

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

BROWARD COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 15-2799E

■,

Respondent.

\_\_\_\_\_ /

FINAL ORDER

A final hearing was held in this case before Todd P. Resavage, an Administrative Law Judge of the Division of Administrative Hearings ("DOAH"), on July 8 and August 5, 2015, in Fort Lauderdale, Florida.

APPEARANCES

For Petitioner: Barbara J. Myrick, Esquire  
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For Respondent: Amanda L. Routman, Esquire  
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STATEMENT OF THE ISSUE

Whether the proposed change of the subject child's ("the Child") placement to a separate day school represents the least

restrictive environment ("LRE") within the meaning of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, et seq.

PRELIMINARY STATEMENT

On May 19, 2015, Petitioner Broward County School Board, pursuant to section 1003.5715, Florida Statutes, filed a request for a due process hearing that sought approval to place the Child in an exceptional student education center ("special day school").<sup>1/</sup> Petitioner's hearing request was necessitated by the Child's parents' ("hereinafter Respondent") refusal to provide consent to the proposed placement as recommended in the Child's IEP dated May 13, 2015.

On May 21, 2015, the undersigned issued a Notice of Hearing scheduling the final hearing for June 11, 2015. On June 9, 2015, Respondent filed a motion to continue. Said motion was granted and the final hearing was rescheduled for July 8, 2015.

On July 2, 2015, the parties filed an Amended Joint Statement of Undisputed Facts. To the extent relevant, those facts have been incorporated in this Final Order.

The final hearing proceeded as scheduled; however, the hearing was not concluded. On July 17, 2015, the undersigned issued a Notice of Hearing setting the final day for the final hearing for August 5, 2015. The final hearing concluded on said date.

At the conclusion of the final hearing, the parties and the undersigned agreed to set the deadline for the filing of proposed final orders to September 4, 2015, and the undersigned's Final Order to October 5, 2015.

The final hearing Transcript was filed on August 17, 2015, and a Notice of Filing Transcript was issued on August 18, 2015. The identity of the witnesses and exhibits and the rulings regarding each are as set forth in the Transcript.

On September 1, 2015, Petitioner filed a motion for extension of time to file proposed final orders. On September 2, 2015, the undersigned issued an Order Granting Extension of Time for Proposed Final Orders and a Specific Extension of Time for Final Order. The parties timely filed Proposed Final Orders, which were considered in preparing this Final Order. Unless otherwise indicated, all rule and statutory references are to the version in effect at the time the subject IEP was drafted.

For stylistic convenience, the undersigned will use male pronouns in the Final Order when referring to the Child. The [REDACTED] pronouns are neither intended, nor should be interpreted, as a reference to the Child's actual gender.

FINDINGS OF FACT

Stipulated Facts:

1. The Child was born on [REDACTED].

2. The Child has been diagnosed with [REDACTED]

[REDACTED]  
[REDACTED].

3. In [REDACTED], the Child began attending a Broward County Public School, as a transfer student, while [REDACTED] was in pre-kindergarten. [REDACTED] was determined eligible for exceptional student education ("ESE") services in January 2012 in the areas of

[REDACTED]. [REDACTED] also received [REDACTED] as related services.

4. In 2012, [REDACTED] attended the [REDACTED] [REDACTED] Broward, a private agency under contract with Petitioner to provide educational services [REDACTED] [REDACTED].

5. On May 9, 2012, the Child was determined to be eligible for ESE services in the areas of [REDACTED] [REDACTED]. [REDACTED] was further determined to continue needing [REDACTED] as related services.

6. In the fall of 2012, [REDACTED] began attending another public [REDACTED] school in the Broward County School District

("School A") in a "cluster program" for students with [REDACTED]. The Child was placed in a separate classroom due to [REDACTED] need for personal assistance or supervision in all activities of [REDACTED]. Additionally, [REDACTED] received specialized instruction and/or curriculum for a majority of learning activities.

