Broward County School District
No. 04-1681E
Initiated by: Parent
Hearing Officer: Stuart M. Lerner
Date of Final Order: October 21, 2004

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

[redacted]	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 04-1681E
	)	
BROWARD 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, on August 25, 26, and 27, 2004, in Fort Lauderdale, Florida, before Stuart M. Lerner, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: [redacted] (Petitioner's mother)[1]
(address of record)

For Respondent: Edward J. Marko, Esquire
Broward County School Board
K. C. Wright Administrative Building
600 Southeast Third Avenue, 11th Floor
Fort Lauderdale, Florida 33301

STATEMENT OF THE ISSUES

1. Whether the Broward County School Board committed the violations alleged in the due process hearing request filed by [redacted] mother on behalf of [redacted] as ultimately amended at the due process hearing.

2. If so, what remedial action, if any, should be ordered.

PRELIMINARY STATEMENT

By letter dated May 3, 2004, [redacted] requested a due process hearing on behalf of [redacted], [redacted] who was then a [redacted] grade student at [redacted], a public school in Broward County, Florida. [redacted] letter read as follows:

> On April 6, 2004 I forwarded you a letter requesting any all information inclusive of the raw data utilized towards my [redacted] psychosocial assessment and evaluation. To this day I have not received such. I am therefore making a formal request for a due process proceeding during which time I intend to challenge both your refusal to release records I have requested, as well as challenge your findings and resultant IEP.
>
> If I do not hear from you in the next ten days please be advised that I intend to retain the law firm of Mrs. Roberta Stanley, Suite 1900, New River Center, 200 East Las Olas Blvd., Fort Lauderdale 33301.

On May 10, 2004, the Broward County School Board (School Board) referred the matter to the Division of Administrative Hearings (Division) for the assignment of a Division administrative law judge to conduct the requested due process hearing.

The undersigned was subsequently assigned the case. On May 14, 2004, he issued a Notice formally setting the due process

hearing in this case for May 24, 2004, and (if necessary) June 7, 2004.

On May 20, 2004, [redacted] filed a motion requesting that the due process hearing be continued. A hearing on the motion was held by telephone conference call that same day. During the motion hearing, the School Board indicated that it did not oppose the motion. In addition, both parties affirmatively waived the requirement of 34 C.F.R. § 300.511 and Florida Administrative Code Rule 6A-6.03311 that a final order be issued within 45 days of the due process hearing request. By Order issued May 20, 2004, following the motion hearing, [redacted] motion for continuance was granted and the parties were directed "to confer and advise the undersigned in writing no later than June 1, 2004, as to whether a due process hearing in this case [was] still necessary and, if so, the estimated length of the hearing and those dates on which the parties and their witnesses w[ould] be available for hearing."

On June 1, 2004, [redacted] filed a motion requesting that the parties be given additional time to file the written advisement required by the undersigned's May 20, 2004, Order. By Order issued June 2, 2004, the motion was granted and the parties were given until June 14, 2004, to file this written advisement.

On June 14, 2004, the School Board, on behalf of both parties, requested that this matter be placed in abeyance for 15 days. By Order issued that same day, the request was granted and the parties were directed "to confer and advise the

undersigned in writing no later than June 29, 2004, as to status of this matter and as to length of time required for the final hearing in this cause and several mutually-agreeable dates for scheduling the final hearing should one be necessary."

On June 27, 2004, [redacted] filed a motion requesting a "continuance" of the abeyance. By Order issued June 29, 2004, the motion was granted and the parties were directed "to confer and advise the undersigned in writing no later than July 21, 2004, as to status of this matter and as to length of time required for the final hearing in this cause and several mutually-agreeable dates for scheduling the final hearing should one be necessary."

On July 15, 2004, the School Board, on behalf of both parties, requested that this matter continue to be held in abeyance. By Order issued July 16, 2004, the motion was granted and the parties were directed "to confer and advise the undersigned in writing no later than July 30, 2004, as to status of this matter and as to length of time required for the final hearing in this cause and several mutually-agreeable dates for scheduling the final hearing should one be necessary."

On July 29, 2004, the undersigned received a document in which [redacted] indicated that [redacted] "wish[ed] to have the [instant] case heard as expeditiously as the Administrative Law Judge and both parties c[ould] schedule it."

Following a telephone conference call held August 2, 2004, during which the undersigned obtained input from parties

regarding the dates of their availability for hearing, the undersigned, on August 3, 2004, issued a Notice scheduling the due process hearing in this case for August 25 through 27, 2004.

On August 23, 2004, less than 48 hours before the due process hearing in this case was scheduled to commence, [redacted] filed a motion requesting that the undersigned: "[p]ostpone the Due Process Hearing date"; issue an order concerning Respondent's production of certain documents; allow Petitioner "[t]o amend the Grounds for the Due Process Action in a fashion and manner safeguarding Petitioner's right to receive and avail [redacted] of Discovery"; and to provide "that such amendment be without prejudice to pursue other relief. After hearing oral argument on the motion by telephone conference call the morning of August 24, 2004, the undersigned issued an Order denying the motion. See Cyr v. Cyr, 815 So. 2d 731, 732 (Fla. 5th DCA 2002)("Nor was it an abuse of discretion for the court to deny [the appellant's] last-minute motion for continuance."); S.T. v. School Board of Seminole County, 783 So. 2d 1231, 1233 (Fla. 5th DCA 2001)("The authority of an administrative law judge to conduct a due process hearing in ESE cases is conferred solely by Section 231.23(4)(m)5 [the predecessor of current Sections 1001.42(4)(l) and 1003.57, Florida Statutes] and Rule 6A-6.03311(5) of the Florida Administrative Code. Neither of these authorities, however, discuss, contemplate, or otherwise support the allowance of discovery in this particular

circumstance. . . .[2] Unless created by the constitution, an administrative agency has no common law powers, and has only such powers as the legislature chooses to confer upon it by statute. . . . Here, the legislature chose not to confer upon the administrative law judge the power to allow discovery in this particular variety of hearing. The administrative law judge, therefore, erred in authorizing this practice, and the lower court erred in its sanctioning of it."); and Allett v. Hill, 422 So. 2d 1047, 1049 (Fla. 4th DCA 1982)("The lower court erred in permitting plaintiffs to amend their complaint on the eve of trial to insert the breach of contract issue.").

As noted above, the due process hearing in this case was held on August 25 through 27, 2004.[3]

At the outset of the hearing, [redacted] renewed the motion [redacted] had filed on August 23, 2004. The renewed motion was denied.

At hearing, [redacted] requested, and was granted (without objection by the School Board), permission to amend [redacted] due process hearing request to allege the following violations (and only the following violations): the School Board failed to produce documents within five business days before the hearing, as required by the Individuals with Disabilities Education Act (IDEA); the School Board, in violation of the IDEA, "failed to provide [[redacted]] with due notice of [its] intent to test and evaluate [redacted] on 11-12-03"; the School Board violated the IDEA by failing, "upon the commencement of [its] intent to test and

evaluate [redacted]" to provide [redacted] with "a written document or documents of [redacted] rights" under the IDEA; and the School Board has "neither allowed nor formally responded to [redacted] request for an independent evaluation dated 3-2-04 and May 5, 2004," and has thereby violated the IDEA.

A total of eight witnesses testified: Audrey Wong; Grace McDonald; Michael Kasdaglis; [redacted] Jennette Rutland; LuAnn Licari; Lester Baker; and [redacted] father. In addition, a total of 8 exhibits (Petitioner's Exhibits 1 through 6, and Respondent Exhibits 1 and 2) were offered and received into evidence without objection.

At the conclusion of the evidentiary portion of the due process hearing on August 27, 2004, the undersigned established and announced on the record a deadline (5:00 p.m. on October 5, 2004) for the filing of proposed final orders. On August 30, 2004, the undersigned issued a written Notice advising of the October 5, 2004, 5:00 p.m. deadline. Copies of the Notice were mailed to [redacted] and the School Board.

A transcript of the due process hearing, consisting of three volumes, was filed with the Division. Volumes 1 and 2 of the transcript were filed on September 17, 2004. Volume 3 of the transcript was filed on September 20, 2004.

The same day that the first two volumes of the transcript were filed, the School Board filed a motion requesting that the deadline for filing final orders be extended to October 11,

2004. By Order issued September 20, 2004, the motion was granted.

On October 11, 2004, both parties timely filed their Proposed Final Orders.

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:

1. [redacted] was born on [redacted].

2. [redacted] is [redacted] natural mother.

3. [redacted] is [redacted] natural father.

4. [redacted] have one other child, [redacted] older brother, [redacted]

5. [redacted] have been divorced for several years.

6. They do not get along and are not on speaking terms.

7. The divorce decree awarded [redacted] joint custody of [redacted] designated as the primary custodian (having custody all weekdays except Wednesday evenings and alternating weekends). It further provided that [redacted] would have "shared responsibility as it relates to [redacted] education."

8. [redacted] acted as [redacted] primary custodian following the divorce until October 2003, when, at the suggestion of Michael Kasdaglis, a licensed clinical social worker and marriage and family therapist to whom [redacted] had taken [redacted] voluntarily ceded primary custody of [redacted] At the time, [redacted] was "having tremendous difficulties academically, socially, [and] behaviorally." Mr. Kasdaglis suggested that [redacted] "return [redacted]

to [redacted], fully cognizant of the fact that [redacted] would begin to fail even more miserably. What [Mr. Kasdaglis] had in mind [was] to establish a paper trail so that, at the end of [a] short period of time, [redacted] would get [redacted] back and make appropriate provisions for what [redacted] needed in terms of care, doctors and medication without the [redacted] interfering."

9. At the time of [redacted] assuming the role of [redacted] primary custodian, [redacted] lived (as [redacted] still does) in [redacted], Florida (in Palm Beach County), outside the jurisdictional boundaries of the School Board.

