

**BEFORE THE
IMPARTIAL HEARING OFFICER**

STATE OF NEVADA

In the Matter of

STUDENT¹, by and through his
Grandparent

Petitioners,

v.

CLARK COUNTY SCHOOL
DISTRICT

Respondent.

DECISION OF THE HEARING
OFFICER

May 25, 26, 27, 28, 2010 and
June 28, 2010

Representatives

Greg Ivie, Esq.
Legal Aid Of Southern Nevada
for Petitioners

Phoebe V. Redmond, Esq.
for Clark County School District

Hearing Officer

Gretchen Greiner, Ed.D.

¹ Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

INTRODUCTION

The Petitioner is a 9 year old boy who attends elementary school in the Clark County School District (District) in Nevada. The parties stipulate that the Petitioner is eligible for special education and related services through the Individuals with Disabilities Education Act (IDEA) (20 USC § 1400 et seq, 34 CFR Part 300) under the category of hearing impaired. This action arises under the IDEA and *Nevada Revised Statutes* (NRS) Chapter 388.

PROCEDURAL BACKGROUND

Petitioners' request for a hearing was received by the District on January 25, 2010, with a decision due date of April 10, 2010. *Hearing Officer exhibit (HO)-1* A status conference was scheduled for February 16, 2010, but was re-scheduled for February 16, 2010, and once again delayed until February 23, 2010. *HO-2, HO-3, HO-4* During the status call, a pre-hearing conference was scheduled for March 5, 2010. *HO-6* The parties attempted mediation but were unsuccessful in resolving the issues. During the pre-hearing conference call, the parties requested an extension for the hearing and issuance of the decision to May 21, 2010. The extension was necessitated due to already scheduled conflicts on the part of the District and to allow the Petitioner's Grandparent to secure legal representation. The Hearing Officer was assured that the Petitioner was not being harmed by the delay. *HO-7*

Notice was received of the Petitioner's legal representation on March 16, 2010. *HO-9* The parties initiated a conference call with the Hearing Officer on April 14, 2010. The Petitioner's representative asked for an extension to prepare his case, and the request was granted. The hearing was re-scheduled for May 25 through 28, 2010, with a decision to be rendered on or before June 25, 2010. *HO-11* On May 11, 2010, the parties again requested a conference call. The Petitioner had a witness who would not be available for appearance during the scheduled dates. The Hearing Officer required the parties to look into other means of securing the witness' testimony, such as telephonic, interactive video or satellite. On May 12, 2010, the parties reconvened a call with the Hearing Officer. There was no way to connect this witness to the hearing during the scheduled dates, due to the remoteness of her location. An additional day of hearing was scheduled, June 28, 2010, to accommodate this witness. The decision would then be rendered on July 21, 2010. *HO-16*

Both parties submitted their witness lists as scheduled, on May 11, 2010. *HO-12, HO-13. HO-14* Disclosure of exhibits was achieved as scheduled on May 18,

2010.

The matter proceeded to hearing and was heard before Gretchen Greiner, Hearing Officer, beginning on Monday, May 25, 26, 27, and 28, 2010 at Nova University located at 8945 West Russell Road, Las Vegas, Nevada, continuing and concluding on Monday, June 28, 2010 at the District offices, 5100 West Sahara, Las Vegas, Nevada.

Petitioners (Petitioner and Grandparent) were represented by Mr. Greg Ivie, Esq. of the Legal Aid Center of Southern Nevada. The Grandparent was present during the entire hearing. The Parent did not attend the hearing, as an infant sibling of the Petitioner had surgery on May 25, 2010. Joining Mr. Ivie were two paralegals. Mrs. Phoebe Redmond, Esq., represented respondent District. Present throughout the hearing with District's counsel were the LEA representative and three Compliance Monitors.

The witnesses, in order of appearance, were: **Librarian, Grandparent, Sunday School Teacher, Reading Teacher, Math Teacher, Auditory Verbal Therapy (AVT) Specialist, Oral Teacher, Principal, Teacher of the Deaf, Audiologist, Low Incidence Disabilities Team member, CI Audiologist, Speech Language Pathologist (SLP), Independent Evaluator.** Re-appearing to introduce a DVD into evidence was the **Grandparent.**

At the beginning of the hearing, by stipulation of the parties, the parties' exhibits CCSD 1 through 7 (hereinafter D), Petitioner 1 through 14 (hereinafter P), and Joint Exhibits 1 and 2 (hereinafter J), including the table of contents/list of documents in each, were accepted as submitted into evidence. However, the Hearing Officer stated that exhibits submitted but not entered into the record through witness testimony would be returned to the parties. No exhibits were returned to the parties as all were entered into evidence through witness testimony, with the exception of pages D-174 through D-179, which were discovered to be duplicates of other pages and subsequently removed from District Exhibit 13. The District raised objection to the admittance of a DVD of the Petitioner, who was not present at the hearing. The DVD was viewed so all could see it, as the District had been unable to open it. The District renewed their objection to the DVD. The objection was overruled and the DVD was accepted for worth by the Hearing Officer.

