

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CARLSBAD UNIFIED SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH CASE NO. 2008030631

DECISION

Administrative Law Judge (ALJ) Susan Ruff of the Office of Administrative Hearings, State of California (OAH), heard this matter on May 13 – 15, 2008, and June 10, 2008, in San Diego, California.

Jonathan P. Read, Esq., represented Carlsbad Unified School District (District) at the hearing. J. Bruce Kramer also appeared on behalf of the District.

Ellen Dowd, Esq., represented the Student and his parents (Student) at the hearing. Student's mother was present throughout the hearing. Student was not present.

The District's due process complaint was filed on March 14, 2008. On March 25, 2008, OAH granted the District's motion to continue the due process hearing in this matter. At the conclusion of the hearing, the parties requested time to file written

closing argument. The matter was taken under submission upon the receipt of the parties' written closing argument on June 18, 2008.¹

ISSUE

Did the District's offer of placement developed at the January 24, 2008, and February 20, 2008 individualized education program (IEP) team meetings constitute a free appropriate public education (FAPE)?²

FACTUAL FINDINGS

1. Student is an 11-year-old boy who resides within the jurisdiction of the District.
2. In March 2005, Student was found eligible for special education services by the District under the eligibility category of speech or language impairment. At the time, Student had a moderate delay in syntax and some articulation errors. Student was in the average cognitive range and was average in academic achievement, with the exception of spelling (in which he was below average).
3. Student's March 2005 IEP placed Student in a general educational classroom with speech-language and learning center services. The speech-language services were provided in a small group setting by Cynthia Schmitz, a speech-language therapist employed by the District. At first the services were provided in Student's

¹ In order to maintain a clear record, the parties' written closing arguments have been marked as exhibits. Student's written closing argument has been marked as Exhibit U. The District's written closing argument has been marked as Exhibit 41.

² In its due process request, the District originally alleged a second issue, but the District withdrew that issue on May 5, 2008.

classroom, but later they were provided in Schmitz's office. Schmitz never saw Student exhibit any anxiety during the time she worked with him.

4. In April 2005, Student's mother removed Student from the District's school program. She testified that her decision to remove Student was based on the recommendation of a psychologist who saw Student at the time. Student's mother believed that Student suffered from anxiety at school that was causing him to suffer psychosomatic symptoms such as stomach aches. She thereafter home schooled Student until approximately the summer of 2007, when she requested that Student be re-enrolled in the District schools.³

5. In March 2007, Marc Lewkowicz, Ph.D., a neuropsychologist, assessed Student at the request of Student's mother. Lewkowicz received his Ph.D. in clinical psychology in 1979 and began private practice as a clinical psychologist in 1981. Although he does not hold a teaching credential, he has performed numerous psychological evaluations on behalf of school districts and has participated in work groups providing assistance to the California Department of Education. He has served on advisory groups and committees for state and local government agencies, such as the Special Education Community Advisory Committee for the California Youth Authority. He has reviewed hundreds of IEPs during his career. He is not licensed as an occupational therapist or speech-language pathologist.

6. In connection with his assessment of Student, Lewkowicz reviewed Student's prior assessments and obtained input from Student's mother. He administered

³ There was a due process proceeding between the parties and a settlement agreement around that time. It is not necessary to discuss the details of that proceeding for purposes of this current due process case, because the only issue in this case is the propriety of the January-February 2008 IEP offer.

the Reitan Neuropsychological Battery (Reitan) to Student. The Reitan is a test designed to evaluate a child from a clinical perspective and is not generally used in educational assessments. Lewkowicz chose this test because Student was having difficulties with math, handwriting, initiating tasks and understanding information. He believed there were sufficient concerns to go more in depth than a traditional psychoeducational assessment.

7. Lewkowicz also administered the Wide Range Assessment of Memory and Learning, the Woodcock-Johnson Achievement Battery-III, the Wold Sentence Copying Test, the Roberts' Apperception Test for Children-2, and the Behavior Assessment System for Children 2 (Parent Rating Scale). Lewkowicz concluded that Student had a "highly impaired nonverbal processing ability" and an impaired ability to organize information for mental retrieval. He also found that Student was impaired in handwriting and math calculation.

8. Because Student was being home schooled at the time of the assessment, Lewkowicz's analysis of Student's behavior was based largely on the report of Student's mother and rating scales filled out by Student's mother. Lewkowicz diagnosed Student with a "Cognitive Disorder, NOS with secondary attention difficulties," "School Phobia with somatic reactions" and a "Disorder of Arithmetic." He recommended that Student be educated in a group of no more than four pupils per teacher. He also recommended social skills training, as well as direct instruction in math and written expression. Lewkowicz believed that Student should eventually be educated in a general education classroom, but should start with a small, special education classroom. He recommended both individual counseling for Student and family therapy. Based on the information he reviewed, Lewkowicz believed that Student was an anxious child, although he did not observe anxiety by Student during his testing. At hearing, he explained that it would be unusual to see a child exhibit anxiety in a one-to-one setting.

9. Lewkowicz completed his assessment in approximately April 2007. He has not seen Student since that time. He never observed Student in a school setting.

10. The District conducted its assessments of Student during September through December 2007.⁴

11. In September 2007, Student's mother placed Student in a private general education program at Encinitas Country Day School. Student's mother did not inform the District about this placement during the District's assessment or at the IEP meetings in January and February 2008. Instead, Student's mother led the District to believe that she was home schooling Student during that time. Student's mother removed Student from Encinitas Country Day School in approximately January 2008, shortly before the January IEP meeting.

12. Student's first report card from Encinitas Country Day School stated, in part that Student "is adjusting to Room 219 and is making friends...[Student's] first book report was very well done and he presented it confidently and concisely."⁵ Student's mother received that report card in December 2007. Student's mother testified that

⁴ Student objects to the length of time between the request by Student's mother for public school placement in 2007 and the formation of the IEP in January and February 2008. However, the propriety of that length of time is not at issue in this case and no findings regarding it are made herein. This is a District-filed case and solely involves whether the District's 2008 proposed IEP offered a FAPE. The District's 2007 assessments are relevant to this Decision only to the extent that those assessments enabled the District staff to make an offer designed to address Student's unique needs.

