05-0511945

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[redacted],	:	
Petitioner,	:	
	:	Docket No.:
v.	:	OSAH-DOE-SE-0511945-60-Caley
ATLANTA PUBLIC SCHOOL DISTRICT,	:	
Respondent.	:	

FINAL ORDER

I. INTRODUCTION

In November 2004, [redacted]. filed a due process hearing request alleging that the Atlanta Public School District ("APS") had denied him his procedural and substantive rights to a free appropriate public education under the Individuals With Disabilities Act ("IDEA"). He demanded, in part, compensatory services, reimbursement for private services, creation of a new I.E.P., damages, costs and attorneys fees. (Petitioner's Exh. 1) APS filed its response essentially denying the allegations and denying that [redacted]. was entitled to any relief. This matter was heard on November 1, 2, and 15, 2005. Upon receiving the transcripts of the hearing, the parties requested fifteen days to submit proposed findings of fact and conclusions of law. The parties proceeded to file their proposed findings of fact and conclusions of law on December 16, 2005.

After carefully weighing all of the evidence of record, including voluminous documents and three days of testimony from several witnesses, and considering the credibility of the witnesses, the administrative law judge finds that APS has denied [redacted]. his right to a free appropriate public education in violation of IDEA, that J.D. is entitled to compensatory services to compensate him for APS' violations, that [redacted]. is entitled to reimbursement for private services

previously provided by the [redacted] Center and that [redacted]. is entitled to all litigation costs and attorneys fees. The administrative law judge's findings of fact and conclusions of law are set forth further below.

II. FINDINGS OF FACT

[redacted]. was born on [redacted], presently attends [redacted] High School in Atlanta, Georgia, and has been diagnosed with dyslexia, a specific learning disorder that makes it difficult for him to learn to read. In a few short days, [redacted]. will be [redacted] years old, but still reads at a third to fourth grade level.

This tragic tale begins shortly after [redacted]. entered the Atlanta public school system.[1] In February 1995, when [redacted]. was in the second grade at [redacted] School, APS personnel noted that [redacted]. was not able to work at a second grade level throughout the curriculum. (Petitioner's Exh. 9)[2] His writing was at a kindergarten level, he did not know the sounds of the alphabet, and he could not read. (*Id.*) The school system was aware that [redacted].'s problems had existed at least since September 1994 at the beginning of the school year, yet the school system essentially did nothing to determine the nature of the problem. Although [redacted].'s teachers recommended in February 1995 that he be tested to determine the cause of his difficulties, [redacted].'s educational records do not show that any testing was done at that time. (*Id.*)

[redacted].'s educational records for November 1996 and February 1997 indicate that he was still in the third grade. (Petitioner's Exhs. 10-11) His February 1995 records noted above showed that he was in the second grade. Therefore, although the record does not specifically

[1] The historical facts are set forth not to support a violation of IDEA prior to November 2002, as any such claims are barred by the applicable two year statute of limitations, but to provide context for the claims at issue in this case.

[2] Both the Petitioner and the Respondent have submitted a set of exhibits which, in most important respects, are identical. At the first hearing held in this case in February 2005, the parties agreed that Petitioner's exhibits would be considered joint exhibits and would be deemed authentic for purposes of admissibility. Although a few of those exhibits ultimately were ruled inadmissible at the November 2005 hearing, for ease of reference, this Order will refer primarily to Petitioner's exhibits that were admitted at the November hearing.

address when [redacted]. was held back a grade, he must have been held back in either the second or third grade.

In late November 1996 while [redacted]. was in the third grade at [redacted] Elementary School, [redacted].'s teachers documented that his reading skills were below a first grade level, and his math skills were only at a first grade level. (Petitioner's. Exh. 10) Once again, [redacted].'s student support team, which consisted of his classroom teachers, requested that [redacted]. be tested. (*Id.*) Despite the team's concerns, they did not plan to have another meeting regarding [redacted].'s progress until February 1997. At this critical juncture in [redacted].'s educational life, his school records do not show that any testing or other evaluations took place to determine the nature of his academic problems.

[redacted].'s support team met again, as scheduled, on February 17, 1997. (Petitioner's Exh. 11) At that time, the team noted that [redacted]. was having difficulty mastering third grade skills, that he was still reading below a first grade level, and that his math level was still at only a first grade level. (*Id.*) At that time, the team referred [redacted]. to special education services and recommended that evaluations be performed. Again, [redacted].'s educational records do not show that any evaluations took place.

On October 30, 1997, [redacted].'s student support team met again to review his progress. (Petitioner's Exh. 12) The minutes of the meeting note that [redacted]. still did not know pre-primer words, could not write a complete sentence, and could not read. However, he could respond appropriately to verbal questions in his subjects. The report also noted that he wrote his letters, words, and numbers backwards. Again, the support team recommended that [redacted]. be referred for further evaluation. (*Id.*)

While [redacted].'s classroom teachers continued to wait for [redacted]. to be evaluated properly, on December 15, 1997, the APS program for exceptional children concluded that [redacted]. was four

years behind in basic reading skills despite achieving grade level equivalent scores in reading and math of four and five respectively on the Iowa Test of Basic Skills given in March 1997. (Petitioner's Exh. 13) Given that [redacted]. was in the fourth grade at this time and had apparently repeated at least one grade, being four years behind meant that he had not learned anything about how to read for the entire time he had been in school. Despite the glaring inconsistency between [redacted].'s classroom performance and his scores on the Iowa Test of Basic Skills, the school system did nothing to evaluate [redacted].

Over two months after [redacted].'s support team had requested testing for at least a fourth time and almost three years after [redacted].'s support team had first requested such testing, on January 9, 1998, the school system notified [redacted].'s parents that a meeting was being scheduled to discuss possible testing and evaluation. (Petitioner's Exh. 12) The school system then delayed any attempt to obtain consent for testing from [redacted]'s mother until February 24, 1998, J.D. (*Id.*)

In spite of [redacted]. continuing to fall behind in his academic studies at a very early age, APS waited until June 1, 1998 at the end of [redacted].'s fourth grade before scheduling the comprehensive evaluation that [redacted].'s mother had approved in February 1998. (Petitioner's Exh. 14) The testing that was supposed to be comprehensive administered only four separate assessments and used only one assessment tool for academic achievement. (*Id.*) The evaluation did not measure [redacted].'s processing speeds to determine whether his problems were a result of an inappropriate diagnosis created by the existence of a specific learning disorder. Given that [redacted]. had been observed writing words, letters, and numbers backwards, a classic symptom of dyslexia, and that he performed much better on verbal tasks, the evaluation performed in June 1998 was spectacularly deficient. The evaluation did not measure [redacted].'s phonological processing levels (which are essential to reading) nor did the evaluator review [redacted].'s receptive and expressive levels. Based

on the limited evaluation performed, which essentially included an I.Q. test, the school psychologist concluded that [redacted]. had a full scale I.Q. of 63. (*Id.*)

Despite the test results from June 1998, [redacted].'s student support eligibility team did not meet until six months later on January 25, 1999 to assess those results and the services that [redacted]. might need. In the meantime, [redacted]. had been promoted to the fifth grade. Based upon the I.Q. score and one behavioral adaptive scale which failed to incorporate any measures taken from outside the school environment, the team placed [redacted]. in the most restrictive educational environment available, a self-contained special education classroom for children with mild intellectual disabilities (M.I.D.). (Petitioner's Exh. 15) By the end of the fifth grade in May 1999, APS determined that [redacted]. still demonstrated weakness in reading, reading comprehension and language. (Petitioner's Exh. 17)

Approximately a year later, on April 19, 2000, [redacted].'s I.E.P. team met and determined that he was functioning at the third grade level in reading comprehension and word recognition, at the first grade level in spelling and at a 4.7 level in math. (Petitioner's Exh. 18) For the next two years, [redacted]. continued in the M.I.D. self-contained program at [redacted] Middle School and continued to function at the second to third grade level in reading. (Petitioner's Exhs. 19-22)

Despite [redacted].'s continuing academic difficulties, particularly in reading and math, [redacted] was not evaluated again until April 2003 when he was in the ninth grade at [redacted] High School. (Petitioner's Exhs. 7, 50) Indeed, a state hearing officer found on January 27, 2004 that the school system's failure to evaluate [redacted]. for over five years was a violation of state and federal requirements. (Petitioner's Exh. 50)

