STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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Petitioner,

vs. Case No. 24-3355E

VOLUSIA COUNTY SCHOOL BOARD,

Respondent.
_____/

FINAL ORDER

By agreement of the parties, the due process hearing was held virtually, by Zoom conference, on December 17 and 18, 2024. Administrative Law Judge Jessica E. Varn presided over the hearing.

APPEARANCES

For Petitioner: Rawsi Williams, Esquire
Rawsi Williams Law Group
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Miami, Florida 33131

For Respondent: Erin Harrigan, Esquire
Gilbert L. Evans, Jr., Esquire
The School Board of Volusia County, Florida
200 North Clara Avenue
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STATEMENT OF THE ISSUES[1]

Whether the School Board failed to design individualized educational plans (IEPs) that would appropriately meet the student's needs;

Whether the School Board failed to materially implement the IEPs;

Whether the student is routinely disciplined for conduct related to his disability; and lastly,

Whether these alleged actions by the School Board resulted in discrimination and retaliation on the basis of the student's disability, in violation of the Rehabilitation Act of 1973, Section 504.[2]

PRELIMINARY STATEMENT

On September 10, 2024, the School Board referred this matter to the Division of Administrative Hearings (DOAH), with a cover letter and a pleading drafted by the School Board, and titled, "Due Process Hearing Request." This document listed the name of the student, the student's home address, the name of the school the student was attending, and a statement that the student was not homeless. It also had an attachment, a chain of emails sent between the parties. Petitioner's attorney, in the most recent email sent, stated:

> As the email chain below shows, this is no[w] our third (and final) request that you provide the contact person at Volusia specifically for submitting our requested Due Process Hearing request/petition. As

[1] In Petitioner's Proposed Final Order, Petitioner argues that the parents were denied meaningful participation in the educational planning for the student. This issue was not identified in the request for a due process hearing, or during the numerous motion hearings held. In addition, the Notice of Hearing identified the scope of the issues, and Petitioner never sought to amend the Notice of Hearing issue statement. Accordingly, this issue is not addressed in this Final Order.

[2] The Rehabilitation Act of 1973, 29 U.S.C. § 795, *et seq.* (Section 504).

> the email shows, you continue to respond to emails but withhold that information. As I am sure you are aware, a copy of the Due Process Hearing request is also to provide[d] to the FL DOE. Accordingly, your refusal in this email chain will be attached as evidence of Volusia's further non-compliance.
>
> We will submit our Due Process Hearing request/petition tomorrow to Volusia, and copy it to the FL DOE as well as to our US DOE Complaint. If you fail to act on it we will file specific complaints against the involved educators and administrators. Volusia's pre-textual attempts to now cover itself and its violations will not prevail.

On September 17, 2024, a telephonic conference was held with the parties, to address the omission of an actual request or petition for due process hearing. During the conference, Petitioner requested, and was granted, additional time to draft and file the request for a due process hearing.

Three days later, the School Board filed a Notice of Insufficiency and Motion to Dismiss, stating that because Petitioner had yet to file the request for a due process hearing, the matter should be dismissed so that the forthcoming petition could be properly forwarded to DOAH. On September 24, 2024, an Order on Notice of Insufficiency and Motion to Dismiss was entered, finding that a sufficiency review could not be conducted on a yet-to-be-filed petition, and requesting that Petitioner respond to the Motion to Dismiss by no later than September 27, 2024.

On September 30, 2024, Petitioner filed his request for a due process hearing. On October 8, 2024, the School Board filed a Second Motion to Dismiss, and ten days later, a second telephonic conference was held. The Motion to Dismiss was denied during the conference, and the case was set for hearing on November 5 and 6, 2024.

