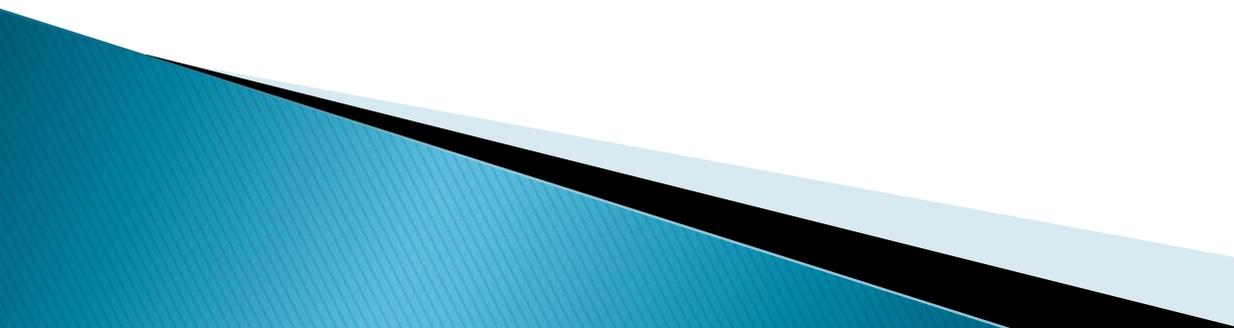


# Top 10 Disability cases, statutes, and rules for Chapter 39 Proceedings

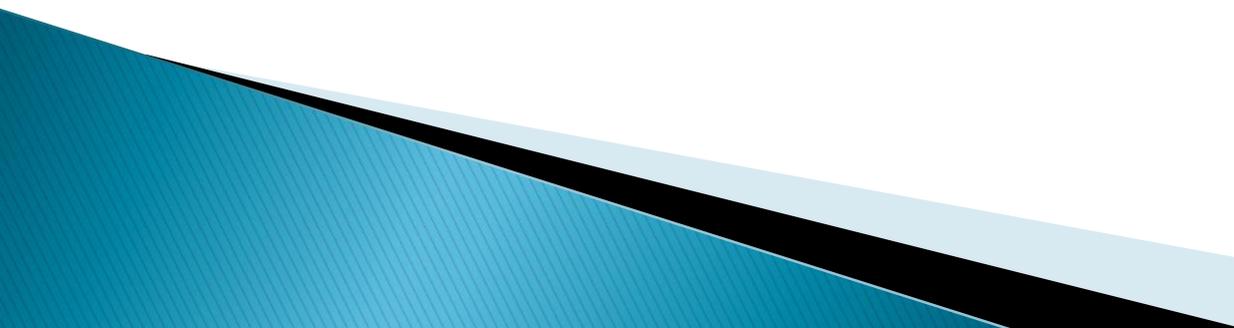


- ▶ Kelly Swartz – Director of Legal Services, Statewide Guardian ad Litem Program
  - ▶ Stephanie Zimmerman – Children’s Legal Services, Deputy Director & Statewide Director of Appeals
  - ▶ Ward Metzger – Children’s Legal Services, Appellate Counsel, Northeast Region
  - ▶ Kelley Schaeffer – Appellate Counsel, Statewide Guardian ad Litem Program
- 

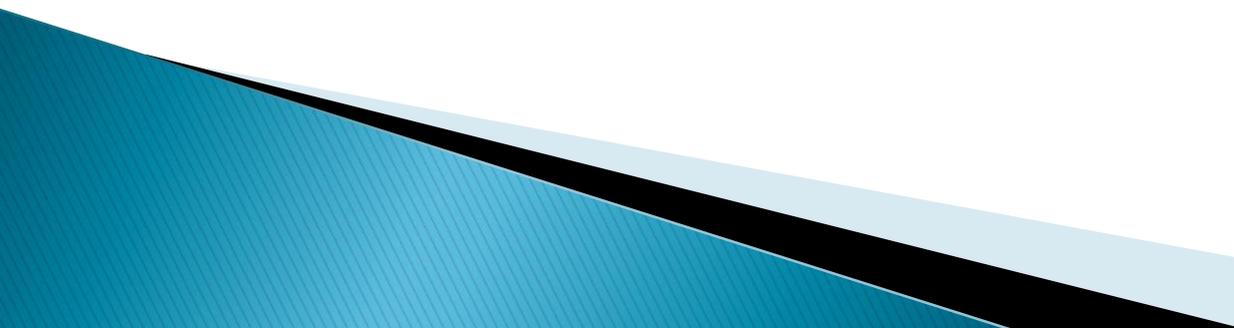
# Psychotropic Medications

Tool #1 = § 39.407(3), Florida Statutes  
& FRJP 8.355

# WHAT ARE PSYCHOTROPIC MEDICATIONS?

- ▶ Psychotropic medication is a technical term for psychiatric medicines that alter chemical levels in the brain which impact mood and behavior. They affect a person's mental state as well as how a person processes information and perceives his or her surroundings. Psychotropic medications can be used for diagnoses such as ADHD, schizophrenia, post-traumatic stress disorder, depression, and anxiety.
- 

# Danger!

- ▶ While psychotropic medication can be very effective in the treatment of many mental health diagnoses, they also carry very serious side effects.
  - ▶ Additionally, some of the psychotropic medication prescribed may come with a “FDA Black Box Warning Label.” This warning is reserved for prescription drugs that pose significant risk of serious or life threatening adverse effects based on medical studies.
  - ▶ Medication alone is rarely the answer. It should be used in combination with therapeutic treatment.
- 

# SECTION 39.407 – Consent

- ▶ The prescribing physician shall attempt to obtain express and informed consent of parents or legal guardians. The department must continue to try to get consent. § 39.407(3)(a)(1).
- ▶ If no consent or if parents or legal guardians are unavailable, or parental rights are terminated, then department may seek court authorization (after consultation with prescribing physician).
- ▶ The department must provide the evaluating physician all pertinent medical information to continue or initiate psychotropic medication. § 39.407(3)(a)(2).
- ▶ What is express and informed consent? "Express and informed consent" means consent voluntarily given in writing, by a competent person, after sufficient explanation and disclosure of the subject matter involved to enable the person to make a knowing and willful decision without any element of force, fraud, deceit, duress, or other form of constraint or coercion."  
§ 394.455(9)

# CONTINUATION OF PSYCHOTROPIC MEDICATION – PRE-SHELTER HEARING § 39.407(3)(B)(1)

- ▶ The department may take possession of the psychotropic medication and continue to provide it to the child until the shelter hearing if:
  - the psychotropic medication is in its original container; and
  - it is a current prescription for the child.
- ▶ The department must inform parents or legal guardians that the drug is being administered. The child's official departmental record must include:
  - Reason parent's authorization not obtained; and
  - Why the psychotropic medication is necessary for the child's well-being. § 39.407(3)(b)(2).

# CONTINUATION OF PSYCHOTROPIC MEDICATION – SHELTER HEARING TO ARRAIGNMENT HEARING § 39.407(3)(B)(3)

- ▶ If advised by a licensed physician, the department shall request court authorization of continuation of psychotropic medication at shelter hearing. The department shall provide any pertinent information to court.
- ▶ Authorization is granted at shelter hearing only until arraignment hearing or 28 days following the child's removal (whichever is first).

# CONTINUATION OF PSYCHOTROPIC MEDICATION – BEFORE FILING OF DEPENDENCY PETITION. § 39.407(3)(B)(4)

- ▶ Before the filing of the dependency petition, the department must have child evaluated by a licensed physician to determine appropriateness of continuing psychotropic medication. If continuing psychotropic medication is appropriate, the department must file a motion at the same time as the dependency petition or within 21 days after shelter hearing.
- ▶ The Department's motion seeking the court's authorization to initiate or continue psychotropic medication must include the following § 39.407(3)(c):
  - ▶ Report written by the department including the efforts made to enable the prescribing physician to obtain the parent's consent; and
  - ▶ Treatment considered for the child or recommended for child; and
  - ▶ Prescribing physician's signed medical report which must include:
    - ▶ The name of the child,
    - ▶ the name and range of the dosage of the psychotropic medication, and
    - ▶ that there is a need to prescribe psychotropic medication to the child based upon a diagnosed condition for which such medication is being prescribed;
    - ▶ A statement indicating that the physician has reviewed all medical information concerning the child which has been provided;

# CONTINUATION OF PSYCHOTROPIC MEDICATION – BEFORE FILING OF DEPENDENCY PETITION.

## § 39.407(3)(B)(4)

- ▶ A statement indicating that the psychotropic medication, at its prescribed dosage, is appropriate for treating the child's diagnosed medical condition, as well as the behaviors and symptoms the medication, at its prescribed dosage, is expected to address;
  - ▶ An explanation of the nature and purpose of the treatment; the recognized side effects, risks, and contraindications of the medication; drug–interaction precautions; the possible effects of stopping the medication; and how the treatment will be monitored, followed by a statement indicating that this explanation was provided to the child if age appropriate and to the child's caregiver; and
  - ▶ Documentation addressing whether the psychotropic medication will replace or supplement any other currently prescribed medications or treatments; the length of time the child is expected to be taking the medication; and any additional medical, mental health, behavioral, counseling, or other services that the prescribing physician recommends.
- 
- ▶ The department must notify parties of the motion to obtain court authorization in writing or other method within 48 hours after motion is filed. § 39.407(3)(d)(1).
  - ▶ If a party objects then that party must file objection within 2 working days of the department's notice of motion. § 39.407(3)(d)(1).

