

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF YORK	)	BEFORE THE LOCAL DUE PROCESS HEARING OFFICER DOUGLAS F. DENT
In the Mater of:	)	
	)	
J. B. and R. B., on behalf of J. B.,	)	
	)	
Petitioners	)	
	)	FINAL ORDER
V,	)	
	)	
York County School District Four (Fort Mill,)	)	
<u>Respondent</u>	)	

This matter is before me pursuant to a Complaint and Due Process Hearing Request received by the Respondent on November 15, 2016 and a request that I serve as a Local Hearing Officer in the matter received by me on November 22, 2016. On November 22, 2016, a letter was sent to the Petitioners informing them of their rights and responsibilities in a Due Process Hearing and on November 26, 2016, the Respondent supplied their Answer to the Petitioners' Complaint. On November 30, 2016 the parties held a Resolution Session and on December 29, 2016, mediation was conducted, neither was successful. Two teleconferences were held, one on January 3, 2017, with the Petitioners and the Respondent's legal counsel; and again on January 11, 2017, with the Petitioner's newly retained legal counsel and the Respondent's counsel. At that time a Hearing was set for January 23, 2017, with the document and witness list exchange to occur on January 17, 2017, because of the Martin Luther King Holiday which occurred on January 16, 2017.

Although some glitches occurred in the evidence exchange, both parties were satisfied with the process and the hearing began on the day and time agreed to. At a pre-hearing conference, it was agreed that the Petitioners' Complaint and the Respondent's Response would be introduced into the record and they were at the end of the hearing as Hearing Officer Exhibits 1 and 2. The Petitioners requested an open hearing and numerous visitors were present.

FINDINGS OF FACT

1. The child was a seventh grade student in Fort Mill Middle School until May of 2016. After that, he has been home-schooled. (Testimony of Parents and District).
2. The Student is a bright student who has done well academically and has been in the gifted and talented program in middle school. (Testimony of several witnesses and District Exhibit 1).
3. The Student has a history of making grades of A or B in school (Testimony and School District Exhibit 1).
4. Because of emotional problems, attention deficit hyperactivity disorder (ADHD) and possible Autism Spectrum Disorders the Student missed substantial class time in middle school (Testimony of Mother, School District Exhibit 5, Petitioners' Exhibits 4, 8 & 9).
5. The District evaluated the Student and on November 17, 2014, issued a determination that the Student did not qualify for special education services under the categories of Autism, Emotional Disability, Other Health Impairment, or Speech/Language Impairment primarily because he was receiving "A's" in class work; was in the gifted and talented program and had good state test scores. (Testimony of Parents and District, Petitioners' Exhibit 5).
6. At the same time the District determined the Student was eligible for an accommodations plan under 504 of the Rehabilitation Act of 1973 (Section 504) to address his ADHD, Anxiety Disorder, and Autism Spectrum Disorder. (Testimony of Parents and District, Petitioners' Exhibit 5).
7. The Student continued to have difficulty staying in class and in October 2015 he was placed on homebound after a meltdown in school. (Testimony of Mother and others).
8. In November 2015, the Petitioners submitted a Complaint to the South Carolina Department of Education alleging a failure of the District to provide the Student a FAPE because it would not give the Student special education services. (Testimony of Mother, Petitioners' Exhibit 11).
9. Between April 2014 and March 2016 the Parents paid a total of \$29,827.40 for outside services for the Student. (Testimony of Mother and Petitioners' Exhibit 21)
10. On January 8, 2016, the State Department of Education (SCDE) ruled the "District in violation of the child find requirements in the IDEA regulations at 34 C.F.R. Sec. 300.111 by failing to appropriately identify and evaluate the Student in a timely manner." (Petitioners' Exhibit 12).
11. The remedy proposed by the District was a compensatory education plan to comply with the SCDE's requirements to begin no later than March 1, 2016 (Petitioners' Exhibit 12).
12. In January 2016, the District, with agreement of the Parents, engaged the services of Betsy C. Grier, PhD, NCSP to perform an evaluation and make recommendations regarding the Student's IEP and compensatory education plan. (Testimony of Parents and District witnesses, Petitioners' Exhibit 13).

