

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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Petitioner,

vs.

Case No. 17-5948E

BROWARD COUNTY SCHOOL BOARD,

Respondent.

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FINAL ORDER

A due process hearing was held in this case before Jessica E. Varn, an Administrative Law Judge of the Division of Administrative Hearings (DOAH) in Ft. Lauderdale, Florida, on January 3 through 5, 2018.

APPEARANCES

For Petitioner: Petitioner, pro se
(Address of record)

For Respondent: Susan Jane Hofstetter, Esquire
School Board of Broward County
K. C. Wright Administration Building
600 Southeast Third Avenue, 11th Floor
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STATEMENT OF THE ISSUES

Whether the student needs to be evaluated by a neuropsychologist in order to receive a free and appropriate public education (FAPE); whether the School Board's agreement to provide an independent educational evaluation (IEE) in the field

of [REDACTED] was appropriate; whether the School Board's failure to develop a [REDACTED] denied the student a FAPE; and whether the individualized education plan (IEP) goals developed in November 2017 were too general, vague, and not tailored to meet the student's needs.

PRELIMINARY STATEMENT

Prior to the filing of this request for a due process hearing (RFDP), Petitioner filed, on February 1, 2017, a RFDP challenging the design of the student's IEP developed in January of 2017. That case was designated as DOAH Case Number 17-0705E, and was heard by the undersigned. A Final Order was issued in August of 2017; Petitioner was awarded [REDACTED] of compensatory education, which was intended to compensate the student for the School Board's failure to provide a FAPE during [REDACTED] of [REDACTED]. In September of 2017, the student began [REDACTED] [REDACTED] at a new school, School Y. The instant RFDP hearing was filed on October 31, 2017, and then amended on November 9, 2017.

The due process hearing was held on January 3 through 5, 2018, over the School Board's objection. The School Board argued that because the schools were closed for a winter break, and the public school teachers are not contractually obligated to work during the winter break, the due process hearing should be scheduled for a time when school is in session. Petitioner did

not agree to waive the deadlines set forth in the Case Management Order; therefore, the undersigned denied the request to waive the timelines and scheduled the hearing during the School Board's winter break.

During the hearing, testimony was heard from [REDACTED], the compensatory education provider for the student; [REDACTED]; the student's father; [REDACTED], Program Specialist for Behavior; [REDACTED], Director of Support Services for Exceptional Student Learning Support; [REDACTED], ESE Specialist; and [REDACTED], Due Process Coordinator. Petitioner Exhibits 1 through 10 and 12 through 19 were admitted into evidence. Petitioner also proffered exhibits, which were labeled by Petitioner and also made part of the record, although not considered in the preparation of this Final Order. School Board Exhibits 1 through 3, 5 through 9, 11 through 24, 26, and 27 were admitted into evidence. School Board Exhibit 6 was admitted as a joint exhibit. Official recognition was taken of the final orders in DOAH Case Nos. 17-0705E and 10-4494E.

The Transcript was filed on January 22, 2018. Proposed orders were timely filed by both parties on January 29, 2018; the proposed orders were considered in preparing this Final Order. Unless otherwise noted, citations to the United States Code, Florida Statutes, Florida Administrative Code, and Code of Federal Regulations are to the current codifications. For

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

FINDINGS OF FACT

1. The student in this case is a [REDACTED], who is eligible for exceptional student education due to [REDACTED]
[REDACTED]
[REDACTED]

2. Due to the severity of [REDACTED] is a complex learner who requires intensive instruction and several accommodations to learn. [REDACTED] is well [REDACTED] level in all academic areas, [REDACTED] to communicate verbally and often exhibits [REDACTED], otherwise known as [REDACTED], behaviors. The student is instructed using an access points curriculum.

IEE request in the field of [REDACTED]

3. On or about October 17, 2017, the student's father requested that the student be evaluated in the field of [REDACTED]. When making this request, as well as many others made by this parent, [REDACTED] used the term "independent evaluation," and cited to the portion of the Individuals with Disabilities Education Act (IDEA) regarding IEEs. The School Board understandably interpreted this request to be a request for an IEE. As would be expected, the

School Board replied that the last [REDACTED] evaluation was done in 2009 (when the student was in [REDACTED]); therefore, any request for an IEE was time-barred.

