

08-070466

IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS  
STATE OF GEORGIA



\_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_,  
Plaintiffs,

v.

GWINNETT COUNTY SCHOOL  
DISTRICT,  
Defendant.

DOCKET NO.

OSAH-DOE-SE-0813766-67-Gatto

FINAL ORDER

COUNSEL: Chris E. Vance, David M. Monde, for Plaintiffs.

Charles L. Weatherly, Victoria Sweeny, Elizabeth F. Kinsinger, for Defendant.

GATTO, Judge

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LEGAL SERVICES  
GA DEPARTMENT OF EDUCATION

I. INTRODUCTION

The above-styled action was filed by Plaintiffs \_\_\_\_\_ and her parents \_\_\_\_\_, and \_\_\_\_\_ ("Plaintiffs") on November 28, 2007 against the Defendant Gwinnett County School District "GCSD") contending that the GCSD violated their rights under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794, and the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.* Specifically, Plaintiffs alleged in their complaint that the GCSD: improperly identified \_\_\_\_\_ as a child with mental retardation instead of a child with language impairment and high functioning autism; failed to evaluate and to properly evaluate \_\_\_\_\_; denied \_\_\_\_\_ and \_\_\_\_\_ parents their procedural rights; improperly placed \_\_\_\_\_; denied \_\_\_\_\_ an appropriate education; and discriminated against \_\_\_\_\_ based upon \_\_\_\_\_ race and her disability.

Plaintiffs demanded in part an appropriate individualized education program ("IEP") and appropriate placement; intensive instruction and remediation; continued private placement;

compensatory education; and reimbursement for all costs associated with evaluation and educational programming that [REDACTED]'s parents have provided.<sup>1</sup>

After carefully weighing all of the evidence of record, including voluminous documents and ten days of testimony from numerous witnesses, and considering the credibility of the witnesses, the Court finds and concludes that GCSD has denied [REDACTED] right to a free appropriate public education ("FAPE") in violation of IDEA, that [REDACTED] is entitled to compensatory education to compensate her for GCSD's violations, that [REDACTED] is entitled to reimbursement for private placements and for costs associated with the evaluations and educational programming [REDACTED]'s parents have provided, and that [REDACTED] is entitled to a private placement at public expense. The Court's findings of fact and conclusions of law are set forth below.

## II. FINDINGS OF FACT<sup>2</sup>

In 1994, [REDACTED], an [REDACTED] child who was then 4 years of age, was evaluated by Waterbury Connecticut School District ("Waterbury"). Waterbury reported [REDACTED]'s developmental cognition quotient pursuant to the Developmental Observation Checklist System

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<sup>1</sup> Plaintiffs' Exhibit 172, an observation notebook prepared by [REDACTED]'s Paraprofessional, was provided in part after close of plaintiffs' case and in part after proposed findings of fact and conclusions of law had been filed. Plaintiffs moved for judgment because the detailed observations had been withheld, which would have helped Plaintiffs to prepare for the trial and testimony of its own witnesses and the cross examination of the GCSD's witnesses. This Court denied the motion but reversed a previous ruling related to the statute of limitations and ruled that all of [REDACTED]'s claims after the MID placement on August 16, 1996 were not time barred. Thus, this Court re-opened and placed the case back on the trial calendar to take additional evidence on these previously excluded claims and to also allow Plaintiffs to examine or cross-examine any witnesses that they believe were relevant related to the contents of the observation notebook.

<sup>2</sup> The historical facts are set forth not to support a violation of IDEA prior August 16, 1996, 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.

was a standard score of 80. J. Ex. 1, pp. 2-3.<sup>3</sup> Waterbury reported that [REDACTED]'s "inconsistent ability to respond appropriately to questions asked raised concerns that [REDACTED] language processing and ability to attend was, interfering with [REDACTED] performance." *Id.* at p. 6. Waterbury also reported that [REDACTED] had significant difficulties "in the area of language processing." *Id.* [REDACTED] had language scores in the 3<sup>rd</sup> to 1<sup>st</sup> percentiles, did not interact with peers, and used "chunks" of language learned but not generalized. *Id.* at pp. 4-6.

As a result of the developmental evaluation provided by Waterbury, [REDACTED] was given an "Uncategorical" eligibility and provided an IEP on March 11, 1994. *Id.* at p. 11-15. On June 20, 1994, the speech language pathologist for Waterbury reported that [REDACTED] continued to demonstrate significant delays in language with an apparent processing component. *Id.* at pp. 7-8. Waterbury planned to continue to provide special education and speech and language services, as well as provide occupational therapy and physical therapy consult per [REDACTED]'s IEP. *Id.* at pp. 17, 29. Waterbury recommended that [REDACTED] have "opportunities for integration with typical age-appropriate peers." *Id.* at p. 32.

On June 22, 1994, [REDACTED]'s parents, having moved to Gwinnett County, Georgia, referred [REDACTED] to the GCSD. J. Ex. 2, p. 33. On August 16, 1994, the IEP Team determined that [REDACTED] was eligible under the IDEA as a child with Significant Developmental Delay ("SDD") based on the Waterbury test scores. *Id.* at p. 34. On August 22, 1994, the IEP Team provided [REDACTED] with an IEP using the testing from Waterbury. J. Ex. 3, pp. 39-45. The IEP Team discontinued [REDACTED]'s speech and language therapy and her occupational therapy from Waterbury. *Id.* The IEP Team proposed 10 hours a week of special education in a self-contained classroom for children with significant developmental delay. *Id.* at p. 40. On September 3, 1994, the IEP Team, relying upon Waterbury testing, also found that [REDACTED] was speech language impaired. J. Ex. 4, p. 50; J.

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<sup>3</sup> "J. Ex." were the joint exhibits submitted by the parties.

Ex. 1, p. 14; J. Ex. 1, p. 16.<sup>4</sup> The IEP Team reported that [REDACTED] had moderate receptive and expressive language impairment, and that [REDACTED] used “stereotypic responses.” J. Ex. 5, p. 54. On September 12, 1994, the IEP Team added one hour a week of speech and language therapy to [REDACTED]’s IEP. *Id.* The Court finds that this placement was appropriate.

In December 1995 and January 1996, [REDACTED]’s parents provided the IEP Team with a neuropsychological evaluation of [REDACTED] completed by Emory University. J. Ex. 11; Def.’s Ex. 10; Tr., May 28, 2008, p. 317. However, neither the IEP Team nor [REDACTED]’s parents had a complete copy of the evaluation report. *Compare* J. Ex. 11 with Def.’s Ex. 10. Two typed pages of text and one page of test data had not been included in the report. *Id.* The IEP Team nonetheless determined that [REDACTED] was eligible for the mentally handicapped program relying on the incomplete Emory evaluation. J. Ex. 11, 12; Def.’s Ex. 10; Tr., May 28, 2008, p. 319.

In the Emory evaluation, it was reported that [REDACTED]: had a fear of toilets that interfered with [REDACTED] daily routine; had a history of significant delays in language and motor skills; had “stopped communicating”; had difficulty learning; had attentional issues; was immature for [REDACTED] age, was slow to adapt to changes in routine and environment and would scream and cry with transitions; had some difficulty getting along with peers and took a long time to warm up to them; demonstrated concrete language skills; often focused on the toilet and [REDACTED] fear of the toilet. J. Ex., pp.1-4. The evaluator went forward with testing [REDACTED] even though [REDACTED] did not pass the hearing screening, and there is no evidence [REDACTED] passed a vision screening.<sup>5</sup> *Id.* at pp. 2, 4.

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<sup>4</sup> A speech language report from Waterbury was referenced in the exhibit but was not attached.