Due to [redacted].'s lack of progress in his academic studies, including his reading and math skills, [redacted].'s family insisted in early 2003 that the school system evaluate [redacted]. for the first time in

five years. Finally, on April 3, 2003, a school psychologist completed an evaluation of [redacted]. (Petitioner's Exh. 3) The school psychologist reported that [redacted].'s current teachers had indicated that [redacted]. was performing at the second to third grade level in most academic subjects even though he was presently in the ninth grade. (*Id.*) Notably, the test results showed that [redacted]. scored significantly higher on non-language based assessments and that [redacted]. scored lower on non-verbal assessments. Thus, the psychologist noted that even though the test results showed that [redacted]. had a full scale I.Q. score of 60, the significant variations among the separate scales on the cognitive assessment system showed that the I.Q. score may not be an accurate reflection of [redacted].'s true ability. As one example, on the simultaneous scale, [redacted]. obtained a standard score of 82. (*Id.*) The April 2003 evaluation was also limited, as noted by the State Department of Education hearing officer in January 2004, in that no adaptive behavioral evaluations were completed by the family and only one source was used for an adaptive behavioral evaluation. (*Id.*) (Petitioner's Exh. 24) Based upon the discrepancies in the subtest scores, the school psychologist recommended in April 2003 that APS perform additional evaluations. (Petitioner's Exh. 3)

[redacted].'s family objected to the school system making any determinations regarding an appropriate education for [redacted]. based upon the April 2003 test results. (Petitioner's Exh. 23) Despite the recommendations of the school psychologist and findings which noted discrepancies in the subtest scores, [redacted].'s I.E.P. team continued to classify him as M.I.D. on April 17, 2003. (*Id.*)

When [redacted].'s family learned about the I.E.P. team's conclusion to continue to classify [redacted] as M.I.D. in April 2003, the family objected once again and insisted on additional testing.

(Petitioner's Exh. 56) In response to those objections, a different school psychologist performed an additional psychological evaluation on July 23, 2003. (Petitioner's Exh. 4)

The July 2003 evaluation confirmed that [redacted]. was not M.I.D. but had a specific learning disability. The tests showed that [redacted]. had a full scale I.Q. score of 82 which was in the low average range of intelligence. (Petitioner's Exh. 4) In the July 2003 testing, [redacted]. had lower scores on other tests, but the examiner believed that the full scale I.Q. of 82 was a truer representation of his overall level of cognition. (*Id.*) The July 2003 testing also showed that [redacted].'s reading level was at grade three, spelling level was at grade two, and arithmetic level was at grade three. (*Id.*) At the time of the testing, [redacted]. was still in a self-contained tenth grade class for M.I.D. students at [redacted] High School. He was described by teachers as respectful and enjoyed the challenge of learning despite being placed in the wrong classroom.

On August 6, 2003, the I.E.P. team met to discuss the July test results. (Petitioner's Exh. 25) The school psychologist who performed the evaluation noted that [redacted] had the characteristics of a learning disabled child. (*Id.*) [redacted].'s family indicated that they wanted one-on-one tutoring in the deficit areas and wanted the school to consider private schooling and the [redacted] Center where [redacted]. had been able to raise his reading level from grade three to grade five in five months from February to July 2003. [redacted]. expressed his desire to obtain a proper undergraduate education that would enable him to go to college and obtain a degree in computer technology. (*Id.*) No action was taken on the family's request, and the team agreed to meet again in September.

Shortly after the August meeting, on August 14, 2003, [redacted].'s mother, [redacted], wrote the school principal confirming her request for tutorial support for [redacted]. and one-on-one academic instruction in order to assist [redacted]. to close the achievement gap in his studies.

(Petitioner's Exh. 27) Ms. [redacted] also requested a research-based structured program for reading and math and noted that when she enrolled [redacted]. into the [redacted] Center for five months in February 2003, [redacted]'s reading grade level went from the third grade to the fifth grade level. (*Id.*) [redacted]'s mother further noted that [redacted]. had made clear to his teachers that he wanted to go to college and become a computer engineer and that she wanted the school system to continue using the [redacted] Center at public expense to assist [redacted] with obtaining a normal high school diploma so that he could go to college. (*Id.*)

On September 9, 2003, the I.E.P. team met again and discussed [redacted]'s eligibility for services. The only recommendation the team made was to provide 1.5 hours of speech tutoring to [redacted] despite an acknowledgment that [redacted] was not achieving in a manner commensurate with his age and ability in all academic areas and that he had a severe discrepancy between achievement and cognitive ability that was not correctable without clinical/specialized techniques. (Petitioner's Exh. 27) A speech language impairment eligibility report dated September 9, 2003 concluded that [redacted] had language deficits ranging from six years and one month to nine years and seven months. (Petitioner's Exh. 28)

On October 7, 2003, the I.E.P. team amended [redacted]'s I.E.P. by agreeing to provide [redacted] with 19.5 hours in general education and 10.5 hours in special education in the tenth grade. It was determined that the special education would be in math and communication. [redacted] would attend regular classes for the first time since the third grade and would receive after-school assistance two hours per week. (Petitioner's Exh. 29) Attachments to the I.E.P. contained [redacted]'s grades for the prior year which consisted primarily of Cs and Ds and a failing grade in math. Despite those grades, he was passed along to the tenth grade for the following year. (*Id.*)

The staffing minutes for the October 7, 2003 I.E.P. team meeting indicate that [redacted].'s mother believed that [redacted].'s placement in the M.I.D. program had hindered his learning and that his performance in high school was therefore not a true measure of his ability. (Petitioner's Exh. 30) The school system suggested that the Lexia reading program (a phonics based reading program) possibly could be used in [redacted]'s study skills class, but [redacted].'s mother requested services on Saturday due to [redacted].'s busy schedule during the week. She also requested services during the summer. The school system responded by stating that she could file a complaint with Dr. Johnson who was the APS director of services for exceptional students. At this time, [redacted].'s high school program was also changed to a college prepatory curriculum. (*Id.*)

On November 17, 2003, mediation was held which resulted in an agreement to provide the Lexia reading program by no later than November 21, 2003. (Petitioner's Exh. 44) The parties also agreed that APS would look into providing the Lexia program on Saturdays, that APS would review the Lexia program by January 16, 2004, that APS would provide a syllabus and homework assignments to the parents, and that APS would consider providing textbooks on tape to [redacted] (*Id.*) The parties agreed that this was an interim agreement, and [redacted]. specifically reserved his right to file a due process complaint if he was not satisfied with the school's program. (*Id.*)

Contrary to the mediation agreement, the Lexia program was not implemented until December 9, 2003, and by January 12, 2004, [redacted] had received only two and one-half hours of instruction with it. (Petitioner's Exhs. 48, 50) The I.E.P. team met on January 12, 2004 to review the new program. (Petitioner's Exh. 31) At that time, APS decided that the Lexia program would be continued. (Petitioner's Exh. 31)

On January 27, 2004, in response to a complaint filed by [redacted]. with the Georgia State Department of Education, a state hearing officer found that APS was not in compliance with state and federal requirements for providing a free and appropriate education to [redacted]. The hearing officer noted that [redacted]. was below grade level in reading, spelling, and math and that no in-depth instruction had been provided in [redacted].'s I.E.P. to address his academic deficits. (Petitioner's Exh. 50) The hearing officer stated that [redacted].'s mother had expressed her disagreement with [redacted].'s I.E.P. at least as early as February 2003. The hearing officer specifically found that APS had violated IDEA by failing to evaluate [redacted]. every three years and by failing to fully assess all areas of his disability. As a result, the hearing officer ordered that APS: 1) provide compensatory services to [redacted]. during the summers throughout his high school career including either school-based services or private tutoring to be decided by the I.E.P team; 2) provide three hours of tutoring per week outside school hours by a certified teacher or outside person for the remainder of the school year; 3) provide reading services through the Lexia program; 4) have the I.E.P. team decide whether to add to or amend [redacted].'s academic goals; and 5) consider transferring [redacted] to another high school. The hearing officer also made clear that if the parent disagreed with the I.E.P. recommendations, she could request mediation or a due process hearing. (*Id.*)