Following oral closing arguments, the evidentiary hearing was concluded on June 28, 2010, and the record was closed and the matter submitted to this Hearing Officer for decision.

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Issues

The request for impartial due process initially encompassed two issues that are within the jurisdiction of this Hearing Officer. Specifically, the Petitioner disagreed with the District's proposed change in the Petitioner's instructional methodology from an oral program to a total communication program, and also sought reimbursement for an independent educational evaluation secured by the Petitioner. However, in closing arguments on June 28, 2010, the Petitioner withdrew his request for reimbursement for the independent educational evaluation, leaving only the single issue of the appropriateness of the instructional methodology for this Hearing Officer to render a decision herein. *Transcript (T)-760*

Requested Relief

As resolution, the Petitioner is seeking an order that would require the District to continue the Petitioner's present oral instructional methodology. Also requested in the original due process complaint had been a request for reimbursement for the independent educational evaluation obtained by the Petitioner, but that issue was withdrawn by the Petitioner and no reimbursement is being sought.

Burden of Proof

It is necessary in this decision to speak to burden of proof. The Petitioner claims the District's proposed instructional methodology is not appropriate for him and specifically seeks a continuance of the oral program that he participated in during the 2009-10 school year. The burden of proof is rightfully on the Petitioner as he is the party seeking relief. *Schaffer v. Weast*, 44 IDELR 150 (U.S. 2005)

FINDINGS OF FACT

This Hearing Officer finds the following facts, based on exhibits and testimony presented by the Petitioner and the District, and all records of pre-hearing conferences and rulings, entered at the hearing as evidence:

1. Petitioner is a student with hearing impairment who will be attending the 4th grade in the District for the 2010-11 school year. The Petitioner has been involved with the District since he was three years old and began attending District special programs near the end of the 2003-04 school year. *T-44* At the time of this hearing, the Petitioner was nine years, eleven months old.
2. The Petitioner was born on July 4, 2000 and was diagnosed at birth with sacral dimple. *T-32* The Petitioner was extensively evaluated

neurologically. *T-33* Ultimately, it was determined that there was no damage to the spinal cord even though his feet were turned out. *T109* After enrolling in the District pre-school at age 3, he began walking, first with a walker, then he cruised the walls until he was able to walk on his own. *T-46*

3. When the Petitioner was about fifteen months old, the family began to have concerns about his hearing. On March 10, 2002, the Petitioner was diagnosed with profound hearing loss. He received his first hearing aids five or six days later. *T-31* The Petitioner began working with a speech therapist and continued to have adjustments made to his hearing aids for about 18 months, until it was determined that he was not getting enough benefit from the hearing aids. *T-34* At this point the family began to pursue cochlear implants. *T-35*
4. The Petitioner received a cochlear implant in his left ear on February 2, 2004, when he was three years, seven months old. *T-35* It was about 5 weeks after the implant that the device was turned on, and the process of mapping began. *T-36*
5. A cochlear implant is an implantable device in which the technology consists of two parts, external and internal. The purpose is to give sound to the brain (internal) and to process speech and sound (external). The sound or speech processor is the outer piece and is connected to the headpiece with a magnet. The internal piece is an actual electrode array inside the cochlea, attached to a receiver stimulator. Sound is sent via radio waves across the skin and perceived as sound in the brain through electrical stimulation. *T-365*
6. Once activated, mapping of a cochlear implant is done by computer. The child is hooked up to a computer and manufacturer driven software checks the functioning of the internal device. Each of the twenty-two electrodes that are placed in the cochlea can be adjusted, once the process has determined, through neural response telemetry, what each electrode needs to have in order to fire so that neural response happens. The device is set accordingly, and an audiogram is used to check the results. *T-194, 195*
7. The Petitioner enrolled in pre-school with the District at the end of the 2003-04 school year, shortly after mapping of his cochlear implant was complete. *T-203, 613, 660* Since then, the Petitioner has attended a variety of schools in the District, and has received instruction from a number of teachers. *T-54* Throughout his school career, he has received his instruction in an oral classroom. *T-70, 88*

8. The processor for the original cochlear implant in the Petitioner's left ear was upgraded in April 2007. The upgrade was mapped very quickly and resulted in improved vocalizations and verbalizations from the Petitioner. *T-41*
9. In September of 2007, in an IEP meeting, the District proposed instructing the Petitioner in a total communication classroom in the annual IEP meeting. *J-114*
10. The Grandparent filed due process because she opposed total communication and wanted the Petitioner to remain in an oral program. *T-115* The issue was resolved, and the Petitioner remained in oral instruction. *T-117*
11. The Petitioner received a cochlear implant in his right ear on September 26, 2007. *T-84, P-25* Mapping of this implant took considerably less time, approximately 2 months, to complete.
12. Because the Petitioner's second cochlear implant was fully operational late in the school year, the family requested that the Petitioner repeat the second grade for the 2008-09 school year. The family felt it would be beneficial for the Petitioner to repeat the grade to catch up on his academics and his speech. *T-50*
13. During the 2009-10 school year, the Petitioner was in the third grade at Harriet Treem Elementary School, placed in a self-contained oral program for the deaf, with inclusion into a general education math program for 20 minutes a day, and into a general education reading program daily, in addition to special classes like gym. *T-51, 152, 167, 243, 425, 532*
14. On November 13, 2009 the District convened an IEP meeting for the Petitioner. The Grandparent was in attendance. The District proposed changing the instructional method for the Petitioner from oral to total Communication. The team was concerned about the Petitioner's limited progress and felt the Petitioner needs more tools to progress. The IEP team recommended that the Petitioner needs sign language to help him improve his communication and academic skills. *T-67, 264, 473, 660, J-8, 24, 119-138*
15. The Grandparent disagreed, and asked for time to seek some additional assessments of the Petitioner. She wanted to take him to the dentist and to the cochlear implant surgeon, Dr. Ashley Sikand, to review his progress. *T-79*

