



Special Education Hearing Office

ORDERS AND DECISIONS DATABASE SEARCH

Record Detail

General Case Information

Case Year:	1997
Case Number:	1076
Petitioner:	Student
Respondent:	SAN MATEO-FOSTER CITY SCHOOL DISTRICT
Name of Document:	DECISION

Hearing Officer Information

Type of Case:	Decision Only
Type of Disability:	Hearing Impaired
Issue:	Designated Instruction and ServicesRelated ServicesReimbursement and Funding
Topic:	

Assistant Calendar Clerk Information

California Children's Services:	0
Public School District:	41-69039 San Mateo-Foster City SD
Mental Health Agency:	
SELPA:	

COE:

Issues Findings:**Body of Text:**

This matter was heard before Jennifer Nolan, Hearing Officer of the California Special Education Hearing Office, McGeorge School of Law, in San Mateo, California, on February 3, 4, and 19, 1998.

Petitioner STUDENT was represented by advocate Paul S. Foreman of Community Alliance for Special Education (CASE) and attorney Robert W. Crockett from the law firm of Bronson, Bronson & McKinnon. Also present on STUDENT's behalf were her parents, PARENTS.

Respondent San Mateo-Foster City School District (District) was represented by attorney Diane E. Finkelstein from the law firm of Shupe and Finkelstein. Also present on behalf of the District was Linda Waddell, interim director of student services.

Oral and documentary evidence was received. Following receipt of written closing arguments on March 9, 1998, the record was closed and the matter was submitted for decision.

ISSUES(Footnote 1)

1. Did the San Mateo-Foster City School District offer STUDENT a free appropriate public education in the least restrictive environment for the 1997-98 school year?
2. Is the San Mateo-Foster City School District required to fund STUDENT's placement at a private school, Sea Breeze, for the remainder of the 1997-98 school year?
3. Is the San Mateo-Foster City School District required to fund STUDENT's therapy provided by the Phoenix Education Center for the remainder of the 1997-98 school year?
4. Is the San Mateo-Foster City School District required to reimburse STUDENT's parents for:
 - a. The cost of Sea Breeze school from STUDENT's third birthday to the present?
 - b. The cost of the Phoenix Education Center from STUDENT's third birthday to the present?
 - c. The cost of an evaluation conducted by the Phoenix Educational Center?

BACKGROUND FACTS

STUDENT is a three-year-old student. She is eligible for special education because of a hearing impairment. The PARENTS also have two other children. Their son, BROTHER, who is seven years old, is also hearing impaired.

STUDENT was born with significant hearing loss in both ears. The hearing loss was diagnosed when she was ten days old. STUDENT received informal auditory-verbal therapy between the ages of two and six months. At the age of six months, STUDENT was given binaural hearing aides, was formally enrolled at the Phoenix Education Center, and began receiving thirty-minute biweekly auditory-verbal therapy. However, even with the hearing aides, STUDENT showed only minimal response to amplification.

In December 1996, when STUDENT was two years old, she received a cochlear implant.(Footnote 2) The implant surgery was performed at the Children's Hospital Oakland by a cochlear implant team which consisted of professionals including a surgeon, a pediatric audiologist, a speech and language pathologist, and an educational psychologist, among others. Prior to STUDENT's receiving the cochlear implant, the PARENTS underwent an eight- to nine-month screening process. As part of the screening process, the implant team does a rating scale which evaluates the child's medical status, speech and language, educational placement, and parents. If any of the areas are weak, they are considered in determining whether the child is a proper candidate for the cochlear implant.

On January 6, 1997, the cochlear implant was activated, enabling STUDENT to hear. Even with the cochlear implant, STUDENT continues to wear a hearing aide in her left ear.

In late February and early March 1997, Juliet Taylor, school psychologist, conducted a psychoeducational assessment of STUDENT, and Judi Ahonen and Kathleen Sussman conducted a speech and language evaluation. The summary of the psychoeducational assessment describes STUDENT as having age-appropriate cognitive development, social skills, self-help skills, and motor skills. However, STUDENT has significantly delayed communication skills due to her profound deafness. The speech and language assessment summary states that STUDENT is effective in using gestures and accompanying vocalizations to make her needs and communicative intent known. The summary also states that her articulation, receptive, and expressive language skills are significantly below average when compared to other hearing-impaired children.

On April 29, 1997, an IEP team meeting was held for STUDENT. At the meeting, goals and objectives were drafted and the District set forth its offer of placement for STUDENT. STUDENT's parents were present at the meeting and signed the IEP, indicating agreement with the goals and objectives and disagreement with the placement offered.

The parties were unable to agree upon a placement for STUDENT primarily because of a disagreement about the appropriate mode of communication and

because of a disagreement about the amount of mainstreaming. There are several different systems designed for teaching hearing impaired children to communicate. The systems include auditory-verbal, auditory-visual, oral, cued speech, total communication, and exclusive sign language.