On February 17, 2004, the I.E.P. team met to review [redacted].'s performance and the school system's compliance with the findings of the State Department of Education. (Petitioner's Exh. 32) [redacted].'s family continued to express concern that [redacted]. was below grade level and requested that remediation be provided on Saturdays and Sundays and that [redacted]. be provided services at the [redacted] Center rather than through the school-based Lexia program. A teacher who had worked with the [redacted] Center program confirmed that it was an effective program. The school system acknowledged that it used the [redacted] Center program successfully

in at-risk elementary schools. However, APS continued to refuse to pay for use of that program on [redacted].'s behalf. Instead, school officials recommended continuation of the Lexia reading program for 30 minutes daily, tutoring for three hours per week preferably on Saturdays, keeping [redacted] at the tenth grade level the following year, and extending services through the summer. [redacted] indicated his desire to continue his attendance at [redacted] High School rather than transferring to another school. His teachers noted that he had excellent attendance and willingness to work in all of his courses. (*Id.*)

On April 21, 2004, the I.E.P. team met for an annual review and noted that [redacted] was missing some classes and assignments and was failing some classes. (Petitioner's Exh. 33) The team noted that [redacted].'s reading level had dropped somewhat from grade level five to grade level four to five. [redacted].'s family once again reiterated their request for reading services through the [redacted] Center and was told that they would have to file an official complaint if they wanted those services.

On May 24, 2004, the family proceeded to have [redacted]. evaluated for the Lindamood-Bell reading program to determine whether his reading skills could be improved. (Petitioner's Exh. 6) The [redacted] Center performed a battery of 12 tests including the Peabody Picture Vocabulary Test-III and the WRAT-Revised III. (Petitioner's Exh. 6) Although [redacted]. was 17 years old at the time of the testing, the vocabulary test result showed that [redacted]. had an age equivalent of ten years and four months. The results of the WRAT indicated that [redacted]. had a grade three reading level, a grade three spelling level, and a grade five arithmetic level. Based upon these test results, [redacted].'s performance ranges went from below the first percentile to the seventh percentile which means that 93% to more than 99% of students his age were at a higher

level. Consequently, the [redacted] Center recommended that [redacted]. receive intensive sensory-cognitive training at a rate of six hours daily for an initial 360 hours. (*Id.*)

Camelia Fletcher, who is the director of the [redacted] Center, testified at the hearing that the Center did not charge [redacted].'s family for any of this testing. She is a licensed speech pathologist, has worked at the Atlanta Speech School for 18 years and has a master's degree in speech language pathology. She testified that additional testing performed by the Center a year later in 2005 showed that [redacted]. had either not improved in his reading skills or had actually lost reading skills. For example, phonetic awareness testing showed that [redacted]. was below a kindergarten level and other reading tests showed that he scored no higher than a third grade level.

On May 26, 2004, the I.E.P. team met and reviewed the Lexia program. (Petitioner's Exh. 34) Test results for [redacted]. showed that he was still reading at an elementary level. [redacted].'s Lexia instructor informed the team that [redacted].'s reading skills were inconsistent in the Lexia program. The team decided that [redacted]. would audit algebra and continue with the Lexia reading program over the summer. [redacted].'s family believed that he was still reading at a third grade level. This belief had been confirmed a few weeks earlier on May 9, 2004 by Lucinda Brown, [redacted].'s certified tutor for the Lexia reading program, who wrote that [redacted]. was at a third grade level in reading. (Petitioner's Exh. 55) As a result, once again, [redacted].'s family requested that APS provide reading instruction through the [redacted] Center or consider using the [redacted] Center. The I.E.P. team members refused to consider the [redacted] Center but agreed to look at the Lindamood-Bell program. The family was told once again that they would have to file a formal complaint if they wanted to pursue the matter. As of the date of the hearing in this case, APS had refused to use the Lindamood-Bell program.

On August 24 and 25, 2004, after continued requests from [redacted]'s family, APS referred [redacted]. to Dr. [redacted] for an independent psychological evaluation. (Petitioner's Exh. 7) Dr. [redacted] administered 18 separate tests over two days. The results included a verbal comprehension index score of 84 which was in the 14th percentile and a working memory index score of 69. In her report, Dr. [redacted] noted that the verbal comprehension index score was the best indicator of [redacted]'s potential because it was based upon verbal performance and eliminated working memory tasks where [redacted]. struggled. Dr. [redacted] noted in her report that the 15-point discrepancy from [redacted]'s potential that was evidenced by these two test scores was considered significant in view of the fact that he had been receiving special education services from APS. The battery of tests that took place over two days further showed that [redacted]'s skills were at the following grade levels:

- Sight word skills – third grade level which was "severely discrepant from his potential"
- Word attack or phonic skills – second grade level which was "severely discrepant from his potential"
- Reading comprehension skills – third grade level which was "severely discrepant from his potential"
- Listening comprehension – fourth grade level
- Spelling skills – second grade level which was "severely discrepant from his potential"
- Math calculation skills – fourth grade level which was "severely discrepant from his potential"
- Math problem solving – third grade level which was "severely discrepant from his potential"
- Written expression – borderline range which was "weaker than his potential"

- Visual motor integration skills – age nine years to nine years, eleven months which was "significantly below his age level"

- Phonological awareness – "severely discrepant from his potential."

Based upon her comprehensive evaluation of [redacted]., which also included extensive interviews of [redacted]. and his family, Dr. [redacted] concluded that [redacted] suffered from a specific learning disability consistent with dyslexia. She further opined that [redacted]. needed intensive multi-sensory training to bring his deficient skills closer to his potential so that he could perform independently as an adult. She recommended that [redacted]. continue to receive speech and language services and that after participating in a more intensive reading program, [redacted]. should have an updated evaluation of functioning and have some vocational counseling.

Dr. [redacted] also testified at the hearing in this case. She noted that [redacted]. is not deficient intellectually, but his basic reading and spelling skills are significantly below the 84 test score that he received. She estimated his reading grade level at 3.7. He therefore needs intensive multi-sensory training. She noted that [redacted]. really wants to learn to read and that his reading skills are more deficient than they should be.

On September 10, 2004, the Georgia Department of Education acknowledged that [redacted].'s grades had not improved despite using the Lexia reading program. (Petitioner's Exh. 64) In the letter addressed to [redacted].'s family, the Department of Education further noted that if the family was not happy with [redacted].'s I.E.P. or reading program, the family could request a due process hearing. (*Id.*)

On November 18, 2004, the I.E.P. team met again. (Petitioner's Exh. 36) At that meeting, [redacted].'s family indicated that [redacted]. wanted the Lindamood-Bell program to improve his reading skills because the Lexia program had proved inadequate. This conclusion was supported

by Dr. [redacted]'s testimony who noted that an intensive multi-sensory approach had not been provided to [redacted]. The meeting minutes further reflected that [redacted] was having difficulty turning in assignments and that he was failing a class. The school system refused to offer any reading program other than the Lexia program.

On December 1, 2004, a specific learning disability eligibility team report noted that [redacted] continued to struggle with regular academic classes and that his tests showed a "severe discrepancy" in basic reading skills, math calculation, math reasoning, and written expression skills. (Petitioner's Exh. 37) The report further noted that "there is a severe discrepancy between achievement and cognitive ability that is not correctable without clinical/specialized techniques." The report found that [redacted] met specific learning disability eligibility criteria. The report also included the results of a single test performed by the school system on October 22, 2004 which showed that [redacted] was performing at a third grade level in mathematics. The test scores for reading were widely divergent ranging from a 3.3 grade level for reading decoding to a 6.9 grade level for reading comprehension (with a composite grade reading level score of 4.7). According to Dr. Edward Dragan, [redacted]'s expert who testified at the hearing, this wide variation made the test results suspect. Without considering Dr. Dragan's opinion, the results are particularly suspect for three other reasons: 1) as demonstrated by the testimony at the hearing, the test was performed without the parent's knowledge or consent; 2) the test results for reading directly conflicted with a much more extensive battery of tests performed just two months earlier by Dr. [redacted], an *independent* psychologist consultant; and 3) reading decoding requires far less skill than reading comprehension, yet the reading comprehension score is more than two times higher than the reading decoding score. In any event, the test report itself noted that the

overall test scores were extremely low or well below average for a student who was 17 years, 8 months old and in the tenth grade. (*Id.*)

At the hearing held in this case, Dr. Icicie Johnson, who is the APS director of program services for exceptional children, acknowledged that diagnosing a student as mentally retarded when the student actually has a specific learning disability is "serious," but denied that he had been misdiagnosed. She also admitted that [redacted] was not timely re-evaluated after he was initially evaluated in 1998 and erroneously found to be M.I.D. The next evaluation should have been done in three years, but did not occur for five years. When the re-evaluation was performed in March 2003, the school psychologist still failed to properly diagnose [redacted]. as having a learning disability and additional evaluation was performed only at the insistence of [redacted]'s family.