7. During the [REDACTED] school year, the Child attended School A and was in [REDACTED] grade.

Evidence Presented at Hearing

8. Prior to the subject IEP, during the [REDACTED] school year at School A, the Child received all of [REDACTED] special education services (academics, behavior, independent functioning, communication, and direct language therapy), and the related service of occupational therapy in an "ESE Class." Although not specifically delineated as such in the IEP, it is undisputed that the Child participated in an [REDACTED] cluster program, a separate/special class<sup>2/</sup> for [REDACTED] students.

9. At School A, the Child's [REDACTED] class consists of between seven to nine students and two adults-- [REDACTED], the ESE teacher, and an educational support professional. The hours of the [REDACTED] class are from 8:00 a.m. to 2:00 p.m. Based on the evidentiary presentation, a typical day begins with morning group time, wherein the students, all of whom are [REDACTED], participate in songs, work on learning the alphabet, utilize visuals, and

attempt the use of voice output devices (where applicable). At the conclusion of group time, the students consume a snack, work on art projects, and may play on the "Smart Board."

10. Following snack time, [REDACTED] works with the children, including the Child, on a one-to-one basis. [REDACTED] utilizes a cardboard trifold to separate the individual student from the balance of the class to avoid distractions. During the one-to-one time, [REDACTED] attempted to primarily focus on the Child's IEP goals. Specifically, [REDACTED] focused on the Child's academics, a non-preferred activity of the Child.

11. In the special class placement, the Child's availability for interaction with non-disabled peers in the non-academic setting is limited. [REDACTED] and [REDACTED], an ESE specialist at School A, credibly testified that the Child has the potential opportunity for contact with non-disabled peers in the following circumstances: 1) when [REDACTED] first arrives to school; 2) when transitioning locations; 3) during lunch; 4) at dismissal; and 5) during "play pals."<sup>3/</sup>

12. In practice, however, the Child's interaction with non-disabled peers in the non-academic environment is rare. School A has developed a program wherein non-disabled students may assist exceptional students in getting settled to their class upon arrival. The Child's father, however, escorts the Child when arriving.

13. The students in the [REDACTED] cluster program do not have recess with non-disabled students. Although the Child is able to access the school campus and playground without any physical limitations, [REDACTED] requires constant supervision as [REDACTED] tries to wander from the group. Moreover, the Child has difficulty transitioning within the school environment, and requires constant supervision to maintain [REDACTED] safety and the safety of others.

14. During lunch time, the Child has a difficult time sitting down and getting settled without multiple adults addressing [REDACTED] using various prompts (verbal, visual, gestural, tactile, physical). Occasionally, the Child will point to another student and verbalize. The Child's availability to have contact with non-disabled peers at dismissal is also curtailed. The Child's father frequently checks the Child out from school early in an effort to prepare the Child for therapy sessions that occur away from school.

15. As noted above, the Child has been diagnosed with [REDACTED]. From the limited evidence presented on the [REDACTED], the undersigned finds that [REDACTED] is an [REDACTED], associated with [REDACTED]. Most children with [REDACTED] have moderate to severe delays and often do not develop functional language.<sup>4/</sup>

16. Consistent with the [REDACTED] diagnosis, the Child has significant [REDACTED]. On January 8, 2015, an informal assessment was conducted by a speech-language pathologist concerning the Child's expressive and receptive language abilities. The results of said assessment are set forth, in pertinent part, as follows:

[REDACTED]



[REDACTED]

17. The Child's IEP dated February 17, 2015, documents that, "[b]ased on the impact of [REDACTED], [the Child] may have difficulty using functional communication with peers and adult [sic] and following simple directions." The IEP documents [REDACTED] present level of academic achievement and functional performance in the domain of communication as follows:

[REDACTED]



18. Petitioner's witnesses uniformly and credibly testified that, based in whole or in part on the Child's lack of communication skills, the Child consistently demonstrated inappropriate and often aggressive behaviors. [REDACTED] credibly testified that the Child was aggressive a "good deal" of the time, and [REDACTED] aggressive behavior appeared to escalate if [REDACTED] was given a non-preferred activity such as sitting in a chair, or attempting to perform an academic activity. The Child hit most of the students in the class and would throw any object that was within reach, which in turn may also have hit the fellow students.

