

05-0515896

RECEIVED
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BY: AKW, PES

██████, Petitioner,
v.
DEKALB COUNTY SCHOOL DISTRICT,
Respondent.

:
: Docket Nos.:
: OSAH-DOE-SE-0515896-44-Walker-Russell
: OSAH-DOE-SE-0524817-44-Walker-Russell
:
:
:
:

FINAL DECISION

Appearances: For Petitioner: Chris E. Vance, Esquire
For Respondent: Harold N. Eddy, Jr., Esquire

FILED
DEC 20 2005
OFFICE OF STATE
ADMINISTRATIVE HEARINGS

I. INTRODUCTION

This matter comes before the Office of Administrative Hearings ("OSAH") pursuant to due process hearing requests filed by Petitioner ("██████") on January 20, 2005, and May 10, 2005, alleging that the DeKalb County School District ("DCSD") has failed to provide him with a free appropriate public education ("FAPE") as required under the Individual with Disabilities Education Act ("IDEA"), Section 504 of the Vocational Rehabilitation Act, and the American with Disabilities Act. OSAH has jurisdiction to hear this matter pursuant to Article 2 of the Georgia Administrative Procedures Act. After having carefully reviewed the testimony and documentary evidence presented in this matter, and for the reasons indicated below, ██████'s appeal is **HEREBY GRANTED**.

A. HEARING PHASES AND RELEVANT IEPs

The hearing proceeded in two phases. In the first phase, Petitioner presented evidence as to why the two year statute of limitations should not apply, as set forth in *Mandy S. v. Fulton County School District*, 205 F. Supp. 2d 1358 (N.D. GA 2000), *aff'd without opinion*, 273 F.3d 1114 (11th Cir. 2001). After four days of hearing, and a partial day of deposition testimony, the Court granted Respondent's Motion for Involuntary Dismissal as to claims arising out of any IEP entered into more than two years prior to January 20, 2005, which is the date that Petitioner filed his due process hearing request. The second phase of the hearing addressed ██████'s educational program, beginning with the December 11, 2003 IEP and continuing through the Summer 2005 ESY Program. The IEPs at issue during the relevant period are: (1) the December 11, 2003 IEP; (2) the May 2004 ESY Agreement and IEP Notes; (3) the August 24, 2004 IEP; and (4) the May 10, 2005 ESY IEP.

B. PROCEDURAL HISTORY

█ filed his due process request on January 20, 2005. A Notice of Hearing (NOH) scheduled the case to be heard on February 10, 2005, at OSAH. DCSD requested, and was granted, a brief extension of the hearing date that was unopposed by Petitioner. The ALJ continued the case to be heard on the first available consecutive hearing dates, March 2, 3, and 4, 2005. On March 2, 2005, the parties engaged in an all day settlement conference and indicated to the ALJ that they had reached a settlement agreement. However, the attorney for Respondent indicated that the agreement had to be reviewed, and consented to, by the school district's Superintendent. The parties requested, and were granted, additional time to continue with further settlement negotiations. The parties engaged in several months of unsuccessful negotiations, after which they informed the ALJ that they were unable to reach a settlement agreement. The ALJ scheduled the case to be heard on the first available consecutive hearing days, June 8, 9, 15, and 16, 2005. On June 8, 2005, the parties requested, and were granted additional time to exchange witness information and documentation for presentation at the hearing. The ALJ scheduled the case to be heard on the first available consecutive hearing days, August 22, 23, 24 and 25, 2005. This was the "concealment" phase of the hearing, which was heard during these four hearing days in August 2005, and a partial day of deposition testimony on September 1, 2005. The second phase of the hearing was held on the first available consecutive hearing days, September 14 and 15, 2005, and October 5, 7, 13, and 17, 18, 19, and 20, 2005. The parties requested that the record remain open until November 28, 2005, for receipt of transcripts and the filing of post-hearing pleadings. The record closed on November 28, 2005.