Dr. Johnson admitted that the school system did nothing to assist [redacted]. with catching up his reading skills while he was in the ninth grade and offered no actual reading program. As a result, the family placed [redacted]. in the private reading program at the [redacted] Center. She believed that two and a half hours per week of one-on-one tutoring constituted intensive services that would assist [redacted]. in overcoming six years of treatment as a mentally disabled individual, and she believed that the Lexia reading program was an intensive multi-sensory program. Dr. Johnson had no knowledge regarding [redacted].'s current reading level at the time of the hearing but acknowledged that his reading level was at a third grade level in 2003 and 2004 which showed no progress in reading.

Faustina Haynes, who has 11 years of special education experience and was the program assistant for special education at [redacted] High School, also testified. She noted that the documentation in [redacted].'s educational file showed that he failed to turn in class assignments and missed classes and tutorials. She also acknowledged that in order to survive in high school, a

student must be able to read at the fifth or sixth grade level. She could not explain how [redacted] could expect to graduate from high school when he was reading at a third grade level.

Despite use of the Lexia program for approximately 18 months, Ms. Haynes confirmed that by the time an I.E.P. meeting was held on May 12, 2005, [redacted] had failed his language arts class and was failing the second semester of algebra I. [redacted] therefore planned to take the algebra course again during the summer session. [redacted]'s diploma was also changed from a college prep diploma to a vocational diploma because he needed two years of foreign language in order to qualify for a college prep diploma which he was incapable of taking due to his reading problems. Ms. Haynes asserted that [redacted]'s aunt agreed to the May 12, 2005 I.E.P., but the record does not support that assertion and shows that the family continued to insist on additional private remediation services in reading as it had since 2003.

Dr. Barry Bogan also testified on behalf of the school system. He is in charge of graduate and undergraduate studies at Kennesaw State University and teaches special education courses. He considers the Lexia reading program to be scientifically based and multi-sensory. Although he acknowledged that the Lindamood-Bell program is a multi-sensory reading program, he believes that it lacks quantitative scientific validation. He acknowledged, however, that, qualitatively, the Lindamood-Bell program is an intensive multi-sensory reading program that has many adherents and that has been used successfully to develop reading skills. Dr. Bogan believes the Lexia program is an appropriate program for [redacted] and essentially believes that APS has provided an appropriate education for [redacted]

On cross-examination, Dr. Bogan admitted that he had incorrectly assumed that [redacted] was mentally retarded and did not know that [redacted] suffered from a specific learning disability, namely, dyslexia. Dr. Bogan also mistakenly believed that [redacted] was reading at a sixth to eighth grade

level rather than a third grade level.[3] Dr. Bogan had not reviewed Dr. [redacted]'s report or the extensive tests that she had performed for two days on [redacted] which showed that [redacted]. was reading at a third grade level. He also had never met with or spoken with [redacted]. and believed that [redacted] was 16 or 17 years old when, in fact, he was almost 19 years old at the time of the hearing. When he was made aware of these discrepancies, he testified that they had no effect on his opinion that APS had provided [redacted]. with an appropriate education.

Dr. [redacted] and Camilla Fletcher, who have extensive experience with reading disabilities and who spent considerable time speaking with and testing [redacted], also testified at the hearing. Dr. [redacted]'s testimony in pertinent part has been summarized above. With respect to Ms. Fletcher, in addition to her qualifications set forth earlier, she has co-authored an evaluation of tests that is being used nationally for auditory and speech issues. She has a master's degree in speech language pathology and spent considerable time interviewing [redacted]. and his family and administering 12 sets of tests on [redacted]. As noted above, her testing showed that [redacted].'s reading skills actually decreased from 2004 to 2005 while he was being provided the Lexia reading program. She testified that the Lexia reading program is not multi-sensory and is not intensive and required skills that [redacted]. does not have in order to use it. She observed [redacted]. at [redacted] High School while he was using the program and, during the better part of her observation, [redacted]. was left to himself. There was no one to give him any input if he used the right or wrong format, and

[3] Under further questioning, Dr. Bogan indicated that he based his sixth to eighth grade reading level conclusion on the single October 22, 2004 test noted *supra* that was performed by the school system without the parent's knowledge or consent. To reach that conclusion, he also necessarily had to rely solely on only one of the subtest scores of 6.9 while ignoring the other subtest score of 3.3 and the composite score of 4.7. When confronted with this information, he acknowledged that, at most, [redacted]. was reading at a fifth to sixth grade level. He arrived at this conclusion by taking the composite 4.7 score and assuming that one year later at the time of this hearing that [redacted] would have improved at least one more grade level to 5.7. Apart from Dr. Bogan's reliance on a test with highly questionable reading scores (as noted *supra*), his assumption that [redacted] would have improved an entire grade level from 2004 to 2005 is quite remarkable given all of the other evidence of record that [redacted] was not progressing by using the Lexia program, including the report of [redacted].'s own certified Lexia instructor that confirmed he was reading at only a third grade level. Dr. Bogan's credibility in relying on this single test is especially questionable given that he did not even review a much more comprehensive set of tests performed just a few months earlier by Dr. [redacted], an *independent* consultant, who found that [redacted]. was reading at only a third grade level.

there was no one to give him feedback. While she was observing [redacted]. working through the Lexia program, for the first time in her professional career in a visit to a school, school personnel required her to leave the school. In a clear reference to Dr. Bogan's testimony, she testified that it is risky to draw conclusions regarding a student's reading skills if you have not tested the student and have not seen the student yourself.

Ms. Fletcher further testified that 30 minutes for five days a week in a reading program is not near enough instruction to close [redacted].'s achievement gap that developed over the course of his entire time in school. She considered the M.I.D. misdiagnosis to be harmful. She testified that language processing is critical to [redacted].'s ability to learn to read and that language processing is not being addressed at all in his reading program. Ms. Fletcher spent 10 hours performing an exploratory intervention with [redacted]. just to see if she received any type of positive response, and the response from [redacted] was overwhelming in his desire to learn. Her exploratory intervention showed how much he has not been taught. [redacted]. has a huge desire to read. Ms. Fletcher concluded by stating that the tests on [redacted]. show no improvement in his reading with the programs that the school has offered. She was not paid anything for her testimony or extensive testing.

Dr. Edward Dragan also testified by telephone on behalf of [redacted]. He has a master's degree in special education and a Ph.D. in supervision and administration from Rutgers University. He has published 35 to 40 articles in peer-reviewed journals. He has done coursework in learning disabilities and reading disabilities, has been a special education teacher, has been an adjunct professor on learning disabilities, has been a school superintendent responsible for supervising all special education services in the State of New Jersey where he has been responsible for 21 school districts, and he has been the curriculum coordinator at a special

education/residential treatment center for children with severe disabilities including learning disabilities.

Dr. Dragan spent several hours reviewing [redacted]'s educational file including his test results, and he talked with [redacted]. at some length. He considered [redacted]. to be very articulate and to have a very good idea of what he wants to do. After reviewing [redacted].'s test results and reports, Dr. Dragan was surprised to learn that [redacted]. had not improved at all from one grade level to another. In his opinion, the school district acted unreasonably in taking so many years to properly evaluate and diagnose [redacted].'s learning difficulties. APS should have had no difficulty in realizing that [redacted]. was not mentally retarded based on observing him in class. Moreover, a person who is mentally retarded performs in a consistently low manner in academic, social and recreational areas. Such a situation was never true of [redacted]. The test results and classroom observations of [redacted]. should have alerted the school system at a much earlier time that [redacted]. had some form of a learning disability and that he was not mentally disabled.