4. However, in what the School Board characterizes as an act of good faith, it agreed to perform an [REDACTED] evaluation, and further agreed to allow the parent to choose a provider in the tri-county area which would meet certain School Board requirements pertaining to credentials, willingness to contract with the School Board, and the rate of pay. The undersigned characterizes this willingness to provide an [REDACTED] evaluation as long overdue, given the severity of the student's disabilities.

5. [REDACTED] testimony, and the documentation pertaining to this issue, support the conclusion that the School Board is ready, willing, and able to conduct an [REDACTED] evaluation, and that the parent is permitted to choose an independent provider within the tri-county area.

6. The School Board's response to the request for an IEE in the field of [REDACTED] was and remains appropriate. Petitioner offered no evidence to the contrary; therefore, Petitioner should promptly select a provider who meets the School Board's requirements in order to address the student's [REDACTED] needs as quickly as possible.

Request for neuropsychological evaluation

7. Since 2010, the student's father has requested a [REDACTED] evaluation, and in doing so, has requested it using the term "independent evaluation," and cited the provision in the IDEA regarding IEEs. Predictably, the School Board has interpreted these requests to be a request for an IEE, and responded by arguing that since no [REDACTED] evaluation has ever been conducted by the School Board, there existed no evaluation with which to disagree.

8. During a telephone conference with both parties, the undersigned discerned that the student's father was actually requesting (and had been for years) that [REDACTED] undergo a [REDACTED] evaluation, at public expense, because the father believes [REDACTED] cannot receive a FAPE without one.

9. Accordingly, the request was not for a [REDACTED] IEE, nor was it for an "initial" eligibility determination, as the term "initial" is used in the special education field.

10. Simply put, Petitioner presented no credible evidence, either through testimony or through documentation, that the student must undergo a [REDACTED] evaluation in order to receive a FAPE.^{1/}

Failure to address behavior and develop appropriate IEP goals

11. The student's father alleges that School Y has not appropriately addressed [REDACTED] behavioral needs, and that it has failed to develop IEP goals that are properly tailored to meet the student's needs.

12. In August 2017, the undersigned awarded this student [REDACTED] of compensatory education; therefore, the only period of time that could be at issue in the instant case is the time period between the beginning of this school year and November 2017, when the RFDP was filed.

13. Hurricane Irma affected the state of Florida during the middle weeks of September, closing schools throughout the state for approximately one week in some of the hardest hit areas. For most of the school boards in Florida, this hurricane came at the beginning of the school year. On September 18, 2017, which is approximately when schools were back in session in Broward County, School Y sent a Parent Participation Form to the parent, requesting that the IEP team meet on [REDACTED]. Petitioner filed [REDACTED] amended RFDP on November 9, 2017, approximately seven weeks later.

14. In reviewing the record for evidence concerning the [REDACTED] employed at School Y, there is no evidence of [REDACTED] data that was actually collected, no testimony from a teacher who collected any [REDACTED] data, and no evidence of a

██████████ of any type that was actually created for the student. The School Board did present testimony from a Program Specialist in ██████████, not the student's classroom teacher, who assisted School Y in addressing the student's target behaviors. ██████████ recalled giving School Y staff individualized behavior charts and other data collection forms, plus intervention ideas to utilize with this particular student to address ██████████ specific ██████████. The School Board also introduced into the record a series of emails between the Program Specialist and the classroom teacher regarding the need to conduct a ██████████ ██████████, ██████████ behaviors exhibited by the student, and requests for support to handle the student's ██████████. This record evidence establishes that the student does indeed have ██████████, and that those needs prompted the School Y staff to ask for consultation and support from district-level staff.

15. Absent from the record were any of those charts and forms with actual data recorded, or any testimony from the classroom teacher establishing that those individualized ██████████ interventions that were suggested by the Program Specialist were ever actually implemented.