10. At all times material to the instant case, [redacted] has been a resident of [redacted], Florida (in Broward County).

11. [redacted] regained primary custody of [redacted] from [redacted] approximately two weeks before the commencement of the due process hearing in this case.

12. [redacted] began the 2003-2004 school year at [redacted] ([redacted]), a Broward County public school operated by the School Board. [redacted] remained at the school throughout the school year even though [redacted] lived, "primarily," with [redacted] [redacted] in [redacted] (outside of Broward County) from October on. Currently, [redacted] lives, "primarily," with [redacted] [redacted] and attends [redacted], another Broward County public school operated by the School Board.

13. On September 8, 2003, shortly after the beginning of the 2003-2004 school year, [redacted] met with [redacted] teachers at [redacted] and [redacted]'s guidance counselor, Martha Biller, to

discuss the problems that [redacted] was having in school and how to deal with them. [redacted] stated at the meeting that [redacted] was seeing Mr. Kasdaglis at the Family Crisis Intervention Center and that, according to Mr. Kasdaglis, [redacted] did not have ADD, but was not processing." She further advised that she "knew that [redacted] was a handful" and that, if the staff at [redacted] needed her assistance, "they could call [her] anytime."

14. Several days after [redacted] went to live with [redacted], [redacted] sent the following letter, dated October 28, 2003, to the principal of [redacted], [redacted]:

> As of October 23, 2003, my [redacted] has moved in with [redacted], [redacted] residing at [redacted] Boynton Beach, Fl. . . .
>
> Please see that I am copied on all school notices, report cards, conferences, behavior notices, teacher notes, etc.

15. [redacted] made this request of Principal Rashid because she "could not rely on [redacted] to keep [her] informed" of what was happening to [redacted] even though [redacted] had a duty to share such information.

16. The day after [redacted] delivered the letter, [redacted] telephoned Principal Rashid to make sure that Principal Rashid understood that [redacted] "needed to be kept in the loop."

17. The letter was ultimately passed on to Luann Licari, the ESE (exceptional student education) specialist at [redacted].

18. As the school's ESE specialist, Ms. Licari provides assistance to "all the personnel of the school," including the principal, in ESE-related matters. Among other things, she

coordinates and schedules meetings and conferences and makes arrangements to provide parents with "documentation" to meet notice and disclosure requirements.

19. [redacted] has an Intervention Assistance Team (IAT) that devises interventions for students having "some difficulty" in school and, after the interventions have been "put into place" and tried," it "meets back again to discuss if further evaluation is [warranted]."

20. In early November 2003, [redacted] was referred to the IAT. The "concern[s]" that prompted the referral were described as follows on an Intervention Assistance Team Referral Form (which was dated November 6, 2003):

> [redacted] is a CONSTANT disruption in class. [redacted] is inappropriate at ALL times. [redacted] does not complete classwork or homework. [redacted] is always poking and bothering other students.

21. On November 7, 2003, Ms. Biller filled out a form referring [redacted] for "[s]chool [s]ocial [w]ork [s]ervices" and giving the following "reason(s) for [the] referral":

> Was seeing Michael Kasdaglis at Family Crisis Intervention Center when [redacted] was living with [redacted]. Now living with [redacted]. No counseling, not on medication. Needs to be involved with a counselor. [redacted] needs to follow up every night. Needs resources. . . .

22. An IAT meeting to discuss [redacted] situation was scheduled for November 12, 2003. Ms. Biller prepared an Intervention Assistance Team Meting/Parent Conference Notice, dated November 10, 2003, which was addressed to the "Parent/Guardian of [redacted]. It read as follows:

> Your child's teacher has requested additional consultation and support regarding your child. Our Intervention Assistance Team is scheduled to meet with his/her teacher as stated below. You are invited to attend this conference.
>
> Date: Wed., Nov. 12, 2003
> Time: 11:30
> Place: ESE Conference Room
>
> We look forward to having you participate in this meeting. Please call Mrs. Biller at . . . to confirm whether you are able to attend.

A handwritten notation on the Intervention Assistance Team Meting/Parent Conference Notice indicates that [redacted] telephone number was called on November 10, 2003, and a message was left.

23. [redacted] did not receive notice of the scheduled November 12, 2003, IAT meeting.

24. The IAT meeting was held, as scheduled, on November 12, 2003. Neither [redacted] attended the meeting. Discussed at the meeting, among other things, was whether [redacted] should undergo psychosocial and psycho-educational evaluations. The IAT ultimately recommended that these evaluations be conducted.

25. On November 14, 2003, [redacted] had a conference with [redacted] teachers and Ms. Biller. The following written "action plan" was developed at the conference:

> 1. Parents could seek court mediation, case manager. School social worker (Ms. Adler) will follow up.
>
> 2. Check in system for AST.

3. Continue study habits/motivation group.

4. Psycho ed. evaluation & psycho-social evaluation.

5. Parent to check agenda nightly and have daily consequences.

26. On November 25, 2003, [redacted] homeroom/math teacher, Mr. Chajulal, had a telephone conference with [redacted] According to the School Board's record of this telephone conference, the following "plan" was discussed during the conference:

1. Be sure rep. card copy is mailed.

2. Mail interim Dec. 8.

3. Psycho-ed eval.- ok

4. Ms. Adler will contact her.

27. On December 1, 2003, Ms. Licari filled out a form referring [redacted] for testing to evaluate [redacted] eligibility for ESE "speech and language" services.

28. On December 16, 2003, Ms. Licari mailed to [redacted] and [redacted] for them to fill out, sign, date, and return, a Parent Consent/Notice: Screening/Formal Individual Evaluation (Consent to Evaluate Form), which included the following:

* * *

In order to develop an appropriate educational program for your child additional information is needed. An individual evaluation is recommended. The evaluation is proposed based on your child's educational performance and review of any previous evaluation information, as well as observations and conferences. Your written permission is required to proceed with the screening/evaluation. The evaluator(s) will

select assessment areas based on your child's needs.

* * *

After the evaluation is completed a report will be written based upon the results. As soon as this is completed you will be contacted to review the results.

Please check the appropriate space provided, sign and date. Keep one copy for your records and return the other copies to the school. Your signature also indicates that you have read and understand your rights.

__ YES. I GIVE PERMISSION FOR THE SCREENING/EVALUATION

__ NO. I REQUEST A CONFERENCE TO DISCUSS THE PROPOSED EVALUATION BEFORE I GRANT PERMISSION.

__ No. I DO NOT CONSENT TO SCREENING EVALUATION.

_____ Date _____
Signature of Parent(s)

_____ Date _____
Signature of Parent(s)

* * *

Parents of a child with a disability have protections under the Procedural Safeguards of the Individuals with Disabilities Education Act (IDEA). (A copy of this information is attached.) For further clarification call:

School Contact: L. Licari . . . .
School Contact. M. Biller . . . .

The "procedural safeguards" informational booklet that accompanied the Consent to Evaluate Form Ms. Licari mailed to

[redacted] summarized the "procedural safeguards" available to "students with disabilities" and their parents. It had separate sections devoted to: "[n]otice"; [c]onsent; [m]eetings; "[i]ndependent [e]ducational [e]valuation[s]"; "[r]ecords"; "[m]ediation"; "[h]earings"; "[a]dministrative [l]aw [j]udges"; "[d]ue [p]rocess [h]earing [r]ights"; "[a]ppeals of [d]ue [p]rocess [h]earings"; "[p]lacement during due process hearings and appeals"; "[a]ttorneys' [f]ees; discipline; "[p]rivate [s]chool [p]lacement; "[s]tate [c]omplaint [p]rocedures"; and "[s]urrogate [p]arents."

29. On December 16, 2003, Ms. Licari also mailed to [redacted], for them to fill out, sign, date, and return, a Parent Information Form--Social and Developmental History (Parent Information Form), which contained the following introductory statement:

> Dear parents:
>
> The information provided by this questionnaire, along with other observations, will assist in planning for your child's educational development. Your input is very important, so please take the time to answer every question as fully and accurately as possible. If you need any assistance please call the guidance counselor at your child's school.

30. The Consent to Evaluate Form and the Parent Information Form were not the only forms that Ms. Licari mailed to [redacted] on December 16, 2003. She mailed to them, on that date, two additional forms, for them to complete and return. One was a Behavior Assessment System for Children-

Parent Rating Scale (BASC Form). It contained the following "instructions":

> On both sides of this form are phrases that describe how children may act. Please read each phrase and mark the response that describes how this child has acted over the last six months. If the child's behavior has changed a great deal during this period, describe the child's recent behavior.
>
> Please mark every item. If you don't know or are unsure, give your best estimate.
>
> Before starting, please provide the information requested at the top of the page.

The other form was a Conners' Parent Rating Scale- Revised Long Version (Conners Form). The following instructions were set forth on this form:

> Below are a number of common problems that children have in school. Please rate each item according to how much of a problem it has been in the last month. For each item, ask yourself "How much of a problem has this been in the last month?", and circle the best answer for each one. If none, not all, seldom, or very infrequently, you would circle 0. If very much true, or it occurs very often or frequently, you would circle 3. You would circle 1 or 2 for ratings in between. Please respond to all the items.

31. The Parent Information, BASC, and Conners Forms were sent to [redacted] in an effort to elicit from them information that could be used in determining [redacted] eligibility for ESE services and assessing [redacted] educational needs.

32. [redacted] returned to Ms. Licari completed BASC and Conners Forms, each dated December 26, 2003.

33. Ms. Licari, however, did not receive from [redacted] either a filled-out Parent Information Form or a signed Consent to Evaluate Form.

34. [redacted] never saw the Consent to Evaluate Form or the "procedural safeguards" informational booklet that was mailed with it to [redacted] .