16. The IEP meeting reconvened on January 14, 2010. *P-152 through 156*
There were no changes to the content of the IEP from November 13, 2009
to January 14, 2010. *T-86, 275*

17. In the proposed November 13, 2009/January 14, 2010 IEP, the goals for
the Petitioner were:

- By annual review, in the speech room or classroom setting
Petitioner will develop his ability to auditorily discriminate and
imitate suprasegmental features of speech as measured by
observation and documentation achieving a criteria of 70% and
implement by the Teacher of the Deaf (TOD), Speech-Language
Pathologist (SLP) and teaching staff. *J-127*
- By annual review date, in the speech room or classroom setting
Petitioner will auditorily discriminate and imitate segmental features
of speech as well as one, two, and three- syllable words as
measured by observation and documentation with 70 % accuracy
and implemented by the TOD, SLP and teaching staff. *J-127*
- By annual review date, Petitioner will independently write complete
3-5 word sentences on his own using correct spelling, correct
spacing, sizing and alignment achieving 70%. Implemented by
Special Ed. Teacher and staff. *J-128*
- By annual review date, in a classroom setting, Petitioner will
improve auditory sequential memory skills by recalling and imitating
words, phrases, sentences, and questions achieving 70% as
measured by observation and documentation implemented by
Special Ed. Teacher and staff. *J-128*
- By annual review date, in a classroom setting, Petitioner will
improve auditory sequential memory with 70% accuracy measured
by observation, documentation, teacher-made and standardized
tests implemented by Special Ed. Teacher and staff. *J-129*
- By annual review date, in a classroom setting, Petitioner will
increase vocabulary achieving a criteria of 70% as measured by
observation, documentation, teacher-made and standardized tests
implemented by Special Ed. Teacher and staff. *J-129*
- By annual review date, Petitioner will improve grammar and syntax
by answering simple yes/no and wh questions, combining three or
more words to produce a simple statement, and by imitating three-
four word sentences with 70% accuracy as measured by
observation, documentation, teacher-made and standardized tests
implemented by Special Ed. Teacher and staff. *J-130*
- By annual review date, Petitioner will decode a minimum of 300
high frequency sight words 7 out of 10 times measured by

observation, documentation, teacher-made and standardized tests with 70 % accuracy implemented by Special Ed. Teacher and staff. *J-130*

- By annual review date, in a classroom setting, Petitioner will perform addition and subtraction problems with sums of 18, achieving a criteria of 70% as measured by teacher-made tests, standardized test and work samples implemented by Special Ed. Teacher and staff. *J-131*
- By annual review date, Petitioner will determine the value of any given set of coins with 70% accuracy as measured by observation, documentation and work samples implemented by Special Ed. Teacher and staff. *J-131*

18. There were no goals for sign in the two proposed IEPs. *T-271, 271, 276* Goals for sign would be developed after where he was going to be educated had been determined. *T-276, 698* Goals had been proposed in the IEP, so that all that needed to change was the addition of words to include sign, if the methodology change was agreed to. *T-702*
19. The two proposed IEPs contains the following elements: present levels of academic achievement and functional performance *J-120 through 125*, strengths, concerns, interests and preferences, consideration of special factors *J-126*, IEP goals, including academic and functional goals, benchmarks or short-term objectives *J-127 through 131*, accommodations and modifications (supplementary aides and services, participation in statewide and/or district-wide assessments) *J-132, 133*, special education services *J-138*, related services *J-139*, transportation *J-140*, placement considerations *J141*, and extended school year *J-133*. The IEP team included the Grandparent, an LEA representative, a special education teacher, and a regular education teacher, all of whom are required members. Also in attendance were an SLP, occupational therapist, Low Incidence Disabilities Team (LIDT) member, area coordinator, audiologist, transportation representative, a second regular education teacher, and the LIDT coordinator.
20. The placement for the Petitioner in either the oral program and the total communication is the same, as both are self-contained special classes. *T-276, 474, 553, J-114, 137* Changing from the oral program to the total communication program is lateral move, not a change in placement. *T-474, 670*
21. The Grandparent requested that the District pay for an independent educational evaluation of the Petitioner. *T-87, 135, 136*

22. The Grandparent disagreed with the two proposed IEPs. *J-156* When served with notice of the District's intent to implement the IEP, she filed due process. *J-157, HO-1*

23. The Petitioner has been evaluated regularly for academic progress. One consistent measure has been the Kaufmann Test of Educational Achievement II (KTEA-II). It is scored in grade equivalents (GE), age equivalents (AE) and percentiles (%).

