answer to Interrogatory Number 8, the District states:

18 I did not receive a copy of the correspondence
19 dated November 8, 2001, from Plaintiff's counsel, Ms.
20 Maureen Graves, and I was not provided that document by
21 Lozano Smith. Since I did not receive a copy of the
 correspondence from Plaintiff's counsel dated November
 8, 2001, I did not respond to any of the allegations of
 misrepresentation of fact and law contained therein.

22 *Id.* at 13. Lozano Smith has submitted fax transmission
23 confirmation sheets showing that it faxed and Defendant did
24

25 ¹⁶ The court raised the issue of conflict between the
26 District and its attorneys in the OSC matters.

27 ¹⁷ The answers to these interrogatories were submitted by
28 Plaintiff's counsel. See Graves Decl. regarding evidence, Doc.
151, Exhibit G.

1 indeed receive this letter. See attachments to Doc. 150.

2 In answer to Interrogatory Number 5, the District admits it
3 read the Trial De Novo Briefs submitted on its behalf as well as
4 Plaintiff's reply brief (which contains numerous complaints about
5 Defendant's misrepresentations). See Graves Decl. Regarding
6 Evidence, Doc. 151, Exh. G at 10-11. In answer to Interrogatory
7 Number 6, Defendant admits it read the brief but claims it did so
8 after the brief was submitted to the Court, and therefore, the
9 District "did not attempt to correct any misstatements of fact or
10 misleading representations on factual matters." *Id.*, Exh. G at
11 12-13. Defendant's statement that because the briefs were
12 already submitted to the Court it made no effort to correct any
13 misstatements contained in the briefs, is an abdication of the
14 duty of candor any party owes the court. In-house counsel
15 reviewed the briefs and, as an attorney licensed to practice law
16 in California, is under the same ethical responsibilities as
17 Defendant's outside counsel to see that only truthful and
18 accurate information is submitted to the Court.

19 The District, as a party, has a duty to be honest and to
20 correct any factual errors, to notify its attorneys to enable
21 them to file corrections or amended papers and to ensure the same
22 mistakes were not repeated in future pleadings. Rule 11 applies
23 to parties as well as their counsel. See *Rachel v. Banana*
24 *Republic, Inc.*, 831 F.2d 1503, 1508 (9th Cir. 1987).

25 In answer to Interrogatory Number 9, the District admits it
26 was provided a copy of Plaintiff's November 26, 2001, letter and
27 addresses its discussion of the settlement issues contained in
28

1 this letter.¹⁸ However, the District ignores that portion of the
2 Interrogatory that inquires, "Please describe, in detail, the
3 District's review of and response to the settlement
4 correspondence dated November 26, 2001, and the allegations
5 regarding misrepresentations of fact and law contained therein."
6 Graves Decl. Regarding Evidence, Doc. 151, Exh. G at 13-14
7 (emphasis added). The District provides no response regarding
8 what steps it took to correct the misstatements of fact contained
9 in its pleadings after a second notification from Plaintiff on
10 November 26, 2001. From Defendant's evasive answer it is
11 inferred that the District purposefully took no steps to correct
12 any misstatements it found in the first round of briefs and
13 intentionally let its counsel continue to repeat those
14 misstatements in the later Motion for Summary Judgment briefs.

15 The District took a hard line position, despite its obvious
16 and knowing violations of IDEA, and chose to wait until after
17 Summary Judgment was granted against it before it settled with
18 Plaintiff. The District was entitled to a hearing on summary
19 judgment and is not being sanctioned for asserting its position
20 on the merits of plaintiff's claims.

21 The District had an obligation to correct the many factual
22 misstatements contained throughout its papers, especially since
23 it was given notice by plaintiff regarding allegations of
24 misconduct and because it had its own in-house attorney review
25 these briefs and Plaintiff's letters. By not correcting the
26

27 ¹⁸ The District also acknowledges receipt of this letter in
28 answer to Interrogatory Number 11. See *id.*

1 errors contained in the initial Trial De Novo briefs, despite
2 notice of such errors, the District joined the bad faith
3 perpetration of those falsehoods in the subsequent briefs
4 submitted to the Court. "Bad faith" exists, not only in the
5 actions that led to the lawsuit, but also in the conduct of the
6 litigants. *Roadway Express*, 447 U.S. at 766.

7 The only reasonable conclusion is that the District
8 intentionally chose to ignore the warnings it received that it
9 was misrepresenting the truth to the Court, in an effort to
10 mislead the Court and to prolong the proceedings in the hope that
11 Plaintiff would give up. The District's conduct rises to bad
12 faith. The power to sanction the District exists under Rule 11,
13 § 1927, and the Court's inherent authority. See *Roadway Express*,
14 447 U.S. at 766.

15 The District should be sanctioned under the Court's inherent
16 powers for its bad faith efforts to deceive the court by not
17 addressing and correcting the obvious misstatements of fact
18 contained in its Trial De Novo briefs and by allowing these
19 errors, and others specified above, to be perpetuated in their
20 Summary Judgment briefs. This conduct was obstructive and
21 manifestly multiplied the proceedings.