<sup>5</sup> On August 15, 1994, [REDACTED] was unable to be tested for vision and hearing. J. Ex. 2, p. 36. [REDACTED]’s file included two incomplete pages, J. Ex. 8, pp. 73-74, where the school speech language therapist completed a form on vision and hearing “observations.” The therapist did not have [REDACTED]’s parents’ sign and date the forms. The forms are dated April 17, 1995. Clearly, the therapist did not follow procedure and document any attempts to conduct a vision and hearing screening.

The Emory evaluator administered the WISC-III and the McCarthy Scales of Children's Abilities tests to [REDACTED], reporting that [REDACTED] had an IQ score of 64 on both.<sup>6</sup> *Id.* at pp. 4-5. It was reported, however, that "[r]esults on the WISC-III indicate a significant discrepancy between verbal and performance abilities. [REDACTED] verbal Scale Score of 75 is in the borderline range, while [REDACTED] Performance Scale Score of 57 is in the deficient range of intellectual functioning." *Id.* at p. 5.

The Emory evaluator reported that [REDACTED]'s academics were in the low average range in science and reading, in the low average to borderline range in written language, and significantly subaverage range in math. *Id.* The evaluator administered only one adaptive behavior scale. J. Ex. 11, p. 82. The evaluator failed to mention directly in her report that while [REDACTED] scored above the mentally retarded range on the WISC-IV verbal scale and in the mentally retarded range on the performance scales that [REDACTED] actually did the opposite of this on the McCarthy, scoring only slightly below the average in quantitative abilities (which differed from the achievement scores in math reported) but 2.5 standard deviations below norm on the verbal abilities. Def.'s Ex. 10. Neither the IEP Team nor [REDACTED]'s parents had this information since it was contained in the missing portion of the report. J. Ex. 11; Def.'s Ex. 10.

Additionally, on the two pages the IEP Team and [REDACTED]'s parents were missing, it stated that [REDACTED] was withdrawn; had attentional problems; had significant social difficulties; avoided emotional stimuli; processed external stimuli to a lesser degree; and achievement scores were somewhat higher than expected given her alleged IQ. Further, while the evaluator concluded that [REDACTED] met the diagnostic criteria for mild mental retardation, the evaluator noted that "it is important to note that there are some fluctuations in the data which warrant viewing the present

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<sup>6</sup> The McCarthy Scales of Children's Abilities was normed in 1972.

findings tentatively.” (Emphasis added.) Compare Def.’s Ex. 10, last two pages of text with J. Ex. 11 (this language was not included in the draft report the parties had).

The Emory report recommended that [REDACTED] remain at the [REDACTED] School since [REDACTED] had made progress there and it appeared to be a good environment for her.<sup>7</sup> *Id.* The report also recommended that since [REDACTED] would still be significantly behind in terms of academic and emotional functioning in a few years, [REDACTED] parents may wish to “consider placement in a school program for children with generalized learning disabilities and/or educable mental retardation.” *Id.* The evaluator stated, “Careful note should be made if [REDACTED] improves in her level of cognitive development if the phobic reaction resolves.” *Id.* The IEP Team did not have any of this information or the recommendation that the IQ scores school be tentatively considered.

On May 26, 1995, at an IEP meeting for [REDACTED], the IEP Team reported that [REDACTED] had a “moderate to severe language disorder characterized primarily by difficulty processing and responding to auditory information.” J. Ex. 8, p. 71. After attending the [REDACTED] School during [REDACTED] kindergarten year, [REDACTED] returned to the GCSD in August 1996. J. Ex. 12.

On August 8, 1996, the IEP Team prepared a “Mentally Handicapped Program Eligibility Report” for [REDACTED]. *Id.* at p. 87. The report incorrectly stated that [REDACTED] had previously been placed by the IEP Team in a “class for severely mentally retarded.” *Id.* at 87. See also J. Ex. 11, p. 79; Tr., May 28, 2008, pp. 354, 397 (the GCSD stipulated at trial that [REDACTED] had not been in a classroom for severely mentally retarded children). There was no regular education teacher present at the IEP meeting, and there were no educators from the [REDACTED] School. J. Ex. 12, p.

<sup>7</sup> On January 30, 1995, [REDACTED]’s parents removed her from the GCSD and privately placed [REDACTED] at the [REDACTED] School because they disagreed with the GCSD’s placement of [REDACTED] in a classroom with children who were “severely developmentally delayed” and were concerned that [REDACTED] would pick up some of their inappropriate behaviors. Tr., May 28, 2008, p. 354; J. Ex. 3, p. 40; J. Ex. 6, p. 58.

88. The placement of [REDACTED] in the mentally retarded program was reported to be an “Interim Placement.” *Id.* at p. 89.

On August 16, 1996, the IEP Team prepared an “interim IEP” pending an evaluation that was to be completed during a 30 day period.”<sup>8</sup> J. Ex. 12, p. 85. [REDACTED] was placed by the IEP Team in an intellectually disabled program for 26.5 hours a week and in speech language therapy for 1 hour a week. *Id.* As with the August 8 meeting, there was no regular education teacher present at the August 16 IEP meeting. *Id.* at p. 86.

On September 20, 1996, the GCSD produced a “Speech-Language Impaired Eligibility Report,” which purportedly evaluated [REDACTED] in speech and language.<sup>9</sup> J. Ex. 13, p. 101. At this time, the GCSD had still had not conducted any testing to determine if [REDACTED] was mentally retarded or autistic. The IEP Team determined at this time that [REDACTED] was no longer language impaired. J. Ex. 13, p. 102. There was no regular education teacher at the eligibility meeting, nor were [REDACTED]’s parents present. *Id.* The IEP Team again relied upon the evaluation from Emory to deny [REDACTED] speech and language services, alleging that [REDACTED]’s “speech/language skills were consistent with (and generally stronger than) overall cognitive functioning,” even though the GCSD had not assessed [REDACTED]’s cognitive skills, there were no protocols to support the alleged language scores, there was no evaluation report, and the IEP Team did not include [REDACTED]’s parents. *Id.*

On September 30, 1996, when [REDACTED] was in first grade, the IEP Team prepared an IEP for [REDACTED] and placed [REDACTED] in an intellectually disabled program for 24.5 hours a week, and an adaptive special education program for 30 minutes a week. J. Ex. 13, p. 92. Once again, there was no

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<sup>8</sup> On August 15, 1996, [REDACTED]’s mother signed GCSD’s parent consent for evaluation form so the GCSD staff could conduct comprehensive evaluations of [REDACTED]. J. Ex. 12, p. 90.

<sup>9</sup> The Court gave limited weight to this report since there were no protocols to support it.

regular education teacher present, and the GCSD still had not evaluated [REDACTED] for mental retardation or autism, instead relying on the incomplete Emory report. *Id.*

On May 28, 1997, the IEP Team held an IEP meeting for [REDACTED] and prepared an IEP for [REDACTED] as [REDACTED] entered the next school year in second grade. In this IEP, the IEP Team reported that [REDACTED] “likes to play by [REDACTED]self,” transitions with difficulty, but that [REDACTED] “[a]daptive skills are age appropriate.” J. Ex. 14, p. 104 (emphasis added). Even though [REDACTED]’s adaptive skills were reported to be age appropriate, the IEP Team placed [REDACTED] in the intellectually disabled program for 32 hours a week and in the adaptive PE program for 30 minutes a week. *Id.* at pp. 104-105. Again, there was no regular education teacher present at the IEP meeting, and again, the GCSD still had not evaluated [REDACTED] for mental retardation or autism. *Id.*

At the May 28, 1997 IEP meeting, the IEP Team determined that [REDACTED] did not require extended school year (“ESY”) services and that [REDACTED] should remain in the self-contained program for those with intellectual disabilities. J. Ex. 14, p. 114-115. [REDACTED]’s report card stated [REDACTED] was “mainstreamed” for P.E. and technology during the 1996-1997 school year, but the IEP contained no accommodations, supplementary services, or aids to accomplish successful mainstreaming. *Id.* at p. 117; J. Ex. 13.