On January 16, 2008, the Petitioner was 6 year, 6 months of age (6-6), he scored as follows: *J-35*

<u>Test</u>	<u>GE</u>	<u>AE</u>	<u>%</u>
Reading	<1.0	<6-0	
Math	K.3	5-6	
Writing	K.1	5-0	

On May 28, 2008, when he was 7.10, he scored as follows: *D-110*

Reading	K.4	5-8	<1
Math	1.3	6-6	9
Writing	K.7	5-0	1

On November 6, 2009, the Petitioner's age was 9.4 and he scored as follows: *D-111*

Reading	1.2	6-6	0.3
Math	1.9	7-3	6
Writing	K.0	50	0.1

And, on April 12, 2010, the Petitioner scored: *D-112*

Reading	K.9
Math	K.7
Writing	K.2

Looking from the scores obtained in January 2008 to the most recent scores from April 2010, it appears that the Petitioner made no progress in reading, a four month gain in math and a one month gain in writing. By looking only at the highest scores earned since the testing in January 2008, it appears that the Petitioner could possibly have gained three months in reading, a year and six months in math, and six months in writing skills over the equivalent of 2 years and 3 months of elapsed school time.

24. The Petitioner has taken the Receptive One-Word Picture Vocabulary Test (ROWPVT) in the last two years to measure his receptive vocabulary, and his scores are as follows:

1/11/08	AE	2-9	<1%	J-30
12/17/08		No scores		J-76
3/5/09		Not able to obtain any scores		J-105
11/13/09	AE	2-11	<1%	J-121

The Petitioner has also taken the Expressive One-Word Picture Vocabulary Test (EOWPVT) to measure his spoken vocabulary. His scores are as follows:

1/11/08	AE	1-8	<15	J-30
12/17/08		No scores		J-76
3/5/09		Not able to obtain scores		J-105
11/13/09		Not able to obtain scores		J-121

The Petitioner has gained 2 months of receptive vocabulary in 26 months, and shows no gains in expressive vocabulary.

25. In the MDT report of March 11, 2009, there are scores for the Weschler Individual Achievement Test (WIAT) that the Petitioner was given for that re-evaluation. *J 22* His scores were as follows

Basic Reading	GE	K.9	14%
Math Reasoning	GE	K.1	3%
Spelling	GE	1.6	14%
Reading Comprehension	GE	<1	4%
Numerical Operations	GE	1.4	14%

The Petitioner was repeating second grade when this test was administered. This data is similar to and supports the scores on the KTEA-II from November 6, 2009.

26. For the most part in his educational history, the Petitioner has been in an oral program for his instruction. There have been instances when a substitute or other teacher has signed to him, such as the extended year teacher during the 2009-10 school year. The Oral Teacher had to inform this teacher that the program was an oral program and that the Petitioner did not sign. *T-146, 147*

27. The Petitioner's cognitive function has been measured twice over the course of his enrollment in the District. In the March 11, 2006 Multi-Disciplinary Team (MDT) report, it reflects that the Petitioner was administered the Universal Nonverbal Intelligence Test (UNIT), a test of general intelligence, on March 13, 2006 and that he obtained a full scale

IQ score of 82, which placed him in the low average range. *J-4* The Petitioner was administered the UNIT again on March 6, 2009, and he obtained a full scale IQ score of 86, which again placed him in the low average range. *J-21*

28. A person who is deaf and whose hearing is restored has both a chronological age and a hearing age. The chronological age is the age a deaf person has achieved since his/her birth. Hearing age is determined to begin at the age at which that person begin hearing properly or that it is known that the device (hearing aid or cochlear implant) is producing hearing thresholds in the speech range. *T-397* The CI Audiologist calculated the Petitioner's hearing age from the first time he was determined to have hearing that would allow for access to speech, from the acquisition of the first cochlear implant in February 2004. *T-629, D-42* His audiology reports show access to speech and progress in language skills from that point in time. *T-629, 621, 622, 627-631, D-40-45, 48* The Petitioner's hearing age is 6-3 in his left ear (calculated from February 2008) and is 2-9 in his right ear (calculated from September 2007).
29. Researchers have shown that on average, children with cochlear implants make one year of language progress in one year's time. *T-213, 227, 638, D-213 through 220* The Petitioner has had six years of access to language yet the Petitioner has made minimal growth. *T-153, 475, 595, 657, 671, 700, P-115, 116, 638*
30. There is a known window of opportunity for receptive language, which could be called a ceiling in terms of the certain things that can be learned in terms of spoken language and or the processing of sounds to produce words. That window is critical for receptive language from birth to 3 years. *T-636* Children who receive their cochlear implant prior to the age of 3-6, and whose devices have been properly mapped and given ideal circumstances, are expected to close the gap and be able to progress alongside their hearing peers. *T-402* The Petitioner may never get those phonemes because he did pass that critical window. *T-408* Another window exists for learning expressive language at its fluency level, and that window has been alternately described as age zero to six years, or zero to eight years, when the brain is more malleable and is more successful at learning language when the child is youngest. *T-494, 636* At the Petitioner's chronological age, he needs access to language. *T-642*
31. The Petitioner's speech and language acquisition is limited. He converses mostly in one to two word sentences, although occasionally his sentences will be three or four words long. *T-311, 484, 662, 678, 727, J-106* The Petitioner has difficulty putting his thoughts into words and the words into

correct order. T311 The longer the utterance, the more likely it will be a series of words that may be associated with the topic or random.² T- 311, D-117, 119, 120, 121, 122, 151