13. Based on Dr. Grier's report on February 22, 2016, the District issued an eligibility determination that the Student was eligible for special education services in the categories of Emotional Disability and Other Health Impairment, but did not find him eligible under the categories of Autism Spectrum Disorder, Specific Learning Disability or Speech/Language Impairment. (Testimony of Parents and District witnesses, Petitioners' Exhibit 14)
14. On March 21, 2016, the District developed a draft individualized education program (IEP). (Petitioners' Exhibit 16).
15. Pursuant to a prior written notice (PWN) issued March 23, 2016, the District offered the IEP to the Parents along with a compensatory education plan. (Petitioners' Exhibit 17).
16. The Parents sought to modify the IEP and to add applied behavior analysis (ABA) therapy and additional compensatory education services. Pursuant to a PWN dated May 5, 2016, the District agreed to some modifications but rejected the Parents' request for ABA therapy. (Testimony of Parents and District, Petitioners' Exhibit 18).
17. On June 2, 2016, the District issued a PWN offering a modified IEP and rejecting the Parents' request for extended school year (ESY) services during the summer of 2016 but agreed to have occupational therapy and physical therapy evaluations conducted. (Testimony of Parents and District, School District Exhibit 7).
18. At the end of the school year, June 2016, the Student passed 7th Grade with grades of "B's" and was recommended to be promoted to 8th grade. (Testimony of 7th grade gifted and talented math teacher, School District Exhibit 1).
19. The Student has been home-schooled for the 2016-2017 school year and currently lives in another school district. (Testimony of Parents and District).
20. On December 16, 2016 the SCDE issued a letter stating that based on the information provided by the school district, it had "substantially initiated compliance with the corrective actions in the January 8, 2016, LOR and shows a good faith effort to continue correcting the systemic issues of noncompliance." (School District Exhibit 2).

ISSUES

The basic issue in this case is whether or not the Petitioners are entitled to recover monetary damages for the private services they secured for the Student. They contend two periods: The first being between April 2014 and March 2016, prior to the District's determination that the Student was eligible for special education services and the issuance of an IEP and compensatory education plan. The second being between April 2016 and December 2016.

During the discussion of these matters other sub-issues will be discussed and determinations made below.

DISCUSSION

WITH REGARD TO THE FIRST PERIOD

To determine whether reimbursement is appropriate we are fortunate to have three United States Supreme Court Cases to use as guidance: *Burlington School Committee v. Massachusetts Department Of Education*, 471 U.S. 359 (1985); *Florence Co. School District Four v. Shannon Carter*, 510 U.S. 7, (1993); and *Forest Grove School District v. T.A.* 129 S. Ct. 2484 (2009). *Burlington* established the right of parents to obtain financial reimbursement for private school placement when the District was not providing a FAPE and a private placement was providing a FAPE. *Carter* set up a three (3) pronged test to determine if reimbursement was appropriate and ruled that the private placement did not have to meet State standards. *Forest Grove* decided that reimbursement was possible for private special education services, even when the child did not previously receive special education services from the public school.

In this case during the period of April 1, 2014 and March 1, 2016, the Student's Parents were consistently seeking special education services for him, not based on his academic performance but because of his emotional breakdowns, outbursts, and the anxiety they caused. In addition, he was diagnosed with ADHD which was acknowledged by the Respondent. However, those services were denied to him based on the Respondent's observations that he was making A's and B's in the gifted and talented program and doing well on state standardized tests. The IDEA and its implementing regulations, specifically 34 CFR 300.101(c) states:

“(c) *Children advancing from grade to grade.* (1) Each State must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade.”

Therefore, the SCDE ruling was correct in rejecting the Respondent's argument that the Student did not qualify for special education services based on his academic achievements. While the Respondent accepted the SCDE ruling, they stated that they did not agree with it. They offered an argument akin to a "*nolo contendere*" plea in Criminal Court, i.e. we don't agree we were wrong in not identifying the Student as a student eligible for special education services, but we will agree to accept the punishment required by the SCDE. That punishment was to provide compensatory education for the Student through May of 2017 in the form of paying for the outside service providers that the Petitioners had identified and who were working with the Student.

The issue is whether the Petitioners are entitled to recover the costs of providing those outside services for all the time that the Respondents were denying the Student was eligible for special education services and thus not providing a FAPE. The *Burlington* case cited above clearly establishes the right to recover monetary damages when a school district is not providing a FAPE and a private placement is; and *Forest Grove* clearly states that those damages are not limited to private schools or to students who were already identified as students with disabilities. The question is whether or not the *Carter* three (3) pronged test is met.

Prong One requires the District to offer a FAPE. Not the case here. In addition to the SCDE's finding of a Child Find violation, the Respondent clearly was not addressing the Student's emotional difficulties, anxiety, and loss of class time, necessitating the purchase of outside services by the Petitioners. In addition, the Respondents specifically denied the Student's eligibility for services on more than one occasion.

Prong Two requires a showing that the program offered by the Petitioners was

designed to provide a FAPE; not that actual progress was made, but that it was designed to help the Student make academic progress. It is hard to imagine that he would have made the academic progress in school that he did without the counseling and support services provided by the Petitioners' professionals. Although the Respondent was providing minimal assistance when the Student had a meltdown or became anxious in class through his 504 plan, it was not sufficient to keep him in class and eventually in school. So it appears that the services provided by the Petitioners during this period were appropriate.