Next, on October 30, 2024, the School Board moved to quash subpoenas, which included those served on the Superintendent, counsel for the School Board, and a potential witness, [redacted]. A motion hearing was scheduled for November 4, 2024. On that day, Petitioner filed an unopposed emergency motion to cancel and reschedule the due process hearing and the motion hearing. Both requests were granted, and the parties were ordered to file mutually agreeable dates for the rescheduling of both hearings by no later than November 12, 2024. The parties complied, the motion hearing was rescheduled for December 4, 2024, and the due process hearing was rescheduled for December 17 and 18, 2024.

On November 26, 2024, the School Board filed an Emergency Motion to Override Stay-Put and Compel an IEP Meeting. On December 4, 2024, the motion hearing was held. An Order on Pending Motions was issued two days later, memorializing the rulings on all pending motions. The undersigned quashed the subpoena directed at the Superintendent, because Petitioner had failed to establish that the Superintendent had any personal knowledge of the issues raised in the request for a due process hearing. As to [redacted] and [redacted], those subpoenas were not quashed. Lastly, the School Board, during the motion hearing, withdrew its Emergency Motion to Override Stay-Put and Compel an IEP Meeting.

The due process hearing was held as scheduled. The Transcript reflects the names and identities of the 13 witnesses called to testify, as well as the exhibits entered into the record by both parties. The Findings of Fact will not address each witness's testimony or every exhibit entered into the record, but all testimony was considered and all exhibits were reviewed in preparing this Final Order.

At the end of the due process hearing, the parties agreed to file proposed final orders by January 21, 2025, and agreed to extend the deadline for the Final Order to February 5, 2025. The Transcript was filed on January 6, 2025. On January 16, 2025, the School Board filed a Motion to Strike Rebuttal Evidence, and attached what it sought to add to Petitioner's rebuttal exhibit, which consisted of an email chain. Petitioner never filed a response to the Motion to Strike. The Motion to Strike is denied. On January 21, 2025, Petitioner filed an unopposed request to extend the deadline for proposed final orders to January 24, 2025. That request was granted, and the deadline for the Final Order was extended to February 10, 2025. Both parties filed proposed orders, which were considered in preparing this Final Order.

Unless otherwise indicated, all rule and statutory references are to the versions in effect during the relevant time period. For stylistic convenience, the undersigned uses male pronouns when referring to the student. The male pronouns are neither intended, nor should be interpreted, as a reference to the student's actual gender.

FINDINGS OF FACT

1. The student has been eligible for exceptional student education services (ESE) since [redacted] ([redacted]). He is now a [redacted] [redacted], with eligibility under the categories of developmentally delayed, language impairment, and speech impairment.

2. During his [redacted] year, his maladaptive behaviors resulted in the school staff seeking consent for a functional behavior assessment (FBA), which the parents granted in March [redacted]. The FBA hypothesized that when the student was denied access to a preferred item, he would hit his peers or the adults in the classroom, or rip up materials. Also, when he was directed to do something, or corrected, he would act out physically, or lash out orally. The

FBA resulted in an initial behavior intervention plan (BIP), which assisted the IEP team in creating an IEP for the upcoming [redacted] year.[3]

3. An IEP was created in May [redacted], and amended in September, at the beginning of [redacted]. In this IEP, the student's disruptive behaviors were described as follows:

> Based on observations and data collection, [**] engaged in physical aggression (hitting, scratching, kicking, punching) 61 times over a period of 4 days. This can be triggered by a peer knocking over [his] toys, being asked to stop a disruptive behavior, being asked to join a learning activity, and sometimes randomly. [He] engaged in property destruction (throwing chairs, throwing toys and other items, throwing shoes, throwing water bottles) 39 times over a period of 4 days. This can be triggered by being asked to do something that [he] doesn't want to do, being told to stop a disruptive behavior, and sometimes randomly. [**] uses inappropriate language and demonstrates inappropriate gestures. At this time, [**] requires maximum adult support to follow simple routines. [He] often refused and runs away…. [He] is not yet understanding and following basic safety rules.
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> [**] demonstrates difficulty understanding the difference between expected and unexpected behaviors in the classroom. [He] frequently speaks out of turn while the teacher is addressing the class or another student. [He] demonstrates difficulty regulating the volume of [his] voice. [He] will engage in socially inappropriate behaviors (i.e. slapping [his] bottom, using curse words, etc.). [He] will often refuse to join structured, group activities except for [his] turn.

