

“WHAT MADE THE DIFFERENCE?”

VOL. III



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The cornerstone of virtually every successful reimbursement claim is a strong record. A record made not just for the Due Process Hearing, but also for a potential appeal. The importance of making a strong record for a potential appeal was especially evident in a recent SRO decision our firm received regarding a Student’s entitlement to tuition reimbursement for a specialized private school and the expense of after-school services. While the appeal to the State Review Office (SRO) was a lengthy process, we at Mayerson, Muré, and Hobbs are proud to highlight a recent victory regarding a student’s need for after-school services along with his placement at a specialized private school. Let’s explore “what made the difference.”

At issue before the Impartial Hearing Officer (IHO) was the Student’s placement at a full-time, ABA-driven private school, along with after-school services that included ABA therapy and Physical Therapy. After multiple days of hearing, the IHO issued a Findings of Fact and Decision that awarded tuition reimbursement for the Student’s private school but denied reimbursement for the student’s after-school services. The IHO had reasoned that while the Student’s after-school services were “appropriate” under Prong II of the Burlington/Carter Analysis, the requested after-school services were “excessive” under Prong III.

On appeal, we challenged the IHO’s findings regarding the Prong III “Equitable Considerations” for our Student’s after-school ABA and Physical Therapy (“PT”) services. As this was an appeal, we were limited to arguing the record established before the IHO. For the Student’s after-school ABA services, this meant highlighting the ABA provider’s testimony showing that such services were necessary to ensure the Student was actually available to learn during the school day. Moreover, our appeal had to highlight the student’s notable deficits in behavioral regulation, communication, activities of daily living, and executive functioning skills, as well as draw the SRO’s attention to the private evaluations and reports submitted on the Student’s behalf. Lastly, our appeal needed to strike a balance between differentiating the student’s home ABA program and his Private School program and showing that the two programs were not at odds. For the Student’s PT services, our appeal focused on differentiating the PT programming offered after school, with the Occupational Therapy (“OT”) services offered during the school week. For both services, the tipping point was highlighting not just the **benefit** of the services, but their **necessity** as well.

On appeal, the DOE, for its part, argued that the Student’s ABA and PT services were excessive under the Prong III standard, in that the services were for maximization, and went beyond what the DOE was obligated to provide the Student to facilitate a Free and Appropriate Public Education (FAPE). For the SRO, this appeal turned on whether the ABA and PT services were used to maximize and/or generalize skills, and whether the IHO properly denied reimbursement for those after-school services.

For the Student’s PT service, the SRO found the record did not support the IHO’s conclusion that the in-school OT services were sufficient to address the Student’s PT needs. Here, the underlying record played a pivotal role. Specifically, the SRO was able to conclude the Student’s after-school PT was not excessive due to:

1. The Student’s PT progress reports and goals and the Private School’s OT progress reports showing that, while there was some overlap in the gross motor skills addressed in each program, the PT services addressed skill sets that the in-school OT was not addressing; and
2. The DOE’s own IEP recommended that the Student receive both OT and PT services at the frequency the student was afforded through his private program

As such, the SRO found that the IHO and DOE were “hard-pressed to conclude...that such services so significantly exceeded what would be required for the district to offer FAPE to the student that they should be denied as excessive.” Moreover, the SRO noted that the record before the IHO established, “that there was interdisciplinary agreement on the fundamental areas to support the student’s motor development, but the fact that some of those needs were addressed outside of the MCC setting does not automatically render one of the services so unnecessary as to be excessive.”

For the student’s ABA services, the SRO similarly compared the in-school goals and progress reports with after-school ABA goals and treatment plan to determine whether such services were excessive. And, as with the Student’s PT services, the SRO found that while the Private School program and after-school ABA services overlapped in some instructional domains, both were sufficiently distinct as not to render the after-school services unduly repetitive. Moreover, the SRO recognized the after-school BCBA’s testimony, which highlighted the student’s need for 1:1 ABA services using various techniques, as well as his need for highly structured, 1:1 settings with continuous high rates of reinforcement and task repetition.

Critically, the SRO also recognized that the record established collaboration between the after-school ABA services and the student’s Private School, and that it contained two evaluative reports recommending that the Student continue to receive after-school ABA services in collaboration with his school program.

This recent victory further underscores the need for a detailed and cohesive record that clearly demonstrates that the student’s after-school programming strikes a critical balance by addressing their academic needs without unreasonably duplicating the services provided in school. In demonstrating this balance, it is also imperative to show some meaningful level of collaboration between the student’s school and after-school program. We at Mayerson, Muré, and Hobbs are proud of this recent success and share “what made the difference” in this case in the hope of empowering parents to seek out and advocate for programming that truly fits their child’s unique needs



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