19. The Child's inappropriate behaviors would frighten the other students and would preclude them from learning. At times, when the Child was throwing, hitting, and kicking, the staff would be required to remove the other students, some of whom are medically fragile. Other times, the Child was required to be

removed for [REDACTED] safety and the safety of others. It is undisputed that the Child's aggressive behaviors were not intentionally malicious.

20. [REDACTED], the principal at School A, was frequently called to the classroom to assist in the Child's removal or attempted re-engagement back to the classroom. [REDACTED] credibly estimated that the Child was probably removed from the classroom on a daily basis.

21. The Child's IEP, under the heading of "Domain: [REDACTED]," documents the Child's present level of academic achievement and functional performance as follows:

[REDACTED]

22. Over the course of the [REDACTED] school year, Petitioner attempted to ameliorate the Child's behavioral issues that are perceived to stem from the Child's [REDACTED] and resulting

communication deficits. These attempts include, but are not limited to, the following: 1) sensory interventions; 2) the creation of a Functional Behavioral Assessment and Behavioral Intervention Plan; 3) a speech and language assessment; 4) a psychological evaluation; 5) assistance from one of the School District's board-certified assistant behavioral analysts to conduct observations of the Child; and 6) employing a behavioral specialist to work one-to-one with the Child for several weeks.

23. Notwithstanding these efforts, the Child did not demonstrate any progress on [REDACTED] IEP goals throughout the [REDACTED] school year. The Child's IEP annual goals included the following:

[REDACTED]: By November 15, 2015, given fewer than 3 verbal, visual, and/or gestural prompts, [the Child] will attend to a teacher-directed activity for 2 minutes, in 4 out of 5 opportunities.

[REDACTED]: By November 15, 2015, given fewer than 3 verbal, visual, and/or gestural prompts and reinforcers [the Child] will refrain from aggressively touching his/her peers for 15 minutes in 4 out of 5 opportunities.

[REDACTED]: By November 15, 2015, given fewer than 3 verbal, visual, and/or gestural prompts, [the Child] will walk in line with his/her peers, 4 out of 5 opportunities.

By November 2015, given gestural and verbal prompts [the Child] will carry his/her tray from the lunch line to the table in 4 out of 5 opportunities.

██████████: Given a structured setting, and picture cards/objects paired with verbal and gestural prompts, [the Child] will point to the correct picture in 4 out of 5 opportunities by November 2015.

24. Petitioner's Complaint maintains that the Child has made limited educational progress due to ██████ behavioral issues, as well as inconsistent attendance, and School A is unable to meet the Child's unique needs.

25. On May 13, 2015, an IEP team meeting was conducted. At the meeting, the IEP team recommended that the Child's placement should be changed from the special class to a special day school. A special day school is a school which is administratively separate from regular schools and is organized to serve one or more types of exceptional students.<sup>7/</sup> The Child's parents did not consent to this proposed change in placement.

26. Specifically, Petitioner proposes a change of the Child's placement to a special day school in the Broward County School District ("School B"). School B is a school entirely composed of exceptional students. According to ████████████████████, a School B ESE specialist, all of the students either have an eligibility of ██████ or ████████████████████. Each classroom typically consists of an ESE teacher, a behavioral technician, and two classroom assistants. The average class has seven students.

27. Approximately 45 percent of the School B students are

[REDACTED]  
[REDACTED]  
[REDACTED] and three full-time nurses are on staff. School B also possesses behavioral support staff to assist the needs of its student body, including two full-time behavioral specialists, and behavioral technicians throughout the school to assist, when needed. [REDACTED] also employs four speech and language pathologists to ensure that every class receives approximately 45 minutes to 60 minutes of speech language every day.