35. Although [redacted] did not sign a Consent to Evaluate Form, [redacted] did send the following letter, signed by [redacted] and dated December 29, 2003, to Principal Rashid, requesting that the School Board evaluate [redacted]

> As per P.L. 94[-]142[[5]] I am requesting that the School Board of Broward County test and evaluate my [redacted] [redacted] in order to rule out any psychiatric, psychological, or academic deficits that may impair [redacted] school adjustment and academic progress.
>
> Thank you.

As of December 29, 2003, the date of this letter, the School Board had merely proposed to evaluate [redacted] and had not commenced any formal evaluation of [redacted].

36. Ms. Licari did not receive from [redacted] either a completed BASC Form or a completed Conners Form.

37. [redacted] did return to Ms. Licari a completed Parent Information Form, dated January 6, 2004, as well as a Consent to Evaluate Form. On the latter, [redacted] had marked the space indicating that [redacted] wanted to have "a conference to discuss the proposed evaluation before [redacted] grant[ed] permission."

38. The requested conference was held with [redacted] on January 7, 2004. At the conference, [redacted] signed the form "grant[ing] permission" to the School Board to evaluate [redacted]

39. Ms. Licari at no time sent[redacted] a copy of the Consent to Evaluate Form that [redacted] signed.

40. At the January 7, 2004, conference at which [redacted] signed the form, there was a discussion with [redacted] failing grades and misbehavior in school. The discussion resulted in the following "plan" being devised:

> 1. Behavior- Recom. Dad to start w/Case Manager & counseling & psychiatrist.
>
> 2. Initiate Comprehensive Evaluation.
>
> 3. All 3 teachers to sign agenda. (Send science book home if needed. Check w. [redacted]
>
> 4. [redacted] to serve missed detention today at 2:30.
>
> 5. Initiate behavior chart/plan starting by Mon. Jan 12.

41. Later on January 7, 2004, after obtaining [redacted] signature on the Consent to Evaluate Form, Ms. Licari submitted to the School Board's Psychological Services unit a Referral for Psychological Evaluation Services requesting evaluation services for [redacted] On the referral form, January 7, 2004, was given as the "[d]ate [the] [c]onsent [was] [s]igned."

42. At or about the time this referral was made, Ms. Biller telephoned [redacted] and "told [redacted] that [redacted] was going to be tested."

43. [redacted] "thought that the testing was starting [pursuant to [redacted]] request." [redacted] was unaware that [redacted] had been asked for, and had given, [redacted] consent for the School Board to evaluate [redacted]

44. Upon learning from Ms. Biller that "[redacted] was going to be tested" by the School Board, [redacted] did not express any opposition to such testing.

45. To the contrary, on January 8, 2004, [redacted] faxed a "thank you" letter to Ms. Biller expressing [redacted] appreciation for Ms. Biller's "concern and efforts regarding . . . [redacted] and letting Ms. Biller know that she was "anxiously awaiting a date from the school for commencement of the testing and evaluation of [[redacted]]."

46. Deena Adler, the school social worker at [redacted], conducted a psychosocial assessment of [redacted]. She issued her psychosocial assessment report on January 28, 2004.

47. Ms. Adler's report listed the following as the "[s]ources or [d]ata" on which she relied::

> Information for this psychosocial assessment was obtained via several meetings with school personnel (11/13/03, 12/18/03, 1/07/04), interviews with Mr. [redacted] father (1/07/04, 1/21/04), an interview with Ms. [redacted] mother (1/21/04), student observation (1/14/04), and an interview with the student (1/21/04). A review of school records, including the A/L Panels was also conducted.

48. The "Developmental/Medical/Mental Health/Substance Abuse History" portion of the report contained, among other things, the following information:

[redacted] [redacted] indicated that [redacted] had been seeing a neurologist, Dr. Tatiana Dubrovsky, since the 4th grade. [redacted] had put [redacted] on Adderal (4th grade) and Clondine (5th grade) for possible attention deficit/hyperactivity disorder and explosive behaviors.

49. The report ended with the following "[s]ocial [w]orker [a]ssessment and [r]ecommendations":

> [redacted] is an [redacted]-year-old student at [redacted]. [redacted] was recommended for a comprehensive evaluation by the intervention assistance team to address [redacted] academic, emotional, and behavioral difficulties. [redacted] recently went to live with [redacted] father as [redacted] was having behavioral problems with [redacted]. According to [redacted] [redacted], [redacted] is doing fine at home and will do [redacted] homework and chores. However, Mr. [redacted] did indicate that there are opposition and attention difficulties on the Behavior Criteria Checklist. Since living with Mr. [redacted] all mental health services have ended, including medication. Mr. [redacted] is currently arranging for mental health follow-up to address these concerns, along with [redacted] school difficulties.
>
> [redacted] lived with Ms. [redacted] prior to October 2003. At that time, [redacted] had been taking Adderal and Clondine. Since [redacted] has been off of [redacted] medication, [redacted] behavior has become more disruptive at school. [redacted] behavior appears to be negatively affecting [redacted] academic success. [redacted] is failing most of [redacted] classes. [redacted] rarely does any class work or homework. [redacted] is not utilizing the point sheet that was developed for [redacted].
>
> The following recommendations are respectfully submitted for consideration:
>
> 1. The behavior plan should be followed both at home and at school. The incentive[s] and consequences that were predetermined should be reinforced at home.

2. [redacted] needs consistency and clear expectation. A visual schedule posted may be helpful to assist [redacted] with a structured routine.

3. Mr[redacted] is encouraged to obtain additional mental health services for [redacted] The family counseling program through the school system may be an option. This school social worker will continue to assist as needed.

4. Mr. [redacted] should sign [redacted] planner nightly and verify that the correct homework is completed.

5. Communication between the school and parent is vital to assist [redacted]

6. This psychosocial assessment, as well as any additional evaluation, should be given to any of [redacted] mental health provider[s] to ensure appropriate continuity of care.

7. [redacted] parents may want to follow up with the speech assessment for articulation concerns.

8. [redacted] is receiving a psycho-educational evaluation as recommended by the intervention assistance team. Once completed, school personnel should review all available information to discuss appropriate interventions. Parental involvement is strongly encouraged.

50. Audrey Wong, a certified school psychologist[6] employed by the School Board, conducted a psycho-educational evaluation of [redacted] on January 26 and 28, 2004. She issued her psycho-educational evaluation report on February 2, 2004.

51. Ms. Wong's report indicated that she utilized the following "assessment procedures":

Review of Records[7]
Student Interview[8]
Differential Ability Scales (DAS)- School Age
Woodcock-Johnson Psychoeducational Battery-III
Differential Ability Scales Diagnostic Subtests
Bender Visual-Motor Gestalt Test
Developmental Test of Visual Motor Integration (VMI)
Projective Drawings
Sentence Completion Test
Conners' Parent Rating Scale- Revised: Long Version
Conners' Teacher Rating Scale- Revised: Long Version
BASC Parent Rating Scales
BASC Teacher Rating Scales
Revised Children's Manifest Anxiety Scale (RCMAS)
Piers-Harris Children's Self Concept Scale[9]

52. The report contained the following "[s]ummary and [r]ecommendations":

> [redacted] is an [redacted] year old, [redacted] grader, who was referred for an evaluation due to academic and behavioral concerns. Current test results indicate that [redacted] intellectual ability is in the low average range. [redacted] academic skills are commensurate [with] or exceed [redacted] measured ability. [redacted] demonstrates a weakness in visual-motor integration and strength in visual-memory. Results of the behavioral checklists, self-rating scales and projective assessment suggest that [redacted] exhibits behaviors associated with ADHD as well as oppositional, defiant and aggressive traits. [redacted] appears to be motivated by the satisfaction of immediate needs and fails to reflect on the consequences of [redacted] actions. Many negative school-related behaviors and attitudes interfere with [redacted] academic performance. They may include, for example,

resentment and oppositional behavior toward teachers, boredom and disinterest. Due to [redacted] impatience, restlessness and distractibility, [redacted] may find it difficult to focus on one task at a time without being bored or annoyed. Further, [redacted] impulsiveness and difficulty modulating emotions often manifest in inappropriate behavior. [redacted] has a poor self-concept and is overly sensitive to social opinion. [redacted] feels inferior and rejected. [redacted] sees [redacted] as different from [redacted] peers and [the] object of ridicule. On the positive side, [redacted] presents as a likeable and friendly child in a one to one setting, wanting to please others with [redacted] good behavior.

To assist [redacted] teachers and parents the following recommendations are suggested:

1. [redacted]'s parents are encouraged to share this report with [redacted] psychiatrist. [redacted] would benefit from a medical consultation in order to address ADHD issues.

2. [redacted] parents may wish to consider seeking family counseling for [redacted] through the Broward County school system.

3. Provide visual experiences or opportunities to involve [redacted] in active learning, utilizing everyday occurrences stressing the recognition of relevant parts of the learning experience.

4. One of the most critical elements in a classroom for [redacted] to succeed is structure. The elements of structure that need to be in place are clear communication and expectations, clear rules and consequences and abundance of teacher modeling and guided instruction.

5. Academic tasks also need to be structured for [redacted] by breaking down long-term assignments into manageable parts with

the teacher monitoring and providing feedback to [redacted]

6. The schedule and the routine also need to be structured for [redacted] by alternating quiet and active periods and activities. [redacted] needs assistance structuring [redacted] materials, workspace and transitional times in the day. [redacted] needs to know precisely what is expected of [redacted] and know what to do from the minute [redacted] walks into the classroom until the minute [redacted] is dismissed (minimize lag time).

7. Strategies to help prevent [redacted] from drifting off tasks in the classroom include the use of proximity control, making direct eye contact and using physical cuing when possible. Frequently reviewing and practicing the rules and expectations will also assist in preventing attentional drift.

8. [redacted] current behavior plan needs to be monitored and reinforced in relatively shorter intervals than other students may need. The school CORE team may be consulted to modify [redacted] behavior plan.