⁵ No one from Encinitas Country Day School testified at the hearing, and the statements in the report card were admitted into evidence solely as administrative hearsay.

Student attended Encinitas Country Day School for a trial period, but he was not successful there academically. She explained that he did not adjust well to Encinitas Country Day School, and that he suffered from low self-esteem because he was so far behind the other pupils academically. She believes that he did not gain educational benefit while at Encinitas Country Day School.

13. During approximately that same time period, Student received one-to-one instruction in reading and language from the Foundations for Reading and Learning (FRL) funded by the District, pursuant to the prior due process settlement agreement. In its January 2008 report, FRL explained that Student was working with visualizing and verbalizing reading material at a third and fourth grade level. He processed fourth grade level paragraphs one sentence at a time.

14. John Pappas, Ph.D, a school psychologist with approximately 30 years of practice, conducted the psychoeducational portion of the District's assessment of Student. Pappas currently teaches psychology at Alliant International University and works part time as a school psychologist for the District. During the 20 years that he worked as a school psychologist for the Poway Unified School District he had a great deal of experience working with pupils who had emotional difficulties and low self-esteem. Pappas has assessed more than 2000 children in his career and attended hundreds of IEPs. In connection with his assessment of Student, he reviewed Student's prior assessments, including Lewkowicz's assessment. He conducted cognitive and achievement testing, and met with Student's mother in order to obtain background information about Student. He did not review Student's 2005 IEP during his assessment.

15. As part of the assessment, Pappas asked Student's mother to fill out a Health and Developmental History questionnaire regarding Student. Student's mother filled out the questionnaire and returned it to Pappas during either October or November 2007. Although Student's mother knew that Student was attending Encinitas

Country Day School at the time she filled out the questionnaire, she did not disclose that in her answers. Instead, she inaccurately indicated that he was being home schooled. In response to the question about how Student feels after school, his mother responded "fine."

16. Because Lewkowicz had recently tested Student, Pappas chose different test instruments to determine Student's cognitive ability and achievement levels. He administered the Wechsler Abbreviated Scale of Intelligence to determine Student's cognitive abilities. The results showed Student to be in the average range of intelligence.

17. To measure Student's achievement, Pappas used the Woodcock-Johnson-III Extended Achievement Subtests. Student scored poorly in math (but still within the average range), and was within the average range in the other subjects.

18. Pappas conducted his assessment and testing of Student during two one-hour sessions at the main office of Aviara Oaks Elementary School within the District. The short testing sessions were done to accommodate the wishes of Student's mother. Student did not exhibit any anxiety during the testing sessions with Pappas. In Student's responses to the assessments administered by Pappas, Student reported that he was concerned with coping skills in social situations, for example when he was picked on by peers.

19. Pappas also interviewed Student's mother as part of the assessment. Student's mother reported that Student had problems with academic and daily living skills. Pappas asked Student's mother to complete the Achenbach Child Behavior Checklist. Student's mother's responses showed Student to be in the average range in all areas except attention. Her responses in the "somatic complaints" category for Student were elevated, but not enough to be in the borderline range for problems. Pappas also administered an informal behavioral rating scale to Student.

20. Pappas concluded that Student had problems with short term and immediate memory, short attention span and limited sustained attention. He recommended that certain structures and methodologies be used to assist Student in his classroom. For example, he recommended that a system be set up in the classroom to make certain that Student could understand directions and ask for help when he needed it.

21. Ann Jordan conducted the occupational therapy (OT) portion of the District's assessment. She reviewed Student's records and tested Student using the Bruiniks-Oseretsky Test of Motor Proficiency (BOT-2) and the Word Sentence Copying Test. Jordan performed her testing of Student at Magnolia Elementary School during the school day. As part of her assessment, she spoke with Student's mother about Student's living skills at home. Student was shy during Jordan's testing, but was attentive to all the tasks she presented to him.

22. Jordan determined that Student's speed of writing was at a third grade level. Student's fine motor integration was below average and he had some difficulty with letter formation. She recommended OT services to assist Student with writing speed and letter formation.

23. Cynthia Schmitz, the speech-language therapist who had provided Student's speech-language therapy services under his previous District IEP in 2005, performed the 2007 speech and language assessment of Student. Schmitz has been a speech-language pathologist for 27 years and has worked for the District since 2001. She has assessed over 1200 children in her career and has provided speech-language therapy to hundreds of children.

24. Schmitz tested Student on September 25 and October 2, 2007, in a conference room at Calavera Hills Elementary School (Calavera). The testing sessions were one-hour long and took place during the normal school day. Student's mother

dropped Student off at the testing room and had Student call her when he was ready to be picked up. Schmitz waited with Student until his mother arrived. Schmitz did not observe any anxiety by Student during the time she was with him.

25. The tests Schmitz administered included the Expressive One-Word Picture Vocabulary Test and the Clinical Evaluation of Language Fundamentals 4. Student exhibited a significant delay in the area of interpreting and following spoken directions. He scored poorly on the word classes subtest during the first testing session, so Schmitz assessed that area further using the Word Test 2 during the second testing session. Student scored in the average range in that test. He scored in the average range in the other subtests Schmitz administered.

26. Overall, Schmitz found that Student's receptive language score was very low, but his other scores were in the average range. Schmitz believed that his low receptive language score was probably not a good indicator of his true abilities because it was based, in part, on the word classes subtest. She felt that the main area of concern for Student was his ability to interpret spoken directions of increasing length and complexity. She believes that, in general, his speech and language skills are fairly strong.

27. Karissa Neilson, a special education teacher at Calavera, administered academic testing to Student as part of the District's assessment. Neilson received her teaching credential in 2004 and her special education credential in 2006. She administered the testing to Student in September and October 2007 at Calavera. She noticed possible attention problems by Student during her testing, but did not see any anxiety.