[3] In April [redacted], the student experienced a frightening consequence for his behavior: he was placed in a bathroom, alone, and the door was closed. This unfortunate event undoubtedly created a schism between the parents and the school staff. This event was isolated and was properly addressed by the school staff and IEP team moving forward. A new principal began her term the following school year, with hopes that the relationship could be mended.

4. In October [redacted], some of the student's oral outbursts were recorded, as the school staff collected behavior data. Some of those statements were: "[redacted] you, Isaiah, I will kick your [redacted]"; "[redacted] I will kick your [redacted] [redacted]"; "[redacted] you [redacted], I will [redacted] your neck"; and "I will knock you out, [redacted]—[redacted]."

5. A snapshot of behaviors during [redacted] included: punching a teacher in the back; slamming his fist into a teacher's hand; and destroying classroom displays, such as the calendar, the class schedule, technology information, and bathroom privacy rules.

6. In May [redacted], at the end of a challenging [redacted] year, the IEP team met to create an IEP for [redacted] [redacted]. The IEP was amended in September. The IEP reflects, that, not surprisingly, the student's academic progress was lagging behind his peers, and the staff was continuing to attempt to replace maladaptive behaviors with positive behaviors.

7. The IEP also describes the student as continuing to struggle with maintaining positive interactions with peers and adults, employing self-control, following rules, tolerating frustration, respecting others, respecting property, and seeking attention with physical and oral outbursts. He often would spend an entire day of school without engaging in a single academic task, but requiring constant supervision due to his dysregulated behavior.

8. The IEP school staff members requested permission, which was granted, to keep evaluating the student, to attempt to better serve his priority needs. The team agreed to evaluate the student for more areas of eligibility, such as autism spectrum disorder, specific learning disability, other health impaired, and intellectual disability. Once all of the evaluations were completed, the IEP team met again in November [redacted], after this request for due process hearing was filed.[4]

[4] In Petitioner's Proposed Final Order, Petitioner focuses on the student's proprioceptive difficulties, and the staff's failure to address them. One of these evaluators, an occupational therapist, explained that the student's sensory profile did not specifically indicate that he has proprioceptive difficulties. Rather, it reflects that the student has movement processing

9. Petitioner presented no persuasive evidence that the IEPs developed for the student failed to provide a free and appropriate education (FAPE); or that they were deficient in any aspect. Petitioner also failed to present any persuasive evidence that the IEPs were not materially implemented.[5]

10. The record does reflect that the student was suspended from school 11 days during [redacted], zero days in [redacted], and two days in [redacted]. Logically, he has also received multiple referrals for his maladaptive behaviors, based on multiple violations of the code of student conduct. The school staff, while imposing appropriate discipline, also sought to meet his behavioral needs, in compliance with the Individuals with Disabilities Education Act (IDEA). The referrals and suspensions were all appropriately addressed as manifestations of the student's disabilities—evidenced by the fact that the student's conduct was evaluated, studied, and either diffused or intervened with daily, and as the referrals piled up.

11. Petitioner has failed to present any persuasive evidence establishing a pattern of inappropriate discipline for conduct related to the student's multiple disabilities, or of discrimination or retaliation.

CONCLUSIONS OF LAW

12. DOAH has jurisdiction over the subject matter of this proceeding as well as the parties. *See* § 1003.57(1)(c), Fla. Stat.; Fla. Admin. Code R. 6A-6.03311(9)(u).

