

Miami-Dade County School District
No. 06-1801E
Initiated by: District
Hearing Officer: Stuart M. Lerner
Date of Final Order: November 16, 2006

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████████)
)
Petitioner,)
)
vs.) Case No. 06-1801E
)
MIAMI-DADE COUNTY SCHOOL BOARD,)
)
Respondent.)
_____)

FINAL ORDER

Pursuant to notice, a due process hearing was conducted in this case pursuant to Section 1003.57(5), Florida Statutes,¹ on September 13, 2006, by video teleconference at sites in Miami and Tallahassee, Florida, before Stuart M. Lerner, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Bernard P. Perlmutter, Esquire
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For Respondent: Laura E. Pincus, Esquire

Miami-Dade County School Board
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STATEMENT OF THE ISSUE

Whether Petitioner should be classified as an "educable mentally handicapped" student, as described in Florida Administrative Code Rule 6A-6.03011.

PRELIMINARY STATEMENT

On May 15, 2006, the Miami-Dade County School Board (School Board) received a request for a due process hearing from Petitioner, which it sent, the following day, to the Division of Administrative Hearings (DOAH). On May 18, 2006, the School Board filed a Motion to Dismiss the request, arguing that the request was "substantially similar to [a previous request for due process hearing that Petitioner had filed in] DOAH Case Number 06-1127E" and had subsequently "voluntarily dismissed pursuant to a Mediation Agreement." On May 23, 2006, Petitioner filed a Response to the School Board's Motion to Dismiss. Argument on the motion was held by telephone conference call on May 23, 2006. On May 26, 2006, the undersigned issued an Order on Respondent's Motion to Dismiss, which provided as follows:

Upon consideration, it is hereby ORDERED:

1. The undersigned does not have jurisdiction to determine whether there has been a breach of the parties' Mediation Agreement or to otherwise interpret or enforce the agreement. It is "the circuit court that properly should hear" these

matters, "not an administrative judge."
School Board of Lee County v M. C., 796 So.
2d 581, 583 (Fla. 2d DCA 2001).

2. Accordingly, the allegation made by Petitioner in the instant request for due process hearing that [the School Board] has violated the parties' Mediation Agreement will not be considered by the undersigned; nor will the undersigned consider the allegation made by [the School Board] in its Motion to Dismiss that, by entering into the Mediation Agreement, Petitioner waived any right may have had to advance the remaining allegations in the instant due process hearing request.

3. In view of the foregoing, [the School Board's] Motion to Dismiss is granted to the extent that it seeks the dismissal of the allegation that Respondent has violated the parties' Mediation Agreement, but is denied to the extent that it seeks, through enforcement of that same Mediation Agreement, dismissal of the remaining allegations in the instant request for due process hearing.

4. No later than 7 days from the date of this order, the parties shall advise the undersigned in writing as to the dates between June 15, 2006, and July 7, 2006, on which they are unavailable for the due process hearing in this case.

On June 5, 2006, after having received input from the parties regarding their dates of unavailability for hearing, the undersigned set the due process hearing in this case for July 3, 2006.

On June 26, 2006, Petitioner's attorney filed a Notice of Appearance and Notice of Counsel's Unavailability for Hearing. The undersigned treated the latter as a motion requesting a

continuance of the due process hearing scheduled for July 3, 2006. Following a telephone conference call on the matter, the undersigned, on June 27, 2006, issued an Order Granting Continuance, which provided as follows:

1. The final hearing in this cause scheduled for July 3, 2006, is hereby canceled.

2. The deadline for the issuance of the final order in this case is extended for a period of time equal to the length of the continuance herein granted (that is, for a period of time equal to the number of days from July 3, 2006, to the date of the rescheduled hearing).^[2]

2. The parties shall confer and advise the undersigned in writing no later than July 5, 2006, as to the dates that they will be unavailable for the rescheduled hearing in this case. Failure to timely advise will result in the conclusion that this cause has been amicably resolved, and the file of the Division of Administrative Hearings in the above-captioned matter will be closed.

On July 5, 2006, after having received input from the parties regarding their dates of unavailability for hearing, the undersigned rescheduled the due process hearing in this case for August 30, 2006. (In view of the provisions of paragraph 2 of the undersigned's June 27, 2006, Order Granting Continuance, rescheduling the hearing for August 30, 2006, had the effect of extending the deadline for the issuance of the final order in this case 58 days.)

On August 23, 2006, Petitioner and the School Board filed a Joint Statement of Facts, which read as follows:

The Petitioner [REDACTED] and the Respondent, MIAMI-DADE COUNTY SCHOOL BOARD, pursuant to

the Pre-Hearing Order, dated June 5, 2006, state the following:

The parties agree to the following facts:

1. [REDACTED] is an [REDACTED]-year-old young [REDACTED] previously identified as a student who meets criteria for the specific learning disability (ESE) program.
2. [REDACTED] has aged out of the foster care system and the juvenile court has retained jurisdiction for an additional year. [REDACTED] is receiving independent living services from a community provider, Kids Hope United.
3. Respondent engaged in a pattern of suspending [REDACTED] multiple times from January 4, 2006 to March 28, 2006 without conducting manifestation determination hearings.
4. [REDACTED] is currently attending [REDACTED] School for part of the day and [REDACTED] Skills Center for the other part of the day.

The parties agree that the following issues need to be resolved at the hearing:

1. Whether [REDACTED] was denied a free appropriate public education in the least restrictive environment.
2. Whether [REDACTED] meets the eligibility criteria for the Educable Mentally Handicapped, Language Impaired and Other Health Impaired Programs.
3. Whether [REDACTED] is entitled to compensatory educational services and, if so, what would they be.

On August 28, 2006, the School Board filed an unopposed motion requesting a continuance of the due process hearing scheduled for August 30, 2006, due to the threat posed by

Tropical Storm Ernesto. Following a telephone conference call on the matter, the undersigned, on August 28, 2006, issued an Order Granting Continuance, which provided as follows:

This cause having come before the undersigned on Respondent's Motion for Continuance, filed August 28, 2006, and the undersigned being fully advised, it is, therefore,

ORDERED that:

1. Good cause having been shown, the motion is hereby granted, and the final hearing in this cause scheduled for August 30, 2006, is hereby canceled.
2. The deadline for the issuance of the final order in this case is extended for a period of time equal to the length of the continuance herein granted (that is, for a period of time equal to the number of days from August 30, 2006, to the date of the rescheduled hearing).
3. The parties shall confer and advise the undersigned in writing no later than September 5, 2006, as to the dates that they will be unavailable for the rescheduled hearing in this case. Failure to timely advise will result in the conclusion that this cause has been amicably resolved, and the file of the Division of Administrative Hearings in the above-captioned matter will be closed.

On September 7, 2006, after having received input from the parties regarding their dates of unavailability for hearing, the undersigned rescheduled the due process hearing in this case for September 13, 2006. (In view of the provisions of paragraph 2 of the undersigned's August 28, 2006, Order Granting Continuance, rescheduling the hearing for September 13, 2006, had the effect of extending the deadline for the issuance of the final order in this case an additional 14 days.)