# CONTINUATION OF PSYCHOTROPIC MEDICATION – BEFORE FILING OF DEPENDENCY PETITION. § 39.407(3)(B)(4)

- ▶ Court shall hold hearing as soon as possible.
- ▶ Burden of Proof is Preponderance of the Evidence. § 39.407(3)(d)(2).
- ▶ Court authorization of initiation or continuation of psychotropic medication. § 39.407(3)(d)(1).
- ▶ The court can authorize based on department's motion, medical report and child's best interests.
- ▶ Court shall ask what other services are being provided to the child for child's medical condition.
- ▶ The court may order additional medical consultation:
  - Med Consult Line at the University of Florida; or
  - May require second opinion(not to exceed 21 days).
- ▶ The department must make referral for second opinion within one working day.
- ▶ Court may not discontinue psychotropic medication if contrary to the prescribing physician unless the following are true: § 39.407(3)(d)(1).
- ▶ If licensed psychiatrist or licensed physician states that “more likely than not, discontinuing psychotropic medication would not cause significant harm to the child”.
- ▶ Unless the prescribing physician specializes in mental health of children and adolescents.
- ▶ Can discontinue if required opinion is also from physician who specializes in mental health of children and adolescents.
- ▶ Court may discontinue psychotropic medication if treating physician states that continuing psychotropic medication would cause significant harm to child due to diagnosed non-psychiatric condition. § 39.407(3)(d)(1).

# EMERGENCIES WHEN PSYCHOTROPIC MEDICATION MUST BE GIVEN BEFORE COURT AUTHORIZATION.

## § 39.407(3)(E)(1)

- ▶ Child's prescribing physician certifies in a signed medical report that delay would cause "significant harm."
- ▶ Medical report must contain:
  - ▶ Why child may experience significant harm; and
  - ▶ Nature and extent of harm.
- ▶ The department must submit motion to continue psychotropic medication within 3 working days after commencing psychotropic medication.
- ▶ The department shall seek order at next regularly scheduled court hearing or within 30 days after date of prescription (whichever is sooner).
- ▶ If any party objects to the departments motion, the court shall hold a hearing within 7 days.

# HOSPITAL, CRISIS STABILIZATION UNITS AND STATEWIDE INPATIENT PROGRAMS.

## § 39.407(3)(E)(2)

- ▶ Must seek court authorization within 3 working days after medication begun.
- ▶ Must follow same motion process.
- ▶ Must file motion with written report, physician report;
- ▶ Notify other parties within 48 hours; and
- ▶ Objections must be filed within 2 working days.

# JUDICIAL REVIEWS § 39.407(3)(F)(1)

- ▶ The department must inform court, as part of the social services report, of child's medical and behavioral status.
- ▶ The department shall provide pertinent medical records since the last hearing.
- ▶ Court may review child's status more frequently on motion or good cause shown by any party.
- ▶ Court may order the department to obtain medical opinion regarding whether continued use of the psychotropic medication under the circumstances is "safe and medically appropriate."  
§ 39.407(3)(f)(2).

# ADDITIONAL RESOURCES

- ▶ Psychotropic Medication Checklist and specific assistance regarding psychotropic medications:  
<http://guardianadlitem.org/training-advocacy-resources/conferences-training/>
- ▶ Florida Administrative Code 65C-35:  
<https://flrules.org/gateway/ChapterHome.asp?Chapter=65C-35>
- ▶ Children and Families Operating Procedure 175-40(Chapter 3): [CFOP](#)
- ▶ Florida Guardian ad Litem Program Standards, #7: <http://guardianadlitem.org/2015-standards/>
- ▶ University of Florida Med Consult Line:  
<http://dcf.psychiatry.ufl.edu/>

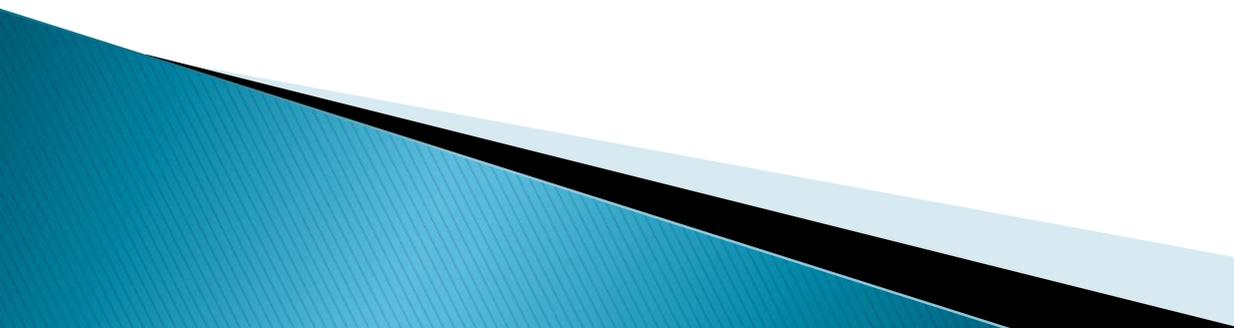
# MEDICALLY COMPLEX CHILDREN

Tool #2 = § 39.001(4), Florida Statutes

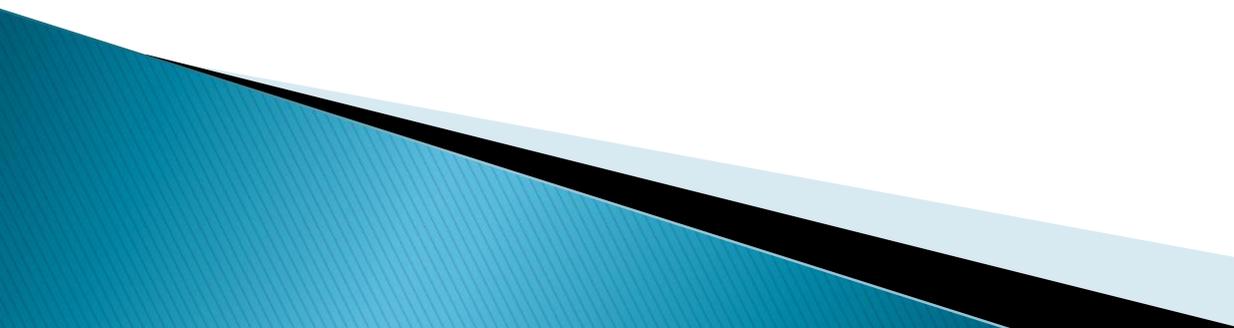
# § 39.001(4), Florida Statutes

- ▶ SERVICES FOR MEDICALLY COMPLEX CHILDREN. –
  - The Department shall maintain a program of family-centered services and supports for medically complex children.
  - The purpose of the program is to prevent abuse and neglect of medically complex children while enhancing the capacity of families to provide for their children's needs.
  - Program services must include outreach, early intervention, and the provision of other supports and services to meet the child's needs.
  - The department shall collaborate with all relevant state and local agencies to provide needed services.

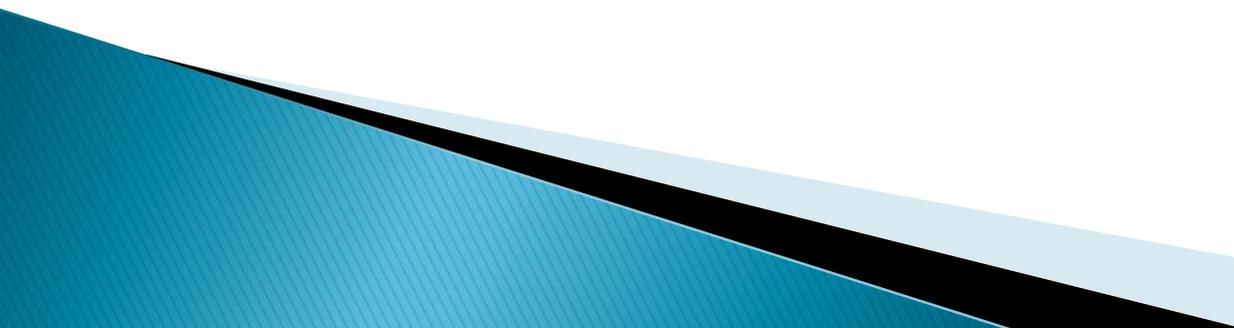
# Types of Medical Complexity Cases

- ▶ Complex Chronic Conditions
    - Diabetes
    - Asthma
    - Eczema
  - ▶ Medically Fragile Conditions
    - Failure to Thrive – Breastfeeding and Bottle-fed Children
    - Failure to Thrive – Traditional
  - ▶ Children with Special Medical Conditions
    - Obesity
  - ▶ Dental Neglect
- 

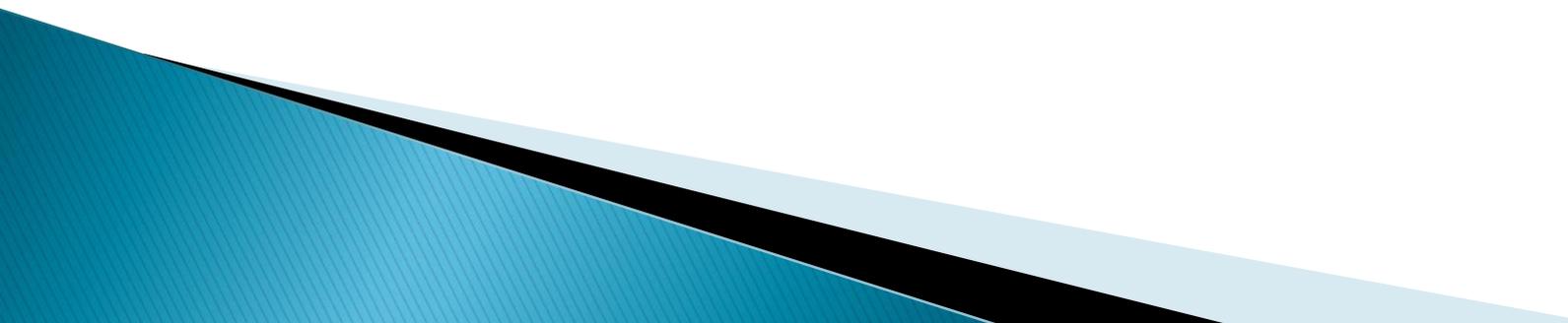
# Medical Neglect – Definition

- ▶ The failure to provide or the failure to allow needed care as recommended by a health care practitioner for a physical injury, illness, medical condition, or impairment, or
  - ▶ The failure to seek timely and appropriate medical care for a serious health problem that a reasonable person would have recognized as requiring professional medical attention.
- 

