

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
SPECIAL EDUCATION DIVISION  
STATE OF CALIFORNIA

In the Matter of:

STUDENT,

Petitioner.

vs.

OAH No. N 2005070117

FONTANA UNIFIED SCHOOL DISTRICT,

Respondent.

**DECISION**

This matter was heard by Vincent Nafarrete, Administrative Law Judge of the Office of Administrative Hearings, in Fontana on October 19 - 20, 2005. Petitioner, Matthew H. was represented by Francisco A. Suarez, Attorney at Law. Respondent, Fontana Unified School District, was represented by Sundee M. Johnson, Attorney at Law. Petitioner's grandmother/mother was present during the hearing.

At the conclusion of the hearing, the record was held open for the parties to file written argument. On November 14, 2005, both petitioner and respondent filed their closing briefs, which were marked as petitioner's Exhibit S and respondent's Exhibit 22, respectively.

Oral and documentary stipulated evidence and written argument having been received, the Administrative Law Judge finds as follows after having had reviewed and considered all of the evidence and arguments of the parties:

**ISSUES**

The issues presented for decision are as follows: first, whether respondent school district failed to provide petitioner-student with a free appropriate public education in the 2003-2004, 2004-2005, and 2005-2006 school years; second, whether respondent school district failed to follow or implement Behavior Support Plan(s) for petitioner-student; third,

whether respondent school district failed to assess petitioner-student in all areas of disability; and fourth, whether respondent school district committed procedural violations by failing to include petitioner-student's parent in individualized education program meetings.

## FACTUAL FINDINGS

1. Petitioner, Student (hereinafter student), is a thirteen-year child who lives with his grandmother and guardian (hereinafter parent). They live together with the grandfather, aunt, aunt's boyfriend, and his sisters in the grandparents' home in Fontana. The student has attended school in the Fontana Unified School District (school district) since February 1999.

### Initial IEP

2. (A) In June 2003, when the student was in fifth grade at Locust Elementary School, the school district recommended that he be expelled for stealing property, disrupting school activities, and/or defying authority of school personnel. At the pre-expulsion meeting on June 11, 2003, the school district determined that the student should be assessed for special education services.

3. (A) On June 23, 2003, the student was referred to a school district psychologist for an evaluation to help plan his school program and to determine whether he was eligible for special education services. He had been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and was being treated with medications. The school psychologist opined that the student's education was being adversely affected by his behavior which, in turn, was affected by his ADHD. The student was administered several tests during the evaluation.

(B) Under the Differential Ability Scales, the student's general cognitive ability was estimated to be within the average range. His ability to coordinate visual perception with finger or hand movements was within the average range. His short-term memory was best when receiving information through his sense of hearing. With respect to language, the student had average range scores in receptive and expressive vocabulary. In academic achievement tests, Matthew scored well below average to average but did not demonstrate any discrepancy between his overall ability and achievement. In adaptive behavior, the student scored at the below average in socialization, at the at risk range in social skills, and in the clinically significant range in adaptability. In social and emotional areas, various indicators demonstrated that the student was dealing with several issues including aggression, conduct, attention, impulsively, and hostility but did not meet the criteria for an emotional disturbed pupil. The school psychologist recommended treatment and counseling for the student's social and emotional issues.

(C) Following his evaluation, the school psychologist opined that the student met the eligibility criteria for special education services under the classification of "Other Health Impaired" based on the student's diagnosis of ADHD, test results that showed he had attention problems, and demonstrated limitations in alertness which adversely affected his educational performance. The school psychologist recommended that the IEP team review

the evaluation results and develop appropriate interventions. The school psychologist opined that the student might benefit from a change in schools so that he could have a fresh start. The school psychologist considered whether the student had a specific learning disability but found no discrepancy between his ability and his achievement. The school psychologist concluded that the student's behavioral problems affected his academic performance, he did not meet the criteria for emotional disturbance, and he did not qualify for a special day class placement.

4. (A) On June 23, 2003, the school district held the initial individualized education program (IEP) meeting to discuss the evaluation by the school psychologist and to determine the student's eligibility for special education services. The student's grandparent as well as the school psychologist were among the participants at this initial IEP meeting. The IEP team found that the student qualified for special education services based on the evaluation showing that he met the criteria for Other Health Impaired.

(B) In reviewing the student's present levels of performance, the IEP team reviewed the findings of the school psychologist. His overall math skills were in the well-below average range for his age and grade and he had significant problems in socializing with peers and with his behavior. It was noted that the student's impulsivity as caused by ADHD and unresolved emotional issues interfered with his ability to learn in the classroom. The student wanted to be a singer. He participated in anger management classes. His grandmother wanted the student to function at grade level and to do well in school. The IEP team discussed and developed behavioral goals for the student, determined goals for his performance in math, and recommended Resource Specialist Program (RSP) services in math for the student. With respect to special education services then, the IEP team recommended to be provided at that time that the student be placed in a general education setting and be assigned four times weekly for 45 minute of RSP sessions in math. In addition, the school psychologist recommended that the student be referred to the county mental health department for AB2726 counseling.

(C) At the initial IEP meeting on June 23, 2003, the IEP team discussed school placement for the student but decided not to make any final placement decisions until they could consult with the director of the SELPA.