As noted above, the due process hearing in this case was held, as scheduled, on September 13, 2006. At the outset of the hearing, the parties expressed their agreement that, of the issues articulated in the parties' August 23, 2006, Joint Statement of Facts, the only one remaining that was ripe for resolution was whether Petitioner met "the eligibility criteria for the Educable Mentally handicapped . . . Program[]." ³ Seven witnesses testified at the hearing: Ketty Patiño-Gonzalez, Ph.D.; Jorge Trejo; Petitioner; Anna Fernandez, Psy.D.; Aida Reyes; Antoinette Cooper; and Sue Buslinger-Clifford, Ed.D. In addition to the testimony of these witnesses, a total of eight exhibits (Joint Exhibits 1 through 8) were offered and received into evidence.

At the conclusion of the evidentiary portion of the September 13, 2006, due process hearing, the undersigned, with input from the parties, established the following deadline for the filing of proposed final orders: 14 days from the date of the filing of the hearing transcript with DOAH. In so doing, with the parties' agreement, he also extended the deadline for the issuance of the final order for a period of time equal to the number of days from the end of the hearing until the filing of the hearing transcript, ⁴ plus an additional five days. ⁵

The Transcript of the September 13, 2006, due process hearing was filed with DOAH on October 24, 2006.

The School Board Petitioner and Petitioner timely submitted their Proposed Final Orders on November 6, 2006, and November 7, 2006, respectively.

With the specific extensions of time (of 58 days, 14 days, and 46 days) referred to above that were granted pursuant to 34 C.F.R. § 300.515(c), the original final order deadline of July 29, 2006, was extended to November 24, 2006. This Final Order is being issued prior to the expiration of the November 24, 2006, extended deadline.

FINDINGS OF FACT

Based on the evidence adduced at the due process hearing, and the record as a whole, the following findings of fact are made to supplement and clarify the factual stipulations set forth in the parties' Joint Statement of Facts:⁶

1. Petitioner is a young [REDACTED] who recently (on [REDACTED] turned [REDACTED] years of age.
2. As a child [REDACTED] did not have the benefit of a stable home environment.
3. When [REDACTED] was nine years old, Petitioner's parents' parental rights were terminated based on their neglect and abuse and Petitioner was declared a dependent child.
4. While in the custody of the state child welfare agency, Petitioner moved from one foster home to another.

5. As an 11-year-old, Petitioner was adopted. The adoption, however, did not work out and after less than a year, Petitioner was returned to the custody of the state.

6. Petitioner has an extensive record of juvenile delinquency.

7. Petitioner has a record of receiving mental health treatment, but is not currently receiving such treatment.

8. Since [REDACTED] birthday (when [REDACTED] "aged out of the foster care system"), Petitioner has been receiving independent living services from Kids Hope United, Inc., a provider of community-based child welfare services in Miami-Dade County, to "help [REDACTED] be[come] self-sufficient." [REDACTED] Kids Hope United case manager is now, and has been from the time [REDACTED] first became a recipient of these services, Jorge Trejo. Petitioner is one of approximately 60 clients for whom Mr. Trejo is responsible.

9. Mr. Trejo has met with Petitioner approximately once a week since becoming [REDACTED] case manager. Mr. Trejo has found Petitioner "very difficult to work with" as a result of Petitioner's failure to behave appropriately and function like a "normal young adult[]."

10. Despite the assistance that [REDACTED] has received from Mr. Trejo and Kids Hope United, Petitioner has experienced bouts of homelessness after exiting the foster care system.

11. Petitioner attends public school in Miami-Dade County as a student on a special diploma track, going to " [REDACTED] School [for academic classes] for part of the day and [REDACTED] Skills Center [for vocational training in auto detailing] for the other part of the day." [REDACTED] is supposed to have "individual paraprofessional assistance" in all classes, but as of September 13, 2006, a paraprofessional to provide such assistance had not yet been hired.

12. Petitioner first enrolled in the Miami-Dade County public school system in January 1993 as a kindergarten student and, with the exception of periods that [REDACTED] was in the custody of the Department of Juvenile Justice (for having engaged in delinquent behavior), has been a student at School Board-operated schools since. [REDACTED] time as a student has been marked by poor academic performance, irregular attendance, and disruptive behavior, and [REDACTED] has changed schools far more frequently than the typical student.

13. From the time of [REDACTED] initial enrollment in January 1993 until August 2003, Petitioner was in the School Board's English for Speakers of Other Languages (ESOL) program (a period of time that was "longer than normal"). In Petitioner's case, the "Other Language" was Spanish.

14. In or about April 1995, Petitioner was evaluated by a School Board school psychologist, Celia Bolzani, and determined

to be eligible for special education and related services as both a student with "specific learning disabilities" and a "language impaired" student. Thereafter, ██████ started receiving such services from the School Board.

15. Petitioner has remained classified as a student with "specific learning disabilities." ██████ classification as a "language impaired" student was removed on April 30, 1999, but restored at the beginning of the current school year.

16. In May 2006, Anna Fernandez, Psy.D., a first-year School Board school psychologist, conducted a psycho-educational evaluation of Petitioner in order to assess ██████ current level of functioning and to help determine how best to meet ██████ educational needs. ██████ did so under the supervision of Aida Reyes, an experienced school psychologist employed by the School Board.

17. As part of the evaluation process, Petitioner was given a battery of tests by Dr. Fernandez over five days (May 2, 3, 5, 9, and 12, 2006). While Dr. Fernandez initially had "difficulty" in testing Petitioner because of "██████ level of motivation and effort" and "██████ state of mind,"⁷ ultimately the situation improved and conditions were conducive to obtaining accurate test results.

18. The tests Petitioner was given included, among others, the Wechsler Adult Intelligence Scale-Third Edition (WAIS-III) to assess Petitioner's intellectual functioning; the Woodcock-Johnson Tests of Achievement (WJ-III-Ach) to assess Petitioner's scholastic achievement; and selected subtests of the Woodcock-

Johnson Test of Cognitive Abilities (WJ-III-Cog) to assess Petitioner's language processing abilities,⁸ and the Bender Visual-Motor Gestalt Test II (Bender-Gestalt II) to assess [REDACTED] visual-motor integration functions.

19. The WAIS-III is a "widely-used" and "well-researched" measure of intellectual functioning administered to adults. It was an appropriate test to give to Petitioner, given [REDACTED] age.

20. The WAIS-III consists of 14 subtests and yields three intelligence quotient (IQ) scores (verbal IQ, performance IQ, and full scale IQ) that are standardized, having a mean of 100 and a standard deviation of 15. The standard error of measurement is plus or minus three points.

21. The verbal IQ score (VIQ) is the product of the scores on the following seven subtests (Verbal Subtests), which "measure[] verbal ability": Vocabulary, Similarities, Arithmetic, Digit Span, Information, Comprehension, and Letter-Number Sequence. The performance IQ score (PIQ) is the product of the scores on the remaining seven subtests (Performance Subtests), which involve the completion of non-verbal tasks: Picture Completion, Digit Symbol, Block Design, Matrix, Reasoning, Picture Arrangement, Symbol Search, and Object Assembly. The full scale IQ (FSIQ) score is derived from the scores on all 14 subtests.