9. When not involved in group activities, [redacted] should be seated away from distractors.

10. Modify [redacted] assignments and accept alternative methods of assessing [redacted] skills and mastery of concepts whenever possible. Give [redacted] more opportunities to share what [redacted] knows orally. [redacted] may need assistance organizing [redacted] thoughts through the use of visual cues and graphic organizers. The use of computers and word processors are encouraged.

This case should be referred to the school Eligibility and Program Placement Committee for education programming and planning.

> [If] [t]his office can be of any further assistance, please do not hesitate to contact us.

53. On January 29, 2004, [redacted] had a telephone conversation with Ms. Adler, during which Ms. Adler (with whom [redacted] had met the week before) led [redacted] to believe that "no testing date [for [redacted] had yet been] set." This "surprised" [redacted]

54. A few days letter, [redacted] faxed a letter to Principal Rashid inquiring as to whether it was true that "no testing date for [redacted] had yet been] set," as Ms. Adler had led [redacted] to believe.

55. On February 5, 2004, in response to [redacted] letter, Principal Rashid telephoned [redacted] and "told [[redacted]] the testing was complete."

56. [redacted] was pleased to learn of the completion of the testing.

57. [redacted] asked Principal Rashid to send [redacted] the written results of the testing.

58. When [redacted] obtained these results, [redacted] was disappointed to find out that Ms. Wong had concluded that [redacted] exhibit[ed] behaviors associated with ADHD." Based upon what Mr. Kasdaglis had told [redacted], [redacted] firmly believed that [redacted] did not suffer from ADHD.

59. Ms. Licari invited [redacted] to a meeting scheduled for February 23, 2004, to discuss the test results by sending them the following Parent Participation Form, dated February 19, 2004:

To the Parent(s) of: [redacted] (Last Name) [redacted] (First Name) Date: 2/19/04

Your participation is valuable. You will be given opportunities to participate in meetings about the identification, evaluation, and educational placement of your child, and other matters relating to your child's free appropriate public education (FAPE). As a member of your child's educational team, it is helpful if you review prior educational information including evaluation(s) and past IEPs before the meeting. Please bring any additional information that may be useful.

A meeting has been scheduled at [redacted] on 02/23/04 at 11:00 AM. The purpose of this meeting is to:

Review evaluation information and determine if your child is eligible for Exceptional Student Education. If your child is determined eligible for exceptional student education a[] Family Support Plan (FSP) or Individual Educational Plan (IEP) or Transition IEP (TIEP) will be developed and placement options will be discussed. This may result in a change in placement. . . .

Required Committee Members by title will include:

Parent(s)
Student
L. Licari LEA Representative
D. Chajulal General Education Teacher
C. Deleu ESE Teacher/Provider
A. Wong Evaluation Specialist

Other Participants may include:

Vocational Teacher
Agency Representative
D. Adler Social Worker
M. Rashid Principal
N. Dillner Speech Pathologist

Note: Parents have the right to invite other individuals who have special knowledge or expertise regarding their child. As a courtesy to the school, if you wish to invite additional participants, please add their names and titles to the above list indicating that you have contacted them and invited them to participate. If you think that any other school personnel should be invited to this meeting, please call the school contact person.

* If the person named is unable to attend, a person who is in the same position may fill that role.

Parent: Please check one of the following:

1 __ I will attend at the above date and time.
2 __ I wish to attend on another date or time. (School contact person will arrange a mutually agreeable date and time.)
3 __ I wish to participate through a telephone conference.
4 __ I cannot attend at any scheduled time. (The school will send home the results of the meeting in writing.) . . . .

Signature _____ Date ____ . . .
Parent(s)

Parents of a child with a disability have protections under the Procedural Safeguards of the Individuals with Disabilities Education Act (IDEA). (A copy of this information is attached.) For further clarification call:

School Contact: L. Licari . . . .
School Contact. M. Biller . . . .

60. [redacted] returned to Ms. Licari a signed and dated (February 20, 2004) Parent Participation Form on which [redacted] had

indicated that [redacted] would be attending the scheduled February 23, 2004, meeting.

61. The meeting was held as scheduled on February 23, 2004. [redacted] attended the meeting. [redacted] did not.

62. Notwithstanding that Ms. Licari had made a reasonable and good faith attempt to first provide [redacted] with the School Board's "procedural safeguards" informational booklet back in mid-December 2003 (along with the Consent to Evaluate Form), it was not until this February 23, 2004, meeting that [redacted] first "saw that book[let]."

63. [redacted] brought Mr. Kasdaglis to the meeting with [redacted]. Mr. Kasdaglis did most, if not all, of the talking for [redacted]

64. The School Board personnel at the meeting proposed that [redacted] be found eligible for ESE services as a Speech and Language Impaired (SLI) student, an Emotionally Handicapped (EH) Student, and an Other Health Impaired (OHI) student with ADHD.

65. Mr. Kasdaglis expressed, on [redacted] behalf, strong disagreement with the proposal that [redacted] eligibility be based on a finding that [redacted] was an OHI/ADHD student.

66. The February 23, 2004, meeting ended abruptly when Mr. Kasdaglis and [redacted] walked out before Ms. Wong had the opportunity to finish "talk[ing] about [redacted] findings and explain[ing] why [redacted] came up with the findings."

67. Ms. Licari invited [redacted] to a follow-up meeting scheduled for March 2, 2004, by sending them a Parent Participation Form, dated February 25, 2004, identical to the February 19, 2004, Parent Participation Form she had sent them in

advance of the February 23, 2004, meeting (except for the scheduled meeting date and time and the "[o]ther [p]articipants" who might be at the meeting).

68. The follow-up meeting was held on March 2, 2004, as scheduled. [redacted] was in attendance at the meeting. [redacted] was not.

69. [redacted] was accompanied by Mr. Kasdaglis, who again did most, if not all, of the talking for [redacted], reiterating what he had said at the February 23, 2004, meeting regarding the inappropriateness of classifying [redacted] as an OHI/ADHD student.

70. After approximately a half-hour of discussion, Mr. Kasdaglis and [redacted] walked out of the meeting. They were told, before they left, that the meeting would continue in their absence, and it did.

71. The remaining participants in the meeting reached a consensus that [redacted] was eligible for ESE services under the categories of SLI, EH, and OHI (with the latter deemed [redacted] "primary exceptionality") and drafted an IEP for [redacted]

72. Ms. Licari sent the following letter, dated March 16, 2004, to [redacted]

> In following district procedures it is [redacted] right to have an Individualized Educational Plan. The IEP committee wrote an Individualized Educational Plan for [redacted] In order for services to begin for [redacted] we must have parental written consent. Please review and sign the enclosed documents and return them in the self-addressed stamped envelope we have provided. If you have a need for a meeting to review these documents, March 24th at 7:45 AM is available. Please let use know

> by March 19th if you would like to attend the previously mentioned meeting.
>
> If you have any other questions or concerns do not hesitate to call me at . . .

73. The "enclosed documents" referred to in the letter included the "IEP committee's" draft IEP and written material describing the above-mentioned eligibility determinations made at the March 2, 2004, meeting. A "procedural safeguards" informational booklet was also sent to [redacted]

74. A meeting to review these "enclosed documents" was held on March 24, 2004. [redacted] was present at the meeting. [redacted] although invited, was not.

75. After the review was conducted, [redacted] stated to those at the meeting that "[redacted] was very happy with what [redacted] had read and that [redacted] thought that the school was doing a great job."

76. [redacted] then signed and dated (March 24, 2004) documents signifying [redacted] agreement with the eligibility determinations made at the March 2, 2004, meeting, [redacted] approval of the draft IEP prepared at that meeting, and [redacted] consent to [redacted] initial placement in the School Board's ESE program and receipt of services in accordance with the IEP.

77. Later on March 24, 2004, after the meeting, Ms. Licari told [redacted] over the telephone, that [redacted] had "signed off" and [redacted] was now eligible to begin receiving ESE services.

78. [redacted] remained firm in [redacted] opposition to [redacted] being classified as OHI, and [redacted] therefore, unlike [redacted] refused to

"sign off," on the eligibility, IEP, and placement that had been proposed for [redacted]

79. [redacted] sought to obtain from the School Board certain records "so that [redacted] could share them with [redacted] psychiatrist" as part of [redacted] effort to establish that [redacted] did not have ADHD and therefore should not be classified as OHI.

80. Dissatisfied with the School Board's response, on May 3, 2004, as noted above, [redacted] wrote a letter requesting a due process hearing to challenge the School Board's "refusal to release records," as well as its evaluative "findings [concerning [redacted] eligibility for ESE services] and resultant IEP."

81. On May 5, 2004, [redacted] attended a "matriculation" meeting at the invitation of Ms. Licari. [redacted] was also invited to this meeting, but was unable to attend.

82. The purpose of the meeting was to discuss [redacted] move to [redacted] the following school year. This move was going to occur whether or not [redacted] was retained in the [redacted] grade[10] since [redacted] was "no longer [going to] be servicing [redacted] grade students."

83. At the meeting there was a discussion as to how the ESE services described in the IEP that [redacted] had signed were going to be delivered at [redacted].

84. At no time during this May 5, 2004, meeting, or during the February 23, 2004, and March 2, 2004, meetings that [redacted] attended did [redacted], or anyone acting on [redacted] behalf or on behalf of [redacted] request that the School Board conduct a reevaluation of [redacted] or pay for an independent educational evaluation of [redacted].

