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U.S. DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

BY            *wh*

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

9	ROBERT MOSER,	)	CIV F 99-6273 OWW SMS
		)	
10	Plaintiff,	)	ORDER TO SHOW CAUSE FOR
		)	SANCTIONS FOR ATTORNEY'S
11	v.	)	VIOLATIONS OF DUTY OF
		)	CANDOR AND NOT TO IMPEDE,
12	BRET HARTE UNION HIGH SCHOOL	)	OBSTRUCT, OR TO VEXATIOUSLY
	DISTRICT,	)	MULTIPLY PROCEEDINGS
13		)	
	Defendant.	)	
14	_____	)	

17 TO: Defendant and its attorneys of record Lozano Smith by Elaine  
18 M. Yama:

19       On December 1, 2003, at the hour of 9:00 a.m. in Courtroom  
20 2, Defendant and said attorneys shall show cause, if any they  
21 have, why they should not be sanctioned under the provisions of  
22 28 U.S.C. § 1927 for vexatious conduct that has harassed  
23 Plaintiff and unjustifiedly multiplied the proceedings in this  
24 case and unduly and unnecessarily burdened the court in dealing  
25 with the following:

26       Defendant Bret Harte Unified School District *so frequently*  
27 *and so egregiously misstates the facts* contained the 4000+ page  
28 Administrative Record, *including much of its own witnesses'*

101

1 testimony and evidence, that its tactics require explanation and  
2 justification.

3 Bret Harte's frequent frivolous objections to plaintiff's  
4 statement of chronological facts are equally unwarranted and  
5 vexatious. Fed. R. Civ. Pro. 11(b) states: "by presenting to the  
6 court (whether by signing, filing, submitting, or later  
7 advocating) a pleading, written motion, or other paper, an  
8 attorney... is certifying that to the best of the person's  
9 knowledge, information, and belief, formed after an inquiry  
10 reasonable under the circumstances - (4) the denials of factual  
11 contentions are warranted on the evidence or, if specifically so  
12 identified, are reasonably based on a lack of information or  
13 belief.

14 A hearing will also be held to determine whether 28 U.S.C.  
15 § 1927 sanctions and/or sanctions under the court's inherent  
16 authority to administer proceedings before it, are appropriate.

17  
18 A. The Following Is A Sample List Of Defendant's Attorneys'  
19 Misstatements Of, Or Miscitations To, The Record:

20 1. Defendant contends "Mrs. Moser only wanted  
21 transportation, tracking of progress and some counseling." UF 48  
22 & 50, Doc. 72. Defendant contends that "At no time did Mrs.  
23 Moser indicate to Mr. Smith that she wanted more accommodations."  
24 UF 57, Doc. 72.

25  
26 Mr. Smith's testimony contradicts defendant's claim. Mr.  
27 Smith testified he believed the accommodations were sufficient,  
28 but, in answer to a question, acknowledged that he knew Mrs.

1 Moser would not "feel that [Robert] was getting ... enough  
2 accommodations." AR 1458:9-19.

3 2. Defendant alleges Ms. Pape-Reynoso, Plaintiff's  
4 sophomore learning director, "communicated with Plaintiff's  
5 teachers about his special physical health needs and the  
6 accommodations required as to assignments." UF 53, Doc. 72.

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

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

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

13 AR 917:16-22.

14 Q: do you recalled being... given anything to read  
15 about Chronic Fatigue Syndrome?

16 A: at the... student study team meeting, Sheila Silcox  
17 did... share information... and there was certainly a  
18 long discussion... in terms of how that would play out.  
19 And, and what kind of support he would need.

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

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

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

27 A: usually the contact had more to do with, 'where is  
28 he?' 'Here's the work for him.' 'Mom said she was  
coming to get the work.' 'She didn't come.' 'Where is  
it?' And those kinds of things.

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

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

6 The testimony shows this is a misrepresentation. Mr. Smith  
7 testified that he met with Robert, "probably not more than ... a

1 couple of times a month." AR 1450:14-15; Doc. 72 ¶ 54 at 16.  
2 Mr. Smith testified that Robert "would never initiate" a meeting  
3 and that Mr. Smith initiated meetings with Robert "a couple times  
4 a semester. But I can't remember exactly." AR 1450:14-26; Doc.  
5 72 ¶ 54 at 16.

6 4. According to defendant, "Mr. Smith, the school  
7 counselor, and the learning director, Saundra Wimberly, tracked  
8 Plaintiff's progress [in 11<sup>th</sup> grade] . . . Wimberly testified  
9 that Plaintiff would have been able to get an 'A' if all his  
10 'modified assignments' had been turned in and judged on their own  
11 merit." Doc. 72 ¶¶ 71-72 at 20 (disputed) citing Wimberly, AR  
12 133:11-24; Smith, AR 1427:18-21; Evaluation Reports, AR 4205-  
13 4209.

14 These assertions are contradicted by the record. Learning  
15 Director Wimberly testified that her first contact with Robert  
16 was at the end of 11<sup>th</sup> grade, in May-June, when she mailed out an  
17 academic probation letter. AR 133: 12-26. Ms. Wimberly  
18 testified she had no knowledge at that time about Robert's CFS or  
19 as to why Robert failed two classes and that she "probably" had  
20 no further contact with Robert "until the following year." AR  
21 134:4-20,27-135:2.