28. Petitioner's witnesses articulated several reasons why the IEP team (excluding the Child's parents) recommends the [REDACTED] placement. First, [REDACTED] would allow for increased support in the classroom to provide greater individual attention and to work on the Child's interventions. Second, due to the behavioral staff, there is an ability to work with the Child's behavioral concerns on a more consistent basis. Third, full-time speech language pathologists are available to work with the Child on a daily basis.

29. In opposition to the proposed placement, Respondent avers that Petitioner failed to explore different placement options. Petitioner offers different types of special classes, one of which being for those with [REDACTED]. The [REDACTED] cluster includes an [REDACTED] coach as an additional service

provider. The [REDACTED] coach's duties include assisting the teacher in social skills groups, working towards the goals contained on the student's IEP, collaborating with parents, and obtaining and maintaining data. Despite [REDACTED] being an [REDACTED] [REDACTED] Petitioner did not evaluate the Child to determine if [REDACTED] is [REDACTED] and/or to determine if [REDACTED] would be eligible for [REDACTED] prior to the proposed change in placement.

#### CONCLUSIONS OF LAW

30. DOAH has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to sections 1003.57(1)(b) and 1003.5715(5), Florida Statutes, and Florida Administrative Code Rule 6A-6.03311(9)(u).

31. Petitioner bears the burden of proof with respect to each of the claims raised in the Complaint. Schaffer v. Weast, 546 U.S. 49, 62 (2005).

32. In enacting the IDEA, Congress sought to "ensure that all children with disabilities have available to them a free appropriate public education that emphasized special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A); Phillip C. v. Jefferson Cnty. Bd. of Educ., 701 F.3d 691, 694 (11th. Cir. 2012). The statute was intended to address the inadequate educational

services offered to children with disabilities and to combat the exclusion of such children from the public school system.

20 U.S.C. § 1400(c)(2)(A)-(B). To accomplish these objectives, the federal government provides funding to participating state and local educational agencies, which is contingent on the agency's compliance with the IDEA's procedural and substantive requirements. Doe v. Alabama State Dep't of Educ., 915 F.2d 651, 654 (11th Cir. 1990).

33. Parents and children with disabilities are accorded substantial procedural safeguards to ensure that the purposes of the IDEA are fully realized. See Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 205-06 (1982). Among other protections, parents are entitled to examine their child's records and participate in meetings concerning their child's education; receive written notice prior to any proposed change in the educational placement of their child; and file an administrative due process complaint "with respect to any matter relating to the identification, evaluation, or educational placement of [their] child, or the provision of a free appropriate public education to such child." 20 U.S.C. §§ 1415(b)(1), (b)(3), & (b)(6).

34. Local school systems must also satisfy the IDEA's substantive requirements by providing all eligible students with



a free appropriate public education ("FAPE"), which is defined as:

Special education services that--(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under [20 U.S.C. § 1414(d)].

20 U.S.C. § 1401(9).

35. "Special education," as that term is used in the IDEA, is defined as:

[S]pecially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including--

(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings . . . .

20 U.S.C. § 1401(29).

36. The components of FAPE are recorded in an IEP, which, among other things, identifies the child's "present levels of academic achievement and functional performance," establishes measurable annual goals, addresses the services and accommodations to be provided to the child and whether the child will attend mainstream classes, and specifies the measurement tools and periodic reports that will be used to evaluate the child's progress. 20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R.

§ 300.320. "Not less frequently than annually," the IEP team must review and, as appropriate, revise the IEP. 20 U.S.C. § 1414(d)(4)(A)(i).

37. In addition to requiring that school districts provide students with FAPE, the IDEA further gives directives on students' placements or education environment in the school system. Specifically, 20 U.S.C. § 1412(a)(5)(A), provides as follows:

Least restrictive environment.