The PARENTS contend that STUDENT should be enrolled in a program that uses the auditory-verbal approach for therapy. An auditory-verbal program uses one-to-one therapy exclusively, includes placement in a regular education class or program, and does not include enrollment in a special education class or program. Presentation is done through auditory modes and lip reading is discouraged. The auditory-verbal approach is also parent-centered. Parents are trained in the therapy so that it can be utilized in the home.

The District contends that STUDENT can benefit from the placement it has offered, which uses the oral approach. An oral program is one which places hearing impaired students in school settings with other hearing impaired students and stresses lip-reading. With the oral approach, therapy may or may not be one-to-one.

In September of 1997, STUDENT's parents unilaterally enrolled STUDENT in preschool at Sea Breeze and continued her speech and language therapy at the Phoenix Education Center.

On August 25, 1997, the Petitioner filed for a due process hearing to resolve the issues set forth above.

CONTENTIONS OF THE PARTIES

The Petitioner contends that her unique needs require therapy in the auditory-verbal mode of communication without visual cues, with intense parent and sibling involvement, home-based therapy, and a regular education preschool placement.

The District contends that STUDENT's unique needs require a "complete program" including speech and language therapy, a school program with age-appropriate and cognitively appropriate peers, and support for her communication delays. The District also contends that the oral approach to communication is appropriate for STUDENT.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

ISSUE 1: Did the San Mateo-Foster City School District offer STUDENT a free appropriate public education in the least restrictive environment for the 1997-98 school year?

Under both state and federal law, students with disabilities have the right to a free appropriate public education. Pursuant to 20 U.S.C. § 1401(8)(A)-(D), "free appropriate public education" means special education and related services that are provided at public expense, meet the standards of the State educational agency, and conform with the student's individualized educational

program. "Special education" is defined as "specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability...." (20 U.S.C. § 1401(25).)

The term "related services" includes services that may be required to assist a child to benefit from special education. (20 U.S.C. § 1401(22).) California Education Code § 56363 similarly provides that designated instruction and services (DIS), California's term for related services, shall be provided "when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program."

In *Board of Education of the Hendrick Hudson Central School District, et.al. v. Rowley* (1982) 458 U.S. 176, the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirements of the IDEA (now IDEA 1997). According to the Court, an IEP must be reasonably calculated to provide the student with some educational benefit. The school district is not required to provide the best possible education, to maximize educational benefits, or to provide each disabled child with an equal educational opportunity "commensurate with the opportunities provided other children." The school district must only provide a "basic floor of opportunity." (Rowley, 458 U.S. at 200-201.)

In determining whether the District has offered a FAPE, one must focus on the adequacy of the District's program. (*Gregory K. v. Longview School District*, 811 F.2d 1307, 1314 (9th Cir. 1987).) If the District's program reflects the child's needs, provides some benefit, and comports with the IEP, the District has offered a FAPE, even if the parents prefer another program and even if the parents' preferred program would result in greater educational benefit. (Rowley, 458 at 207-208.)

Special education law also requires that a student be educated in the least restrictive environment (LRE). (20 U.S.C. § 1412(a)(5)(A); California Education Code § 56031.) This means that, to the maximum extent appropriate, children with disabilities must be educated with children without disabilities. (34 C.F.R. 300.500.) Removal of a child with disabilities from the regular educational environment is to occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (34 C.F.R. 300.550(b)(2).)

The comment to 34 C.F.R. section 300.552, which discusses placement, states that the LRE requirements "apply to all preschool children with disabilities who are entitled to receive FAPE." The comment continues:

In each case the public agency must ensure that each child's placement is in the LRE in which the unique needs of that child can be met, based upon the child's IEP, and meets all of the other requirements of [related federal special education regulations].

Taken together, the IDEA and the Supreme Court's decision in Rowley provide four factors for analyzing whether the San Mateo-Foster City School District has substantively proposed an appropriate placement: Whether the District's proposed placement (1) was designed to meet STUDENT's unique needs, (2) was designed to provide STUDENT an education in the least restrictive environment, (3) was designed to provide educational benefit to STUDENT, and (4) conformed to STUDENT's IEP. (20 U.S.C. § 1400 et seq.; Rowley, 458 U.S. 176.)

Additionally, California has adopted two other provisions that apply in STUDENT's case. The legislature has found that many hard-of-hearing and deaf children use sign language as an appropriate communication mode, while others express and receive language orally and aurally, with or without visual signs or cues. (California Education Code § 56000(b)(1).) Education Code section 56001(b)(2) states:

It is essential that hard-of-hearing and deaf children, like all children, have an education in which their unique communication mode is respected, utilized, and developed to an appropriate level of efficiency.

Further, California Education Code section 56441.2 provides that special education programs for children between the ages of three and five "shall include specially designed services to meet the unique needs of preschool children and their families." [Emphasis added.]

STUDENT's unique needs

STUDENT's unique needs arise from her hearing impairment and from her uncommon family circumstances created by having another hearing impaired child in the family. In the psychoeducational assessment conducted by Juliet Taylor, school psychologist, on February 21 and March 6, 1997, STUDENT was found to have age appropriate cognitive development and to be meeting age level expectations in social skills, self-help skills, and motor skills. The goals the parties agreed to for STUDENT are in the areas of auditory skills, receptive language, expressive language, and speech skills. (Pet. Exh. 14.)

