

**INDIVIDUALS WITH DISABILITIES EDUCATION IMPROVEMENT ACT  
BEFORE THE STATE REVIEW OFFICER  
FOR THE SOUTH CAROLINA DEPARTMENT OF EDUCATION**

STATE OF SOUTH CAROLINA COUNTY )  
 )  
OF YORK )  
 )  
In the Matter of: )  
 )  
York County School District Four (Fort Mill, )  
Appellant )  
 )  
V. )  
 )  
J.B. and R.B., on behalf of J.B., )  
 )  
Respondent )

**DECISION OF THE  
STATE REVIEW OFFICER**

This matter is before me pursuant to an appeal by York County School District Four (“District”) from a decision by the Local Hearing Officer (“LHO”) for reimbursement of private service costs incurred by J.B. and R.B. (“Parents”) in the amount of \$29,827.40.

**I. Procedural Background**

Parents submitted a request for due process to the District on November 15, 2016. On November 30, 2016, the parties held a Resolution Session, and on December 29, 2016, mediation was conducted. Neither was successful. The LHO convened a hearing on January 23, 2017, and issued this written decision on January 28, 2017.

The District appealed the LHO’s decision, which was received by the South Carolina Department of Education (SCDE) on February 13, 2017. On February 22, 2017, both parties, as

represented by counsel, and the Undersigned held a phone conference to discuss schedules. Both parties indicated a desire to submit written arguments and agreed to simultaneous briefing given the short timelines. On February 21, 2017, the Undersigned received the transcript and all exhibits entered into the record for review. Both parties submitted briefs as requested on March 6, 2017.

## **II. Factual Background**

This appeal involves the Parents' request for reimbursement for private services for their child, between November 20, 2014 and March 24, 2016. The Parents obtained the relevant services during a time period when the District failed to provide the student with a Free Appropriate Public Education (FAPE).

The following factual background outlines key points in the timeline.

### **Major Milestones/Timeline**

The challenges for the Student began in 2009 when he was in Kindergarten. The Mother testified that she requested an evaluation in his 3<sup>rd</sup> grade year but was denied. The Student had behavioral challenges in 4<sup>th</sup> grade as well. (Testimony of Mother)

#### **Student as 5<sup>th</sup> grader (Sugar Creek Elementary School)**

|                |                                                                                                                                                                                                                                                                                                     |
|----------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| January 2014   | Student and Parent began working with a psychiatrist. (Testimony of Parents)                                                                                                                                                                                                                        |
| March 21, 2014 | The Psychiatrist diagnosed Student with attention deficit hyperactivity disorder (ADHD) and anxiety disorder and suggested the initiation of a 504 plan and an individualized education program (IEP). (Parents' Exhibit 2). Parents informed the school of this information (Testimony of Parents) |

April 2014 Parents began accessing outside resources to provide services to Student. (Through March 2016) (Testimony of Parents, Parents' Exhibit 21, LHO Decision)

June 2014 Testing with Child and Family Services was completed with a diagnosis of anxiety, ADHD, and non-verbal learning disorder with the need for further testing to rule out autism. (Testimony of Parents)

Student as 6<sup>th</sup> Grader (Fort Mill Middle School)

August, 2014 Parents formally requested assessment for special education services.

September 8, 2014 Psychiatrist recommended a 504 plan and IEP.

November 17, 2014 District evaluated the Student and issued a determination that the Student did not qualify for special education services for Autism, Emotional Disability, Other Health Impairment, or a Speech/Language Impairment primarily because he had good grades, was in the gifted & talented program and had good state test scores. (Testimony of Parents and District, Parents' Exhibit 5, LHO Decision)

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, Parents' Exhibit 5, LHO Decision)

April 8, 2015 An outside evaluator, submitted a functional behavioral assessment of the Student that recommended 2 hours a week of individual applied behavior analysis (ABA) therapy and Cognitive Behavior Therapy (CBT).

Throughout year Records from the school nurse indicate 23 visits to the nurse between November 2014-May 2015 for a variety of symptoms including vomiting and lethargy. (Parents' Exhibit 3)

Throughout year Parents paid for counseling through the Thompson Center, services and social skills with a psychologist. (Testimony of Parents). Parents began these services after they were "told by [] and by [] that if we didn't immediately implement ABA therapy, that we were looking at placing

the child in residential treatment.” (Testimony of Parents)

Summer 2015o Student was successfully involved in several camps with accommodations in place to support him. (Testimony of Parents)

Student as 7<sup>th</sup> Grader (Fort Mill Middle School)

August 13, 2015 Parent held a meeting at the school to ask why the Student could not have an IEP. Parent was told it was because of his academic success. School said they would provide social skills support. (Testimony of Parents)

August 26, 2015 A 504 meeting held and plan created.