(A) In general. To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

38. Pursuant to the IDEA's implementing regulations, states must have in effect policies and procedures to ensure that public agencies in the state meet the LRE requirements. 34 C.F.R. § 300.114(a). Additionally, each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. 34 C.F.R. § 300.115. In turn, the Florida Department of Education has enacted rules to comply with the

above-referenced mandates concerning LRE and providing a continuum of alternative placements. See Fla. Admin. Code R. 6A-6.03028(3)(i) and 6A-6.0311(1).<sup>8/</sup>

39. In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child; the meaning of the evaluation data; and the placement options.

34 C.F.R. § 300.116(a)(1). Additionally, the child's placement must be determined at least annually, based on the Child's IEP, and as close as possible to the child's home. 34 C.F.R. § 300.116(b).

40. With the LRE directive, "Congress created a statutory preference for educating handicapped children with nonhandicapped children." Greer v. Rome City School Dist., 950 F.2d 688, 695 (11th Cir. 1991). "By creating a statutory preference for mainstreaming, Congress also created a tension between two provisions of the Act, School districts must both seek to mainstream handicapped children and, at the same time, must tailor each child's educational placement and program to [REDACTED] special needs." Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1044 (5th Cir. 1989).

41. In Daniel, the Fifth Circuit set forth a two-part test for determining compliance with the mainstreaming requirement:

First, we ask whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child. See §1412(5)(B). If it cannot and the school intends to provide special education or to remove the child from regular education, we ask, second, whether the school has mainstreamed the child to the maximum extent appropriate.

Daniel, 874 F.2d at 1048.

42. In Greer, infra, the Eleventh Circuit adopted the Daniel two-part inquiry. In determining the first step, whether a school district can satisfactorily educate a student in the regular classroom, several factors are to be considered: 1) a comparison of the educational benefits the student would receive in a regular classroom, supplemented by aids and services, with the benefits he will receive in a self-contained special education environment; 2) what effect the presence of the student in a regular classroom would have on the education of other students in that classroom; and 3) the cost of the supplemental aids and services that will be necessary to achieve a satisfactory education for the student in a regular classroom. Greer, 950 F.2d at 697.

43. Here, it is undisputed that the Child cannot be satisfactorily educated in the regular classroom, with the use of supplemental aids and services. Respondent does not seek and has not previously sought for the Child to be so educated. Rather,

Respondent argues in its Proposed Final Order that the child can receive an educational benefit with appropriate supplementary aids and services in a different special class setting (an autism cluster) on the campus of a regular school.<sup>9/</sup>

44. Accordingly, the instant proceeding turns on the second part of the test: whether the Child has been mainstreamed to the maximum extent appropriate. In determining this issue, the Daniel court provided the following general guidance:

The [IDEA] and its regulations do not contemplate an all-or-nothing educational system in which handicapped children attend either regular or special education. Rather, the Act and its regulations require schools to offer a continuum of services. Thus, the school must take intermediate steps where appropriate, such as placing the child in regular education for some academic classes and in special education for others, mainstreaming the child for nonacademic classes only, or providing interaction with nonhandicapped children during lunch and recess. The appropriate mix will vary from child to child and, it may be hoped, from school year to school year as the child develops. If the school officials have provided the maximum appropriate exposure to non-handicapped students, they have fulfilled their obligation under the [IDEA].

Daniel, 874 F.2d at 1050 (internal citations omitted).

45. During the [REDACTED] school year, the Child received all of [REDACTED] academics in the special education setting, a special class. The Child's recess was also provided apart from the regular education environment. The Child's placement provided

the opportunity for exposure to non-disabled peers during lunch, transitioning, play-pals, and when arriving and departing from the campus. As discussed above in the Findings of Fact, however, due to the nature and severity of the Child's disability, ■ did not, or could not, meaningfully avail ■ of the opportunities to interact or model with non-disabled peers.