32. The number of expressive vocabulary words the Petitioner knows is around 300 and his receptive vocabulary is around 500 words, which is commensurate with the vocabulary of a three year old. T-547, 681, 699 His articulation is poor for his age, and he is frequently unintelligible if the subject of the conversation is unknown to the listener. Progress on improving speech has been very limited. T-151, 191, 197, 200, 307, 317, 322, 451, 466, 654, 662, 677, 727, 728, J-123
33. It is clear that the Petitioner has good speech detection and discrimination, but it is not clear if he understands what he hears. He frequently does not understand directions and cannot comply or respond without the addition of visual prompts. J-8 Often when asked to repeat information just given to him he doesn't know the information. T-160, 306, 307, 496, 563, 587, 589
34. The family prefers that the Petitioner continue in an oral program and do not want the Petitioner to learn sign. T-88, 92, 93 However, the Petitioner knows and uses finger-spelling and some signs. T-269, 349, 351, 352, 673, 688, 740, J-23 He has been seen by a variety of individuals to sign with other students in the classroom when he thinks the teacher doesn't see, on the playground, in the lunchroom, on the bus and with evaluators. In addition to more traditional sign, he also resorts to gestural communication and acting out to convey his message. T-125, 498, 534, 665, 668, 673, 679 When signing was added to speech, the Petitioner understood what was being asked of him. J-23 Finger-spelling helped him spell words or understand what letters he was supposed to write in an assessment. J-21, 23 When sign is added to instructional voice, his comprehension improves. J-122
35. The Petitioner is very aware of surroundings, aware enough to use his compensatory skills to watch the other students and follow them. T-538 He is constantly watching for cues so he knows what is expected of him. He relies on visual cues such as pictures, written prompts, posters, and teacher pointing to be able to respond to queries or perform tasks. T-275, 280, 282, 307, 314, 315, 396, 467, 484, 488, 499, 538, 565, J-122, J-137

² The Oral Teacher gave an example of the Petitioner using the word "hurt" in a sentence. The sentence might be "[name] hurt" or "[name] is to four my hurt". The Petitioner relayed his experience with the dentist to the SLP. He said, "Dentist, teeth" and "sleep". When asked if he went to sleep, he replied "teeth out".

36. On the report card generated for the Petitioner during the 2009-10 school year, "W" means that the Petitioner is working on standards below his grade level. *T-256, 357, 385, P-111, 112, 113, 114* Even working below grade level, the Petitioner made limited progress except for one area where he made no progress. *T-260, 261, P-115, 116* All goals show that they need more time to meet the standard. *T-261, P-115, 116* The report card actually reflects a 2 to 5 % growth this year depending on the standard. *T-462* What progress the Petitioner has made is not enough to get him over that hump to facilitate learning. *T-645*
37. Oral Program uses every means except for sign language to teach academics to the child – speaking, listening, auditory input, lip reading, speech reading, visual cues, facial gestures, natural gestures, use of technology. The emphasis in an oral program is on developing spoken language along the same continuum that children with normal hearing would follow and developing listening through the use of amplification. *T-371* The prognosis if the Petitioner remains in the oral only program is poor. *T-638*
38. Total Communication Program employs all of the methods to teach the child that are used in the oral program, with the addition of sign language. *T-371* The goal is the same as the goal in the oral program, to develop spoken language. *T-643*
39. There is a need to facilitate language with the Petitioner. A language intervention that can be met with visual support, such as sign language, would clarify and enhance language and give him another way to obtain the information, allowing him to connect a sign with a word. *T-487, 637* Sign language is a tool to support his comprehension and would support both his hearing and his speech. *T-304, 329, 504, 519, 637, 643* Sign language when paired with auditory input can be a bridge for that vocabulary development as it provides a concrete visual perceptual way to understand how things work linguistically, what they mean, how they are used. *T-643*
40. Cognitive delays would not impede the Petitioner's learning to sign if sign complemented instruction and learning to help child achieve goals. *T-380* We learn visually before we learn auditorily. *T-486, 487* Sign language is a visual language and the Petitioner is strong visually. *T-488* Even if the Petitioner had cognitive deficit, he requires a multisensory approach – kinesthetic, tactile, visual, auditory – all modalities to enhance his learning. *T-557* One of the predictors of maximizing cognition is language acquisition. To affect the Petitioner's potential language needs to be facilitated in any way to build vocabulary and language. *T-637* It is

already known that when sign is added to directions, the Petitioner's comprehension improves. *T-500*