On May 14, 1998, an IEP meeting was held for [REDACTED], and the IEP Team reported that [REDACTED] “seems anxious most of the time,” “rarely smiles,” “refuses to try new things,” and “has trouble with transition time.” J. Ex. 16, p. 119. The January 6, 1996 Emory evaluation is still listed as [REDACTED]’s psychological. *Id.* For the first time, a regular education teacher ([REDACTED]’s music teacher) attended an IEP meeting. *Id.* at p. 120, 127. The May 14, 1998 the IEP Team reported that [REDACTED] “will try science or some academic for purposes of mainstreaming.” *Id.* at p. 121.

There were no modifications or supports listed for [REDACTED] to “try” mainstreaming. J. Ex. 16. [REDACTED] was again denied ESY services. *Id.* at p. 128.

The IEP Team reported that at age 7, [REDACTED] could read about 127 words, and at age 8, she could read about 163 words. J. Ex. 14, p. 104; J. Ex. 15, p. 119. The IEP Team reported that at age 7, [REDACTED] had “good comprehension skills” and was able to answer “many questions about a story,” but when [REDACTED] was 8, the IEP Team reported that [REDACTED] read on a pre-primer level. *Id.* When [REDACTED] was 7, the IEP Team reported that [REDACTED] had many math skills, but at age 8, the IEP Team reported that [REDACTED] refused to take the math test. *Id.* The IEP Team reported that [REDACTED] would be “mainstreamed” for P.E., music, art, and technology during the 1997-1998 school years, even though [REDACTED] IEP placed [REDACTED] 32 hours a week in a self-contained mental retardation program and 30 minutes a week in an adaptive P.E. class. J. Ex. 16, p. 131; J. Ex. 14, p. 105.

On October 16, 1998, an IEP meeting was held for [REDACTED] and the IEP Team, including [REDACTED]’s parent, agreed to reduce [REDACTED]’s time in the regular education setting because [REDACTED] was uncomfortable in music, technology, and Spanish and [REDACTED] “does not participate” and could not “keep up with the academics in the regular second grade class.” J. Ex. 18, p. 139. The discussions did not include providing [REDACTED] with supplementary services, aids, or accommodations in the regular education setting. *Id.* On October 16, 1998, the IEP Team continued [REDACTED]’s placement in the intellectually disabled program. *Id.* at p. 140; J. Ex. 18. On October 30, 1998, the GCSD finally provided [REDACTED] with a vision/hearing screening. [REDACTED] passed the hearing screening but failed the vision screening. J. Ex. 19, p. 143.

On January 21, 1999, [REDACTED]’s mother signed the GCSD written parent consent form for evaluation. J. Ex. 20, pp. 144-45. After minimal testing had been completed, the GCSD then had a re-evaluation conference, reporting testing from February 18, 1999 in academic ability (in

§ 87(2)(b)'s 3<sup>rd</sup> year at GCSD § 87(2)(b) math was at a kindergarten level, where it was when § 87(2)(b) began the GCSD, and § 87(2)(b) reading was at a 1<sup>st</sup> grade level). The GCSD evaluated § 87(2)(b)'s adaptive functioning with only one scale by one person as well as § 87(2)(b) behavior by one scale, and the GCSD did not evaluate § 87(2)(b) for mental impairment or autism, still relying on the January 6, 1996 Emory evaluation. J. Ex. 21, p. 146. Only § 87(2)(b)'s parents, a GCSD psychologist, and the mentally impaired program teacher were present at the meeting. *Id.* at p. 147.

On May 18, 1999, the IEP Team had yet another IEP meeting without a regular education teacher present, and § 87(2)(b) was reported to be reading on the 1<sup>st</sup> grade level (231 sight words), had a lack of age appropriate social and interactive skills, tended to withdraw, and became anxious if singled out or put in a place that made § 87(2)(b) feel uncomfortable. J. Ex. 22, p. 165. On this IEP, on the line for psychological, although the GCSD had always placed the January 6, 1996 Emory evaluation on the line, it was appropriately omitted since it was more than three years old at the time of the IEP meeting. *Id.* The IEP placed § 87(2)(b) in the intellectually disabled program for 27 hours a week, in the adaptive P.E. class for 30 minutes a week, and in the regular education setting for 5 hours a week. *Id.* at p. 166. The IEP Team reported that § 87(2)(b) had a “significantly different curriculum.” *Id.* at p. 167. For the first time, § 87(2)(b) was provided with ESY for 12 hours for the entire summer (less than 2 days of instruction for a 10-week period). *Id.* Once again, there was no regular education teacher at the IEP meeting. J. Ex. 22. The IEP Team reported § 87(2)(b) still did not adjust to change. *Id.* at p. 169. Under related services, it stated that “there is going to be some consultative support and possible referral.” *Id.* However, there is no evidence in the record that this occurred.

On September 2, 1999, § 87(2)(b)'s teacher reported that § 87(2)(b) was withdrawn and unhappy; a fear of the toilet; fear of animals and other things; preferred to be alone; avoided eye contact;

stood away from others; spoke too softly; pulled back when approached by others; spoke in a monotone voice; did not adapt to change; used inappropriate facial expressions; lacked social maturity; had trouble telling jokes; misread the intentions of others; seemed insensitive to others; failed to respond appropriately or at all to greetings; and was anxious. J. Ex. 23.

On May 12, 2000, an IEP meeting was held for [REDACTED]. J. Ex. 24. On the IEP form, the most current psychological was written to be January 2000, but this notation had been scratched out. J. Ex. 25, p. 181. Although [REDACTED] was still reported to have good self help skills, [REDACTED] was withdrawn and anxious. *Id.* Again, no modifications, supplementary services, or aids were discussed, ESY was not provided, and [REDACTED] was placed for 27 hours a week in the self contained classroom. *Id.* The IEP Team stated it would “investigate resource[s] for reading, social studies, and science/health with younger students.” *Id.* At this IEP meeting, [REDACTED]’s mother was told that [REDACTED] was not on a regular education curriculum and that [REDACTED] would not be able to fulfill the requirements for a regular education diploma. J. Ex. 24. At this point, the GCSD still had not evaluated [REDACTED] for an autism or mental retardation eligibility. *Id.*

When [REDACTED] was 10 years old and in 5<sup>th</sup> grade, the GCSD gave [REDACTED] a group school ability test, called the Otis-Lennon School Ability Test, Seventh Edition, and [REDACTED] scored a 73 for verbal abilities, a 74 for nonverbal abilities, and a 73 total. J. Ex. 25. However, [REDACTED] math score was less than the 1<sup>st</sup> grade level and [REDACTED] reading score was on a 2<sup>nd</sup> grade level. J. Ex. 26, p. 194.

On May 10, 2001, an IEP meeting was held for [REDACTED] and again there was no regular education teacher present. J. Ex. 28. The IEP again inappropriately listed the January 6, 1996 psychological from Emory as the last psychological. *Id.* However, for the first time, [REDACTED] was given a modification plan but there was no facilitation with regular education students listed. *Id.* The IEP Team continued [REDACTED] in the mentally retarded the program. *Id.* at p. 224. During the

2000-2001 school year, the IEP Team reported that [REDACTED] participated in 4 specials classes. While [REDACTED] did not interact with any of [REDACTED] classmates, [REDACTED] worked well, was creative, and [REDACTED] teachers felt like [REDACTED] should continue in the classes. J. Ex. 31.