August, 2015o As part of the 504 plan, Student meets with behavior specialist for Fort Mill School District, on a weekly basis. (Testimony of District)

September, 2015o Student met with school counselor five times. (Parents’ Exhibit 4)

September, 2015o District attempted to obtain required parental permission to conduct the evaluation. Parent said she did not give the permission because she understood that another comprehensive evaluation was not possible. (Testimony of Parents)

October 8, 2015o Student had a meltdown in school and was placed on medical homebound for six weeks. Parent started accessing Blooming Kids for support because other caregivers were not available. (Testimony of Parents, Parents’ Exhibit 6, LHO Decision)

October, 2015 Parents requested support of the South Carolina Department of Disabilities and Special Needs. (Testimony of Parents)

November, 2015o District contacted Dr. Betsy Grier to conduct an independent educational evaluation (IEE). (Testimony of coordinator of psychological services for District)

|                   |                                                                                                                                                                                                                                                                                               |
|-------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| November 6, 2015  | Parents submitted a Complaint to the SCDE alleging a failure of the District to provide the Student a FAPE. (Testimony of Parents, Parents' Exhibit 11, LHO Decision)                                                                                                                         |
| November 19, 2015 | After the Student's return from medical homebound, the School agreed to add 30 minutes of services in the area of social skills at lunch and 15 minutes of one-on-one to the 504 plan. (Testimony of Parents)                                                                                 |
| December 3, 2015  | The outside evaluator submitted a VB-MAPP Language Milestones, Barriers and EESA Assessment, with suggestions for IEP Goals to Parents. (Parents' Exhibit 1)                                                                                                                                  |
| December 29, 2015 | Novant Health sent a letter stating that Student was diagnosed with Autism Spectrum Disorder. (Parents' Exhibit 10)                                                                                                                                                                           |
| January 8, 2016   | The SCDE issued a Letter of Resolution (LOR), ruling the "District (was) 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." (Parents' Exhibit 12, LHO Decision) |
| January, 2016e    | District, with the agreement of the Parents, engaged the services of an independent evaluator to make recommendations regarding Student's IEP and compensatory education plan. (Testimony of Parents and District, Parents' Exhibit 13, LHO Decision)                                         |
| February 8, 2016  | District sent a letter to the SCDE expressing concerns about the LOR. (Parents' Exhibit 11)                                                                                                                                                                                                   |
| February 9, 2016  | Dr. Grier submitted an evaluation of the Student diagnosing him with Generalized Anxiety Disorder, Depressive Features, ADHD, Language Disorder, Specific Learning Impairment, Developmental Motor Coordination Disorder, and Autism Spectrum Disorder by History. (Parents' Exhibit 13)      |
| February 22, 2016 | District issued an eligibility determination that the Student was eligible for special education services under the categories of Emotional Disability and Other Health Impairment, but not eligible under the categories for Autism Spectrum Disorder, Specific Learning Disability, or      |

|                 |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
|-----------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                 | Speech/Language Impairment. (Testimony of Parents and District, and Parents' Exhibit 14, LHOs Decision)                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| March 21, 2016  | District developed a draft IEP. (Parents' Exhibit 16, LHO Decision)                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| March 23, 2016  | District offered the IEP to the Parents along with a compensatory education plan. The compensatory education plan included weekly therapy from Thompsons Center through May 2017 and social skills training over the summer by the outside evaluator. (Parents' Exhibit 17, Testimony of Parents, LHO Decision)                                                                                                                                                                                                                                |
| April 4, 2016   | The new IEP took effect. (Parents' Exhibit 16)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| April 27, 2016  | Parents sent Student to Blooming Kids and paid for a special education tutor because of the Student's extremely low grades. (Testimony of Parents)                                                                                                                                                                                                                                                                                                                                                                                             |
| May 5, 2016s    | The District issued a prior written notice (PWN) that agreed to some modifications of the IEP and compensatory education plan but rejected the Parent's request for ABA Therapy. The compensatory education plan did not include any reimbursement of services, but did include services going forward for the Student's anxiety, but not Autism. (Testimony of Parents and District, Parents' Exhibit 18, LHO Decision)                                                                                                                       |
| June 2, 2016    | The District issued a PWN offering a modified IEP for the Student but rejecting Parents' request for extended school year (ESY) services during the summer of 2016. The District agreed to have occupational therapy and physical therapy evaluations conducted. (Testimony of Parents and District, District's Exhibit 7, LHO Decision)                                                                                                                                                                                                       |
| Throughout year | <p>Records from the school of more than 25 visits to the counselor's office (District's Exhibit 5), and more than 25 visits to the nurse's office (District's Exhibits 5). Math teacher reports the Student missed 18 classes beyond the 6 weeks out on medical homebound.</p> <p>Parent provided services in the Fall Semester. Parent reports that she was told by Thompson Center and the Student's psychiatrist that without treatment, Student would have been hospitalized or put into residential treatment. (Testimony of Parents)</p> |