Dr. Dragan further testified that once the school system properly diagnosed [redacted]., it failed to provide a sufficient response to the change in [redacted].'s diagnosis from M.I.D. to a learning disability. A totally different educational methodology must be utilized for a student suffering from a learning disability than for a student who is M.I.D. An M.I.D. diagnosis leads to a focus on functional skills as opposed to remediating the specific learning disability. Because [redacted]. did not receive the proper instruction from third grade to ninth grade, much needs to be done for him to catch up.

He does not believe that a purported expert can testify regarding the needs of a student if he does not know the real diagnosis. If the expert does not know the student's age, it shows that he has not reviewed the materials carefully.

Dr. Dragan further noted that he is familiar with the Lexia program and that 30 minutes per week does not constitute the intensive services that [redacted]. requires. He could not say that 30 minutes per day in the Lexia program would constitute the intensive services that [redacted]. needs. He considers the Lindamood-Bell program to be a far more intensive program than the Lexia program. It was also Dr. Dragan's opinion that the I.E.P.s in this case were not individualized enough because they had the same goals and objectives from year to year. He considered this to be a failure to provide a free appropriate public education. Based upon his review of the records in this case and the many, many years in which APS had failed to provide appropriate services, he had serious doubts that APS could or would provide the necessary services to [redacted]. even if it was ordered to do so. He therefore believed that [redacted]. should be placed in a private school that focused on students with specific learning disabilities such as the [redacted] School or the [redacted] School which are both located in Georgia.

In Dr. Dragan's opinion, the absolute minimum services that should be provided to [redacted]. are: 1) 60 minutes per day in a specific intensive multi-sensory program with a trained certified professional; 2) having a certified special education teacher in the classroom with regular teachers to assist [redacted]. with his classes and to work in consultation with the regular teachers; and 3) insuring that the teachers in each of [redacted].'s classes are trained in dyslexia and know how to provide instructional strategies for a dyslexic student. He also believes that after appropriate services are provided, there should be regular comprehensive evaluations so that needed adjustments can be made in the services that are provided.

Finally, [redacted]. testified at the hearing. He was eight years old when he was placed in special education classes. At the time of the hearing, he was 18 years old and in the eleventh grade of high school. When he was first diagnosed with M.I.D., the school system told him he

would be in special education the rest of his life. He was told the same thing when he learned for the first time in 2003 that he was considered to be M.I.D. When he and his aunt challenged the diagnosis at school, Faustina Haynes made clear that he would always be M.I.D. and would never graduate from high school. This upset him greatly because he believes that anyone who talks with him and observes him can tell that he is not M.I.D.

At the time of the hearing, [redacted] was engaged in the Lexia reading program for 30 minutes for one day each week. Contrary to the school district's assertions, he was insistent that APS does not provide him with Lexia instruction 30 minutes per day for five days a week. He considers the program to be very elementary and not appropriate for his age. The first paraprofessional provided to him by the school system did not know how to set up the program, and it took several weeks before the school officials figured out how to use it. He very much desires a regular education high school diploma and wants to do computer engineering in college. However, the school system has repeatedly encouraged him to drop out of school and get a job. Both students and teachers have called him derogatory names due to being in special education.

As late as the 2005 school year, [redacted]. testified that the school system is not actually providing the tutoring services as required by his I.E.P. A football coach serves as his tutor and spends much of the allotted time looking at football sites on the computer. Moreover, he was not allowed to begin taking algebra during the summer session until only two weeks were left for the session, contrary to the requirements in his I.E.P.

While [redacted]. was in the M.I.D. special education classes, his science classes consisted of coloring and his math classes consisted of using crossword puzzles. He thought the classes were ridiculous. His poor attendance reports are based on being pulled out of class for numerous tests

including testing without his family's consent. He described one instance in which he and 30 other students were summoned over the school's public address system to go to the gym and stand in line, whereupon they were told that they had to leave school that day because they were being transferred with no notice to another high school. The school gave no reasons for its actions. This incident occurred on a day when he was supposed to take some important tests in his regular classes. After his family objected, he was allowed to return to school.

Faustina Haynes with the school system told him that he could not enroll in regular high school classes unless he paid for the reading program at the [redacted] Center and increased his reading level. Ms. Haynes also told him that the school had no program to help him catch up and that he had to find his own program outside of school. He therefore enrolled at the [redacted] Center from February 2003 to July 2003 and his reading level increased from a third grade level to a fifth grade level. At the time, he felt that he had won the lottery so it was very upsetting to be told at the next I.E.P. meeting that he was being held back a year.

[redacted]. was very articulate at the hearing and was a very impressive witness. Despite all of the obstacles that have come his way, he still has a very positive attitude and a tremendous desire to learn. His descriptions of the school system's treatment of him were stated calmly and without rancor. Based on his demeanor and speech on the witness stand, the ALJ finds it incredulous that anyone, let alone supposedly trained professionals, could have deemed him mentally retarded as late as 2003.

III. CONCLUSIONS OF LAW

A. Introduction

This action arises under the Individuals with Disabilities Act, 20 U.S.C. §§ 1400, *et seq.* ("IDEA"). The stated purpose of IDEA is "to ensure that all children with disabilities have

available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. § 1400(d)(1)(A). A free appropriate public education ("FAPE") includes both instruction designed to suit the needs of a disabled child and related services, 20 U.S.C. § 1401(a)(18), which include "such developmental, corrective, and other supportive services...as may be required to assist a child with a disability to benefit from special education." 20 U.S.C. § 1401(a)(17). In order to ensure that FAPE is provided, state and local educational authorities are required to identify and evaluate children with disabilities and develop an Individualized Education Program for each disabled child. 20 U.S.C. § 1411. The I.E.P. must state the student's current educational status, annual goals for the student's education, special education services, and other supplementary aides and services to be provided to the student, and the extent to which the student will be participating in mainstream classes. 20 U.S.C. § 1401(a)(20). If the parents of the disabled child are dissatisfied with an I.E.P., the educational agency is required to give them an impartial due process hearing. 20 U.S.C. § 1415(f). In this case, on November 24, 2004, [redacted]. filed his due process hearing request. (Petitioner's Exh. 1) The due process hearing request alleges that APS violated [redacted]'s procedural and substantive rights under IDEA, and it seeks compensatory services.

B. Preliminary Matters Including the Burden of Proof Issue

As an initial matter, APS argued prior to the hearing in this case that [redacted] had the burden of going forward with the evidence and the burden of persuasion on the ultimate issues in this case. APS relied primarily on the Eleventh Circuit's decision in *Devine v. Indian River County School Board*, 249 F.3d 1289 (11th Cir. 2001). In *Devine*, the Eleventh Circuit addressed the burden of proof in the federal district court after an administrative law judge had already heard

the case and issued a decision. In *Devine*, the Eleventh Circuit specifically held that the burden of proof in a federal district court is on the party attacking the I.E.P. and based its decision on the premise that a child currently learning in a program that was jointly developed and agreed upon by the school district and the parents should show why the program is inappropriate. The issue in *Devine* also arose out of an administrative decision in Florida, a state that had no administrative rules governing the burden of proof.

Here, the issue is who has the burden of proof at the administrative level, not the district court level. Furthermore, as already shown above, beginning in early 2003, [redacted]'s family repeatedly objected to the I.E.P.s that were implemented by APS. Therefore, this is not a case where the family is attacking an I.E.P. to which it previously agreed as in *Devine*. Finally, unlike *Devine*, the Georgia State Board of Education has a specific rule which places the burden of proof on the school district unless the child is requesting a "placement that is more restrictive *than provided by an existing agreed upon IEP.*" *See* Georgia State Board of Education Rule § 160-4-7-.18(1)(g)(8) (emphasis added). OSAH Rule 616-1-2.07 also specifically places the burden on the school system.