28. Neilson administered the Wechsler Individual Achievement Test-Second Edition (WIAT-II) to Student. The test results showed Student to be very low in mathematical computation and written language. His reading comprehension score was low, but overall his skills were in the average range in reading and oral language. To

further explore Student's reading ability, she administered the Johns Basic Reading Inventory to Student. She found that Student could independently read at a fifth grade level. Because a private assessor had previously found Student had problems with decoding, Neilson also administered the Phonological Awareness Profile to Student. She discovered that he was a sight word reader and that it would be necessary to work on his decoding skills in a school program.

29. Neilson's initial Summary of Assessment for the WIAT-II dated October 17, 2007, listed Student's scaled score for the reading comprehension subtest as 92. The results were later changed to reflect a reading comprehension score of 90. Two other subtest results were also revised on the second document to show slightly lower scaled scores. During the hearing, Neilson explained that she first scored the test by hand. She subsequently used a computer to rescore the tests and make sure the scores were accurate. She realized there were minor differences, so she issued a corrected report. Neilson forgot to correct the score for reading comprehension on the draft IEP present levels of performance and in the baseline for the reading comprehension goal. This minor inaccuracy in the IEP had no effect on the placement, goals or services offered.

30. On January 24, 2008, Student's IEP team met to review the District's assessments and develop an IEP program for Student. Student's mother attended the meeting along with her attorney. The District representatives at the meeting included Schmitz, Pappas, Jordan, Neilson, J. Bruce Kramer, the school administrator, Hun Kaplowitz, a general education teacher from Student's neighborhood school Hope Elementary School (Hope), Juanita Bass, a special education teacher at Hope, the school psychologist from Hope, a speech-language pathologist from Hope, and the District's attorney.

31. The team reviewed the assessment reports and discussed Student's present levels of performance, but was unable to complete the IEP at the January 24,

2008 meeting. The team arranged to meet again on February 13 to complete the IEP. Student's mother was unable to attend that day, so the meeting was postponed until February 20, 2008.

32. Student's mother attended the February 20, 2008 meeting. The District representatives who attended the January meeting were also present during the February meeting. The District started the meeting with its attorney present. However, Student's mother had not brought her attorney to the meeting, so she objected to the District having an attorney present. To accommodate the mother's concerns, the District staff asked their attorney to leave the meeting.

33. Student's mother also objected to having three of the representatives from Hope at the meeting. The District did not agree with her objection, and the representatives from Hope remained at the meeting. At the time the District began the assessments in 2007, the District staff believed that Calavera was Student's neighborhood school. Calavera had been the school he attended in 2005. In approximately November 2007, the District staff realized that Student was actually within Hope's jurisdiction. The District's assessors then met with their counterparts from Hope to discuss the assessments. It was appropriate for the representatives of Hope, Student's neighborhood school, to be at the meeting. The District acted properly in refusing to have them leave.

34. There was no representative from FRL at the meetings, but the District had a written report from FRL discussing Student's progress.

35. There was no representative from Encinitas Country Day School at the meetings. The District could not have invited anyone from Encinitas Country Day School to the meetings because Student's mother never informed the District about the private school placement before or during the IEP meetings. Instead, the District team members believed that Student's mother was Student's teacher at the time in connection with his

home schooling. Although Student's mother testified that she never told the IEP team she was his general education teacher, her statements led the District staff to believe he was being home schooled. For example, she testified that she told them "I help [Student] with his work, help him like teaching him at home, but I am not a teacher."⁶

36. During the second IEP meeting in February 2008, the IEP team discussed Student's goals and objectives, his proposed placement and the proposed designated instruction and services (DIS services). Student's mother had expressed concerns about Student's reading comprehension, so a goal was added to the proposed IEP regarding reading comprehension. Student's mother also expressed her concern during the meeting about Student's problems with self-esteem. She believed that he might have difficulty in a regular classroom and asked that he be placed in a nonpublic school (NPS). The District members of the IEP team disagreed with an NPS placement.

37. At the end of the meeting, Student's mother asked for a copy of the proposed IEP to take home with her. The computer system where the meeting was being held was not working, so the District could not print a copy of the IEP there. One or two of the District staff members went to a different school to have the IEP printed and came back.⁷ By the time the District staff members returned with the copies, some

⁶ In his written closing argument, Student contends that the District failed to prove that Student's mother was his teacher. Student misses the point. The issue is not whether Student's mother was a credentialed teacher, but instead whether the District believed she was home schooling Student and thereby acting as his teacher.

⁷ The parties disagree about how long the District staff members were gone. Student's mother testified they were gone for more than two hours, while the District staff thought it was less than one hour. It is not necessary to decide this factual dispute because, either way, the length of time did not constitute a procedural violation. It is not

of the District IEP team members had departed. Student's mother did not agree to the IEP at that time, and took the draft home with her.

38. Student's mother testified that the District changed the amount of time for the OT and speech and language services on the draft IEP while they were at the other school printing out the hardcopy. She said that they had offered 60 minutes per week of OT and speech-language DIS services during the meeting, but changed it to 30 minutes each on the printed IEP. The District witnesses, however, testified that the offer had always been 30 minutes, not 60 minutes. The evidence does not support a finding that any such changes were made. It makes no sense for the District staff to surreptitiously change an IEP under these circumstances just after discussing it at a meeting. Instead, it appears that Student's mother was mistaken about what she heard during the meeting. She admitted during her testimony that she felt overwhelmed by the information presented at the meeting.

39. However, even if what Student's mother said was correct, there was no procedural error. Until the team agreed to the IEP, any changes could be proposed by either side. Student's mother never agreed to the IEP. As stated in Factual Findings 47 – 51 below, the proposal of 30 minutes each for OT and speech-language DIS services was sufficient to meet Student's needs.