As stated above, the Petitioner argues her unique needs include auditory-verbal therapy and a regular education placement.

With regard to the law requiring that a child's mode of communication be respected and utilized, STUDENT's communication mode is auditory, similar to that of a nonhearing impaired child. Victoria Deasy, director of the Phoenix Education Center, has been STUDENT's speech and language therapist since STUDENT was two months old.(Footnote 3) Currently, she provides STUDENT with speech and language therapy four or five times a week in one-hour sessions using the auditory-verbal approach. In addition to STUDENT, one of her parents is required to attend the therapy session and to be in the therapy room. Ms. Deasy explained that parental involvement is a basic tenant of auditory-verbal therapy. Although MaryKay Therres, Children's Hospital Oakland speech and language therapist, testified that either an oral or auditory

approach would be an appropriate mode in which STUDENT could learn to communicate, STUDENT has been learning and communicating in the auditory-verbal mode since she was two months old.

The evidence presented does not establish that STUDENT's unique needs include learning another mode of communication, particularly since she has been using the auditory-verbal mode since she was two months old, and because she is still adjusting to her cochlear implant and learning her capabilities with its use.

In addition to STUDENT's personal unique needs, the Hearing Officer must consider the unique needs of STUDENT's family. STUDENT has an older brother, BROTHER, who is also hearing impaired and has been provided auditory-verbal therapy. STUDENT also has an older sister, SISTER, who is not hearing impaired. MOTHER testified that sending STUDENT to JWPOSD would have a dramatic effect on their family. In the home, the PARENTS would be teaching and communicating with one child, BROTHER, using the auditory-verbal approach, and the family would have to learn another mode of communication with STUDENT. MOTHER further stated that it would be particularly difficult for STUDENT's five year old sister, SISTER, to learn two modes of communication and to be able to recognize that she would have to use the auditory-verbal method with BROTHER (which requires placing the hand over the mouth so as to require the listener to focus on the verbal cues) and another mode, which may include lip-reading, with STUDENT. MOTHER stated that the whole family uses the auditory-verbal mode as part of their day-to-day life. FATHER echoed MOTHER's concerns regarding using different modes of communication in the home. Ms. Therres testified that if STUDENT and BROTHER were to use different modes of communication it would be confusing for both the parents and the children. Ms. Deasy also testified that it is hard to have hearing impaired children and that it would be even harder to employ different modes of communication with different family members. Moreover, serious concerns arise about the ability of STUDENT and BROTHER to communicate with each other if they are required to use different modes of communication. Therefore, the Hearing Officer finds that the unique needs of STUDENT and her family include auditory-verbal communication as a common mode of family communication.

The Petitioner maintains that she needs to be in a regular education class with normal hearing students who can provide modeling for her. Ms. Deasy testified that part of the auditory-verbal therapy includes concurrent enrollment in a regular education setting. Ms. Deasy stated that one goal is to have a child such as STUDENT in a regular education setting so that she can hear normal speech and language and learn from her peers. According to Ms. Deasy, it is important for a child to be placed with normally developing peers as soon as possible because generally children respond to each other. Since September 1997, STUDENT has been in a regular education setting at Sea Breeze.

Ms. Therres testified that she saw STUDENT weekly for sixty minutes for the first two months after STUDENT received the cochlear implant. Currently, she sees STUDENT once a month. Ms. Therres has no concerns with STUDENT

being placed in a regular education setting because STUDENT is meeting the expectations of the implant team. Ms. Therres stated that STUDENT is on track to be able to attend a regular education kindergarten class.

However, the District maintains that STUDENT's needs include a special day class. In support of the District's position, Ms. Sussman testified that STUDENT needs a "total program" in a special education setting with play-groups in a comfortable setting. Ms. Sussman described a total program to include daily therapy with the opportunity to have focused practice with the teacher, and opportunities for practice in a large group. Ms. J. Taylor's psychoeducational assessment concluded that STUDENT's communication skills are significantly delayed due to her profound deafness and, therefore, STUDENT would benefit from a preschool special day class (SDC) for hearing impaired children. (Dist. Exh. 5, p. 53.) On February 21 and March 10, 1997, Judi Ahonen and Kathleen Sussman conducted a speech and language assessment of STUDENT. STUDENT was found to have articulation skills of about twelve months, receptive language levels of about seven to nine months, and expressive language levels of about twelve to fifteen months. Due to STUDENT's delays in communication, Ms. Ahonen and Ms. Sussman recommended a daily special education self-contained preschool placement for hearing-impaired children, with intensive speech, language, and hearing services. (Dist. Exh. 5, p. 46.) It should be noted that both the psychoeducational evaluation and the speech and language evaluation were conducted approximately two months after STUDENT's implant was turned on. According to the speech and language assessors, at the time of the assessment STUDENT was "just learning to accommodate to a new acoustic/electronic signal with her cochlear implant." (Dist. Exh. 5, p. 46.) The proximity of these evaluations to the time STUDENT's implant was turned on is such that STUDENT's capabilities could not be fully realized. Further, these evaluations do not reflect STUDENT's post-implant progress.

