



Special Education Hearing Office

ORDERS AND DECISIONS DATABASE SEARCH

Record Detail

General Case Information

Case Year:	1997
Case Number:	593
Petitioner:	STUDENT
Respondent:	SAN BERNARDINO CITY UNIFIED SCHOOL DISTRICT
Name of Document:	DECISION

Hearing Officer Information

Type of Case:	Decision Only
Type of Disability:	Hearing Impaired
Issue:	Designated Instruction and Services Non Public School Placement Reimbursement and Funding
Topic:	

Assistant Calendar Clerk Information

California Children's Services:	0
Public School District:	36-67876 San Bernardino City USD
Mental Health Agency:	
SELPA:	

COE:

Issues Findings:**Body of Text:**

This matter was heard before JoAnn Irwin-Eshelman, Hearing Officer of the California Special Education Hearing Office, McGeorge School of Law, in San Bernardino, California, on November 18 and 19, and December 9, and 10, 1997.

Rebuttal testimony was received in a telephone conference on December 18, 1997.

Petitioner STUDENT was represented by attorney Alexis Kashar of Newman, Aaronson, and Vanaman, Attorneys at Law. STUDENT's father, PARENT, was present during the first two days of hearing, and STUDENT's mother, PARENT, was present throughout the hearing. Mary Austin, paralegal with Newman, Aaronson, and Vanaman, was present on the last two days of hearing in December. Respondent San Bernardino City Unified School District (District) was represented by Linda Paule, coordinator of special education due process and compliance for the District. No other District representative was present. Connie Schultz and Brenda Roberts were present as interpreters of American Sign Language for Ms. Kashar.

Petitioner presented six witnesses: PARENT; Linda Dye, director and audiologist for the Children's Choice for Hearing and Talking Center (CCHAT); Kimberly Hiddleston, speech and language pathologist; Vicki Ishida, director for the Echo Center at the Echo Horizon School; Kay Schneider, teacher at the Oralingua School for the Hearing Impaired; and Dr. Bradley Billings, audiologist. Respondent called five witnesses: Sandra Lourenco, school nurse; Vicki Zietlow, Early Start teacher; Sally Carrera, teacher of the aurally handicapped; Josefina Preuit, speech and language specialist; and Joan Roberts, director of special education for the District.

Oral and documentary evidence was received. The case was closed, and the matter was submitted for decision.

ISSUES (Footnote 1)

1. Did the District provide Petitioner with a free and appropriate public education (FAPE) during the 1996-97 school year?
2. Has the District offered Petitioner an appropriate placement for the 1997-98 school year?
3. If the District did not provide Petitioner with a FAPE during the 1996-97 school year, are his parents entitled to reimbursement for costs of his unilateral private placement at the Children's Choice for Hearing and Talking (CCHAT) Center from May 1997 through the date of decision? Is the CCHAT Center an appropriate placement for Petitioner for the remainder of the 1997-98 school year?

year?

4. Did the District fail to assess STUDENT for assistive technology, including augmentive communication? If so, is he entitled to compensatory education at the CCHAT Center as a remedy?

PROCEDURAL MATTERS

The Petitioner's request for due process hearing, filed by his parents, was received by the Hearing Office on May 14, 1997.

As a result of mediation on May 29, 1997, the parties agreed that the student's primary language is English rather than American Sign Language.

On December 18, 1997, Petitioner presented rebuttal testimony from four witnesses via telephone conference call. Each of the four witnesses had previously testified, and the District did not object.

BACKGROUND FACTS

STUDENT is four and one-half years old and eligible for special education services as a result of a severe to profound sensori-neural hearing loss in both ears. In July 1994, when STUDENT was approximately fourteen months old, his hearing loss was first diagnosed by an audiologist, Dr. Robin Vaughn. Dr. Vaughn concluded that STUDENT had a "severe to profound hearing loss in the left ear and a probable moderate hearing loss in the right ear." (Pet. Exh. 48.) On September 7, 1994, STUDENT's mother contacted the District to request services for him.