A re-evaluation conference report dated March 12, 2002 indicated that [REDACTED]'s composite adaptive score was a 74 and that [REDACTED] had excellent behavior. J. Ex. 33. The IEP Team again inappropriately used the January 6, 1996 Emory psychological to continue [REDACTED] in the mentally retarded program. *Id.* Significantly, the score range on the adaptive scale the teacher completed for a 74 composite was 71 to 77, and it required a 55-69 for the mentally retarded program; thus, [REDACTED]'s adaptive functioning *as evaluated by [REDACTED] own teacher* did not fall in the mentally retarded range. *Id.* at p. 253.

On May 1, 2002, an IEP meeting was held for [REDACTED] and the IEP Team improperly reported achievement scores and the adaptive behavior score in standard scores. J. Ex. 34. Again, there was no regular education teacher present even though [REDACTED] was in the regular education setting 6.5 hours a week. *Id.* During the Summer of 2002, [REDACTED] received 12 hours of ESY (again less than 2 school days for 10 weeks). *Id.* at p. 267. [REDACTED] was given all A's but one B from 2001 through May 2002 even though [REDACTED] was behind in grade levels. *Id.* at p. 271.

On April 29, 2003, an IEP meeting was held for [REDACTED] who was then 13, and the IEP Team reported that [REDACTED] had the math application skills of a first grader and the reading comprehension skills of a third grader. J. Ex. 37. ESY was denied in this meeting. The music teacher and special education teacher were present at the meeting. *Id.* at p. 281. The IEP Team reported [REDACTED] was either not in regular education curriculum or below regular education curriculum. *Id.* at p. 293.

In September 2003, [REDACTED] was administered a group IQ test along with all other students at that time. [REDACTED] scored a 78 composite score on the Cognitive Abilities Test (with a 82 verbal abilities score), a 75 quantitative abilities score, and a 82 nonverbal abilities score (100 was average). J. Ex. 52, p. 502.

In April 2004, when [REDACTED] was in 8<sup>th</sup> grade, [REDACTED] IEP Team reported at an IEP meeting that [REDACTED] math skills were at a 1<sup>st</sup> to 2<sup>nd</sup> grade level, and that [REDACTED] reading comprehension skills were at a 2<sup>nd</sup> grade level. J. Ex. 40. [REDACTED] curriculum was primarily non-academic, consisting of functional tasks like ordering from a menu, locating department stores, counting money, using a calculator, purchasing food, preparing meals, and job training. J. Ex. 40. The IEP Team reported that [REDACTED] was not on a regular education curriculum and that [REDACTED] had regressed. *Id.* at p. 316, 321. Nonetheless, in the spring 2004, [REDACTED] was reported to have passed the Georgia Criterion-Referenced Competency Test for 8<sup>th</sup> grade in the areas of reading, English/language arts, science, and social studies. J. Ex. 42.

On March 15, 2005, the GCSD held a re-evaluation conference and completed a re-evaluation conference report. J. Ex. 44. The GCSD did not list [REDACTED] adaptive scale scores, but again listed the incomplete Emory evaluation. *Id.* The school psychologist and a special education teacher were the only attendees from the GCSD. *Id.* Achievement scores were given in standard scores and grade equivalents. [REDACTED] was reported to be at a 1<sup>st</sup> grade level in math applications and receiving all A's. *Id.* Significantly, testing superseded this meeting, and the GCSD teacher scored [REDACTED] to have overall adaptive skills in the average range, with a standard score of 96. *Id.* at p. 349. Furthermore, none of [REDACTED] subtest scores were outside the average range, and [REDACTED] practical abilities scores were above 100, placing [REDACTED] in the 66<sup>th</sup> percentile. *Id.*

On April 20, 2005, an IEP meeting was held for [REDACTED], and the IEP Team reported [REDACTED] standard achievement scores but no adaptive functioning scores in the IEP. J. Ex. 45. The IEP Team reported that [REDACTED] was able to “get along well with her peers,” and “have a great sense of humor;” but “does not like to have her space invaded,” and “does not like to feel like [REDACTED] has been backed into a corner.” J. Ex. 45, p. 353. The IEP Team reported that [REDACTED] was on a non-regular education program. *Id.* at p. 369.

In early spring 2006, [REDACTED] came home one day from [REDACTED] community skills GCSD mentally retarded program curriculum and stated, “I am not scraping plates the rest of my life.” Tr., May 28, 2008, p. 378. Because of this, [REDACTED] parents requested a change in [REDACTED] placement, and on April 19, 2006, a “Student Support Team Intervention” meeting was held for [REDACTED] and the Team decided it would give [REDACTED] “reading homework,” let [REDACTED] visit several classes during the next school year, finalize IEP accommodations, place [REDACTED] in a study skills class, provide [REDACTED] text books at home, and provide [REDACTED] a reading list for the next school year. J. Ex. 46.

On May 16, 2006, after [REDACTED] had been placed for almost a decade in a program for mentally retarded individuals, [REDACTED] was tested at age of 15 ½ to be reading and computing math at a 2<sup>nd</sup> and 3<sup>rd</sup> grade level. J. Ex. 47. An IEP meeting was held for [REDACTED] on May 24, 2006, and [REDACTED] parents brought an advocate to the meeting. The advocate requested a “comprehensive evaluation” of [REDACTED] and suggested autism as an eligibility. J. Ex. 48, p. 397. No regular education teacher was present, but the IEP Team agreed to provide ESY services. *Id.* at pp. 385, 397-98. This time the IEP Team included the self help/daily living (adaptive scale scores) on [REDACTED]’s IEP. However, instead of using the standard scores showing that [REDACTED] had tested much earlier in the average range for adaptive functioning, the IEP Team used scaled scores, which

without the conversion, could not be understood and made the scores look lower than they actually were. *Id.* at p. 381; *compare* J. Ex. 44, p. 349.

2006 ESY teacher reported that with regard to “working with integers, rational and irrational numbers [2006] was able to perform above mastery,” and that when 2006 had trouble with the vocabulary of the reading book, 2006 would look up the words in the dictionary. However, teaching 2006 to write a 5-paragraph essay “seemed a little foreign to 2006.” J. Ex. 49, p. 411. 2006 often did not make eye contact with the teacher. *Id.* at p. 417. However, the teacher reported that 2006. “seemed to grasp the concepts fairly well . . . sometimes doubting 2006 ability.” *Id.* This same teacher was 2006’s biology teacher the next school year, and she reported that 2006. was enthusiastic about being in the class and “seems to grasp what is going on but does tend to get frustrated with some of the students with the comments they make.” *Id.*

On May 24, 2006, the GCSD completed a school-based occupational therapy/physical therapy evaluation request/referral form. The GCSD stated on the form: “Speech is also being evaluated,” 2006. “is undergoing psych testing because it has been a long period since tested. Parents and child advocate request speech and OT evaluation,” 2006. “has not been psych. evaluated since Kindergarten/first grade. We are expecting an eligibility change.” J. Ex. 53, p. 771 (emphasis added).