August 2016 Last time the outside evaluator saw the Student, paid for by the District in accordance with the compensatory education plan. (Testimony of outside evaluator)

Summer 2016 Student received services from Blooming Kids Learning Center and Chief Fitness. (Testimony of Parents)

The Parents were not happy with the IEP or the compensatory services offered by the District because the services did not specifically address ABA treatment.

Student as 8<sup>th</sup> Grader (Homeschooled, moved to new district)

August 12, 2016 Parents sent letter to District stating the Student would not return to public school. (Testimony of Parents)

September 1, 2016 South Carolina Department of Disabilities and Special Needs sends Parents a letter stating that he is eligible for services under the autism diagnosis.

November 15, 2016 Parents submitted a due process hearing request to the District. (LHO Decision)

December 16, 2016 The SCDE issued a letter stating based on the information provided by the 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; LHO decision)

January 6, 2017 Thompson Center sent District an update on Student's progress, recommending continued in home services, counseling, ABA, and an occupational assessment. (Petitioner's Exhibit 20)

February 13, 2017 District appealed the LHO's decision. (Appeal)

Current Student is homeschooled and lives in another District. (Testimony of Parents and District; LHO decision).

### **Financial Summary**

From November 20, 2014, through March 24, 2016, Parents spent \$29,273.37 on services.  
From April 1, 2016, through December 9, 2016, Parents spent \$39,651.10 on services.  
(Testimony of Parents, LHO decision)

### **III. Standard of Review**

Federal and state regulations provide that a party aggrieved by a local hearing officer decision may appeal to a state review officer and that the review officer must “[e]xamine the entire hearing record” and “[m]ake an independent decision on completion of the review.” 34 C.F.R. § 300.514(b)(2)(i) and (v)(2014). In doing so, the findings of fact of the local hearing officer are entitled to great deference and are considered prima facie correct. *M.S. ex rel. Simchick v. Fairfax Cnt. Sch. Bd.*, 553 F.3d 315, 326 (4<sup>th</sup> Cir. 2009); *Doyle v. Arlington Cnty. Sch. Bd.*, 953 F.2d 100, 105 (4<sup>th</sup> Cir. 1991). The state review officer must also consider the hearing officer’s advantage of examining the demeanor of the witnesses when credibility determinations are at issue. *Id.*; *Shore Reg’l High Sch. Bd. Of Educ. V. P.S. ex rel. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004).

### **IV. Hearing Officer’s Findings**

The LHO analyzed this case alongside the three pronged test created in *Florence Co. School District Four v. Shannon Carter*, 510 U.S. 7 (1983). He divided the time period up into two portions – the time from the beginning of the case until the IEP was written, and the time after the IEP was written. The LHO found that in the first time period, the District did not provide the student a FAPE, the Parents had designed a program to help the Student make

with appropriate services, and that the compensatory education plan being offered does not make up for the fact that the Parents made financial outlays to ensure the Student made academic progress. He also found that he should not take into account any insurance contribution and awarded \$29,827.40 in reimbursement for that time period.

For the second time period, the LHO found that APE was not denied, despite a difference in methodology preferences. He did not rule on the appropriateness of the current educational services. Because the family moved out of the District and the Parents are now homeschooling the Student, he said they are no longer entitled to services under an IEP. Therefore, he denied the reimbursement request of \$39,751 for the period of April 1, 2016, to December 31, 2016.

The District has appealed the LHO's first finding. The Parents did not appeal the LHO's second finding. Therefore only the first finding is before me in this appeal.

## **V. Discussion**

### **1. The Claim is not barred by the IDEA's two-year statute of limitations**

The District requested dismissal of all or part of the claim based on the Individual with Disabilities Education Act's (IDEA) two-year statute of limitations (20 U.S.C. §1415(f)(3)(C)).

First, the District argued that the entire claim should be barred because the parents filed the due process request on November 15, 2016, after the two-year statute of limitations tolled: "Parents knew or should have known the District failed to identify and evaluate the Student at least by May 2014, if not earlier." District Brief, P. 8.