5. (A) Two days later, on June 25, 2003, the IEP team reconvened for the sole purpose of determining the student's school site placement for the following school year. In the interim, the school psychologist had met with the SELPA director to discuss placement options. The IEP team had recommended that the student change schools in order to give him a fresh start with a different peer group; he was taking medication for his ADHD and had been referred for counseling. Based on the suggestion of the SELPA director, the IEP team agreed that, for the next school year, the most appropriate educational environment for the student was at Fontana Middle School. The IEP team noted that the student would receive RSP services for math as well as transportation.

(B) On June 25, 2003, the IEP team held the meeting to select the student's school without the attendance of the parent. The school district did not notify the parent of the follow-up IEP meeting but forwarded to her a copy of the amended IEP that documented the change in school sites. Subsequently, the parent consented to the amended IEP, agreeing with the recommendation that the student attend Fontana Middle School for the next school year.

6. On June 30, 2003, the school district terminated the ongoing expulsion proceedings after it had been determined that the student was eligible for special education services.

7. On July 7, 2003, the Department of Behavioral Health of San Bernardino County acknowledged that it had received the school district's referral of the student. The county mental health department deemed the referral to be complete as well as appropriate and indicated that it would be contacting the parent within the prescribed time frame.

#### 2003-2004 School Year

8. On September 22, 2003, the school district convened an IEP team meeting to discuss the student's referral for mental health counseling. The parent participated in the meeting. The IEP team noted that the student was working on his organizational skills by keeping a notebook, he learned best in small groups and through individual instruction, and he needed modifications to the general education curriculum to be able to succeed as a mainstream pupil. With respect to the counseling previously recommended, the grandmother stated that she had not been contacted by the county mental health department but would call herself to set up an intake interview. The grandmother consented to the IEP document developed from this meeting.

9. (A) Later that school year, on May 11, 2004, the school district conducted an annual review of the student's Individual Education Program. The parent was invited but did not participate in the IEP meeting. The IEP team reviewed the student's progress, finding that he was struggling with new concepts in math, was easily frustrated in math, and was often disruptive in class. His RSP teacher in math reported, however, that the student was passing math and making some progress in math. Other teachers reported that the student was failing social studies and science classes. He did not work in class, did not turn in homework, and did not make-up work for late assignments.

(B) On May 11, 2004, the IEP team recommended accommodations for the student including giving him extended time to complete assignments, isolating him in the classroom so that he did not disrupt the class, and collecting in-class assignments from him on a daily basis. The teachers were to inform the student that assignments were due on the day they were given to him. The IEP team also developed new goals for the student in math and in vocational training so that he could keep track of and complete work assignments. The IEP team recommended that the student continue his placement in a general education classroom and increased the RSP sessions in math to five times weekly for 50 minutes each session.

10. (A) The grandmother did not attend the IEP meeting on May 11, 2004. Prior to the meeting, the school district sent a notice of the meeting home with the student, made a follow-up telephone call to her, and sent her another notice to her about the meeting. After the meeting, the school district forwarded a copy of the draft IEP document to the grandmother. The school district documented in the IEP record its attempts to invite the parent and to ensure her participation at the IEP meeting.

(B) On June 7, 2004, the grandmother signed the consent to the IEP developed at the May 2004 IEP meeting but added that the student had "A.D.D." and was taking medication for his condition. She indicated that he was not adjusted to the regular or general education classroom and was failing and not doing well in his class. The grandmother stated that further review and services seemed necessary. In addition, the grandmother stated that she did not receive any notification of the IEP meeting.

#### 2004-2005 School Year

11. (A) Pursuant to the May 2004 IEP, the student received math instruction in a RSP math class from October 2004 until February 2005. The seventh grade math curriculum was modified for the RSP class, which was composed of ten to fourteen students, and the student was provided with accommodations, including multiplication charts and modified math problems. The student made good progress towards his math goals. He solved problems written on the board in front of the class, developed a good grasp of multiplication, and performed multiple step calculations. The RSP math class was appropriate for the student and addressed his difficulties he had in performing math calculations. However, the student received a "D" grade in the RSP class due, in important part, to his failures to turn in homework and his behavior.

(B) In the RSP math class, the student was often disruptive; he sought attention and showed off to his fellow students. The RSP math teacher referred him to detention for disrupting the class and preventing other pupils from learning. After the amendment of his IEP and Behavior Support Plan in October 2005, the student was allowed to leave class to see the school administrator to talk about or vent his feelings. In February 2005, the student was reassigned to a male RSP math teacher because his female RSP teacher had a difficult time in controlling him in class and the IEP team determined that the student's behavioral problems would be better addressed by a male teacher.

12. For the 2004-2005 school year, the student was also enrolled in a general education life science class at Fontana Middle School. The student was a social, gregarious, and outgoing pupil. The science teacher enjoyed the student's attendance in the science class and did not have any occasion to refer him to detention. The science teacher spent extra time with the student, spoke to him about his school work and class participation, and coaxed him to do his work. The student was able to perform the work in the science class and received the grades of "C" and "C+".

13. On October 13, 2004, the student was referred by a teacher in an undetermined class to the assistant principal at Fontana Middle School for disciplinary action. Noting that it was the third referral for the new school year, the assistant principal stated that he was not going to take disciplinary action and suggested to the teacher that he discuss his concerns for the student's behavior with the parent. The assistant principal also suggested that the teacher handle the student's behavioral issues under his classroom disciplinary policy.

