

Broward County School District  
No. 09-2467E  
Initiated By: District and Parent  
Hearing Officer: Stuart M. Lerner  
Date Of Final Order: July 28, 2009

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

██████████, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 09-2467E  
 )  
BROWARD COUNTY SCHOOL BOARD, )  
 )  
Respondent. )  
\_\_\_\_\_ )

FINAL ORDER

Pursuant to notice, a due process hearing was conducted in this case pursuant to Florida Administrative Code Rule 6A-6.03313 and Section 1003.57(1)(e), Florida Statutes,<sup>1</sup> before Stuart M. Lerner, a duly-designated administrative law judge of the Division of Administrative Hearings (DOAH), on June 11, 2009, by video teleconference at sites in Lauderdale Lakes and Tallahassee, Florida.

APPEARANCES

For Petitioner: ██████████  
(Address of record)

For Respondent: Barbara J. Myrick, Esquire  
Office of the School Board Attorney  
Broward County School Board

600 Southeast Third Avenue, 11th Floor  
Fort Lauderdale, Florida 33301

STATEMENT OF THE ISSUE

Whether Petitioner (who will also be referred to herein as ■■■ or ■■■) meets the criteria set forth in Florida Administrative Code Rule 6A-6.03019 for eligibility to receive special instruction and services as a "gifted" student.

PRELIMINARY STATEMENT

On May 11, 2009, Petitioner's mother, ■■■, submitted to the Broward County School Board (School Board) a request for a due process hearing to challenge the School Board's refusal to identify Petitioner as eligible for special instruction and services as a "gifted" student. The following day, the request was transmitted to DOAH.

The case was assigned to the undersigned. On May 13, 2009, the undersigned issued a Notice of Hearing by Video Teleconference scheduling the due process hearing ■■■ had requested for June 5, 2009. On that same date, the undersigned also issued a Case Management Order, which provided, in pertinent part, that "any request for a continuance of the due process hearing . . . shall be deemed to seek, and if granted shall effect, a like extension of the final order deadline."

On May 15, 2009, the School Board issued its Notice of District's Response to Due Process Complaint, in which it stated the following:

After a careful review of your due process complaint, we are proposing the following action(s):

To conduct a third comprehensive evaluation of ■■■ for the purpose of gathering additional information to determine eligibility for gifted.

The action(s) described above are proposed because:

■■■ was previously evaluated by the Broward County Schools as well as by a private evaluator. When the EP team reviewed both [of] the evaluations, private and public, there was a wide discrepancy between the two test results. Therefore, the committee has recommended a third evaluation be conducted with the results of all three evaluations being reviewed at an EP meeting for the purpose of determining eligibility.

After careful review of your due process complaint, we are refusing the following action(s):

To determine that ■■■ meets the criteria for Gifted eligibility based on the two evaluations (public and private) that are currently available.

The action(s) described above are refused because:

The committee met on February 9, 2009, for the purpose of reviewing the private and the public evaluations and determining eligibility. The committee considered the private evaluation results, which were widely discrepant from the evaluation conducted by the Broward County Schools evaluator. After reviewing the Policies and Procedures for the Provision of Specially

Designed Instruction and Related Services as well as both reports, the committee determined that ■■■ was ineligible and requested that the parent provide consent to evaluate for a third time.

Evaluation procedures, tests, records, or reports that were used as a basis for the actions described above include:

Review of Records, Renzulli Scales for Rating the Behavioral Characteristics of Superior Children, Student Interview, Differential Ability Scales, 2nd Edition (DAS-II), Private Report.

Before making this decision the following options were considered and rejected:

Option(s) Considered: Not to evaluate ■■■ for the third time

Why Rejected: The two evaluations were reviewed and considered by the EP committee on February 9, 2009. Due to the large discrepancy between the two evaluations, more information is needed to determine eligibility.

Option(s) Considered: To make ■■■ eligible for gifted.

Why Rejected: A determination of eligibility must be established based on the evaluation results and the criteria established by the Policies and Procedures for the Provision of Specially Designed Instruction and Related Services.

If other factors were relevant to this decision, they are described below:

Consent for additional testing was provided to the parent on February 9, 2009. The parents have not provided the school system the opportunity to conduct the third evaluation.

Also on May 15, 2009, the School Board filed a motion seeking a continuance of the due process hearing scheduled for

June 5, 2009. On May 20, 2009, the undersigned issued an Order granting the motion and rescheduling the due process hearing in this case for June 11, 2009. On that same date (May 20, 2009), the undersigned issued an Order Extending Deadline for Issuance of Final Order, indicating that "the deadline for the issuance of the final order in this case [was being] extended six days."

On June 9, 2009, the School Board, on behalf of both parties, filed a Joint Notice of Stipulated Facts, which read as follows:

COME NOW, the Petitioner and the Respondent, and hereby file this Joint Notice of Stipulated Facts, and state as follows:

1. The undersigned has conferred with Petitioner [through █████] and is authorized to file this Joint Notice of Stipulated Facts on behalf of the Parties.
2. Petitioner was born █████ and is currently █████ years old.
3. Petitioner attended █████ School in Broward County, Florida, for kindergarten, 1st and 2nd grades.
4. Petitioner was in the high achiever/gifted class in 1st grade.
5. THE SCHOOL BOARD completed an evaluation in December 2008, with the results indicating that Petitioner had an IQ of 95.
6. Petitioner's parents had Petitioner evaluated privately in December 2008, with the results indicating Petitioner had an IQ of 130.

7. The December 2008, private evaluation at parent[']s['] expense met THE SCHOOL BOARD's criteria for private evaluations.

8. THE SCHOOL BOARD has an obligation to consider private evaluations when determining gifted eligibility.

9. Petitioner's 1st grade teacher indicated a majority of gifted characteristics on the Renzulli Scale.

10. Petitioner's 2nd grade teacher did not indicate a majority of gifted characteristics on the Renzulli Scale.

11. THE SCHOOL BOARD proposed to complete a third evaluation due to the discrepancies in the scores of the two IQ evaluations.

The due process hearing in this case was held on June 11, 2009, as scheduled. The following witnesses testified at the hearing: Barbara Prelak, Linda Banton, Julianne Conner, Barbara Leonard, Noel Weinstock, [REDACTED], Cathy Boylan, Dr. Beth Pomerantz, Lisa Hariton, Lida Yocum, Donna Turner, and Hector Troche. In addition to the testimony of these witnesses, the following exhibits were offered and received into evidence: Petitioner's Exhibits A through I, K through O, Q, R, GG through ZZ, AAA, and CCC; and Respondent's Exhibits 1 through 15.

Following the hearing on June 12, 2009, the undersigned issued an Order Extending Final Order Deadline, which read as follows:

Pursuant to the agreement of the parties, expressed at the due process hearing held in this case on June 11, 2009, the deadline for the issuance of the final order in this case

is extended to 21 days after the filing of the parties' proposed final orders (which are due to be filed no later than July 20, 2009).

The Transcript of the June 11, 2009, due process hearing was filed with DOAH on June 26, 2009.

█ and the School Board timely submitted their Proposed Final Orders on July 20, 2009.

On July 21, 2009, █ filed a motion seeking permission to file a response to the School Board's Proposed Final Order, which the School Board opposed. On July 22, 2009, the undersigned issued an order denying the motion.

#### FINDINGS OF FACT

Based on the evidence adduced at the due process hearing and the record as a whole, including the Joint Notice of Stipulated Facts,<sup>2</sup> the following findings of fact are made:

1. █ was born on █.
2. As an infant and toddler, █ was "very bright, very alert." █ "knew all the letters of the alphabet before [turning] two [years of age]."
3. █ attended a voluntary pre-kindergarten program.
4. Since the start of kindergarten, █ has been enrolled as a student at █ School (█), an elementary school operated by the School Board.

5. This past spring, [REDACTED] successfully completed second grade. When school begins in August, [REDACTED] will be a third grader at [REDACTED].

6. As a result of having an [REDACTED] birthday, [REDACTED] will be one of the youngest students in the class (as [REDACTED] was in kindergarten and first and second grades).<sup>3</sup>

7. In kindergarten, a screening was done to determine whether [REDACTED] was "a candidate for formal evaluation" for "gifted" identification.

8. As part of the screening, on April 19, 2007, the Kaufman Brief Intelligence Test, Second Edition (KBIT2) was administered. [REDACTED] received the following standard scores on the KBIT2: Verbal: 119; Nonverbal: 118; and IQ Composite: 122.

9. These scores, although above average, were insufficient to warrant further testing.

10. On August 13, 2007, the then-ESE Specialist at [REDACTED], Maria McCullen, sent the following letter to [REDACTED] parents:

[REDACTED] will have a program this school year that links gifted students with high achievers of the same grade in a separate class. We have seen excellent academic and social progress for all students in the past.

We have placed your child in a class with students that have an eligibility of "Gifted." Your child's test scores were high and he/she appears to be capable of keeping up with an advanced curriculum. We use the term "Gifted like" for your child.



This placement will be for the current school year [2007-2008] only. Each placement will be reassessed yearly. Please sign and return this letter if you are in agreement.