The District did not argue that the statute of limitations should bar the Parents' entire claim at the hearing. During the hearing, the District referenced the statute of limitations to draw a limit on the timeframe of the claim. (Tr. P. 9, Lawyer for District: "...our position is and the

evidence strongly supports the fact that the compensatory education plan compensates the parents for all expenses from March 21, 2016, backwards, and of course with the two-year statute of limitations under the IDEA and the due process case being filed in mid November of 2016, you can only, you can only possibly look back to November of 2014. That's, that's [sic] an absolute limit on the period that can be considered in the past, and lots of expenses that the parents are seeking reimbursement for pre date November of 2014....")

Because the District did not raise the argument at the local hearing (and in fact, one could argue that they admitted the claim fell within the statute), I must consider the issue waived. *See Pollowitz v. Weast*, 90 Fed. Appx. 438, 444 (4<sup>th</sup> Cir. 2001) (declining to review issues that were not raised by the lower authority) (citing *United States v. LA Trucker Lines*, 344 U.S. 33, 37 (2005)); *Wilder Corp. v. Wilke*, 330 S.C. 71 (1998) (finding that an issue must be raised at the trial level to be preserved for the appeal); *Doe v. Arlington Cty. School Bd.*, 41 F.Supp.2d 599 (D. Va. 1999) (stating that an issue raised in an initial due process hearing, but not argued and briefed on appeal, is deemed waived) (citing *Moubry v. Independent Sch. Dist.* 696, F. Supp. 2d 1086 (1099) (D.Minn. 1998)). While none of the cases cited above address this exact issue, taken together they show that an issue is waived if not raised at a lower level. Therefore, I will not determine whether the two-year statute of limitations barred the entire claim.

Second, the District argued, if the claim is not barred, then the period of recovery must not extend back beyond November 15, 2014. The District and Parent are correct that only services within the time period of November 15, 2014, through April 1, 2016, should be included in the calculation of reimbursement. The Parents did not dispute this conclusion. In fact, in his closing argument, the Parents' attorney referred specifically to the time period the District believes is appropriate in his request for reimbursement. "Therefore, we think that in

addition to the \$29,827.40, the parents should be reimbursed for the time period from November 20<sup>th</sup>, 2014, to April 1, 2016.” (Tr. p. 268). In the final order, the LHO referenced the time period for payment as being April 2014 through March 2016, but in fact, the total granted matched the requested reimbursement for the more narrow time period. I agree with the Parent’s contention that the LHO’s reference to April 2014 as the time period is simply a scrivener’s error. (Parents’ Brief, p. 7). Only services in the time period from November 15, 2014, through April 1, 2016, are included in the reimbursement ordered, so I make no change to the LHO’s ruling based on this argument.

**2. The claim should not be denied based on lack of notice to the District that Parents would seek reimbursement for private service expenses.**

The District argues that “Parents’ abject failure to provide notice to the District of dissatisfaction with the compensatory services and that they were seeking reimbursement, until the filing of the instant due process complaint, is sufficient reason alone to bar their claim.” District Brief P. 10. The District appears to focus on the Parents’ lack of notice only during or after the creation of the compensatory services plan, which occurred in April/May 2016. “Parents presented no evidence that they communicated dissatisfaction *with the compensatory services plan*, that they were obtaining private services because of *such dissatisfaction*, or that they would be asking the District to pay for such services.” *Id.* (emphasis added). But even if one assumes that the lack of notice could or should bar reimbursement, no reimbursement for the time period indicated by the District’s argument is at issue in this appeal. The LHO decided that the Parents are not entitled to reimbursement after compensatory services were put into place. Even if the Parents had given notice at the time compensatory education services were discussed,

the District would have had to go back in time to rectify the problems leading to the reimbursement order at issue in this appeal.

Even construing the District's argument to be that the Parents should have provided notice of their dissatisfaction with services offered by the District at an earlier point in the timeline would not change the result, because the District did not offer any services under the IDEA at an earlier time. Notice is relevant when analyzing the third of the 3-prong test created by *Florence Cnty. Sch. Dist. Four v. Carter* 510 U.S. 7 (1993), equitable considerations. The IDEA's notice requirement states that the cost of reimbursement for private placement "may be reduced or denied" in certain circumstances, including when parents fail to give proper notice of their rejection of a proposed IEP. 20 U.S.C. § 1412 (a)(10)(C)(iii) (emphasis added). A LHO can consider timeliness of a parent's notice during its consideration of equitable issues. Because it is reasonable to permit some claims under the notice requirement, the LHO maintains discretion on this requirement. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 247 (2009).