II. FINDINGS OF FACT

A. PETITIONER'S TWO DUE PROCESS HEARING REQUESTS

JANUARY 20, 2005 DUE PROCESS HEARING REQUEST

Petitioner filed two separate due process hearing requests on January 20, 2005, and May 10, 2005, which have been consolidated in this hearing. █'s January 20, 2005, due process hearing request contends that DCSD has failed to identify his autism disability; structure a program to meet his independent educational needs; and develop an appropriate Individual Education Program ("IEP") that contains appropriate goals, objectives, and support services. █ further contends that he requires an intense, scientifically based program for children with autism; that the staff where he attends school at █ Elementary School was not properly

trained; and that he made no meaningful progress in the educational setting. [REDACTED] contests the procedural and substantive appropriateness of the current and prior IEPs, and alleges that DCSD's actions have caused him harm. [REDACTED] seeks compensatory education, reimbursement for private educational services provided by his parents, and an order requiring an appropriate education going forward.

MAY 10, 2005
DUE PROCESS REQUEST

[REDACTED]'s May 10, 2005, due process hearing request contends that DCSD has provided an Extended School Year (ESY) Program in May 2005 that fails to provide FAPE. Specifically, [REDACTED] alleges that the ESY Program fails to provide him with the necessary special education services needed, and implements limited goals and objectives that do not address all areas of his academic needs. In addition, [REDACTED] contends that DCSD's failure to provide FAPE has required his parents to pay for necessary private education services from which [REDACTED] has made progress. [REDACTED] seeks an order requiring an additional 20 hours a week of 1:1 ABA services; an intense program with more 1:1 interaction and exposure to neurotypical peers; and more goals and objectives added to his IEP.

B. BACKGROUND AND EVALUATIONS

1.
[REDACTED] is a [REDACTED] year old student born on [REDACTED], [REDACTED] enrolled in the DeKalb County School District ("DCSD") in August 2001, at age 3. [REDACTED] is entitled to special education services under the provisions of the IDEA and currently receives services from DCSD. (*Stipulation of Parties; (Transcript, August 22, 2005, p. 212)*). DCSD has provided [REDACTED] with special education services under the primary eligibility category of "Significantly Developmentally Delayed ("SDD") and secondary disabilities of Speech and Language Disordered". (*R-15, p. 5103*).

2.
On February 27, 2001, Babies Can't Wait ("BCW") conducted a speech/language evaluation on [REDACTED] at the request of his parents, because he used very few words. During the evaluation, [REDACTED]'s mother reported that he would very occasionally say words appropriate to a situation such as "mama", "baby/bottle", "Tigger", and "Grandma". The results of the evaluation indicated that [REDACTED]'s communication skills were determined to be in the 12-month age range and significantly delayed. The evaluation further indicated that [REDACTED]'s spontaneous sound language system was limited to few words that consisted of an occasional sustained "m" or "ee" sounds; squeals of excitement; and whines of distress. [REDACTED] demonstrated a significantly reduced set of

communication and play behaviors in the developmental skills age range of nine to twelve month. (R-2). The evaluation recommended individual speech/language therapy, twice weekly for 45 minutes, and suggested that family members become closely involved to learn a variety of oral stimulations and imitation activities, using actions, gestures and sounds. The evaluation referred ██████ for an occupational therapy evaluation by a clinician experienced in sensory integration difficulties; recommended that W.M. see a developmental pediatrician or pediatric neurologist to help develop a medical diagnosis; and suggested regular participation in a play group with "age peers". (R-2, R-14, at p. 5097).

3.

On May 10, 2001, the Dekalb County Schools System ("DCSS") Department of Special Education Services' Coralwood Center ("Coralwood") referred ██████ to BCW for an individualized evaluation in the areas of "achievement/educational" and "speech/language". (R-3 through R-8). The evaluation was conducted on June 8, 2001. ██████'s parents were present during the evaluation. Rebecca Smith, a DCSD employee and former diagnostician, was also present during the evaluation and noted that a representative from BCW discussed whether ██████ had pervasive developmental delay ("PDD"), or autism, and indicated that either BCW, or the parents, needed to schedule an appointment at the Marcus Center for follow-up testing. (Testimony of Rebecca Smith, TR., Sept. 1, 2005, at pp. 51-52; R-9, p. 5036).¹ Ms. Smith was very confident that the significant developmental delayed ("SDD") label was most appropriate for ██████ based on what she had observed during the evaluation. However, she acknowledges that autism is very complex to diagnose before age three, and that she did not give a test to determine whether ██████ is autistic. (Id. at pp. 57-58).

4.