11. ■ signed the letter, signifying her consent to ■ placement in the "Gifted/High Achiever" first grade class, and returned the signed letter to Ms. McCullen.

12. ■ consent having been received, the placement was made.

13. ■ spent the entire 2007-2008 school year in the "Gifted/High Achiever" first grade class at ■.

14. Lisa Hariton was ■ first grade teacher.

15. Ms. Hariton has been employed as a teacher with the School Board for the past 23 years, the last ten of which she has "taught in a gifted classroom."

16. As reflected by the grades Ms. Hariton gave ■ on the progress reports she prepared for each of the four marking periods of the school year, ■ thrived in her class.

17. The progress reports assessed student performance in various skill areas, using the following alternative number grades: "1," signifying the student "[h]a[d] mastered [the] skill(s) independently"; "2," signifying the student "[wa]s learning [the] skill(s) with assistance"; and "3," signifying it was an "[a]rea of [c]oncern."

18. For all four marking periods, Ms. Hariton gave [REDACTED] a "1" (the highest possible grade) in the following skill areas:

Language Arts: Comprehends what is read; Self-corrects when reading; Identifies unknown words by supplying words that make sense (context); Identifies unknown words by prefixes, suffixes, base words (structure); Identifies unknown words by using letter/sound relationships (phonics); Reads with fluency and expression; Applies spelling skills in written work; Listens and interprets information accurately; Expresses ideas orally; and Demonstrates phonemic awareness (rhyming, blending, segmentation and manipulation of sounds).

Mathematics: Demonstrates concepts of number sense and number relationships; Understands concepts of addition and subtraction; Demonstrates algebraic thinking to see patterns and relationships; Demonstrates problem solving ability; and Demonstrates the ability to explain and justify solutions and answers.

Related Arts/Foreign Language: Art; and Music.

Science/Health/Social Studies:  
Science/Health; and Social Studies

Social Growth: Attempts new tasks; Demonstrates self-control; Respects individual differences; Works cooperatively; Uses appropriate behavior in a variety of situations; Respects authority; and Shows respect for property and rights of others.

Study Skills: Uses appropriate technology effectively; Demonstrates responsibility for personal belongings; Applies information in making decisions/solving problems; Stays on task; Completes classroom activities/ assignments on time; Thinks and works independently; Follows directions; Shows

effort; Selects appropriate materials for learning tasks; and Completes and returns homework assignments on time.

19. With respect to the remaining skill areas in which [REDACTED] was evaluated, [REDACTED] received the following grades from Ms.

Hariton:

Language Arts: Uses the writing process to produce a variety of written work: a "2," for the first and second marking periods, and a "1," for the third and fourth marking periods; and Applies rules for written communication: a "2," for all four marking periods.

Mathematics: Applies the concepts of measurement for objects, money, time and temperature: a "2," for the first and second marking periods, and "1," for the third and fourth marking periods; Demonstrates an understanding of geometric concepts: a "2," for the first marking period, and a "1," for the remaining marking periods; and Demonstrates the ability to collect, record, analyze and interpret data: a "2," for the first marking period, and a "1," for the remaining marking periods.

Related Arts/Language: Physical Education: a "2," for each marking period.

20. In a November 7, 2007, written communication to [REDACTED]'s parents, Ms. Hariton wrote::

[REDACTED] has had a wonderful beginning in first grade. [REDACTED] excels in all areas of the curriculum, especially creative writing. [REDACTED]'s letter formations are improving and [REDACTED]'s language and grammar usage has improved tremendously from the beginning of the year. [REDACTED] picks up new math skills easily and quickly at the fast pace we are moving. [REDACTED] is reading at approximately a

2.1 readability level and has good comprehension. ■■■ is a sensitive and delightful child who is a true joy to have in my class.

21. A subsequent written communication to the parents made towards the end of the school year (on April 30, 2008) contained the following comments by Ms. Hariton:

■■■ has made great progress this year in all areas of the curriculum. In reading, ■■■ can successfully read and comprehend novels at a third grade level. I would encourage ■■■ to continue reading over the summer at this independent reading level. In mathematics and writing, ■■■ has also made wonderful advances and keeping a summer journal is a great idea. ■■■ has matured a lot this year but still gets teary eyed rather quickly. ■■■ is a sweet loving child and I will miss ■■■.

22. During the second half of the 2007-2008 school year, ■■■ participated in standardized testing.

23. On March 3, 2008, ■■■ took the Reading Comprehension subtest of the Stanford Achievement Test, Tenth Edition (SAT-10), which was "made up of reading selections and questions about each selection. The passages [were] categorized into three types of reading material: Literary, Information and Functional. Test questions [were] also classified by the following standards: Initial Understanding, Interpretation, and Critical Analysis & Strategies." ■■■ received a "high" score on all subcategories of the subtest (Literary, Information, Functional, Initial Understanding, Interpretation, and Critical

Analysis & Strategies). ■■■'s total score of 617 on the subtest gave ■■■ a National Percentile Rank of 88, meaning that ■■■'s performance was equal to or higher than 88 percent of the students in the national reference group.

24. On May 20, 2008, ■■■ took a standardized primary mathematics test and received a 100th percentile score.

25. In addition to participating in the foregoing standardized testing (which was designed to measure academic achievement), ■■■ was screened for "gifted" identification. The Naglieri Nonverbal Ability Test (NNAT) was used as the screening instrument. It was administered to ■■■ on April 17, 2008. ■■■ received a Nonverbal Ability Index score of 108 on the NNAT, placing ■■■ in the 70th percentile. The score was not high enough to justify further evaluation.

26. For the 2008-2009 school year, despite having performed so well in Ms. Hariton's first grade class, ■■■ was placed, not in the "Gifted/High Achiever" second grade class (taught by Linda Banton), but in a regular second grade class.

27. On September 10, 2008, shortly after the beginning of the school year, ■■■ took the STAR Reading Test, a test designed to assess "general reading skills." The "diagnostic report" of the test results read, in part, as follows:

The student's Grade Equivalent (GE) score is 4.5. His or her reading skills are therefore comparable to those of an average

fourth grader after the fifth month of the school year. ■ also received a national Percentile Rank (PR) of 98. This score is in the above-average range and means that ■ scored greater than 98% of students nationally in the same grade. The PR range indicates that if this student had taken the STAR reading test numerous times, most of his or her scores would likely have fallen between 95 and 99. It reflects the amount of statistical variability in a student's PR score.

These scores indicate the ■ is probably reading books and other texts independently. He or she is comfortable with a wide range of reading material, including fiction and nonfiction. He or she can read chapter books with few or no illustrations.

28. ■'s second grade teacher was Barbara Leonard.<sup>4</sup>

Ms. Leonard has taught at ■ for about 15 years, first as a third grade teacher, then ten years as a kindergarten teacher, and finally as a second grade teacher.

29. There were occasions, especially at the beginning of the school year, that ■ became distracted and inattentive in class and had to be redirected and refocused by Ms. Leonard.

30. In Ms. Leonard's class, ■ had a tendency to rush through tests and not check answers, which sometimes resulted in "careless mistakes" or "missed items."

31. ■ "very rarely asked [Ms. Leonard] for help" with class work. ■ "very much wanted to know it and to get it done."

32. ■ was in the "top reading group and the top math[ematics] group" in Ms. Leonard's class.

33. Ms. Leonard gave ■ and the other "top" performing students in the class the opportunity, after finishing their required class work, to engage in enrichment activities (that supplemented the regular second grade core curriculum). These enrichment activities were "optional," and, up until "toward the end of the [school] year," ■ "rarely participated" in them, preferring instead to "sit quietly" and "play with [erasers and other] items in ■'s desk."

34. From the middle of the third marking period on, however, ■ used the enrichment activity time in class to write stories.

35. ■'s stories had essentially the same "formulaic" structure: a "beginning," with a "title page" or "cover page," and then a "middle and conclusion," with illustrations. Ms. Leonard found this "interesting." She had "never taught ■ this particular setup."

36. In ■'s writing, ■ displayed a sense of humor and creativity.

37. Each of ■'s stories had "themes [that] were different" and were "creatively" based on "things around ■"

38. ■ became "like a . . . writing machine," producing a large amount of creative writing. One day, ■ turned in ten

stories to Ms. Leonard. After receiving the tenth story, Ms. Leonard had to tell ■■■, "That's enough. You need to stop." When Ms. Leonard suggested that ■■■ "read for a while," ■■■ responded, "But I want to write." ■■■'s desire to write during the last marking period and a half was a passion that bordered on "obsessiveness."

39. The sustained and concentrated effort ■■■ made to churn out these stories was in sharp contrast to ■■■'s lack of focus when doing "other things [in Ms. Leonard's classroom] like tests, reading, and math[ematics]."

40. Throughout the school year, ■■■ had some difficulty fitting in socially in Ms. Leonard's class.

41. ■■■ was "shy" with all but one or two of the students in the class.<sup>5</sup>

42. During "free time," when the other children did not allow ■■■ to have ■■■'s way, ■■■ cried inconsolably and withdrew from the group.