The notice requirement can hinge on the presence of active evaluations and/or an IEP process. All three cases cited by the District referred to situations in which an active IEP and evaluation process were in place. *Frank G. v. Bd. Of Educ.*, 459 F.3d 356, (2<sup>nd</sup> Cir., 2006), *W.D. v. Watchung Hills Reg'l High Sch. Bd. Of Educ.*, 602 Fed. App'x 563 (3<sup>rd</sup> Cir., 2015), *Ashland Sch. Dist. v. Parents of Student E.H.*, 587 F.3d 1175 (9<sup>th</sup> Cir., 2009). At the point when the Parents started accessing private resources, no active evaluations were being conducted and the school, in fact, was still arguing that the Student did not need special education services. This is an important distinction. The IDEA provides that reimbursement may be barred or reduced if the parents fail to provide notice "at the most recent IEP meeting." 20 U.S.C. § 1412(a)(10)(C)(iii)(I). When, as here, a district fails to hold an IEP meeting, the notice

requirement is not triggered. Moreover, a failure to provide notice “may” lead a LHO, when considering equitable factors, to reduce or bar reimbursement. *Id.* It is not mandatory. Here, given the District’s failure to identify the Student as a child with a disability or to engage in an IEP process during the relevant time period, the LHO was well within his discretion in not reducing or barring reimbursement.

For the reasons above, I make no change to the LHO’s order on the basis of this argument.

**3. The LHO properly found the District did not meet the FAPE requirement during the first time period in question and awarded reimbursement for that time period, despite compensatory education being put into place at the end of the time period in question.**

The District argued three points:

- 1) The LHO’s analysis of the denial of a FAPE in the first time period (November, 2014 through April 1, 2016) was erroneously completed. The District argued that he should not have looked at the denial of a FAPE during the first time period, but only at whether the compensatory services plan was inadequate.
- 2) The LHO awarded “double compensatory” services because the compensatory services provided by the District beginning in April 2016 compensated retrospectively for this first time period.
- 3) The Parents should have pursued reimbursement at the IEP meeting on March 21, 2016 at which the compensatory education plan was discussed; they cannot now pursue reimbursement.

I will discuss the first two points together. The first two questions get fundamentally to the question of whether a Student may be entitled to both compensatory education and

reimbursement for private services obtained during the same time period in which a FAPE was denied. By offering compensatory education, does a FAPE suddenly exist for the time period prior (at least for purposes of evaluating a reimbursement claim)? Does the District still have an obligation to reimburse parents for costs they incurred in keeping a child in school during a time period when the District was not providing a FAPE?

The two cases the District cites as arguments that the two remedies could not exist simultaneously are not appropriately applied to the situation at hand. The District cites *P.P. ex rel v West Chester*, 585 F.3d 727 (3<sup>rd</sup> Cir., 2009), as making the claim that “compensatory education and tuition reimbursement are not available for the same period of time.” A careful read of *P.P.*, however, suggests a different conclusion. In *P.P.*, tuition reimbursement was denied because the district was in fact offering a FAPE, and compensatory education was denied because the Student was never enrolled in a public school. *P.P.* observes that the two are distinct remedies and distinguishes them in purpose, but makes no comment on whether they can overlap in time. The District cited *Blake C. ex rel Tina F. v. Department of Educ., State of HI*, 593 F. Supp.2d 1199 (D.Hawaii.2009) for the claim that “A child is entitled to both remedies only when each is for a different period of denial.” (District Brief, p.12) While the initial facts of *Blake C.* do focus on three distinct periods of time, the case heard by the district court focused only on one year for which the court granted tuition reimbursement but denied compensatory education because of a variety of procedural issues in the case. *Blake C.* also made no comment on whether both were available at the same time. Neither of these cases supports the District’s argument that the determination of remedy should look only to whether the compensatory education plan provides a FAPE. They also do not support the argument that the award of both tuition reimbursement and compensatory education serves as a double compensatory award.