On June 8, 2001, Coralwood conducted an Initial Speech-Language Disordered Eligibility Report, which indicated that ██████ had difficulty maintaining his attention to a given task, following simple directions with cues, and identifying familiar objects. ██████'s father reported that he had said "baseball" lately. During the examination, ██████ "squealed" to indicate pleasure and "fussed" to indicate displeasure. He communicated nonverbally by using gestures, pushing, and pulling, did not smile, and had difficulty maintaining eye contact. (R-14, at p. 5098). The results of the evaluation indicated that W.M. was nonverbal and has a language disorder.

¹ There is no evidence in the record that DCSD, or the parents, ever made an appointment at the Marcus Center for follow-up testing.

PRIVATE EVALUATION

5.

In October 2002, [REDACTED]'s parents took him to a developmental pediatrician. [REDACTED] was tested for PDD/autism and immediately identified as a child with autism. (*Transcript, August 22, 2005, pp. 217-218; Transcript, August 23, 2005, pp. 21, 104-106.* Prior to this private testing, [REDACTED]'s parents did not know that he had autism. [REDACTED]'s mother informed his teacher, Ms. Peek, between October 2002 and December 2002 that W.M. had been diagnosed with autism. (*Transcript, August 22, 2005, pp. 221-222; Transcript, August 23, 2005, pp. 99-100.* However, [REDACTED]'s parents did not provide DCSD with a copy of the diagnosis of autism at any IEP meeting. (*Transcript, October 19, 2005, at p. 35.* DCSD did not request a copy of [REDACTED]'s autism diagnosis, or seek a release to speak to the doctor who diagnosed him as autistic. (*Transcript, August 25, 2004, pp. 276-277.*) In addition, the parents did not submit documentation of a private autism diagnosis into the hearing record.

DECEMBER 1, 2003 IEP

6.

In December 2003, [REDACTED] was [REDACTED] years old and in grade K-5. On December 11, 2003, the IEP Team ("Team") convened to discuss [REDACTED]'s eligibility report, progress at school, and teacher observation. [REDACTED]'s mother was present at the meeting. The Team determined that [REDACTED] continued to perform *significantly* below his grade level in all subject areas; had difficulties with following directions; initiating peer interaction; and responding to his name. [REDACTED] also had difficulties with circular scribbling, sorting, and assembling a seven (7) to nine (9) piece-interlocking puzzle. (*R-79, p. 5369.*)

7.

The Team noted that [REDACTED] had limited communication skills that impaired his ability to verbalize his wants and needs. He was easily distracted and required simple directions and tasks to be broken down into small increments. With assistance, [REDACTED] was able to pull up his pants, take off his coat, and attend group activities. Based on these findings, the Team determined that [REDACTED] met the primary eligibility for SDD and secondary eligibility of Speech/Language Disorder. *Id.* The Team did not discuss whether [REDACTED] met the eligibility for autism and did not recommend that he have an evaluation to determine if he met the criterion for autism eligibility. There was no regular education teacher present at the IEP meeting. (*Id.*)

MAY 24, 2004 IEP MEETING AND
ESY AGREEMENT

8.

On May 24, 2004, the IEP Team met to discuss the Extended School Year ("ESY"), share information and assessment, and discuss ██████'s placement for August 2004. ██████'s parents retained an attorney in 2004 that attended the IEP meeting. During the meeting, the attorney asked why ██████ had not been identified as a child with autism and provided eligibility under the IDEA as a child with autism. DCSD did not deny that ██████ has autism. (*Transcript, August 25, 2005, pp. 103, 328-329, 331-332; R-114*). Minutes from the IEP meeting indicate that the IEP Team acknowledges that ██████ has autism. Private Speech pathologist, Kellie Hetzal, was present at the meeting and discussed programs needed for autistic children. In addition, DCSD Autism Specialist, Dr. Kent Logan, asked whether children with autism act differently in different individual settings and conditions. (*R-114*).² During the meeting, the Team noted that ██████'s speech and communication progress had been slow and that there had been regression. In addition, ██████ had been stemming with his saliva. There was no regular education teacher present at the IEP meeting. (*Id.*)

9.

The IEP Team also drafted a May 2004 ESY Agreement. The agreement indicates that the parents rejected the current IEP as inappropriate, but agreed to wait until August 2004 to devise a new IEP in order to determine if the drafted ESY agreement worked for ██████. The IEP Team did not discuss whether ██████ met the special education services primary eligibility category for autism, and the May 24, 2004 IEP and ESY agreement did not recommend that ██████ have an evaluation to determine if he met the criterion for autism eligibility. (*Id.*)

AUGUST 24, 2004 IEP

10.