The Hearing Officer finds more persuasive the testimony presented by those who are familiar with STUDENT and work with her on a day-to-day basis and finds persuasive the testimony that her needs do not include a special day class, but rather a regular education placement.

To summarize, The Hearing Officer concludes that STUDENT's unique needs, along with the unique needs of her family, include auditory-verbal therapy and a regular education preschool setting.

Based on the above findings with respect to STUDENT's unique needs, the question now becomes whether the placement offered by the District meets the unique needs of STUDENT and her family.

On April 29, 1997, an IEP team meeting was held at which the District made an offer of placement for STUDENT. The District's placement offer consisted of a preschool special day class at Jean Weingarten Peninsula Oral School for the Deaf (JWPOSD) with the following related services: speech, language, and auditory therapy fifty minutes a day with the parent and one-on-one with the child, a parent group one time a week, transportation to and from school, and

informal monitoring of STUDENT's cochlear implant at school. (Pet. Exh. 14.)

After the District offered JWPOSD, PARENTS visited JWPOSD. MOTHER testified that she observed at JWPOSD for approximately one hour. MOTHER shared her impression of JWPOSD and the programs offered based on her observation. She testified that JWPOSD is a school for deaf and hearing impaired children which uses the oral mode of communication. The oral mode places an emphasis on lip reading and mouth placement. MOTHER stated that the therapy is to be one-on-one, three times a week. MOTHER testified, however, that the therapy is not always one-to-one. She observed a therapy session with two hearing impaired students, one mother, and one therapist. Her understanding is that parents are invited to attend the sessions, but that it is not mandatory.

Kathleen Sussman, director of JWPOSD, testified regarding the school and its programs. JWPOSD is a certified nonpublic school that serves children from preschool to first grade. Not all of the students at JWPOSD are hearing impaired. JWPOSD is a reverse mainstreaming school; the majority of the students have a hearing impairment and other hearing students are integrated into the classes. Ms. Sussman testified that approximately two or three students in each class have normal hearing. The class STUDENT would have been in is composed of six children, three that do not have a hearing impairment. Ms. Sussman stated that this form of reverse mainstreaming serves as a reminder to the staff of what kids talk about at certain ages and allows for modeling to the hearing impaired children. Ms. Sussman testified that if STUDENT were attending JWPOSD, her schedule would be 8:40 - 9:00 a.m. with the nurse, and 9:00 - 11:30 a.m. of preschool education.

The testimony presented on behalf of the District regarding the speech, language, and auditory therapy at JWPOSD was confusing and, at times, contradictory. Ms. Sussman testified that for three-year-old students, therapy sessions are held five times a week. The student's parents are required to attend once a week and are encouraged to attend as many sessions as possible. Of the generally recognized communication therapy approaches, Ms. Sussman testified that JWPOSD is classified as using the oral approach. The oral approach focuses on children learning to speak orally and may concentrate on lip-reading. However, Ms. Sussman stated that she would describe the therapy at JWPOSD as "auditory-oral" because the focus is first on auditory communication. According to Ms. Sussman, the school does not teach lip-reading, and lip-reading is not referenced in any of the literature describing the school. Ms. Sussman explained that the focus of the therapy is to get the child to listen, but that how each therapist gets the child to listen is left up to each individual therapist.

From the evidence presented, it is unclear precisely what mode of communication JWPOSD subscribes to and would use with STUDENT. The District's placement offer states that speech, language, and auditory therapy will be done at JWPOSD. Ms. Therres testified that she has observed the programs at JWPOSD and that she observed lip-reading. MOTHER also

testified that at JWPOSD she observed what appeared to be lip-reading and exaggerated lip movement. Ms. Waddell testified that she observed several therapy sessions at JWPOSD and that in one session the therapist covered her mouth and in another session the therapist did not block her mouth, allowing the child to see the therapist's lips at all times. Even Ms. Sussman, director of JWPOSD, could not state with clarity what method of therapy is used and what mode of communication is used. She testified that therapy sessions are left up to each individual therapist. The District has failed to establish that the speech and language therapy at JWPOSD is designed to meet STUDENT's unique needs.

In conclusion, the Hearing Officer finds that the District's offer of placement is not designed to meet STUDENT's unique needs or those of her family because it is not a regular education placement, it does not take into account her chosen mode of communication, and it does not respect her family's need for a cohesive method of communication.

Least Restrictive Environment

The evidence presented established that STUDENT's unique needs are able to be met in a regular education preschool placement with speech and language therapy. The placement offered by the District, an SDC, is more restrictive than what STUDENT requires or than is permitted under the law. The Hearing Officer concludes that for STUDENT regular education with speech and language therapy is the least restrictive environment.

Educational Benefit

The Hearing Officer found above that the placement offer made by the District does not meet STUDENT's unique needs and that for STUDENT regular education with speech and language therapy is the least restrictive environment. Therefore, it is not necessary to determine whether the placement offered by the District would provide STUDENT with educational benefit.