On August 17, 2006 and August 24, 2006 the GCSD’s psychologist conducted a psychological evaluation of 2006.<sup>10</sup> J. Ex. 50, p. 497; J. Ex. 52, pp. 500-516. The GCSD psychologist reported that 2006 had an IQ of 91. The psychologist explained that this was in the average range, because 2/3’s of the population obtain scores between 85 and 115. J. Ex. 52, p. 504. The evaluation indicated that 2006 was not a child with mental impairment: “The results of this evaluation indicate that [2006’s] current level of intellectual functioning is within the low

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<sup>10</sup> On August 22, 2006, the GCSD evaluated 2006’s hearing and vision.

average to average range with significantly lower achievement test scores in all areas including language. [REDACTED] manner of functioning is characteristic of a student with a learning problem, resulting in academic achievement significantly below demonstrated ability level. . . . [REDACTED] also displays many of the characteristics of students who have been diagnosed with high functioning Autism or Asperger's syndrome." *Id.* at p. 515. On August 22, 2006, the GCSD evaluated [REDACTED]'s language skills and reported that [REDACTED] had scored in the less than .1 to .2 percentiles for [REDACTED] core, receptive, expressive language and language memory. J. Ex. 56, p. 836. All of [REDACTED]'s scores were in the 50's on the CELF-IV. *Id.*

On September 4, 2006, the IEP Team did not continue [REDACTED] as a child with mental retardation and for the first time found [REDACTED] eligible as a child with autism and as a child with "a severe receptive and expressive language impairment that impacts [REDACTED] educational performance."<sup>11</sup> J. Ex. 54, pp. 772-779, 779. The IEP Team reported almost all of [REDACTED]'s academic skills to be in the 2<sup>nd</sup> and 3<sup>rd</sup> grade level and explained that [REDACTED] has always had a history of demonstrating characteristics that [REDACTED] was a child with autism since [REDACTED] was first in the SDD program ("difficulties adapting to change," "always had difficulty making eye contact with anyone," [REDACTED] can "misunderstand verbal communication."). *Id.* at p. 73.

When the GCSD occupational therapist finally evaluated [REDACTED], he reported that [REDACTED] had a nervous system with a low neurological threshold. [REDACTED] had more intense responses to specific sensory stimuli, did not open [REDACTED] eyes sufficiently, found the lighting in the room too bright, did not like to be touched, avoided certain stimuli, had motor planning deficits, had difficulties using [REDACTED] hands, wrote at a slow rate, typed 7 words per minute, wrote 22 letters per minute, and had visual motor integration skills in the below 1<sup>st</sup> percentile. J. Ex. 55, p. 825.

<sup>11</sup> The GCSD representative testified that the IDEA identification does impact the disabled child's programming. Tr., June 17, 2008, p. 1448. She nonetheless testified that it is improper to misidentify any student. *Id.*

On October 2, 2006, an IEP meeting was held for [REDACTED] and the IEP Team went over [REDACTED]'s occupational therapy evaluation. [REDACTED]'s parents and their advocate expressed concern that they finally knew [REDACTED] had been in the wrong program for all those years and that [REDACTED] had not been exposed to the proper curriculum such that [REDACTED] could be successful. J. Ex. 57. All of [REDACTED]'s teachers reported at this meeting that [REDACTED] was passing the regular education classes. However, [REDACTED] was experiencing anxiety because [REDACTED] had not been taught the skills that were now being demanded of [REDACTED]. *Id.* The IEP Team stated that [REDACTED] would only make 6 month gains a year. *Id.* at p. 920.

On November 11, 2006, an IEP meeting was held for [REDACTED]. [REDACTED]'s parents expressed concern that [REDACTED] would drop out of school if [REDACTED] had to proceed at the rate recommended, continue to deal with the frustration of not having been taught what was being expected of [REDACTED], and continue to not have [REDACTED] disabilities addressed. J. Ex. 59, pp. 952-975. [REDACTED]'s parents requested intensive language intervention and academic remediation. *Id.* at p. 980-981. Ms. Husby, a GCSD administrator, wrote to [REDACTED]'s parents and stated that the GCSD had provided [REDACTED] FAPE in the LRE. *Id.* at p. 982. This same administrator admitted during her testimony at the trial that she had stated several times that "we cannot go back and fix what occurred," "we can't fix anything that has happened in the past." Tr., June 17, 2008, pp. 1612-1613. At the IEP meeting, [REDACTED]'s parents requested remediation, asking for Lindamood Bell ("LMB") services, a program they had researched. The IEP Team denied this request. J. Ex. 62, p. 990. Nonetheless, [REDACTED]'s Mother asked the GCSD to review the LMB program. *Id.*

The GCSD refused to remediate [REDACTED]'s deficits and provide [REDACTED] with the educational programming, support, supplementary services, related services, and aids necessary for [REDACTED] to receive an appropriate education. The GCSD refused to make up for [REDACTED]'s wrongful placement,

wrongful identification, its failure to address her disabilities, and other significant educational deficiencies. Therefore, [REDACTED]'s parents provided written notice that they were going to privately place [REDACTED] at public expense pursuant to the IDEA and seek reimbursement at the appropriate time. J. Ex. 60, pp. 976-977. On November 13, 2006, [REDACTED]'s parents wrote again to the GCSD and stated that the GCSD had no plan to address [REDACTED]'s needs and reminded the GCSD they had given notice of private placement pursuant to the IDEA on October 24, 2006. J. Ex. 63, p. 994.

Dr. Jacque Digieso has been an educator since 1969, a special educator since 1975, and is the founder of [REDACTED] School, a private school which provides a regular education diploma to students. Dr. Digieso accepted [REDACTED] to receive a regular education diploma. Tr., September 3, 2008, pp. 2518-2528. He testified that [REDACTED] would be successful at [REDACTED] School and could receive a regular education diploma. *Id.* at pp 2531-32. [REDACTED]'s slow processing and need for additional time would not prevent [REDACTED] from receiving a high school diploma at [REDACTED] School. *Id.* at p. 2533. At [REDACTED] School, [REDACTED] would not be placed in an "autism program" for a special education diploma – rather, [REDACTED] would be placed in a program for a high school diploma with a diversified population. *Id.* at p. 2534.

Dr. Thomas White, a former Georgia public school psychologist and special education director, testified that given [REDACTED]'s sensory issues and [REDACTED] experience at the GCSD, any placement in the GCSD would aggravate [REDACTED]'s anxieties further and would not be appropriate. Tr., May 27, 2008, p. 132. [REDACTED] cannot handle a large environment. *Id.* at p. 133. Ms. Tupper, a psychologist and an expert in reading, joined Dr. White in recommending a smaller learning environment for [REDACTED] after [REDACTED] received additional remediation at LMB, suggesting [REDACTED] School as an appropriate placement.<sup>12</sup> *Id.* at pp. 132, 228-232.

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<sup>12</sup> Ms. Tupper also mentioned Eaton Academy, Brandon Hall, or Mills Springs Academy as appropriate placements. *Id.*

Dr. Lori Muskat is an expert in psychology; neuropsychology; school psychology; student evaluation, identification, and testing; and learning disabilities. Tr., September 4, 2008, pp. 2540-41.<sup>13</sup> Dr. Muskat met with [REDACTED] and her family. *Id.* at p. 2545-46. She also reviewed all of [REDACTED]'s educational records. *Id.* at p. 2546. Dr. Muskat testified that the material in [REDACTED]'s paraprofessional's observation notes and [REDACTED] school records "supports the later diagnosis of the school system, which was that [REDACTED] has features more of autism or autism spectrum related features than of mental retardation. The notebook substantiates that." *Id.* at p. 2552. Dr. Muskat testified [REDACTED] functions like a child with a language impairment as [REDACTED] needs terms clarified, relates to language in a concrete manner, has trouble translating [REDACTED] thoughts into words, and has trouble with written expression. *Id.* at pp. 2554-55. Dr. Muskat testified that it was her opinion that [REDACTED] was denied an appropriate education from 1996 to 2006. *Id.* at p. 2568.