46. The majority of the Child's IEP team opines that FAPE cannot be provided to the Child absent a special day school setting. The undersigned is mindful that great deference should be paid to the educators who developed the IEP. A.K. v. Gwinnett Cnty. Sch. Dist., 556 Fed. Appx. 790, 792 (11th Cir. 2014) ("In determining whether the IEP is substantively adequate, we 'pay great deference to the educators who develop the IEP.'") (quoting Todd D. v. Andrews, 933 F.2d 1576, 1581 (11th Cir. 1991)). As noted in Daniel, "[the undersigned's] task is not to second-guess state and local policy decisions; rather, it is the narrow one of determining whether state and local officials have complied with the Act." Daniel, 874 F.2d at 1048.

47. The May 13, 2015, IEP proposes a change of the Child's placement to the next point (in terms of escalating restrictiveness) on the continuum of possible placements. While it is undisputed that the proposed placement offers less potential for interaction with non-disabled peers, in practice, from the evidence presented, it is anticipated that the same will

be a distinction without a difference. The undersigned concludes that Respondent's proposed placement of the Child in a special day school mainstreams the Child to the maximum extent appropriate. Accordingly, the proposed placement is approved.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Petitioner's proposed change of the Child's placement from a separate/special class to an exceptional student education center/special day school is approved.

DONE AND ORDERED this 30th day of September, 2015, in Tallahassee, Leon County, Florida.

**S**

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TODD P. RESAVAGE  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 30th day of September, 2015.

ENDNOTES

<sup>1/</sup> "Exceptional student education center" or "special day school" means a separate public school to which nondisabled peers do not have access. § 1003.57(1)(a)1.a., Fla. Stat.

<sup>2/</sup> Pursuant to section 1003.57, Florida Statutes, a "separate class" means a class in which a student spends less than

40 percent of the school week with nondisabled peers. A "special class" is defined as "the provision of instruction to exceptional students who receive the major portion of their educational program in special classes located in a regular school." Fla. Admin. Code R. 6A-6.0311(1)(c).

<sup>3/</sup> On a weekly basis, non-disabled students come to the special class and interact with the [REDACTED] students.

<sup>4/</sup> The undersigned notes (but does not make any findings of fact) the following description of [REDACTED], as found on the [REDACTED] Foundation website:

[REDACTED]

[REDACTED]

[REDACTED]





<sup>5/</sup> The language contained in the Child's IEP remained essentially identical in the IEPs dated February 17, 2015; April 2, 2015; and the subject IEP dated May 14, 2015.

<sup>6/</sup> The verbiage noted in this passage is essentially identical in the subsequent IEPs dated April 2, 2015, and the subject IEP, dated May 13, 2015.

<sup>7/</sup> See Fla. Admin. Code R. 6A-6.0311(1)(d).

<sup>8/</sup> In Florida, a school district may not place a student in an exceptional student education center ("special day school"), without parental consent. Where, as here, the parent does not consent, the school district may not proceed with such placement unless the school district obtains "approval" through a due process hearing. See § 1003.5715, Fla. Stat. Section 1003.5715 does not abrogate any parental right identified in the IDEA and its implementing regulations. § 1003.5715(7), Fla. Stat.

<sup>9/</sup> Respondent dedicates much of his Proposed Final Order endeavoring to convince the undersigned of procedural or substantive inadequacies of the Child's IEP (as well as former IEPs). Inasmuch as Respondent has not filed a due process hearing complaint raising these claims, see section 1003.5715(7), Florida Statutes, (noting that said section does not abrogate any parental right identified in the IDEA and its implementing regulations), such claims are not properly before the undersigned for adjudication.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless, within 90 days after the date of this decision, an adversely affected party:

- a) brings a civil action in the appropriate state circuit court pursuant to section 1003.57(1)(c), Florida Statutes (2014), and Florida Administrative Code Rule 6A-6.03311(9)(w); or
- b) brings a civil action in the appropriate district court of the United States pursuant to 20 U.S.C. § 1415(i)(2), 34 C.F.R. § 300.516, and Florida Administrative Code Rule 6A-6.03311(9)(w).