22. Petitioner received the following standard scores on the Verbal Subtests of the WAIS-III administered by Dr. Fernandez:

Vocabulary: 3

Similarities:	5
Arithmetic:	3
Digit Span:	6
Information:	6
Comprehension:	4
Letter-Number Sequence	8

These scores yielded a VIQ of 66.

23. Petitioner received the following standard scores on the Performance Subtests of the WAIS-III administered by Dr. Fernandez:

Picture Completion:	12
Digit Symbol:	9
Block Design:	8
Matrix Reasoning:	5
Picture Arrangement:	3
Symbol Search:	6
Object Assembly:	8

These scores yielded a PIQ of 83.

24. The "split" of 17 points between Petitioner's VIQ and ■■■ PIQ was "statistically and clinically significant." Such a "split" "only occurs in 12 percent of the population." It is indicative of ■■■ having a language impairment. "What's been consistent across time, no matter [who has evaluated Petitioner] is this difference between ■■■ performance [or non-verbal] abilities and ■■■ verbal abilities."

25. Petitioner's VIQ of 66 and PIQ of 83 gave ■■■ a FSIQ of 72.

26. On the majority (ten) of the 14 subtests of the WAIS-III administered by Dr. Fernandez (all but the Vocabulary, Arithmetic, Comprehension, and Picture Arrangement subtests), Petitioner received scores that were higher than two or more

standard deviations below the mean. One of [REDACTED] scores, the 12 [REDACTED] received in Picture Completion, was actually above the mean (and considered to be a high-average score). This is not a score that one would expect a "mentally handicapped" student to obtain.

27. Although Petitioner had taken Wechsler intelligence tests in the past (albeit tests designed for children), given the time that had passed since [REDACTED] had taken these previous tests, [REDACTED] having done so likely did not create a "practice effect" that artificially inflated [REDACTED] scores on the WAIS-III Dr. Fernandez gave [REDACTED].

28. On the WJ-III-Ach, Petitioner received the following standard scores (SS) (with their grade equivalents (GE) and age equivalents (AE) noted): Letter/Word Identification: SS: 66, GE: 3.8, and AE: 9-2; Reading Fluency: SS: 72, GE: 4.1, and AE: 9-6; Story Recall: SS: 40, GE: <K.0, and AE: 3-6; Understanding Directions: SS: 37, GE: <K.0, and AE: 5.5; Calculation: SS: 66, GE: 4.5, and AE: 10-1; Math Fluency: SS: 67, GE: 4.5, and AE: 9-11; Spelling: SS: 73, GE: 4.7, and AE: 9-5; Passage Completion: SS: 47; GE: 2.0, and AE: 7-4; Writing Samples: SS: 65, GE: 2.8, and AE: 8-6; Picture Vocabulary: SS: 59, GE: K.7, and AE: 6-0; Oral Comprehension: SS: 45, GE <K.0, and AE: 4-6; Broad Reading: SS: 65, GE: 3.3, and AE: 8-8; Oral Language Extended: SS: 46, GE: <K.0, and AE: 5-0; Listening Comprehension: SS: 29, GE: <K.0, and AE: 5.0; Oral Expression: SS: 56, GE: K.0, and AE: 5-1; Math

Calculation: SS: 65, GE: 45, and AE: 10.0; and Academic Skills: SS: 66, GE: 4.2, and AE: 9-6.

29. The tests administered to assess Petitioner's language processing abilities revealed results indicating "significant language processing deficits."

30. On the Bender-Gestalt II, Petitioner obtained "a low average score suggestive of adequate, but somewhat below average, visual motor skills." [REDACTED] score was "commensurate with [REDACTED] low-average range non-verbal abilities as measured by [REDACTED] Performance IQ score on the WAIS-III."

31. In assessing Petitioner's level of adaptive behavior, Dr. Fernandez relied on information gleaned from the Scales of Independent Behavior-Revised (SIB-R) questionnaire that Sylvia Simon, a School Board social worker, had Mr. Trejo, on May 12, 2006, complete as the "respondent."

32. SIB-R scores on adaptive behavior are based on answers that a respondent, usually a parent or other adult who lives with the subject, gives to questions pertaining to the subject's motor skills, social and communication skills, personal living skills, and community living skills. The subject's scores in these four areas (motor skills, social and communication skills, personal living skills, and community living skills) are averaged to obtain a Broad Independence score, which is a "measure of overall adaptive behavior."

33. Mr. Trejo was not an ideal respondent to complete a SIB-R questionnaire on Petitioner inasmuch as [REDACTED] did not live with Petitioner and have the opportunity to observe Petitioner on

a daily basis taking care of [REDACTED] everyday needs; however, given Petitioner's living situation at the time--[REDACTED] was in a homeless shelter--, Mr. Trejo was not an unreasonable choice to serve as respondent.

34. The information that Mr. Trejo provided in completing the SIB-R questionnaire (as interpreted by Ms. Simon) yielded a Broad Independence score reflecting that Petitioner's overall adaptive behavior was "very limited" and "comparable to that of the average individual at age 6 years 10 months."

35. Following the completion of the evaluation process, Dr. Fernandez prepared a written report (signed by her and Ms. Reyes) discussing the process and what it revealed.

36. Dr. Fernandez's report reflected that prior evaluations of Petitioner's intellectual functioning were considered, and it contained the following discussion of these prior evaluations:

A review of records revealed that [Petitioner] has been evaluated intellectually in the past by Miami-Dade County Public Schools (M-DCPS) and by independent (private) evaluators outside M-DCPS. One of the evaluations originating outside M-DCPS was conducted by Michael DiTomasso, Ph.D. on February 23, 2000. In this evaluation, [Petitioner] was tested with the Wechsler Intelligence Scales for Children, 3rd Edition (WISC-III). Dr. DiTomasso concluded that although [Petitioner's] IQ scores fell within the mentally deficient range, "[Petitioner] evidences fairly good abilities in terms of adaptive functioning and for that reason, [REDACTED] does not appear to meet DSM criteria for mental retardation."⁹ In addition, it is noteworthy that at the time the evaluation was conducted, [Petitioner] was receiving classes in the English for

Speakers of Other Languages (ESOL, Level III), but Dr. DiTomasso did not address [Petitioner's] bilingualism or language differences in [REDACTED] report. It appears that the evaluation was conducted solely in English, which could have likely resulted in lower IQ scores. Similarly, on December 19, 2001, [Petitioner] was evaluated by Dr. Leonard Haber using the WISC-III. While [Petitioner] was still in ESOL during that time, Dr. Haber also did not address [Petitioner's] bilingualism, nor were language differences addressed in the report. This evaluation appears to have also been conducted exclusively in English. In addition, Dr. Haber's report does not include nor lists full scores from the WISC-III. Moreover, the evaluation does not include results regarding [Petitioner's] adaptive functioning. For the reasons mentioned above, the results of these two evaluations may be questionable and do not meet the criteria for acceptance according to M-DCPS Policy for Review of Psychological Reports Originating Outside M-DCPS.