Instead, two cases not cited by either party support the conclusion that both compensatory education and tuition reimbursement can be offered for the same period of time when addressing an earlier denial of FAPE. *Jefferson Cty. Bd. Of Educ vs. Breen*, 853 F.2d 853 (11<sup>th</sup> Cir., 1988), actually awarded both compensatory education and tuition reimbursement to a student. In this case, a parent put their child in their choice of private school. Upon finding that this placement was the only choice for a FAPE for this child, the court awarded both tuition reimbursement for the time period and compensatory education for two additional years for the student. In doing so, the court stated “reimbursement merely requires the [Board] to belatedly pay expenses that it should have paid all along...” *Id.* at 857 (citing *Burlington, School Comm. v. Massachusetts Dep’t of Educ.*, 471 U.S. 359, 370–71 (1985)). Compensatory education, the *Breen* court said, “is necessary to preserve a handicapped child’s right to a free education. Without it, the child’s right would depend upon his or her parent’s ability to fund the education during the years of administrative proceedings and federal court litigation.” *Id.* at 857. A 2<sup>nd</sup> circuit case made a similar point, when it stated that reimbursement “is a remedy limited to what has been paid,” and compensatory education should fill the gap of what else the child needed over the time period when FAPE was not provided. *Doe v. East Lyme Bd. of Educ.*, 790 F.3d 440, 456-457, 2<sup>nd</sup> Cir, 2015).

In *Breen* and *Doe*, the presence of compensatory education does not immediately correct all harm created by a lack of a FAPE prior to the start of compensatory education, thus negating the first two arguments made by the District.

Further, denying the Parents compensatory services after such a long period of time of procuring services on their own would go against the principle in *Burlington*: “If they choose the latter course [to pay for services what parents consider to be an appropriate placement], which

conscientious parents who have adequate means and who are reasonably confident of their assessment normally would, it would be an empty victory to have a court tell them several years later that they were right but that these expenditures could not in a proper case be reimbursed by the school officials.” 471 U.S. at 370. If a district could escape responsibility for reimbursing parents simply by offering compensatory education after multiple years of failing to provide a FAPE, *Burlington* could be rendered ineffectual.

I turn now to the third issue raised by the District -- whether the Parents should have raised the issue of reimbursement in the IEP meeting where compensatory services was discussed. In the hearing, the mother testified that they accepted the compensatory education plan as stated despite wanting more services: “We asked for more services, but they were unwilling to provide it, so rather than lose everything, we took what we were offered.” (Tr. p. 89) She also stated that she did not have a real opportunity to ask for more under the compensatory education plan, “It was offered to me, and we agreed to it, but it was predetermined, it was not discussed.” (Tr. p. 116). Moreover, it is not clear why notice at the compensatory education meeting is relevant. Notice, or lack thereof, after the denial of a FAPE does not change the fact that the District failed to provide a FAPE, and, as noted above, that they may have a duty to reimburse parents for costs the District should have incurred in the first instance.

For the reasons above, I find that the LHO did not err in the method of application of the three-prong test to the decision about reimbursement in the time period in question. The LHO made a number of factual and credibility decisions in his consideration of these three-prongs, and I must accord the LHO due deference. *Doyle v. Arlington Cty. Sch. Bd.*, 953 F.2d 100, 105 (4<sup>th</sup> Cir., 1991).

For the reasons above, I make no change to the LHO’s order on the basis of this argument.

**4. Parents established that some but not all of the services arranged were reasonably calculated to yield educational benefit.**

The District argued the LHO did not correctly ensure all services were reasonably calculated to yield educational benefit. In awarding reimbursement for all the service providers, the LHO ruled that “It is hard to imagine the [Student] would have made the academic progress that he did in school without the counseling and support services provided by the [Parents’] professionals.” The District argued that this ruling is based on speculation and without evidence or documentation. The Parents argued that the evidence raised during testimony makes it clear that the Student was at risk of residential treatment, and that only through these services did the Student continue to experience academic success.

To determine the standard of review for value of these services, I will use a two-step test. First, does the service fall within the definition of “related services” under the regulations supporting the IDEA?

Related services means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training. 34 C.F.R. § 300.34 (a).

Only services which qualify under the IDEA can trigger reimbursement; a District is not liable to reimburse a parent for services which the IDEA would not require the District to provide itself.

Second, do the services meet the necessary standards for yielding educational benefit? In *Carter*, the Supreme Court held that a unilateral parental placement need not meet the

requirements of a public placement in the IDEA. 510 U.S. 7. *Carter* stated “ ... to read the §1401(a)(18) requirements as applying to parental placements would effectively eliminate the right of unilateral withdrawal recognized in *Burlington*.” *Id.* at 13. Further, in *Carter*, the court said that reimbursement is not necessarily barred by failure to meet education standards, including those relating to certification and whether it develops IEPs. Instead, “a private school placement is ‘proper under the Act’ if the education provided by the private school is ‘reasonably calculated to enable the child to receive educational benefits.’” *Id.* at 11 (quoting *Bd. of Educ. of Hendrick Hudson Central School District Westchester City v. Rowley*, 458 U.S. 176, 207 (1982)). . The test I must use then is whether the services are reasonably calculated to receive educational benefits. I need not look at specific state credentials or standards for the service providers.