THE PLACEMENT AND SERVICES OFFERED IN THE 2008 IEP

40. The IEP team determined that Student qualified for special education under the eligibility category of specific learning disability because of the discrepancy between his cognitive ability and his achievement level, as well as his attention

a violation of FAPE if the computer system at the IEP meeting site is not working so the District staff must go elsewhere to print the IEP.

difficulties. The IEP document contained the written elements required by law, such as a listing of Student's present levels of performance. The proposed IEP offered the following program and services to Student: placement in a general education classroom at his neighborhood school, with specialized academic instruction in the learning center for 60 minutes per day, five days a week, speech and language services one time per week at 30 minutes per session, individual occupational therapy services one time per week for 30 minutes per session. The IEP team also proposed that Student participate in a social skills group with the school psychologist and 2-3 peers. To address the concerns of Student's mother about Student's anxiety, the IEP provided that Student would be able to meet with the school psychologist or his learning center teacher as needed to address any social or emotional problems that arose during the school day.

41. The IEP recommended program modifications and accommodations for Student, including visual cues, use of colors and use of concrete materials, books on tape, a typing program, transcription of answers to testing "bubble sheets," testing in small groups, oral examinations in social studies and science, and weekly consultation between the general educational teacher and other district staff.⁸

⁸ During the hearing, the parties disputed whether the District could introduce evidence of two letters sent to Student's mother after the February 2008 IEP meeting. The District contends that these letters were intended, in part, to clear up any confusion that Student's mother may have had regarding the February 20 IEP offer. Student contends that it was improper for the District to clarify its offer after the fact. It is not necessary to address Student's contention, because the IEP offer was clear and complete. Any letters sent by the District after the fact were not necessary to offer Student a FAPE.

42. The parties dispute whether the placement and services offered in the IEP were sufficient to meet Student's needs. Lewkowicz testified that he believes Student should be placed in a small SDC class. He thinks that Student should return to a regular education placement as soon as possible, but he believes an SDC placement is necessary at this time to help Student build confidence in his academic abilities. He does not think Student could currently be successful in a general education classroom.

43. Lewkowicz also had strong concerns about Student's proposed placement based on events which occurred during an observation at Hope. About two or three weeks before the due process hearing, Lewkowicz conducted a classroom observation at Student's proposed fifth grade class at Hope. He observed one child seated in the back of the room with his desk facing the wall, forcing the child to swivel in his seat to see the teacher. Later, he witnessed the teacher chastising that same child for inattention to his class work. Lewkowicz believes that this type of treatment would be highly detrimental to Student's self-esteem. Lewkowicz also feels that the traditional teaching approach in that classroom would not meet Student's academic needs. He believes that Student's psychosomatic issues would surface in that placement. He also believes that Student would have difficulty maintaining his mental concentration in that classroom because he would be worried about humiliation.

44. Hun Kaplowitz, the fifth grade teacher in the classroom Lewkowicz observed, testified that the pupil chastised during the observation was not a special education pupil. Instead he was a bright, self-assured, general education student who likes to act as the "class clown." The positioning of his desk and Kaplowitz's chastising of him were done pursuant to a behavioral contract between that child, his mother, and the school. There was no evidence that Kaplowitz would treat Student in this manner if he entered her class or that she treated any other pupils in that fashion besides the one in question.

45. Lewkowicz believes that the Winston School would be a more appropriate placement for Student. He explained that Winston is an NPS with a much smaller class size and a program designed to deal with children with speech and language problems. Winston has a very supportive environment with counseling services.

46. Student's mother also believes that Student's anxiety problems and lack of self-esteem require him to be educated in a much smaller setting than a general education classroom.

47. The District employees, on the other hand, were unanimous in their testimony that the IEP would provide educational benefit to Student. Neilson testified that Student would benefit from a general education placement with learning center instruction. Schmitz stated that the speech-language services of 30 minutes once a week were sufficient to meet Student's speech language needs. Jordan testified that 30 minutes once per week of individual OT was sufficient to work on his OT goals and that OT needs can also be addressed in the general classroom.

48. Pappas agreed that the IEP placement and services were sufficient to meet Student's needs. He explained that, because Student has not been in school, it was difficult to tell with certainty how much support Student would need to enable him to progress in his general education class, but his program could be altered if he needed more support. Juanita Bass, the special education teacher who would be teaching Student in the learning center at Hope, confirmed that all of his academic goals could be implemented in her classroom and described how she would collaborate with the occupational therapist and speech-language pathologist in implementing his program.

49. The District employees were also unanimous in their testimony that, even if Student had self-esteem or anxiety issues, they would be able to address those issues in a regular school program. Schmitz, who had worked with Student during his initial District placement in 2005, testified that she works with children with anxiety and self-

esteem issues every day. She believes that, even if Student has self-esteem and anxiety issues, the proposed speech-language services and social skills group offered in the proposed IEP would be sufficient to meet his needs. She feels that placement in an NPS would not be good for Student.

50. Pappas explained that the proper way to address school phobia is not to remove the child from school. Instead, the school should provide supports to the child to make the child feel safe and teach the child to adjust. Continued removal from school can make school phobia worse. Pappas disagreed with Lewkowicz's conclusions and felt the Reitan was not an effective tool to use in an educational assessment.

51. The evidence supports a finding that the proposed placement and services in the District's 2008 IEP offer were sufficient to meet Student's needs and were reasonably calculated to provide him with educational benefit. The District staff was experienced and well informed about Student's condition due to their thorough assessments. Those assessments and the prior assessments of Student indicated that he is of average intelligence and is capable of doing school work. Although he is below grade level in several academic areas at the moment, he has not been in a formal school setting for almost three years. The District witnesses were persuasive in their testimony that Student can make educational progress in a general education class with specialized learning center instruction and the other accommodations and services offered in the proposed IEP. Lewkowicz's contrary opinion was largely based on his belief that Student needs an SDC until he can catch up to his peers, but the learning center should provide any additional support Student needs in that regard. There is no reason to place Student in a highly restrictive NPS program.

52. Student's written closing argument claims that the District did not consider how Student's attention deficit disorder impacted his learning. However, the evidence does not support that contention. Pappas and the other assessors discussed

their findings regarding Student's attention issues and the IEP provided supports to accommodate those attention problems. Student's eligibility category of specific learning disability was based, in part, on his attention problems. The District assessments were thorough, comprehensive and conducted by experienced individuals. Based on those assessments, the District personnel were well versed regarding Student's needs.