In late September 1994, an initial assessment of STUDENT was performed by the District's school nurse and a special education teacher. Although STUDENT was 16 months old, he was able to use only one word, and was functioning at the 12-month age level in language. STUDENT's development in all other areas was noted to be within normal limits. The assessors relied on Dr. Vaughn's report of STUDENT's hearing loss, and stated that STUDENT was "deaf in one ear" and had "a profound hearing loss in the other." (Pet. Exh. 5.) STUDENT was found eligible for the District's parent/infant services, known as the Early Start in-home program, based on his severe language delay and hearing loss.

An Individualized Family Service Plan (IFSP) was developed for STUDENT on September 30. He was placed in the Early Start program and two goals were established--for STUDENT to talk and to follow directions. The District also noted family concerns on the IFSP, namely, to have STUDENT fit with hearing aids, to help him communicate, and to have the family learn sign language.

From October 20, 1994, through February 15, 1995, an Early Start program teacher came to the PARENTS' home for approximately one hour each week to work with STUDENT by showing him toys and colors, playing with him, and teaching him sign language. The teacher did not work with the parents during

these sessions. In late January 1995, STUDENT received his first hearing aids through Crippled Children's Services (CCS). (Footnote 2)

In February 1995, at the age of 21 months, STUDENT was moved to Harmon School for the "school-based component" of the Early Start program, which provided six to nine hours per week of activities. The class which STUDENT attended had between 10 and 12 students enrolled, but only one other student was hearing impaired. STUDENT's special education teacher at Harmon, Vicki Zietlow, used oral and sign language throughout the day to communicate with STUDENT and the other children. STUDENT did not learn to speak by the end of the school year.

On September 26, 1995, when STUDENT was 28 months old, an annual IFSP review was held. The team noted that STUDENT communicated with some sign language (10 signs), gestures and movement. An Early Intervention Developmental profile ("the Michigan"), completed that month, indicated that STUDENT's language was at the nine- to eleven-month age level. The team established two new goals for the 1995-96 school year--for STUDENT to "sign more or say some words" (i.e. at least 25 signs), and to "play on the computer." The team also recommended that STUDENT continue in the Early Start classroom at Harmon until he turned three years old. (Pet. Exh. 9.)

In April 1996, a triennial assessment of STUDENT was performed by the District's Early Childhood Assessment Team (ECAT). STUDENT was 35 months old. The team found that he had no oral language and used nonverbal gestures and a few signs to meet his needs. Testing by the ECAT team indicated that STUDENT's nonverbal cognitive ability, self-help skills, gross and fine motor skills, and social skills were all within normal limits. The team concluded that STUDENT continued to be eligible for special education services based on a diagnosis of hard of hearing, and a speech and language disorder.

At the May 1996 IEP team meeting, PARENT restated her wish for STUDENT to communicate and speak. She was told that speech "may not be possible" for STUDENT due to the severity of his hearing loss. (Pet. Exh. 20.) The team noted that in the area of language and communication, STUDENT knew at least 20 signs and that he "babbling." STUDENT was offered a preschool special day class for children with aural handicaps at Barton School, and speech and language services for 30 to 60 minutes per week.

On June 17, 1996, the IEP team met again to add extended year services to STUDENT's IEP. That summer, he attended the District's extended year program for preschoolers with aural handicaps.

In June and July 1996, STUDENT received an auditory brainstem response evaluation and a sound field evaluation from audiologists at Loma Linda University Surgery Medical Group. These tests indicated that STUDENT had a severe to profound hearing loss in both ears. STUDENT's parents were referred to Linda Dye, the director and audiologist of the CCHAT Center in Rialto, for further assistance. (Footnote 3) Ms. Dye met with the PARENTS in July and

recommended that STUDENT receive auditory training and aural habilitation services.

In September 1996, STUDENT entered the Barton preschool class. He received 30 to 60 minutes of speech and language services each week, with one group session in the classroom, and two sessions in a pull-out group of two to four children. Both the classroom and pull-out services were provided by the speech and language specialist.

In October 1996, after approval by CCS, Ms. Dye began providing auditory training and aural habilitation services to STUDENT twice weekly for a total of two hours. The training was to help STUDENT maximize his residual hearing. STUDENT's mother attended the sessions and received help to "carry-over" the training at home. At the first session with STUDENT, Ms. Dye determined that his hearing aids were not powerful enough for his hearing loss and that he also needed new ear molds. Ms. Dye provided STUDENT with loaner hearing aids until new aids could be obtained.

