

# “WHAT MADE THE DIFFERENCE?”

## VOL. II



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Today’s hearing environment is more precarious for parents seeking reimbursement for after-school services. In addition to proving the appropriateness of their student’s private school placement, parents seeking funding for after-school services must also bear the burden of establishing the appropriateness of those services. On top of that, parents must establish that their after-school services are an “equitable remedy” under the Burlington-Carter Analysis. While the controlling law clearly establishes that there is no “one size fits all” approach to special education, Parents still bear the burden of showing that their “Dual-Program”, one that includes a private school placement and after-school services, is both appropriate AND equitable under the law. And while scrutiny of such dual programs has risen in recent years, we at Mayerson, Mure and Hobbs are proud to highlight a recent victory regarding a student’s need for both a private school placement and after-school services.

At issue for this Student was placement at a full-time, ABA-driven private school, along with after-school services in ABA therapy, Occupational Therapy, and Speech Language Therapy. For its part, the Department of Education did not allege that it provided the student with a Free and Appropriate Public Education (FAPE). Rather, the DOE hedged all of its bets on “disproving” the appropriateness of the Student’s unilateral program. In doing so, the DOE employed a two-fold argument that has become very common in dual-program cases. The DOE’s first argument maintained that a student’s private school placement should be able to provide all necessary services and instruction within the school day, thereby rendering any after-school services “Excessive” and the purpose of “Maximization.” Second, the DOE argued that the Student’s need for, and receipt of, after-school services demonstrated that the Student’s private school placement was inappropriate under Prong II of the Burlington-Carter Analysis. Ultimately, neither of these arguments carried much weight in the Impartial Hearing Officer’s Findings of Fact and Decision.

The DOE’s first argument, that the Student’s services and instruction should only be rendered during the school day, is contrary to well-established law. What this argument fails to appreciate is the “Individualized” nature of special education services. As consistently held by the Second Circuit, there is no “one size fits all” approach to special education services. In fact, such an approach to special education can be seen as “Predetermination”, wherein the Student’s special education program is “predetermined” before their specific deficits, learning needs, and present levels of performance are considered in good faith. Thus, as argued by the Parents at the hearing, the appropriateness of a student’s unilateral program should not be confined to “what’s available in the District 75 setting”, and on the assumption that a student’s learning needs are confined to the school day. Instead, a unilateral program’s appropriateness is based on whether the program, as a whole, is “reasonably calculated to enable the child to receive educational benefits.” *Frank G.*, 459 F.3d at 364.

Similarly, the DOE’s second argument that the Student’s need for and receipt of after-school services demonstrate the “inappropriateness” of the private school carried little legal weight. As with its first argument, the DOE attempted to limit the services available to a student to those that can be provided in a public school setting, thereby ignoring the student’s individualized needs. Pursuant to SRO Decision 23-237 (which cited and relied on 2nd circuit case law, such as *C.L. v. Scarsdale Union Free Sch. Dist.*, 744 F.3d 826,836 [2d Cir. 2014] and *Frank G. v. Bd.of Educ. of Hyde Park*, 459 F.3d 356, 364 [2d Cir. 2006]), a student’s afterschool services can be awarded as part of the parent’s reimbursement claim under Prong II, if such services were “reasonably calculated” to provide a meaningful educational benefit.

While the law was on the Parents’ side regarding the DOE arguments, the parents still had the burden of presenting a coherent and persuasive case that 1) established the appropriateness of the Student’s dual program, and 2) established that the parents’ request for relief for tuition reimbursement AND reimbursement for after-school services was equitable.

The success of this case hinged on exhaustively demonstrating the extent of the student’s deficits. It is not enough for the parent to simply point to the “success” and “progress” made while the Student was enrolled in their dual program. Rather, the parents must be able to demonstrate that the severity of their student’s disabilities necessitates the provision of a dual program. For this Student, this meant explaining to the Impartial Hearing Officer their multiple disabilities, and the associated comorbidities of deficits that came with them. This was done by including not only reports from the Student’s school team and after-school service providers that addressed the level and extent of their deficits, but also clinical reports (e.g., Neuropsychological Evaluation and Report), which provided a comprehensive analysis of the student’s learning and developmental deficits.

In addition to reports from the Student’s clinicians, educators, and service providers, the Parents here also provided a united front in their testimony across the Private School Representative and after-school service providers. To help establish the necessity of the Student’s dual program, and by extension the “appropriateness” of the Parent’s requested relief, each parent witness (E.g. service providers and private school representatives) was able to testify to the communication and collaboration that took place between the Student’s “in-school” and “after-school” teams.

Such collaboration, which was established well before the Parents' due process complaint was filed, helped demonstrate the tailored, individualized nature of the Student's dual program. As noted in IHO's analysis, the student's providers, "collaborate closely with the Student's classroom team to reinforce skills across settings, including sequencing, inferencing, written expression, sustained attention, executive functioning, and task endurance, thereby ensuring that the Student acquires, retains, and functionally applies academic skills taught in the classroom."

Securing reimbursement for a dual program may be difficult, but it is not impossible. Securing such a program requires a detailed and cohesive record that amply demonstrates the student's programming is clearly tied to their ability to make meaningful progress. Mayerson, Muré and Hobbs is proud of this recent success, and share this case in the hope that it will empower parents to seek out and advocate for the programming that truly fits their child's needs.



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