Further review of psycho-educational records revealed that [Petitioner] was initially tested by M-DCPS on September 19, 1995 with the Differential Ability Scales (DAS) and the Kaufman Assessment Battery for Children (K-ABC). At that time, [Petitioner's] level of intellectual functioning fell within the Borderline to Below Average range. On September 27th, 2005 [Petitioner] was tested with the Reynolds Intellectual Assessment Scales (RIAS).^[10] At that time [REDACTED] global intellectual abilities were found to fall within the borderline range. The scores from [Petitioner's] current evaluation are comparable to [REDACTED] scores from these two previous M-DCPS evaluations.

37. In her report, Dr. Fernandez "summarize[d]" her "intellectual evaluation" of Petitioner as follows:

To summarize, [Petitioner] did very poorly in tasks that reflect [redacted] verbally acquired knowledge and [redacted] verbal reasoning. The verbal subtests also required [Petitioner] to use social comprehension, social judgment, common sense, and practical types of knowledge, which may be negatively affected by [redacted] severe emotional disturbance. However, [Petitioner] did somewhat below average in measures of nonverbal, fluid reasoning, attentiveness to detail, and visual-motor integration. These are considered areas of relative strength for [Petitioner]. Although the aggregate of [Petitioner's] intellectual skills are found to fall within the Borderline range, the best estimate of [redacted] overall intellectual abilities is considered to fall within the Low-Average range. These results are commensurate with the results from two prior evaluations.

38. Dr. Fernandez's report contained the following "summary" of what her testing revealed about Petitioner's "language processing abilities":

In summary, [Petitioner's] receptive and expressive language abilities are severely compromised. [redacted] evidences significant language processing deficits that manifest on verbal processing assessments such as the WAIS-III Verbal Comprehension and WJ-III Cognitive and Achievement subtests.

39. At the end of her report, Dr. Fernandez provided the following overall "summary":

[Petitioner] is an [redacted]-year-old [redacted] of [redacted] origin who is currently in the [redacted] grade at [redacted]. [redacted] was referred for a psycho-educational evaluation in order to assess [redacted] current level of functioning, to help determine [redacted] most appropriate educational placement, and [redacted] educational needs. [Petitioner] has evidenced poor academic functioning and worrisome behaviors, including bizarreness, distractedness, social withdrawal, and poor school attendance. Although the aggregate

of [Petitioner's] intellectual skills was found to fall within the Borderline range, the best estimate of [REDACTED] overall intellectual abilities is considered to fall within the Low-Average range. The results of this psycho-educational evaluation are consistent with the results from two prior evaluations. The achievement test data indicate that [Petitioner] evidences deficits in all the basic academic areas. Process tests suggest significant language processing deficits that should be further addressed with a comprehensive bilingual speech and language evaluation. Fine visual-motor integration abilities fell within the low-average range commensurate with [REDACTED] overall cognitive abilities. [Petitioner] has a history of mental illness as well as an inconsistent and limited treatment history. It appears as though [Petitioner] currently exhibits severe symptoms of a psychiatric disturbance, with a pathological level of personality functioning. Overall, [Petitioner's] evaluation results, and [REDACTED] clinical history suggest that [REDACTED] learning difficulty may be attributed to the presence of a severe emotional disturbance, as well as significant language impairment, which are adversely affecting [REDACTED] educational performance and social development.

40. In or about May 2006, Petitioner was referred by [REDACTED] educational advocate, Lilliam Rangel-Diaz, to Ketty Patiño-Gonzalez, Ph.D., a well-credentialed clinical psychologist and professor on the staff at the University of Miami with extensive experience in conducting psychological/psycho-educational evaluations. Ms. Rangel-Diaz asked Dr. Patiño-Gonzalez to conduct an independent assessment of Petitioner's intellectual functioning.

41. To assess Petitioner's cognitive abilities, Dr. Patiño-Gonzalez, on June 19, 2006, administered to [REDACTED] the WJ-III-Cog. Testing took about an hour and a half. While the WJ-III-Cog is an "accepted testing instrument" for measuring intelligence, there are better alternatives available (including, but not limited to, the WAIS-III) to obtain a single score representing an overall measure of intellectual functioning when the subject of the testing has "demonstrated language difficulties."¹¹

42. The WJ-III-Cog consists of 7 basic subtests, each measuring one of the "seven major areas of [intellectual] functioning" identified in the Cattell-Horn-Carroll Theory of Intelligence: Verbal Comprehension, Visual Auditory Learning, Spatial Relations, Sound Blending, Concept Formation, Visual Matching, and Numbers Reversed. Derived from the subtest scores are three cluster scores (Verbal Ability, from the score on the Verbal Comprehension subtest; Thinking Ability (which is what most practitioners think of as "intelligence"), from the scores on the Visual Auditory Learning, Spatial Relations, Sound Blending, and Concept Formation subtests; and Cognitive Efficiency, from the scores on the Visual Matching and Numbers Reversed subtests), as well as a General Intellectual Ability score that is based on a weighted combination of the subtest scores, with the scores on the Verbal Comprehension subtest and the Concept Formation subtest (which is language "intensive as

far as the instructions are concerned") accorded the greatest weight. These various scores are standardized, having a mean of 100 and a standard deviation of 15.

43. Petitioner received the following standard scores on the seven basic subtests of the WJ-III-Cog administered by Dr. Patiño-Gonzalez:

Verbal Comprehension:	66
Visual Auditory Learning:	73
Spatial Relations:	86
Sound Blending:	86
Concept Formation:	71
Visual Matching:	75
Numbers Reversed:	85

Of these seven subtest scores, only one, the Verbal Comprehension subtest score, was two or more standard deviations below the mean.

44. These seven subtest scores produced the following three cluster scores, only one of which, the Verbal Ability cluster score, was two or more standard deviations below the mean:

Verbal Ability: 66
Thinking Ability: 73
Cognitive Efficiency: 75

and a General Intellectual Ability score of 66 (matching [REDACTED] lowest subtest score--the one [REDACTED] received on the Verbal Comprehension subtest--, reflecting how heavily weighted that subtest score was in calculating Petitioner's General Intellectual Ability score).

45. In assessing Petitioner's level of adaptive behavior, Dr. Patiño-Gonzalez relied on information [REDACTED] obtained from Mr. Trejo (who completed a Vineland Adaptive Behavior Scales II (VABS-II) questionnaire for Dr. Patiño-Gonzalez) and from Ms. Rangel-Diaz (who completed an Adaptive Behavior System-Second Edition (ABAS-II) for Dr. Patiño-Gonzalez).¹²

46. The information that Mr. Trejo provided in completing the VABS-II questionnaire (as interpreted by Dr. Patiño-Gonzalez) yielded an Adaptive Behavior Composite standard score of 55 (or three standard deviations below the mean, the mean being 100) and an age equivalent score of 5 years.