22 Regarding grading, Ms. Wimberly's testimony is cited  
23 incompletely in order to give a false impression; her complete  
24 testimony shows she really did not know how Robert was graded:

25 A: ... and my understanding was that if Robert...  
26 was assigned an essay, for example, and the time, you  
27 know, there were no time constraints on it as to due  
28 date, then it would be judged on its own merit and  
would be possible to earn an A on that assignment and  
because he was doing lesser work than the other  
students, my understanding was that he would still be

1 able to earn an A based on the number of assignments  
2 that he completed and the quality of the assignments.

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

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

8 Q: do you recall... do you know whether in the final  
9 calculation of grades in each class, were teachers  
10 looking at what percentage of the general assignments  
11 Robert had completed, or were they looking at what  
12 percentage of his assignments he completed, or do you  
13 know?

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

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

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

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

23 Mr. Smith's testimony does not support defendant's  
24 contention that Mr. Smith "tracked plaintiff's progress" during  
25 Robert's 11<sup>th</sup> grade year:

26 A: 97/98 [Robert's 12<sup>th</sup> grade] I would have been  
27 off completely, 96/97 [Robert's 11<sup>th</sup> grade] I was on  
28 partial... time - I think it was 50 percent.... I was  
only here a certain number of hours a week and I was  
working mornings... and I was seeing only a small  
percentage of the typical load that I had.

Q: And the year before that [Robert's 10<sup>th</sup> grade,  
1996/1997], were you also on some kind of  
(unintelligible)?

AR 1427:2-17.

The cite given by defendant's attorneys to support  
defendant's contention that Mr. Smith tracked Robert's progress  
during his 11<sup>th</sup> grade year, *actually discusses Robert's 10<sup>th</sup> grade  
year:*

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

A: [] as far as my counseling responsibilities, pretty

1 much. [] Full-time counseling and, [], I had some  
2 administrative responsibilities (unintelligible) extra  
3 duty things and nighttime things, and all the things  
4 that we get to do that are so much fun. [] To help  
5 manage lively, young people.

6 AR 1427:18-24.

7 5. The district argues "Section 504 accommodations were  
8 provided to Plaintiff [Prior to 12<sup>th</sup> grade]. Although they were  
9 written down and implemented for the past several years, they  
10 were not ever written on a formal 504 Service Plan." UF 102,  
11 Doc. 72.

12 The district's argument *is directly contradicted* by the  
13 evidence it cites in the record; Superintendent Wilamek did not  
14 testify that accommodations were "written down and implemented  
15 for several years." Superintendent Wilamek testified:

16 [i]t was my understanding at the time I wrote this  
17 letter, that some accommodations had been made for him. I  
18 wasn't sure whether a complete 504 plan had been written  
19 since the person who was employed in the district was on  
20 leave of absence from the district, so I don't know what had  
21 taken place, and I couldn't find a formalized 504 plan,  
22 because usually there's a copy of them in my office. So I  
23 didn't find one.... I knew that we made accommodations as  
24 far as graduation requirements and transportation, but I  
25 didn't know what else had been done except that I do recall  
26 having a conversation with a counselor asking to make sure  
27 that accommodations were made in the classroom etc.... but  
28 since I couldn't find [a 504 plan], I decided we're going to  
do it again and do it by the book.

AR 308:1-18.

6. Defendant states plaintiff's English teacher, Vicki  
Oneto, "provided many accommodations, including . . . tape  
recording of answers...." Doc. 72, UF 136.

Ms. Oneto testified:

Q [Stephens]: What kind of adjustments did you make?  
A [Oneto]:... One time he made a tape recording of []  
identifications.

1           7. Defendant contends "the IEP team met to discuss  
2 plaintiff's individual transition plan." Doc. 72, UF 145 citing  
3 ITP plan, AR 4031-4035.

4           The IEP team and the ITP meeting participants were  
5 different. The ITP meeting did not include Dr. Trotter (school  
6 psychologist), Deborah Wright (Robert's advocate), any regular  
7 education teacher, nor any administrator. The ITP form shows the  
8 following five people in attendance (via their signatures):  
9 Robert Moser, Patty Haskell (resource specialist), Glenda Kinnear  
10 (Vocational Tech), Mrs. Moser, and Sandra Wimberly (learning  
11 director). AR 4033; AR 2933. In comparison, the October 6,  
12 1997, IEP team meeting included: Mrs. Moser, Dr. Trotter (School  
13 Psycholgist), Mr. Wilamek (Administrator/superintendent), Mr.  
14 Randall (regular education teacher), Dr. Mills (District Director  
15 of Special Ed.), Ms. Haskell (Resource Specialist), Ms. Wimberly  
16 (Learning Director) and Ms. Wright (Robert's Advocate). AR 4084.  
17 The IEP team did not meet to discuss Robert's transition plan.  
18 The October 6 IEP form puts off discussion of Robert's transition  
19 until two months later. See AR 4083.

20           8. Defendant contends Glenda Kinnear, vocational  
21 technician, "met with Plaintiff one hour to 45 minutes one time  
22 per week to discuss his interests, refer to department of  
23 rehabilitation, and obtain work experience." Doc. 72 UF 147  
24 citing Kinnear AR 600:23-27; 601:1-6; 604:14; 605:23-27; 606:1-6;  
25 608:1-10.

26           Defendant misrepresents its own witnesses' testimony:

27           Q [Graves]: Can you describe your involvement with  
28           Robert Moser?

          A [Kinnear]: I didn't have a lot of involvement with

1 Robert. I was brought into an IEP meeting for him and,  
2 I think, it was January. I'd have to check my  
3 records.... I spent, I would say *from January of 1997*  
4 *until he graduated maybe a total of [] an hour and 45*  
5 *minutes with him.* And that includes what's called an  
6 intake meeting with the department of rehabilitation  
7 counselor and an exit meeting with the department of  
8 rehabilitation counselor.