STUDENT's IEP

Because the Hearing Office found that the placement offered by the District does not meet STUDENT's unique needs and does not provide for education in the least restrictive environment, it is not necessary to determine whether the placement conformed to her IEP.

ISSUE 2: Is the San Mateo-Foster City School District required to fund STUDENT's placement at a private school, Sea Breeze, for the remainder of the 1997-98 school year?

The District failed to offer STUDENT a FAPE for the 1997-98 school year. Therefore, the Hearing Officer must determine whether the placement provided by her parents is appropriate. (20 U.S.C. § 1400 et seq.; Rowley, 458 U.S. 176.) The Petitioner has requested a nonpublic school placement at District expense. A nonpublic school placement can be provided when no appropriate public

education is available. (California Education Code § 56365.)

STUDENT's Unique Needs

As found above, STUDENT's unique needs include a regular education preschool placement as part of an auditory-verbal program. Ms. Lewis, STUDENT's preschool teacher, described STUDENT's class at Sea Breeze. STUDENT is in a class that meets two days a week from 12:30 P.M. to 2:30 P.M. There are fifteen students in the class, one teacher, and one teacher's aide. STUDENT is the only hearing impaired student in the class.

In this case, the evidence shows that STUDENT's preschool education at Sea Breeze when combined with therapy at the Phoenix Education Center as discussed below meets her needs.

Educational Benefit

Ms. Lewis testified that STUDENT has made progress in class since she first enrolled in September. Ms. Lewis stated that she does not see STUDENT's hearing as a barrier to her socialization or class performance. Ms. Lewis stated that STUDENT is not ostracized and is a fully integrated member of the class. When attending chapel, all of the students have a partner, including STUDENT.

Ms. Lewis testified that she is not always able to fully understand what STUDENT is saying, but that through the use of verbal cues, STUDENT is able to communicate with Ms. Lewis. Ms. Lewis stated that in class, STUDENT relies on visual cues more than the other children. Notwithstanding the visual cues, STUDENT is participating in the class through auditory communication. Ms. Lewis testified that STUDENT receives auditory signals and that STUDENT understands her name and basic class instructions. Ms. Lewis stated that STUDENT uses sounds and some words to communicate with the other students. Ms. Lewis testified that language skills are worked on daily. As an example, Ms. Lewis described the use of a poster or interactive game which would serve as the basis for a conversation. Ms. Lewis stated that STUDENT is involved in the interactive game along with the other students in the class.

According to Ms. Lewis, when STUDENT first started preschool, she had difficulty separating from her parents. She would remain isolated at the beginning of the session and then would slowly join the class. Ms. Lewis testified that in approximately November the separation anxiety ended and that STUDENT now joins the class immediately upon entering the room.

Ms. Lewis stated that no accommodations have been made for STUDENT and that no special language activities have been created for STUDENT; she works on the same lessons as her classmates.

Ms. J. Taylor testified that she observed STUDENT for approximately forty-five minutes at Sea Breeze in October 1997. Ms. Taylor stated that during the visit she observed STUDENT engaged in play activities alone, at circle time,

and at chapel. Based on her observations, Ms. Taylor stated that she would like to have seen the staff facilitating STUDENT's involvement with other kids and with language use. However, Ms. Taylor testified that she is not an expert in speech and language development. Additionally, Ms. Taylor and Ms. Sussman observed STUDENT at Sea Breeze in October 1997, only a little over a month after STUDENT was enrolled there. Although Ms. Sussman and Ms. Taylor testified that based on their observation of STUDENT at Sea Breeze they would have liked to see her more involved in class activities, no evidence was presented to show that STUDENT is not receiving educational benefit.

Based on the evidence presented, the Hearing Officer finds that STUDENT is receiving educational benefit from her regular education program at Sea Breeze.

Least Restrictive Environment

Generally, students are to be educated in the least restrictive environment and are to be educated to the maximum extent appropriate with children without disabilities. (20 U.S.C. § 1412(a)(5)(A); California Education Code § 56031; 34 C.F.R. 300.500.) STUDENT is in a regular education class at Sea Breeze. Ms. Lewis testified that STUDENT is the only hearing impaired student in the class. Thus, the Hearing Officer finds that the regular education class at Sea Breeze constitutes the least restrictive environment for STUDENT.

STUDENT's IEP

This prong is not relevant here because STUDENT's IEP contains an inappropriate placement and the only IEP goals are in the areas of speech and language. The IEP goals are being met at the Phoenix Education Center.

Based on the above findings, the Hearing Officer concludes that Sea Breeze is an appropriate regular education preschool setting for STUDENT. However, there is one additional point about Sea Breeze that must be addressed: it is a noncertified school.(Footnote 4)

California Education Code section 56441.4 sets forth appropriate settings for early education services. The list of appropriate settings includes the regular or private nonsectarian preschool program.

Although the Supreme Court found in *Florence Co. School Dist. Four v. Carter*, (1993) 114 S.Ct. 361, that lack of certification did not preclude reimbursement for services provided in the past, that decision does not allow an order for prospective placement at an uncertified school when state law prohibits such an order.