Dr. Muskat testified that "It's basically a fundamental tenet in children with autism, particularly higher functioning children with autism, particularly higher functioning autism, that it is – that a best practice would be to have them educated as much as possible in environments with neurotypical children because of the effects of "modeling". It allows them to benefit from the – from generally the better developed communication skills and social behaviors of their neurotypical peers." *Id.* at p. 2578-79. Dr. Muskat testified that there was "absolutely no evidence at all to substantiate" a claim that it would be appropriate or advantageous to educate children with autism with mentally retarded children. Based on [REDACTED]'s functioning, she knows

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<sup>13</sup> Dr. Muskat is a professor of a doctoral program in psychology. *Id.* As an expert in her field and a licensed psychologist in Georgia, she identifies and diagnoses children with autism, and children with speech and language impairments as a part of her profession. *Id.* at pp. 2541, 2544. Dr. Muskat also works with school districts on programming with children with autism and speech and language impairment, and she has expended 27 years studying autism as an expert in psychology. *Id.* at pp. 2545, 2623-24. Dr. Muskat coauthored with Dr. Jerome Sattler the Instructor's Manual for the Fifth Edition of his book *Assessment of Children, Behavioral, Social, Clinical Applications*. *Id.* at p. 2627.

of no literature or from her clinical or educational experience that would suggest [REDACTED], who functions at the higher end of the spectrum, would benefit from placement in a classroom with children who are mentally retarded. *Id.* at pp. 2579-81. [REDACTED]'s functioning was observably better after [REDACTED] attended Aurora Strategies, Kumon, and LMB, as indicated by the observations in the notebook by Ms. Blake and from the observations and testing by the GCSD psychologist. *Id.* at p. 2590.

Dr. Muskat testified that [REDACTED]'s educational programming should have included occupational therapy for many reasons. *Id.* at pp. 2592-93. Dr. Muskat also testified that [REDACTED] had language impairment. *Id.* at p. 2594. Dr. Muskat testified that the work in the autism program was below [REDACTED]'s level of functioning and that the notebook demonstrates that the program was not individualized for [REDACTED]. *Id.* at pp. 2595-96, 2599.

Ms. Hetzel, an expert in the area of speech language pathology, including the provision of these services in the school setting for 20 years, is licensed to practice in the State of Georgia and is certified in the United States in her field of expertise. *Tr.*, September 4, 2008, pp. 2642-53. Ms. Hetzel has taught and continues to teach [REDACTED]. *Id.* at p. 2654. Ms. Hetzel testified that [REDACTED] lacks negotiation skills, problem solving language skills (a higher level of language skills), and pragmatic language skills. *Id.* at p. 2663. According to Ms. Hetzel, [REDACTED] had a developmental language disability that was not acquired, meaning [REDACTED] had language impairment all of [REDACTED] life. *Id.* at pp. 2664-70. Upon questioning by this Court, Ms. Hetzel testified that it would be very rare for a child to be discharged from speech and language therapy and then need them later, which would occur when the child was "discharged too early." *Id.* at p. 2671. As an expert and in answering the questions posed by this Court, Ms. Hetzel stated that if someone needed speech and language services (barring the injury to the brain scenario), then that

individual needed speech and language services 10 years ago. *Id.* at pp. 2671-72. According to Ms. Hetzel, [REDACTED] required speech and language services during the 10 years [REDACTED] did not receive them. *Id.* at pp. 2672-76.

Ms. Hetzel testified that the autism social skills classroom with “listening to the Beatles music, watching the 1980s television shows, the exchanges of introductions at the beginning of the classes, exchanges of comments by [REDACTED] and other students’ preferences --- those are my observations of that part of the social skills class, Ms. Casey’s class --- and these activities are not the activities that result in positive social skills development.” *Id.* at pp. 2706-7. Ms. Hetzel testified that the research in her field indicates that social skills instruction in that type of isolated, contained environment does not result in gains in social skills. *Id.* at p. 2707. Ms. Hetzel testified that [REDACTED] required more intensive language instruction than what the GCSD was providing. *Id.* at p. 2712. Ms. Hetzel also testified that [REDACTED] was not prompt dependent, but rather, [REDACTED] struggled due to [REDACTED] language impairment. *Id.* at p. 2728.

Mr. Duncan, [REDACTED]’s history teacher, explained at one meeting how difficult world history would become because one has to compare and contrast and use higher order conceptual thinking skills. Nonetheless, [REDACTED] passed that class. Tr., June 17, 2008, p. 1485; Tr., September 4, 2008, p. 2774. Mr. Duncan also testified that it would be unethical to prompt a student when the student is taking a test and that he never prompted [REDACTED] when [REDACTED] took a test in regular education: high school level world history. *Id.* at pp. 2774-2776. At times, [REDACTED] independently completed all tasks in the class. *Id.* at pp. 2777.

Dr. B. J. Freeman, the GCSD’s expert: did not know what programs were used with [REDACTED], *Id.* at pp. 2276-78; she did not know what reading programs were used to educate [REDACTED] in the mental retardation program; she thinks TouchMath was used as some point, maybe 4<sup>th</sup> or 5<sup>th</sup>

grade; she did not know what writing programs were used to teach [REDACTED] written expression; she did not know what text books were used or not used; she did not know how language was taught or not taught to [REDACTED], who ended up in the .1 to .3 percentile of language scores after 10 years in the mental retardation program; she thought [REDACTED] did not receive homework until 5<sup>th</sup> grade (actually 12<sup>th</sup>), and she admitted she did not know if [REDACTED] received homework in 6<sup>th</sup>, 7<sup>th</sup>, and 8<sup>th</sup> grades. *Id.* Dr. Freeman did not know if the GCSD used programming designed for children with autism, such as neural behavioral approaches including incidental teaching and pivotal response training. *Id.* at pp. 2286-2287. Interestingly, Dr. Freeman criticized the GCSD on all testing that indicated that [REDACTED] had not had [REDACTED] language issues addressed and on the GCSD's own psychological testing because it indicated that [REDACTED] was a child with autism and not mentally retarded. *Id.* at pp. 2292-95. Dr. Freeman could not or would not answer the simple question of whether [REDACTED]'s language deficit was severe. *Id.* at pp. 2295-96. This Court finds shocking Freeman's testimony that the GCSD met [REDACTED]'s reading educational needs when it taught [REDACTED] to read at the 2<sup>nd</sup> to 3<sup>rd</sup> grade level after 10 years, especially in light of the fact that LMB taught [REDACTED] to read grade levels beyond this in just 12 weeks. *Id.* at p. 2298; *supra* ¶ 74. Dr. Freeman testified she saw no underlying data to show any progress in the mental retardation program, and this Court agrees that the records reflect none. *Id.* at p. 2306.

[REDACTED]'s parents placed her privately, after proper notice, at Aurora Strategies, LMB, and Kumon, to address [REDACTED] language deficits and other disabilities that had not been addressed by the GCSD.<sup>14</sup> Pls.' Ex. 4, pp. 1206-1237; Tr., May 28, 2008, p. 303. The GCSD was like "Hartsfield Jackson" International Airport to [REDACTED], with approximately 2,800 students. Tr., May 28, 2008, p.

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<sup>14</sup> Since the GCSD refused the requested vision evaluation, [REDACTED]'s parents had [REDACTED] evaluated at [REDACTED] Eye Clinic on February 27, 2007, and Dr. [REDACTED] diagnosed issues with eye movement, teaming skills, visual motor integration, and visual perceptual skills and recommended vision therapy. J. Ex. 65; J. Ex. 61, pp. 983-984.