41. The proposed IEP commented that the Petitioner's malocclusion might be causing some of the difficulties with articulation. *T-664, J-123* The Grandparent talked to the dentist in January 2010 and he stated that the Petitioner's dentition would not impact his articulation or ability to form words. *T-72, 73* The AVT Specialist recommended in February 6, 2010 report that the Petitioner seek an orthodontic evaluation for dental management as to how it affects his articulation. *P-26*
42. Dr. Sikand issued a report stating the Petitioner has done well and is able to understand speech at this point, noting that the Petitioner's speech discrimination scores were 100 percent between 30 and 40 dB SRT level. There is no evidence of any testing done to quantify the Petitioner's understanding of speech. *T-636, D-49, P-25* Dr. Sikand stated that he feels the Petitioner would be best served with continuing an ongoing speech therapy and continuing in an oral program rather than a sign language program. *P-25* The IEP team discussed this report but did not agree with Dr. Sikand's recommendation in light of the Petitioner's limited educational progress. *T-84, 290, 453, 560, 586, 588, 670*
43. Jil Gertz, MS-SLP CCC, was hired by the family to evaluate the Petitioner's speech and language. *T-87* The evaluation took place on February 23, 2010. *P-44* She found the Petitioner's expressive language and receptive language in 3 year old range, intelligibility at about 50% in connected speech when context is not known to listener, his sentence length was 1 to 4 words sentences. *T-726, 727, P-44* The Independent Evaluator felt learning a second language such as sign language would be difficult for a child if that child also had language learning disabilities. The Independent Evaluator recommended the Petitioner remain in the oral program. *P-44*
44. The DVD, which was entered into the record on June 28, 2010, was a brief video recording of Petitioner filmed by the Grandparent, where the Petitioner can be seen playing basketball with family members, answering simple questions with 1 to 2 word statements, and reading "The Three Little Pigs". *T-717, P-361*

CONCLUSIONS OF LAW

It should be noted for the record that there were two outside witnesses, The AVT Specialist and the Independent Evaluator, who testified regarding the need for the Petitioner to continue to receive his instruction via the oral program. The

AVT Specialist had worked with the Petitioner since 2004, and had direct knowledge of his cochlear implants and his ability to hear with them, and some knowledge of the language abilities within a clinical setting. The Independent Evaluator had spent a total of one and one half hour with the Petitioner, and had looked at the descriptions of the two programs on the District's website. Neither had any direct experience with either the total communication program or the oral program, nor were they able to address how the Petitioner's present levels of language related to his educational performance. The AVT Specialist gave conflicting testimony regarding the Petitioner's hearing age³, was unable to substantiate the claims in her recent reports of growth regarding the Petitioner's performance⁴, stated the Petitioner did not sign⁵, and was unable to provide specific examples of the sentence length she attributed to the Petitioner⁶. All of these factors combined to undermine credibility of the AVT Specialist when she spoke about the Petitioner's language skills and gave opinions about his education.

The opinions of the educators and specialists who had spent more time involved with the Petitioner and his education, were given more weight. All of these people had each worked with the Petitioner for at least one school year in the oral program, and their testimony was informative regarding the Petitioner's educational performance during that time. The CI Audiologist had worked for the AVT Specialist for four years before joining the District in 2004, had worked with the Petitioner and his family since 2004 since coming to work for the District, and had dealt with the Petitioner in his educational setting to address educational

³The Petitioner's hearing age was variously given as 6.2 (calculated from age in April 2005 report to May 2010) *D-23*, 2-7 (calculated from age in February 2009 report to May 2010) *T-206*, *P-31*, 2-11 (calculated from age in February 2010 report to May 2010), *P-28* in reports written by the AVT Specialist, and 5-0 from her testimony. *T-226*

⁴ Reports prepared by the AVT Specialist, dated February 27, 2009 *P-31*, *D-46* and February 6, 2010, *P-28* contain this identical statements: "Compared to his scores last year he has gained 12 months in expressive vocabulary and over 12 months in receptive vocabulary (as measured by ROWPVT/EOWPVT)." No scores are given in the reports, and when asked to provide scores or baselines for comparison she could not do so. Her statement was that this was for "insurance and all they want is document of progress". *T-226*

⁵ The AVT Specialist stated that she would be surprised if the Petitioner knew how to sign. *T232*

⁶The AVT Specialist stated in the February 6, 2010 report that the Petitioner routinely used five to seven word sentences, but when asked to provide specific examples, she was unable to accurately quote the Petitioner. For example, the AVT Specialist said that an example was "Me and Dad, me and dad are playing basketball". She then qualified:

"He may not have said it in the correct verb tense, but basically he said, 'Me and my dad are playing basketball,' or 'are going to play basketball,' or something similar to that." *T230*

Another example the AVT Specialist gave in response to the request for specific examples:

"He might tell me that grandma is going to take him shopping after he leaves my office. As an example of that, he might say, 'Grandma take me shopping. I'm going to get a toy.' And it may not come out as 'I'm going to get a toy,' but you can tell that the sentence markers are in there..." *T230*

And, finally:

" 'I had pizza for lunch.' He probably wouldn't use 'and.' I don't have his notes with me. But, 'I had pizza for lunch and some apple.'" *T231*

issues with his cochlear implants. The CI Audiologist was able to provide a broad perspective regarding the Petitioner's needs and past educational experiences and, therefore, her testimony was given significant weight.