Prong three requires consideration of "equitable factors". The Respondent claims that because they have offered and are providing a compensatory education plan to bring the Student up to the educational and emotional place he would have been if it had been offering services all along, the question of reimbursement for this first period is moot. They further offer that the Petitioners agreed to the compensatory education plan and thus they are not entitled to come back at a later date and seek reimbursement for the services they purchased during the period. Finally, they argue that some of the costs were paid for by insurance and the Petitioners cannot seek reimbursement for the gross amount but only that amount that was actually paid out of pocket.

The offer of a compensatory education plan for the Student is helpful for him and that is great, but it does not change the fact that while the Respondent was not offering a FAPE, the Petitioners were paying money for services that the Respondent should have been offering. In addition, the acceptance of that plan by the Petitioners does not mitigate the financial damages they incurred. Finally, as in an award of damages in a civil case such as an accident, The Courts do not take into account any insurance contribution, it would not be proper to do so here. That is a matter for the Petitioners and their insurance carrier to deal with.

Therefore, an award of \$29,827,40 in reimbursement for costs incurred from April 2014 through March of 2016 is appropriate.

WITH REGARD TO THE SECOND PERIOD

An analysis of the Petitioners' request for reimbursement for expenses incurred by purchasing private services from the period of April 1, 2016 to December 31, 2016 presents a completely different set of circumstances. Again we must use the Carter three pronged test but the facts are different.

Prong one, i.e. did the District offer FAPE. The IEP developed from March to May of 2016 along with the compensatory education plan for that period is well designed to provide the Student with meaningful education progress as required by *Hendrick Hudson Board of Education. v. Rowley*, 458 U.S. 176 (1982). The Petitioners allege that it is defective because it does not include ABA services. The Respondents in their testimony showed that services to address the Student's emotional issues were being provided through a methodology called Cognitive Behavioral Therapy (CBT) and counseling. According to testimony from the District, this therapy includes some ABA principals, but is more expansive. Thus, this is a conflict over methodology issue. It has been long settled that the failures to use a parent's preferred methodology does not deny FAPE, *Desoto County Sch Bd* 110 :RP 38104.

Prong two, i.e. did the Petitioners' educational plan provide a FAPE. We don't know the answer to that question because no testimony or evidence was offered as to the educational program being conducted by the Petitioners' home-school effort. The Respondent continues to provide compensatory education and from the cost reimbursement offered it can be assumed that some private providers are providing services to the home-school program at the Petitioners' expense, but no information has been provided regarding Jarod's progress or current state of mental health.

Prong three, i.e. equitable factors. Sometime during 2016, the Petitioners apparently moved out of the Respondent District and this combined with the fact that they are homeschooling the Student, they are no longer entitled to services under an IEP. Children who are not enrolled in school, even if homeschooled, are entitled to services under an individual service plan pursuant to 34 CFR 300.130 through 140 and disagreements with a school district are not subject to a Due Process Hearing. Therefore, it is certainly debatable as to whether or not this is the proper jurisdiction to even deal with the Petitioners' claim for reimbursement.

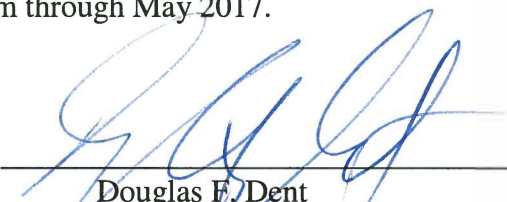
For all the reasons stated above, reimbursement for the requested \$39,571 for the period of April 1, 2016 to December 31, 2016 is not appropriate.

DECISION

THEREFORE, IT IS HEREBY ORDERED that the Respondent shall reimburse the Petitioners the amount of \$29,827.40 for services purchased between April 2014 and March 2016. The Petitioners' request for reimbursement in the amount of \$39,571 for services purchased between April 2016 and December 2016 is hereby denied. The Respondent shall continue to ensure that services required under the compensatory Education Plan are provided and paid by them through May 2017.

IT IS SO ORDERED.

Greenville, South Carolina
January 28, 2017



Douglas F. Dent
Local Due Process Hearing Officer

APPEAL

Should either party wish to appeal this ruling they may do so by writing a letter to the South Carolina Department of Education, Office of Special Education Services, 1429 Senate Street, Rutledge Building, Columbia, South Carolina 29201 within ten (10) days of receipt of the Hearing Officer's Order.

RECEIVED
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State Dept. of Education
Office of General Counsel