The concept of "cooperative federalism" allows states to set substantive and procedural standards under IDEA so long as they are not more restrictive than IDEA. *GARC v. McDaniel*, 716 F.2d 1565, 1569 (11th Cir. 1983), *Battle v. Commonwealth of Pennsylvania*, 629 F.2d 269, 278 (3rd Cir. 1980), *cert. denied*, 452 U.S. 968 (1981). IDEA contains no provisions setting forth the burden of proof that are applicable in this case such that the Georgia rules are not more restrictive than IDEA. As such, the Georgia rules control the burden of proof issue in this case.[4]

[4] The recent United States Supreme Court decision in *Schaffer v. Weast*, ___ U.S. ____, 126 S. Ct. 528, 2005 WL 3028015 (2005) does not change this result. Although the Supreme Court in *Schaffer* held that the burden of proof in an administrative hearing is on the party challenging an I.E.P., the court specifically excepted from its decision situations where state laws or regulations place the burden of proof on the school district. *Id.* 2005 WL 3028015 at

It is also worth noting that although there is a split of authority as to which party has the burden of proof in an IDEA case, numerous courts have held that the burden should be on the school district particularly if the case is at the administrative level. *T.D. v. Warwick School Committee*, 361 F.3d 80, 82 (1st Cir. 2004) (burden at the administrative level); *Blackmun v. Springfield R-12 School District*, 198 F.3d 648, 658 (8th Cir. 1999) (burden at the administrative level); *see also Clyde K. v. Puyallup School District No. 3*, 35 F.3d 1396, 1398 (9th Cir. 1994); *E.S. v. Independent School District No. 196*, 135 F.3d 566, 569 (8th Cir. 1998); *Walczak v. Florida Union Free School District*, 142 F.3d 119, 122 (2d Cir. 1999); *Oberti v. Board of Education*, 995 F.2d 1204 (3rd Cir. 1993); *Lascari v. Board of Education of Ramapo Indian Hills Regional High School District*, 116 N. J. 30, 560 A.2d 1180 (N.J. 1989). In any event, as further discussed *infra*, the administrative law judge finds that even if the burden were placed upon J.D. as a the party challenging the I.E.P.s at issue, he has met that burden.[5]

C. IDEA, the "Free Appropriate Public Education" Standard and the Compensatory Services Standard

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*8. Because no such law or regulation existed in the case at hand, the Supreme Court did not address that situation in *Schaffer*. *See also Escambia County Board of Education v. Benton*, 2005 WL 3560555 (S.D. Ala. 2005), a case decided after *Schaffer* which held that despite *Schaffer*, the burden of proof rested on the school board in a challenge to an I.E.P. because Alabama had a regulation that specifically placed the burden of proof on the school district. *Id.* at *9.

[5] Respondent also raised three other affirmative defenses in its statement of issues that were addressed prior to the hearing and which were discussed at some length on the record. First, Respondent argued that a November 17, 2003 mediation agreement barred Petitioner from raising any issues occurring on or before that time. As noted by Judge Russell-Walker at the first hearing in this case, Petitioner was not so barred because he reserved his right to file a due process hearing request on all issues contained in the mediation agreement at the time it was agreed upon. Second, Respondent argued that the January 27, 2004 Georgia Department of Education decision on Petitioner's state complaint barred any consideration of issues arising before that decision was issued. Respondent's argument is inapposite because the DOE specifically found in its decision that Petitioner could file a due process request if he was dissatisfied with any IEP recommendations issued in relation to the complaint and decision. Third, Respondent argued that Petitioner's entire claim was moot because he agreed to an I.E.P. on May 12, 2005 after he filed the present due process hearing request. Petitioner vociferously disputed this characterization at the hearing. The record does not support Respondent's assertion. Petitioner has continually claimed a right to additional services from APS at every I.E.P. meeting that has been held since at least early 2003 and was pursuing that claim actively in this case at the time of the May 2005 I.E.P meeting. Moreover, Respondent waited until the eve of the hearing held in November 2005, seven months after the May 2005 I.E.P meeting, before making this argument. As such, the argument is untimely.

The United States Supreme Court has set forth a two-pronged inquiry for determining whether a state has provided a free appropriate public education: "First, has the State complied with the procedures set forth in the Act? And second, is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S. Ct. 3034, 3051, 73 L.Ed.2d 690 (1982). In *Rowley*, the Supreme Court found that, by passing IDEA, Congress sought primarily to make public education available to disabled children. In seeking to provide access to public education, "...Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful." *Id.*, 458 U.S. at 192, 102 S. Ct. at 3043. In fact, the Supreme Court noted that Congress expressly recognized that disabled children are not guaranteed any particular outcome. *Id.* Thus, the intent of the Act was to open the door of public education to disabled children on appropriate terms and was not intended to guarantee any particular level of education once inside. *Id.* Additionally, the Act was not intended to require a state to maximize the potential of a disabled child commensurate with the opportunity provided to non-disabled children. *Id.*, 458 U.S. at 200, 102 S. Ct. at 3048. Thus, the Supreme Court concluded that the Act simply imposes a requirement to confer some educational benefit upon a disabled child and provide a "basic floor of opportunity" which consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the disabled child. *Id.*, 458 U.S. at 200-01, 102 S. Ct. at 3048. In so holding, the Supreme Court was careful to note that simply because a disabled child advances from grade to grade in a regular public school does not automatically mean that the child is receiving a free appropriate public education. 458 U.S. at 203, n. 25, 102 S. Ct. at 3049, n. 25. In *Rowley*, the Supreme

Court ultimately held that the disabled child had performed better than the average child in a class and was advancing easily from grade to grade while receiving personalized instruction and related services calculated to meet her educational needs. As such, the court held in favor of the school system. *Id.*, 458 U.S. at 209-10, 102 S. Ct. at 3052-53.

In *JSK v. Hendry County School Board*, 941 F.2d 1563 (11th Cir. 1991), the Eleventh Circuit applied the *Rowley* decision and found that a "meaningful education is not required under IDEA except to the extent that 'meaningful' is defined to mean more than 'some' or 'adequate' educational benefit." *Id.* at 1572. Instead, a "basic floor of opportunity" is all that is required. *Id.* The Eleventh Circuit held that the adequacy of educational benefits must be determined on a case by case basis in light of the child's individual needs and that while a "trifle" may not constitute "adequate" benefits, maximum improvement is never required. *Id.* at 1573. In applying the above standards in *JSK*, the Eleventh Circuit found that an "appropriate education" requires making measurable and adequate gains in the classroom. *Id.*

More recently, in *School Board of Collier County Florida v. K.C.*, 285 F.3d 977 (11th Cir. 2002), the Eleventh Circuit approved the use of a four-part test for determining whether a child had received educational benefit as required by IDEA as follows: 1) whether the program is individualized on the basis of the student's assessment and performance; 2) whether the program is administered in the least restrictive environment; 3) whether the services are provided in a coordinated and collaborative manner by the key stakeholders; and 4) whether positive academic and non-academic benefits are demonstrated. *Id.* at 982. While approving this four-part test, the Eleventh Circuit was careful to note that those factors do not constitute the only test that may be applied in determining whether educational benefit has been provided under IDEA. *Id.*

If and when a state violation is shown, the Supreme Court has held that compensatory services and other equitable remedies may be imposed upon the school system. *Florence County School District Four v. Carter*, 510 U.S. 7, 15-16, 114 S. Ct. 361, 366, 126 L.Ed.2d 284 (1993); *School Committee of the Town of Burlington Massachusetts v. Dept. of Education of Massachusetts*, 471 U.S. 359, 369-70, 105 S. Ct. 1996, 2002-03, 85 L.Ed.2d 385 (1985). Such compensatory services may include placement in a private school. *Id.*; *see also Loren F. v. Atlanta Independent School System*, 349 F.3d 1309, 1312 (11th Cir. 2003) Reimbursement for private school placements can be denied if the parents' own actions frustrated the school's efforts or if the parents otherwise act unreasonably. *Loren F.*, 349 F.3d at 1313. Even if the parent has acted unreasonably, such action may be excused and reimbursement ordered if one of four exceptions is shown to the IDEA provision allowing such reimbursement including that denying reimbursement "would likely result in physical or serious emotional harm to the child...." *Id.*; *see also* 20 U.S.C. § 1412(a)(10)(C)(iv)(II).