On August 24, 2004, the IEP Team met to review the proposed IEP goals and objectives, to discuss schedules, the amount of time of one on one, small group, OT, and speech, and to review the Behavior Intervention Plan ("BIP"). The IEP Team also discussed the May 2004 ESY program. It was noted that ██████ was making progress with this program. The IEP Team did not discuss whether ██████ met the special education services primary eligibility category for autism and did not recommend that W.M. have an evaluation to determine if he met the criterion

² Dr. Logan previously responded, "yes" when previously asked whether ██████ is autistic at an April 19, 2005 IEP meeting. (*R-101*).

for autism eligibility. There was no regular education teacher present at the IEP meeting. (R-146).

MAY 10, 2005 IEP MEETING AND
ESY AGREEMENT

11.

On May 10, 2005, the IEP Team met to review [REDACTED]'s progress on the goals in the August 24, 2004 IEP, and to discuss DCSD'S proposal for ESY 2005, which included adding one (1) additional hour to the May 2004 ESY agreement. DCSD's proposal provided for 25 hours a week of services, including 5 hours a week of 1:1 speech, 4 hours a week of 1:1 occupational therapy, and 5 hours a week of 1:1 ABA based instruction. (*Resp. Ex. 172 at pp. 7135-7144*). Petitioner rejected the May 2005 ESY proposal. (*Resp. Ex. 172 at p. 7144*). There was no regular education teacher present at the IEP meeting. (*Id.*)

12.

DCSD did not offer parent training in autism, SDD, or speech/language disorder to [REDACTED]'s parents. [REDACTED]'s parents did not know that they had a right to parent training until they hired an attorney, and paid for the private parent training they had received. (*Transcript, August 23, 2005, pp. 102-103, 195, 197; Transcript, August 25, 2005, p. 132*).

13.

[REDACTED]'s parents began providing him with private speech therapy in September 2003. The private therapist met with [REDACTED] twice weekly for thirty to forty five minute sessions. The focus of the therapy was to provide a sensory environment that provided play therapy to elicit communication from [REDACTED]. The therapist taught [REDACTED] the "more" sign, and worked with him on two word phrases. As a result, [REDACTED] began to use spontaneous language. (*Transcript, October 5, 2005, pp. 117-121*). After each therapy session, the speech therapists spent 5 minutes with [REDACTED]'s parents to provide a summary of what worked during the session and to give them information about autism. (*Id. at p. 123*).

14.

In May 2004, [REDACTED]'s parents began providing [REDACTED] with 10 hours a week of ABA Discrete Trial Training ("DTT") therapy from May South, plus oversight by a senior therapist and ABA board certified analyst. (*Transcript, September 15, 2005, pp. 239-241*). In addition, [REDACTED]'s parents paid for their own parent training and program oversight for 2 hours a week, twice a month. (*Id. at p. 242*). The costs are \$40 an hour for the 10 hours a week of therapy, and \$60 an hour for oversight and parent training. (Initially, it was \$60 an hour for therapy. (*Transcript, October 7,*

2005, p. 59). As a result of the ABA therapy, [REDACTED] can now spontaneously say two and three word utterances. (*Transcript, September 15, 2005, p. 248*).

15.

[REDACTED]'s parents did not learn that they could receive ABA Discrete Trial Training (DTT) services from DCSD until they retained an attorney in 2004. Instead, the parents thought that they had to privately pay for such services. (*Transcript, September 15, 2005, at pp. 299, 297, 300-301; Transcript, August 25, 2005, pp. 59-61, 74, 132, 314*).

16.

May South has worked with [REDACTED] to increase his receptive vocabulary and to follow simple motor commands. *Id.* at pp. 253-254. May South has taught [REDACTED] to say words including: "puzzle, book, car, chair, table, more, rock, tickle, hug, done, up the water spout, itsy bitsy spider, beads, eat, yeah, bye, break, play, eyes, mouth, ears, nose, book, the numbers 1 to 10, juice, and approximate the word pizza, eat, I want beans, let me go, play, drink, grandma, this bub (for bubble), wait, ready, hi, yeah, mouth, eyes, nose, ears, his numbers, good, go sit, more, mama, done, all right, ball, toes, break, tickle, I want, egg, more beads, dog, and rock". [REDACTED] pronounces some words correctly, while others are approximations. (*Id. at pp. 248-252, 258, 399; See Petitioner's Exhibit Book 5, pp. 36 to 53*).