16. Testimony at the hearing and the record as a whole do establish that addressing the student's ██████████ is an educational need, yet there is no direct proof that the student's

behavioral needs were actually addressed while in the classroom. The father's allegation and testimony that [REDACTED] has yet to be addressed at School Y is uncontroverted and is found credible.

17. The undersigned concludes, therefore, that the student's [REDACTED] needs were left unattended, which resulted in a denial of a FAPE.

18. Turning to the IEP goals in the November 2017 IEP, Petitioner takes issue specifically with the math and reading goals.

19. The [REDACTED] goal on the IEP in question (11/8/17) states:

By January 2018, given a worksheet containing 8 addition and subtraction problems with the function underlined, [REDACTED] will identify the operation with 80% accuracy in 4 out of 5 trials with 80% accuracy.

20. The reading goal states:

By January 2018, given a structured reading program provided with fidelity, extra time and adult assistance, [REDACTED] will be able to increase [REDACTED] decoding skills to read words on a [REDACTED] level with 80% accuracy.

21. [REDACTED], the compensatory education teacher (and Broward County School Board employee) who works with the student for [REDACTED] hours weekly, credibly testified that both goals were inappropriate; the [REDACTED] goal is one that the student has already mastered, and the [REDACTED] goal is too lofty of a goal to be attainable in a span of a year. According to [REDACTED], the student has already mastered the [REDACTED] goal; in fact, [REDACTED] is

capable of [REDACTED]. As to reading, [REDACTED] credibly testified that the student decodes at a [REDACTED]; therefore, setting a goal for a [REDACTED] level is inappropriate.^{2/}

22. The father, a member of the IEP team, and a parent who works extensively with [REDACTED], also credibly testified that the [REDACTED] goal was below [REDACTED] abilities and that the reading goal was not attainable.

23. The School Board did not offer the testimony of the classroom teacher who drafted the goals and who tested the student in order to ascertain [REDACTED] present levels of performance. Nor did the School Board offer any evidence that showed academic progress during the time in question, which might have established that even though the IEP goals in reading and math were deficient (from the previous IEP that was in place, or the one being developed by the School Y staff), the student achieved reasonable academic progress in light of [REDACTED] circumstances.

24. The evidence establishes that the IEP [REDACTED] and [REDACTED] goals were not reasonably calculated to enable the student to make progress in light of [REDACTED] circumstances.

CONCLUSIONS OF LAW

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

26. Petitioner bears the burden of proof with respect to each of the issues raised herein. Schaffer v. Weast, 546 U.S. 49, 62 (2005) ("The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief.").

27. 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 each 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).

28. Parents and children with disabilities are accorded substantial procedural safeguards to ensure that the purposes of the IDEA are fully realized. Bd. of Educ. 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).

29. In Rowley, the Supreme Court held that a two-part inquiry must be undertaken in determining whether a local school system has provided a child with FAPE. First, it is necessary to examine whether the school system has complied with the IDEA's procedural requirements. Id. at 206-07. A procedural error does not automatically result in a denial of a FAPE. G.C. v. Muscogee Cnty. Sch. Dist., 668 F.3d 1258, 1270 (11th Cir. 2012). Instead, FAPE is denied only if the procedural flaw impeded the child's right to a FAPE, significantly infringed the parents' opportunity to participate in the decision-making process, or caused an actual deprivation of educational benefits. M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 (2d Cir. 2012); Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 (2007).

30. To satisfy the IDEA's substantive requirements, school districts must provide all eligible students with a FAPE, which is defined as:

[S]pecial 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).

31. The central mechanism by which the IDEA ensures a FAPE for each child is the development and implementation of an IEP.

20 U.S.C. § 1401(9)(D); Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 368 (1985). The IEP must be developed in accordance with the procedures laid out in the IDEA, and must be reasonably calculated to enable a student to make progress appropriate in light of the student's circumstances. Andrew F. v. Douglas Cnty. Sch. Bd., 137 S. Ct. 988, 991 (2017).

32. The IDEA provides that an IEP must include measureable annual goals designed to meet *each* of the educational needs that result from the child's disability. 20 U.S.C. § 1414(d)(1)(A)(i)(II); Alex R. v. Forrestville Valley Cmty. 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).