303. It was an overwhelming sensory overload for [REDACTED]. *Id.* However, at LMB, it was a very relaxed atmosphere with intensive one-on-one programming tailored to meet [REDACTED]'s individual needs. *Id.* At LMB, in just 12 weeks, [REDACTED] improved [REDACTED] reading comprehension from a 3.7 grade level to a 6.4 grade level and [REDACTED] reading fluency by an entire grade level. J. Ex. 67. [REDACTED] reading accuracy went from a 3.2 grade level to a 5.7 grade level. *Id.* [REDACTED]'s auditory conceptualization improved from a standard score of 55 to 75, with an increase of 2.5 grade levels and [REDACTED] reading word attack skills increased from a standard score of 77 to 89, from the 3.4 grade level to the 6.2 grade level. *Id.* In just 12 weeks, [REDACTED] also received 2.75 Carnegie units toward high school graduation with a regular education diploma while at LMB. *Id.* at p. 1026. The cost of the evaluations and the programming that [REDACTED]'s parents had to provide to begin addressing [REDACTED] language disabilities and other unidentified disabilities totaled \$55,626.90. Pls.' Ex. 4; Tr., May 28, 2008, pp. 421-425.

[REDACTED]'s language scores in the 50's indicated [REDACTED] had to receive an intensive program. Tr., May 27, 2008, p. 125. After [REDACTED] was privately placed at public expense, [REDACTED] returned to the GCSD and the GCSD evaluated [REDACTED] and found [REDACTED] to have *significantly* improved [REDACTED] severe language disabilities. J. Ex. 76, p. 1083. [REDACTED] improved [REDACTED] language skills from the 50's to the 70's. *Id.*; J. Ex. 56, p. 836.

#### IV. CONCLUSIONS OF LAW

##### A. The Individuals with Disabilities Education Act

This action arises under the Individuals with Disabilities Act ("IDEA"), 20 U.S.C. §§ 1400, *et seq.* The purpose of the IDEA is to: (1) ensure that all children with disabilities have a free and appropriate public education ("FAPE") that emphasizes special education services designed to meet their unique needs and prepare them for further education, employment, and

independent living; (2) protect the rights of disabled children and the parents of those children; and (3) assist states and other agencies with providing education for disabled children. 20 U.S.C. § 1400(d)(1). The IDEA guarantees disabled students a FAPE. *Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1311 (11th Cir. 2003).

A FAPE is defined as special education and related services that: "(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program [IEP] required under section 1414(d)." 20 U.S.C. § 1401(9).<sup>15</sup> Each child with a disability as defined under the IDEA is entitled to an IEP. 20 U.S.C. § 1414 (d) (1) (A). The development and implementation of the IEP is the cornerstone of the IDEA. *Honig v. Doe*, 484 U.S. 305, 311 (1988). To provide a FAPE, a school formulates an IEP during a meeting between the student's parents and school officials.<sup>16</sup> See 20 U.S.C. §§

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<sup>15</sup> An IEP is a written document developed by an IEP team. 20 U.S.C. § 1401(11), § 1414(d)(1)(A), (B). The IDEA specifically enumerates the components to be included in a student's IEP, which must contain the following: (1) a statement of the child's present levels of educational performance; (2) a statement of measurable annual goals including short-term objectives; (3) a statement of the special education and related services and supplementary aids and services to be provided or available to the child and a statement of the program modifications or supports for school personnel that will be provided to the child; (4) an explanation of the extent, if any, to which the child will not participate with non-disabled children in the regular class; (5) a statement of modifications to State or district-wide assessments of achievement that are needed in order for the child to participate or if the child will not participate, a statement as to why that assessment is not appropriate and how the child will be assessed; (6) the projected date for the beginning of the services and the anticipated frequency, location, and duration of the services; (7) beginning at certain ages, transition services needed for the child; and (8) a statement of how the child's progress toward the annual goals will be measured and how and when the child's parents will be informed of progress. 20 U.S.C. § 1414(d)(1)(A).

<sup>16</sup> The IEP team is composed of: (1) the child's parent(s); (2) at least one regular education teacher if the child is or may be participating in the regular education environment; (3) at least one special education teacher; (4) a representative of the local educational agency who is

1414(d)(1)(A)-(B). The parents or the local education agency may file a due process complaint if either disagrees with the IEP or believes that the child has been denied procedural or substantive rights to a FAPE. 20 U.S.C. § 1415(f).<sup>17</sup> The parent may file a due process complaint in an IDEA case relating to the identification, evaluation, or educational placement of the child or the provision of a FAPE. 20 U.S.C. § 1415(b) (6).

## **B. Statute of Limitations**

The Act requires parents to file a due process complaint "within 2 years of the date the parent . . . knew or should have known about the alleged action that forms the basis of the complaint." 20 U.S.C. § 1415(f)(3)(C). However, when a child has been improperly placed in a program for children with mental retardation by the school district, the two year statute of limitations does not begin to run until the child's parents have critical information to know the placement is improper. In *Draper v. Atlanta Independent Sch. System*, 480 F. Supp. 2d 1331, 1341 (N.D. Ga. 2007), *aff'd*, *Draper v. Atlanta Indep. Sch. Sys.*, 2008 U.S. App. LEXIS 4813 (11th Cir. Ga., Mar. 6, 2008), the district court found:

Although J.D.'s mother consented to his MID placement and participated in his IEPs until 2003, she could not have had the critical facts that he was not MID until tests confirmed this in 2003. Therefore, J.D.'s claim for improper placement in the MID class is not barred by the two-year statute of limitations because his family had reason to know only in 2003 that he had been injured by this placement. A.A. filed his due process request within two years from 2003 when his parents learned of the injury, and therefore J.D.'s claim that GCSD improperly placed him in the MID class is not barred by the statute of limitations.

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qualified to provide or to supervise specially designed instruction to meet the child's unique needs, is knowledgeable about the general curriculum, and about the availability of resources; (5) a person who can interpret the instructional implications of evaluation results; (6) others who may have knowledge or expertise regarding the child; and (7) the child, when appropriate. 20 U.S.C. § 1414(d)(1)(B).

<sup>17</sup> Georgia law provides that such complaints are within the jurisdiction of this Court. See O.C.G.A. § 50-13-41(a)(1).

See also *K. P.*, 891 F. Supp. at 716-17 (IDEA claim for inappropriate education spanning several years accrued only after the plaintiff was placed with another education program and his gains indicated that he had the capacity to attain academic goals).

Similarly, in the present case, this Court ruled that [REDACTED]'s family did not have critical facts to know that [REDACTED] had been injured by the MID placement on August 16, 1996 until they received the results of the 2006 testing that confirmed that [REDACTED] was autistic and not MID. [REDACTED] filed the due process complaint within two years of learning of the injury, and therefore, [REDACTED]'s claim that GCSD improperly placed [REDACTED] in the MID class was not barred by the statute of limitations.

### C. "Free Appropriate Public Education" Standard

The Supreme Court established a two part test for determining whether a child with disabilities has been provided with a FAPE. First, has the State complied with the procedures set forth in the Act? And second, is the individualized program developed through that Act's procedure reasonably calculated to enable the child to receive educational benefits? *Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 206-07 (1982).

In matters alleging a procedural violation, this Court may find that a child did not receive a FAPE "if the procedural inadequacies impeded the child's right to a [FAPE]; significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a [FAPE] to the parents' child; or caused a deprivation of educational benefits." 20 U.S.C. § 1415 (f) (3) (E) (ii). The *Rowley* Court also held that a State provides a FAPE when it provides personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. *Rowley* at 203.

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.*

#### **D. Remedies**

Once an IDEA violation is found, the Court is authorized to "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415 (i) (2) (B) (iii). Thus, 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). “The IDEA provides various types of remedies for plaintiff – including restitution for some parental expenses, compensatory education for students, and procedural remedies . . . .” *Ortega v. Bibb County Sch. Dist.*, 397 F.3d 1321 (11<sup>th</sup> Cir. 2005). The court's discretion in fashioning relief is broad. *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 369 (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 (11<sup>th</sup> Cir. 2003).