13. As the party seeking relief, Petitioner bears the burden of proving each issue raised in the Complaint. *See Schaffer v. Weast*, 546 U.S. 49, 62

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or touch processing issues; and that can be attributed to his maladaptive behavior. With these recent evaluations, the IEP team created a new IEP.

[5] To the extent that the parents', family members', and friends' testimony conflicts with the testimony provided by school staff, the record as a whole supports the testimony provided by the school staff. The parents, family members, and friends of the family had no personal knowledge of how the student behaved while in school.

(2005); *Devine v. Indian River Cnty. Sch. Bd.*, 249 F.3d 1289, 1291 (11th Cir. 2001).

14. Congress passed the IDEA "to ensure that all children with disabilities have available to them [FAPE] that emphasize[s] 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. § 14 1400(d)(1)(A); *Phillip C. ex rel. A.C. v. Jefferson Cnty. Bd. of Educ.*, 701 F.3d 691, 694 (11th Cir. 2012). In enacting the IDEA, Congress intended to address 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).

15. To achieve these aims, Congress provides funding to participating state and local educational agencies and requires such agencies to comply with the IDEA's procedural and substantive requirements. *Doe v. Ala. State Dep't of Educ.*, 915 F.2d 651, 654 (11th Cir. 1990).

16. The IDEA provides parents and children with disabilities with substantial procedural safeguards. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 205-06 (1982). Among other protections, parents can examine their child's records and participate in meetings concerning their child's education; receive written notice before any proposed change in the educational placement of their child; and file an administrative due process complaint about any matter relating to the identification, evaluation, or educational placement of their child, or the provision of FAPE. *See* 20 U.S.C. § 1415(b)(1), (b)(3), & (b)(6).

17. To satisfy the IDEA's substantive requirements, local school districts must provide all eligible students with FAPE, which is:

> [s]pecial education and related 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 section 1414(d) of this title.

See 20 U.S.C. § 1401(9).

18. The IDEA defines "special education" as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including[,] instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings ....." 20 U.S.C. § 1401(29).

19. The components of FAPE are recorded in an IEP, which is "the centerpiece of the statute's education delivery system for disabled children." *Endrew F. v. Douglas Cnty. Sch. Dist.* RE-1, 137 S. Ct. 988, 994 (2017) (quoting *Honig v. Doe*, 108 S.Ct. 592 (1988)). "The IEP is the means by which special education and related services are 'tailored to the unique needs' of a particular child." *Id.* (quoting *Rowley*, 458 U.S. at 181).

20. At a minimum, an IEP must identify the child's present levels of academic achievement and functional performance; establish measurable annual goals; address the services and accommodations to be provided to the child, and whether the child will attend mainstream classes; and, specify the measurement tools and periodic reports to be used to evaluate the child's progress. *See* 20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R. § 300.320. A child's IEP team must review his or her IEP at least annually. 20 U.S.C. § 1414(d)(4)(A)(i).

21. In *Rowley*, the Supreme Court held that a two-part inquiry must be undertaken in determining whether a local school system has provided a student with FAPE. First, it is necessary to examine whether the school district has complied with the IDEA's procedural requirements. *Rowley*, 458 U.S. at 206-07. Second, it must be determined whether the IEP developed under the IDEA is reasonably calculated to enable the child to receive educational benefits. *Id.*, at 206-07.

22. As discussed in *Endrew F.*, "[t]he 'reasonably calculated' qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials," and that "[a]ny review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal." 137 S.Ct. at 999.

23. The IDEA provides that an IEP must be individualized to the student and include measurable annual goals and services designed to meet each of the educational needs that result from the child's disability. *See* 20 U.S.C. § 1414(d)(1)(A)(i)(II); *see also Alex R. v. Forrestville Valley Cmty. 12 Unit Sch. Dist. #221*, 375 F.3d 603, 613 (7th Cir. 2004) (explaining that an IEP must respond to all significant facets of the student's disability, both academic and behavioral).