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

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

14 There is no record of a January 1998 IEP team meeting to  
15 address Robert's schedule. The IEP addendum, AR 4001, is dated  
16 1/13/98. The IEP addendum form states, "Considered a part of the  
17 IEP written on '10/6/97.'" AR 4001 (10/6/97 is filled in). The  
18 following changes are described on the form, "add two periods a  
19 day, 48 minutes a period, five days a week for study skills to  
20 Robert's schedule. This change will begin at semester 1/20/98.  
21 Continue with goals from the IEP 10/6/97." AR 4001. The  
22 addendum is signed by Mrs. Moser. Ms. Wimberly (listed as  
23 "administrator") signed the addendum on 1/16/98. Ms. Haskell  
24 signed the addendum on 1/13/98. Ms. Oneto signed the addendum  
25 and did not include a date. See AR 4001. Three school officials  
26 signed this form, not the entire IEP Team. The IEP Team which  
27 met May 28, 1998, consisted of: Mrs. Moser, Robert Moser,  
28 Superintendent Wilamek, Mr. Randall (math teacher), Ms. Haskell  
(resource specialist), Scott Black (Department of  
Rehabilitation), Nancy Stephens (District's Attorney), Ms.

1 Wimberly (learning director), Ms. Graves (plaintiff's attorney),  
2 Sonya Bach (nurse), and Dr. Mills (District's Special Education  
3 Director). Mrs. Moser testified that the schedule change did not  
4 occur through an IEP meeting, instead she "met with Patti  
5 [Haskell] in ... the classroom." AR 1910:6-12. Ms. Haskell's  
6 handwritten notes indicate that the schedule change was made  
7 unilaterally: "mom asked about a hr a week. I said the IEP was 30  
8 minutes a week and we would change that to 1 hr a day [.]  
9 [illegible] mom about addendum to change to 48 minutes a day five  
10 x a week[, mom] wants update on classes. Sent home addendum for  
11 signature." AR 3998.

12  
13 10. An IEP "exit meeting" was convened on May 28, 1998.  
14 Doc. 72 UF 175. Defendant claims the IEP team determined  
15 plaintiff had met all IEP goals and objectives. Doc. 72 UF 175.

16 Page three (of five) of the 5/28/98 "exit" IEP report  
17 contains a copy of the 10/6/97 IEP plan "goals and objectives."  
18 Handwritten notes, completed by Patty Haskell, show Robert had  
19 not met 3 of the 5 objectives listed under the "study skills"  
20 goal section. AR 3834. However the very next page (#4 of 5 in  
21 5/28/98 IEP report), a blank version of the 10/6/97 "goals and  
22 objectives" page has the sentence "district believes goals and  
23 objectives have been met" scrawled across the page. AR 3835. At  
24 best, defendant misstates the record by only including one of two  
25 contradictory sections of the Exit IEP report.

26  
27 11. Defendant alleges plaintiff provided a diagnosis of  
28 narcolepsy "after graduation." Doc. 72 at ¶ 186.

1           Bret Harte had notice of the narcolepsy diagnosis on May 28,  
2 1998, as noted on the IEP "health update" dated May 28, 1998. AR  
3 2779: "Health concerns: Narcolepsy, recently diagnosed - to be  
4 confirmed;" signed by school Nurse Sonia Bach.

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

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

13  
14           13. Defendant's Undisputed Fact #8 states, "In 6<sup>th</sup> grade,  
15 Plaintiff's services were reduced to 45 minutes" citing IEP, May  
16 1992, pp.4379-4381.

17           AR 4379 states RSP (Resource Services) beginning May 28,  
18 1992 ending Jan 1993 "one 45 min session 5x each week in written  
19 language."

20  
21           14. Defendant's Undisputed Fact #29 states, "During this  
22 IEP meeting, Mrs. Moser stated that Plaintiff's physician was  
23 considering a diagnoses of chronic fatigue syndrome. Nurse was  
24 to communicate with doctor regarding physical condition," citing  
25 IEP 10/25/94, p.4273; Olsen-Miller, pp.737:17-25; 738:9-11;  
26 Harrison, p.1293:12-13; Sylcox, p.854:15-17; Olsen-Miller Notes,  
27 pp.3825-3826.

28           Defendant's own 1994 IEP report, written evidence and

1 hearing testimony contradict its claim. The IEP states: "Robert  
2 has a history of mono - Dr. says he now has Chronic Fatigue  
3 Syndrome - nurse will communicate [with] Dr. Re: his physical  
4 condition." AR 4273. Nurse Silcox testified that, at the  
5 October 1994 IEP meeting she believed Robert had been diagnosed  
6 with CFS and was eligible for special education. AR 854:15-  
7 855:1-14. Nurse Silcox wrote a letter to Robert's doctor, Dr.  
8 Lake, on November 1<sup>st</sup>, 1994, which states:

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

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

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

16 AR 4270.

17 According to Nurse Silcox, she understood Robert to have CFS  
18 at the beginning of his Freshman year:

19 Q: And when he [Dr. Lake] called, do you recollect  
specifically that he said Chronic Fatigue Syndrome or  
did he say they were doing further testing?

20 A: He said Chronic Fatigue Syndrome.

21 Questions by Defendant's Attorney, Ms. Stephens, AR 872:21-  
22 24.

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

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

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

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

28 Q: So, when you were speaking with him [Dr. Lake],  
were you, under the impression that Robert did have

1 Chronic Fatigue Syndrome?

A: Yes.

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

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

8 A: I have found that doctors sometimes felt that  
9 [the phone] was much more expedient and with  
10 documenting what he said over the phone, I felt that  
11 was sufficient....