# Who gets involved?

- ▶ CPI to use checklist in order to understand the medical condition of the child
  - ▶ CPI must refer medically complex cases to CPT
  - ▶ CPT will assist the CPI in providing appropriate immediate care
  - ▶ CPT required to conduct a complete medical examination of the child
- 

# Considerations

- ▶ Services
    - Medical/nursing
    - Therapeutic
  - ▶ Equipment
    - Medical devices
    - Mobility devices
    - Personal care devices
    - Communication devices
  - ▶ Training
    - Family Support
- 

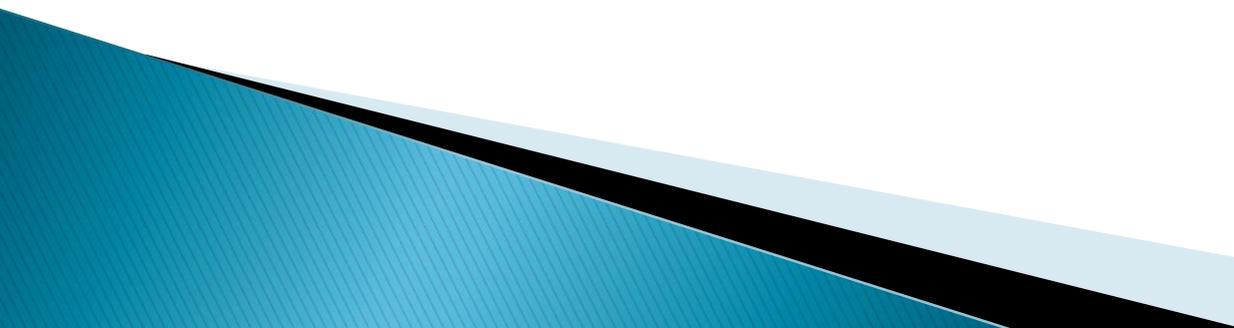
# Other Considerations

- ▶ Financial Impact of a Medically Complex Child
- ▶ Insurance Requirements/State Benefits
- ▶ Education Implications
- ▶ Community Assistance
  - Utility Notification of Special Conditions

# Appointment of counsel for dependent children with special needs

Tool #3 = § 39.01305, Florida Statutes  
& FRJP 8.231

## § 39.01305 Categories of Children Appointed an Attorney

- ▶ **Requires the court to appoint an attorney for a dependent child who:**
  - ▶ **Resides in, or is being considered for placement in, a skilled nursing facility;**
  - ▶ **Is prescribed a psychotropic medication and declines it;**
  - ▶ **Has been diagnosed with a developmental disability § 393.063;**
- 

## **§ 39.01305 Categories of Children Appointed an Attorney**

- ▶ **Requires the court to appoint an attorney for a dependent child who:**
  - ▶ **Is being placed in, or is considered for placement in a residential treatment center; or**
  - ▶ **Is a victim of human trafficking as defined in § 787.06(2)(d)**
- 

## § 39.01305 Categories of Children Appointed an Attorney

- ▶ § 39.01305 does not limit Judicial authority to appoint attorneys for dependent children that are not included in the 5 categories (discretionary appointments) but there are no funds appropriated for these appointments

## § 39.01305 Attorneys for Dependent Children with Special Needs

- ▶ Does not require a child to be adjudicated as a dependent in order to have an attorney appointed

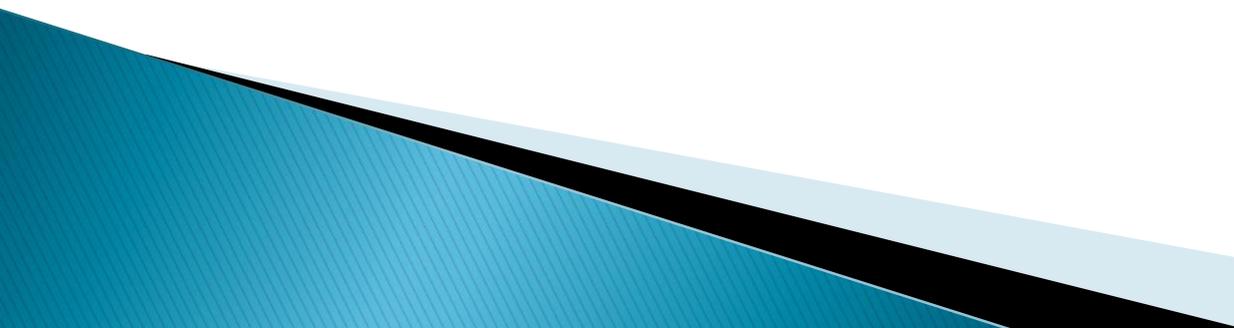
## Appointing an Attorney Under § 39.01305(4)a

- ▶ Court must request a recommendation from GAL Program for attorney to represent without additional compensation
- ▶ This can be a pro bono attorney or attorney from other funding source
  - GAL has up to 15 days to identify attorney
  - The court must appoint GAL Program recommended attorney

# Attorney Representation Under § 39.01305(4)b

- ▶ Appointed attorney representation continues until attorney is allowed to withdraw or discharged by court or until case is dismissed

## Attorney Representation Under § 39.01305(4)b

- ▶ Attorney represents complete range of legal services from removal through all appellate proceedings
  - ▶ With court permission, the attorney may arrange for supplemental or separate counsel to represent the child in appellate proceedings.
  - ▶ Court order must be in writing
- 

# Attorney Compensation Under § 39.01305(5)

- ▶ Attorneys appointed under § 39.01305 must be adequately compensated for expert witnesses, depositions, and other cost of litigation
- ▶ **Attorney fees may not exceed \$1,000 per child per year** (Payment subject to appropriations and review by the JAC for reasonableness)
- ▶ Attorney may seek compensation in excess of the flat fee as provided for in § 27.5304(12)

## Minimum Criteria for an Attorney to be included on the Registry

- ▶ Member in Good Standing with The Florida Bar
- ▶ Meets the minimum requirements established by the Chief Judge of the Circuit in which they wish to participate
  - including any existing local requirements for court appointed attorneys representing children in dependency cases

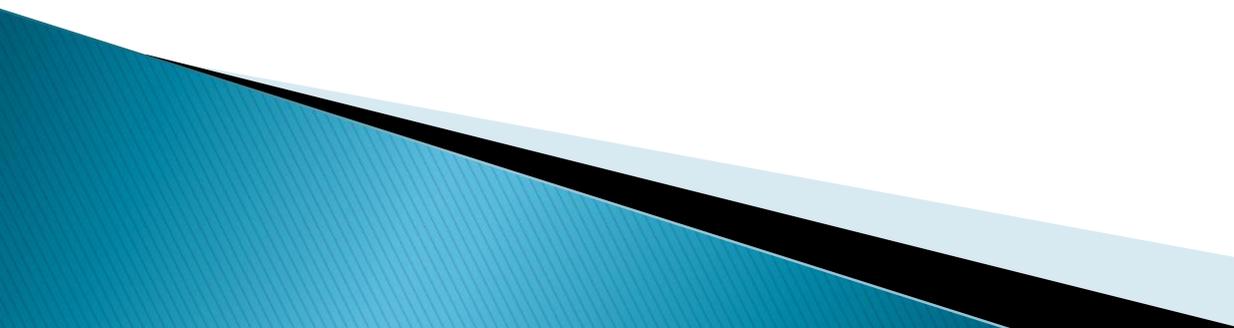
## Minimum Criteria for an Attorney to be included on the Registry

- ▶ One year of experience representing children within the last five years; or
- ▶ is currently supervised by an attorney with one year of experience representing children; or
- ▶ has observed thirty hours of dependency proceedings including 1 hour of each type of hearing

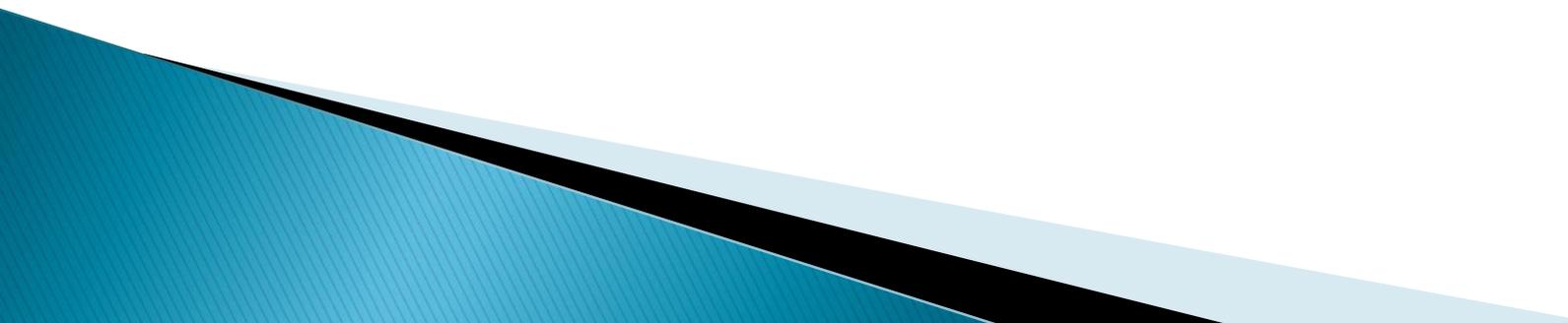
# Minimum Criteria for an Attorney to be included on the Registry