14. (A) On October 29, 2004, the school district convened an IEP team meeting to develop a Behavior Support Plan for the student. The parent participated in the meeting. In reviewing his present levels of performance, the IEP team noted that the student was argumentative and disrespectful, his relationships with peers were delinquent in nature, he seemed to mask emotional issues by posturing and bullying, and his behavior tended to be antisocial. The IEP team noted that he was taking the medication Adderal on a daily basis and needed to take his medication while at school. The IEP team agreed that the student needed counseling since his emotional behavior was escalating and unpredictable and his physical behavior, such as thumb sucking, was regressing.

(B) On October 29, 2004, the IEP team developed a behavioral goal as well as a Behavior Support Plan for the student. His behavioral goal was to follow classroom and school rules at least 85 percent of the time. One of the benchmarks of his behavioral goal was to refrain from loud, inappropriate, and profane language. Under the Behavior Support Plan, the student was to take his medications regularly and be allowed to have time with a teacher and/or administrator to de-escalate. Teachers and administrators were expected to use anger management and de-escalation techniques with the student, teach him to describe his emotions, use positive reinforcement procedures such as computer time, and use strategies such as positive choices, timeouts, and reminders to prompt the student to behave appropriately at school. Teachers and administrators were to make weekly progress reports and phone calls to the grandmother. The grandmother consented to both the IEP and the Behavior Support Plan.

15. Following his October 2004 IEP and the development of his Behavior Support Plan, the student began regular visits to the assistant principal's office at Fontana Middle School in December 2004. The assistant principal volunteered her office to be the student's "safe place" where he could express his feelings and use the administrator as a sounding board. The assistant principal tried to teach the student to cope with his feelings by having him write and talk about his feelings with her. After five to seven visits, the administrator felt that the student was trying to manipulate her and using the office visits to excuse his behaviors. Thereafter, his behaviors at school did not improve but worsened and the office visits ended in February, 2005. The assistant principal implemented the student's Behavior Support Plan.

16. (A) On February 8, 2005, the school district held an IEP team meeting to review the student's Behavior Support Plan. The parent participated in the meeting. The assistant principal of the middle school expressed concerns about the student's behavior and what steps might be taken if he continued to act out negatively. The IEP team determined that the

student should be assessed to ascertain whether he qualified for a different academic setting such as a special day class, recommended that he be referred again to the county mental health department for counseling, and changed his math teacher to a male teacher. The IEP team determined that the student might benefit from a male role model who could also address his behavioral issues. The IEP team also recommended that regular calls be made to the student's home to discuss behavior concerns.

(B) On February 8, 2005, the IEP team revised the student's behavior support plan by adding another teacher with whom the student could take time to talk and adding praise for positive behavior as a reinforcement tool that teachers were expected to use to establish appropriate behavior. The parent consented to the IEP including changes to the Behavior Support Plan and the change of math teacher.

17. (A) Pursuant to the February 2005 IEP, the student was assigned to the RSP pre-algebra math class taught by Kirk D. Dannenberg for the last two trimesters of the 2004-2005 school year. This RSP math class was a smaller-sized class with ten to twelve pupils and the student received individual instruction, small group work assignments, and more intensive attention and work. During class, the teacher provided the student with regular prompts to keep him busy and on task and redirected his attention so that he could focus on the math assignments. The student struggled with pre-algebra but made progress in his math goals. He came to understand one-step equations including multiplication and achieved a "C minus" grade in the RSP math class.

(B) The teacher found the student to be a good and generally well-behaved student. The student's behavior in class varied but he was able to stop talking and refocus on the math assignments when prompted or reminded to do so. The student also asked the teacher for help if he did not understand a math concept. The teacher has training and experience to teach pupils, like the student, who have ADHD, and found him to be a joy to teach. The teacher did not have any occasion to refer the student for detention.

(C) The math teacher also implemented the student's Behavior Support Plan in the pre-algebra RSP class. The teacher participated in the February 2005 IEP meeting and was aware of the Behavior Support Plan. The teacher allowed the student to go to the assistant principal's office to decompress from any emotional episodes and to receive intervention services. In class, the teacher also addressed the student's behavior when he disrupted the classroom or escalated his behaviors. The teacher asked the student to calm down or to count to ten when he became frustrated. The teacher reminded the student to use the anger management techniques that he had learned.

#### 2005 Re-Assessment of Student

18. Pursuant to the IEP developed on February 8, 2005, the school district prepared an assessment plan to determine whether the student needed or was eligible for a change in academic placement. The assessment was to include evaluations of the student's academic achievement, learning ability, perceptual-motor development, language and speech

development, and social-emotional or behavioral development. The parent gave permission for the assessment.

19. On April 18, 2005, an instructional aide observed the student in his pre-algebra RSP class and completed a Student Study Team Classroom Observation form as part of the assessment. The instructional aide found that the student did not pay attention to the teacher's instructions, was disruptive, and rebellious and manipulative toward adults. The student talked and socialized with other pupils in the classroom. The student became aggressive when another pupil asked him to pay attention to the teacher.