53. The evidence does not support a finding that Student currently suffers from school phobia to the extent that he cannot participate in a regular classroom with supports. Student did not exhibit any signs of anxiety or school phobia during any of the testing, even though the District's assessments took place at various elementary schools during school hours. Even when Student's mother dropped him off at the school for the testing and he had to wait for her to pick him up, he did not exhibit anxiety while waiting.

54. Lewkowicz based his findings of school phobia largely on what Student's mother reported. However, the evidence supports a finding that the information Student's mother supplied regarding her son is not always reliable. She omitted critical information regarding Student's private schooling on the District's health and development questionnaire. She testified that Student had self-esteem problems at Encinitas Country Day school, but the report card from Encinitas Country Day School did not support her testimony. Although she pulled Student from that school in January 2008, there is no evidence that she did so based on advice of a psychologist, as she had in 2005.

55. However, even if Student still suffers from school phobia, the evidence supports a finding that the proposed IEP offered appropriate placement and services to meet Student's needs. John Pappas interviewed Student's mother, reviewed prior assessments and personally tested Student as part of his assessment. Although he was

unable to observe Student in a school setting (because Student's mother never informed him that Student was at the Encinitas Country Day School), he was still very familiar with Student's psychoeducational needs. Based on his many years as a school psychologist and professor of psychology, his testimony is persuasive that school phobia is not treated by removing a child from school. Instead the IEP provided for social skills training and as-needed counseling to address any anxiety issues Student might have.

56. Although Dr. Lewkowicz is unquestionably an expert in the educational field, his opinion that Student needed an SDC placement was based on the fact that Student is currently behind his peers academically, and it would hurt his self-esteem to be in a general education school setting. However, a public school can provide sufficient supports to address self-esteem issues. Lack of self-esteem is not a sufficient basis for taking a child with average cognitive abilities away from his typically developing peers and placing him in an SDC.

57. Lewkowicz's concerns about the classroom observation at Hope are also not sufficient to show a denial of FAPE. As stated in Factual Finding 44 above, there was no evidence that Kaplowicz would treat Student in the manner she used with the general education child on the behavioral contract. There was also no evidence that her style of teaching would deprive Student of educational benefit. Any special help he needed could be provided through his IEP accommodations and DIS services, including his time in the learning center. The placement offered in the IEP was a general education classroom at Hope, not a specific teacher's classroom. If Kaplowitz's class failed to meet Student's needs, the class could be modified or Student could be moved to a different general education fifth grade class. It does not make the District's offer improper or require Student to be placed in an SDC.

THE GOALS AND OBJECTIVES IN THE PROPOSED IEP

58. The proposed 2008 IEP contained 10 goals and objectives, including: 1) a mathematics goal relating to use of decimal notation; 2) a mathematics goal related to beginning multiplication; 3) a mathematics goal related to math reasoning; 4) a spelling goal related to high-frequency, irregularly spelled words; 5) a spelling goal related to phonological awareness; 6) a writing goal relating to use of proper capitalization and punctuation; 7) a listening and oral comprehension goal related to following directions; 8) a listening/speaking goal related to word classes and semantics; 9) an OT goal related to writing speed; and 10) a reading comprehension goal.

59. The reading comprehension goal stated that "when given half a page of grade four text, [Student] will state the main idea of the text and identify at least 5 statements (evidence) within the text that support the main idea with at least 80% accuracy in at least 4 of 5 trials as measured by student work samples."

60. Neilsen explained during the hearing that she did not believe Student needed a reading comprehension goal, but Student's mother was concerned about his reading comprehension and indicated that Student was reading at a much lower level than fifth grade. The District IEP team members felt a goal would be appropriate, given some of Student's test scores and his mother's concerns. Student's reading comprehension score on the WIAT-II showed Student to be at a 3.9 grade level, so the District IEP team members wanted to be certain Student had mastered fourth grade text before he moved on. The goal was also consistent with the progress report by FRL which stated that Student was processing fourth grade level paragraphs one sentence at a time. During the hearing, Student's mother confirmed that she did not believe Student could read at a fifth grade level.

61. The evidence supports a finding that the goals and objectives in the District's 2008 proposed IEP were clear, measurable and sufficient to meet Student's

unique needs. The goals were designed to address the educational needs found during the District's assessments, and took into consideration the concerns raised by Student's mother. The District staff members who attended the two IEP meetings testified that the goals were discussed at the February meeting and that Student's mother participated in the discussion.

62. Student objects to the reading comprehension goal because it called for Student to be reading at a fourth grade level, not a fifth grade level. However, the evidence supports a finding that the reading comprehension goal was appropriate. While it is true that Lewkowitz testified that the reading comprehension goal was set too low for Student and the District's assessor did not see a need for the goal, IEP formation is a team process. Student's mother was concerned about Student's reading comprehension and did not believe he could not read at a fifth grade level. Her concerns were supported by the FRL progress report and the reading comprehension score on the WIAT-II. In light of those factors, it was appropriate to set the goal at a fourth grade reading level. If Student mastered the goal quickly, a new goal could be drafted later.

THE TRANSITION PLAN IN THE IEP

63. In order to help Student transition from his home school program, the District's proposed IEP included a transition plan in which Student would attend Hope for the first half of the day and continue to receive one-to-one instruction from FRL for two hours per day. The length of time in class would increase gradually over a six-week period, until Student was in school full time. That transition plan was appropriate to meet Student's needs.

64. Student objects to the IEP because it did not contain a plan for Student's transition to middle school during the fall of 2008 and did not name the middle school he would attend. The January 2008 IEP was intended to continue until January 2009. The

IEP contemplated that Student would transition to his neighborhood middle school at the end of the 2008 school year with the same type of learning center pull-out program and DIS services as he had in elementary school. The IEP team discussed the issue of transition to middle school during the meetings, but no formal transition plan was written into the IEP. The District holds transition meetings for all pupils, not just special education pupils, near the end of the school year. They do not list those transition meetings in IEPs.