33. Here, Petitioner argues that the IEP developed at School Y is inadequate because the math and reading goals are too general, too vague, and are not tailored to meet the student's needs. Petitioner also challenges the failure to address [REDACTED] behavior. Given the evidence presented at the hearing, the undersigned agrees. The [REDACTED] has already been mastered by the student, and the reading goal is unattainable in a span of one year. There is no evidence of behavior interventions that have been implemented and documented, no behavior data taken, and no [REDACTED] or current [REDACTED], despite the student's [REDACTED] needs which warranted a Program Specialist in [REDACTED] to be called into service.

34. The IEP reading and math goals, as they were drafted in November, 2017, are not reasonably calculated to enable this student to make progress in light of [REDACTED] circumstances. And the IEP is deficient in its design because it does not incorporate a behavior plan or behavioral interventions that are necessary for the student to receive a FAPE.

35. The School Board therefore denied this student a FAPE, and the student is entitled to compensatory education.

36. In calculating an award of compensatory education, the undersigned is guided by Reid ex rel. Reid v. District of

Columbia, 401 F.3d 516, 523 (D.C. Cir. 2005), wherein the D.C. Circuit emphasized that IDEA relief depends on equitable considerations, stating, "in every case . . . the inquiry must be fact specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." Id. at 524. The court further observed that its "flexible approach will produce different results in different cases depending on the child's needs." Id. at 524.

37. This qualitative approach has been adopted by the Sixth Circuit and a number of federal district courts. See Bd. of Educ. v. L.M., 478 F.3d 307, 316 (6th Cir. 2007) (agreeing with the district court that a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address the student's educational problems successfully); Petrina W. v. City of Chicago Pub. Sch. Dist., 2009 U.S. Dist. LEXIS 116223, *11 (N.D. Ill. Dec. 10, 2009) (noting that a flexible, individualized approach is more consonant with the aim of the IDEA, the Court found such an approach more persuasive than the Third Circuit's formulaic method); Draper v. Atlanta Indep. Sch. Sys., 480 F. Supp. 2d 1331, 1352-53 (N.D. Ga. 2007) (holding that, in formulating a compensatory education award, the Court must consider all relevant factors and use a flexible approach to

address the individual child's needs with a qualitative, rather than quantitative focus), aff'd, 518 F.3d 1275 (11th Cir. 2008); Barr-Rhoderick v. Bd. of Educ., 2006 U.S. Dist. LEXIS 72526, *83-84 (D.N.M. Apr. 3, 2006) (holding that an award of compensatory education must be specifically tailored and cannot be reduced to a simple, hour-for-hour formula); Sammons v. Polk Cnty. Sch. Bd., 2005 U.S. Dist. LEXIS 45838, *21-22 (M.D. Fla. Oct. 7, 2005) (adopting Reid's qualitative approach).

38. Guided by the above-stated principles, Petitioner is entitled to compensatory education for [REDACTED], which is the period of time in which there is no documentation of the student's behavioral needs having been addressed, despite the fact that addressing the student's [REDACTED] behaviors was an educational need. The award is calculated taking into account that the school staff made good faith efforts on [REDACTED] [REDACTED], at the start of the school year, to begin the process of developing an appropriate IEP and an appropriate behavior plan, but failed to do so up and until November 9, 2017, which is when the amended RFDP was filed.

IEE at public expense in the field of AT

39. Under the IDEA and its implementing regulations, a parent of a student with a disability is entitled, under certain circumstances, to obtain an IEE of the student at public expense. The circumstances under which a parent has a right to an IEE at

public expense are set forth in 34 C.F.R. § 300.502(b), which provides as follows:

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, subject to the conditions in paragraphs (b)(2) through (4) of this section.

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

(i) File a due process complaint to request a hearing 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 pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.

(3) If the public agency files a due process complaint notice to request 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 [REDACTED] or [REDACTED] objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.

(5) A parent is entitled to only one independent educational evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees.

40. Florida law, specifically Florida Administrative Code Rule 6A-6.03311(6), provides similarly as follows:

(a) A parent of a student with a disability 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 due process hearing under 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 parent still has a right to an independent educational evaluation, but not at public expense.