Applicable Law

The purpose of the IDEA was to "open the door the door of public education on appropriate terms [rather] than to guarantee particular level of education once inside." *Board of Education of the Hendrick Hudson Sch. Dist. v. Rowley* 458 U.S. 176,189 (U.S. 1982). The Court determined a student's IEP must be reasonable calculated to provide the student with some educational benefit, but the IDEA does not require that a school district provide that student with the best education available of with the most benefit. In *Rowley*, the court established a two prong standard to determine if an IEP was sufficient: 1) if the State complied with the procedures set forth in the IDEA, and 2) if the individualized educational program developed was reasonably calculated to enable the child to receive educational benefits. However, the *Rowley* opinion is clear that as long as a district's proposed IEP offers an appropriate educational program, that the choice of methodology used to implement the IEP is left to the District.

The full participation of parents in the development of their child's IEP is required by the IDEA. 34 CFR 300.322. However, as the Ninth Circuit stated in *Ms. S. v. Vashon School District*, 39 IDELR 154 (9th Cir. 2003), "while the school district must allow for meaningful parental participation, the parent does not have a veto power over any provision of the IEP." The Ninth Circuit relied on the language found in *Doe v. Gonzales*, 557 IDELR 553 (9th Cir. 1986), which states that:

"In discussion parents' participatory role in developing IEPs for the children, the [Supreme] Court observed that Congress, '[a]pparently recognizing that [a] cooperative approach would not always produce a consensus between the school officials and the parents, and that in any dispute the school officials would have a natural advantage, incorporated an elaborate set of what it called 'procedural safeguards' to insure the full participation of the parents and proper resolution of substantive disagreements.' We construe the Court's language as recognition that, although the formulation of an IEP is ideally to be achieved by consensus among the interested parties at a properly conducted IEP meeting, sometimes such agreement will not be possible. If the parties reach consensus, of course, the [IDEA] is satisfied and the IEP goes into effect. If not, the agency has the duty to formulate the plan to the best of its ability in accordance with information developed at [prior] meetings, but must afford the parents a due process hearing in regard to that plan."

Nevada Administrative Code (NAC) 388.245 requires that a "public agency shall

provide a continuum of alternative *placements* to meet the needs of any pupil with a disability for special education and related services necessary to implement the individualized educational program for each pupil with a disability.” (emphasis added) This continuum includes, as appropriate for the pupil,

“(a) Consultative and supplementary services provided with regular class placement; and

(b) Instructing the pupil in:

- (1) A regular class;
- (2) A special class;
- (3) A special school;
- (4) A community-based program;
- (5) The pupil’s home;
- (6) A hospital; or
- (7) An institution.”

NAC 388.284 also requires that when developing a pupil’s individualized educational program, the committee shall “consider the communication needs of the pupil, and in the case of a pupil who is deaf or hard-of-hearing, consider the pupil’s language and communication needs, opportunities for direct communications with other pupils and professional personnel in the pupil’s language and communication mode, academic level and full range of needs, including, without limitation, opportunities for direct instruction in the pupil’s language and communication mode.”

Discussion

Issue: Is the District’s proposed change in placement to a total communication setting is appropriate for the Petitioner?

Pursuant to the first prong of the *Rowley* test, did the District comply with all of the procedures set forth in the IDEA in developing the IEP? There were no allegations by the Petitioner that the District did not comply with either state or federal requirements in the development of the IEP. No testimony or evidence was presented to that effect. As a result, for the purposes of the decision at hand, it will be considered that the first prong of the *Rowley* test has been met.

Looking at the second prong of the *Rowley* test, it is necessary to determine if the January 14, 2010 IEP was reasonably calculated to confer educational benefit to the Petitioner. Again, the Petitioner brought forward no challenges to any of the portions of the IEP proposed on January 14, 2010, other than a change in placement from the oral program to a total communication program. However,

the Petitioner's actual "placement" was never in question, nor disputed. The oral program is a self-contained placement, as the total communication program. The only difference between the two programs is the instructional methodology.