The District first questioned the value of Blooming Kids, both the providers’ credentials and the services provided. First, Blooming Kids provided services that fit within the definition of related services as a counseling service. I do not need to consider the credentials of the employees at Blooming Kids. *Carter* made it clear that the parents can choose the services without regards to state standards, so long as educational benefits are received. *Id.* at 14. I also need not address the specific costs associated with Blooming Kids. *Carter* also addressed the concern that parents may burden the state with a program that is more expensive than state-approved programs by saying that the LHO has the ability to consider the costs as an equitable factor in determining reimbursement. *Id.* at 15.

In determining whether the services were beneficial, I must look to the evidence in the hearing, including that of the mother who said Student’s grades dropped until she started using Blooming Kids’ services. (Tr. pp 126, 131, 132). Further considerations of their

benefit requires a study of the credibility of witnesses in the hearings and of the evidence they present. As stated in the standard of review, I must give questions of credibility deference to the LHO. The LHO clearly decided that the District should be responsible for all of the costs of BloomingsKids, and the District has not shown that BloomingsKids did not provide the educational values the Parents and other witnesses said they did.

The District also questions the payments to the psychiatrist involved in the case. Under the definition of related services provider, medical costs are permitted for *evaluative and diagnostic* purposes only. Districts are not responsible for providing medical services beyond those purposes when those services must or are provided by a physician. See *Cedar Rapids Community School District v. Garret F. and Charlene F.*, 526 U.S. 66, (1999), 75-76 (citing *Irving Independent School Dist v. Tatro*, 468 U.S. 883, (1984)). The IDEA regulations differentiate services which can be provided by a school nurse from those that have to be provided by a medical doctor in the definition of related services. The psychiatrist's services included diagnostic services as well as ongoing medical checks, psychotherapy, and prescription refills that had to be provided by a doctor. The services of the psychiatrist that are not evaluative or diagnostic must be removed from the reimbursements awarded to the Parents. The record does not provide the information needed to make this determination, so I remand this issue to the LHO to determine which payments to the psychiatrist are specifically focused on evaluations and diagnosis rather than on ongoing treatment, prescription refills and other medical treatments.

Finally, the District questions the clinical psychologists who "provided the Students with social skills trainings in a group settings for youth with Asperger's in one or more sessions." District Brief, p.15. This work falls within the definition of related services. Whether it was

educationally beneficial comes down to a question of credibility of his testimony and the testimony of the Student's mother, and I must defer to the LHO.

The District did not specifically raise questions about other services provided, so I will not address them. In summary, the LHO must re-consider the portion of the reimbursement that was paid to the psychiatrist. Only payments made for diagnostic and evaluative purposes should be included in the final holding. All other payments ordered by the LHO are affirmed.

**5. The LHO did not misapply the collateral source rule in including insurance payments in the reimbursement order.**

The District contended the reimbursement award should include only out-of-pocket expenses minus the insurance company's payments. The District's argument hinges on the idea that reimbursements are a remedy rooted in equity rather than damages. (citing *Burlington*, 471 U.S. at 370). The collateral source rule applies, the District said, only if reimbursements are rooted in damages.

The Parents argued that the collateral source rule does apply, regardless of whether the reimbursements are rooted in damages or equity. "The collateral source rule is the well-established rule that a party that causes injury – such as a tortfeasor—cannot reduce the amount of remedy it must pay to the injured party based on amounts the injured party receives from collateral sources." (Parents' Brief, p. 12) (citing *Chisholm v. UHP Projects, Inc.*, 205 F.3d 731 (4<sup>th</sup> Cir. 2000) and *In re W.B. Easton Const. Co., Inc.*, 320 S.C. 90, 92 (1995)).

Unfortunately, no clear case or statutory law exists to help guide this question. In 2016, however, a District court in Illinois heard a similar issue and provided some guidance that I find persuasive. *Jason O v. Manhattan School District No. 114*, 173 F.Supp.3d 744 (N.D., Illinois,

2016). *Jason O* found that the collateral source rule should be considered when looking at equitable factors. The special education context is analogous to tort law, in which Section 921A(2) of the Restatement (Second) of Torts states that the tortfeasor should not receive a “windfall” because the injured party procured insurance, applies to the special education context. The *Jason O* court continues:

This *de facto* moral hazard problem (that is, the tortfeasor does not bear the full cost of his actions when insurance offsets damages) flows into the special education context with equal force, as this case demonstrates. See Richard A. Posner, *Economic Analysis of Law* § 6.13 (9th ed. 2014) (providing the economic case for the collateral source rule). Here, the School District, like a tortfeasor pocketing a windfall, has dipped into Plaintiffs' insurance, thereby appropriating the benefits of the premiums the parents paid and transforming their insurance into a school subsidy, and has thereby avoided the cost of conducting evaluations or providing services that the District otherwise had a legal duty to procure itself in the first instance. See, e.g., 34 C.F.R. § 300.502. Equity thus requires that this result not be sanctioned. Indeed, had insurance covered Jason's evaluations in full, the School District would have paid nothing absent application of the collateral source rule.