17.

After eight months of private therapy instruction from May South, [REDACTED] began saying two and three word phrases, which he previously did not do. (*Id. at p. 385*). During summer 2004, [REDACTED] began to speak words in response to parental commands. (*Transcript, October 7, 2005, p. 3*). In Addition, [REDACTED]'s uncle has observed [REDACTED] say, "daddy, hallelujah, thank you, and thank you daddy", since he began receiving private therapy from May South in the summer of 2004. (*Id. at p. 10*).

III. CONCLUSIONS OF LAW

1.

The pertinent laws and regulations governing this matter include the Individuals with Disabilities Education Act (IDEA or "the Act"), 20 U.S.C. § 1400 *et seq.*; 34 CFR Part 300, the Georgia Board of Education Rules 160-4-7, *et seq.* 20 U.S.C. § 1415 (b) and 34 CFR § 507 (b) directs that this hearing must be conducted by the State Education Agency or the public agency directly responsible for the education of the child, as determined under State statute, State regulation, or a written policy of the State Education Agency.

BURDEN OF PROOF

2.

As a general rule, the Petitioner bears the burden of persuasion in IDEA cases, *Schaffer v. Weast*, 126 S.Ct. 528 (2005); *Devine v. Indian River Sch. Bd.*, 249 F.3d 1289, 1291 (11th Cir. 2001) (citing *Christopher M. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285, 1290 (5th Cir. 1991)). In Georgia, parents advocating a more restrictive placement "shall bear the burden of establishing that the more restrictive environment is appropriate." Ga. Bd. of Educ. Rule 160-4-7-.18(1)(g)8. Petitioner seeks a 40-hour a week program of 1:1 ABA instruction and 1:1 therapy. Since [REDACTED]'s parents are advocating a more restrictive placement than the current placement at [REDACTED] Elementary, Petitioner bears the burden of establishing that the more restrictive environment is appropriate. Ga. Bd. of Educ. Rule 160-4-7-.18(1)(g)8.

In addition, Petitioner agreed to the placement set forth in the IEPs prior to August 24, 2004. Therefore, Petitioner bears the burden of persuasion as to the December 1, 2003 and May 24, 2004 IEP's pursuant to *Devine v. Indian River Sch. Bd.*, 249 F.3d 1289, 1291 (11th Cir. 2001) (citing *Christopher M. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285, 1290 (5th Cir. 1991)), which provides that, in IDEA cases, the party challenging the status quo, *i.e.*, seeking to change an existing agreed-upon placement, bears the burden of proof. However, DCSD has the burden of persuasion as to the 2004-2005 school year and 2005 ESY program, since W.M.'s parents did not sign or accept these proposed plans.

STATUTE OF LIMITATIONS

3.

It is undisputed that the applicable statute of limitation in this action is two years as established in *Mandy S. v. Fulton County School District*, 205 F. Supp. 2d 1358 (N.D. Ga. 2000), *aff'd without opinion*, 273 F.3d 1114 (11th Cir. 2001). Petitioner filed his due process hearing request on January 20, 2005. Therefore, the only IEPs at issue are those prepared on or after January 20, 2003, or two years before Petitioner filed the instant due process hearing request.

Petitioner argues that *Mandy* is inapplicable in this matter since DCSD withheld the fact that [REDACTED] was suspected "PDD" in June 2001. Upon careful review of the evidence, Petitioner's argument is unpersuasive. The parents were present during the initial evaluation by BCW. [REDACTED]'s mother was in the room when BCW discussed "PDD", or autism. There is no evidence in the record to indicate that she was not allowed to participate in the discussions or ask questions that she had regarding "PDD". In addition, the parents were informed in October 2002 that [REDACTED]

has autism. Moreover, the parents were present, participated in all IEPs, and hired an attorney in 2004. Under these facts, Petitioner has failed to establish that DCSD withheld critical facts from the parents such that the statute of limitations should be tolled.

WHETHER DCSD OFFERED [REDACTED] A FREE, APPROPRIATE EDUCATION

4.