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

A: No.

14 AR 880:5-22.

15 15. Defendant's undisputed fact number 31 states,  
16 "Subsequent to IEP meeting, Nurse Sylcox contacted Dr. Lake  
17 regarding Plaintiff's medical condition and information on  
18 diagnoses or prognoses concerning chronic fatigue syndrome. In  
19 addition, Nurse Silcox discussed with family regarding vitamin  
20 supplements. Ms. Moser indicated she was not interested in  
21 vitamin therapy. Defendant's Undisputed Fact #32 states, "In  
22 November 1994, Nurse Silcox spoke with Dr. Lake who indicated  
23 that he was running a few more lab tests on Plaintiff to make  
24 sure he was not anemic. Dr. Lake also indicated that testing on  
25 Plaintiff for mononucleosis was not conclusive and that he was  
26 continuing testing and the diagnosis was still in progress. They  
27 also discussed vitamin therapy." Letter, p.3393; Silcox p.874:1-  
28 12. Defendant's Undisputed Fact #34 states, " district one to

1 provide whatever supports possible until Mom got diagnosis."

2 Defendant's Undisputed Fact #35 states, "staff was provided  
3 information regarding chronic fatigue syndrome." Doc. 72.

4 The statements taken together indicate defendant was  
5 attempting to misleadingly imply that the CFS diagnosis was still  
6 in progress. The letter and Nurse Silcox's testimony were about  
7 the Mononucleosis diagnosis, not the CFS diagnosis. The Letter  
8 cited at AR 3393 is a letter from Nurse Silcox dated November 10,  
9 1994 to Mrs. Moser, which states, in its entirety:

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

19 I asked Dr. Lake about vitamin supplements for  
20 Robert, explaining that you stated he was not a very  
21 good eater. He said that a multivitamin tablet without  
22 iron would be a good idea for Robert. He stated that  
23 he had never heard of the body not producing its own  
24 vitamins after having taken a vitamin pill. Please  
25 discuss the vitamin issue with Dr. Lake if you continue  
26 to have questions regarding their use.

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

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

16. Defendant's Undisputed Fact #30, listed under 9<sup>th</sup> GRADE  
(1994-1995) states, "In response to parents' concern regarding  
chronic fatigue syndrome, District staff offered accommodations,  
including shorten day, no P.E. or electives, transportation, and  
classes in personal development and study skills taught by  
special education resource specialist, Ms. Olsen-Miller, in order

1 to monitor Plaintiff's progress and provide assistance with  
2 written expression. The personal development class and the study  
3 skills class provided by resource specialist who would serve both  
4 special education students and "at-risk" regular education  
5 students. Olsen-Miller, pp.746:22-26; 748:3-5; 759:1-2; 781:4-8;  
6 Silcox p.863:5-12; Harrison, p.1288:4-27; Olsen-Miller, pp.759:1-  
7 2; 775:22-24; Silcox, p.881:12-18; Harrison, p.1355:1-4; Olsen-  
8 Miller Notes, pp.3825-3826.

9 The record contradicts most of defendant's claims. Robert  
10 was not offered a shortened day until his second semester when he  
11 transferred to a small continuation-type high school in Arnold,  
12 closer to home. AR 291; 4262. Robert was not provided  
13 transportation until his *sophomore* year, after his mother  
14 specifically requested transportation services, when she learned  
15 from a neighbor that Robert had the right to the accommodation.  
16 AR 4253; Doc. 72 ¶ 48 at 13. The school placed Robert in a  
17 resource specialist's class held in the early morning, at a time  
18 Robert's CFS made it difficult for him to attend. The school was  
19 aware of Robert's CFS and its effect upon his ability to attend  
20 morning classes. See, e.g., Ingrid-Olsen testimony, AR 750:13.  
21 Robert was not exempted from P.E. until his *sophomore* year. AR  
22 4226; 867. At Arnold, Robert was required to keep a P.E. log of  
23 activity, the same requirement of every student at Arnold. AR  
24 4262. Plaintiff points out, and the record confirms, that Robert  
25 did not receive any special written language instruction from  
26 Ingrid Olsen Miller:

27 Q: did you - you focused your efforts with him on  
written language?

28 A: most of the time it was just progressive works

1 caught up [sic]. He was so overwhelmed at times. And  
2 most of it was in a written form. So, there was  
assistance with that, as well as getting caught up.

3 Q: did you have time to deal with the spelling  
concerns particularly the mother had had?

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

6 AR 749:4-13.

7  
8 17. At the end of his first semester of ninth-grade  
9 plaintiff's mother transferred her son from Bret Harte High  
10 School to Arnold High School about alerting Bret Harte High  
11 School staff or discussing her decision with anyone. Smith, p.  
12 1444:10-19.

13 The cited testimony does not support the claim:

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

15 Smith: No.

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

17 Smith: pardon me?

18 Graves: do you recall ever - at any point  
receiving anything about how things had gone for Robert  
at Arnold High School?

19 Smith: not until he was getting ready to come back  
to Bret Harte.

20 Graves: and then what did you hear?

21 Smith: um, that he was coming back.

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

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

1 AR 745:1-6.

2

3 18. Defendant's Undisputed Fact #44 states, "Plaintiff  
4 missed 16 days in the 9<sup>th</sup> grade year, which was 'real good' for  
5 plaintiff." Wilimek, p. 373:18-22.