47. The information that Ms. Rangel-Diaz provided in completing the ABAS-II questionnaire (as interpreted by Dr. Patiño-Gonzalez) yielded a General Adaptive Composite standard score of 56 (or one point shy of three standard deviations below the mean, the mean being 100), which was in less than the first percentile.

48. The scores obtained from the questionnaires that Mr. Trejo and Ms. Rangel-Diaz completed for Dr. Patiño-Gonzalez

reveal adaptive behavior below that of other students
Petitioner's age and in [REDACTED] socio-cultural group.¹³

49. Following her evaluation of Petitioner, Dr. Patiño-Gonzalez prepared a written report.

50. In her report, Dr. Patiño-Gonzalez stated the following regarding the evaluations of Petitioner that were conducted prior to May 2006:

[Petitioner] was seen by Miami-Dade County Public Schools for the first time in September 1995 (age [REDACTED]). Results of cognitive testing with the Differential Abilities Scale indicated [Petitioner's] nonverbal abilities fell in the Borderline to Low Average range, with "significant deficits" in [REDACTED] verbal abilities (i.e., Borderline receptive language in both English and Spanish). Results of testing indicated that [Petitioner] met public school criteria for the Specific Learning Disability and Language Impaired programs. [REDACTED] started receiving speech therapy.

[Petitioner] was again seen by Miami-Dade Public Schools in July 1998 (age [REDACTED] years, [REDACTED] months) for academic achievement testing. Results of testing with the Woodcock-Johnson Test of Achievement Revised (WJA-R) were as follows: Broad Reading: SS=78 (Reading Comprehension: S=80, 2.6 grade level), Broad Math: SS=69 (2.8 grade level), and Basic Writing Skills: SS=51 (1.3 grade level).

A clinical psychologist, Michael DiTomasso, Ph.D., saw [Petitioner] for a psychoeducational evaluation in February 2000 (age [REDACTED] years, [REDACTED] months [sic]). Results of testing with the Wechsler Intelligence Scale for Children, Third Edition (WISC-III) were in the Mentally Deficient range. However, according to Dr. DiTomasso, [Petitioner] evidenced "fairly good" adaptive abilities and therefore did not meet criteria for mental retardation. Scores were not available. Dr. DiTomasso did not evaluate the effect that [Petitioner's] bilingualism could have had [o]n the results of the evaluation.

In December 2001 (age [REDACTED] years, [REDACTED] months) {Petitioner was evaluated by Dr. Leonard Haber, a clinical psychologist. Results of testing with the WISC-III were as follows: Verbal IQ=46, Performance IQ=63, and Full Scale IQ=52. Dr. Haber did not address adaptive behavior nor [Petitioner's] bilingualism.

In September 2005 (age [REDACTED]) [Petitioner] was evaluated with the Reynolds Intellectual Assessment Scales. [REDACTED] abilities were found to fall in the Borderline range.

51. At the end of her report, Dr. Dr. Patiño-Gonzalez provided a "summary," the first two paragraphs of which read as follows::

[Petitioner] is an [REDACTED]-year-old [REDACTED] young [REDACTED] of [REDACTED] heritage who was finishing ESE [REDACTED] grade at the time of this examination. On the WJC-III [Petitioner] obtained a General Ability Index score of 66, which places [REDACTED] overall estimated cognitive abilities in the Mildly Mentally Retarded range. Results of the Vineland Adaptive Behavior Scales and of the Adaptive Behavior Scales confirm this level of functioning (Composites=55 and 56, respectively). These results are consistent with those of previous evaluations. Additional evidence of this level of functioning comes from psychoeducational testing [REDACTED] received through the public school system in May 2006, when [REDACTED] scored at similar levels (e.g., Broad Reading SS=65; Math Calculations SS=65; Writing Samples SS=65).

These results clearly and unequivocally show [Petitioner] is functioning in the Mildly Mentally Retarded range (Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition [DSM-IV] Code 317). This level of functioning makes it highly unlikely [Petitioner] will be able to function independently if is not

provided with supports, such as supported living and supported employment.

52. Dr. Patiño-Gonzalez then went on in her "summary" to discuss in further detail the "psycho-educational testing [Petitioner] received through the public school system in May 2006" and the conclusions reached by Dr. Fernandez based on that testing:

This level of cognitive functioning has been found before, yet seems to have almost invariably been accompanied by caveats. However, the preponderance of the evidence shows that this is the level at which [Petitioner] is functioning. Let us examine [redacted] last evaluation results, for example, which concluded that [Petitioner] was not functioning in the Mentally Retarded range. Although this last evaluation (May 2006) showed [Petitioner] to have a Full Scale IQ score of 72 (on the high end of the Mentally Retarded range), this IQ was dismissed by the examiners, who stated that [Petitioner's] "best estimate" of functioning was [redacted] Performance IQ of 83. This decision to adopt the highest score as a "best estimate" belies statistical reality, as statistical principles take into account not only the individual scores a person achieves, but rather the aggregate sum of the scores. Let us now examine what happened during the present evaluation to illustrate this point.

During the present evaluation [Petitioner] obtained an overall score of SS=66 in [redacted] cognitive abilities test. This was a statistical composite of seven subtests whose scores ranged from a low of SS=66 to a high of SS=86. Seen like this, it does not make intuitive sense that the composite of these varied scores is 66, as their arithmetic mean is 77. However, when an individual achieves very low (or very high)

scores on several subtests, the aggregate score obtained is not the numerical average of the subtests. Rather the aggregate score takes into account the statistical reality that there is strong evidence that the individual is indeed functioning at a pervasively low (or high) level. Therefore, the overall score is not just the average of the subtests, but statistically becomes much lower (or much higher).

She concluded her discussion of this matter by stating:

Therefore, to dismiss the FSIQ in favor of a particular score is not supported by statistical principles or by common clinical practice.

53. In her "summary," Dr. Patiño-Gonzalez also addressed Petitioner's adaptive behavior (stating that it was sufficiently impaired to meet the DSM criteria required "to qualify for a diagnosis of mental retardation"), as well as [REDACTED] "emotional condition" (which she described as "very worrisome").

54. An IEP team meeting was held on August 24, 2006, to determine Petitioner's educational placement and program.

55. At the meeting, a disagreement arose between Petitioner (acting through [REDACTED] representatives) and the School Board (acting through its representatives) over Petitioner's eligibility to be classified as an "educable mentally handicapped" student, with Petitioner taking the position that [REDACTED] was eligible for such classification and the School Board taking the position that [REDACTED] was not.