85. On or about May 15, 2004, the School Board sent [redacted] copies of 514 pages of [redacted] school records.

86. On May 20, 2004, [redacted] sent the following letter to the School Board's attorney:

> As per our conversation today, you agreed to release all raw data to Dr. Gregory Marsella, MD, PA . . . .
>
> It is understood that all records, audio tapes, notes and all raw data utilized to arrive at evaluatory or diagnostic impressions concerning my [redacted] will be released now.
>
> Please note that what you will forward to Dr. Marsella should also include the same and/or similar derived during any or all meetings, via face to face or telephone or via written communication between myself and/or my child and/or the school or school board.
>
> If any element of my request if not fully understood please let me know via fax or mail. Thank you.

87. On June 1, 2004, [redacted] sent the following letter to the School Board's due process coordinator:

> As per our telephone conversation today, you are in possession of [redacted] "green folder" that you said contained all RAW DATA. It is my understanding that after your meeting with Dr. Len Russo, Student Services Coordinator, you will then release all RAW DATA. You also stated that Dr. Marsella will have all RAW DATA and all documentation by Thursday, June 3, 2004.
>
> If I have misunderstood any of our conversation please fax or e-mail me.

88. On June 27, 2004, [redacted] sent the following letter to the School Board's attorney:

> Commencing in January 2004, I had made persistent requests both verbal as well as written for my child's records. I have asked for notes, material pertaining to any and all activities, conferences, behavioral plans, academic[s], recordings, video, audio, e-mails, teacher comments, notes from meetings etc.
>
> It is now apparent that the Broward School System is maliciously and without regard for the law, attempting to impede the Due Process to which I am rightfully and legally entitled to. The records that I have received, forwarded to me on May 18, 2004[[11]] and the second set received June 4, 2004 are not complete. More specifically, the following are missing:
>
> 3rd & 4th grade: records notes, inter-office e-mails, transcripts, etc. relating to disciplinary, behavioral, academic, social and/or psycho social adjustment problems.
>
> 3rd & 4th grade: records notes, memoranda, conference material etc. relating to or pertinent to any corrective, and/or punitive, and/or disciplinary, and/or remediating actions taken or implemented by the school.
>
> 5th grade [sic]: to my knowledge there have been three (3) formal staffings. The first staffing 2/23/04 a formal staffing with among others myself, Mr. Kasdag[]lis, Ms. Barnard, Asst Principal, Ms. Licari, ESE Specialist, Mr. Cha[j]ulal, [redacted]'s] teacher, Ms. Dillner, Speech Teacher, Ms. Adler, Social Worker, Mrs. Wong, School Psychologist. On 3/2/2004 the second formal staffing with all of the above as well as Ms. T[ier]n[o] from North Area. I believe the third formal staffing was 3/24/04. To

this day I have not received any notes, records, minutes etc at all on any of these staffings.

Records received DID NOT contain any copies or notes of the greatest majority of communications originating from me to the school which included telephone calls, faxes, and letters including 4 letters sent certified.

I am utterly confused, frustrated and angry at the school[']s continuous refusal to release ALL of my [redacted]'s records, memos, inter office e-mails, notes, etc. I have attached an e-mail from Mrs. Rashid, Principal [redacted]. Where are the other e-mails? Where are the notes from the staffings?

Please forward to me without delay my child's records, so I may proceed with my entitled Due Process Hearing.

89. On June 28, 2004, the School Board's due process coordinator sent [redacted] the following letter:

> I am in receipt of a letter you sent to Mrs. Gary-Orange, Principal of [redacted]..[12]
> I have emailed both Mrs. Gary-Orange and Mrs. Rashid to request any additional records relative to your request be sent to me so that I can provide you the documents/files you requested.
>
> As is customary when the parent files a due process hearing request, a letter goes out from my office informing the school of the request. Further, the school is required to provide my office with the original student records so that they can be copied, numbered and provided to parents.
>
> I have [redacted] student records in my office. I will send you a copy of these records and anything additionally that is received from either school by Friday, July 2, 2004.
>
> If I can be of further assistance, please don't hesitate to call on me.

90. On Wednesday, August 18, 2004, at approximately 5:30 p.m., [redacted] received from the School Board a final packet of documents, which contained additional copies of the 514 pages of documents that [redacted] had received on or about May 15, 2004, plus copies of approximately 350 other pages of documents (representing copies of all of [redacted] records that the School Board had "been able to locate)."

91. The due process hearing in this case, as noted above, commenced on August 25, 2004, which was five business days later.

CONCLUSIONS OF LAW

92. District school boards are required by the Florida K-20 Education Code,[13] 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)(l) and 1003.57, Fla. Stat.

93. "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 who are gifted and students with disabilities who are mentally handicapped, speech and language impaired, deaf or hard of hearing, visually impaired, dual sensory impaired, physically impaired, emotionally handicapped, specific learning disabled, hospital and homebound, autistic, developmentally delayed children, ages birth through 5 years, or children, ages birth through 2 years, with established conditions that are identified in State Board of Education rules pursuant to s. 1003.21(1)(e)." § 1003.01(3)

94. The Florida K-20 Education Code's imposition of the requirement that "exceptional students" receive special education and related services is necessary in order for the State of Florida to be eligible to receive federal funding under the IDEA, 20 U.S.C. §§ 1400 et. seq., 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.").

95. To meet its obligation under Sections 1001.42(4)(l) and 1003.57, Florida Statutes, to provide an "appropriate" public education to each of its "exceptional students," 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, 102 S. Ct. 3034 (1982); see also § 1003.01(3)(b), Fla. Stat. ("'Special education services' means specially designed instruction and such related services as are necessary for an exceptional student to benefit from education. Such services may include: transportation; diagnostic and evaluation services; social services; physical and occupational therapy; job placement; orientation and mobility training; braillists, typists, and readers for the blind; interpreters and auditory amplification; rehabilitation counseling; transition services; mental health services; guidance and career counseling; specified materials, assistive technology devices, and other specialized equipment; and other such services as approved by rules of the state board."). The instruction and services provided must be "'reasonably calculated to enable the child to receive educational benefits.'" School Board of Martin County v. A. S., 727 So. 2d 1071, 1073 (Fla. 4th DCA 1999),

quoting from, Board of Education of the Hendrick Hudson Central School District v. Rowley, 102 S. Ct. at 3051. As the Fourth District Court of Appeal further stated in its opinion in School Board of Martin County v. A. S., 727 So. 2d at 1074:

> Federal cases have clarified what "reasonably calculated to enable the child to receive educational benefits" means. Educational benefits provided under IDEA must be more than trivial or de minimis. J. S. K. v. Hendry County Sch. Dist., 941 F.2d 1563 (11th Cir. 1991); Doe v. Alabama State Dep't of Educ., 915 F.2d 651 (11th Cir. 1990). Although they must be "meaningful," there is no requirement to maximize each child's potential. Rowley, 458 U.S. at 192, 198, 102 S. Ct. 3034. The issue is whether the "placement [is] appropriate, not whether another placement would also be appropriate, or even better for that matter. The school district is required by the statute and regulations to provide an appropriate education, not the best possible education, or the placement the parents prefer." Heather S. by Kathy S. v. State of Wisconsin, 125 F.3d 1045, 1045 (7th Cir. 1997)(citing Board of Educ. of Community Consol. Sch. Dist. 21 v. Illinois State Bd. Of Educ., 938 F.2d at 715, and Lachman v. Illinois State Bd. Of Educ., 852 F.2d 290, 297 (7th Cir. 1988)). Thus, if a student progresses in a school district's program, the courts should not examine whether another method might produce additional or maximum benefits. See Rowley, 458 U.S. at 207-208, 102 S. Ct. 3034; O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233, No. 97-3125, 144 F.3d 692, 709 (10th Cir. 1998); Evans v. District No. 17, 841 F.2d 824, 831 (8th Cir. 1988).

96. "The [law] does not demand that [a district school board] cure the disabilities which impair a child's ability to

learn, but [merely] requires a program of remediation which would allow the child to learn notwithstanding [the child's] disability." Independent School District No. 283, St. Louis Park, Minn. V. S.D. By and Through J.D., 948 F. Supp. 860, 885 (D. Minn. 1995); see also Coale v. State Department of Education, 162 F .Supp. 2d 316, 331 n.17 (D. Del. 2001)("If the IDEA required the State to 'cure' Alex's disability or to produce 'meaningful' progress in each and every weakness demonstrated by a student, then the State's decision to accommodate Alex's 'fine motor skills' problems with adaptive technology might be more problematic. But the court does not understand the IDEA to impose such requirements on the State.").

97. 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)("[W]hether 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); Galina C. ex rel. Reed v. Shaker Regional School District, 2004 WL 626833 *10 (D. N.H. 2004), ("Galina's parents also attach great significance to the fact the School District did not diagnose Galina as dyslexic, nor label her as such even after she was so diagnosed by Dr. Kemper in 2000. . . . Galina's parents have not demonstrated that her IEP would have been proposed any substantively different programming or services for Galina if it had labeled her as dyslexic. Therefore, the IEP was not deficient in its failure to use Galina's parents' preferred terminology for her disability."); and 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 J.W. is eligible for SED, OHI, and/or MD codes, but whether his 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.").

98. A district school board is required to conduct "a full and individual initial evaluation . . . before the initial provision of special education and related services" in order to determine the student's eligibility for such services and the student's "educational needs." 20 U.S.C. § 1414(a)(1)(A) and (B).

99. It must provide to the parents of the student prior written notice of its intention to conduct such an "initial evaluation." See 20 U.S.C. § 1414(b)(1); 20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503; and Fla. Admin. Code R. 6A-6.03311(1).

100. It also must attempt to obtain parental consent before conducting the evaluation. If it is unable to obtain such consent, it may nonetheless conduct the proposed evaluation, provided it requests a due process hearing and is successful in its efforts to persuade the hearing officer conducting the hearing that the proposed evaluation is warranted. See 20 U.S.C. § 1414(1)(C); 34 C.F.R. § 300.505(a)(1)(i) and (b); and Fla. Admin. Code R. 6A-6.03311(3).