6 Mr. Wilamek's testimony, AR 373:14-22, states Robert was  
7 absent for 16 days during his second semester of ninth-grade, at  
8 Arnold High School:

9 Wilamek: *This is the attendance form from Arnold  
10 High School.*

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

14 Wilamek: Um hum.

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

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

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

20 Wilamek: well, a little bit above average. But  
21 for Robert, it's real good.

22

23 19. Defendant's Undisputed Fact #125 states, "October 8,  
24 1997 American Government instructor indicates Plaintiff refused  
25 to keep notebook...." Notes, p. 4075.

26 This "undisputed fact" is a misstatement. The notes at page  
27 4075 in the administrative record do not state Robert refused to  
28 keep notebook. The Notes state: "notebooks - required to keep -  
[illegible] lecture notes - someone else...."

29

30 20. Defendant's Undisputed Fact #133 states, "Mrs. Moser  
31 had no problem with accommodations on 504 plan." J.Moser,  
32 pp.1979-1982:5.

33 This "undisputed fact" is an exaggeration. Mrs. Moser

1 testified:

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

8 ...  
9 Stephens: OK. What is it about those [Mr.  
10 Overton's] accommodations that you disagreed with,  
11 other than the fact that you did not want to have  
12 Robert, uh, ask a friend for the assignment if he were  
13 away for one or two days?

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

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

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

22 ...  
23 Stephens: It sounds like Patti was kind of like a  
24 central figure, uh, in helping to coordinate things,  
25 Ms. Haskell, is that correct?

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

28 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.

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

Stephens: Uh-huh. Okay. But as far as the  
accommodations of English, you didn't have a problem  
with that? The last one, of course, is the, uh,  
Physics program. And I'm not going to go through this  
again, because I think we spent a lot of time on this,

1 but these are the accommodations. Uh, you can see at  
2 the bottom of the page, uh, that, uh, all of the  
3 teachers signed this document. But you did not sign  
4 this document?

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

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

10 Moser: Yes.

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

13 Moser: No.

14 Stephens: And the reason?

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

20 Stephens: Okay, well, I think you have sort of a  
21 sense, Ms. Moser, of what you're requesting.

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

24 ...

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

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

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

Moser: I don't remember.

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

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.

J.Moser, pp.1979-1983:26.

21  
22  
23 21. Defendant's Undisputed Fact #167 states, "Plaintiff  
24 believes he has the ability to advocate for himself." R.Moser  
25 p.2232:1-19.

26 The cited testimony does not support this generalized  
27 statement:

28 Hearing Officer: Okay. Okay. Just one last  
question. Jack Pool today testified that he recently

1 had a meeting with you and your Mom and another  
2 counselor at Columbia - Paul, I think his name was.  
And you talked about, I guess about self-advocacy a  
3 little bit.

R. Moser: Um-hmm.

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

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

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

R. Moser: Yeah.

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

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

10 Hearing Officer: Um-hmm. Have you done that this  
semester with your instructors?

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

Hearing Officer: And how did it work out?

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

13  
14  
15 22. Defendant's Undisputed Fact #169 states, "Mr. Randall  
16 saw Plaintiff 2 to 3 times per week and 1 to 2 times per week  
17 after school and on weekends. Randall, p.1790:3-9.

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

26  
27 23. Defendant's Undisputed Fact #171 states, "Algebra II  
28 was not particularly challenging, so Plaintiff was advanced to

1 Trigonometry. Plaintiff understood concepts of Trigonometry very  
2 well. In fact, if Plaintiff attended college, he could take pre-  
3 calculus." Randall, pp. 1390:24-26; 1391:14-16; 1400:2-11;  
4 Randall, p. 1401-1-3.

5 The cited testimony is as follows:

6 Randall, pp. 1390:24-26:

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

8 Stephens: did he have friends there, too?

9 Randall: Yes."

10 Randall, pp. 1391:14-16:

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

13 1400:2-11:

14 Randall: Yeah. Um, the concern I had with what he  
15 has done in trig is that the material for which he was  
16 present for which he did work, he grasped it very well.  
17 Uh, but there were - because of the absences and  
18 because of the homework, there were some topics, some  
19 chapters that he had huge holes. And I did not  
20 penalize him for not having that material, but  
21 evaluated him based on the material he did achieve.

18 Stephens: Did he have the opportunity to, uh,  
19 contact you to - for some tutoring to make up these  
20 deficits?

20 Randall: Yes.

21 1401:1-3:

22 Randall: Yes. We discussed that. He and I  
23 discussed it where when he went to college that the  
24 course to continue with would probably be a pre-  
25 calculus class, and that some of the topics would be  
26 ones that he saw...

27 Testimony not cited does indicate Robert was advanced to  
28 Trigonometry w/o meeting the prerequisite (AR: 1391:176-23).

24. Defendant's Undisputed Fact #173 states, "Plaintiff was

1 on medications during his senior year which changed 5-7 times,  
2 but failed to inform school. J.Moser, p.1938:21-24.

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

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

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 psycotropic, 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.

Hearing Officer: You may answer the question.

23 Moser: Uh, I know that I wrote a letter asking him  
24 to, uh, the school asked me to do something like that,  
25 so, I wrote a letter and I think only Dr. Lee responded  
26 to the school. And then, when, when he started taking  
27 different medication, I came in and told Sandy as it  
28 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.

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

Moser: Five or seven times.

Stephens: Five to seven?

Moser: I couldn't tell you exactly. [emphasis  
added]

25. Defendant's Undisputed Fact #197 states, "Based on Dr.

1 Trotter's review of records and conversations with the Moser's,  
2 he believes that since Robert was within normal expectations for  
3 his grade level, he probably would not be afforded special  
4 education services under other health impairment criteria, but he  
5 would perhaps be eligible probably for 504 Plan accommodations."  
6 Trotter, pp. 283:22-24; 284:10-16.