56. The parties, having been unable to resolve this dispute, have asked the undersigned to do so.

CONCLUSIONS OF LAW

57. District school boards are required by the Florida K-20 Education Code¹⁴ 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. The imposition of this requirement by the Florida Legislature on district school boards enables the State of Florida to be eligible to receive federal funding under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 et. seq., as amended (IDEA),¹⁵ which mandates, among other things, that participating states ensure, with limited exceptions, that "[a] free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school." 20 U.S.C. § 1412(a)(1); cf. Agency for Health Care Administration v. Estabrook, 711 So. 2d 161, 163 (Fla. 4th DCA 1998)("[A] state that has elected to participate [in the Medicaid program], like Florida, must comply with the federal Medicaid statutes and regulations."); Public Health Trust of Dade County, Florida v. Dade County School Board, 693 So. 2d 562, 564 (Fla. 3d DCA 1996)("The State of Florida elected to participate in the Medicaid program, Title XIX of the Social Security Act, 42

U.S.C. § 1396 et seq. (1994), which provides federal funds to states for the purpose of providing medical assistance to needy persons. However, once the State of Florida elected to participate in the Medicaid program, its medical assistance plan must comply with the federal Medicaid statutes and regulations"; held that where a Florida administrative rule is in direct conflict with federal Medicaid statutes and regulations, the federal Medicaid law governs); and State of Florida v. Mathews, 526 F.2d 319, 326 (5th Cir. 1976)("Once a state chooses to participate in a federally funded program, it must comply with federal standards.").

58. "Exceptional students," as that term is used in the Florida K-20 Education Code, are students who have been "been determined eligible for a special program in accordance with rules of the State Board of Education. The term includes . . . students with disabilities who are mentally handicapped, speech and language impaired, . . . [and] specific learning disabled" § 1003.01(3)(a), Fla. Stat.

59. Florida Administrative Code Rule 6A-6.03011 describes those students who qualify for special education and related services because they are "mentally handicapped."

60. A "mental handicap," as that term is used in Florida Administrative Code Rule 6A-6.03011 is defined in Subsection (1) of the rule as "significantly sub-average general intellectual

functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period."

61. There are three categories of "mentally handicapped" students recognized under Florida Administrative Code Rule 6A-6.03011: "educable mentally handicapped" students, "trainable mentally handicapped" students, and "profoundly mentally handicapped" students.

63. An "educable mentally handicapped student" is described in Subsection (1)(a) of Florida Administrative Code Rule 6A-6.03011 as follows:

An educable mentally handicapped student is a student who is mildly impaired in intellectual and adaptive behavior and whose development reflects a reduced rate of learning. The measured intelligence of an educable mentally handicapped student generally falls between two (2) and three (3) standard deviations below the mean and the assessed adaptive behavior falls below that of other students of the same age and socio-cultural group.

64. Pursuant to Subsection (2) of Florida Administrative Code Rule 6A-6.03011,

[a] student is eligible for a special program for the mentally handicapped if there is evidence that the student meets all of the following criteria:

(a) The measured level of general intellectual functioning is two (2) or more standard deviations below the mean as prescribed in Rule 6A-6.03011(1)(a)-(c), FAC. The standard error of measurement may be considered in individual cases. The profile of intellectual functioning shows consistent sub-average performance in a majority of areas evaluated;

(b) The assessed level of adaptive behavior is below that of other students of the same age and socio-cultural group; and

(c) The demonstrated level of performance in academic, preacademic, or developmental achievement is sub-average.

65. Subsection (4) of Florida Administrative Code Rule 6A-6.03011 sets forth the following "procedures for student evaluation" to determine special education (ESE) eligibility under the rule:

(a) The minimum evaluation for determining eligibility shall include all of the following:

1. A standardized individual test of intellectual functioning individually administered by a professional person qualified in accordance with Rule 6A-6.071(6)(a), FAC;^[16]
2. A standardized assessment of adaptive behavior;
3. An individually administered standardized test of academic or preacademic achievement. A standardized developmental scale shall be used when a student's level of functioning cannot be measured by an academic or preacademic test; and
4. A social-developmental history which has been compiled directly from the parent, guardian, or primary caregiver.

66. The provisions of Subsection (4) of Florida Administrative Code Rule 6A-6.03011 are in addition to the following procedures governing "student evaluation" set forth in

Subsection (4) of Florida Administrative Code Rule 6A-6.0331 that must be followed in determining eligibility for ESE services:

(a) The school board shall be 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 shall include, but not be 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 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. Notwithstanding the provisions of subparagraph (6)(a)2., of Rule 6A-6.03016, F.A.C., and subparagraph (4)(a)1., of Rule 6A-6.03011, F.A.C., tests of intellectual functioning shall be administered and interpreted by a professional person qualified in accordance with Rule 6A-4.0311, F.A.C.,^[17] or licensed under Chapter 490, Florida Statutes.

2. Notwithstanding the provisions of subparagraph 6A-6.03011(4)(a)2., F.A.C., the standardized assessment of adaptive behavior of students suspected of having a mental handicap, shall include parental input regarding their child's adaptive behavior.

* * *

(e) Tests and other evaluation materials used to assess a student shall be selected and administered so as not to be discriminatory on a racial or cultural basis

and shall be provided and administered in a student's native language or other mode of communication, unless it is clearly not feasible to do so.

(f) Materials and procedures used to assess a student with limited English proficiency shall be selected and administered to ensure they measure the extent to which the student has an exceptionality and needs specially designed instruction and related services rather than measuring the student's English language skills.

(g) Any standardized tests that are given shall have been validated for the specific purpose for which they are used and shall be administered by trained and knowledgeable personnel in accordance with any instructions provided by the producer of the tests.

(h) If an assessment tool is not conducted under standard conditions, a description of the extent to which it varied from standard conditions shall be included in the evaluation report.

(i) Tests and other evaluation materials shall include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.

(j) Tests shall be selected and administered so as to best ensure that if a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the student's sensory, manual, or speaking skills unless those are the factors the test purports to measure.

(k) No single assessment shall be used as the sole criterion for determining whether a student is a student with a disability

(l) The school district shall use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

(m) The school district shall use assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the student.

(n) In evaluating a student suspected of having a disability:

1. A variety of assessment tools and strategies shall be used to gather relevant

functional and developmental information about the student including information:

- a. Provided by the parents;
- b. Related to enabling the student to be involved in and progress in the general education curriculum;
- c. That may assist in determining whether the student is a student with a disability; and
- d. That may assist in the writing of the individual educational plan or family support plan.

2. The student shall be assessed in all areas of the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

3. The evaluation shall be sufficiently comprehensive to identify all of the student's specially designed instruction and related services needs, whether or not commonly linked to the disability category in which the student is identified.

67. To meet its obligation under Sections 1001.42(4)(1) and 1003.57, Florida Statutes, to provide an "appropriate" public education to a child found to meet ESE eligibility requirements, a district school board must provide "personalized instruction with 'sufficient supportive services to permit the child to benefit from the instruction.'" Hendry County School Board v. Kujawski, 498 So. 2d 566, 568 (Fla. 2d DCA 1986), quoting from, Board of Education of the Hendrick Hudson Central

School District v. Rowley, 458 U.S. 176, 188 (1982). The instruction and services provided must be "'reasonably calculated to enable the child to receive educational benefits,'" taking into account the child's "unique needs." School Board of Martin County v. A. S., 727 So. 2d 1071, 1073 (Fla. 4th DCA 1999), quoting from, Rowley, 458 U.S. at 207.