- ▶ Within last two years 10 hours CLE devoted to legal needs of children
  - at least 5 hours of which was devoted to representing children with special needs, and
  - 1 hour ethics devoted to representing children, or
  - commit to complete CLE within 3 months of acceptance on registry
- ▶ Reviewed the Florida Guidelines of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases

# GAL Responsibilities Pursuant to HB 561 / § 39.01305 & Proviso Language

- ▶ Select attorneys for children being considered for placement in skilled nursing facilities
  - ▶ Inform court if attorney available to represent child without additional compensation within 15 days after court request recommendation
- 

# Department Responsibilities Pursuant to HB 561 / § 39.01305

- ▶ DCF shall develop procedures to identify a child that meets criteria and request court to appoint an attorney
- 

# Court Responsibilities Pursuant to HB 561 / § 39.01305

- ▶ Chief Judge should include the attorney registry of attorneys for appointment to children in their circuit registry after it is received from the JAC

# Court Responsibilities Pursuant to HB 561 / § 39.01305

- ▶ Dependency Judge issues orders appointing an attorney from the registry containing the following information:
  - The Judge has **requested a recommendation from the GAL** for an attorney that will take the appointment without additional compensation and the GAL has informed the Judge there is no attorney available.
  - **A finding the child meets the criteria** for at least one of the special needs identified in §39.01305(3)(a)–(e), identifying the corresponding sub paragraph.
  - Pursuant to §27.40(4)(b), **if the judge appoints an attorney out of order** the judge must include a finding of good cause that supports the appointment
  - Must be in writing

# Court Responsibilities Pursuant to HB 561 / § 39.01305

- ▶ If the attorney files a motion seeking fees or costs in excess of the flat fee, and the JAC objects the Dependency Judge issues order determining payment

# EDUCATIONAL ADVOCACY

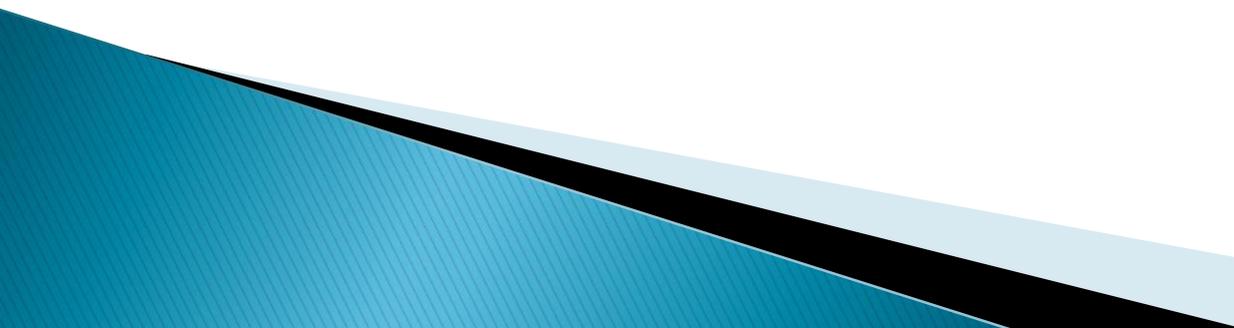
Tool #4 = § 39.0016, Florida Statutes  
& FRJP 8.292

# Foster Care & Education

Foster children perform significantly worse in school than do children in the general population. They have:

- ▶ higher rates of grade retention
- ▶ lower scores on standardized tests, and
- ▶ higher absenteeism, tardiness, truancy and dropout rates

# Foster Care & Education

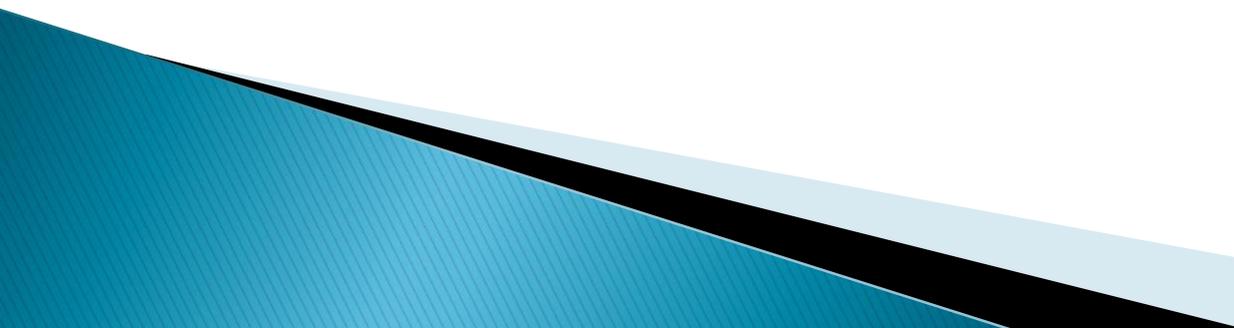
- ▶ More than half of children or youth in care drop out of school before graduation
  - ▶ Foster Youth are two or three times more likely than other students to have disabilities that affect their ability to learn
- 

# **Individuals with Disabilities Education Act (IDEA)**

**The Individuals with Disabilities Education Act (IDEA) ensures students with a disability are provided with Free Appropriate Public Education (FAPE) that is tailored to their individual needs**

# Free Appropriate Public Education (FAPE)

**FAPE is Defined as an Educational Program that is:**

- ▶ individualized to a specific child
  - ▶ designed to meet that child's unique needs,
  - ▶ provides access to the general curriculum,
  - ▶ meets the grade-level standards established by the state, and
  - ▶ from which the child receives educational benefit
- 

# Free Appropriate Public Education (FAPE)

To Provide FAPE to a Child with a Disability:

- ▶ schools must provide students with an education
- ▶ including specialized instruction & services
- ▶ that prepares the child for further education, employment, and independent living.

# Free Appropriate Public Education (FAPE)

## Appropriate Education

*Guarantees only a basic floor of opportunity*

Its an education that is specifically designed to meet the child's unique needs, supported by services that will permit him to benefit from the instruction

# Definition of Special Education

## **SPECIAL EDUCATION IS:**

- ▶ individually designed instruction
- ▶ to meet child's unique educational needs

## **RELATED SERVICES ARE:**

- transportation and such developmental, corrective, and other supportive services
- that are required to assist a child with a disability to benefit from special education

# Eligibility

To be eligible for special education must have a disability under IDEA – Florida establishes the criteria for eligibility (Chapter 6A–6 of the Florida Administrative Code)

# Eligibility

## 2 Steps

1. Show the child has a disability under IDEA
2. Show that the child needs special education services or that the disability adversely affects the child's education performance

# Eligibility

Autism Spectrum Disorder (ASD)

Deaf or Hard of Hearing (DHH)

Developmentally Delayed (DD)

Dual Sensory Impairment (DSI)

Emotional/Behavioral Disability (EBD)

Homebound/Hospitalized (H/H)

Intellectual Disability (InD)

Language Impairment (LI)

Other Health Impairment (OHI)

Orthopedic Impairment (OI)

Specific Learning Disability (SLD)

Speech Impairment (SI)

Traumatic Brain Injury (TBI)

Visual Impairment (VI)

# Eligibility

Gifted is a category that is not identified in IDEA. It is only a Florida category

# Eligibility

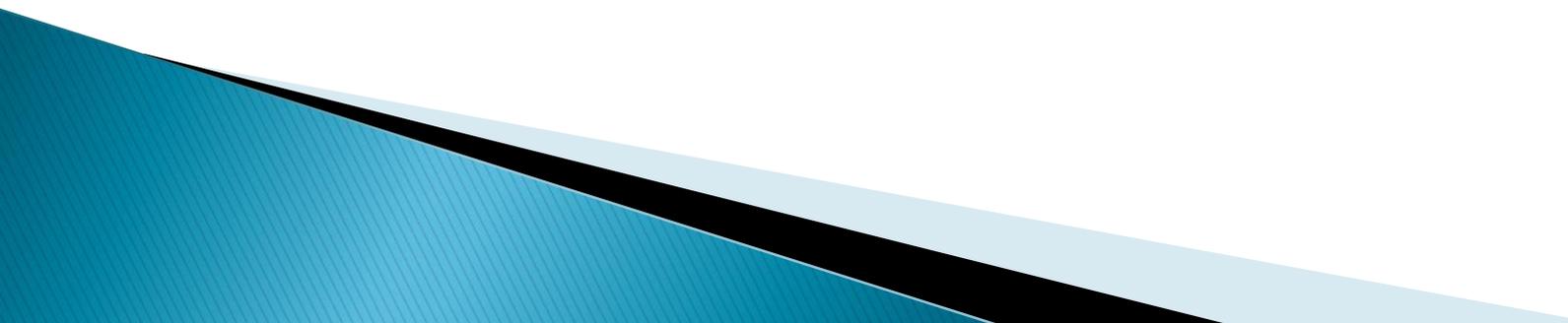
Under IDEA must have evaluation  
within 60 days of a parent consenting  
to evaluations –  
reevaluation every 3 years

# Evaluation

Anyone, including the guardian ad litem, can request an evaluation, the school must get a parent's (*or a person acting as a parent*) informed consent before conducting an evaluation

# Evaluation

## When Should There be an Evaluation?

- ▶ Bad grades
  - ▶ Low test scores
  - ▶ Speech is hard to understand
  - ▶ Difficulty following directions
  - ▶ Difficulty paying attention
  - ▶ Gets frustrated with school work
  - ▶ Truancy
  - ▶ Gets in trouble/suspended
- 

# Individualized Education Plan (IEP)

IDEA requires that public schools create an Individualized Education Program (IEP) for every child receiving special education services

# Individualized Education Plan (IEP)

Legal Document – spells out child’s learning needs, the services the school will provide and how progress will be measured

# Individualized Education Plan (IEP)

## Who Must Attend

- ▶ Someone acting as a parent: biological parent, foster parent, guardian, individual with child lives and/or surrogate parent
- ▶ Regular education teacher
- ▶ Special education teacher
- ▶ School district representative
- ▶ Evaluation specialist
- ▶ Student, if appropriate
- ▶ Others with knowledge or special expertise about child, including guardians ad litem.