(h) If a parent requests an independent educational evaluation, the school district may ask the parent to give a reason why [REDACTED] or [REDACTED] 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.

(i) A parent is entitled to only one (1) independent educational evaluation at public expense each time the school district conducts an evaluation with which the parent disagrees.

41. These provisions make clear that a district school board in Florida is not automatically required to provide a publicly funded IEE whenever a parent asks for one. A school board has the option, when presented with such a parental request, to initiate a due process hearing to demonstrate, by a preponderance of the evidence, that its own evaluation is appropriate. T.P. v. Bryan Cnty. Sch. Dist., 792 F.3d 1284, 1287 n.5 (11th Cir. 2015). If the district school board is able to meet its burden and establish the appropriateness of its evaluation, it is relieved of any obligation to provide the requested IEE.

42. Here, the School Board has agreed to provide an IEE at public expense in the field of [REDACTED] and has clearly indicated to the student's parents that [REDACTED] may choose a provider within the tri-county area who meets district criteria. Petitioner provided no evidence to establish that the offer to provide the IEE was not true, or that it was inappropriate in some way. Petitioner's father is ordered to promptly choose a provider so that the student's current [REDACTED] needs can be properly addressed; this

unnecessary delay in selecting a provider unfortunately only impacts the student, who is unable to advocate for [REDACTED].

43. As to the request for a [REDACTED] evaluation, Petitioner did not establish that such an evaluation is necessary for the student to receive a FAPE. Petitioner is reminded that although the student is not entitled to a [REDACTED] evaluation as public expense, Petitioner is free to obtain any evaluation at [REDACTED] own expense, whose results the IEP team would be required to consider. See Fla. Admin. Code R. 6A-6.03311(6)(j)1. (providing that if a parent shares with the school district an evaluation obtained at private expense, the school district shall consider the results of such evaluation in any decision regarding the provision of FAPE to the student, if it meets appropriate district criteria).

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1) The School Board denied the student a FAPE because [REDACTED] behavioral needs were not properly addressed, thereby impeding [REDACTED] ability to access [REDACTED] education, and because the IEP goals for [REDACTED] were not calculated to enable the student to progress in light of [REDACTED] circumstances.

2) The IEP team is ordered to reconvene as soon as possible, if it has not reconvened already, to redesign the [REDACTED]

and [REDACTED], and to finalize the [REDACTED] that have allegedly been drafted. Petitioner is ordered to promptly comply with the requests of the school in completing the [REDACTED].

3) The School Board is ordered to provide [REDACTED] of compensatory education.

4) The School Board's response to the request for an IEE in [REDACTED] is appropriate. Petitioner offered no evidence to show that the offer made was inappropriate; therefore, Petitioner is ordered to select an independent provider within the tri-county area as quickly as possible.

5) Petitioner failed to establish that in order to receive a FAPE, the student must undergo a [REDACTED] evaluation.

6) All other requests for relief are denied.

DONE AND ORDERED this 5th day of February, 2018, in Tallahassee, Leon County, Florida.

S

JESSICA E. VARN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of February, 2018.

ENDNOTES

1/ Petitioner only presented the testimony of two lay people, the father and [REDACTED], as to the need for a [REDACTED] evaluation, and attempted to enter into evidence a document that was purportedly a [REDACTED] evaluation of a different student. The undersigned denied the request to admit the other student's [REDACTED] evaluation because it was irrelevant to the issues presented in this case. Even had the undersigned admitted the evaluation, there was no evidence from any credible source to establish that the student at issue in this case needed to undergo a [REDACTED] evaluation in order to receive a FAPE.

2/ During the course of the hearing, the undersigned learned that [REDACTED] was not invited to IEP team meetings--the school staff did not find it necessary to include [REDACTED], and the parent did not want [REDACTED] to be present. Since the IEP team should work to develop an appropriate IEP for this student, [REDACTED] would be a valuable member of the IEP team, and should be a member of the IEP team moving forward (and as long as [REDACTED] is the educator providing the compensatory education services).

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).