43. Grade-wise, on the whole, ■■■ did not do as well in Ms. Leonard's class as he had done in Ms. Hariton's class, at least during the first three marking periods of the school year.<sup>6</sup>

44. For the first, second, and third, marking periods, respectively, Ms. Leonard gave ■■■ the following number grades in Language Arts: Comprehends what is read: a "1," a "2," and a "2"; Self-corrects when reading: a "1," a "2," and a "2";



Identifies unknown words by supplying words that make sense (context): a "1," a "1," and a "1"; Identifies unknown words by prefixes, suffixes, base words (structure): a "2," a "2," and a "2"; Identifies unknown words by using letter/sound relationships (phonics): a "1," a "1," and a "1"; Reads with fluency and expression: a "1," a "1," and a "1"; Uses the writing process to produce a variety of written work: a "2," a "2," and a "1"; Applies spelling skills in written work: a "1," a "1," and a "1"; Applies rules for written communication: a "2," a "2," and a "1"; Listens and interprets information accurately: a "2," a "2," and a "2"; Expresses ideas orally: a "2," a "2," and a "1"; and Demonstrates phonemic awareness (rhyming, blending, segmentation and manipulation of sounds): a "1," a "1," and a "1."

45. For the first, second, and third, marking periods, respectively, Ms. Leonard gave ■■■ the following number grades in Mathematics: Demonstrates concepts of number sense and number relationships: a "1," a "1," and a "1"; Understands concepts of addition and subtraction: a "1," a "1," and a "1"; Applies the concepts of measurement for objects, money, time and temperature: a "2," a "2," and a "2"; Demonstrates an understanding of geometric concepts: a "2," a "1," and a "1"; Demonstrates algebraic thinking to see patterns and relationships: a "2," a "2," and a "1"; Demonstrates the

ability to collect, record, analyze and interpret data: a "2," a "2," and a "2"; Demonstrates problem solving ability: a "2," a "2," and a "2"; and Demonstrates the ability to explain and justify solutions and answers: a "2," a "2," and a "2."

46. The progress reports that Ms. Leonard prepared for the first, second, and third marking periods indicated that, in Language Arts and Mathematics, [REDACTED] was at or above grade level.

47. For the first, second, and third, marking periods, respectively, Ms. Leonard gave [REDACTED] the following number grades in Related Arts/Foreign Language: Art: a "1," a "1," and a "1"; Music: a "1," a "1," and a "1"; Physical Education: a "2," a "2," and a "2"; and Tech Knowledge: a "2," a "2," and a "1."

48. For the first, second, and third, marking periods, respectively, Ms. Leonard gave [REDACTED] the following number grades in Science/Health and Social Studies: Science/Health: a "1," a "1," and a "1"; and Social Studies: a "1," a "1," and a "1."

49. For the first, second, and third, marking periods, respectively, Ms. Leonard gave [REDACTED] the following number grades in Social Growth: Attempts new tasks: a "1," a "1," and a "1"; Demonstrates self-control: a "2," a "2," and a "2"; Respects individual differences: a "2," a "2," and a "1"; Works cooperatively: a "2," a "2," and a "1"; Uses appropriate behavior in a variety of situations: a "2," a "2," and a "1";

Respects authority: a "1," a "1," and a "1"; and Shows respect for property and rights of others: a "2," a "2," and a "1."

50. For the first, second, and third, marking periods, respectively, Ms. Leonard gave ■■■ the following number grades in Study Skills: Uses appropriate technology effectively: a "2," a "2," and a "2"; Demonstrates responsibility for personal belongings: a "2," a "2," and a "2"; Applies information in making decisions/solving problems: a "2," a "2," and a "2"; Stays on task: a "3," a "3," and a "2"; Completes classroom activities/assignments on time: a "3," a "2," and a "2"; Thinks and works independently: a "3," a "2," and a "2"; Follows directions: a "3," a "2," and a "2"; Shows effort: a "1," a "1," and a "1"; Selects appropriate materials for learning tasks: a "1," a "1," and a "1"; and Completes and returns homework assignments on time: a "2," a "1," and a "1".

51. On March 31, 2009, ■■■ took the Reading Comprehension subtest of the SAT-10. ■■■ received a score of 627, placing ■■■ in the 73rd percentile.

52. Two weeks later, he took the Total Reading subtest and scored in the 75th percentile.

53. At the beginning of the 2008-2009 school year (specifically, on August 18, 2008), ■■■ had requested in writing that ■■■ "be tested for giftedness as soon as possible . . . ."

54. At all times material to the instant case, the School Board has had in place a Florida Department of Education-approved document entitled, "Policies and Procedures for the Provision of Specially Designed Instruction and Related Services for Exceptional Students" (SP&P),<sup>7</sup> which, among other things, addresses evaluations of the type requested by [REDACTED].

55. The following pertinent discussion regarding exceptionality testing is found in Part II.E. of the SP&P:

Definition: Student evaluation is the systematic examination of all areas related to the student's needs . . . .

1. Responsibility for evaluation

The school board is responsible for the medical, physical, psychological, social, and educational evaluations of students who are suspected of being exceptional students, by competent evaluation specialists. Evaluation specialists include, but are not limited to, persons such as physicians, school psychologists, psychologists, speech/language pathologists, teachers, audiologists, and social workers, with each such person licensed in the professional's field as evidenced by a valid license or certificate to practice such profession in Florida. Educational evaluators not covered by a license or certificate to practice a profession in Florida either hold a valid Florida teacher's certificate or are employed under the provisions of Rule 6A-1.0502, FAC. Tests of intellectual functioning are administered and interpreted by a professional person qualified in accordance with Rule 6A-4.0311, FAC, or licensed under Chapter 490, F.S. . . . .

\* \* \*

In evaluating a student suspected of having an exceptionality, the district uses a variety of assessment tools and strategies to gather functional and developmental information about the student. These should include information provided by the parents, information related to enabling the student to be involved and progress in the general curriculum, . . . information to help determine if the student . . . may be gifted, and information that will assist in writing an . . . EP . . . . The student is comprehensively assessed in all areas of the suspected exceptionality . . . . The evaluation should be comprehensive enough to identify all of the student's specially designed instruction and related services needs, whether or not commonly linked to the eligibility category for which the student is identified.

The school district obtains an informed written consent from the parent before the evaluation is conducted. Parental consent for evaluation is not construed as consent for placement for receipt of specially designed instruction and related services. . . .

The school district conducts a full and individual initial evaluation before the initial provision of specially designed instruction and related services to an exceptional student. As part of an initial evaluation, existing evaluation data on the student including evaluations and information provided by the parents of the student and the student as appropriate, current classroom-based assessments and observations by the teacher and related services provider(s) are reviewed.<sup>[8]</sup> Based on this review, input from the student's parents, and any additional data and/or evaluations, a determination must be made regarding the following: (1) whether the student has an exceptionality; . . . .<sup>[9]</sup>

## 2. Valid tests

The district's evaluation procedures provide for the use of valid tests and evaluation materials, administered and interpreted by trained personnel, in conformance with instructions provided by the producer of the tests or evaluation materials. If an assessment is not conducted under standard conditions, a description of the extent to which it varied from the standard conditions is included in the evaluation report.

Tests, and other evaluation materials, are selected and administered so as not to discriminate on a racial or cultural basis. . . . Any standardized tests that are given to a student have been validated for the specific purpose for which they are used and are administered by trained and knowledgeable personnel in accordance with instructions provided by the producer of the tests. For all students, no single assessment is used as the sole criterion for determining whether a student has an exceptionality or for determining an appropriate educational program.

Tests and other evaluation materials also are selected to ensure that the test results accurately reflect the student's aptitude or achievement level, or other factors that the test purports to measure, rather than reflecting the sensory, manual, or speaking skills unless those are the factors being measured. Tests and other evaluation materials include those tailored to assess specific areas of educational need rather than those merely designed to provide a single general intelligence quotient. The district uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The district also chooses tools and strategies that provide relevant

information that directly assists in determining the educational needs of the student.

\* \* \*

4. Consideration of evaluations obtained by parent

For all students, if the parent obtains an independent educational evaluation at his/her own expense, the results shall be considered by the school district in any decision regarding the student, if the evaluation meets school district criteria.

56. Part III.I. of the SP&P sets forth procedures specifically for "programs for students who are identified as gifted." It provides, in pertinent part, as follows:

Definition: One who has superior intellectual development and is capable of high performance.

Eligibility Criteria: A student is eligible for special programs for the gifted if the student meets the criteria and demonstrates:

1. need for a special program;
2. a majority of characteristics of gifted students according to a standard scale or checklist; and,
3. superior intellectual development as measured by an intelligence quotient of two (2) standard deviations or more above the mean on an individually administered standardized test of intelligence.

\* \* \*

Students are eligible for services from kindergarten through grade 12.

\* \* \*

Student evaluation:

1. Minimum student evaluations as required by Rule 6A-6.03019(3), FAC, are:

- a. need for a special instructional program;
- b. characteristics of the gifted;
- [c.] intellectual development; and,

\* \* \*

3. Evaluations or tests administered may include but are not limited to:

a. Characteristics of the gifted:

Qualified Evaluators: Teachers;<sup>[10]</sup>  
Education Diagnostician; School Psychologist

b. Intellectual development:

Qualified Evaluator: psychologist

\* \* \*

57. There was a delay in starting the evaluation process initiated by ■■■'s request because the first consent form that she had signed and returned to ■■■ was lost.