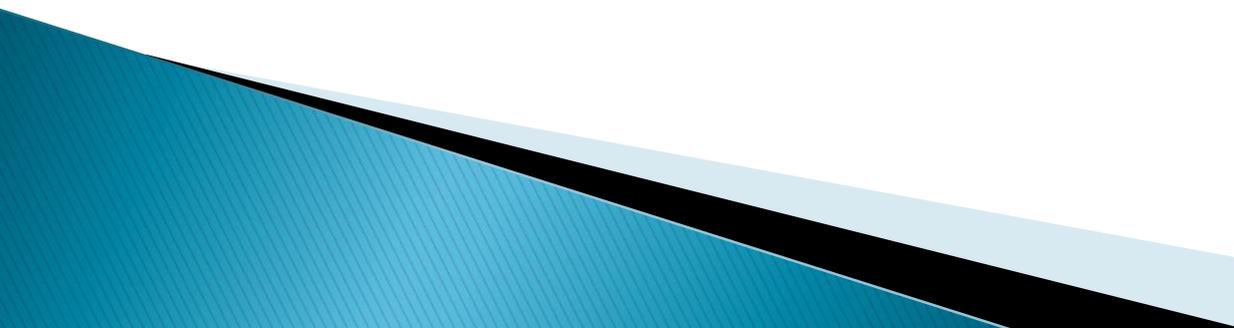
# Individualized Education Plan (IEP)

## What is Included in an IEP?

- ▶ A statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum
- ▶ A statement of measurable annual goals designed to enable the child to make progress in the general education curriculum and to meet each of the child's other educational needs that result from the child's disability
- ▶ A statement of special education and related services and supplementary aids and services to be provided to the child to advance toward meeting goals

# Individualized Education Plan (IEP)

## What is Included in an IEP?

- ▶ An explanation of the extent, if any, to which the child will not participate with nondisabled children
  - ▶ A statement of accommodations in the administration of statewide standardized assessments or district assessments of student achievement
  - ▶ A statement of how progress will be measured
  - ▶ Whether extended school year (ESY) services are necessary
  - ▶ Communication plan for those deaf or hard-of-hearing or dual-sensory impaired
  - ▶ Transition plan for those 16+
- 

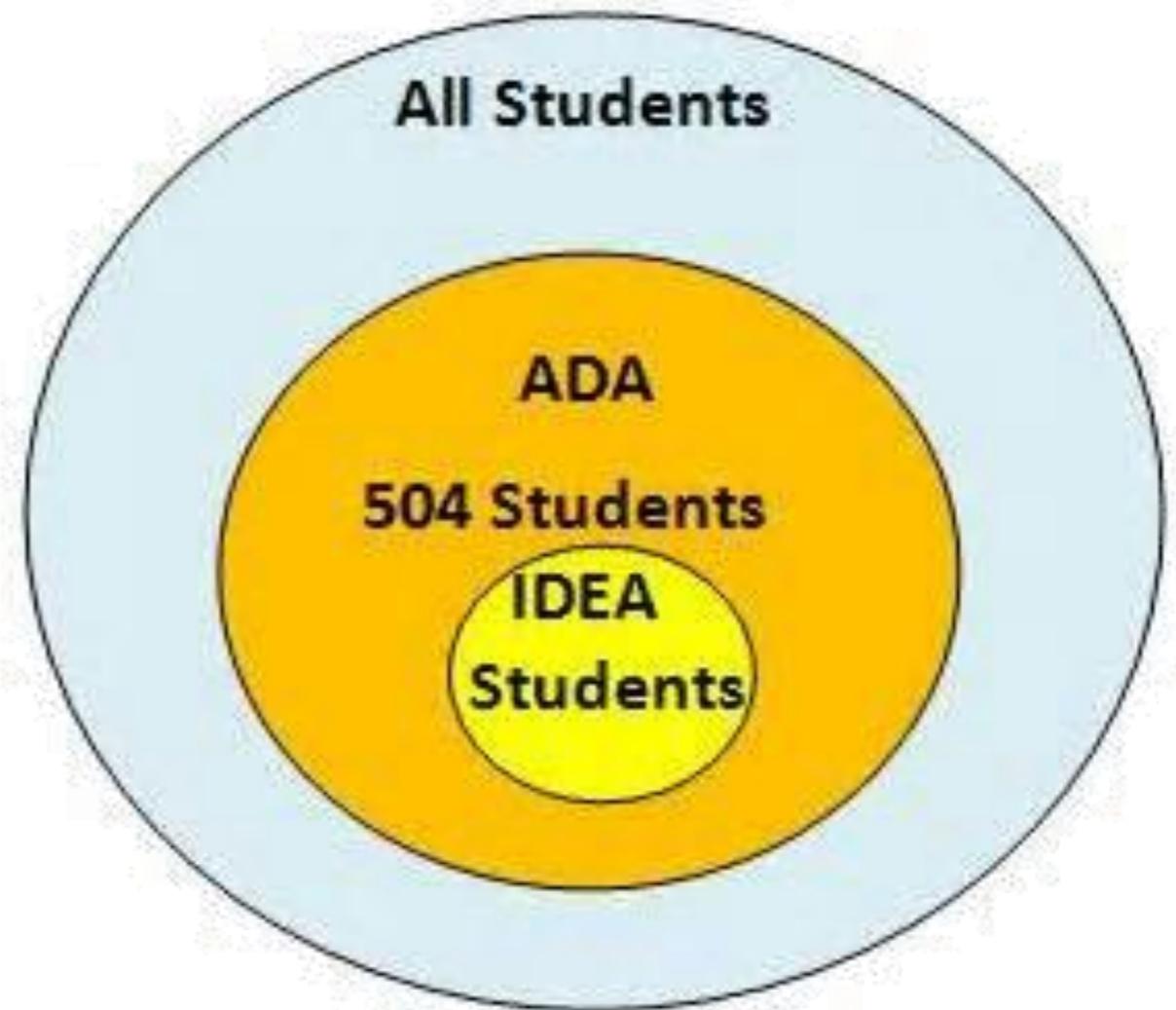
# 504 Plans

504 plans are for K-12 public school students with disabilities. Section 504 defines disability in very broad terms

Children who are not eligible for an IEP may qualify for a 504 plan

# 504 Plans

- ▶ A 504 plan outlines how a child's specific needs are met with accommodations, modifications and other services. These measures “remove barriers” to learning.
- ▶ A student with a 504 plan usually spends the entire school day in a general education classroom.



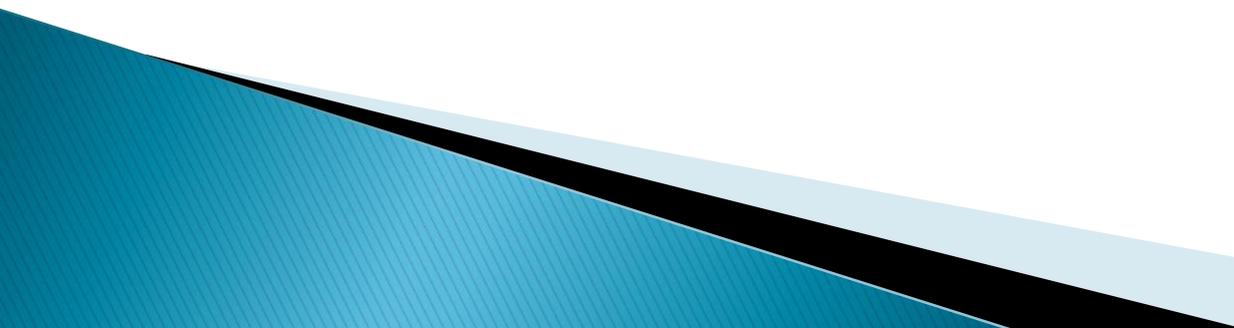
# 504 Plans

## 504 PLANS

- ▶ Identifies accommodations and modifications
- ▶ If many services are being provided through 504 Plan, request comprehensive evaluation for IDEA services.