101. Parents whose child a district school board has referred for evaluation are entitled to receive a "procedural

safeguards notice," pursuant to 20 U.S.C. § 1415(d) and 34 C.F.R. § 300.504, which provide as follows:

> 20 U.S.C. § 1415
>
> (d) Procedural safeguards notice
>
> (1) In general
>
> A copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents, at a minimum--
>
> (A) upon initial referral for evaluation;
>
> (B) upon each notification of an individualized education program meeting and upon reevaluation of the child; and
>
> (C) upon registration of a complaint under subsection (b)(6) of this section.
>
> (2) Contents
>
> The procedural safeguards notice shall include a full explanation of the procedural safeguards, written in the native language of the parents, unless it clearly is not feasible to do so, and written in an easily understandable manner, available under this section and under regulations promulgated by the Secretary relating to--
>
> (A) independent educational evaluation;
>
> (B) prior written notice;
>
> (C) parental consent;
>
> (D) access to educational records;
>
> (E) opportunity to present complaints;
>
> (F) the child's placement during pendency of due process proceedings;

(G) procedures for students who are subject to placement in an interim alternative educational setting;

(H) requirements for unilateral placement by parents of children in private schools at public expense;

(I) mediation;

(J) due process hearings, including requirements for disclosure of evaluation results and recommendations;

(K) State-level appeals (if applicable in that State);

(L) civil actions; and

(M) attorneys' fees.

34 C.F.R. § 300.504 Procedural safeguards notice.

(a) General. A copy of the procedural safeguards available to the parents of a child with a disability must be given to the parents, at a minimum--

(1) Upon initial referral for evaluation;

(2) Upon each notification of an IEP meeting;

(3) Upon reevaluation of the child; and

(4) Upon receipt of a request for due process under § 300.507.

(b) Contents. The procedural safeguards notice must include a full explanation of all of the procedural safeguards available under §§ 300.403, 300.500-300.529, and 300.560-300.577, and the State complaint procedures available under §§ 300.660-300.662 relating to--

(1) Independent educational evaluation;

(2) Prior written notice;

(3) Parental consent;

(4) Access to educational records;

(5) Opportunity to present complaints to initiate due process hearings;

(6) The child's placement during pendency of due process proceedings;

(7) Procedures for students who are subject to placement in an interim alternative educational setting;

(8) Requirements for unilateral placement by parents of children in private schools at public expense;

(9) Mediation;

(10) Due process hearings, including requirements for disclosure of evaluation results and recommendations;

(11) State-level appeals (if applicable in that State);

(12) Civil actions;

(13) Attorneys' fees; and

(14) The State complaint procedures under §§ 300.660-300.662, including a description of how to file a complaint and the timelines under those procedures.

(c) Notice in understandable language. The notice required under paragraph (a) of this section must meet the requirements of § 300.503(c).

102. Parents dissatisfied with a district school board-conducted evaluation are entitled to request that an independent educational evaluation be conducted before the student's eligibility and "educational needs" are finally determined. Such independent educational evaluations are addressed in 34 C.F.R. § 300.502 and Florida Administrative Code Rule 6A-6.03311. The former provides, in pertinent part, as follows:

> Independent educational evaluation.
>
> (a) General.
>
> (1) The parents of a child with a disability have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.
>
> (2) Each public agency shall provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations as set forth in paragraph (e) of this section.
>
> (3) For the purposes of this part--
>
> (i) Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question; and
>
> (ii) Public expense means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent, consistent with § 300.301.

(b) Parent right to evaluation at public expense.

(1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency.

(2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either--

(i) Initiate a hearing under § 300.507 to show that its evaluation is appropriate; or

(ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing under § 300.507 that the evaluation obtained by the parent did not meet agency criteria.

(3) If the public agency initiates a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

(4) If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the explanation by the parent may not be required and the public agency may not unreasonably delay either providing the independent educational evaluation at public expense or initiating a due process hearing to defend the public evaluation.

(c) Parent-initiated evaluations. If the parent obtains an independent educational evaluation at private expense, the results of the evaluation--

(1) Must be considered by the public

> agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child; and
>
> (2) May be presented as evidence at a hearing under this subpart regarding that child.
>
> * * *
>
> (e) Agency criteria.
>
> (1) If an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent educational evaluation.
>
> (2) Except for the criteria described in paragraph (e)(1) of this section, a public agency may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense.

Prior to September 20, 2004, and at all times material to the instant case, Florida Administrative Code Rule 6A-6.03311 provided, in pertinent part, as follows[14]:

> (4) Independent evaluation.
>
> (a) The school district shall notify the parent of an exceptional student of the right to an independent evaluation and provide to the parents, on request, information about where an independent educational evaluation may be obtained.
>
> (b) A parent has the right to an

> independent evaluation at public expense if the parent disagrees with an evaluation obtained by the school district.
>
> (c) The school district shall consider the results of such evaluation in any decision regarding the student.
>
> (d) The school district may initiate a due process hearing to show that its evaluation is appropriate.
>
> (e) The independent evaluation may be presented as evidence at a hearing as described in subsection (5) of this rule.
>
> (f) If the final decision from the hearing is that the district evaluation is appropriate, the independent evaluation will be at the parent's expense.
>
> (g) Whenever an independent evaluation is conducted, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the evaluation specialist, shall be the same as the criteria prescribed by Rule 6A-6.0331(1), Florida Administrative Code, for use by the school district when it initiates an evaluation.
>
> (h) The independent evaluation shall be conducted by a qualified evaluation specialist as prescribed in Rule 6A-6.0331(1)(a), Florida Administrative Code, who is not an employee of the district school board.

103. If, following the evaluative process, the student is found eligible for special education and related services, the district school board must develop, taking into consideration any input provided by the child's parents,[15] an IEP

(Individualized Education Program) designed to meet the student's unique needs. 20 U.S.C. § 1414(a)(4) and (d).

104. The IEP is "the centerpiece of the [IDEA's] education delivery system for disabled children." Honig v. Doe, 484 U.S. 305, 311, 108 S. Ct. 592, 598 (1988). It must include, among other things, "[a] statement of the child's present levels of educational performance"; "[a] statement of measurable annual goals, including benchmarks or short-term objectives"; "[a] statement of the special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child"; "[a] statement of the program modifications or supports for school personnel that will be provided for the child"; "[a]n explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class"; and "[a] statement of any individual modifications in the administration of State or district-wide assessments of student achievement that are needed in order for the child to participate in the assessment." 34 C.F.R. § 300.347. Unless and until an IEP is in effect, special education and related services may not be provided. 34 C.F.R. § 300.342(b)(1)(i). Once an IEP is in effect, special education and related services must be provided in accordance with the IEP. 34 C.F.R. § 300.350(a)(1).

105. "[I]nformed parent consent must be obtained

before . . . [i]nitial provision of special education and related services to a child with a disability." 34 C.F.R. § 300.505(a)(1)(ii); see also former Fla. Admin. Code R. 6A-6.03311(3)(b)("Parental consent shall be obtained prior to initial placement of the student into a special program for exceptional students.").[16] Unless and until such consent is obtained, an IEP drafted by the district school board describing those special education and related services it proposes to provide to the child cannot be considered to be "in effect," within the meaning 34 C.F.R. § 300.342(b)(1)(i), and the services may not be provided.

106. Parents who have "complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child" 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). In Florida, by statute, a Division administrative law judge must conduct the "impartial due process hearing" to which a complaining parent is entitled under the IDEA. § 1003.57(5), Fla. Stat.

107. At the "impartial due process hearing," pursuant to 34 C.F.R § 300.509, each party has the right to "[p]rohibit the

introduction of any evidence at the hearing that has not been disclosed to that party at least 5 business days before the hearing." A "business day," as that term is used in 34 C.F.R § 300.509, "means Monday through Friday, except for Federal and State holidays (unless holidays are specifically included in the designation of business day, as in § 300.403(d)(1)(ii))."). 34 CFR § 300.9(b). Prior to September 20, 2004, and at all times material to the instant case, Florida Administrative Code Rule 6A-6.03311 provided, in pertinent part, that "[a]ny party to the [due process] hearing has the . . . right[]: [t]o prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five (5) days before the hearing."[17] Although this Florida rule provision did not specify whether the five days referred to therein were business or calendar days, it must be concluded that the former was intended because otherwise the rule provision would not have been consistent with governing federal law. See Brand v. Florida Power Corporation, 633 So. 2d 504, 509 (Fla. 1st DCA 1994)("[I]f a Florida statute is modeled after a federal law on the same subject, the Florida statute will take on the same construction as placed on its federal prototype, insofar as such interpretation is harmonious with the spirit and policy of the Florida legislation."); and Hill v. School Board of Pinellas County, 954 F. Supp. 251, 254 n.1 (M.D. Fla. 1997), aff'd, 137

F.3d 1355 (11th Cir. 1998)("The Florida Statute [Section 230.23(4)(m), Florida Statutes, the predecessor of Sections 1001.42(4)(l) and 1003.57, Florida Statutes] is patterned after the IDEA and should be construed consistently.").

108. In the instant case, [redacted] requested, and was granted, an "impartial due process hearing" to air complaints about the School Board's dealings with [redacted] and [redacted] At hearing, [redacted] amended [redacted] due process hearing request. In [redacted] request, as ultimately amended at hearing, [redacted] complains: that the School Board failed to produce documents within five business days before the hearing, as required by the IDEA; that the School Board, in violation of the IDEA, "failed to provide [[redacted]] with due notice of [its] intent to test and evaluate [redacted] on 11-12-03"; that the School Board violated the IDEA by failing, "upon the commencement of [its] intent to test and evaluate [redacted] to provide [redacted] with "a written document or documents of [[redacted]] rights" under the IDEA; and that the School Board "neither allowed nor formally responded to [[redacted]] request for an independent evaluation dated 3-2-04 and May 5, 2004," and this failure to act in a timely manner on [redacted] requests violated the IDEA.