According to California Education Code section 56505.2(a)

a hearing officer may not render a decision that results in the placement of an individual with exceptional needs in a nonpublic, nonsectarian school...if the school ...has not been certified pursuant to Section 56366.1.

Ms. Lewis described Sea Breeze as a private school affiliated with the Episcopal church. Once a week for fifteen minutes, STUDENT's class attends a chapel service where the students learn about God and Jesus. The Petitioner, in the closing brief, concedes that Sea Breeze is a noncertified sectarian school. (Pet. Closing Brief, p. 5.) The Petitioner cited STUDENT v. Los Angeles Unified School District, SN 865-94, as authority for the Hearing Officer to award prospective payment to a noncertified school. (Pet. Closing Brief, p. 5.) Each special education due process hearing resolves issues as they relate to an individual student's unique needs. In cases that have resulted in a school district being required to maintain a student in a placement by prospectively funding a noncertified school, the continued placement and funding were found to be necessary because of the unique needs of the student involved and because of the unique factual circumstances of the specific case. For example, in SN 865-94, the student was eligible for special education because of Down's Syndrome and developmental delays in communication, language and motor skills. The Hearing Officer in SN 865-94 found that based on that student's needs, it would be educationally inappropriate to require the student to change schools at an extremely late point in the school year.

California Education Code section 56505.2(a) has not been construed as requiring detrimental changes to a student's placement in an ongoing school year. However, decisions ordering a continued placement in a noncertified school have been confined to situations where special circumstances require that the placement be maintained until the conclusion of the school year.

In the present case, several factors weigh in favor of an order requiring the District to maintain STUDENT in her placement at Sea Breeze for the remainder of the 1997-98 school year. One factor is that decisions about placement and services are generally made on an annual basis. (California Education Code § 56343(d).) Thus, when the District failed to offer STUDENT a FAPE for the 1997-98 school year, her parents were in the position of having to secure a location for her to attend school for the entire year. Another factor to consider is that STUDENT is a young child -- she will turn four on April 26 of this year. Perhaps the most important factor to consider is the proximity to the end of the 1997-98 school year. It is mere weeks before the school year will come to an end. It would be logistically impractical at this late date to require the IEP team to convene and locate an appropriate placement for STUDENT, to develop a transition plan necessary for STUDENT, and to implement the transition. All of the above factors bring STUDENT's case within the special circumstances discussed above and weigh against making a sudden shift in STUDENT's placement at such a late point in her school year.

STUDENT's unique needs and the unique factual circumstances of this case are such that the District must maintain STUDENT at Sea Breeze for the remainder of the 1997-98 school year.

ISSUE 3: Is the San Mateo-Foster City School District required to fund STUDENT's therapy provided by the Phoenix Education Center for the remainder of the 1997-98 school year?

The District failed to offer STUDENT FAPE for the 1997-98 school year; therefore, the Hearing Officer must determine whether the speech and language service provided by her parents is appropriate. (20 U.S.C. § 1400 et seq.; Rowley, 458 U.S. 176.)

STUDENT has been receiving speech and language therapy from Ms. Deasy at the Phoenix Education Center four to five times a week for one hour each session. Ms. Deasy testified that the Phoenix Education Center is a certified nonpublic agency.

STUDENT's Unique Needs

As found above, STUDENT's unique needs include auditory-verbal therapy. Ms. Deasy testified that at the Phoenix Education Center STUDENT receives auditory-verbal therapy. The therapy is exclusively one-to-one, with one of STUDENT's parents required to be present at each session. Ms. Deasy stated that at the therapy sessions she covers her mouth so that STUDENT is not able to read Ms. Deasy's lips which forces reliance on auditory channels.

Ms. Therres testified that STUDENT's cochlear implant team is comfortable with STUDENT receiving speech and language therapy at the Phoenix Education Center.

Finding no evidence to the contrary, the Hearing Officer concludes that Phoenix Education Center meets STUDENT's unique need of having speech and language therapy in the auditory-verbal mode.

Educational Benefit

STUDENT's IEP for the 1997-98 school year contains goals in the areas of auditory skills, receptive language, expressive language, and speech skills. (Pet. Exh. 14.) Ms. Deasy prepared a report indicating STUDENT's progress on each of her IEP goals. (Pet. Exh. 12.) In the area of auditory skills, STUDENT has met nine of the objectives set forth by the IEP team, and has partially met the tenth objective. For receptive language, STUDENT has met four of the objectives in her IEP and has partially met the other two. In expressive language, three objectives have been met and four have been partially met. In speech skills, five objectives have been met with the other two partially met. (Pet. Exh. 12.)

Ms. Deasy testified that STUDENT is at a very basic level of speech. She testified that STUDENT can use single words and put two words together. Currently, STUDENT has about two-hundred words in her vocabulary.

Ms. Therres stated that STUDENT is meeting the speech and language expectations of the cochlear implant team. According to Ms. Therres, at one

year post-implant she would not anticipate all of a child's speech to be intelligible. She stated that some words would be able to be understood while in others the student may drop some of the consonants. Ms. Therres testified that at one year post-implant two and three word utterances would be expected. She stated that STUDENT is meeting this expectation. Ms. Therres also stated that STUDENT is on track to enter kindergarten when she is five years old.