On February 13, 1997, after a further hearing aid evaluation, Ms. Dye recommended stronger amplification with new binaural hearing aids and earmolds for STUDENT. She also recommended that STUDENT continue his aural habilitation program at the CCHAT Center for another four months, and identified proposed goals for STUDENT in sound awareness, phonetic listening, and auditory comprehension. On the same date, the District audiologist, Dr. Bradley Billings, completed the first unaided audiogram of STUDENT by District personnel. Dr. Billings concluded that STUDENT had severe to profound hearing loss in both ears and that this loss was educationally and communicatively handicapping.

In March 1997, STUDENT's mother requested an IEP team meeting due to her concern about STUDENT's continuing delays in speech development. Before the meeting, STUDENT's teacher, Sally Carrera, and his language, speech and hearing specialist, Josefina Preuit, prepared reports evaluating his progress. Ms. Carrera noted that STUDENT "uses 1 to 2 signs to communicate," and that he "says single words such as bird." (Pet. Exh. 26.) Ms. Preuit stated that STUDENT's "signing skills and vocalization upon request show steady growth and improvement." (Pet. Exh. 27.)

At the meeting, on March 18, 1997, PARENT requested an educational program for STUDENT which included 1:1 speech training, aural habilitation and oral speech instead of total communication. PARENT was accompanied to the meeting by Ms. Dye of the CCHAT Center. Ms. Dye provided the IEP team with the results of her February 13 evaluation of STUDENT, and proposed goals for him. The District members of the IEP team did not agree to the changes proposed by PARENT and Ms. Dye, and made no changes in STUDENT's placement at the Barton preschool class. The team suggested that PARENT visit special day classes for aurally handicapped children in the upper elementary grades and high school. The team wrote goals and objectives for STUDENT which continued his current total communication program. PARENT did not sign the March 18 IEP.

On April 30, 1997, the District sent the PARENTS a letter stating that special education services for STUDENT would be discontinued if the March 18 IEP were not signed and returned within 10 days. PARENT did not sign and return the IEP. Instead, in a letter dated May 6, 1997, PARENTS notified the District that they disagreed with the March 18 IEP, both as to the goals and objectives and continued placement at Barton for STUDENT. The PARENTS also stated that they wished spoken English to be STUDENT's primary mode of communication. The PARENTS advised the District that they were enrolling STUDENT full-time at the CCHAT Center effective May 6.

On May 6, 1997, STUDENT began attending the CCHAT Center preschool program full-time. The CCHAT Center provided STUDENT with a three-hour-per-day program which included 30 minutes of 1:1 speech training and 30 minutes of 1:1 auditory training daily. STUDENT also received group speech and language services in class two times per week.

In a letter dated May 14, 1997, Joan Roberts, then coordinator of communicatively handicapped programs for the District, advised the PARENTS that the District considered its program for STUDENT to be appropriate and declined to reimburse them for the CCHAT Center.

On June 18, 1997, another IEP team meeting was held. The IEP team drafted more comprehensive goals for STUDENT, and adopted many of Ms. Dye's suggested goals for auditory training and skill development. Although the District still refused to provide 1:1 speech training, it did slightly modify the existing placement offer by increasing the group speech and language services from 30 to 60 minutes per week to 30 to 90 minutes per week.

In June 1997, STUDENT's progress at the CCHAT Center was evaluated by CCHAT staff. Ms. Dye noted that STUDENT was progressing in his auditory skills and was beginning to correctly make sound-object association. He was also learning to discriminate between sounds. According to the speech and language pathologist, Kim Hiddleson, STUDENT was inconsistent in using his voice meaningfully without prompts, but would vocalize when requested to do so. STUDENT had difficulty comprehending oral language and often used gestures to communicate. (Pet. Exh. 36.)

On August 20, 1997, Ms. Hiddleson prepared a report evaluating STUDENT's progress in his speech and language therapy. She noted that STUDENT's overall verbal output, both spontaneous and imitative, had "significantly increased." STUDENT was observed attempting to sing songs, and was using approximately 10 words meaningfully and spontaneously. (Pet. Exh. 36.) STUDENT's mother also noticed that he was pushing himself to develop speech and that he was paying attention to sounds. She stated that STUDENT could now communicate with family members and was able to speak several words such as "ball," "Mom," and "Daddy."