109. [redacted] contends that by waiting until 5:30 p.m. on Wednesday, August 18, 2004, to deliver to [redacted] its final packet of documents, the School Board violated the "five business days

before the hearing" disclosure requirement of 34 C.F.R § 300.509. August 18, 2004, however, was five business days before the commencement of the due process hearing in the instant case and therefore all of the documents in the packet (many of which [redacted] had already been furnished) were provided to [redacted] in time to meet the disclosure requirement of 34 C.F.R § 300.509. That [redacted] received the packet at 5:30 p.m. on August 18, 2004, as opposed to 5:00 p.m. or earlier, is not a reason to hold otherwise since 34 C.F.R § 300.509 does not require that the disclosure be made by any particular time of the day on the fifth business day before the hearing. Cf. Serifsoy v. The City of Lake Worth, 789 So. 2d 1173, 1175 (Fla. 4th DCA 2001)("[W]here the clerk has made provisions for after-hours filing, a jurisdictional document will be treated as timely even if it is filed after closing on the thirtieth day."); Sunshine Dodge, Inc. v. Ketchem, 427 So. 2d 819, 820 (Fla. 5th DCA 1983)("Appellee asks us to dismiss this appeal because the notice of appeal was filed in the office of the Clerk of the Circuit Court after 5:00 P.M. on the last day of the appeal time. Thus, says appellee, we do not have jurisdiction because the notice was filed "after the close of the business day." Florida Rule of Appellate Procedure 9.110(b) requires the notice of appeal to be filed within thirty *days* of the rendition of the order to be reviewed. The rule does not

say "business days," nor does it otherwise limit the time period by hours of the day. Clearly the notice was filed within the thirty day period. If the Clerk's Office remains open to receive and file the notice and it is in fact filed within the required thirty-day period, as it was here, it is timely."); Husebye v. Jaeger, 534 N.W.2d 811, 814 (N.D. 1995)("This court held in State v. Richardson, 16 N.D. 1, 109 N.W. 1026, 1029 (1906): 'Unless the contrary is fixed by statute, a day extends over the 24 hours from one midnight to the next midnight.' Other courts have also recognized that the term 'day' generally means the full twenty-four hour period running from midnight to midnight. Webster's New World Dictionary 361 (2nd ed. 1982), says that the 'civil or legal day is from midnight to midnight.' Finally, the common law rule was that a day consists of the full twenty-four hours and an obligation required to be performed within a certain number of days may be performed until midnight of the final day. II Blackstone, Commentaries *141.")(citations omitted); Meisel v. Piggly Wiggly Corp., 418 N.W.2d 321, 325 (S.D. 1988)("There being no official business hours for the office of sheriff, and a 'day' being the time period from midnight to midnight, delivery of the summons to the sheriffs' offices at 7 p.m. was delivery on January 27 within the meaning of SDCL 15-6-6(a). We hold that receipt of the summonses in the normal course of business by duly appointed

sheriffs' office employees at 7:00 p.m. on January 27, 1986, constituted delivery to the sheriffs or other officers within the meaning of SDCL 15-2-31. Meisel's action was timely commenced."); and Rock Finance Co. v. Central National Bank of Sterling, 89 N.E.2d 828, 831-32 (Ill. App. Ct. 1950)("This construction [of the term 'business day'], furthermore, is consistent with the prevailing legal concept of a 'day,' as an indivisible unit consisting of a twenty-four hour period from midnight to midnight. Courts do not ordinarily take cognizance of fractions of a day, and an act to be done therein is not referable to any particular portion thereof. Thus, the designation, 'election day' referred to the twenty-four hour period of the day on which the election is held, rather than to the hours during which the polls are open. It is, however, within the power of the legislature to declare what shall constitute a day for a particular purpose. The legislature has unequivocally provided that eight hours of labor, between the rising and setting of the sun, in all mechanical trades, arts and employments, shall constitute a legal day's work, unless there is a specific contract to the contrary. In sec. 207a of the Illinois Negotiable Instruments Law, there is no such clear statutory limitation on the length of a day. The word 'business,' if it were to be construed as qualifying the word day, is vague and ambiguous, for banks vary, even within a

single community, in the hours that they are open for business transactions with the public. There is an even greater variance in the number of hours during which the employees and officials attend to business matters after the doors are closed. Therefore, it would be tantamount to judicial legislation to construe the word 'business' as limiting the 'day' to the hours between 9:00 A. M. and 3:00 P. M., or to the particular number of hours on the specific day that the individual bank may be open to the public.")(citations omitted).

110. Moreover, as the undersigned explained to [redacted] at the due process hearing when [redacted] raised the issue of the School Board's compliance with the "five business days before the hearing" disclosure requirement of 34 C.F.R § 300.509 and requested that a "mistrial" be granted or the hearing be "end[ed]," the appropriate remedy for a violation of this requirement, as a reading of 34 C.F.R § 300.509 makes abundantly clear, is "[t]o prohibit the introduction [at hearing] of any evidence" not timely disclosed. [redacted] though, did not seek this remedy at hearing. She objected to none of the exhibits the School Board offered into evidence. Accordingly, even if the School Board had not timely disclosed these exhibits in accordance with 34 C.F.R § 300.509, by failing to object to their introduction into evidence, [redacted] waived [redacted] right to seek

the only remedy available under 34 C.F.R § 300.509 for the School Board's untimely disclosure.

111. [redacted] complaint that the School Board violated the IDEA by "fail[ing] to provide [[redacted]] with due notice of [its] intent to test and evaluate [redacted] on 11-12-03" is based upon the erroneous premise that the School Board "test[ed] and evaluate[d] [redacted] on 11-12-03." The School Board did not, nor did it ever intend, "to test and evaluate [redacted] on 11-12-03." What actually occurred on November 12, 2003, was that [redacted]'s IAT met to consider the problems [redacted] was having in the classroom and to discuss ways to deal with those problems. Among the specific topics the IAT members talked about at the meeting was whether [redacted] should undergo psychosocial and psycho-educational evaluations. The team members decided to propose that these evaluations be conducted. The proposed evaluations were ultimately conducted, but not on November 12, 2003. Rather, they were conducted in January 2004, <u>after</u> [redacted] had requested (in late December 2003) "that the School Board of Broward County test and evaluate [[redacted]] [redacted] [redacted] in order to rule out any psychiatric, psychological, or academic deficits that [might] impair [redacted] school adjustment and academic progress" and <u>after</u> [redacted] had consented in writing (in early January 2004) to the School Board's conducting these evaluations. [redacted] therefore is wrong to suggest that on November 12, 2003, the School Board did anything more, with respect to "test[ing] and evaluat[ing] [redacted] than merely discussing the subject and developing a

proposal that it conduct such "test[ing] and evaluat[ing]." The School Board sent [redacted] an invitation to attend the November 12, 2003, IAT meeting at which these "preparatory" activities took place. Unfortunately, [redacted] never received the invitation and did not find out about the meeting until well after November 12, 2003. The School Board's lack of success in getting the invitation into [redacted]'s hands, however, did not bring the School Board in violation of the IDEA since the School Board, despite its notification efforts, had no obligation thereunder to give [redacted] notice of, or an opportunity to participate in, the November 12, 2003, IAT meeting. 34 C.F.R. § 300.501 (district school boards not required to give parents notice of, and an opportunity to participate in, "preparatory activities that public agency personnel engage in to develop a proposal"); cf. Blackmon ex rel. Blackmon v. Springfield R-XII School District, 198 F.3d 648, 657 (8th Cir. 1999)("The fact that the School District developed an unfinished draft of Grace's IEP in advance of the meeting is not cause for concern, as nothing in the IDEA or its regulations prohibits a school district from coming to an IEP meeting with tentative recommendations for its development prepared in the parents' absence."); and Tracy v. Beaufort County Board of Education, 2004 WL 2095601 (D. S.C. March 5, 2004)("Nothing in the IDEA or its implementing regulations precludes the school officials from meeting informally,

reviewing the medical evaluations, discussing placement options with the parents, or creating a draft IEP proposal prior to the formal IEP meeting."). In any event, even if the School Board's failure to notify [redacted] of the November 12, 2003, meeting amounted to a violation of the IDEA (which it does not), such a procedural violation would be a harmless one since the "test[ing] and evaluat[ing]" discussed and proposed at the meeting was what [redacted] later asked for (in her December 29, 2003, letter to Principal Rashid). See Weiss v. School Board of Hillsborough County, 141 F.3d 990, 996 (11th Cir. 1998)("For the Weisses to prove that Samuel was denied a FAPE, they must show harm to Samuel as a result of the alleged procedural violations. Violation of any of the procedures of the IDEA is not a per se violation of the

Act. . . . Here, Plaintiffs seek to advance a per se violation argument, claiming that the School Board's failure to provide specific notice to the Weisses of various aspects of Samuel's education are per se denials of a FAPE to Samuel. However, the facts do not show that any of these procedural defects resulted in harm to Samuel, or restricted the Weiss' ability to participate fully in Samuel's education."); Heather S. v. State of Wisconsin, 125 F.3d 1045, 1059 (7th Cir. 1997), quoting from, W. G. v. Board of Trustees of Target Range School District No. 23, Missoula, Montana, 960 F.2d 1479, 1484 (9th Cir. 1992)("Procedural flaws do not automatically require a finding of a denial of a FAPE. However, procedural inadequacies that result

in the loss of educational opportunity, . . . or seriously infringe the parents' opportunity to participate in the IEP formulation process, . . . clearly result in the denial of a FAPE."); Moubry v. Independent School District 696, Ely, Minnesota, 9 F. Supp. 2d 1086, 1102 (D. Minn. 1998)("This Circuit has adopted what amounts to a harmless error standard, by which to review claimed procedural deficiencies in the formulation of an IEP, by holding that an IEP should be set aside only if procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits.")(internal quotation marks omitted.); Sanger v. Montgomery County Board of Education, 916 F. Supp. 518, 526-27 (D. Md. 1996)("[T]o the extent that there may be failure to comply strictly with IDEA's procedures, the Court must consider whether the failures have caused the loss of 'educational opportunity' or are merely technical in nature."); and Chuhran v. Walled Lake Consolidated Schools, 839 F. Supp. 465, 473 (E.D. Mich. 1993), aff'd, 51 F.3d 271 (Table) (6th Cir. 1995)(failure to develop a written plan for transition services held to be an insubstantial technical defect where the student "ha[d] been provided with adequate transition services in spite of the District's failure to document them.").