# 504 Plans

## WHO IS ELIGIBLE FOR 504 PLAN?

- ▶ Disabilities are not specifically listed.
  - ▶ Disability is defined as a physical or mental impairment that substantially limits one or more major life activities (e.g., learning).
  - ▶ Attention Deficit Hyperactive Disorder (ADHD) is example of a disability that is not specified under IDEA but is a disability under 504.
- 

# McKinney – Vento

McKinney – Vento ensures that each child of a homeless individual and each homeless youth has equal access to free appropriate public education

# McKinney –Vento

**The McKinney–Vento program is designed to address the problems that homeless children and youth face in enrolling, attending, and succeeding in school.**

**States must ensure that each homeless child has equal access to the same free, appropriate public education, including a public preschool education, as other children and youth.**

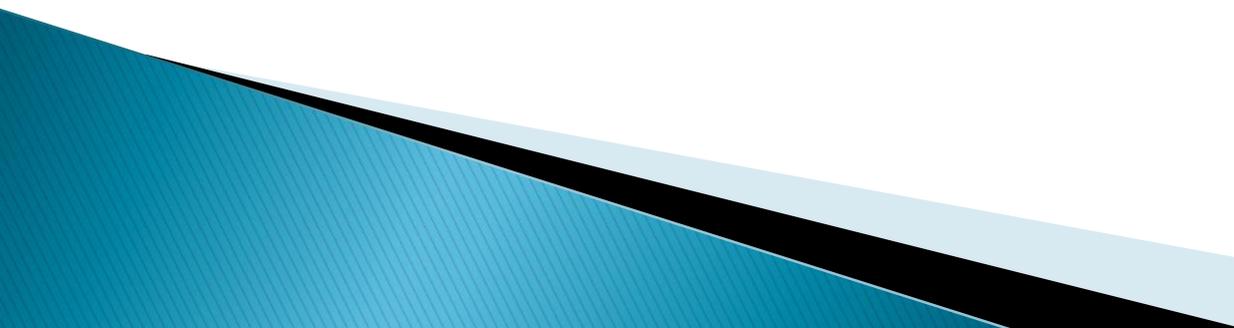
**Homeless children and youth should have access to the educational and other services that they need to enable them to meet the same challenging State student academic achievement standards to which all students are held.**

**Homeless students may not be separated from the mainstream school environment.**



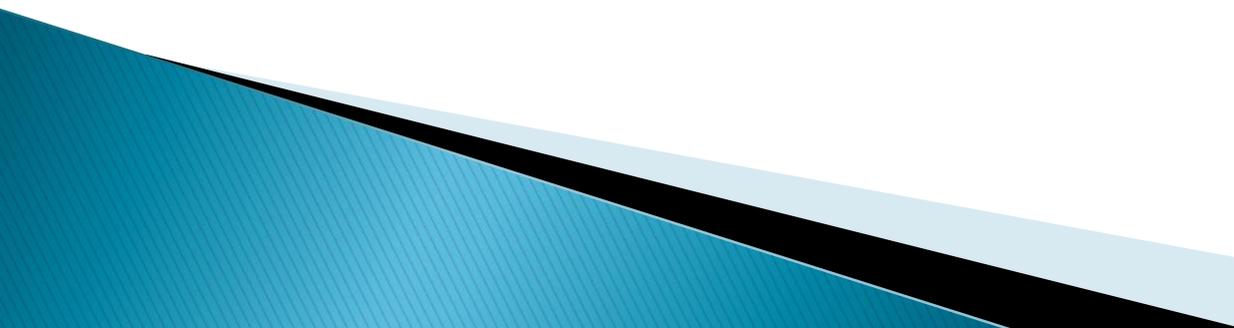
# McKinney –Vento

## WHO IS ELIGIBLE?

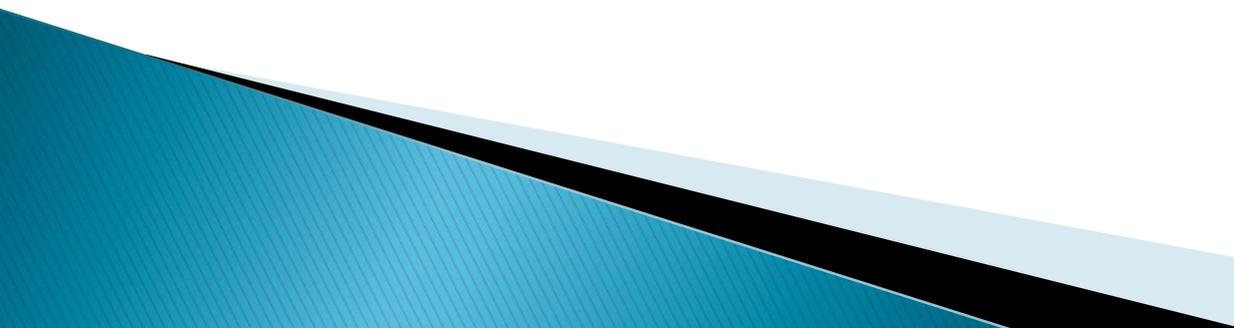
- ▶ Homeless children and youth are individuals who lack a fixed, regular, and adequate nighttime residence.
  - ▶ Includes children staying in other people's homes, hotels, and shelters.
  - ▶ Includes those abandoned in hospitals or awaiting foster care placement.
- 

# McKinney –Vento

## Rights of Homeless Children

- ▶ Can stay in home school
  - ▶ Do not need required documentation
  - ▶ Services provided: school supplies, case management, transportation, and other services as needed
- 

# Action Items

- ▶ Request Evaluation
  - ▶ Ask to Meet with Teachers, Principal, ESE Director, Superintendent
  - ▶ Ask for a New IEP meeting
  - ▶ Request Mediation
  - ▶ Request an Administrative Due Process Hearing
- 

# Action Items

## File complaint with:

- ▶ Florida Department of Education
- ▶ U.S. OCR – Office of Civil Rights
- ▶ U.S. OSERS – Office of Special Education Rehabilitation Services

## Mediation:

- ▶ May be conducted without the filing of a due process complaint
- ▶ Paid by Florida DOE
- ▶ Resolutions must be written and are legally binding in state or federal court

# Florida Statutes and Rules

## Major Sources Of Education Rights: Florida

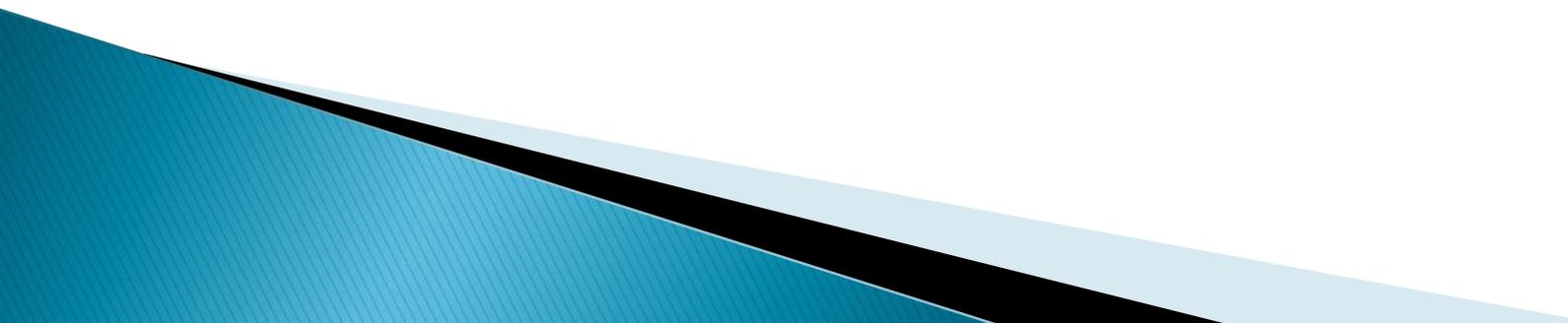
Fla. Const.: education is a fundamental value

§ 1003.57, Fla. Stat.: exceptional students instruction

Fla. Admin. Code Ch. 6A-6: rules for programs for exceptional students

§ 409.1451, Fla. Stat.: independent living transition services for foster teens

§ 411.012, Fla. Stat.: voluntary universal pre-kindergarten



# Florida Statutes and Rules

## Major Sources Of Education Rights: Federal

IDEA: Individuals With Disabilities Education Act

504: Rehabilitation Act

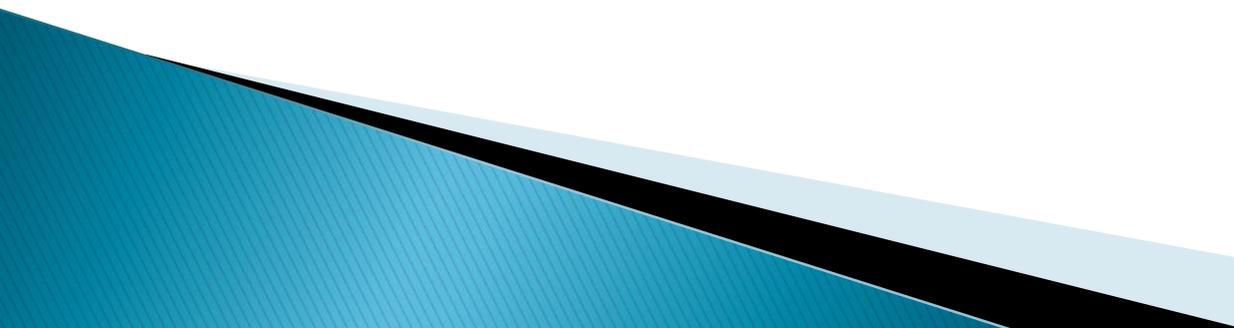
ADA: Americans With Disabilities Act

NCLB: No Child Left Behind. *To be replaced by Every Student Succeeds Act (ESSA) beginning in 2016-17*

McKinney Vento Act

Foster Care Independence Act

Due Process Clause of Fourteenth Amendment of U.S. Constitution



# Florida Statutes and Rules

## § 39.402(11)(d)

- ▶ The court may appoint a surrogate parent or may refer the child to the district school superintendent for appointment of a surrogate parent if the child has or is suspected of having a disability and the parent is unavailable pursuant to § 39.0016(3)(b).