65. The evidence supports a finding that the IEP offer was appropriate despite the absence of a written transition plan from elementary to middle school. Because Student's program would stay the same and he would be moving from one neighborhood school to the next, there was no need to name the school he would attend the following year in the IEP. The standard transition meeting at the end of the year would fully meet his needs, particularly in this case in which Student had been out of the District schools for so long. The IEP team would better understand his transition needs at the end of the school year, when he had been in the public school for a while and they could see how he progressed. There was no denial of FAPE.

PARENTAL PARTICIPATION AT THE IEP MEETINGS

66. The parties dispute the extent to which Student's mother participated during the two IEP meetings. Student's mother believes that, although she attended the IEP meetings, she was not afforded meaningful participation, because the District IEP team members dismissed her concerns. In particular, she believes the District members of the IEP team dismissed her concerns regarding: Student's anxiety, her request for an NPS placement for Student and her concerns about Student's reading comprehension. She also believes the District team members did not adequately consider Lewkowicz's report and the other independent evaluations. Student's mother did not have a written copy of the IEP in front of her during the meeting and felt overwhelmed by the

information presented. She testified that by the time she received a written copy of the IEP (after the District staff returned from printing it at the other school), most of the IEP team members had gone and she never had a chance to discuss her concerns with them.

67. The District witnesses, on the other hand, described a great deal of participation by Student's mother during the meetings. Schmitz related how Student's mother participated in the discussion of Student's assessments and the goals during the meetings. Schmitz and Kramer recalled a discussion regarding placement and the request by Student's mother for an NPS. The IEP meeting notes also reflect the request by Student's mother for the NPS. Neilsen and Juanita Bass recalled the discussion about reading comprehension and explained that the team added a goal in direct response to parental concerns. Bass also recalled the IEP team discussing the concerns that Student's mother had about Student's anxiety. Kramer testified regarding IEP discussions about the transition to middle school and Student's anxiety.

68. The evidence supports a finding that Student's mother was able to and did participate in the meetings. The District staff discussed and considered her concerns. They added a proposed reading comprehension goal specifically to address her concerns and provided for social skills counseling. Just because the IEP team members disagree with a parent does not automatically mean that the parent had no input or that the placement was predetermined. The evidence showed group discussions and modifications to the IEP, not a "take-it-or-leave it" offer. There was no procedural violation in this regard.

OTHER PROCEDURAL CONCERNS RAISED BY STUDENT

69. Student also objects to the IEP because some of the participants in the meeting had not read the prior District IEP (from 2005). However, Cynthia Schmitz was a member of both the 2005 IEP team and the 2008 IEP team. She was the individual who

actually provided Student's speech and language services under the prior IEP and she assessed Student for the 2008 IEP. Student's prior IEP was over two years old at the time of the 2008 IEP meetings and his needs had changed. There was no requirement that each member of the IEP team review the old IEP – Schmitz could provide any information the IEP team needed regarding that document. There was no procedural or substantive denial of FAPE due to the failure of IEP team members to review the prior IEP.

70. Student also objects to the District's proposed IEP because Student believes the District did not have sufficient personnel at the two IEP meetings. Student contends there should have been a representative from FRL at the meetings. The evidence does not support Student's contention. FRL provided a one-to-one DIS service funded by the District, not a private school classroom. FRL wrote a progress update for the District staff, so the staff was informed about Student's progress. There was no need to have an FRL employee at the meetings.

71. Student also objects because no second grade teacher who had previously taught Student at Calavera in 2005 attended the IEP meetings. However, there was no need to have such a teacher at the meetings. The District personnel had just conducted Student's assessments and had a good idea of Student's current academic levels. The District assessors and their counterparts from Student's neighborhood school attended the meeting and participated in drafting Student's goals. Both the general education teacher and special education teacher who would be teaching Student's proposed classes at Hope were at the meeting. There was no need to also have a second grade teacher present – any knowledge that teacher had would be almost three years out of date.

72. Student objects that Pappas was not qualified to interpret the results of the Reitan administered by Lewkowicz, so Lewkowicz should have been at the IEP

meeting. However, the Reitan was not an educationally-based test and was not necessary to determine Student's educational needs. To the extent that the IEP team considered that test, Pappas had sufficient knowledge of the test through his work as a professor of psychology to discuss it. There was no procedural violation.

73. Student also contends that there was no discussion of the least restrictive environment (LRE) appropriate for Student during the IEP meeting. However, it was clear from the witnesses' testimony that the proper placement for Student was discussed at the meeting. As discussed in Legal Conclusions 21 – 24, a general education classroom with typical peers is the least restrictive environment for a child, whether or not that term is specifically used at an IEP meeting or mentioned in an IEP.

LEGAL CONCLUSIONS

1. The District has the burden of proof in this proceeding. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387].)

2. Under the federal Individuals with Disabilities Education Act (IDEA) and corresponding state law, students with disabilities have the right to a FAPE. (20 U.S.C. § 1400 et seq.; Ed. Code, § 56000 et seq.) FAPE means special education and related services that are available to the student at no cost to the parents, that meet the state educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).)

3. The congressional mandate to provide a FAPE to a child includes both a procedural and a substantive component. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034], the United States Supreme Court utilized a two-prong test to determine if a school district had complied with the IDEA. First, the district is required to comply with statutory procedures. Second, a court will examine the child's IEP to determine if it was reasonably calculated to enable the student to receive educational benefit. (*Id.* at pp. 206 – 207.)

4. Not every procedural violation of IDEA results in a substantive denial of FAPE. (*W.G. v. Board of Trustees of Target Range School District* (9th Cir. 1992) 960 F.2d 1479, 1484.) According to Education Code section 56505, subdivision (f)(2), a procedural violation may constitute a substantive denial of FAPE only if it:

- (A) Impeded the child's right to a free appropriate public education;
- (B) Significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents' child; or
- (C) Caused a deprivation of educational benefits.