20. (A) On April 21, 2005, the student's RSP math teacher administered the Woodcock-Johnson Psycho-Educational Battery to the student to assess his achievement in academic areas, including reading and math, and prepared an Assessment Report. The RSP teacher opined that the student appeared to have been taught to read phonetically and had excellent word skills. His comprehension and writing ability were slightly below his reading ability. In math, the student struggled with multi-digit multiplication and division and had some idea of working with fractions and integers.

(B) Regarding instructional strategies, the RSP teacher opined that the student would benefit from continued instruction in reading strategies, phonics and decoding skills, sight word practice, and daily reading. It was also recommended that the student receive instruction in writing paragraphs and short essays. For math, the RSP teacher recommended regular and repeated review of basic facts, use of multiplication and division flashcards, and computer games.

21. (A) On April 26, 2005, a school district psychologist conducted a psychoeducational assessment of the student for a three-year review of his eligibility for special education, a re-evaluation of his current placement, and a manifestation determination evaluation. The school psychologist noted that the student had been suspended from school for trying to steal money from a teacher's desk and had been previously identified for special education as a pupil with Other Health Impairment due to Attention Deficit Hyperactivity Disorder.

(B) The student was administered different tests by the school psychologist and other district personnel. On the Cognitive Assessment System, he showed difficulty in planning and had average range scores in other subtests. He demonstrated an average ability to attend to task. His vocabulary and use of language was appropriate for his age. On the Woodcock-Johnson Test of Achievement, the student had a high average range score in reading and an average range score in writing. He had a low average range score in math and demonstrated difficulty in math calculation. The student was found to have adequate adaptive behavior skills for daily living. He performed a variety of tasks at home. In testing of his social and emotional areas, the student showed clinically significant findings for aggression, hyperactivity, and attention problems. The student and two teachers also completed questionnaires for an evaluation of his Behavioral Assessment Systems.

(C) With respect to the manifestation determination, the school psychologist found that the student's placement in the general education program at the middle school with a RSP class for math was appropriate, that he was receiving all supplementary services as indicated on his last IEP, and that his Behavior Support Plan was being implemented. The school psychologist further determined that the student understood the impact and consequences of his recent behavior in trying to steal from a teacher's desk and appeared to have the ability to control the behavior in question. He purportedly discussed the theft with another pupil and threatened another pupil not to tell on him after being seen at the teacher's desk.

(D) The school psychologist found that the student continued to meet special education eligibility criteria and recommended that the IEP team review the assessment results to determine the most appropriate educational setting and course of action for the student.

22. (A) On April 26, 2005, an IEP team met to perform an annual and triennial review of the student's Individualized Education Program and Behavior Support Plan, to review the assessment conducted by the school psychologist, and to conduct a manifestation determination regarding the student's attempt to steal money from a teacher's desk. The parent participated in this IEP meeting and consented to the IEP document developed from the meeting including the amended Behavior Support Plan.

(B) On April 26, 2005, the IEP team reviewed the student's test results and found that he had very good and above average reading ability, average writing skills, and average math skills but that his grades were not indicative of his abilities. The IEP team found that the student had attention and planning skills in the low average range and could think in a logical and reasonable manner. The parent reported that the student admitted that he tried to steal money from the teacher's desk but changed his mind at the last minute. A special education or RSP teacher reported that the student would behave appropriately and stay focused in class if separated from other peers who exerted a negative influence on him. The IEP team reviewed the student's goals in math and behavior and determined that the RSP math class was the appropriate placement for the student. While he was receiving therapeutic services from Medi-Cal and seeing a physician through the parent's private insurance, the IEP team further determined to refer the student again to the county for AB2726 counseling since the earlier referral was returned due to missing dates of his anger management classes. The IEP team reviewed the Behavior Support Plan and found that the plan was appropriate and that the student was receiving all of the interventions listed in the plan. The IEP team amended the Behavior Support Plan by proposing that the student receive praise for positive behavior and begin to see school counselors on a regular basis.

(C) Regarding the manifestation determination, the IEP team discussed whether the student had the ability to control his impulse to steal and whether the student's version of the incident showed that he planned the theft. The parent had concerns about the student's tendencies to lie and steal and his lack of remorse for his misdeeds. The IEP team found that the student had the ability to control any impulse to steal and did not appear to learn from his

mistakes or the consequences of his actions. The IEP team decided that the incident of attempted stealing was not a manifestation of the student's disability and recommended that the student's pre-expulsion process go forward.

23. (A) Shortly thereafter, on April 29, 2005, the student failed to take the bus home after school and then confronted another pupil on the street. The student verbally abused the other pupil and then struck him many times on the jaw and cheek. The other pupil did not retaliate. A police officer witnessed the incident and detained the student. The student was suspended from school for five days. The suspension was his fifth suspension for that school year.

(B) On May 2, 2005, the school district recommended that the student be expelled from Fontana Middle School for striking the other pupil in the face in violation of the Education Code. In a memorandum, the assistant principal noted that the student had an extensive disciplinary history which included numerous incidents of defiant behavior and violence. He stated that teachers and administrators had used intervention strategies with the student which included warnings, teacher-assigned detentions, phone calls to the parent, parent-teacher and/or administrator conferences, behavior support plan, after school work program, minimum day school, and home suspension. The school district notified the parent of the recommendation and scheduled a pre-expulsion meeting.