68. If a district school board is providing an "appropriate" public education to an "exceptional student," it matters not whether the district school board has used an apt label to describe the student's disability. See Heather S. by Kathy S. v. State of Wisconsin, 125 F.3d 1045, 1045, 1055 (7th Cir. 1997)("Whether Heather was described as cognitively disabled, other health impaired, or learning disabled is all beside the point. The IDEA concerns itself not with labels, but with whether a student is receiving a free and appropriate education. A disabled child's individual education plan must be tailored to the unique needs of that particular child. In Heather's case, the school is dealing with a child with several disabilities, the combination of which in Heather make her condition unique from that of other disabled students. The IDEA charges the school with developing an appropriate education, not with coming up with a proper label with which to describe Heather's multiple disabilities.")(citations omitted); School District of Wisconsin Dells v. Littlegeorge, 184 F. Supp. 2d

860, 876 (D. Wis. 2001)("Not only does Z.S. meet all but one of the criteria for emotional disturbance (█████ is able to learn), making him eligible for services, the correctness of █████ label is essentially irrelevant under IDEA."); J. W. ex rel. K. W. v. Contoocook Valley School District, 154 F. Supp.2d 217, 228 (D. N.H. 2001)("The IDEA does not 'require[] that children be classified by their disability so long as each child who has a disability listed in section 1401 of this title and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under [the IDEA].' . . . So, the real question is not whether █████ is eligible for SED, OHI, and/or MD codes, but whether █████ emotional and attention problems cause learning difficulties, requiring services not being delivered by or not available in ConVal, thus constituting unique needs *not* addressed by the IEPs."); Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. 46,540, 46,737 (August 14, 2006)("The Act does not require children to be identified with a particular disability category for purposes of the delivery of special education and related services. In other words, while the Act requires that the Department collect aggregate data on children's disabilities, it does not require that particular children be labeled with particular disabilities for purposes of

service delivery, since a child's entitlement under the Act is to FAPE and not to a particular disability label."); and 34 C.F.R. § 300.111(d) ("Nothing in the Act requires that children be classified by their disability so long as each child who has a disability that is listed in § 300.8 and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under Part B of the Act.").

69. Students of the "age of majority" (█ years of age in Florida) to whom "parental rights" have been transferred pursuant to 34 C.F.R. § 300.520¹⁸ and Subsection (10) of Florida Administrative Code Rule 6A-6.03311¹⁹ having "complaints with respect to any matter relating to their "identification, evaluation, or educational placement," or the "provision of a free appropriate public education to [them]" under the IDEA must "have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency." 20 U.S.C. § 1415(f).

70. In Florida, by statute, a DOAH administrative law judge must conduct the "impartial due process hearing" to which a complaining student is entitled under the IDEA. § 1003.57(5), Fla. Stat.

71. "The burden of proof in [a due process hearing] is properly placed upon the party seeking relief." Schaffer v. Weast, 126 S. Ct. 528, 537 (2005); see also West Platte R-II School District v. Wilson, 439 F.3d 782, 784 (8th Cir. 2006)("[T]he burden of proof in an IDEA case lies with the party initiating the challenge to the Individualized Education Plan (IEP).").

72. In the instant case, the parties agree that Petitioner is an "exceptional student," as that term is used in the Florida K-20 Education Code, entitled to receive special education and related services from the School Board pursuant Sections 1001.42(4)(1) and 1003.57, Florida Statutes. The sole issue litigated at the "impartial due process hearing" (that was held at Petitioner's request) was whether Petitioner should receive these services under the classification of an "educable mentally handicapped" student, as described in Florida Administrative Code Rule 6A-6.03011. As the party seeking relief, Petitioner bore the burden of proof on this issue at the due process hearing.

73. To meet [REDACTED] burden of proving that [REDACTED] should be classified as a "mentally handicapped" student, Petitioner had to show at the hearing, in accordance with the requirements of Florida Administrative Code Rule 6A-6.03011, among other things, that [REDACTED] present "level of general intellectual functioning is

two (2) or more standard deviations below the mean," as accurately measured by a "standardized individual test of intellectual functioning individually administered by a [qualified] person."

74. Evidence was presented at the hearing concerning two "standardized individual test[s] of intellectual functioning" that were recently administered to Petitioner by "[qualified] persons": the WAIS-III administered by Dr. Fernandez (in May 2006) and the WJ-III-Cog administered by Dr. Patiño-Gonzalez (the following month). The former test produced a "measured level of [overall] general intellectual functioning" (in the form of a FSIQ of 72) that was less than two standard deviations (30 points) below the mean (of 100). The latter test produced a "measured level of [overall] general intellectual functioning" (in the form of a General Intellectual Ability score of 66) that was more than two standard deviations (30 points) below the mean (of 100). Having carefully considered the matter, and taken into consideration Petitioner's bilingual background and [REDACTED] "demonstrated language difficulties," the undersigned concludes that the General Intellectual Ability score of 66 that Petitioner received on the WJ-III-Cog administered by Dr. Patiño-Gonzalez under-represents (and therefore is an invalid measure of) [REDACTED] actual "level of general intellectual functioning" because it does not adequately reflect [REDACTED] non-

verbal intelligence; and the undersigned further concludes that Petitioner's FSIQ of 72 on the WAIS-III administered by Dr. Fernandez represents a more accurate measure of [REDACTED] actual "level of general intellectual functioning" inasmuch as it better accounts for [REDACTED] non-verbal cognitive skills. Although Florida Administrative Code Rule 6A-6.03011 provides that the "standard error of measurement may be considered in individual cases," there is no reason in the instant case to apply the standard error of measurement (of plus or minus three points) to lower this FSIQ score. If anything, in view of Petitioner's bilingualism and [REDACTED] "demonstrated language difficulties," the standard error of measurement should be applied to raise, not lower, [REDACTED] FSIQ.²⁰

75. Having failed to prove that [REDACTED] present "level of general intellectual functioning is two (2) or more standard deviations below the mean," as required by Subsection (2)(a) of Florida Administrative Code Rule 6A-6.03011, Petitioner is not entitled to be classified as a "mentally handicapped" student of any kind, including an "educable mentally handicapped" student.²¹

76. This holding, it should be pointed out, is of little or no consequence from an educational perspective. Whether or not Petitioner carries the label of "mentally handicapped," [REDACTED] nonetheless has a right, as an "exceptional student," as that term is used in the Florida K-20 Education Code, to receive from

the School Board special education and related services designed to meet ■ "unique needs," including those, related to language, revealed by Dr. Fernandez's and Dr. Patiño-Gonzalez's recent testing.

77. In view of the foregoing, the relief requested by Petitioner--classification as an "educable mentally handicapped" student, as described in Florida Administrative Code Rule 6A-6.03011--is DENIED.

DONE AND ORDERED this 16th day of November, 2006, in Tallahassee, Leon County, Florida.

S

STUART M. LERNER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of November, 2006.

ENDNOTES

¹ All references to Florida Statutes in this Final Order are to Florida Statutes (2006).

² Pursuant to 34 C.F.R. § 300.515(a), the original final order deadline, prior to this extension, was 45 days after the expiration of the 30-day "resolution period," or July 29, 2006.