58. In mid-October 2008, after the school had received a second signed consent form from ■■■, Ms. Leonard (who, at the time, had been ■■■'s teacher for approximately a month and half) was asked to fill out a checklist rating ■■■'s "Learning



Characteristics," "Creativity Characteristics," "Motivation Characteristics," "Leadership Characteristics," and "Communication Characteristics" in accordance with the Renzulli Scales for Rating the Behavioral Characteristics of Superior Students (Renzulli checklist), which the School Board uses to determine whether a student demonstrates a majority of gifted characteristics.

59. At ██████'s behest, Ms. Hariton (who had ██████ in her "Gifted/High Achiever" class the entire previous school year) was also asked to fill out a Renzulli checklist for ██████

60. Ms. Hariton and Ms. Leonard completed and returned their checklists at around the same time.

61. The checklists contained "[d]irections," which read, in pertinent part, as follows:

These scales are designed to obtain teacher estimates of a student's characteristics in the areas of learning, motivation, creativity, leadership, . . . [and] communication . . . . The items are derived from research literature dealing with characteristics of gifted and creative individuals. It should be pointed out that a considerable amount of individual differences can be found within this population, and therefore, the profiles are likely to vary a great deal. Each item in the scales should be considered separately and should reflect the degree to which you have observed the presence or absence of each characteristic. Since the . . . dimensions of the instrument represent relatively different sets of behaviors, the scores obtained from the

separate scales should not be summed to yield a total score. In addition, we have purposely avoided developing national norms for this instrument. If you choose to develop local norms, they should be constructed for individual schools and grade levels. Instructions for calculating local norms can be found in the Scales for Rating Behavioral Characteristics of Superior Student-Revised Edition: Technical and Administration Manual.

Read each item in each scale and place an "x" in the box that corresponds with the frequency to which you have observed the behavior. Each item should be read with the beginning phrase, "The student demonstrates . . ." or "the student . . . ."

62. For each characteristic there were six possible levels of frequency from which to choose: "Never"; "Very Rarely"; "Rarely"; "Occasionally"; "Frequently"; and "Always."

63. Ms. Hariton rated [REDACTED] as having "a majority of gifted characteristics on the Renzulli Scale."

64. In "Learning Characteristics," [REDACTED] received the following ratings from Ms. Hariton:

1. advanced vocabulary for his or her age or grade level: Frequently
2. the ability to make generalizations about events, people, and things: Occasionally
3. a large storehouse of information about a specific topic: Frequently
4. the ability to grasp underlying principles: Occasionally

5. insight into cause and effect relationships: Frequently
6. an understanding of complicated material through analytical reasoning ability: Occasionally
7. a large storehouse of information about a variety of topics: Frequently
8. the ability to deal with abstractions: Occasionally
9. recall of factual information: Frequently
10. keen and insightful observations: Occasionally
11. the ability to transfer learning from one situation to another: Frequently

65. In "Creativity Characteristics," ■■■ received the following ratings from Ms. Hariton:

1. imaginative thinking ability: Frequently
2. a sense of humor: Occasionally
3. the ability to come up with unusual, unique, or clever responses: Always
4. an adventurous spirit or a willingness to take risks: Occasionally
5. the ability to generate a large number of ideas or solutions to problems or questions: Frequently
6. a tendency to see humor in situations that may not appear to be humorous to others: Occasionally
7. the ability to adapt, improve, or modify objects or ideas: Frequently

8. intellectual playfulness, a willingness to fantasize and manipulate ideas: Occasionally

9. a nonconforming attitude, does not fear being different: Occasionally

66. In "Motivational Characteristics," ■■■ received the following ratings from Ms. Hariton:

1. the ability to concentrate intently on a topic for a long period of time: Always

2. behavior that requires little direction from teachers: Always

3. sustained interest in certain topics or problems: Always

4. tenacity for finding out information on topics of interest: Frequently

5. persistent work on tasks even when setbacks occur: Frequently

6. a preference for situations in which he or she can take personal responsibility for the outcomes of his or her efforts: Always

7. follow-through behavior when interested in a topic or problem: Always

8. intense involvement in certain topics or problems: Always

9. a commitment to long term projects when interested in a topic: Frequently

10. persistence when pursuing goals: Frequently

11. little need for external motivation to follow through in work that is initially exciting: Always

67. In "Leadership Characteristics," ■■■ received the following ratings from Ms. Hariton:

1. responsible behavior, can be counted on to follow through on activities/projects: Frequently
2. a tendency to be respected by classmates: Frequently
3. the ability to articulate ideas and communicate well with others: Always
4. self-confidence when interacting with age peers: Frequently
5. the ability to organize and bring structure to things, people, and situations: Frequently
6. cooperative behavior when working with others: Always
7. a tendency to direct an activity when he or she is involved with others: Frequently

68. In "Communication Characteristics (Precision)," ■■■ received the following ratings from Ms. Hariton:

1. speaks and writes directly and to the point: Frequently
2. modifies and adjusts expression of ideas for maximum reception: Always
3. is able to revise and edit in a way which is concise, yet retains essential ideas: Occasionally
4. explains things precisely and clearly: Frequently
5. uses descriptive words to add color, emotion, and beauty: Frequently

6. expresses thoughts and needs clearly and concisely: Always

7. can find various ways of expressing ideas so others will understand: Frequently

8. can describe things in a few very appropriate words: Always

9. is able to express fine shades of meaning by using a large stock of synonyms: Frequently

10. is able to express ideas in a variety of alternate ways: Always

11. knows and can use many words closely related in meaning: Frequently

69. In "Communication Characteristics (Expressiveness),"

█ received the following ratings from Ms. Hariton:

1. uses voice expressively to convey or enhance meaning: Always

2. conveys information non-verbally through gestures, facial expressions, and "body language": Frequently

3. is an interesting storyteller: Always

4. uses colorful and imaginative figures of speech such as puns and analogies: Frequently

70. Unlike Ms. Hariton, Ms. Leonard rated █ as not having "a majority of gifted characteristics on the Renzulli Scale."

71. In "Learning Characteristics, " █ received the following ratings from Ms. Leonard:

1. advanced vocabulary for his or her age or grade level: Frequently
2. the ability to make generalizations about events, people, and things: Occasionally
3. a large storehouse of information about a specific topic: Very Rarely<sup>[11]</sup>
4. the ability to grasp underlying principles: Frequently
5. insight into cause and effect relationships: Frequently
6. an understanding of complicated material through analytical reasoning ability: Frequently
7. a large storehouse of information about a variety of topics: Very Rarely<sup>[12]</sup>
8. the ability to deal with abstractions: Rarely
9. recall of factual information: Frequently
10. keen and insightful observations: Occasionally
11. the ability to transfer learning from one situation to another: Occasionally

72. In "Creativity Characteristics," ■■■ received the following ratings from Ms. Leonard:

1. imaginative thinking ability: Occasionally
2. a sense of humor: Very Rarely
3. the ability to come up with unusual, unique, or clever responses: Occasionally

4. an adventurous spirit or a willingness to take risks: Very Rarely
5. the ability to generate a large number of ideas or solutions to problems or questions: Very Rarely
6. a tendency to see humor in situations that may not appear to be humorous to others: Very Rarely
7. the ability to adapt, improve, or modify objects or ideas: Occasionally
8. intellectual playfulness, a willingness to fantasize and manipulate ideas: Very Rarely
9. a nonconforming attitude, does not fear being different: Very Rarely

73. In "Motivational Characteristics," ■■■ received the following ratings from Ms. Leonard:

1. the ability to concentrate intently on a topic for a long period of time: Frequently
2. behavior that requires little direction from teachers: Frequently
3. sustained interest in certain topics or problems: Frequently
4. tenacity for finding out information on topics of interest: Occasionally
5. persistent work on tasks even when setbacks occur: Frequently
6. a preference for situations in which he or she can take personal responsibility for the outcomes of his or her efforts: Frequently
7. follow-through behavior when interested in a topic or problem: Occasionally



8. intense involvement in certain topics or problems: Occasionally

9. a commitment to long term projects when interested in a topic: Occasionally

10. persistence when pursuing goals: Occasionally

11. little need for external motivation to follow through in work that is initially exciting: Frequently

74. In "Leadership Characteristics," ■■■ received the following ratings from Ms. Leonard:

1. responsible behavior, can be counted on to follow through on activities/projects: Very Rarely

2. a tendency to be respected by classmates: Occasionally

3. the ability to articulate ideas and communicate well with others: Occasionally

4. self-confidence when interacting with age peers: Occasionally

5. the ability to organize and bring structure to things, people, and situations: Occasionally

6. cooperative behavior when working with others: Frequently

7. a tendency to direct an activity when he or she is involved with others: Occasionally