In cases in which a school district has denied a child with disabilities the appropriate educational placement, parents are entitled to reimbursement for costs incurred in providing a placement and the child is entitled to compensatory education for the time the child was deprived of the appropriate education. *Jefferson County Bd. of Educ. v. Breen*, 853 F.2d 853, 857-858 (11<sup>th</sup> Cir. 1988). Compensatory education allows “courts . . . [to] award educational services . . . to be provided prospectively to compensate for a past deficient program.” *Reid v. District of Columbia*, 401 F.3d 516, 522 (D.C. Cir. 2005) (*internal quotation marks omitted*). Even when a school district provides, at the time of a hearing, if it does, an appropriate educational program, this does not abate the need for compensatory education. *Flores v. District of Columbia*, 437 F. Sup. 2d 22, 30 (D.D.C. 2006). “[W]hereas ordinary IEPs need only provide ‘some benefit,’ compensatory awards must do more - they must compensate.” *Reid*, 401 F.3d at 525 (holding the district court should not have assumed that the student’s placement in appropriate educational program was sufficient to erase need for compensatory award). Compensatory awards should place children in the position they would have been in but for the violation of the Act. *Id.* at 518.

The circuit courts of appeals have uniformly held that compensatory educational services may be awarded prospectively under IDEA for a past deficient program. *Reid ex rel. Reid v.*

*District of Columbia*, 401 F.3d 516,518 (D.C. Cir. 2005); *Phil v. Massachusetts Dep't of Educ.*, 9 F.3d 184, 188 (1st Cir. 1993); *Ridgewood Bd. of Educ. v. N.E. for M.E.*, 172 F.3d 238, 249 (3rd Cir. 1999); *G v. Fort Bragg Dependent Schs.*, 343 F.3d 295,308-09 (4th Cir. 2003); *Hall v. Knott County Bd. of Educ.*, 941 F.2d 402, 407 (6th Cir. 1991); *Board of Educ. of Oak Park & River Forest High Sch. Dist. 200 v. Illinois State Bd. of Educ.*, 79 F.3d 654, 656 (7th Cir. 1996); *Miener v. Missouri*, 800 F.2d 749, 753 (8th Cir. 1986); *Parents of Student W. v. Puyallup Sch. Dist., No. 3*, 31 F.3d 1489, 1496 (9th Cir. 1994); *Jefferson County Bd. of Education v. Breen*, 853 F.2d 853, 857-58 (11th Cir. 1988).

Although ordinary IEP'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.

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)(bb).

#### **E. Application of the Law to the Facts**

In the present case, the Court finds that the GCSD failed to evaluate [REDACTED] until [REDACTED] was almost seventeen years old and inappropriately placed [REDACTED] for 10 years in a program for mental retardation when [REDACTED] was not mentally retarded but rather, was autistic. Furthermore, the Court finds that because of this failure to evaluate and subsequent misdiagnosis, the GCSD has failed to provide a free appropriate education to [REDACTED] for the 1996-97, 1997-98, 1998-99, 1999-00, 2000-01, 2001-02, 2002-03, 2003-04, 2004-05, and 2005-06 school years.

In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in another State, the local educational agency shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency conducts an evaluation, if determined to be necessary by such agency, and develops a new IEP, if appropriate, that is consistent with Federal and State law. 20 U.S.C. § 1414(d)(2)(C)(i)(II). Here, upon her transfer to Georgia and enrollment in the GCSD in 1994, [REDACTED]'s parents presented current evaluative information from the sending school district in Connecticut conducted in the spring of 1994. Based upon this current evaluative information GCSD determined that [REDACTED] was significantly developmentally delayed (SDD) on August 16, 1994. [REDACTED]'s parents consented to placement of [REDACTED], pursuant to an IEP, in an SDD program on September 12, 1994. This Court concludes that this placement was proper and satisfied the requirements of IDEA.

However, this Court concludes that the GCSD violated the IDEA when it failed to evaluate [REDACTED] until [REDACTED] was almost seventeen years old and after placing [REDACTED] for 10 years in a

program for mental retardation when [REDACTED] was not mentally retarded but rather, was autistic. It is undisputed that the GCSD placed [REDACTED] for a decade in one of the most restrictive educational settings possible for children with mental retardation and denied [REDACTED] necessary speech and language therapy and instruction when [REDACTED] was, and is, a child with autism who has a significant speech and language impairment. The GCSD did not provide [REDACTED] with these eligibilities for a decade or more. Furthermore, the GCSD's own observations and evaluations of [REDACTED]'s adaptive functioning since first grade showed that [REDACTED] did not qualify as a child with mental retardation.

Particularly troubling to this Court is the GCSD's reliance on an incomplete neuropsychological evaluation completed by Emory University when it found [REDACTED] eligible for special education services under the category of mild mentally handicapped program, especially since it was reported that the "[r]esults on the WISC-III indicate a significant discrepancy between verbal and performance abilities." On the two missing pages, it is stated that [REDACTED] was withdrawn, had attentional problems, had significant social difficulties, avoided emotional stimuli, processed external stimuli to a lesser degree, and that [REDACTED] achievement scores were somewhat higher than expected given [REDACTED] alleged IQ. While the evaluator concluded [REDACTED] allegedly met the diagnostic criteria for mild mental retardation, the evaluator noted that "it is important to note that there are some fluctuations in the data which warrant viewing the present findings tentatively."

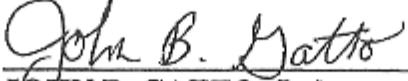
The GCSD argues that no harm has occurred. This Court does not agree. The GCSD argues that [REDACTED] was appropriately placed in the program for children with mental retardation, yet the moment the GCSD itself confirmed [REDACTED] was a child with autism it removed [REDACTED] from the mental retardation program and placed her in the autism program. The GCSD's own expert

testified that early identification of autism is critical, that intensive intervention is critical, and that facilitation with neurotypical peers is critical. Nonetheless, the GCSD argues that even though no language programming was provided, that even though no facilitation with neurotypical peers was provided, and even though the GCSD testing established [REDACTED]'s language skills were in the .1 and .2 percentile after a decade of education in the mental retardation program, that program was appropriate for [REDACTED]. Again, this Court does not agree.

Although Dr. Freeman testified that [REDACTED]'s needs were met in the program for children with mental retardation, it is clear that they were not. After 10 years in that program, [REDACTED]'s language skills were in the .1 and .2 percentile, with standard scores in the 50's, placing [REDACTED] three standard deviations below the norm. However, after just 8 months of intensive and appropriate programming which [REDACTED]'s parents provided, [REDACTED]'s language scores increased over a standard deviation and were in the 70's, moving closer to the average range. This Court concludes that [REDACTED] was inappropriately placed in the program for children with mental retardation and was denied a FAPE as a result of this inappropriate placement.

The Court concludes that since [REDACTED] was misidentified and misplaced for more than 10 years of her educational programming, [REDACTED] is entitled to compensatory education in the amount of 720 hours of instruction at Lindamood Bell, and educational programming thereafter at [REDACTED] School or some other appropriate private Georgia school designed to meet [REDACTED] needs – with transportation as a related service until [REDACTED] graduates from high school with a regular education high school diploma or until [REDACTED] is age 27. Furthermore, [REDACTED]'s parents are entitled to receive reimbursement in the amount of \$55,626.90 from the GCSD for their provision of necessary education and related services to [REDACTED].

SO ORDERED THIS 25th day of November, 2008.

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JOHN B. GATTO, Judge