24. (A) On May 6, 2005, the school district convened an IEP team meeting to discuss the recommendation for the student's expulsion and to make a manifestation determination regarding the April 29, 2005, incident. The student and his parent were both present and participated in the IEP meeting. The IEP team reviewed the issues or questions that had to be answered to make a manifestation determination and discussed the incident in which the student assaulted the other pupil after school. The student was questioned about the incident.

(B) At the IEP meeting on May 6, 2005, the parent expressed her belief that the student needed to receive home instruction. The parent indicated that the student's physician had recommended home instruction so that his medications could be monitored. The parent also expressed her concern that the student had not received counseling from the school district. It was explained to her that a referral for AB2726 counseling had been made to the county mental health department but that the referral had been returned because the dates on which the student had attended anger management classes were not listed by her. The parent indicated that the student did not realize the impact or consequences of his assaultive behavior and could not control his impulses. The IEP team heard that the student had been suspended on 15 occasions for fighting.

(C) On May 6, 2005, the IEP team determined that the incident of assault on another pupil was not a manifestation of the student's disability or condition of ADHD and recommended that the student be expelled from the school district. Pending the outcome of the expulsion proceedings, the IEP team recommended that the student receive home instruction. The IEP team noted that the goals from his previous IEP and Behavior Support Plan would continue. The parent consented to the IEP document from this meeting.

25. (A) On May 9, 2005, a Home or Hospital Instruction Application was filed on behalf of the student. School district teachers and administrators as well as the parent completed the application on which it was noted that the student was facing expulsion proceedings and was a danger to himself and others.

(B) On May 12, 2005, the school district and its special education department placed the student on Home Instruction effective from May 6, 2005, until April 26, 2006. A home instruction teacher was assigned to the student and the IEP document provided to the teacher. The teacher was to obtain instructional materials from the school site service provider, whose name was noted on the IEP.

(C) On June 24, 2005, the school district notified the parent that it had recommended that the student be expelled and that the IEP team had determined that his behavior was not a cause of the student's disability and was not caused by an inappropriate placement. The school district advised the parent of the expulsion hearing before an administrative hearing panel.

(D) On June 28, 2005, the school district and its special education department terminated the proceedings to expel the student. He had been earlier placed on Home Instruction. The school district advised the parent of the termination of expulsion hearing but advised that proceedings may be renewed if the student was involved in any further violations of the Education Code.

26. On June 23, 2005, Dr. Edward Curry of the Pediatric Department of the Kaiser Permanente Medical Center in Fontana wrote that the student had been evaluated and treated at the Kaiser Learning Behavioral Clinic. Dr. Curry indicated that, based on his medical history, school reports, and clinical observations, the student had been diagnosed with Attention Deficit Hyperactive Disorder and Oppositional Disorder and was being prescribe medication for his symptoms. Dr. Curry recommended that the student be placed in a home study program for at least six months until his medication could be adjusted based on his symptoms. The pediatrician indicated that the student would be also receiving counseling for his anger issues.

27. After the student was placed on home instruction in early May, 2005, the student did not begin receiving home instruction until later in the summer. The first home instruction teacher had a heart attack and a new teacher had to be assigned. On June 1, 2005, the new teacher went to the student's home to begin the home instruction but the parent asked the teacher to leave because the home was being prepared for a wedding. At that time, the school year was ending and the student's family was also going on a vacation. As such, home instruction did not begin until July 27, 2005. Pursuant to his IEP, the student has been receiving home instruction from the school district for the 2004-2005 school year.

28. The student has a history of disciplinary problems at school. Since May 1999, he has been involved in approximately 17 fights at school and has been suspended from school on approximately 15 occasions due to fighting or physical altercations. During the 2004-

2005 school year, the student was referred to school administrators for disciplinary action on approximately six occasions, including the incidents of attempted theft from the teacher's desk and striking a fellow pupil in the street after school.

29. (A) It was not established by any expert or medical evidence that the student meets the special education eligibility criteria for emotional disturbance or for a specific learning disability. He has been diagnosed with ADHD and is eligible for special education services under the category for other health impairment.

(B) It was not established that the school district has failed to implement or amend the student's IEP and/or Behavior Support Plan to meet his needs and changed circumstances. In October 2004, the school district first developed the student's Behavior Support Plan and reviewed and added behavioral interventions at subsequent IEP meetings. The assistant principal and RSP math teacher implemented provisions of the Behavior Support Plan.

(C) It was not established that the school district has failed to provide counseling for the student. IEP teams have recommended that the student be referred to the county for AB2726 counseling but, on at least one occasion, the county returned the referral because the parent did not provide the dates when the student attended anger management classes at the police department. On another occasion, the parent was unable to make an appointment with the county. Nevertheless, the student has been receiving counseling or therapy from Vista Behavioral Services under his Medi-Cal coverage since June 2003. The counseling he has been receiving is the same counseling that he would receive from the county mental health department.

(D) It was not established that the student would be better served or benefit from placement in a special day class rather than a RSP class setting. If placed in a special day class, the student would be in the same classroom for the whole school day with much lower functioning pupils. The student is a bright boy with higher skills in language arts and social studies. He has unique needs in math and requires supports for behavioral issues. In math, he needs prompts and reminders but is capable of passing math if placed in a RSP class. The student's placement in a general education setting with assignment to a RSP class for math was or is appropriate to meet his unique needs.