³ They did so after, on the record at hearing, Petitioner had advised that [REDACTED] was not seeking an "Other Health Impaired" classification, and the School Board had conceded that it had denied Petitioner a "free appropriate public education in the least restrictive environment" during the 2005-2006 school year and, as a result, had an obligation to provide Petitioner with compensatory educational services, and it had further stated that it was willing to consider the appropriateness of any specific compensatory educational service Petitioner might request. (The School Board had, on an earlier date, determined to classify Petitioner as "Language Impaired.")

⁴ Both parties expressed a desire to be able to prepare their proposed final orders having the benefit of the hearing transcript.

⁵ This extension of the final order deadline turned out to be 46 days in length.

⁶ The undersigned has accepted these factual stipulations. 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. Indeed, on appeal neither party will be heard to suggest that the facts were other than as stipulated or that any material facts w[ere] omitted."); 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.").

⁷ Petitioner, on occasion, "exhibit[ed] somewhat bizarre behavior."

⁸ The Extended Oral Language Cluster of the WJ-III-Ach was also used to assess Petitioner's language processing abilities.

⁹ The "DSM criteria for mental retardation," it should be noted, are not identical to criteria necessary to find a student

"mentally handicapped" under Florida Administrative Code Rule 6A-6.03011.

¹⁰ The testing was conducted by Robert Todono, a School Board school psychologist.

¹¹ Dr. Patiño-Gonzalez first started to administer the WAIS-III to Petitioner. When, on the first subtest, Picture Completion, Petitioner began "answering so quickly," she "went back and looked at the [School Board] evaluation" administered by Dr. Fernandez and "realized that [Petitioner] had just taken [the WAIS-III]." Justifiably concerned about a "practice effect" skewing the results of the WAIS-III she was administering to Petitioner, she switched to another test, choosing the WJ-III-Cog.

¹² Dr. Patiño-Gonzalez, in enlisting the assistance of Ms. Rangel-Diaz, did not ask her "how many times she had met [Petitioner]," nor does the record evidence reveal the answer to this question.

¹³ Dr. Patiño-Gonzalez so testified (see page 68 of the Transcript of the due process hearing), and the undersigned has credited her testimony.

¹⁴ Chapters 1000 through 1013, Florida Statutes, are known as the "Florida K-20 Education Code." § 1001.01(1), Fla. Stat.

¹⁵ "The IDEA was recently amended by the Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (2004). The amendment did not take effect until July 1, 2005" M. T. V. v. Dekalb County School District, 446 F.3d 1153, 1157 n.2 (11th Cir. 2006).

¹⁶ Florida Administrative Code Rule 6A-6.071 has been repealed.

¹⁷ Florida Administrative Code Rule 6A-4.0311 prescribes the "[s]pecialization [r]equirements for [c]ertification [as a] [s]chool [p]sychologist."

¹⁸ 34 C.F.R. § 300.520 provides as follows:

(a) General. A State may provide that, when a child with a disability reaches the age of majority under State law that applies to all children (except for a child with a

disability who has been determined to be incompetent under State law)--

(1)(i) The public agency must provide any notice required by this part to both the child and the parents; and

(ii) All rights accorded to parents under Part B of the Act transfer to the child;

(2) All rights accorded to parents under Part B of the Act transfer to children who are incarcerated in an adult or juvenile, State or local correctional institution; and

(3) Whenever a State provides for the transfer of rights under this part pursuant to paragraph (a)(1) or (a)(2) of this section, the agency must notify the child and the parents of the transfer of rights.

(b) Special rule. A State must establish procedures for appointing the parent of a child with a disability, or, if the parent is not available, another appropriate individual, to represent the educational interests of the child throughout the period of the child's eligibility under Part B of the Act if, under State law, a child who has reached the age of majority, but has not been determined to be incompetent, can be determined not to have the ability to provide informed consent with respect to the child's educational program.

¹⁹ Subsection (10) of Florida Administrative Code Rule 6A-6.03311 provides as follows:

Transfer of Rights of Students with Disabilities at the Age of Majority. The purpose of this section is to establish procedures for school districts to inform parents and students of the long standing provisions of state law regarding the rights and responsibilities that transfer to an individual upon attaining the age of

eighteen (18). The right to notice under this rule is retained as a shared right of the parent and the student except as provided in paragraph (10)(d) of this rule.

(a) At age eighteen (18), all other rights afforded to parents under Part B of the Individuals with Disabilities Education Act transfer to the student, unless the student has been determined to be incompetent under state law as established by Chapter 744, Florida Statutes, or a guardian advocate has been appointed to make decisions affecting educational services as provided by Section 393.12, Florida Statutes.

(b) The school district shall notify the student and the parent of the transfer of rights, when the student attains the age of eighteen (18).

(c) The school district shall provide all notices required by Rules 6A-6.03311 and 6A-6.03028, F.A.C., to both the student who has attained age eighteen (18) and the student's parent.

(d) For students who have attained age eighteen (18) and are incarcerated in a juvenile justice facility or local correctional facility, all rights accorded to parents under this rule transfer to the student, including the right to notice as described in paragraph (10)(a) of this rule.

(e) If a student with a disability has reached the age of majority and does not have the ability to provide informed consent with respect to his or her educational program, procedures established by statute may be used by the parent to:

1. Have their child declared incompetent and the appropriate guardianship established in accordance with the provisions of Chapter 744, Florida Statutes;

2. Be appointed to represent the educational interests of their child throughout the child's eligibility for a specially designed instruction and related services consistent with Rules 6A-6.03011 through 6A-6.03018, and Rules 6A-6.03020 through 6A-6.03023, F.A.C., in accordance with Section 393.12, Florida Statutes; or

3. Have another appropriate individual appointed to represent the educational interests of their child throughout the child's eligibility for specially designed instruction and related services consistent with Rules 6A-6.03011 through 6A-6.03018, and Rules 6A-6.03020-.03025, F.A.C., if the parent is not available in accordance with Section 393.12, Florida Statutes.

²⁰ It was these "demonstrated language difficulties" that led Dr. Fernandez to opine that Petitioner's "performance IQ score [of 83] was a better indicator, or better estimate" of [redacted] [cognitive] abilities" than his FSIQ score of 72.

²¹ Webb v. Florida Department of Children & Family Services, No. 4D05-1409, 2006 Fla. App. LEXIS 17822 (Fla. 4th DCA October 26, 2006), a case relied on by Petitioner, is distinguishable from the instant case inasmuch it does not deal with the interpretation and application of the language in Florida Administrative Code Rule 6A-6.03011. Moreover, in Webb, the IQ scores that fell two or more standard deviations below the mean were not found by the hearing officer to be invalid measures. Id. at *13.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless an adversely affected party:

- a) brings a civil action within 30 days in the appropriate federal district court pursuant to Section 1415(i)(2)(A) of the IDEA; or
- b) brings a civil action within 30 days in the appropriate state circuit court pursuant to Section 1415(i)(2)(A) of the IDEA and Section 1003.57(5), Florida Statutes; or
- c) files an appeal within 30 days in the appropriate state district court of appeal pursuant to Sections 1003.57(5) and 120.68, Florida Statutes.