No persuasive evidence was presented by the District to show that the therapy STUDENT receives at the Phoenix Education Center in anyway failed to provide STUDENT with educational benefit. Based on the evidence presented, the Hearing Officer concludes that STUDENT is receiving educational benefit from the speech and language therapy at the Phoenix Education Center.

STUDENT's IEP

STUDENT's IEP states that she will receive speech, language, and auditory therapy daily for fifty minutes. (Pet. Exh. 14, p. 106.) However, the IEP does not specify the mode of communication to be used. Therefore, the Hearing Officer finds that the therapy provided at the Phoenix Education Center is consistent with STUDENT's IEP.

Least Restrictive Environment

Generally, students are to be educated in the least restrictive environment and are to be educated to the maximum extent appropriate with children without disabilities. (20 U.S.C. § 1412(a)(5)(A); California Education Code § 56031; 34 C.F.R. 300.500.) STUDENT's speech and language therapy is provided in a one-on-one setting with the therapist and with one of her parents present. The program offered by the District also provided for therapy in a setting where STUDENT would be pulled out of the classroom. The Hearing Officer finds that the therapy at the Phoenix Education Center is provided in no more of a restrictive environment than what STUDENT needs.

The Hearing Officer finds that the therapy provided at the Phoenix Education Center is appropriate to meet STUDENT's unique needs and provides her with educational benefit in the least restrictive environment.

ISSUE 4: Is the San Mateo-Foster City School District required to reimburse STUDENT's parents for:

a. The cost of Sea Breeze school from STUDENT's third birthday to the present?

Parents may be entitled to reimbursement for the placement they have procured for their child when the school district failed to provide an appropriate placement and the placement provided by the parents was appropriate. Equitable considerations may be considered in granting relief, and Hearing Officers and courts have broad discretion in granting relief. (School Committee of the Town of Burlington v. Department of Education, (1985) 471 U.S. 359; Student W. v. Puyallup School District, (9th Cir. 1994) 31 F.3d 1489, 1496.)

Parents need not procure a fully appropriate private school placement or services in order to be entitled to reimbursement. (Alamo Heights Independent School District v. State Board of Education, (5th Cir.) 790 F.2d 1153, 1161.)

As determined above, the District did not offer STUDENT an appropriate placement for the 1997-98 school year. Additionally, as discussed above, the Hearing Officer determined that the placement procured by STUDENT's parents was appropriate.

The fact that Sea Breeze is not certified by the State of California to provide special education services is not a bar to the claim for reimbursement. (Florence Co. School Dist. Four v. Carter, (1993) 114 S.Ct. 361.) The District, in its closing brief, cites California Education Code sections 56355, 56366.1, and Title 5 of the California Code of Regulations section 3060, for the proposition that the only private schools that a school district can contract with to provide services to special education students are nonsectarian private schools. (Dist. Closing Brief, p. 4.) However, these laws refer only to placements initiated by a school district. This case does not involve the school district initiating such a placement.(Footnote 5) In this case, the parents have made a claim for retroactive reimbursement after unilaterally enrolling STUDENT at Sea Breeze. The parents placed STUDENT in a sectarian school when the District failed to offer her an appropriate placement. Therefore, the laws cited above are not applicable to the facts of this case.

Because Sea Breeze is a sectarian school, it must be shown that reimbursement would not violate the Establishment Clause of the First Amendment to the United States Constitution. In *Zobrest v. Catalina Foothills School District*, 113 S.Ct. 2462 (1993), the parents chose to enroll their deaf child in a private Catholic school. The parents did not claim that the school district failed to offer an appropriate placement, and did not seek reimbursement for tuition. They asked the school district to provide a sign language interpreter to accompany him to classes. The school district refused and the parents sought reimbursement for the cost of hiring their own interpreter. The Court in *Zobrest* held that the Establishment Clause does not prohibit a public school district from furnishing a publicly paid sign language interpreter to a child with a disability on the grounds of a parochial school. The Court stated:

The services at issue in this case is part of a general government program that distributes benefits neutrally to any child qualified as handicapped under the IDEA, without regard to the "sectarian-nonsectarian, or public-nonpublic" nature of the school the child attends. By according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents. In other words, because the IDEA creates no financial incentive for parents to choose a sectarian school, an interpreter's presence there cannot be attributed to state decision-making.

(Id. at 2467.)

The court concluded by reiterating that the child, not the private school of

choice, is the primary beneficiary of the IDEA. (Id. at 2469.)

The present case differs from *Zobrest* factually. Unlike *Zobrest*, where the parents chose to enroll their child in a private sectarian school despite the existence of an appropriate public school placement, here STUDENT's parents were forced to enroll her in the private sectarian school because the District failed to offer her an appropriate placement. Additionally, unlike *Zobrest*, where the parents sought funding only for the cost of a related service (hiring a sign language interpreter), here the parents seek reimbursement for STUDENT's entire tuition.