THE REQUIRED INDIVIDUALS ATTENDED THE IEP MEETINGS

5. The law requires that certain District personnel attend every IEP meeting unless the parents agree to waive their attendance. (Ed. Code, § 56341, subd. (b).) In particular, the District attendees must include:

- a. Not less than one regular education teacher of the pupil, if the pupil is, or may be participating in the regular education environment;
- b. Not less than one special education teacher of the pupil;
- c. An administrator who is knowledgeable about the general education curriculum, the availability of district resources, and is qualified to provide or supervise the provision of specially designed instruction to meet the child's unique needs;
- d. An individual who can interpret the instructional implications of assessment results; and
- e. At the discretion of the parent or the district "other individuals who have knowledge or special expertise regarding the pupil, including related services personnel, as appropriate."

(Ed. Code, § 56341, subd. (b).)

6. As discussed in Factual Findings 10 – 33 and 69 – 72 above, the evidence supports a finding that the District had all necessary personnel at the IEP meetings. The District assessors were present at the meetings to discuss their assessments. Both the general education and special education teachers from Student's neighborhood school (the proposed placement) were present. There was no need to have Student's second grade teacher from 2005 present at the meeting. Any information from that teacher would be two years out of date. Student was no longer a second-grader at the time of the 2008 IEP meetings. The District had conducted new assessments and determined Student's current educational situation. To the extent that it was necessary to discuss past circumstances, Cynthia Schmitz, who was familiar with both Student's past and present situation, attended the meeting.

7. As discussed in Factual Finding 72 above, there was no need to have Dr. Lewkowicz at the meeting. The law simply requires that a team member be able to interpret the instructional implications of the assessments. (Ed. Code, § 56341, subd. (b)(5).) The Reitan is a test used by clinical psychologists. It is not generally a test used in psychoeducational assessments. Pappas was familiar with the test as a psychology professor. He had sufficient expertise to interpret the instructional implications of the Reitan.

8. As discussed in Factual Finding 70, there was no need to have anyone from FRL at the meeting. The District had FRL's progress report and had assessors who were very familiar with Student's current achievement levels. There was no need to have a provider of one-to-one educational services for Student at the meeting.

9. In *R.B. v. Napa Valley Unified School District* (9th Cir. 2007) 496 F.3d 932, 939 – 940, the court held that the requirement to have a general education teacher at the IEP does not always require the current private school teacher to be present. The law has changed since the holding of *Shapiro v. Paradise Valley Unified School District* (9th

Cir. 2003) 317 F.3d 1072, 1079, in which the court held that the failure to have the current private school teacher present at the IEP meeting denied Student a FAPE. In addition, *Shapiro* is distinguishable because, as set forth in Factual Findings 11, 15 and 35, in the instant case Student's mother concealed Student's enrollment at the private school from the District. It was impossible for the District to invite the private school teacher to attend. Apparently realizing this, Student states that the District should instead have invited an employee of FRL to attend. However, a one-to-one service provider is not the same as a general education classroom teacher. There was no violation by the District.

10. For similar reasons, the case of *S.B. ex rel. Dilip B. v Pomona Unified School District* (Central District California) CV 06-4874 AHM (RCx), relied upon by Student, is also distinguishable. In that case the school district was well aware that the child was attending a private preschool, but did not invite the preschool teacher to the IEP meeting. By contrast, in the instant case, the District had no knowledge of Student's private school placement.

11. The District met its burden of proving that the IEP meetings complied with the law with respect to the personnel who attended the meetings. There was no procedural violation by the District.

THE FAILURE TO REVIEW OR DISCUSS THE 2005 IEP DID NOT DENY STUDENT A FAPE

12. As set forth in Factual Findings 1 – 33 and 69, there was no denial of FAPE because some of the District IEP team members did not review Student's 2005 IEP prior to the IEP meeting and did not discuss that IEP at the 2008 meetings. Student had grown since his 2005 IEP and his needs had significantly changed. The District had just conducted a full assessment to explore those needs and understood his current needs well. To the extent that the IEP team needed input regarding Student's previous IEP,

Schmitz attended all the IEP meetings (in both 2005 and 2008) and could answer their questions.

THE DISTRICT PERMITTED MEANINGFUL PARENTAL PARTICIPATION IN THE IEP MEETINGS

13. As set forth in Factual Findings 30 – 68, Student mother meaningfully participated in all aspects of the IEP meetings. The District members of the IEP team considered her concerns and made changes to the IEP. There was no “take-it-or-leave-it” offer in this case.

14. It is not clear whether Student contends that the failure of the District to have a written draft of the IEP prior to the meeting for Student’s mother to read during the meeting constituted a procedural violation. If so, Student cites no legal authority requiring a parent to have a written IEP draft prior to the meeting. It was sufficient for the District to discuss the IEP during the meeting and provide a copy to Student’s mother after the meeting.

15. There was no procedural violation with respect to parental participation in the IEP meetings.

THE 2008 IEP CONTAINED MEASURABLE ANNUAL GOALS

16. An IEP is a written document that includes statements regarding a child’s “present levels of academic achievement and functional performance” and a “statement of measurable annual goals, including academic and functional goals” designed to meet the child’s educational needs. (Ed. Code, § 56345, subds. (a)(1), (2).) The IEP must also contain a description “of the manner in which the progress of the pupil toward meeting the annual goals...will be measured and when periodic reports on the progress the pupil is making...will be provided.” (Ed. Code, § 56345, subd. (a)(3).)

17. As discussed in Factual Findings 40 – 62, above, the 2008 IEP proposed by the District properly contains Student’s present levels of performance and measurable annual goals. Those present levels of performance and goals were developed through discussion at the IEP meetings based on recent assessments conducted by the District staff. Student contends that the IEP did not address Student’s attention problems, but the evidence does not support that contention. Instead, Student’s attention issues were noted during the assessments and addressed in the accommodations in the IEP.

18. As discussed in Factual Findings 58 – 62 above, the goals in Student’s IEP were clear and measurable. The reading comprehension goal was set at a fourth grade level to address the concerns raised by Student’s mother and some of Student’s test scores. The other goals addressed each of the areas of educational need determined by the District’s assessors.

THE PROPOSED IEP WAS REASONABLY CALCULATED TO MEET STUDENT’S NEEDS AND PROVIDE EDUCATIONAL BENEFIT.