Limiting parent recovery to the post-insurance, out-of-pocket costs for private evaluations, as the hearing officer decided without much analysis, also presents further equitable dangers. As just one example, as parents access their insurance more often to cover private evaluations or services (an outcome favored by school districts only on the hook for a fraction of the bill), insurers may respond by limiting the scope of coverage or raising the cost of premiums to parents. Likewise, parents, in ostensibly conducting evaluations on the school district's behalf, may also reach insurance policy limits on the number of covered evaluations or therapy sessions, and thus, the improper subsidy of the school district will deprive the parents of their ability to use their full private resources to procure the additional care their children actually need, and do so beyond the legal minimums required by the FAPE mandate. In the absence of full recovery, the end result is that parents and children would suffer real and unjustified harms, and school districts would unfairly profit by outsourcing their own statutory obligations. The law can, and should, do better.

Further, the District argued because the due process complaint specifically asked for “out of pocket expenses,” the Parent should not be entitled to more. This due process complaint was

a hand written document by a parent (not a lawyer), and all the requests in the actual due process hearing referred to the full set of expenses (insurance plus those paid for by the parents). I do not think this slight misstatement is significant enough to cause me to overturn the decision by the LHO. The LHO used his equitable discretion to grant the full reimbursement for the time period at hand, without consideration of insurance payments.

**6. The LHO made an appropriate decision as to the adequacy of the documentation and payment of the services delivered.**

The District's final argument is that the LHO should not have awarded reimbursement on the basis of the invoices presented. The District argues that the documents do not sufficiently support the amount awarded by the LHO. The District seems to want specific invoices and corroboration for each charge on the spreadsheet and "amounts little more than unverified estimates as to what was billed and paid." They cite a 9<sup>th</sup> Circuit case in which reimbursement was not sufficiently documented. *S.L. ex rel. Roof v. Upland Unified Sch. Dist.* 747 F. 3d 1155, 1160 (9<sup>th</sup> Cir. 2014). In *Upland*, the court did not allow for reimbursement of costs that "relied on the witness' bare estimations without supporting documentations or even a statement that the aides were actually present on every one of those school days for the full six hours." Further, in *Upland*, there was contradictory testimony about the hours worked and the presence of aides each day. These inconsistencies and the lack of any documentation besides verbal testimony seem to be the reason for denying reimbursement here.

While more documentation would certainly be helpful, the District's argument turns on the credibility of the witnesses and the evidence presented. The parents testified that the spreadsheet laying out the costs was directly from the insurance website. The mother testified

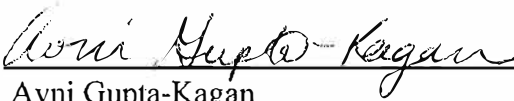
the ledger is a document of all that we have paid for [the Student] since he's been in the Fort Mill School District for therapies and services . . . so he could function.” (Tr. p. 96-97). This spreadsheet, if found credible, certainly provides more documentation than that discussed in *Upland*, and adequate documentation to justify the reimbursement order. Because there is no case that lays out the exact amount of documentation required, the question turns on an issue of credibility of the witnesses, to which I must defer to the LHO.

## **VI. Conclusion**

For the foregoing reasons, the District's request for denial of the reimbursement in the amount of Twenty-Nine Thousand Eight Hundred Twenty-Seven Dollars and Forty Cents (\$29,827.40) is remanded to the LHO to determine the reduction in reimbursement based on costs paid to the psychiatrist that were not evaluative or diagnostic in purpose. The remaining portions of the LHO's order are affirmed.

## **VII. Notice of Appeal Rights**

Any party aggrieved by this decision may commence a civil action with respect to the complaint presented in any state court of competent jurisdiction or in a district court of the United States within ninety (90) days of the date of this decision. 20 U.S.C. § 1415(i)(2)(A)-(B) and 34 C.F.R. § 300.516.

  
Avni Gupta-Kagan  
Administrative State Review Officer

Columbia, South Carolina  
March 13, 2017