7 Defendant miscites testimony and omits Dr. Trotter's  
8 comments just prior to the cited testimony where he says he is  
9 speaking "in generalities" and "hypothetically" as to "if Robert  
10 was doing within normal expectations for his grade level..." Dr.  
11 Trotter does not state that "he believes that since Robert was  
12 within normal expectations for his grade level." Trotter, pp.  
13 283:22-24, states:

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

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

21 Trotter, pp. 284:10-16, states:

22 Graves: The general testing?

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

28 Graves: Okay.

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 to 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

1 specifically to Robert's case. But if he was doing  
2 within normal expectations for his grade level, he  
3 probably would not be afforded special ed services  
4 under OHI, but he would perhaps be eligible for  
5 probably 504 plan accommodations. But these are  
6 generalities, okay, not specific to this case, because  
7 I was not part of the IEP team. [emphasis added].  
8

9 26. Defendant's Undisputed Fact #217 states, "deficit in  
10 spelling did not affect plaintiffs writing competence" and cites  
11 "Patterson, p.1279:1-12."  
12

13 Dr. Patterson was plaintiff's expert. The cited testimony  
14 was from Michael Harrison, defendant's school psychologist, not  
15 Dr. Patterson. Michael Harrison's full testimony on the issue,  
16 at AR 1279:12-27, 1280:8-12, does not support defendant's  
17 generalized claim:  
18

19 Harrison: There seemed to be a deficit in  
20 spelling, but it did not seem to be having a  
21 significant effect on his writing competence. It  
22 seemed to be more related to spelling itself.

23 Graves: okay. And did you notice errors in his  
24 writing itself?

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

Graves: okay. Was he making any grammatical  
errors that you're aware of?

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

Graves: okay. And were you able to review the  
actual sample of the writing he had produced for that  
test?

Harrison: Hm hmmm. Hmm. I saw, um, copies of a --

Graves: okay. And do you know where those will be  
now?

Harrison: I think I passed them up even....

Harrison: I don't believe that I was given any of  
that in preparation for this, um, it would be typical  
in an IEP meeting that I would look over the results of  
the resource specialist had, um, I think the only thing  
I've seen written out is just results of the - the -

1 from the previous ability test, (unintelligible) tests  
2 that has been given.

3 B. The Following Is A Sample List Of Defendant's Attorney's  
4 Vexatious And Frivolous Objections To Plaintiff's  
5 Chronological Statement Of Undisputed Facts.

6  
7 1. Brett Harte "disputes" plaintiff's statement that  
8 "Robert enrolled at Bret Harte Union High School District for 9<sup>th</sup>  
9 Grade" in August 1994. Defendant refuses to admit this  
10 "undisputed fact" because, "plaintiff fails to cite  
11 administrative record."

12 Regardless of plaintiff's failure to cite the administrative  
13 record, it is indisputable that Robert enrolled at Brett Harte  
14 for ninth grade.

15  
16 2. Plaintiff testified that an accommodation made by Ms.  
17 Nanik, "actually increased Robert's workload by shifting from  
18 multiple choice to writing assignments." UF 96, Doc. 78.  
19 Defendant objects to plaintiff's undisputed fact: "argument and  
20 conclusion. Misstates testimony. J. Moser did not testify that  
21 Plaintiff's workload was 'shifting from multiple-choice to  
22 writing assignments.'"

23 Defendant's objection is frivolous. Mrs. Moser testified  
24 exactly to that effect: Q[Graves]: "when Ms. Nanik decided to  
25 have him do something else, other than taking the test at home,  
26 did this involve more writing on Roberts part?" A[Mrs. Moser]:  
27 "Yes." AR 1882:17-20. A[Moser]: "And then, they wanted to have  
28 Robert, instead of taking the test home, to read the whole

1 chapter, which is fine. That's what he did. But then, to answer  
2 all of those questions on the back, which was more than just  
3 taking a test, you know, 'because you have like an A or B. It's  
4 A, B, or C choice. So, it was a lot easier for him to do that.  
5 It took a lot more time and energy, which he really didn't have,  
6 to be doing numerous questions and answering all that long  
7 stuff." AR 1882:4-11.

8  
9 3. Defendant's objection to undisputed fact No. 98 once  
10 again misstates the obvious. The document speaks for itself.  
11 Defendant complains "plaintiff's references to 'long-standing  
12 frustration' and 'depression' and 'hired an advocate' are  
13 statements not referenced within the document. The document  
14 clearly references Robert's frustration and depression as well as  
15 Mrs. Moser's frustration. The document does not mention the  
16 hiring of an advocate.

17 The document is a letter sent by Ms. Moser on June 17, 1997  
18 to Superintendent Wilamek (received June 18, 1997), Ronald Lewis,  
19 Jan Edwards, Principal of Bret Harte High School, and the Bret  
20 Harte School Board. Mrs. Moser's letter specifically states  
21 Robert was depressed and refusing to participate in class due to  
22 this depression, and his frustration with his teachers. AR 3335.  
23 Mrs. Moser expressed her frustration with the school directly:  
24 "as far as I can tell, the teachers and administration have done  
25 absolutely nothing they have been asked repeatedly to do, nor  
26 have they done anything to help my son." Mrs. Moser concludes:

27 Just for your information, Robert is not a 'lazy'  
28 student, just trying to get out of work. In fact, in  
spite of his illness, he has gone out of his way to

1 take entry tests in math and English for Columbia  
2 College, and, *he has passed both*. He is going for  
3 surgery Thursday and even though he should be laid up  
4 for 14 days (not to mention 8 weeks of not being able  
5 to move his torso), he is still taking classes.