75. In "Communication Characteristics (Precision)," ■■■ received the following ratings from Ms. Leonard:

1. speaks and writes directly and to the point: Occasionally

2. modifies and adjusts expression of ideas for maximum reception: Occasionally
3. is able to revise and edit in a way which is concise, yet retains essential ideas: Occasionally
4. explains things precisely and clearly: Rarely
5. uses descriptive words to add color, emotion, and beauty: Rarely
6. expresses thoughts and needs clearly and concisely: Rarely
7. can find various ways of expressing ideas so others will understand: Occasionally
8. can describe things in a few very appropriate words: Occasionally
9. is able to express fine shades of meaning by using a large stock of synonyms: Occasionally
10. is able to express ideas in a variety of alternate ways: Occasionally
11. knows and can use many words closely related in meaning: Frequently

76. In "Communication Characteristics (Expressiveness),"

received the following ratings from Ms. Leonard:

1. uses voice expressively to convey or enhance meaning: Rarely
2. conveys information non-verbally through gestures, facial expressions, and "body language": Rarely
3. is an interesting storyteller: Very Rarely

4. uses colorful and imaginative figures of speech such as puns and analogies:  
Occasionally

77. The Renzulli checklist that Ms. Leonard filled out in October 2008 was the only one she completed for [REDACTED]; however, at the June 11, 2009, due process hearing in the instant case, she identified the following changes that she would have made to her ratings had she been asked to complete another checklist after having had [REDACTED] in her class the entire school year:

Creativity Characteristic 1. (imaginative thinking ability): raise from Occasionally to Frequently;

Creativity Characteristic 2. (a sense of humor): raise from Occasionally to Frequently;

Creativity Characteristic 6. (a tendency to see humor in situations that may not appear to be humorous to others): raise from Very Rarely to an unspecified higher rating<sup>13</sup>;

Motivation Characteristic 1. (the ability to concentrate intently on a topic for a long period of time): lower from Frequently to Occasionally;

Motivation Characteristic 2. (behavior that requires little direction from teachers): lower from Frequently to Occasionally;

Motivation Characteristic 5. (persistent work on tasks even when setbacks occur): lower from Frequently to an unspecified lower rating;

Leadership Characteristic 1. (responsible behavior, can be counted on to follow through on activities/projects): raise from Very Rarely to Occasionally;

Leadership Characteristic 5. (the ability to organize and bring structure to things, people, and situations): lower from Occasionally to Very Rarely;

Leadership Characteristic 6. (cooperative behavior when working with others): lower from Frequently to Occasionally;

Communication Characteristic (Precision) 2. (modifies and adjusts expression of ideas for maximum reception): lower from Occasionally to Rarely;

Communication Characteristic (Precision) 3. (is able to revise and edit in a way which is concise, yet retains essential ideas): lower from Occasionally to Rarely;

Communication Characteristic (Precision) 5. (uses descriptive words to add color, emotion, and beauty): raise from Rarely to Occasionally; and

Communication Characteristic (Expressiveness) 3. (is an interesting storyteller): raise from Very Rarely to Frequently

78. Outside of school, ■■■ acts more like the child described in Ms. Hariton's, than in Ms. Leonard's, completed Renzulli checklist.<sup>14</sup>

79. Ms. Hariton's appraisal of ■■■'s behavioral characteristics more accurately captures the essence of who ■■■ really is and what ■■■'s capabilities are than does Ms. Leonard's.

80. It appears that ■■■'s behavior in Ms. Leonard's class was a product of ■■■ "fitting [in] with ■■■'s environment" (as is

█'s tendency) and not a true reflection of █'s abilities and talents.

81. █ is more apt to display these abilities and talents when surrounded by children who are similarly able and talented (as was the case in first grade).

82. Being in the "gifted" program at █ would enable █ to receive the supplemental academic enrichment services █ needs in such a setting.

83. On December 16, 2008, approximately two months after Ms. Hariton and Ms. Leonard turned in their completed Renzulli checklists, █'s school psychologist, Beth Pomerantz, Ph.D., administered the Differential Ability Scales (DAS II) to measure █'s intelligence.

84. Dr. Pomerantz has been a school psychologist for 11 years and has done approximately three to four hundred gifted evaluations.

85. The instrument that she used to test █'s intelligence (the DAS-II) was an appropriate instrument for that purpose.

86. █ received a General Conceptual Ability score of 95 on the DAS-II administered by Dr. Pomerantz. This score placed █ in the 37th percentile.

87. On December 22, 2009, six days after Dr. Pomerantz's testing, █ took another intelligence test, the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV). This

test was administered by Noel Weinstock, a licensed school psychologist privately retained by ■■■'s parents. Before he tested ■■■, Mr. Weinstock was made aware of the testing Dr. Pomerantz had done six days earlier.

88. Mr. Weinstock has been employed as a school psychologist by the Miami-Dade County School Board (MDCSD) since 1974. For 13 of his 35 years with MDCSD (from 1987 to 2000), he was MDCSB's Chairperson of Psychological Services, "responsible for the coordination and delivery of psychological services to 50 schools involving 20 psychologists." In addition to his employment with MDCSD, Mr. Weinstock has a private practice (in Miami and in Plantation). As a private practitioner, "[t]he majority of children [he] evaluate[s] for gifted [he] find[s] not eligible." As a result, he does not "get many gifted referrals on a private basis."

89. The instrument that Mr. Weinstock used to test ■■■'s intelligence (the WISC-IV) was an appropriate instrument for that purpose.<sup>15</sup>

90. ■■■ received a full scale IQ score of 130 on the WISC-IV administered by Mr. Weinstock. This score was two standard deviations above the mean and placed ■■■ in the 98th percentile.

91. Mr. Weinstock also administered to ■■■ the Letter-Word Identification, Calculation, and Passage Comprehension subtests

of the Woodcock-Johnson III Test of Achievement. The results of this testing was as follows:

Letter-Word Identification: Age Equivalency- ten years, one month<sup>[16]</sup>; Grade Equivalency- 4.6; Percentile- 97th

Calculation: Age Equivalency- eight years, one month; Grade Equivalency- 2.6; Percentile- 80th

Passage Comprehension: Age Equivalency: eight years, eight months, Grade Equivalency- 3.4; and percentile- 88th.

92. Mr. Weinstock's evaluation of [REDACTED] "met the School Board's criteria for private evaluations," which are set forth in School Board Policy 6004, "Consideration of Outside Psychological Evaluation Reports," Section III.B. of which reads, in pertinent part, as follows:

Criteria for Consideration of Outside Evaluation Reports

In order to consider the results of an outside evaluation report in the eligibility determination process, the eligibility committee is responsible for assuring that:

1. The evaluation was conducted by an appropriately licensed or credentialed professional. The evaluator must meet the credentialing requirements set forth in SBER 6A-6.0331(1)(a). . . .

2. Valid tests and evaluation materials were administered and interpreted by trained personnel, in conformance with instructions provided by the producer of the tests or evaluation materials (SBER 6A-6.0331 [1][b]). Whenever the same evaluation instrument is used more than once, the

eligibility committee should consider the likelihood of practice effects as they relate to the reported scores and the impact this might have on eligibility decisions.  
3. The most recent versions of all test instruments were used.

A school-based eligibility committee determines eligibility (in relation to . . . gifted program requirements) based on review and consideration of **all** pertinent information available. The eligibility committee considers an outside evaluation report (in conjunction with other relevant information) in making an eligibility determination, if the criteria set forth in Section B are met.

93. Both Dr. Pomerantz and Mr. Weinstock prepared reports concerning their testing of [REDACTED]

94. Dr. Pomerantz's report was issued on January 26, 2009.

95. The following "Background Information" was set out in Dr. Pomerantz's report:

[REDACTED] lives with [REDACTED]'s mother, father and younger [sibling]. [REDACTED] was the result of an uncomplicated pregnancy and weighed seven pounds, four ounces at birth. Developmental milestones such as sitting up, walking, toilet training and speaking were all reached at age-appropriate times. [REDACTED] has been diagnosed with Reactive Airway Disease. [REDACTED] has had numerous ear infections. Otherwise, there is not significant history of medical problems or hospitalizations.

[REDACTED] "loves" school. [REDACTED]'s parents feels that [REDACTED] was "adequately challenged" while participating in the gifted/high achiever class for first grade. [REDACTED] reports that [REDACTED]'s "sense of pride and eagerness towards homework and projects was much more apparent last year and this year [REDACTED] does not display



that same enthusiasm.["] ■■■ is described as a "sweet, affectionate and sensitive child" with a great sense of humor. ■■■ gets along well with members of ■■■'s family. ■■■ is disciplined by both parents for "screaming extremely loud" and "talking back." ■■■ spends most of ■■■'s time with ■■■'s family and sees ■■■'s friends outside of school, several times a week. ■■■'s hobbies/interests include playing with Pokemon cards, reading Calvin and Hobbes comic books, outerspace, drawing, riding [a] bicycle with friends and building with K'nex and Legos.

The Renzulli Scales for Rating the Behavioral Characteristics of Superior students was completed by ■■■'s first grade teacher, Ms. Hariton. In the classroom, ■■■ "always" demonstrated the ability to come up with unusual, unique or clever responses. ■■■ "frequently" was an imaginative think[er] who demonstrated the ability to adapt, improve, or modify objects or ideas. ■■■ "frequently" displayed an advanced vocabulary for ■■■'s age and demonstrated insight into cause and effect relationships. ■■■ "occasionally" showed ■■■'s ability to grasp underlying principles, deal with abstractions and make keen and insightful observations. ■■■ was very motivated within the classroom. ■■■'s behavior required little direction from teachers. ■■■ was "frequently" persistent when pursuing a goal. ■■■ displayed many strong communication characteristics (expressiveness) within ■■■'s first grade classroom.