The Hearing Officer finds that neither of these distinctions bars reimbursement in this case. First, *Zobrest* held that the Establishment Clause does not bar funding of a related service when the parents voluntarily place their child in a private sectarian school despite the existence of an appropriate public placement. Therefore, the Establishment Clause certainly should not bar reimbursement for tuition where the parents had no reasonable alternative but to place their child in a private sectarian school because the school district failed to offer an appropriate placement.

Second, although tuition relates to a student's entire sectarian program as opposed to one portion of it, this fact is of no particular legal significance and does not run contrary to the general holding of *Zobrest*. Reimbursement of private school tuition, sectarian or nonsectarian, is a neutral remedy available to parents who pay tuition for an appropriate private education when an appropriate public education is not offered.

Neither the California Education Code nor the Establishment Clause of the First Amendment to the United States Constitution bars a school district from reimbursing the parents of a child with a disability for tuition payments made to a private sectarian school.

STUDENT's parents are entitled to reimbursement because the District failed to provide a FAPE and her parents provided an appropriate educational placement.

b. The cost of the Phoenix Education Center from STUDENT's third birthday to the present?

Just as with educational placements, parents may be entitled to reimbursement for the related services they have procured for their child when the school district failed to provide appropriate related services and the related services provided by the parents were appropriate. (*Burlington*, 471 U.S. 359.) Parents need not procure fully appropriate services in order to be entitled to reimbursement. (*Alamo*, 790 F.2d 1153, 1161.)

It was established above that the District did not offer STUDENT speech and language therapy that was designed to meet her unique needs. In this case, as was determined above, the evidence shows that STUDENT's therapy provided by the Phoenix Education Center was appropriate to meet her unique needs and

provided her with educational benefit.

STUDENT's parents are entitled to reimbursement for the speech and language therapy STUDENT received from her third birthday to the present because the District failed to provide appropriate therapy and the therapy procured by STUDENT's parents has been found appropriate.

c. The cost of an evaluation conducted by the Phoenix Educational Center?

The Petitioner did not present any evidence regarding this issue. Therefore, the Hearing Officer finds that the District is not required to reimburse STUDENT's parents for the evaluation conducted by the Phoenix Educational Center.

ORDER

1. From the date of this decision, the District shall fund STUDENT's placement at Sea Breeze for the remainder of the 1997-98 school year.
2. From the date of this decision, the District shall fund STUDENT's speech and language therapy provided by the Phoenix Education Center for the remainder of the 1997-98 school year.
3. Within thirty (30) days of receiving receipts from the PARENTS, the District shall reimburse them for the tuition and fees for Sea Breeze from STUDENT's third birthday to the date of this decision.
4. Within thirty (30) days of receiving receipts from the PARENTS, the District shall reimburse them for the cost of speech and language therapy provided by the Phoenix Education Center from STUDENT's third birthday to the date of this decision.

PREVAILING PARTY ON EACH ISSUE

Pursuant to California Education Code § 56507(d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. The following findings are made in accordance with this requirement:

1. Did the San Mateo-Foster City School District offer STUDENT a free appropriate public education in the least restrictive environment for the 1997-98 school year?

The Petitioner prevailed on this issue.

2. Is the San Mateo-Foster City School District required to fund STUDENT's placement at a private school, Sea Breeze, for the remainder of the 1997-98 school year?

The Petitioner prevailed on this issue.

3. Is the San Mateo-Foster City School District required to fund STUDENT's

therapy provided by the Phoenix Education Center for the remainder of the 1997-98 school year?

The Petitioner prevailed on this issue.

4. Is the San Mateo-Foster City School District required to reimburse STUDENT's parents for:

a. The cost of Sea Breeze school from STUDENT's third birthday to the present?

The Petitioner prevailed on this issue.

b. The cost of the Phoenix Education Center from STUDENT's third birthday to the present?

The Petitioner prevailed on this issue.

c. The cost of an evaluation conducted by the Phoenix Educational Center?

The District prevailed on this issue.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety (90) days of receipt of this decision. California Education Code § 56505(i).

Dated: April 21, 1998 Jennifer Nolan
Hearing Officer
California Special Education
Hearing Office

Footnotes:

Footnotes: 1.The Petitioner presented six issues for hearing. Those issues have been consolidated for a more efficient and orderly discussion. 2. A cochlear implant is a device that is implanted inside the ear with an electrode array that is placed inside the cochlea. There is an exterior headpiece behind the ear which picks up sound and transmits it through a cord to a microprocessor carried on the body. The microprocessor encodes the sound into electrical impulses that are transmitted back to the headpiece. The headpiece then transmits the electrical impulses to the implant, and the implant stimulates the auditory nerve through the cochlea with the electrical impulses. The result is that the brain perceives the electrical impulses as sound. 3.Ms. Deasy founded the Phoenix Education Center in 1984. Ms. Deasy received a certificate in auditory-verbal therapy in 1995, and has been working with hearing impaired

children for twenty-six years. 4. The question of the effect of the sectarian nature of Sea Breeze will be discussed under issue 4 a below. 5. Likewise, these laws do not bar a school district from providing prospective services when ordered to do so by a Hearing Officer or a court.

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