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

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

24 AR 3334-3336; 3337-3339.

25 4. A diagnosis of chronic fatigue syndrome and depression  
26 is written on a doctor's note dated 9/12/97. Plaintiff contends  
27 this note was forwarded to Bret Harte. UF 97a, Doc. 78.  
28 Defendant objects to whether or not this diagnosis was actually  
29 forwarded to the school: "argument and conclusion. Misstates  
30 evidence. Fails to cite record." *Id.*

31 Defendant makes no statement as to whether or not Bret Harte  
32 actually received the doctors note.

33 Defendant's objection is inexplicable. The 504  
34 accommodation plan states *explicitly*, "Robert will meet with Mrs.  
35 Haskell weekly on Fridays from 10:00 to 10:30 AM. They will  
36 confer on his progress, and discuss any academic difficulties he  
37 may be having."

1           5. Defendant objects to plaintiff's undisputed fact # 15,  
2 which states, "In eighth grade, without an assessment or IEP, it  
3 was noted on a parent conference report that Robert would receive  
4 "special ed assistance from 1:15-2:00 in Ms. Johnson's room."  
5 (Page 3783). Defendant's objection, "Misstates evidence. Page  
6 4368 IEP dated 1/13/93 specifically states that 'although student  
7 does not qualify for special education services, he will  
8 participate in after school study hall three times a week for  
9 homework."

10           Defendant's objection is *unintelligible*. The cited form in  
11 plaintiff's undisputed fact, AR 3783, states exactly what  
12 plaintiff contends it states: "Vallecito Union School District  
13 Parent Conference Report" dated 12/xx/93 states "4. Special ed  
14 assistance from 1:15-2:00 in Ms. Johnson's room." The form was  
15 completed prior to the Triennial IEP review where Robert was  
16 exited from special education. The IEP form cited by defendant,  
17 dated one month later, on 1/13/93, "Formal tests do not suggest  
18 the presence of a processing disorder; does not qualify for  
19 special education; Robert will participate in after school study  
20 hall 3x/wk for homework."

21  
22           6. Defendant objects to plaintiff's undisputed fact # 16,  
23 "Robert saw a physician who diagnosed Chronic fatigue syndrome."  
24 (Page 4259). Defendant's objection: "Disputed. Page 4259 is a  
25 doctor's notes [sic] which is signed by the doctor on 6-21-95.  
26 Also, see Plaintiff's Fact No. 58, which references page 3383  
27 (the same document as 4259), and indicates the appropriate date  
28 of 6-21-95.

1 Defendant's objection is confusing at best, misleading at  
2 worst. The documents cited (both AR 4259 and AR 3383) both have  
3 8/5/94 at the date "was seen at this office on" and the diagnosis  
4 "Chronic Fatigue Syndrome." Under "other" it states, "unable to  
5 participate in PE from '95 through '96." The document is signed  
6 by the physician, Dr. Lake, on 6/21/95. Plaintiff's Undisputed  
7 fact lists 8/94 as when Robert saw the physician, who diagnosed  
8 CFS. Both copies of the document support this statement. The  
9 fact that the doctor signed the note in June of 1995, as  
10 basically a doctor's note excusing Robert from P.E. does not have  
11 anything to do with the fact that Robert was seen in August of  
12 1994 and diagnosed with Chronic Fatigue Syndrome at that time, as  
13 clearly indicated on both copies of the doctor's note.  
14 Defendant's objection to the fact as "disputed" is inexplicable,  
15 the document speaks for itself; defendant's reference to when the  
16 note was cited is a red herring.

17  
18 7. Bret Harte "disputes" plaintiff's statement of  
19 undisputed fact, # 21, Doc. 78, that "An assessment was  
20 conducted" on 9/10/94. Defendant refuses to admit this  
21 "undisputed fact" because, "plaintiff fails to cite  
22 administrative record."

23 Regardless of plaintiff's failure to cite the administrative  
24 record, it is indisputable that an assessment was conducted Sept-  
25 Oct of 1994.

26  
27 8. Defendant objects to part of plaintiff's undisputed fact  
28 # 27 which states: "9-10/94 The 'concentration, attention span,

1 memory problems of a diverse kind' and diffuse processing  
2 problems common in narcolepsy were not explored." (Page 1745/line  
3 7 - page 1746 line 21). Defendant's objection: "argument and  
4 conclusion: misstates testimony of Dr. Patterson, in which there  
5 is no reference to 'The 'concentration, ... were not explored."

6 Again defendant's objection is totally inexplicable. The  
7 cited testimony explicitly includes the sentence referenced by  
8 defendant:

9 Graves: I want to um, I'm not sure with you said  
10 what you meant, so I want to make sure that whether,  
11 what you meant. I think you said people with  
12 narcolepsy often have problems with memory and  
13 difficulties and things [unintelligible]. My question  
14 was about head injury -

15 Dr. Patterson: - yeah -

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

17 Patterson: - and head injuries have the same  
18 characteristics. But I was about to say, and in  
19 Robert's case uh, he was noted in, in an early  
20 assessment as having a visual memory problem. And um,  
21 they really didn't do a lot of definitive testing from  
22 memory in, in any of the assessments. But it, it is  
23 not unusual in kids with head injuries to find,  
24 attention-span difficulties, concentration  
25 difficulties, uh, memory types of difficulties. And  
26 those are not memory difficulties that are necessarily  
27 showing up on Wechsler Scales. In other words, you  
28 need definitive tests for that, sometimes what are  
called neuropsychological tests.... but no visual  
testing for visual memory per se is, was, was done. No  
-