# Florida Statutes and Rules

## § 39.0016(3)(b)

Each district school superintendent or **dependency court** must appoint a surrogate parent for a child known to the department who has or is suspected of having a disability, as defined in § 1003.01(3), when:

- ▶ After reasonable efforts, no parent can be located; or
- ▶ A court of competent jurisdiction over a child under this chapter has determined that no person has the authority under the Individuals with Disabilities Education Act, including the parent or parents subject to the dependency action, or that no person has the authority, willingness, or ability to serve as the educational decision maker for the child without judicial action.

# Florida Statutes and Rules

## § 39.701 Judicial Reviews

Must review

- ▶ number of times a child's educational placement has been changed
- ▶ the number and types of educational placements which have occurred, and
- ▶ the reason for any change in placement

# Florida Statutes and Rules

## § 39.701 Judicial Reviews

The court must determine

- ▶ Who holds the rights to make educational decisions for the child. If appropriate, the court may refer the child to the district school superintendent for appointment of a surrogate parent or may itself appoint a surrogate parent under the IDEA and § 39.0016.

**RULE 8.292. APPOINTMENT AND DISCHARGE OF SURROGATE PARENT**

**(a) Appointment.** Unless appointed by the district school superintendent, the court must appoint a surrogate parent for a child known to the department who has or is suspected of having a disability when

(1) after reasonable efforts, no parent can be located; or

(2) a court of competent jurisdiction over a child under Chapter 39, Florida Statutes, has determined that no person has the authority under the Individuals with Disabilities Education Act, including the parent or parents subject to the dependency action, or no person has the authority, willingness, or ability to serve as the educational decision maker for the child without judicial action.

**(b) Who May Be Appointed.** The surrogate parent must meet the minimum criteria established by law.

**(c) Recognition of Surrogate Parent.** The dependency court and school

# RESIDENTIAL MENTAL HEALTH TREATMENT CENTER PLACEMENT FOR CHILDREN IN THE LEGAL CUSTODY OF THE DEPARTMENT OF CHILDREN AND FAMILIES

Tool #5 = § 39.407(5), Florida Statutes

Tool #6 = M.W. v. Davis

Tool #7 = FRJP 8.350

# WHAT ARE RESIDENTIAL TREATMENT CENTERS?

## Section 394.67(21)

- ▶ A 24-hour residential program, including a therapeutic group home, which provides mental health services to emotionally disturbed children or adolescents as defined in s. 394.492(5) or (6) and which is a private for-profit or not-for-profit corporation licensed by the agency which offers a variety of treatment modalities in a more restrictive setting.

# WHO SHOULD BE PLACED IN A RESIDENTIAL TREATMENT CENTER?

Section 394.492(5)–child who has an emotional disturbance

- ▶ under 18 years of age
- ▶ diagnosed with a mental, emotional, or behavioral disorder of sufficient duration to meet one of the categories in DSM
- ▶ who does not exhibit behaviors that substantially interfere with or limit his or her role or ability to function in the family, school or community
- ▶ the emotional disturbance must not be considered to be a temporary response to a stressful situation

# WHO SHOULD BE PLACED IN A RESIDENTIAL TREATMENT CENTER?

Section 394.492(6)–child who has a serious emotional disturbance

- ▶ under 18 years of age
- ▶ diagnosed with a mental, emotional, or behavioral disorder that meets one of the categories specified in DSM
- ▶ exhibits behaviors that substantially interfere with or limit his or her role or ability to function in the family, school, or community
- ▶ the behaviors are not considered to be a temporary response to a stressful situation

# CONSTITUTIONAL DUE PROCESS CONSIDERATIONS

M.W. v. Davis, 756 So. 2d 90 (Fla. 2000)

- ▶ There are three minimum due process requirements: 1) an inquiry by a neutral factfinder which need not be a judicial inquiry; 2) the inquiry must probe the child's background using all available resources; and 3) there must be a periodic review by a neutral factfinder.
- ▶ An order placing a child into a residential facility against the child's wishes deprives the child of liberty and court approval is necessary. At the very least a meaningful opportunity to be heard is required at the hearing.

# CONSTITUTIONAL DUE PROCESS CONSIDERATIONS

Amendment to the Rules of Juvenile Procedure, Florida Rule of Juvenile Procedure 8.350, 804 So. 2d 1206 (Fla. 2001)

- ▶ The court specifically did not determine whether an attorney or a precommitment hearing is constitutionally required when a child is being committed to a treatment center.
- ▶ All children facing placement should be present at the five-day status hearing occurring after a motion for placement of the child has been filed with the court.
- ▶ The child's views towards commitment must be considered by the court in determining the propriety of placement.

# CONSTITUTIONAL DUE PROCESS CONSIDERATIONS

Amendment to the Rules of Juvenile Procedure, Florida Rule of Juvenile Procedure 8.350, 842 So. 2d 763 (Fla. 2003)

- ▶ A procedural rule is necessary to ensure that the commitment process affords due regard to both the rights of the child and the child's best interest.
- ▶ Additional safeguards will provide the child with a meaningful opportunity to be heard which is the minimum required to comply with due process and ensure commitment is the least restrictive alternative for the child.
- ▶ An attorney must be appointed if the child objects to the placement.
- ▶ There must be a precommitment hearing prior to placement in a residential facility.
- ▶ The court may hold a precommitment hearing in the absence of counsel for the child if the court determines that counsel is not immediately available and the child will be harmed by waiting and the child must be present and afforded an opportunity to be heard unless the court determines the child's mental or physical condition is such that a court appearance is not in the child's best interest.

# CONSTITUTIONAL DUE PROCESS CONSIDERATIONS

Section 39.01305 and Florida Rules of Juvenile Procedure 8.231 and 8.350(a)

- ▶ An attorney shall be appointed for a dependent child with special needs subject to chapter 39 proceedings. An adjudication of dependency is not required. The court must first request a recommendation from the GAL of an attorney who is willing to provide representation without compensation. If such an attorney is available within 15 days the attorney must be appointed. If no such attorney is available or the GAL notifies the court within 15 days no recommendation can be made, an attorney must be appointed.
- ▶ In the context of this presentation (and there are other categories) a dependent child with special needs is one who is being placed in a residential treatment center or who is being considered for placement.
- ▶ Unless the attorney is providing pro bono services, the attorney must be adequately compensated and provided with access to funding for experts, depositions and costs of litigation.

# HOW IS A CHILD PLACED IN AN RTC?

- ▶ Whenever the Department believes that a child in its legal custody is emotionally disturbed and may need residential treatment, an examination and suitability assessment must be conducted. The assessment must be completed before the placement.
- ▶ The Department shall file a notice with the court and serve all parties when it arranges to have a child assessed.
- ▶ The examination and suitability assessment must be conducted by qualified evaluator. The QE must be a psychiatrist or psychologist licensed in Florida with at least three years' experience in the diagnosis and treatment of children.

# HOW IS A CHILD PLACED IN AN RTC?

- ▶ The assessment must determine: 1) the child requires residential treatment; 2) the child is in need of a residential treatment program and is expected to benefit from mental health treatment; 3) an appropriate, least restrictive alternative to residential treatment is unavailable.
- ▶ The evaluator must make written findings regarding: 1) the child appears to have an emotional disturbance serious enough to require residential treatment; 2) the child has been given a clinically appropriate explanation of the nature and purpose of the treatment; and 3) all modalities of treatment less restrictive than residential treatment have been considered and are unavailable.
- ▶ A copy of the findings must be provided to the Department and the GAL who then have the opportunity to discuss the findings with the evaluator.

# HOW IS A CHILD PLACED IN AN RTC?

- ▶ A motion for placement must be filed. The motion must contain: 1) a statement as to why the child is suitable for residential placement; 2) why less restrictive alternatives are not appropriate; 3) the written findings of the QE; 4) whether all parties, including the child, are in agreement.
- ▶ Children may be placed by the Department in a RTC without prior court approval if the QE's written assessment indicates the child requires immediate placement and that such placement cannot wait for a hearing, unless the court orders otherwise.
- ▶ After the filing of the motion a status hearing must be set within 48 working hours and the Department shall timely provide notice of the date, time, and place of the hearing to all parties and participants.

# HOW IS A CHILD PLACED IN AN RTC?

- ▶ If no party disagrees with the Department's motion at the status hearing, then the motion for placement may be approved by the court. If any party disagrees, then the court shall set the matter for hearing within 10 working days.
- ▶ The child is required to be present at the hearing unless the court determines such presence is not in the child's best interest. In that circumstance the child must be provided an opportunity to express the child's views to the court by a method deemed appropriate.

# HOW IS A CHILD PLACED IN AN RTC?

- ▶ The hearing is an evidentiary hearing. The court shall consider at a minimum:
  - 1) the recommendation of a Department representative that the residential treatment is in the child's best interest and is the least restrictive available alternative;
  - 2) the GAL recommendation;
  - 3) the QE's assessment and written findings; and
  - 4) the child's views regarding placement.
- ▶ All parties shall be permitted to present evidence and witnesses concerning the suitability of the placement. The burden of proof is clear and convincing evidence.

# PROCEDURES AFTER PLACEMENT

Section 39.407(6) and Florida Rule of Juvenile Procedure 8.350(a)

- ▶ RTC must review the appropriateness and suitability of the child's placement in the program every 30 days. RTC must determine whether the child is receiving benefit toward the treatment goals and whether the child could be treated in a less restrictive treatment program. RTC must prepare a written report and the Department must submit the report to the court.
- ▶ The court must conduct a hearing to review the status of the child's residential treatment plan no later than 3 months after the child's admission to the residential treatment program and every 90 days after. The QE must complete an independent review of the child's progress towards achieving the goals and objectives of the treatment plan before the 3-month review.