[REDACTED] is entitled to a free appropriate public education ("FAPE"). 20 U.S.C. §1401(a)(18)(1997); GDOE Rule § 160-4-7-.04(a)(2000); *Hendrick Hudson School District v. Rowley*, 458 U.S. 176, 203 (1982). "The fundamental objective of the IDEA is to empower disabled children to reach their fullest potential by providing a free education tailored to meet their individual needs." *Cory D. v. Burke County Sch. Dist.*, 285 F.3d 1294 (11th Cir. 2002). FAPE is accomplished through the implementation of an individualized education program ("IEP") tailored to meet the needs of each particular child. *Loren F. v. Atlanta Independent Sch. Sys.*, 349 F.3d 1309 1312-13 (11th Cir. 2003); *Doe v. Alabama State Dept. of Educ.*, 915 F.2d 651, 654 (11th Cir. 1990).

5.

In order to determine whether special education and related services are "appropriate," the United States Supreme Court has established a two-prong test. First, the court must inquire whether the School District has complied with the procedures set forth in the Act. Second, the court must inquire whether the IEP is "reasonably calculated to enable the child to receive educational benefits." *Board of Education of Hendrick Hudson School District v. Rowley*, 458 U.S. 176, 206-207 (1982). If both requirements are met, the School District has provided an appropriate education under IDEA. *Rowley*, 458 U.S. at 206-07; *Loren F.* at 1312, citing, *White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 378 (5th Cir.2003). A 'no' determination on either issue results in a failure of FAPE." *Id.*

PROCEDURAL REQUIREMENTS OF THE IDEA

6.

The IDEA contains detailed procedural safeguards from which a substantively appropriate education results. *Rowley*, at 205-06; *Manecke v. Sch. Bd. of Pinellas Cty, Fla.*, 762 F.2d 912, 917 (11th Cir. 1985). Procedural requirements are designed to insure both full parental participation and thorough analysis of the various educational approaches available to meet the unique educational needs of the handicapped student. Procedural compliance with IDEA "is critical to the efficient operation of the Act, and serious procedural noncompliance can by itself support a finding that the child has not been provided . . . FAPE." *Hudson by and through Tyree v. Wilson*, 828 F.2d 1059, 1063 (4th Cir. 1987).

7.

In order to ensure that disabled children receive an appropriate education, local educational agencies must provide comprehensive evaluation for all suspected disabilities. 20 U.S.C. § 1414 (a) (1) (A); See 34 C.F.R. § 300.532 (g) ("The child is assessed in all areas related to the suspected disability."). They must also provide necessary "related services," which means "transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children". 20 U.S.C. Section 1401 (22).

8.

Autism is a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age 3, that adversely affects a child's educational performance. 34 C.F.R. § 300.7 (c) (1) (i).

9.

In this matter, DCSD has failed to provide [REDACTED] with a comprehensive evaluation for all suspected disabilities, including autism. DCSD admits that [REDACTED] has many "autistic characteristics, but argues that [REDACTED] does not meet the eligibility for autism because Georgia law requires a comprehensive psychological, including a cognitive measure (I.Q.) for autism eligibility. (See, Respondent's Proposed Decision, p. 22). DCSD's reasoning is flawed. IDEA requires DCSD, not the parents, to provide [REDACTED] with an initial comprehensive evaluation for autism, the suspected disability in this matter. 20 U.S.C. § 1414 (b) (4); 34 C.F.R. § 300.532 (g). [REDACTED]'s only evaluations were done in 2001. Thereafter, [REDACTED] was given a primary disability of SDD, and secondary disability of Speech and Language Disordered. However, after the initial testing, Babies Can't Wait recommended additional testing to determine a diagnosis for [REDACTED]. However, DCSD did not refer [REDACTED] for an evaluation, and to date has failed to conduct further testing. In addition, [REDACTED]'s parents informed DCSD that [REDACTED] had been diagnosed with autism in 2002. Yet, the December 11, 2003 IEP; May 2004 ESY Agreement and IEP Notes; August 24, 2004 IEP; and May 10, 2005 ESY IEP do not provide for [REDACTED] to have an evaluation to determine if he meets the criterion for autism eligibility.

Moreover, DCSD did not offer the parents training or provide information regarding autism, autism eligibility, or autism education, to allow [REDACTED]'s parents a meaningful opportunity to participate in his education. See, 20 U.S.C. § 1400 (c) (5) (B).

10.

These procedural errors have caused delay in the implementation of an appropriate educational program for [REDACTED]. As a result, [REDACTED] remained non-verbal until his parents provided private therapy with May South in 2004, and has been denied the "basic floor of opportunity" for an educational benefit. This delay has caused harm, and is a denial of FAPE. *Rowley*, 458 U.S. at 207; 34 C.F.R. § 300.34(a)(1); GDOE Rule § 160-4-7-.09.