30. On or about June 27, 2005, a due process hearing request was filed on behalf of the student. In the request, it was alleged that the school district had failed to provide FAPE to the student, failed to consider his disabling condition when conducting the manifestation determination, failed to provide home instruction pursuant to the May 2005 IEP, and failed to implement or adjust the student's Behavior Support Plan. The issues for the due process hearing were amended by petitioner's counsel at or before the hearing that followed in this matter.

Based on the foregoing findings of fact, the Administrative Law Judge makes the following determination of issues:

## LEGAL CONCLUSIONS

1. Applicable Law: Under the federal Individuals with Disabilities Education Act (IDEA) and state law, pupils with disabilities have the right to a Free Appropriate Public Education (FAPE). (20 U.S.C. §1400 (2005); Ed. Code §56000 et seq.) The term “Free Appropriate Public Education” means special education and related services that are available to the pupil at not cost to the parents, meet state educational standards, and conform to the pupil's individualized education program. (20 U.S.C. §1401(9).) This right to FAPE arises only after a pupil has been assessed and determined to be eligible for special education.

In *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 485 U.S. 176, 200-202, 102 S.Ct. 3034 (1982), the United States Supreme Court addressed the level of instruction and services that must be provided to a pupil with disabilities to satisfy the requirements of the IDEA. The *Rowley* Court determined that a pupil's IEP must be reasonably calculated to provide the pupil with some educational benefit but that the IDEA does not require school districts to provide special education pupils with the best education available or to provide instruction or services that maximize a pupil's abilities. (*Id.* at 198 - 200). Finding that Congress included no language suggesting an obligation to maximize the potential of disabled pupils, the *Rowley* Court stated school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the pupil. (*Id.* at 201).

In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School District*, 811 F.2d. 1307 (9th Cir. 1987).) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district's offer of special educational services to a disabled pupil to constitute a free appropriate public education under the IDEA and the *Rowley* case, a school district's offer of educational services and/or placement must have been designed to meet the student's unique needs, comports with the student's IEP, and was reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment.

The United States Supreme Court in the *Rowley* case also recognized the importance of adhering to the procedural requirements and protections afforded by the IDEA, which are designed to ensure effective parental participation in the IEP process and careful consideration of a pupil's educational needs. (See 20 U.S.C. §1400 et seq.) The United States Supreme Court noted in *Rowley* that, “Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation” at every step “as it did upon the measurement of the resulting IEP.” (*Board of Education of the Hendrick Hudson Central School District v. Rowley, supra*, 458 U.S. at 205-206.) For example, one of the rights afforded to parents is the right to be provided a formal written offer of placement by the school district. (*Union School District v. Smith*, 157

F.3d 1519 (9th Cir. 1994); cert. denied 115 S. Ct. 428 (1994).) In the *Union* case, the Circuit Court of Appeals noted that one of the reasons for requiring a formal written offer is to provide parents with the opportunity to decide whether the offer of placement is appropriate and whether or not to accept the offer. (*Ibid.*)

However, not every procedural flaw constitutes a denial of a FAPE. Procedural flaws must result in the loss of educational opportunity to the student, or seriously infringe on the parent's participation in the IEP process, to constitute a denial of a FAPE. (*Board of Education of the Hendrick Hudson Central School District v. Rowley, supra*, 458 U.S. at 206-07; see also *Amanda J. v. Clark County School District*, 267 F.3d 877 (9th Cir. 2001).) However, procedural violations which do not result in a loss of educational opportunity or which do not constitute a serious infringement of parents' opportunity to participate in the IEP formulation process are insufficient to support a finding that a pupil has been denied a free appropriate public education. (*W.G. v. Board of Trustees of Target Range School District No. 23*, 960 F.2d 1479, 1482 (9th Cir. 1992).)

In general, a pupil shall be referred for special education instruction and services only after the resources of the regular education program have been considered and, where appropriate, utilized. (Ed. Code §56303.) All referrals for special education and related services shall initiate the assessment process and shall be documented. (Cal. Code Regs., tit. 5, §3021, subd. (a).) All school staff referrals shall be written and include a brief reason for the referral and documentation of the resources of the regular education program that have been considered, modified, and when appropriate, the results of intervention. (Cal. Code Regs., tit. 5, §3021, subd. (b).) Upon initial referral for assessment, parents shall be given a copy of their rights and procedural safeguards. (Ed. Code §56301, subd. (c).)

Education Code section 56320 provides that an individual assessment of the pupil's educational needs must be conducted by qualified persons before any action can be taken with respect to the initial placement of an individual with exceptional needs in a special education instruction. Education Code section 56320, subdivision (f), adds, in pertinent part, that the pupil must be assessed in all areas related to the suspected disability including, if appropriate, health and development, language function, general intelligence, academic performance, and social and emotional status.