# PROCEDURES AFTER PLACEMENT

- ▶ The child's attorney must be notified. If the child does not have an attorney, one must be appointed. The court must consider whether the child disagrees with continued placement.
- ▶ If at any time the court determines that the child is not suitable for continued residential treatment, the court shall order the Department to place the child in the least restrictive setting that is best suited to meet his or her needs.
- ▶ For any child in residential treatment at the time a judicial review is held, pursuant to s.39.701, the child's continued placement in residential treatment must be a subject of the judicial review.

# EVIDENCE AND PROOF

Dep't of Children & Fam. Servs. v. J.W.,  
890 So. 2d 337 (Fla. 2d DCA 2004)

- ▶ Clear and convincing evidence is the correct standard, similar to that of other forms of involuntary commitment, because of the substantial liberty issue that is involved in not being confined unnecessarily.

# EVIDENCE AND PROOF

G.T. v. Dep't of Children & Fam. Servs.,  
935 So. 2d 1245 (Fla. 1st DCA 2006)

- ▶ The Department must prove a child is “emotionally disturbed” or “seriously emotionally disturbed” and a doctor’s hearsay report is insufficient. A psychiatrist’s or psychologist’s expert opinion testimony is required at an evidentiary hearing. Hearsay evidence is not sufficient because of the serious deprivation of individual liberty and such deprivation must comport with due process. Findings of disputed fact cannot be based on a hearsay report and the expert must be called as a witness.

# EVIDENCE AND PROOF

L.T. v. Dep't of Children & Fams.,  
967 So. 2d 456 (4th DCA 2007)

- ▶ A child has a meaningful opportunity to participate by telephone in the hearing without the child's physical presence based on being provided opportunities to speak privately with the attorney and the trial court finds the child's physical presence is not in the child's best interest.

# Extended Foster Care

Tool #8 = § 39.6251, Florida Statutes

# Who qualifies?

- ▶ A child who is living in licensed care on his or her 18<sup>th</sup> birthday and who has not achieved permanency under s. 39.621 is eligible to remain in licensed care if:
  - (e) is unable to participate in program or activities due to a physical, intellectual, emotional, or psychiatric condition that limits participation.

# Who qualifies?

- ▶ Any barrier to participation must be supported by documentation.
  - Case file
  - School file
  - Medical records
- ▶ Impairment of ability to perform one or more life activities.

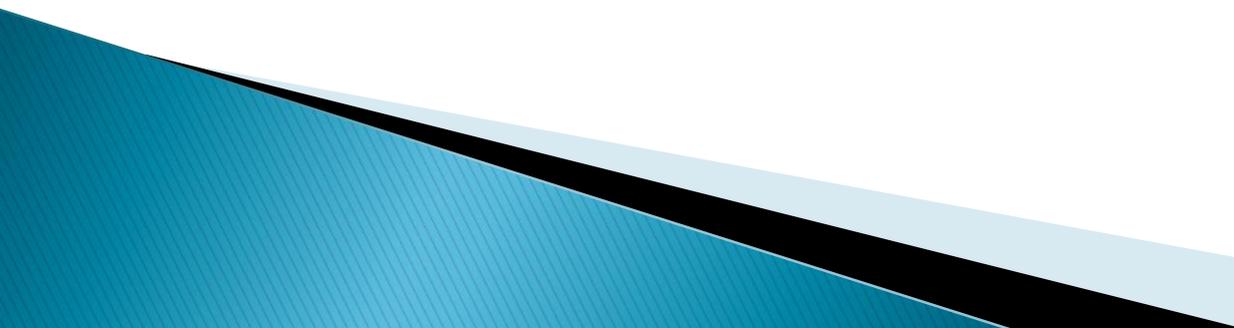
# Young Adults with a Known or Suspected Disability

- ▶ Retain the same rights to self-determination as their nondisabled peers.
- ▶ Presumed capacitated unless a court determines otherwise.
- ▶ Young adult with disability retains the right to choose whether to remain in foster care and to make all other decisions about their life.

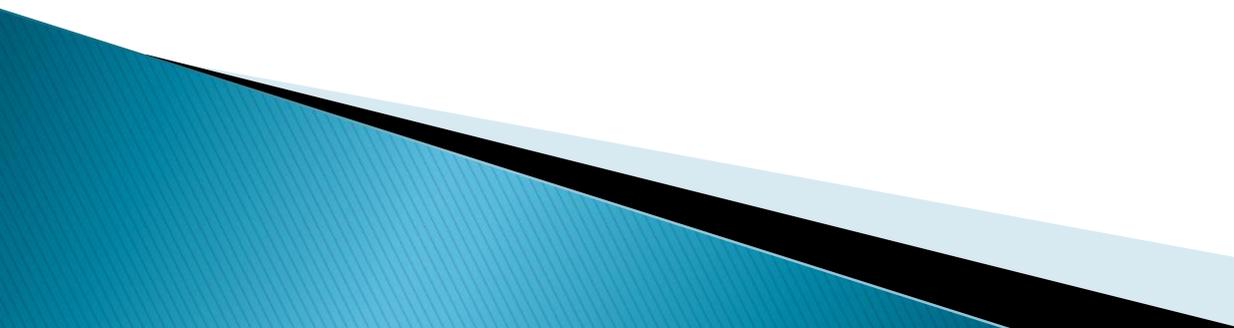
# Benefits

- ▶ Young adult will be able to live with foster parents, in a group home, or in another setting approved by the Department or CBC lead agency.
  - Apartment/dorm/shared housing
- ▶ Young adult must be provided with a level of supervision consistent with her individual goals.

# Benefits

- ▶ Board payments are administered the same way as “under 18” foster care.
  - ▶ Paid to providers to cover living expenses to meet shelter, nutrition, clothing, education, transportation, and employment needs.
  - ▶ Additional allowance may be paid directly to youth (not for necessities).
- 

# Benefits

- ▶ **Monthly contact with a caseworker**
    - Can be by phone for young adult outside service area
  - ▶ **Court reviews status at least every 6 months.**
  - ▶ **Permanency hearing annually**
  - ▶ **GAL maintain monthly contact with youth's consent.**
- 

# Eligibility continues until

- ▶ Young adult reaches 21 / young adult with disability reaches 22;
- ▶ Leaves care to live in a permanent home; or
- ▶ Knowingly and voluntarily withdraws her consent to participate in extended care.  
(verified by a court)

# The Regis Little Act to Protect Children with Special Needs

Tool #9 = Section 39.701(3)(b), Florida Statutes

Tool #10 = Section 393.12(2)(c), Florida Statutes

Bonus Tool = Section 744.3021, Florida Statutes

# Overview

- ▶ Formalizes the process of appointing a guardian or guardian advocate for a young adult determined by the court to meet the requirements of Chapter 744 for appointment of a guardian or section 393.12 for appointment of guardian advocate.

# Who qualifies?

- ▶ Those children with disabilities (physical, intellectual, mental health...) who need decision-making assistance when they become adults.
- ▶ What is the impact on the child's day-to-day functioning?

# Is Guardianship necessary?

- ▶ There must be no less restrictive decision-making assistance available.
  - power of attorney
  - health care surrogate
  - representative payee
- ▶ Guardianship is a last resort.
- ▶ Impact on fundamental and civil rights.

# Types of Guardianship

- ▶ Guardian Advocate
- ▶ Guardianship
  - of the person
  - of the property
  - plenary

# Develop an updated case plan

- ▶ Face to face conference with:
  - ▶ child
  - ▶ child's attorney
  - ▶ GAL
  - ▶ temporary custodian
  - ▶ parent, if rights have not been terminated

## Section 39.701(3)(b)2.– Judicial Review After Child Turns 17

- ▶ If there is a good faith basis to believe child qualifies and no less restrictive help will meet child's needs, recommend appointment of guardian or guardian advocate in JRSSR.
- ▶ Include background information that led to recommendation.

# Who can be a guardian?

## ▶ Requirements

- Residency
- No felony convictions or prior abuse
- Willingness to serve

## ▶ Family members

- need written order finding that such an appointment is in the child's best interest

## ▶ Other adults with relationship to child

## ▶ Office of Public Guardian

# Initiating proceedings

- ▶ Section 39.701(3)(b)2.– Proceedings to be initiated within 180 days after the child turns 17 years of age for the appointment of a guardian advocate, plenary guardian, or limited guardian.
- ▶ Section 393.12 (guardian advocate)– Gives probate court jurisdiction when minor is 17 yrs, 6 mo.
- ▶ Section 744.3021 (guardianship)– Gives probate court jurisdiction when minor is 17 yrs, 6 mo.

# Proceeding initiated by someone else

- ▶ Within 45 days after the JR, Department to provide all necessary documentation and information to petitioner to complete a petition under s. 393.12 or chapter 744.

# After a guardian is appointed

- ▶ Section 39.6251(8)– The court shall review the necessity of continuing the guardianship and whether restoration of guardianship is needed when young adult turns 22.

# Questions?

- ▶ Kelly Swartz – [Kelly.Swartz@gal.fl.gov](mailto:Kelly.Swartz@gal.fl.gov)
- ▶ Stephanie Zimmerman – [Stephanie.Zimmerman@myflfamilies.com](mailto:Stephanie.Zimmerman@myflfamilies.com)
- ▶ Ward Metzger – [Ward.Metzger@myflfamilies.com](mailto:Ward.Metzger@myflfamilies.com)
- ▶ Kelley Schaeffer – [Kelley.Schaeffer@gal.fl.gov](mailto:Kelley.Schaeffer@gal.fl.gov)