■■■'s second grade teacher, Mrs. Leonard, also completed the Renzulli Scales. She has observed ■■■ to "frequently" display an advanced vocabulary for ■■■'s age, grasp underlying principles and understand complicated material through analytical reasoning. ■■■ "occasionally" makes keen and insightful observations and demonstrates

the ability to transfer learning from one situation to another. ■■■ is described as "occasionally" displaying imaginative thinking ability and the ability to adapt, improve, or modify objects or ideas. ■■■ "very rarely" displays a sense of humor in Mrs. Leonard's class nor the ability to be adventurous and take risks. ■■■'s behavior "frequently" requires little direction from teachers. ■■■ is persistent with tasks even when setbacks occur. ■■■ "occasionally" displays intense involvement in certain topics or problems and is "occasionally" persistent when pursuing goals. In the area of communication, ■■■ is "rarely" observed to use ■■■'s voice expressively to convey or enhance meaning. ■■■ "very rarely" is observed to be an interesting storyteller.

Ten days after the administration of the DAS II by this examiner, ■■■ was evaluated privately by Noel Weinstock, M.S. (please see report of 12/22/08). On an administration of the Wechsler Intelligence Scale for Children-Fourth Edition, ■■■ obtained a Full Scale IQ of 130. ■■■ obtained the following index scores: Verbal Comprehension Index: 126, Perceptual Reasoning Index: 121, Working Memory Index: 126 and Processing Speed Index: 121.

96. Dr. Pomerantz's "Behavioral Observations and Impressions" were described in her report as follows:

■■■ presented as a neatly dressed [child] of average weight and height. Rapport was established through a discussion of ■■■'s interests and hobbies. ■■■ spoke about ■■■'s enjoyment of Pokemon and Sponge Bob. ■■■ was cooperative and polite. ■■■'s attention span was average. ■■■ did not display any outward signs of anxiety or stress. ■■■ seemed to work to the best of ■■■'s ability even as test items became more difficult. Test results are considered to

be an accurate reflection of ■■■'s intellectual functioning at this time.

97. That portion of Dr. Pomerantz's report entitled, "Test Results and Interpretations," read as follows:

Intelligence

Differential Ability Scales-II-School Age Form (DAS)

General Conceptual Ability (GCA):  
Percentile: 37; Standard Score: 95

Cluster/Subtest

Verbal: Percentile: 9; Standard Score: 80

Word Definitions: Standard Score: 67  
Similarities: Standard Score: 10<sup>[17]</sup>

Nonverbal Reasoning: Percentile: 34;  
Standard Score: 94

Matrices: Standard Score: 48  
Sequential & Quantitative Reasoning:  
Standard Score: 45

Spatial: Percentile: 82; Standard  
Score: 114

Recall of Designs: Standard Score: 57  
Pattern Construction: Standard  
Score: 59

■■■'s general cognitive ability, as measured by the Differential Ability Scales, is difficult to summarize with one score due to the significant discrepancy among the Verbal, Nonverbal Reasoning and Spatial clusters.<sup>[18]</sup> Significant discrepancy exists between the two Verbal subtests administered within the Verbal Cluster.<sup>[19]</sup> ■■■'s verbal abilities range from the Very Low to High range. ■■■'s Nonverbal Reasoning and Spatial abilities are Average.

The Verbal Cluster is comprised of the Word Definitions and Verbal Similarities subtests. The Word Definitions subtest measures the ability of the child to define words presented orally by the examiner. ■■■'s High Score on this subtest may reflect ■■■'s strong vocabulary knowledge, expressive language skills and long-term information retrieval, among other abilities. The Verbal Similarities subtest measures the ability of the child to identify the common concept linking three words. ■■■ was given three words and asked how they go together, or how they are alike. On all ten items administered, ■■■ simply repeated the words presented, in what appeared to be random order. Despite "teaching" on six items, wherein the examiner was able to provide the correct answer in an effort to demonstrate the correct response, ■■■ continued to repeat the words presented in random order. Throughout the administration of the subtest, ■■■ did not appear flustered or upset. ■■■ seemed to answer with confidence. ■■■'s lack of hesitation suggested ■■■ assumed ■■■ was providing the correct response.<sup>[20]</sup>

■■■'s performance on the Nonverbal Reasoning subtests was Average. On the Matrices subtest, ■■■ was presented with matrix problems in a multiple-choice format. ■■■ was shown a picture of a square matrix consisting of four or nine cells with a blank cell located in the lower right corner. From among six alternatives, ■■■ was asked to choose the design that correctly completes the matrix. On the Sequential and Quantitative Reasoning subtest, the problems are presented visually, with little verbal instruction. ■■■ was presented with a linear array of between three and seven colored pictures. A blank square is placed at some point in each sequence. Each item is a series of simple

objects or abstract figures with one part of the series missing. From among four alternatives, ■■■ was asked to choose the picture that correctly completes the sequence. This subtest measures the ability to perceive sequential patterns or relationships in pictures, draw conclusions from know[n] facts or principles, and the integration of visual information processing, among other abilities.

■■■'s performance on Spatial tasks was Above Average. The Recall of Designs subtest measures the ability of the child to recall briefly exposed abstract designs by drawing them with pencil and paper. Performance on this subtest reflects one's short-term visual recall, perception of spatial orientation and drawing skills. The Pattern Construction subtest measures spatial ability in children by requiring them to construct patterns with plastic blocks. ■■■ demonstrated Above Average visual motor skills, (eye-hand coordination), spatial visualization ability and the ability to follow verbal instructions and use verbal mediation strategies.

98. Dr. Pomerantz concluded her report with the following

"Summary and Recommendations":

■■■ is a ■■■-year-old, ■■■ grade student who performed within the Below Average to Above Average ranges on the DAS-II administered on 12/16/2008. A private evaluation on 12/22/08, provided a Full Scale IQ score of 130 obtained through administration of the WISC-IV. ■■■ demonstrates learning, creativity, motivation, leadership and communication characteristics ranging from below average to above average as rated by ■■■'s first and second grade teachers.

The case is referred to the school-based Eligibility and Placement Committee for programming recommendations. If this office

can provide any further assistance regarding [REDACTED], please do not hesitate to call us.

99. Mr. Weinstock's report read as follows:

REASON FOR REFERRAL

[REDACTED] was referred to help determine [REDACTED]'s eligibility for enrollment in a gifted program.

Background information

[REDACTED] is the oldest of two [siblings] living at home with [their] mom [REDACTED] and dad [REDACTED]. [REDACTED]'s birth was difficult with labor induced including a C-section delivery. Developmental milestones were reached within normal limits. [REDACTED] attended pre-kindergarten, and despite [REDACTED]'s young chronological age [REDACTED]'s teacher felt [REDACTED] was ready for kindergarten. [REDACTED] began reading in kindergarten and in first grade on standardized testing he was at the 88th percentile and enrolled in a Gifted/High Achieving class. Study skills have been more problematic for [REDACTED] in second grade but on the STAR testing he earned a grade equivalent of 4.5 and at the 98th percentile. Attention skills have been variable.

Medically, in the summer of 2008, [REDACTED] was diagnosed with conductive, unilateral hearing loss in the left ear. The right ear is normal. Noisy environments can be problematic for [REDACTED]. [REDACTED] otherwise is healthy and vision is reported to be normal.

[REDACTED] was assessed with the Kaufman Brief Intelligence Test (KBIT) in kindergarten where he earned a score of 124 [<sup>21</sup>] while administration of the Differential Ability Scales (DAS) revealed a Verbal Reasoning score of 80, a Nonverbal Reasoning score of 94, and a Spatial score of 114.

## BEHAVIORAL OBSERVATIONS

■ was a bright, cooperative [child] of seven years and four months. ■ worked well in the one-to-one testing situation, and was able to be refocused to the task in front of ■ on those few occasions where ■ demonstrated variable attention. ■ easily engaged in conversation and talked enthusiastically about ■'s upcoming holiday trip to Pennsylvania where ■ hoped to see snow.[<sup>22</sup>] Results are felt to be a valid indicator of potential.

## PRESENT EVALUATION/INSTRUMENTS USED

Wechsler Intelligence Scale for Children -  
Fourth Edition (WISC-IV)  
Woodcock-Johnson-III-Tests of Academic  
Achievement

## TEST RESULTS

### Intellectual Functioning

■ obtained the following scores on the WISC-IV:

Verbal Comprehension Index: 126; 96th  
percentile

Perceptual Reasoning Index: 121; 92nd  
percentile

Working Memory Index: 126; 96th  
percentile

Processing Speed Index: 121; 92nd  
Percentile

Full Scale IQ: 130; 98th percentile

■'s profile was a strong, consistent one with ■'s Full Scale IQ falling within the Very Superior range of intelligence. ■ has a superb expressive vocabulary which supports ■'s strong reading profile, and

short-term auditory perception was intact and helped by a more quiet environment.