A school district shall develop a proposed assessment plan within 15 calendar days of referral for assessment, unless the parent agrees in writing to an extension (Ed. Code §56043, subd. (a)), and shall attach a copy of the notice of parent's rights to the assessment plan (Ed. Code §56321, subd. (a)). A parent shall have at least 15 calendar days from the receipt of the proposed assessment plan to arrive at a decision whether to consent to the assessment plan. (Ed. Code §56403, subd. (b).) A school district cannot conduct an assessment until it obtains the written consent of the parent prior to the assessment (unless the school district prevails in a due process hearing relating to the assessment); assessment may begin immediately upon receipt of the consent. (Ed. Code §56321, subd. (c).) Thereafter, a school district must develop an individualized education program required as a result of an assessment no later

than 50 calendar days from the date of receipt of the parent's written consent to assessment, unless the parent agrees in writing to an extension. (Ed. Code §56043, subd. (d).)

2. Issue No. 1—It was not established that the school district denied the student a FAPE for the school years from 2003 through the present, based on Findings 1 – 30 above. To determine whether the school district provided a Free Appropriate Public Education to the student, the inquiry must focus on the adequacy of the programming and placement actually offered to him by the school district.

Beginning with his initial IEP in June 2003, the school psychologist identified student to have average scores in cognitive ability, visual perception, memory, and language; he was identified to have needs in socialization, adaptability, and social and emotional issues. The IEP team determined that the student was impulsive and that his math skills were well-below average. Accordingly, the team placed him in a general education setting with RSP services in math. The team also developed behavioral goals for the student as well as goals for performance in math and recommended mental health counseling for him. To give him a fresh start with a new set of peers, the team recommended that he attend the middle school for the upcoming school year.

Subsequently, the school district provided the student with accommodations so that he could complete assignments, developed new goals for him in math and vocational training, and increased his RSP math sessions. The school district then developed a Behavior Support Plan for the student, assigned him to a male RSP math teacher in response to his behaviors, and reviewed and revised the student's goals in math and behavior. Most recently, the school district placed the student in home instruction on request of the parent and on recommendation of his physician.

Based on the evidence of the assessments of the student's needs, the IEP recommendations, and academic performance, the offer and actual placement by the school district in a general education setting with RSP math classes, counseling, and behavioral goals and plan was designed to meet the student's unique needs in math and behavior and was reasonably calculated to provide him with some educational benefit. Although his grade reports could be better, the student benefited from his educational programming by showing improvement in both his math performance and classroom behavior as established by the testimony of this RSP math teacher. He passed his science class. The programming provided by the school district was in conformity with his IEP's. Finally, the general education placement with a RSP math class was an appropriate educational setting in the least restrictive environment for the student; he is a higher functioning pupil whose needs in math and behavioral issues would not have been met in a special day class. The school district offered and provided the student with a FAPE for the school years in question.

3. Issue No. 2—It was not established that the school district failed to follow, implement, or properly amend the student's Behavior Support Plan, based on Findings 1 – 30 above. From October 2004 through May 2005, the school district developed, reviewed, and changed the Behavior Support Plan on several occasions. By October 2004, the student had

attended Fontana Middle School for over one year and developed a history of disciplinary and academic issues. He was disruptive in class, failed to do his academic work, and demonstrated disrespectful and antisocial behavior at school. The school district thus convened an IEP meeting to prepare a Behavior Support Plan for the student. The IEP team developed a behavioral goal for the student that required that he refrain from inappropriate language. He was also to take his medications for ADHD regularly and have time with a teacher or administrator. His teachers were to use anger management techniques, teach him to describe his emotions, and apply appropriate and positive behavior reinforcement techniques and strategies. Later that school year, in February 2005, the school district revised the Behavior Support Plan by adding another teacher with whom the student could talk and adding praise as a tool that teachers could use to reinforce positive behavior. The IEP team also changed the student's RSP math teacher to a male teacher who helped to develop the Behavior Support Plan. In April 2005, the IEP team reviewed the student's Behavior Support Plan and added the proviso that he see school counselors on a regular basis. In May 2005, when considering whether to proceed with the student's expulsion for striking another pupil, the IEP team determined that his Behavior Support Plan should continue.

Since developing the Behavior Support Plan in October 2004, the school district and its staff have followed and implemented the Behavior Support Plan. The assistant principal at the middle school allowed the student to visit her office on several occasions so that he decompress and discuss his feelings. Beginning in February 2005, his RSP math teacher, who helped prepare the Behavior Support Plan, allowed the student to visit with the assistant principal, addressed his disruptive behavior in class, asked the student to calm down or to count to ten when he became frustrated, and reminded him to try to use anger management techniques. The RSP math teacher found the student to have been a good pupil and a pleasure to teach. The student's behavior and math performance improved when he was in the RSP math class. In April 2005, the school psychologist found that the student's Behavior Support Plan was being implemented.

Last school year, the parent was naturally not pleased that the student continued his emotional and antisocial behavior by attempting to steal and striking another pupil and being subject to expulsion from school for his conduct. The parent believes that the student should be in a special day class and the school district agreed to place the student on home instruction. Nevertheless, the fact of the matter was that the school district did implement and revise his Behavior Support Plan during the school year in response to his behavior in and out of the classroom. And the student's behavior improved in the RSP math class with the cooperation of the assistant principal and RSP math teacher who were aware of the Behavior Support Plan.

In support of his contentions, petitioner did not provide any probative evidence that the school district was required to perform or should have performed a functional analysis assessment under federal and state education laws and regulations. Petitioner did not demonstrate by probative evidence that the Behavior Support Plan was inappropriate for the student due to his unique needs or that the instructional or behavioral approaches specified in

his IEP's and Behavior Support Plan were necessarily ineffective. (See Cal. Code Regs., tit. 5, §§3052, subd. (b); 3001, subd. (f).) In summary, the evidence did not show that school district denied a FAPE to the student by failing to follow, implement, or amend his Behavior Support Plan.