19. The District contends that its proposed 2008 IEP substantively offered Student a FAPE. As discussed in Factual Findings 1 – 65, the District IEP team members had thoroughly assessed Student in 2007 and understood his unique educational needs at the time of the two IEP meetings. Student contends that the proposed IEP did not offer FAPE in the following respects: the placement was inappropriate, the DIS services offered were not appropriate, and the IEP lacked a written plan to transition Student to middle school.

THE DISTRICT’S IEP OFFERED AN APPROPRIATE PLACEMENT TO STUDENT

20. As set forth in Factual Findings 40 – 57, the District met its burden of showing that the placement and services in the proposed 2008 IEP were reasonably calculated to meet Student’s unique needs and provide him with educational benefit. In

addition, the evidence supports a finding that the District's proposed placement was the LRE for Student.

21. The law requires that to "the maximum extent appropriate, children with disabilities...are educated with children who are not disabled...." (20 U.S.C. § 1412(a)(5).) "[S]pecial classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." (20 U.S.C. § 1412(a)(5).)

22. Case law has provided guidance for determining whether a particular program for a student constitutes the LRE. In order to measure whether a placement is in the LRE, four factors must be considered: (1) the academic benefit of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect of the disabled student's presence on the teacher and other children in the classroom; and (4) the cost of mainstreaming the disabled student in a general education classroom. (*Sacramento City Unified School District v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1403 – 1404 (hereafter *Rachel H.*))

23. All four *Rachel H* factors weigh in favor of a general education placement for Student, not an NPS placement as recommended by Student's expert. Student has average intelligence and will gain both academic benefit and social benefit by contact with his typical peers. There is no evidence that he will disrupt a regular classroom and there will be no additional cost for mainstreaming him. The specialized instruction in the learning center and other supports provided by his IEP will make up for any current academic deficits or attention problems he may have. Assuming that Student suffers from school phobia, the social skills group and as-needed counseling will assist him with overcoming his phobia. If his somatic symptoms arise again while at school, additional

supports can be added to his school program. There is no evidence to show that this boy has such serious difficulties that he must be removed from his peers and placed in the highly restrictive environment of an NPS.

24. The District's offer of a general education class with typical peers and pull-out services for specialized learning center instruction, OT, and speech and language is the LRE for Student. Student contends that LRE is a "red herring" because the word was not written into Student's IEP. However, LRE is always a consideration when placement is at issue. As set forth in Factual Finding 73 above, the IEP team discussed the placement and the LRE for Student, even if the specific words "least restrictive environment" were not used. There was no violation of IDEA.

25. Student also raised concerns about the particular fifth grade class in which the District planned to place Student. These concerns were based on Lewcowicz's observation of that classroom shortly before the administrative due process hearing. As discussed in Factual Findings 43, 44 and 57, the evidence does not support a finding that Student would be subjected to the conduct which caused Lewcowicz concern. However, even if there was a concern about that particular classroom, that does not create a denial of FAPE. The offer of placement and services was for a fifth grade general education classroom at Hope with accommodations, learning center instruction and DIS services. That offer did not specify a particular teacher's classroom, nor was it required to do so. (See Legal Conclusion 31 below.) If Kaplowitz's classroom did not meet Student's needs, he could be moved to another fifth grade general education class.

THE SPEECH-LANGUAGE AND OT SERVICES WERE APPROPRIATE

26. An IEP must offer DIS services to a pupil if those services are necessary to permit the child to benefit from special education, including services such as speech-language therapy and OT. (Ed. Code, § 56363, subd. (a).)

27. As discussed above in Factual Findings 21 – 26 and 47 – 51 above, Schmitz and Jordan both conducted thorough assessments and determined Student’s needs. Student brought in no OT or speech-language experts to challenge their opinions that the services proposed in the IEP were sufficient to meet Student’s needs. Instead Student argues that the District unilaterally changed the amount of services offered when the District staff left to print out the IEP for Student’s mother. As discussed in Factual Findings 37 – 39, the evidence does not support a finding that any such change occurred. There was no denial of FAPE.

THE TRANSITION TO MIDDLE SCHOOL

28. The law requires IEP teams to discuss transition needs when a child reaches 16 years of age (Ed. Code, §§ 56043, subds. (g)(1), (h); 56345.1), and when a child is transitioning from a non-public school program to a public school (Ed. Code, § 56345, subd. (b)(4)).

29. As set forth in Factual Findings 63 – 65, Student’s IEP properly contained a program to transition him from his home placement to a public school program.

30. Student contends that the IEP should have contained a transition plan to middle school and should have listed the name of the middle school. However, the evidence does not support Student’s contentions. As set forth in Factual Findings 64 – 65, Student’s IEP team discussed his transition to middle school during the January-February 2008 IEP meetings. His IEP contemplated that his current placement in his neighborhood school would transfer to his neighborhood middle school with the same types of learning center support and DIS services. Under these circumstances, there was no need to create a written transition plan. To the extent that a middle school transition plan would be helpful to Student, the District witnesses were persuasive in their testimony that transition planning would be best handled at the end of the school year,

when the District would have worked with Student for several months and obtained more complete knowledge of his classroom needs.

31. Likewise, the failure to place the name of the middle school in the IEP did not deny Student a FAPE. Failure to name the exact location of services is not a violation of IDEA. As the United States Department of Education stated in its comments to the 2006 federal regulations: "The Department's longstanding position is that placement refers to the provision of special education and related services rather than to a specific place, such as a specific classroom or specific school." (71 Fed.Reg. 46687 (Aug 14, 2006).)

ORDER

The District's proposed IEP developed at the January and February 2008 IEP meetings offered Student a FAPE and the District is entitled to implement that IEP.

PREVAILING PARTY

Pursuant to Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. In accordance with that section the following finding is made: The District prevailed on the sole issue in this case.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision in accordance with Education Code section 56505, subdivision (k).

Dated: July 16, 2008

A handwritten signature in black ink, appearing to read "Susan Ruff", is written over a horizontal line.

SUSAN RUFF

Administrative Law Judge

Office of Administrative Hearings