#### Academic Achievement

Academically, this young [redacted] grade student was able to identify words on a mid-fourth grade level while reading comprehension approached a mid-third grade level. Math calculation was on a 2.6 level while [redacted] was able to multiply one-place numbers and regroup with addition and subtraction problems.

#### SUMMARY AND RECOMMENDATIONS

[redacted] is a [child] with very superior intellectual ability and superb reading skills. [redacted] appears to have the ability and academic development to thrive in a more challenging educational environment that a gifted curriculum would provide. [redacted]'s variable attention can be easily addressed with mild refocusing and the increased challenges of a stimulating educational setting should capture [redacted]'s] attention as well. Follow-up consult regarding [redacted]'s] hearing profile, and at this time [redacted]'s] hearing is normal in the right ear while the left ear presented a mild loss in an earlier assessment. One anticipates continued and significant academic growth for [redacted].

100. The 130 full scale IQ score [redacted] obtained on the WISC-IV administered by Mr. Weinstock On December 22, 2008, is a valid and reliable measure of [redacted]'s intelligence that demonstrates [redacted]'s superior intellectual development. The 95 General Conceptual Ability score [redacted] obtained on the DAS-II administered by Dr. Pomerantz six days earlier, on the other



hand, underestimates ■■■'s intellectual functioning. Unlike ■■■'s score on the WISC-IV, it is out of line with the "overwhelming . . . preponderance" of other existing data and information on ■■■ (including, perhaps most significantly, ■■■'s excellent performance in Ms. Hariton's "Gifted/High Achiever" first grade class) indicating that ■■■ is a "bright youngster" (albeit one with some "attention issues . . . that could have some influence on standardized testing [results]").

101. Dr. Pomerantz's and Mr. Weinstock's reports were provided to the members of the team that had been assembled for the purpose of determining whether ■■■ was eligible for special instruction and services as a "gifted" student (Eligibility Committee).

102. The members of the Eligibility Committee were ■■■, Dr. Pomerantz, Ms. Leonard, Ms. Banton, Julianne Conner (■■■ Principal), and Cathy Boylan (■■■ ESE Specialist).

103. The Eligibility Committee (with ■■■ dissenting) determined that the available data and information failed to establish that ■■■ met the eligibility criteria for the School Board's "gifted program." It proposed a "third IQ test . . . be conducted by the [School Board]" to resolve the "wide discrepancy of results from [Dr. Pomerantz's] evaluation and the independent evaluation [of Mr. Weinstock]."

104. █████'s parents refused to consent to such additional testing, believing that there was already enough data and information to establish █████'s "gifted" eligibility.

105. █████ thereafter filed the instant due process hearing request.

CONCLUSIONS OF LAW

106. District school boards are required by the "Florida K-20 Education Code"<sup>23</sup> to "[p]rovide for an appropriate program of special instruction, facilities, and services for exceptional students as prescribed by the State Board of Education as acceptable." §§ 1001.42(4)(1) and 1003.57, Fla. Stat., as amended by Chapter 2009-238, Laws of Florida.

107. "Exceptional students," as that term is used in the "Florida K-20 Education Code," are students who have "been determined eligible for a special program in accordance with rules of the State Board of Education. The term includes students who are gifted . . . ." § 1003.01(3), Fla. Stat.

108. According to the "rules of the State Board of Education," specifically Subsection (1) of Florida Administrative Code Rule 6A-6.03019, a "gifted" student is "[o]ne who has superior intellectual development and is capable of high performance."

109. Subsection (2) of Florida Administrative Code Rule 6A-6.03019 sets forth the "[c]riteria for eligibility" for

"special instructional programs for the gifted." It provides, in pertinent part, as follows:

(2) Criteria for eligibility. A student is eligible for special instructional programs for the gifted if the student meets the criteria under paragraph (2)(a) . . . of this rule.

(a) The student demonstrates:

1. Need for a special program.
2. A majority of characteristics of gifted students according to a standard scale or checklist,<sup>[24]</sup> and
3. Superior intellectual development as measured by an intelligence quotient of two (2) standard deviations or more above the mean on an individually administered standardized test of intelligence.

110. Evaluations to determine "gifted" eligibility must be conducted in accordance with the applicable provisions of Florida Administrative Code Rule 6A-6.0331, which provides, in pertinent part, as follows:

\* \* \*

(3) Initial evaluation. Each school district must conduct a full and individual initial evaluation before the initial provision of ESE. Either a parent of a student or a school district may initiate a request for initial evaluation to determine if the student . . . is gifted.

\* \* \*

(c) The school district shall be responsible for conducting all initial

evaluations necessary to determine if the student is eligible for ESE and to determine the educational needs of the student. Such evaluations must be conducted by examiners, . . . who are qualified in the professional's field as evidenced by a valid license or certificate to practice such a profession in Florida. Educational evaluators not otherwise covered by a license or certificate to practice a profession in Florida shall either hold a valid Florida teacher's certificate or be employed under the provisions of Rule 6A-1.0502, F.A.C.

1. Tests of intellectual functioning shall be administered and interpreted by a professional person qualified in accordance with Rule 6A-4.0311, FAC.,<sup>[25]</sup> or licensed under Chapter 490, F.S.<sup>[26]</sup>

\* \* \*

(f) The school district shall ensure that students suspected of being gifted are evaluated within a reasonable period of time.

(4) Parental consent for initial evaluation.

(a) The school district must provide notice to the parent that describes any evaluation procedures the school district proposes to conduct. In addition, the school district proposing to conduct an initial evaluation to determine if a student is a student . . . is gifted must obtain informed consent from the parent of the student before conducting the evaluation.

\* \* \*

(c) The school district must make reasonable efforts to obtain the informed consent from the parent for an initial evaluation to determine whether the

student . . . is gifted.

\* \* \*

(5) Evaluation procedures.

(a) In conducting an evaluation, the school district:

1. Must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining whether the student is eligible for ESE . . . , including . . . [the] student's needs beyond the general curriculum;

2. Must not use any single measure or assessment as the sole criterion for determining whether a student is eligible for ESE . . . ; and

3. Must use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

(b) Each school district must ensure that assessments and other evaluation materials used to assess a student are:

1. Selected and administered so as not to be discriminatory on a racial or cultural basis;

2. Provided and administered in the student's native language or other mode of communication and in the form most likely to yield accurate information on what the student knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to do so;

3. Used for the purposes for which the

assessments or measures are valid and reliable; and

4. Administered by trained and knowledgeable personnel in accordance with any instructions provided by the producer of the assessments.

\* \* \*

(6) Determination of eligibility for exceptional students.

(a) A group of qualified professionals determines whether the student is an exceptional student in accordance with this rule and the educational needs of the student. . . . The school district must provide a copy of the evaluation report and the documentation of the determination of eligibility at no cost to the parent. If a determination is made that a student is an exceptional student and needs ESE, an . . . EP must be developed for the student in accordance with these rules.

(b) In interpreting evaluation data for the purpose of determining if a student is an exceptional student and the educational needs of the student, each school district shall:

1. Draw upon data and information from a variety of sources, such as aptitude and achievement tests, the student's response to interventions/instruction implemented, parent input, student input as appropriate, teacher recommendations, and information about the student's physical condition, social or cultural background, and adaptive behavior;

2. Ensure that information obtained from all of these sources is documented and carefully considered; and

3. Determine eligibility in accordance with the criteria and procedures specified in these rules.<sup>[27]</sup>

\* \* \*

(f) For students identified as gifted, an educational plan (EP) in accordance with Rule 6A-6.030191, F.A.C., shall be developed.

111. Florida Administrative Code Rule 6A-6.03313 prescribes "[p]rocedural [s]afeguards for [e]xceptional [s]tudents [w]ho [a]re [g]ifted" and for their parents.

112. Subsection (5) of Florida Administrative Code Rule 6A-6.03313 provides that, "[i]f the parent obtains an independent evaluation at private expense" which meets the applicable requirements of Florida Administrative Code Rule 6A-6.0331, "the results of the evaluation must be considered by the school district in any decision made with the respect to the determination of eligibility for exceptional student education services."

113. If a student is determined not to be eligible "for exceptional student education services" as a "gifted" student, the student's parent is entitled, pursuant to Subsection (1) of Section 1003.57, Florida Statutes, as amended by Chapter 2009-238, Laws of Florida, and Subsection (7) of Florida Administrative Code Rule 6A-6.03313, to a due process hearing on the matter to show that the student meets the "gifted"

eligibility criteria set forth in Florida Administrative Code Rule 6A-6.03019(2).

114. The hearing must be conducted by a DOAH administrative law judge. § 1003.57(1), Fla. Stat., as amended by Chapter 2009-238, Laws of Florida; and Fla. Admin. Code R. 6A-6.03313(7)(b).