112. With respect to [redacted] complaint that the School Board violated the IDEA by failing, "upon the commencement of [its] intent to test and evaluate[redacted] to provide [redacted] with "a

written document or documents of [redacted] rights" under the IDEA, the evidentiary record reveals that, on December 16, 2003, before any "test[ing] and evaluat[ing]" had taken place, in a reasonable and good faith effort to comply with the notice requirement of 20 U.S.C. § 1415(d) and 34 C.F.R. § 300.504, the School Board mailed to [redacted] a "procedural safeguards" informational booklet, along with a Consent to Evaluate Form advising [redacted] of the School Board's proposal to "test and evaluate" [redacted] but [redacted] never received the booklet or the form [redacted] was sent, and it was not until the February 23, 2004, meeting on [redacted]'s test results that she first saw a "procedural safeguards" informational booklet. Even if the School Board's making a reasonable and good faith effort on December 16, 2003, to provide [redacted] with a "procedural safeguards" informational booklet was insufficient to meet the requirement of 20 U.S.C. § 1415(d) and 34 C.F.R. § 300.504 that "[a] copy of the procedural safeguards available to the parents of a child with a disability must be given to the parents . . . [u]pon initial referral for evaluation," the School Board's lack of compliance with this requirement would constitute mere harmless error under the authority cited in the immediately preceding paragraph since it is clear that [redacted] wanted the School Board to "test and evaluate" [redacted] (as [redacted] indicated in her December 29, 2003 letter) and that therefore, had [redacted] received the booklet the Department sent [redacted] on December 16, 2003, [redacted]

would not have exercised [redacted] right to refuse to consent to such "test[ing] and evaluat[ing]" and the "test[ing] and evaluat[ing]" would have taken place exactly as it did, with no due process hearing on the matter needed.

113. Turning to [redacted] final contention that the School Board violated the IDEA by failing to timely act on requests for independent educational evaluations [redacted] made on March 2, 2004, and May 5, 2004, although [redacted] may have disagreed with the assessment contained in Ms. Wong's psycho-educational evaluation report that [redacted] exhibit[ed] behaviors associated with ADHD," the preponderance of the evidence establishes that on neither March 2, 2004, nor May 5, 2004, did [redacted] or anyone acting on [redacted] behalf, request an independent educational evaluation of [redacted] contention is therefore without merit.[18]

114. In view of the foregoing, no relief is warranted in the instant case.

DONE AND ORDERED this 21st day of October, 2004, in Tallahassee, Leon County, Florida.

S

_____

STUART M. LERNER
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of October, 2004.

ENDNOTES

1/ [redacted] was accompanied and advised at the due process hearing by Michael Kasdaglis.

2/ Effective September 20, 2004, 24 days after the conclusion of the due process hearing in the instant case, Florida Administrative Code Rule 6A-6.03311 was amended to provide for "the allowance of discovery" in due process proceedings.

3/ [redacted] voluntarily absented [redacted] from the remainder of the due process hearing after resting [redacted] case the afternoon of August 26, 2004.

4/ After "having met [redacted] a couple of times," Mr. Kasdaglis determined that [redacted] had "agitated depression, [and was] at risk [of] doing harm to [redacted] or to others" and "that [redacted] fully met criteria for bipolar depressive disorder." Although Mr. Kasdaglis observed "the presence of hyperactivity and inattention," in [redacted] opinion, [redacted] was not suffering from attention deficit disorder (ADD).

5/ Public Law 94-142 "was originally known as the 'Education for All Handicapped Children Act of 1975,' but was renamed in 1990 as the 'Individuals with Disabilities Education Act.'" Cremeans v. Fairland Local School District Board of Education, 633 N.E.2d 570, 576 (Ohio Ct. App. 1993).

6/ Ms. Wong is certified by the Florida Department of Education as a school psychologist. [redacted] is not licensed by the Department of Health to engage in the practice of psychology under Chapter 490, Florida Statutes.

7/ The Parent Information Form that [redacted] had completed and Ms. Adler's psychosocial assessment report were among the "[r]ecords" Ms. Wong reviewed.

8/ Ms. Wong did not personally interview either [redacted]

9/ By memorandum issued March 8, 2004, Ms. Wong amended her report by adding the Roberts Apperception Test for Children to this list of "assessment procedures."

10/ [redacted] it turned out, was retained.

11/ At hearing, [redacted] testified that she received these records on May 15, 2004.

12/ [redacted] attended [redacted] before attending [redacted].

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

14/ Since September 20, 2004, Florida Administrative Code Rule 6A-6.03311 has provided, as follows, with respect individual educational evaluations:

> (7) Independent educational evaluation.
>
> (a) The parents of a child with a disability have the right to obtain an independent educational evaluation for their child and be provided upon request for an independent educational evaluation information about where an independent educational evaluation may be obtained and of the qualifications of the evaluation specialist in accordance with paragraph (4)(a) of Rule 6A-6.0331, F.A.C.
>
> (b) Independent educational evaluation is defined to mean an evaluation conducted by a qualified evaluation specialist as prescribed in paragraph (4)(a) of Rule 6A-6.0331, F.A.C., who is not an employee of the district school board.
>
> (c) Public expense is defined to mean that the school district either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent.

(d) Whenever an independent educational evaluation is conducted, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the evaluation specialist, shall be the same as the criteria prescribed by paragraph (4)(a) of Rule 6A-6.0331, F.A.C., for use by the school district when it initiates an evaluation to the extent that those criteria are consistent with the parent's right to an independent educational evaluation.

(e) The school district may not impose conditions or timelines for obtaining an independent educational evaluation at public expense other than those criteria described in paragraph (7)(d) of this rule.

(f) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the school district.

(g) If a parent requests an independent educational evaluation at public expense, the school district must, without unnecessary delay either:

1. Ensure that an independent educational evaluation is provided at public expense; or

2. Initiate a hearing under subsection (11) of this rule to show that its evaluation is appropriate or that the evaluation obtained by the parent did not meet the school district's criteria. If the school district initiates a hearing and the final decision from the hearing is that the district's evaluation is appropriate then the independent educational evaluation obtained by the parent will be at the parent's expense.

(h) If a parent requests an independent

> educational evaluation, the school district may ask the parent to give a reason why he or she objects to the school district's evaluation. However, the explanation by the parent may not be required and the school district may not unreasonably delay either providing the independent educational evaluation at public expense or initiating a due process hearing to defend the school district's evaluation as described in subsection (11) of this rule.
>
> (i) Evaluations obtained at private expense. If the parent obtains an independent educational evaluation at private expense:
>
> 1. The school district shall consider the results of such evaluation in any decision regarding the student if it meets the appropriate criteria described in paragraph (7)(d) of this rule; and
>
> 2. The results of such evaluation may be presented as evidence at any hearing authorized under subsection (11) of this rule.
>
> (j) If an administrative law judge requests an independent educational evaluation as part of a hearing, the cost of the evaluation must be at public expense.

15/ "The [parents'] right to provide meaningful input [in the development of the IEP] is simply not the right to dictate an outcome and obviously cannot be measured by such." White ex rel. White v. Ascension Parish School Board, 343 F.3d 373, 380 (5th Cir. 2003); see also AW ex rel. Wilson v. Fairfax County School Board, 372 F.3d 674, 683 n.10 (4th Cir. 2004)(" Although AW's parents indicated their dissatisfaction with AW's April IEP by declining to sign it, the right conferred by the IDEA on parents to participate in the formulation of their child's IEP does not constitute a veto power over the IEP team's decisions.").

16/ This is the version of Florida Administrative Code Rule 6A-6.03311 that was in effect prior to September 20, 2004, and at all times material to the instant case. The version of Florida Administrative Code Rule 6A-6.03311 now in effect similarly provides that "[w]ritten parent consent shall be obtained . . . prior to initial provision of specially designed instruction and related services to a student with a disability."

17/ Florida Administrative Code Rule 6A-6.03311 now provides, as it has since September 20, 2004, that "[a]ny party to a [due process] hearing . . . has the right: [t]o prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five (5) business days before the hearing." In addition, unlike its pre-September 20, 2004, version, it also provides that "[a]n administrative law judge . . . shall conduct such hearings in accordance with the Uniform Rules for Administrative Proceedings, Chapter 28-106, F.A.C. Florida Administrative Code Rule 28-106.103 provides that, "[i]n computing any period of time allowed by this chapter, by order of a presiding officer, or by any applicable statute, . . . [w]hen the period of time allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation."

18/ [redacted] did make such a request at the due process hearing (on August 25, 2004). In its Proposed Final Order, the School Board reports that, in response to this request, on October 11, 2004, it "offered to provide for an independent psychiatric evaluation of [redacted] Accordingly, to the extent that [redacted] is claiming herein that [redacted] is entitled to obtain such relief for [redacted] that claim is now moot. See Sullivan v. Farmers Home Administration, 691 F. Supp. 927, 931 (E.D. N.C. 1987)("Since the FmHA already has provided the relief sought by plaintiffs on their First Claim for Relief, that claim is moot.").

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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 Individuals with Disabilities Education Act (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.