24. Here, Petitioner has raised two substantive IDEA claims; that is, that the IEPs were not properly designed to provide FAPE to the student, and that they were not materially implemented.

25. The Eleventh Circuit addressed the issue of implementation for the first time in *L.J. v. School Board*, 927 F.3d 1203 (11th Cir. 2019). In that case, the court outlined the standard for claimants to prevail in a "failure-to implement case." *Id.* The court concluded that "a material deviation from the plan violates the [IDEA]." *L.J.*, 927 F.3d at 1206. The *L.J.* court expanded upon this conclusion as follows:

> Confronting this issue for the first time ourselves, we concluded that to prevail in a failure-to implement case, a plaintiff must demonstrate that the school has materially failed to implement a child's IEP. And to do that, the plaintiff must prove more than a minor or technical gap between the plan and reality; de minimis shortfalls are not enough. A material implementation failure occurs only when a school has failed to implement substantial or significant provisions of a child's IEP.

Id. at 1211.

26. The court provided a few principles to guide the analysis. *Id.* at 1214. First, the court said that the focus in implementation cases should be on the proportion of services mandated to those provided, viewed in the context of the goal and import of the specific service withheld. Thus, the task is to compare the services that are delivered to the services described in the IEP itself. In turn, "courts must consider implementation failures quantitatively and qualitatively to determine how much was withheld and how important the withheld services were in view of the IEP as a whole." *Id.*

27. Additionally, the *L.J.* court noted that the analysis must consider implementation as a whole:

> We also note that courts should consider implementation as a whole in light of the IEP's overall goals. That means that reviewing courts must consider the cumulative impact of multiple implementation failures when those failures, though minor in isolation, conspire to amount to something more. In an implementation case, the question is not whether the school has materially failed to implement an individual provision in isolation, but rather whether the school has materially failed to implement the IEP as a whole.

Id. at 1215.

28. Here, Petitioner presented no persuasive evidence that the IEPs were not implemented. Petitioner is, thus, not entitled to relief on this issue.

29. Petitioner also asserts that the IEPs were not designed to provide FAPE. This claim also fails. The IEPs outlined Petitioner's present levels of achievement and functional performance and identified measurable goals. They outlined the services Petitioner would receive, placed him in the least restrictive environment, and included a BIP. In short, the IEPs provided FAPE.

30. Lastly, Petitioner also alleges that the alleged substantive IDEA violations also constitute violations of Section 504; that is, the School Board

discriminated against the student due to his disability. In that regard, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), provides:

> No otherwise qualified individual with a disability in the United States, as defined in section 705(20) [29 U.S.C. § 705(20)], shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or experience discrimination under any program or activity receiving Federal financial assistance … .

31. Title 29 U.S.C. § 794(b)(2)(B) defines a "program or activity" to include a "local education agency … or other school system." Title 29 U.S.C. § 794(a) requires the head of each executive federal agency to promulgate such regulations as may be necessary to carry out its responsibilities under the non-discrimination provisions of Section 504.

32. The U.S. Department of Education has promulgated regulations governing preschools, elementary schools, and secondary schools. 34 C.F.R. § 104.21,(D). The K-12 regulations are at 34 C.F.R. § 103.31-39. Title 34 C.F.R. § 104.33-.36 enlarge upon the specific provisions of Section 504 by substantially tracking the requirements of IDEA. Title 34 C.F.R. § 104.33 requires that School Boards provide FAPE to "each qualified handicapped person who is in the recipient's jurisdiction." For purposes of Section 504, an "appropriate education" is the provision of regular or special education and related aids and services that: (1) are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met; and (2) are based on adherence to procedures that satisfy the requirements of 34 C.F.R. §§ 104.33(b)(1), 104.34, 104.35, and 104.36. An "appropriate education" can also be provided by implementing an IEP that complies with the IDEA. 34 C.F.R. § 104.33(b)(2).