115. The parent bears the burden of proof at the hearing. See Espinoza v. Department of Business and Professional Regulation, Florida Board of Professional Engineers, 739 So. 2d 1250, 1251 (Fla. 3d DCA 1999) ("The general rule is that, apart from statute, the burden of proof is on the party asserting the affirmative of an issue before an administrative tribunal."); and Gopman v. Department of Education, No. 05-3583, 2008 Fla. Div. Adm. Hear. LEXIS 31 \*7 (Fla. DOAH January 25, 2008)(Recommended Order) ("The burden of establishing the grounds which demonstrate his eligibility for a Bright Futures award falls on Gopman, who, as the applicant for benefits, must prove that he met the requirements for a scholarship by a preponderance of evidence.").

116. To help meet this evidentiary burden, the parent may offer into evidence an "independent evaluation" of the type described in Subsection (5) of Florida Administrative Code Rule 6A-6.03313, which must be considered (but need not be deemed decisive) by the administrative law judge.



117. The preponderance of the record evidence in the instant case establishes that [REDACTED] meets the "[c]riteria for eligibility" for "special instructional programs for the gifted" set forth in Subsection (2) of Florida Administrative Code Rule 6A-6.03019.

118. It has been shown that [REDACTED] has "[s]uperior intellectual development as measured by an intelligence quotient of two (2) standard deviations or more above the mean on an individually administered standardized test of intelligence," specifically, the WISC-IV administered by Mr. Weinstock on December 22, 2008, on which [REDACTED] obtained an IQ score of 130.

119. It has further been shown that [REDACTED] displays "[a] majority of characteristics of gifted students according to a standard scale or checklist," specifically, the Renzulli checklist completed by [REDACTED]'s [REDACTED] grade teacher, Ms. Hariton, in October 2008.

120. Finally, a showing has been made, principally through the persuasive expert opinion of Mr. Weinstock, that [REDACTED] has a need for "a more challenging educational environment that a gifted curriculum would provide."

121. In view of the foregoing, [REDACTED] is entitled to, and therefore must be provided by the School Board, special instruction and services as a "gifted" student (which are to be spelled out in an Educational Plan (EP) developed, with parental

input, in accordance with Florida Administrative Code Rule 6A-6.030191).

DONE AND ORDERED this 28th day of July, 2009, in Tallahassee, Leon County, Florida.

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STUART M. LERNER  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675 SUNCOM 278-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 28th day of July, 2009.

ENDNOTES

<sup>1</sup> Unless otherwise noted, all references in this Final Order on Placement to Florida Statutes are to Florida Statutes (2008).

<sup>2</sup> The undersigned has accepted these factual stipulations set forth in the Joint Notice of Stipulated Facts and incorporated them in this Final Order. See Columbia Bank for Cooperatives v. Okeelanta Sugar Cooperative, 52 So. 2d 670, 673 (Fla. 1951)("When a case is tried upon stipulated facts the stipulation is conclusive upon both the trial and appellate courts in respect to matters which may validly be made the subject of stipulation."); Schrimsher v. School Board of Palm Beach County, 694 So. 2d 856, 863 (Fla. 4th DCA 1997)("The hearing officer is bound by the parties' stipulations."); and Palm Beach Community College v. Department of Administration, Division of Retirement, 579 So. 2d 300, 302 (Fla. 4th DCA 1991)("When the parties agree that a case is to be tried upon stipulated facts, the stipulation is binding not only upon the parties but also upon the trial and reviewing courts. In

addition, no other or different facts will be presumed to exist." ).

<sup>3</sup> Had [REDACTED] been born just 27 1/2 hours later, [REDACTED] would have started kindergarten the 2007-2008 school year, rather than the 2006-2007 school year.

<sup>4</sup> Ms. Leonard also happens to be [REDACTED]'s neighbor.

<sup>5</sup> [REDACTED] was also "shy" with Ms. Leonard.

<sup>6</sup> The evidentiary record does not reveal the grades that [REDACTED] received from Ms. Leonard for the fourth marking period.

<sup>7</sup> Florida Administrative Code Rule 6A-6.03411(2), which provides as follows, requires the School Board to have such document:

ESE Policies and Procedures Document. For a school district to be eligible to receive state or federal funding for special education and related services for exceptional students, it shall: develop a written statement of policies and procedures for providing appropriate ESE in accordance with and as required by Rules 6A-6.03011 through 6A-6.0361, F.A.C., and as required by Section 1003.57(1)(d) , F.S.; submit its written statement to the Bureau of Exceptional Education and Student Services, Department of Education, 325 West Gaines Street, Tallahassee, Florida 32399-0400; and report the total number of exceptional students in the manner prescribed by the Department. Applicable state statutes, State Board of Education rules, and federal laws and regulations relating to the provision of ESE to exceptional students shall serve as criteria for the review and approval of the procedures documents. This procedures document is intended to provide district and school-based personnel, parents of exceptional students, and other interested persons information regarding the implementation of the State's and school district's policies regarding ESE programs. The procedures document shall be submitted

in accordance with timelines required by the Department.

<sup>8</sup> "[E]xisting evaluation data on the student" that are to be reviewed "[a]s part of an initial evaluation" pursuant to this sentence of the SP&P include such "data" created or produced by the previous grade's teacher.

<sup>9</sup> Nothing in Part II. E. of the SP&P suggests that the previous grade's teacher's observations and assessments of the student may not be relied on in making a "gifted" eligibility determination.

<sup>10</sup> It is significant to note that there is no qualifying language indicating that only present, and not previous, "[t]eachers" of the student may be "[q]ualified [e]valuators" with respect to the "[c]haracteristics of the gifted" eligibility criterion.

<sup>11</sup> Ms. Leonard made the following handwritten notation next to this rating: "If so, it's not shared."

<sup>12</sup> Ms. Leonard put a question mark next to this rating.

<sup>13</sup> Ms. Leonard testified that these upward revisions in Creativity Characteristics 1., 2., and 6. were based solely on the "writing" that ■■■ did.

<sup>14</sup> This finding is based on ■■■'s testimony at the due process hearing, which the undersigned has credited.

<sup>15</sup> Although the DAS-II and WISC-IV "are considered equivalent measures of intelligence," Dr. Pomerantz "prefer[s]" to use the former over the latter because, in her opinion, it "tends to hold the student's attention a little bit more."

<sup>16</sup> ■■■ was seven years, four months, at the time of the testing.

<sup>17</sup> Were this subtest "eliminated" from scoring consideration, ■■■ would have received a General Conceptual Ability standard score of 110 rather than 95 (according to Dr. Pomerantz's calculations).

<sup>18</sup> Such "test scatter" can occur if the child's "focus is not there" or if the child is "anxious."

19 This "[s]ignificant discrepancy" is "atypical."

20 At the due process hearing, Dr. Pomerantz testified that she "would most likely assume that [REDACTED]'s weakness with the similarities [subtest] was due," not to a "learning disability" or "language difficulty," but rather to [REDACTED]'s not understanding the concept behind the subtest."

21 [REDACTED]'s score on this test was actually 122.

22 As Mr. Weinstock testified at the due process hearing, [REDACTED] also displayed a "good sense of humor" during the testing session.

23 Chapters 1000 through 1013, Florida Statutes, are known as the "Florida K-20 Education Code." § 1000.01(1), Fla. Stat.

24 Neither Subsection (2) of Florida Administrative Code Rule 6A-6.03019, nor any other rule or statutory provision, forecloses the possibility that this criterion may be met by a checklist completed by a previous teacher of the student's (as opposed to the student's current teacher). See Hialeah, Inc. v. B & G Horse Transportation, Inc. 368 So. 2d 930, 933 (Fla. 3d DCA 1979)("[A] court may not invoke a limitation or add words to a statute not placed there by the legislature.").

25 Florida Administrative Code Rule 6A-4.0311 prescribes the "[s]pecialization [r]equirements for [c]ertification [as a] [s]chool [p]sychologist."

26 Chapter 490, Florida Statutes, regulates the practice of psychology and school psychology.

27 Subsection (8) of Florida Administrative Code Rule 6A-6.0331 prescribes "[a]dditional requirements for evaluations," including the requirement that "[c]urrent classroom-based . . . assessments and classroom-based observations" be reviewed, but these "[a]dditional requirements" apply to determinations of disability (made by "the IEP Team"), not of giftedness.

COPIES FURNISHED:

Kim C. Komisar, Section Administrator  
Bureau of Exceptional Education  
and Student Services  
Department of Education  
325 West Gaines Street, Suite 614  
Tallahassee, Florida 32399-0400



(Address of record)

Barbara J. Myrick, Esquire  
Office of the School Board Attorney  
Broward County School Board  
600 Southeast Third Avenue, 11th Floor  
Fort Lauderdale, Florida 33301

Deborah K. Kearney, General Counsel  
Department of Education  
Turlington Building, Suite 1244  
325 West Gaines Street  
Tallahassee, Florida 32399-0400

Mr. James F. Notter, Superintendent  
Broward County School District  
600 Southeast Third Avenue  
Fort Lauderdale, Florida 33301-3125

NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless an adversely affected party:

- a) brings a civil action within 90 days in the appropriate state circuit court pursuant to Section 1003.57(1), Florida Statutes, as amended by Chapter 2009-238, Laws of Florida; or
- b) files an appeal within 30 days in the appropriate state district court of appeal pursuant to Sections 1003.57(1), Florida Statutes, as amended by Chapter 2009-238, Laws of Florida, and 120.68, Florida Statutes.