The Grandparent's only complaint about either the first or second IEP was that each one proposed changing the instructional methodology to total communication. Thus, there is no issue as to whether the District complied with the IDEA's procedural requirements. The sole issue is whether the proposed IEPs, which provided for instruction in the total communication class rather than instruction in the oral class, were reasonably calculated to confer educational benefit to the child, as required by *Rowley*. *FOF 10, 15, 22*

The proposed shift from an oral classroom into one which uses total communication is a major change for the Petitioner, who has, to this point, been immersed in oral instruction. From the time the family discovered his hearing loss, they have pursued the restoration of his hearing. The first cochlear implant in his left ear gave the Petitioner access to language in early 2004. The Petitioner's family continued to seek out more technology for him, securing an upgrade to that implant in the spring of 2007. In September 2007, a cochlear implant was placed in his right ear, giving the Petitioner binaural hearing. Through all of this, the family has been dedicated to the Petitioner's acquisition of speech and language through oral instruction. *FOF 3, 4, 7, 8, 10, 11, 12, 13, 15, 22*

It is clear, however, that despite the family's commitment to maintaining the Petitioner in an oral program, his success in that program is diminishing. His progress has been minimal academically in the past year. His progress reports show that he is making some progress, described as minimal by his teachers, in most areas, while not making any progress in one of them. All of his goals need more time to be reached. Various tests consistently place his abilities at a high kindergarten, low first grade level. Over the course of the last 27 months in an oral class, testing shows that the Petitioner has gained just 3 months at most in reading and 6 months at most in writing. He has already been retained once. *FOF 12, 23, 25, 32, 33, 35, 36*

The Petitioner's language skills continue to be significantly delayed, with a noticeable lack of the basics skills that make up language. His communication continues to be made up of one-two word utterances, accompanied by gestures in order to be understood. His intelligibility is quite poor, so that unless the listener knows the topic of conversation and has some familiarity with the Petitioner, it is more than likely that the listener will not be able to understand what the Petitioner is saying. His ability to comprehend spoken language is in doubt, as he requires visual cues to understand what is being asked of him. *FOF 25, 30, 31, 33, 40*

Vocabulary is at the level of three year old, and progress has nearly non-existent. In the course of the last 26 months, testing shows that the Petitioner has gained just 2 months in his receptive vocabulary, and made no gains in his expressive vocabulary. *FOF 24, 32*

The Petitioner is now 10 years old, and has already passed two critical markers for acquiring language. From birth to three years of age is a critical window for receptive language. By the time a child is beyond 8 years of age, he has in all likelihood passed the threshold for expressive language. It is critical that a change be made in his instruction that will allow him to access language while he is still young enough to benefit from it. The Petitioner is at a critical stage regarding his ability to acquire language skills at the fluency level. *FOF 1, 29, 30*

The total communication class program and the oral program share all of the same modalities and instructional strategies, with the exception of sign language. The focus of both programs is the acquisition of spoken language. The difference is that the oral instruction in the total communication program is accompanied by sign language, adding a visual cue that is not available in the oral program. All of the Petitioner's teachers agree that the Petitioner is a strong visual learner, and that adding a visual component, such as sign language, to oral language will offer the Petitioner another avenue to learn language. The Petitioner already knows some sign and how to fingerspell, and he uses it consistently with his friends at school. He regularly employs gesturing and acting out as ways to communicate his thoughts to people. He has demonstrated that when sign is added to his instruction, his comprehension increases. *FOF 34, 35, 38, 39, 40*

The District has, as is required under NAC 388.284, considered the Petitioner's communication needs in developing this IEP. In fact, it is the Petitioner's communication needs that drove this proposed change in methodology. The majority of the goals in the two proposed IEPs address speech and language deficits. The Petitioner has been hearing for six years and has been in oral programs all of that time, and yet his language skills are those of a three year old. There are no apparent cognitive reasons for the Petitioner's minimal progress. The District cannot continue to allow the Petitioner to make such trivial progress. *Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3rd Cir. 1988).* *FOF 24, 25, 26, 28, 29, 39, 40*

The Parent's strong preference for the oral program, while heartfelt, was a consideration but not determinant factor in developing an IEP. While the District may consider the Parent's preference in making methodology decisions, IDEA does not permit the decision to be based solely on the parental preference. 17 EHLR 834 (OSEP 1991). While total communication may not be the instructional methodology that the Petitioner's family wants or prefers, the District has offered

the Petitioner an instructional methodology that offers him a free appropriate education.

In this case, the Petitioner did not carry the burden of proof. The Petitioner did not show that total communication would not promote spoken language or would not provide the Petitioner with educational benefit.

HELD: For the District

DECISION AND ORDER

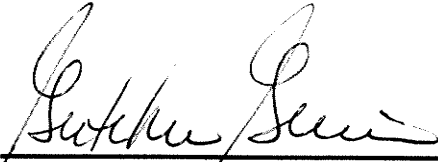
With regard to the Issue, the District prevails.

It is hereby ordered that the District's proposed IEPs dated November 13, 2009 and January 14, 2010 are reasonably calculated to provide the Petitioner with educational benefit and should be implemented without delay.

All relief requested by the Petitioner is denied.

IT IS SO ORDERED.

This 21st day of July, 2010.



Gretchen Greiner, Ed. D.
Hearing Officer

APPEAL RIGHTS

This decision and order will be binding on all parties.

A party may appeal from the decision of a hearing officer made pursuant to NAC 388.310 within thirty (30) days after receiving the decision. A party to the hearing may file a cross appeal within ten (10) days after he receives notice of the initial appeal. If there is an appeal, a state review officer appointed by the State Superintendent of Instruction shall conduct an impartial review of the hearing. NAC 388.315.