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

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

1 9. Defendant objects to plaintiff's undisputed fact #30  
2 which states: "10/25/97 doctor care e-mails, the special  
3 education director, testified that 'it's very difficult to tell'  
4 from this document whether Robert was being found eligible for  
5 special education (page 48/line 14 - page 51/120.). Defendant's  
6 objection: "Misstates testimony as cited. K. Mill's testimony  
7 states: 'it looks like he does not [qualify] because he's going  
8 to participate in a regular program on a full-time basis.' See  
9 K. Mills testimony, page 48:20-21; 'I don't see that he's  
10 determined eligible on this document.' See K. Mills testimony,  
11 page 49:1.17; 'it doesn't discuss discrepancy ... it seems to  
12 infer that its lower than expected. But it doesn't indicate a  
13 discrepancy.' See K. Mills testimony, page 50:3-9[.]"

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

16 Graves: Okay. Is it your understanding in this  
17 IEP meeting Robert was found eligible or ineligible for  
18 Special Education services?

18 Mills: It's very difficult to tell.

19  
20 10. In defendant's objection to Plaintiff's undisputed fact  
21 #31, defendant restates the untrue statement that "Robert had not  
22 yet been diagnosed."

23 The citation provided by plaintiff at his proposed  
24 undisputed fact #31 objected to by defendant is AR 4273,  
25 defendant's IEP report, dated 10/25/94, which states, "'Dr. Says  
26 he now has chronic fatigue syndrome." See additional discussion  
27 regarding Ingrid Olson Miller's testimony that she had the  
28 diagnosis as of the IEP meeting again via her conversation with

1 Robert's doctor in November '94, supra, at p. 11 (N.). The same  
2 can be said for defendant's frivolous objections to plaintiff's  
3 undisputed fact #32 and #33.

4  
5 11. Defendant objects to plaintiff's undisputed fact # 38,  
6 which states, "10/25/94 Robert's mother was understandably  
7 confused by the October 1994 process, seeing Robert as  
8 'semi-qualified,' but not 'quite,' and thinking the plan was to  
9 'see what happened.' (Page 1865/line 17-27.) Defendant's  
10 objection: "argument and conclusion. Misstates testimony of J.  
11 Moser."

12 Defendant's objection is frivolous. Ms. Moser's testimony  
13 says exactly what is quoted and cited:

14 Moser: Uh, yeah, they did, they tested him and uh,  
15 he semi-qualified, he kind of qualified, but they  
16 didn't think he, they didn't think he quite qualified.  
17 I'm not really sure, other than that I wanted to get  
18 whatever service, like he had back when, uh, in Oak  
19 Grove,... so, I wanted some kind of service like that,  
20 but they said he really didn't qualify, so, we just had  
21 the [sic], see what happened.

22 12. Brett Harte "disputes" plaintiff's statement that  
23 "Robert was a regular education student at Arnold High School, a  
24 very small and remotely located high school, which featured  
25 behaviorally challenged challenging students and no special  
26 education staff."

27 Defendant refuses to admit this "undisputed fact" because,  
28 "plaintiff fails to cite administrative record."

29 Regardless of plaintiff's failure to cite the administrative  
30 record, it is indisputable that Robert enrolled at Arnold High  
31 School his second semester and that Arnold was a "continuation"

1 type high school for troubled students and had no special  
2 education staff.

3 The above 13 citations are a few examples of defendants' and  
4 their attorneys' frivolous and vexatious objections to  
5 plaintiff's statement of undisputed facts. Defendants and their  
6 attorney continue to make similar frivolous objections throughout  
7 their "amended response and opposition to plaintiff's  
8 chronological statement of facts," Doc. 78.

9  
10 CONCLUSION

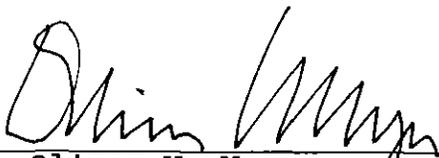
11 The conduct of Defendant's attorneys has grossly and  
12 vexatiously overburdened the court in judicially administering  
13 this case to reach a final decision on the merits.

14 IT IS ORDERED that Defendant and its attorneys shall show  
15 cause if any they have, on December 1, 2003, at the hour of 9:00  
16 a.m. in Courtroom 2 of the above-captioned court, why appropriate  
17 remedies should not be exacted against them for their conduct in  
18 defending this case.

19 Any submission by Plaintiff shall be filed on or before  
20 November 5, 2003. Defendant's submission shall be filed by  
21 November 21, 2003.

22 FURTHER ORDERED the senior attorney and attorney of record  
23 in the law firm representing Defendant in this case, shall  
24 personally appear at the December 1, 2003, hearing on the Order  
25 to Show Cause.

26 DATED: October 15, 2003.

27  
28   
\_\_\_\_\_  
Oliver W. Wanger  
UNITED STATES DISTRICT JUDGE

United States District Court  
for the  
Eastern District of California  
October 17, 2003

\* \* CERTIFICATE OF SERVICE \* \*

1:99-cv-06273

Moser

v.

Bret Harte Union

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I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

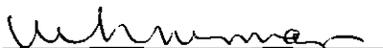
That on October 17, 2003, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

Maureen Ramona Graves  
34 Schubert Court  
Irvine, CA 92612

OWW SMS

Elaine M Yama  
Lozano Smith  
285 West Bullard Avenue  
Suite 101  
Fresno, CA 93704-1706

Jack L. Wagner, Clerk

BY:   
Deputy Clerk