4. Issue No. 3—It was not established that the school district failed to assess the student in all areas of disability, based on Findings 1 – 30 above. In his Closing Brief, petitioner contends that the third issue for decision is whether the school district failed to assess the student in all areas of disability in the year 2004. The student was first assessed in June 2003 when he was found eligible for special education services and reassessed in 2005 to determine whether he needed or qualified for a different academic setting and for purposes of a manifestation determination.

In June 2003, the student was evaluated by a school district psychologist after being diagnosed with ADHD. The school psychologist tested the student's cognitive ability, visual perception, memory, language skills, academic achievement, adaptive behavior, social skills, and social and emotional issues. The school psychologist found that the student's education was adversely affected by his behavior and his behavior by his ADHD. Because there was no discrepancy between his ability and achievement, the school psychologist ruled out that the student had a learning disability and further determined that he did not meet the criteria for emotional disturbance. The student was found eligible for special education under the criteria for other health impaired.

Approximately two years later, following the February 2005 IEP, the school district prepared an assessment plan, an aide observed the student in his RSP math class, and the RSP math teacher administered achievement tests to the student. Thereupon, a school psychologist performed a psychoeducational assessment of the student that included tests and/ or evaluations of his cognitive and planning abilities, language skills, academic achievement, adaptive behavior, behavior systems, and social and emotional issues. Based in major part on the psychoeducational assessment, the IEP found that the student was properly placed in the RSP math, recommended counseling, and amended his Behavior Support Plan. The IEP also found that the student's attempted theft was not a manifestation of his disability.

With respect to this third issue regarding assessments, petitioner did not present any probative evidence demonstrating that the school district's assessments were inadequate or inappropriate, that the personnel who conducted the assessment were not qualified, or that the school district failed to assess the student in all areas of suspected disability. In support of his contentions and argument, petitioner did not present any probative evidence that the student's visual or auditory processing or motor skills, language or reading skills, or any other skills or areas should have been assessed by the school district.

5. Issue No. 4—It was not established that the school district denied a FAPE to the student by committing procedural violations in connection with the attendance of the parent at IEP meetings, based on Findings 1 – 30 above. Among the due process rights afforded to

a pupil with disabilities and his or parent is the right to be present at each individualized education program meeting and to participate in the development of the individualized education program. (20 U.S.C. §§1414(f), 1415(b)(1); 34 C.F.R. §300.345; Ed. Code §§ 56341, subd. (b)(1); 56341.5; 56506, subd. (d).) A school district may conduct an IEP meeting without a parent if it is unable to convince the parent to attend but must maintain a record of its attempts to arrange a mutually agreed-upon time and place for the meeting. (34 C.F.R. §300.345(d); Ed. Code §56341.5, subd. (h).)

Here, the student's parent was not present and did not participate in two IEP meetings. In June 2003, the school district held an IEP meeting to determine the student's initial placement at Fontana Middle School; the parent was not present at this meeting. In May 2004, the parent did not attend or participate in the meeting for an annual review of the student's IEP. Contrary to petitioner's arguments, however, the procedural deficiencies in failing to include the parent in these two IEP meetings did not result in the denial of FAPE for the student.

First, the June 2003 IEP meeting that the parent did not attend was a follow-up meeting to the initial meeting two days earlier. At the initial meeting, the IEP team discussed the student's evaluation, academic performance, and behaviors. The parent was present and participated in the discussion and decision to find the student eligible for special education services. The IEP team postponed only decision for the school placement until the SELPA director could be consulted. Two days later, the IEP team decided to place the student at Fontana Middle School so that he could a fresh start with a new peer group. The parent consented to the IEP document that recommended the placement and agreed with the student's placement there. Second, the parent was not present and did not participate in the May 2004 IEP meeting but the school district took steps to ensure that the parent could be present and documented its efforts in the IEP document. The school district sent an invitation for the meeting to the parent, called her on the telephone, and sent another notice to her. The parent asserts that she did not receive notice of the meeting but, shortly after the meeting, she consented to the IEP document. The student received services under the resultant IEP in the ensuing school year. The evidence did not demonstrate that the failures to include the parent in the two IEP meetings resulted in any loss of educational opportunity for the student or constituted a serious infringement of the parent's opportunity to participate in the IEP process.

6. Prevailing Party--Under Education Code section 56507, subd. (d), this Decision must indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Pursuant to said mandate, it is determined that respondent school district prevailed on each and every issue heard and decided in this matter.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

The due process request of petitioner Student for relief and/or additional or different services from respondent Fontana Unified School District is denied, based on Conclusions of Law Nos. 1 - 6 above. The due process complaint of petitioner Student is dismissed.

*Notice Of Appeal Rights*

This is the final administrative decision and both parties are bound by this decision. Pursuant to California Education Code section 56505, subdivision (k), either party may appeal this Decision to a court of competent jurisdiction within ninety (90) days of receipt of the Decision.

Dated: January 23, 2006

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Vincent Nafarrete  
Administrative Law Judge  
Office of Administrative Hearings  
Special Education Division