11.

Based on the foregoing findings of fact, it is concluded that the December 11, 2003 IEP; May 2004 ESY Agreement and IEP Notes; August 24, 2004 IEP; and May 10, 2005 ESY IEP offered by DCSS are inappropriate as they are not individualized to meet W.M.'s needs and do not provide FAPE.³

12.

LEAST RESTRICTIVE ENVIRONMENT

The second prong of the *Rowley* analysis requires the court to determine whether [REDACTED] has been provided with an IEP "reasonably calculated to enable him to receive educational benefits" in the least restrictive environment. *Rowley*, 458 U.S. 176, 206-207. The "least restrictive environment" ("LRE") requirement dictates that a student be educated with his non-disabled peers to the maximum extent appropriate. 20 U.S.C. § 1412 (a)(5). The issue of least restrictive environment only arises after a determination of appropriateness has been made. Thus, Courts need not reach the question of least restrictive environment, or LRE, unless there are appropriate programs before it. See, *Cleveland Heights University City Sch. Dist. v. Boss*, 144 F.3d 391, 399-40 (6th Cir. 1998); *Knable v. Bexley Sch. Dist.*, 238 F.3d 755, 770 (6th Cir. 2001)(use of LRE improper on private placement as "We would vitiate the right of parental placement recognized in *Burlington* and *Florence County* were we to find that such private school placements automatically violated the IDEA's mainstreaming requirement."); *Warren G. v. Cumberland Co. Sch. Dist.*, 190 F.3d 80, 84 (3rd Cir. 1999)(LRE does not apply as a criteria if the school's program is not otherwise appropriate). Because the December 11, 2003 IEP; May 2004 ESY Agreement and IEP Notes; August 24, 2004 IEP; and May 10, 2005 ESY IEP offered by DCSS

³ Petitioner also contends that DCSD strapped [REDACTED] in the chair without parental consent and failed have a regular education teacher present at the IEP meetings. Because it has already been concluded that DCSD failed to provide FAPE, it is unnecessary to address these issues.

are inappropriate not reasonably calculated to provide [REDACTED] educational benefit, or FAPE, I need not address the issue of LRE.

13.

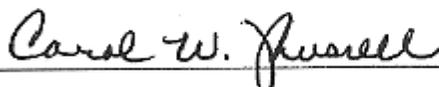
Compensatory services may be awarded for past educational deficiencies as "appropriate relief" under IDEA. Compensatory education involves discretionary, prospective injunctive relief crafted by a Court to remedy an educational deficit created by a school district's failure to provide FAPE over time. *Jefferson County Bd. of Educ. v. Breen*, 853 F.3d 853, 857-58 (11th Cir. 1988). See also, *G. v. Fort Bragg Dep. Schools*, 324 F.3d 240 (4th Cir. 2003); *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *Bd. of Ed. of Oak Park v. Ill. St. Bd. of Ed.*, 79 F.3d 654 (7th Cir. 1996). Damages and attorney fees are not available before this tribunal and need not be pled or proved. Upon review of the entire record, compensatory damages are appropriate in this matter.

IV. DECISION

Based upon the foregoing findings of fact and conclusions of law, it is concluded that [REDACTED] was not offered and did not receive a free, appropriate public education from the Dekalb County School District. Accordingly, the relief sought by Petitioner is GRANTED in part, and DENIED in part. Accordingly, **IT IS HEREBY ORDERED** that:

1. Within ten (10) days of the issuance of this order, DCSD shall provide a comprehensive evaluation for all of [REDACTED]'s suspected disabilities, including autism;
2. Within ten (10) days of completion of the comprehensive evaluation, the parties shall convene an IEP meeting to develop an appropriate program for the 2005-2006 school year that identifies and addresses all areas of [REDACTED]'s disabilities, including all necessary and appropriate related services;
3. Petitioner's request for reimbursement in the amount of \$14,875, for the costs of private services provided by May South is unchallenged and GRANTED;
4. Petitioner's request for compensatory education of 40 hours a week of ABA/DTT one to one from August 2004 to August 2005 is GRANTED.⁴

SO ORDERED, this 20th day of December, 2005.


CAROL WALKER-RUSSELL
Administrative Law Judge

⁴ All other relief not specifically granted herein is DENIED.