22
23 F. Nature of Sanctions

24 Lozano Smith has submitted declarations that it recognizes
25 the seriousness of its conduct in this case and has or will
26 conduct attorney training in ethics and that Ms. Yama has been
27 disciplined by the firm due to her misconduct. These "voluntary"
28 actions are appropriate and recognized as a good faith effort to

1 address the harm perpetrated on the system of justice. These
2 remedial actions are inadequate to redress the totality of the
3 harm visited upon the plaintiff and the legal system. Lozano
4 Smith, Ms. Yama and the District all engaged in egregious
5 conduct, whether by commission or omission. Their "solution"
6 does not recompense Plaintiff for his increased litigation costs
7 caused by their malfeasance,¹⁹ or the unjustified burden on the
8 Court, nor provide the necessary deterrent effect.

9 The actions of Lozano Smith *significantly* increased the
10 Court's work on the case, both in the effort required to identify
11 and verify the numerous misstatements in the pleadings in order
12 to resolve the underlying issues on the merits, but separately to
13 address the ethical violations in the Order to Show Cause
14 proceedings and this decision.

15 The submissions of Ms. Yama, Lozano Smith and the District
16 belie true comprehension of the seriousness of their
17 transgressions against Plaintiff, the Court and the justice
18 system. The District evinced no interest in these proceedings
19 and was intentionally unwilling to truthfully or completely
20 answer the Interrogatories propounded by Plaintiff under Court
21 order. The evasive and contradictory answers by the District
22 indicate a complete lack of respect for the judicial process. In
23 respect to these Order to Show Cause proceedings, the District,
24 which was severally noticed as a respondent, did not even send
25

26 ¹⁹ It is acknowledged that Lozano Smith offered
27 Plaintiff's attorney \$15,000 for attorney's fees to cover these
28 costs and that Plaintiff deferred to the Court the resolution of
any monetary sanctions.

1 its own independent representative or separately address the
2 Court's questions about the improper conduct that was used on its
3 behalf in an attempt to gain advantage over the Plaintiff. The
4 District was represented by its own attorney in the underlying
5 case, independent of Lozano Smith, which is more disturbing. The
6 District reviewed and sought to benefit from its litigation
7 counsel's misconduct, and has ignored its responsibility to
8 respond in this proceeding. Despite noting the appearance of
9 conflict between Lozano, Smith, Ms. Yama, and the District in
10 this proceeding, the District remained silent. The District must
11 be independently sanctioned.

12
13 IV. CONCLUSION

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

22 For the reasons above stated, IT IS ORDERED:

23 1. Ms. Elaine Yama, Lozano Smith and Bret Harte Unified
24 School District, as a party, engaged in bad faith litigation
25 tactics through their systematic and repeated misstatements of
26 the record, frivolous objections to Plaintiff's statement of
27 facts, and repeated mischaracterizations of the law.

28 2. Under FRCP Rule 11, 28 U.S.C. § 1927, and the Court's

1 inherent powers, Ms. Yama is ordered to personally pay Plaintiff
2 and his counsel \$5,000 for the increased costs and expenses
3 related to causing Plaintiff's need to repeatedly respond to
4 Defendant's blatant misrepresentations, throughout the four year
5 history of this litigation; Ms. Yama is PUBLICALLY REPROVED and
6 ordered to attend 20 hours of CLE ethics training in programs
7 approved by the California State Bar Association by December 31,
8 2005, and must submit proof of such training to the Court by
9 December 31, 2005; training received by Ms. Yama while this
10 decision was pending will count towards this requirement. Proof
11 of training must be submitted when the training is complete, not
12 piecemeal.

13 3. Under Rule 11, 28 U.S.C. § 1927, and its inherent
14 powers, Lozano Smith is ordered to pay Plaintiff and his counsel
15 \$5,000 for the increased costs and expenses related to
16 Plaintiff's need to repeatedly respond to Ms. Yama's
17 misrepresentations, and briefs on which partners of the firm were
18 appearing counsel, throughout the four year history of this
19 litigation. Lozano Smith is PUBLICALLY REPROVED. Lozano Smith
20 is further ordered to provide a minimum of 6 hours of CLE ethics
21 training for all its associates and shareholders, in programs
22 approved by the California State Bar Association, by December 31,
23 2005, and must submit proof of such training to the Court by
24 January 30, 2006; training received while this opinion was
25 pending will count towards this requirement. Proof of training
26 must be submitted when the training is completed, and not
27 piecemeal.

28 4. Under Rule 11 and the Court's inherent power, Bret

1 Harte Unified School District, a party, is ordered to pay to
2 plaintiff Robert Moser the sum of \$5,000 for his expense,
3 inconvenience, and delay for its role in obstruction, delay in
4 relief, and unnecessarily multiplying the proceedings in this
5 case.

6 The payment of such sanctions shall be made within forty
7 (40) days following the date of service of this decision by the
8 clerk of court.

9 A copy of this decision shall be served on the California
10 State Bar Association by the Clerk of Court.

11

12 SO ORDERED.

13

14 DATED: January 12, 2005.

15

/s/ OLIVER W. WANGER

16

Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

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