The circuit courts of appeals have uniformly held that compensatory educational services may be awarded prospectively under IDEA for a past deficient program. *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005); *Phil v. Massachusetts Dept. of Education*, 9 F.3d 184, 188 (1st Cir. 1993); *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 249 (3rd Cir. 1999); *G v. Fort Bragg Dependent Schools*, 343 F.3d 295, 308-09 (4th Cir. 2003); *Hall v. Knott County Board of Education*, 941 F.2d 402, 407 (6th Cir. 1991); *Board of Education of Oak Park & Riverforest High School District 200 v. Illinois State Board of Education*, 79 F.3d 654, 656 (7th Cir. 1996); *Miner v. Missouri*, 800 F.2d 749, 753 (8th Cir. 1986); *Parents of Student W. v. Puyallup School District*, 31 F.3d 1489, 1496 (9th Cir. 1994); *Jefferson County Board of Education v. Breen*, 853 F.2d 853, 857-58 (11th Cir. 1988).

Although ordinary I.E.P.s need only provide "some benefit," compensatory awards must do more – they must compensate. *Reid*, 401 F.3d at 525. Moreover, because specialized education and related services must be designed to meet the unique needs of the child under IDEA, a mechanical quantitative remedy is not appropriate; rather, the focus should be a qualitative one so that the ultimate award is 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. Such services are required even though the child may not have objected to the I.E.P. placement because failure to object to a placement does not deprive the child the right to an appropriate education. *Ft. Bragg*, 343 F. 3d at 309; *Ridgewood*, 172 F.3d at 250.

D. Application of the Law to the Facts.

In the present case, the administrative law judge finds that APS has failed to provide a free appropriate education to [redacted] for the 2002-03, 2003-04, and 2004-05 school years. As the Supreme Court emphasized in *Rowley*, access to a free public education is one of the main requirements of IDEA. A student cannot have true access to an education if the student cannot read. As noted by at least one IDEA case involving a dyslexic student, the ability to read is the key that opens the door to all other aspects of an education. *See Nein v. Greater Clark County School Corp.*, 95 F. Supp. 2d 61, 977 (S.D. Ind. 2000).

Since 1998 when [redacted] was in the third grade, the APS has failed abjectly to provide [redacted] with the key to his education by properly teaching him to read. Although the two-year statute of limitations applicable to an IDEA claim bars any claim in this case prior to the 2002 school year, the Atlanta public school system's conduct, and its treatment of this child during the most critical years of this child's education, must be roundly condemned. The Atlanta public school system's

failures in this case are compounded by its complete refusal at the hearing in this matter to even acknowledge that it misdiagnosed [redacted] by labeling him with the stigma of mental retardation as early as the third grade. Indeed, the school system's incompetence in properly educating a child with a specific learning disability such as [redacted] was exemplified by the testimony of its expert, Dr. Bogan, who had the audacity to opine that APS had provided proper services to [redacted] even though Dr. Bogan did not realize that [redacted] suffered from dyslexia rather than mental retardation, did not know [redacted]'s correct age, and erroneously assumed that [redacted] was reading somewhere between a fifth and eighth grade level as opposed to a third grade level. As such, Dr. Bogan's testimony is entitled to very little, if any, weight.[6]

The school system's misdiagnosis of [redacted] was compounded by its reliance on essentially one test to arrive at an M.I.D. diagnosis without any behavioral information from the student's family and friends. Adding insult to injury, APS made no effort whatsoever to further evaluate [redacted] for five years contrary to clearly established law. It did so during the most important years of [redacted]'s educational life.

When APS finally performed additional testing in March 2003, it did so only at the insistence of [redacted]'s family. Although dyslexia is a commonly known learning disability, and [redacted] exhibited classic signs of this specific disability by writing numbers, letters, and words backwards at a very early age, APS still was incapable of making a proper diagnosis when the

[6] Although Dr. Bogan did not get many of the crucial facts right, he at least displayed a professional attitude. Unfortunately, the same cannot be said for his client, the Atlanta public school system. The written transcript of the hearing in this case cannot possibly capture the air of disdain and tone of contempt that the APS officials showed toward [redacted]'s efforts to acquire a program of reading instruction that will give him a fighting chance to read. For example, Faustina Haynes, one of the supervisors of [redacted]'s special education services, physically turned to the side on the witness stand and refused to look at Ms. Morgan during most of Ms. Morgan's cross-examination. Similarly, Dr. Johnson, the APS director of services for exceptional children, spent much of the hearing leaning completely back in her chair with her eyes closed whenever a witness was testifying on [redacted]'s behalf. The overt behavior by APS officials went beyond the bounds of normal adversarial behavior. In the face of such hostility from persons who claim to be professional educators, [redacted]'s testimony regarding the school system's treatment of him was highly credible and put an exclamation point on his quest to learn how to read, to graduate from high school and to go to college. A lesser spirit would have been crushed long ago.

first re-evaluations were performed in March 2003. Again, it was only due to the continued insistence of [redacted]'s family for more testing after March 2003 that led to a proper diagnosis of a learning disability in July 2003.[7] By that late date, [redacted] was in the ninth grade and had lost nine critical years of his educational life. Even at that late date, APS dragged its feet and did not offer the Lexia reading program until five more months had elapsed in December 2003. Furthermore, the program was offered only after the family filed a complaint with the State Department of Education in October 2003.

Because the school system continued to insist through the first half of 2003 that [redacted] was M.I.D. and that no additional educational services had to be provided, [redacted]'s family had no choice but to enroll him in an outside reading program at the [redacted] Center at a cost of $11,000. In five short months, the [redacted] Center was able to increase [redacted]'s reading level from grade three to grade five. Unfortunately, due to the expense, [redacted]'s family could not continue with the [redacted] reading program. The family therefore repeatedly requested at I.E.P. meetings and in correspondence to the school system that the school system pay for continued reading services at the [redacted] Center. APS rejected those repeated requests and insisted that the family agree to utilize the Lexia reading program to be provided by the school.

Although the family continued to insist on private services due to the school's clearly established educational incompetence by misdiagnosing [redacted] and failing to reevaluate him as required by state and federal law, in November 2003, the family allowed the school to begin using the Lexia program but reserved their rights to proceed with a due process hearing request. Additional testing performed throughout 2004 showed that [redacted] had regressed from a fifth grade

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[7] The testimony of Dr. Peter Thomas that the school system did not misdiagnose [redacted] based on the results of very limited testing is entitled to no weight given the other evidence of record and the school system's failure to do more extensive testing and evaluation including obtaining behavioral evaluations from the family at the time the M.I.D. diagnosis was made.

reading level to a third grade reading level and was having difficulty in many of his core subjects at [redacted] High School. Indeed, it was determined that [redacted] needed to repeat the tenth grade. Despite this regression, the school system continued to insist upon utilizing the Lexia reading program and refused repeated requests by [redacted]'s family to allow him to re-enroll at the school system's expense in a reading program at the [redacted] Center or at the [redacted] Center. In fact, the school system basically continued to insist on the same I.E.P. despite the lack of any progress. In a few days, [redacted] will be 19 years and will still be reading at the third to fourth grade level almost three years after he was properly diagnosed as having a learning disability, dyslexia.

The administrative law judge finds that providing essentially the same services that have failed [redacted] for three years has denied [redacted] a free appropriate public education in violation of IDEA. [redacted] certainly has not been provided a basic floor of opportunity as required by the Supreme Court's decision in *Rowley* and, by any objective standard, has not even been provided a trivial benefit let alone an adequate benefit as required by the Eleventh Circuit in *JSK*. The Atlanta public school system's treatment of [redacted] is particularly tragic and appalling given that all objective tests demonstrate that [redacted] has the potential to learn how to read. The administrative law judge is fully cognizant of the Supreme Court's admonition in *Rowley* that once a determination is made that the requirements of IDEA have been met, questions of methodology are for resolution by the states. *See Rowley*, 458 U.S. at 208, 102 S. Ct. at 3052. However, the Atlanta Public School System's intransigence in insisting upon a reading program that has not resulted in even a minimal educational benefit to [redacted] in almost a three year period with respect to his reading ability does not comport with the requirements of IDEA.