33. Turning to the discrimination issue, to establish a prima facie case under Section 504, Petitioner must prove that he: (1) had an actual or perceived disability; (2) qualified for participation in the subject program; (3)

was discriminated against only because of his disability; and (4) the relevant program is receiving federal financial assistance. *Moore v. Chilton Cnty. Bd. of Educ.*, 936 F. Supp. 2d 1300, 1313 (M.D. Ala. 2013)(citing *L.M.P. v. Sch. Bd. of Broward Cnty.*, 516 F. Supp. 2d 1294, 1301 (S.D. Fla. 2007)); *see also J.P.M. v. Palm Beach Cnty. Sch. Bd.*, 916 F. Supp. 2d 1314, 1320 (S.D. Fla. 2013).

34. Assuming Petitioner has established a prima facie case, the School Board must present a legitimate, nondiscriminatory reason for the adverse actions it took. *Lewellyn v. Sarasota Cnty. Sch. Bd.*, 2009 WL 5214983, at *10 (M.D. Fla. Dec. 29, 2009)(citing *Wascura v. City of S. Miami*, 257 F.3d 1238, 1242 (11th Cir. 2001)). The Eleventh Circuit has stated that the respondent's burden, at this stage, is "exceedingly light and easily established." *Id.* (quoting *Perryman v. Johnson Prods. Co. Inc.*, 698 F.2d 1138, 1142 (11th Cir. 1983)). Once the School Board has articulated a nondiscriminatory reason for the actions it took, Petitioner must show that the School Board's stated reason was pretextual. "Specifically, to discharge their burden, Plaintiffs must show that Defendant possessed a discriminatory intent or that the Defendant's espoused non-discriminatory reason is a mere pretext for discrimination." *Id.*; *see also Daubert v. Lindsay Unified Sch. Dist.*, 760 F.3d 982, 985 (9th Cir. 2014).

35. Here, the evidence demonstrated that Petitioner meets the first, second, and fourth factors for establishing a prima facie case. Thus, the remaining issue is whether the School Board discriminated against Petitioner solely by reason of his disability. As noted in *J.P.M.*, the definition of "intentional discrimination" in the Section 504 special education context is unclear. *J.P.M.*, 916 F. Supp. 2d at 1321 n.7. In *T.W. ex rel. Wilson v. School Board of Seminole County*, 610 F.3d 588, 604 (11th Cir. 2010), the Eleventh Circuit stated that it "has not decided whether to evaluate claims of intentional discrimination under Section 504 under a standard of deliberate indifference or a more stringent standard of discriminatory animus." But in

Liese v. Indian River County Hospital District, 701 F.3d 334, 345 (11th Cir. 2012), the Eleventh Circuit, in a case involving a Section 504 claim for compensatory damages, concluded that proof of discrimination requires a showing, by a preponderance of the evidence, that the Respondent acted or failed to act with deliberate indifference. *Id.*

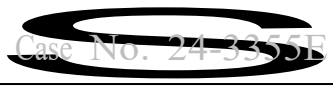
36. Under the deliberate indifference standard, Petitioner must prove that the School Board knew that harm to a federally protected right was substantially likely and that the School Board failed to act on that likelihood. *Id.* at 344. As discussed in *Liese*, "deliberate indifference plainly requires more than gross negligence," and "requires that the indifference be a 'deliberate choice.'" *Id.*

37. Here, the school staff designed IEPs that met the student's needs, and attempted to manage the student's highly volatile behaviors by continuing to try interventions, continuing to evaluate the student, and amending behavior plans and the IEPs. The record does not establish any negligence or indifference on the part of the School Board. Thus, Petitioner has failed to establish a violation of Section 504.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that all of Petitioner's claims for relief are denied.

DONE AND ORDERED this 7th day of February, 2025, in Tallahassee, Leon County, Florida.



JESSICA E. VARN
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Filed with the Clerk of the
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this 7th day of February, 2025.

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).