Although an administrative law judge or a court should avoid taking sides in a reasonable debate over educational policy, theory, or methodology and should recognize that there are no guarantees of success, given the indisputable evidence that [redacted]. has the potential to learn to read, the trivial progress, at best, in [redacted].'s reading skills resulting from the Lexia program simply does not comport with providing an appropriate education by any measure. [redacted]. is still failing classes. His reading level has remained virtually unchanged. Despite these undisputed facts, APS refuses to make any adjustments. In short, APS has not provided [redacted]. with a basic floor of opportunity.[8]

Given APS's clear violations of IDEA, the issue remains regarding the remedy. The school system did not offer any testimony or other evidence on this issue. On the other hand, the experts who testified on behalf of [redacted]. recommended services ranging from one hour to six hours per day in an intensive multi-sensory reading program. Dr. Dragan also testified that additional minimal services should consist of regular classroom teachers being trained in instructional strategies for dyslexia and a certified special education teacher being provided in each classroom with the regular teacher in order to provide one-on-one assistance for [redacted]. in all of his subjects. Although APS has objected to allowing Dr. Dragan to testify by telephone, his opinion regarding the minimum services that APS should provide to [redacted]. arguably involves less services than those required in the opinion of Ms. Fletcher. Based upon Dr. Dragan's serious doubts that APS could provide the necessary services by qualified personnel, Dr. Dragan's preference was for [redacted]. to have a private school placement. His research showed that at least two such schools existed in Georgia, the [redacted] School and the [redacted] School. All of the experts agreed that whatever

[8]Although the oral testimony of Drs. [redacted] and Dragan was highly instructive on this issue, the administrative law judge does not rely on that testimony in arriving at this conclusion. The undisputed facts regarding the lack of any educational benefit to [redacted]. speak for themselves. Moreover, Dr. [redacted]'s oral testimony was largely duplicative and less comprehensive than her written report that was admitted into evidence. Therefore, APS' objection to allowing telephonic testimony from these witnesses is of no import.

program is provided, additional comprehensive evaluations should be performed at regular intervals after a new program has begun.

Based upon abundant evidence presented at the hearing, and without any need to rely on the testimony of Drs. [redacted] and Dragan, the administrative law judge finds that [redacted]. is entitled to compensatory services and that an entity other than APS should provide those services if [redacted] so elects. A school system that so seriously misdiagnoses a student's ability to learn with an M.I.D. diagnosis, that refuses to timely re-evaulate the student for five crucial years, that has no capacity to admit any mistakes, that insists on continuing with a course of instruction for almost three years despite no benefit to the student, that can only promise more of the same in spite of dramatic improvement by the student when an alternative program was used, and that hires an expert to justify its untenable position of more of the same without knowing the student's age, diagnosis, and current reading level has forfeited its right to continue to "educate" that student. Although the administrative law judge does not rely on the school's misdiagnosis of [redacted]. to find a violation of IDEA, APS' intransigence in correcting that misdiagnosis and in failing to provide services that are of some benefit to [redacted] are factors that should be considered in fashioning a remedy and deciding whether APS has the ability or willingness to teach [redacted] how to read. Indeed, [redacted]'s only improvement took place when he attended the [redacted] Center. Given [redacted]'s age, time is of the essence. The Atlanta public school system has shown an inability and an unwillingness to provide appropriate services for [redacted] for several years.

E. <u>The Remedy</u>

The administrative law judge recognizes that a parent who seeks a placement in a more restrictive environment, *i.e.*, allowing for less interaction with students in a regular educational setting, generally bears the burden of proving an entitlement to that placement. However, the

parent bears that burden only if the placement is more restrictive than the one provided by an existing *agreed upon I.E.P.* *See* Ga. State Bd. of Educ. Rule § 160-4-7-.18(1)(g)(8). Here, [redacted]'s parent has not agreed on his present placement since at least 2003. Therefore, under the above rule, the parent does not have the burden to prove [redacted]'s entitlement to a placement more restrictive than his current placement at [redacted] High School. However, given the overwhelming evidence of record demonstrating the school system's failure to provide [redacted] with an appropriate education for many years, even if the burden were assigned to [redacted]'s parent, the parent would meet the burden. The administrative law judge therefore finds that [redacted]., at his election, is entitled to compensatory services as follows:

> Option 1: He may choose to remain in the Atlanta Public School System and, if this choice is made, he will be entitled to 60 minutes per day, five days per week, of intensive multi-sensory reading services provided by either the [redacted] Center program or the Lindamood-Bell Center program at [redacted].'s sole election or at any other program agreed upon mutually by the parties. APS shall pay all costs of transportation to and from any such program. If [redacted]. desires such reading services to be provided elsewhere, his I.E.P. team must approve his request. Teachers in all of [redacted].'s classes shall be trained in dyslexia including instructional strategies for a dyslexic student. A certified special education teacher shall be provided to [redacted]. for each of his classes and shall provide one-on-one instruction in conjunction with the regular teacher during the class to the extent [redacted]. requests it. At [redacted].'s election, at least one hour per day of tutorial services for [redacted].'s classes shall be provided. At [redacted].'s election, the tutorial services shall be provided during his study skills class, after school, or on Saturdays. No more than two hours of tutorial service are required to be made on Saturdays. [redacted]. shall also be entitled to extended services during the summer months which shall include the same services described above for the regular school year. During the first year, APS through [redacted].'s I.E.P. team shall evaluate [redacted].'s progress at least monthly and shall insure that appropriate testing to measure his progress is done at six month intervals by an independent evaluator selected by [redacted]. After the first year, APS through [redacted].'s I.E.P team shall meet at reasonable intervals and shall insure that appropriate testing to measure his progress is done at least annually by an independent evaluator selected by [redacted]. All services shall be provided at APS expense and shall continue until [redacted]. has graduated from high school with a regular high school diploma or until June 2009 whichever is earlier; or

Option 2: If, in order to complete his high school education, [redacted]. desires a placement outside the Atlanta Public School System, [redacted]. shall provide to APS a list of three proposed private schools inside the State of Georgia to provide regular education and special education services for his dyslexia. APS shall choose one of the three schools 30 days from the date it receives the list. APS shall pay the costs of transportation to and from the school. APS shall pay for all reasonable costs to attend the chosen school which shall not exceed $15,000 per year unless APS agrees to pay a higher sum. [redacted]. shall be entitled to extended services during the summer months which shall include the same services provided during the regular school year. [redacted]. shall be entitled to these services until he receives a regular high school diploma or until June 2009 whichever is earlier. During the first year, APS shall pay for an independent evaluation at 6-month intervals to measure [redacted].'s educational progress. [redacted]. shall have the right to select the evaluator. After the first year, APS shall pay for an independent evaluation at least annually to measure [redacted].'s educational progress. [redacted]. shall have the right to choose the independent evaluator. APS shall pay the costs of all such evaluations.

Additionally, the administrative law judge finds that [redacted]. is entitled to reimbursement of $11,000 for the costs incurred at the [redacted] Center in 2003. The school system explicitly told [redacted]. and his family that he could not attend high school without a fifth grade reading level, that APS could not provide him with services to get him to a fifth grade reading level, and that he would have to obtain private services at his own expense to get to a fifth grade reading level. The services were obviously critical to [redacted].'s educational development and were appropriate under the circumstances. [redacted]. is therefore entitled to reimbursement. *See, e.g., Florence County,* 510 U.S. at 9-10, 114 S. Ct at 363; *Loren F.,* 349 F.3d at 1312 (holding that parents who act reasonably in placing their child for private services may be entitled to relief when there is a FAPE violation, particularly "when faced with a demonstrably under-resourced public school system" which in that case was the Atlanta public school system).

Finally, the administrative law judge finds that [redacted]. is entitled to recover all litigation costs including expert witness fees and attorney fees incurred in bringing and concluding this

action. Although [redacted]'s aunt represented [redacted] at the hearing in this matter, he previously had legal representation in this case.

IT IS SO ORDERED this 30th day of ~~September~~ January, 2006.

Steven D. Caley
Special Assistant Administrative Law Judge