CONTENTIONS OF THE PARTIES

Petitioner contends that the program which the District provided him during the 1996-97 school year was the only District program available for aurally handicapped children, not one tailored to his individual needs. Petitioner asserts that the District's offer to continue the Barton preschool class during the 1997-98 school year will not meet his unique needs. He states that he now requires more intensive services due to past deficiencies in the programs he has received from the District. Petitioner also asserts that the District failed to assess him for assistive technology, including augmentive communication devices.

Because Petitioner claims that the District has failed to provide him with a FAPE, he requests that his family be reimbursed for the expenses of his program at the CCHAT Center from May 1997 to the present. Petitioner claims that his program at the CCHAT Center is appropriate, and requests continued placement there for the remainder of the 1997-98 school year because he contends that the District's proposed placement at Barton School is inappropriate. Petitioner also requests continued placement at CCHAT as a compensatory remedy for the District's failure to assess him for assistive technology.

The District contends that the Barton preschool aurally handicapped program placement provided Petitioner with a free and appropriate education and continues to be an appropriate placement for the 1997-98 school year. The District claims that Petitioner's preferred mode of communication was sign language, and that he progressed in the District's programs because he increased the number of signs that he used. The District states that it made efforts to introduce other modes of communication, including oral language as requested by the parents, but that its programs for Petitioner are appropriate considering his preference for sign language.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Issue No. 1: Did the District provide Petitioner with a free and appropriate public education (FAPE) during the 1996-97 school year?

Under state and federal law, students with disabilities have the right to a free, appropriate public education. (Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Sec. 1401(8)(A)-(D), Cal. Ed. Code Sec. 56000, et seq.) (Footnote 4) The term "free and appropriate public education" means special education and related services that have been provided at public expense, under public supervision and direction, and without charge; meet the standards of the State educational agency; include an appropriate preschool, elementary, or secondary school education in the State involved; and are provided in conformity with the individualized education program required under Sec. 614 (d)." (20 U.S.C. Sec. 1401(8)(A)-(D).) Special education means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability...." (20 U.S.C. Sec. 1401(25); Cal. Ed. Code Sec. 56031.)

The U.S. Supreme Court addressed the level of instruction and services which must be provided to a disabled student under the IDEA in *Hendrick Hudson Central School District Board of Education v. Rowley* (1982) 458 U.S. 176.

The Court concluded that the IDEA does not require that a student be provided with the best available special education or services, or that the services maximize each child's potential. Rather, "the 'basic floor of opportunity' provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit" to the student. (Id. at 200.)

The right to a free and appropriate education also includes the right to educational services in the least restrictive environment (20 U.S.C. 1412(5)(A); Cal. Ed. Code Sec. 56031.) This means that, to the maximum extent appropriate, children with disabilities must be educated with children who do not have disabilities. (34 C.F.R. 300.550.) Special classes, separate schooling or other removal of children with disabilities from the regular educational environment can 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).)

Thus, under the IDEA, Rowley, and state law, an appropriate educational placement must include instruction and services which (1) are designed to meet the unique needs of the student, (2) provide educational benefit, (3) conform to the student's IEP, and (4) are provided in the least restrictive environment.

STUDENT's unique needs

Each of Petitioner's four expert witnesses testified that STUDENT needed extensive auditory training, and speech and language services from the earliest age possible. (Testimony of Ms. Dye, Ms. Hiddleston, Ms. Ishida, Ms. Schneider.) Linda Dye, audiologist and director of CCHAT, testified that once STUDENT received his hearing aids in January 1995, he needed to begin intensive, 1:1 training in a structured setting to learn to use his residual hearing. (Footnote 5) STUDENT needed 1:1 services in an intensive daily listening environment that also encouraged appropriate vocalization and speech before he was placed in a group setting. (Testimony of Ms. Dye.) Ms. Dye stated that the severity of STUDENT's hearing loss is not a bar to such services. She emphasized that oral speech is learned from listening and, thus, the earlier aural habilitation begins, the greater the opportunity for a hearing-impaired child, such as STUDENT, to develop appropriate speech and language skills. (Testimony of Ms. Dye.)

Kimberly Hiddleston, a licensed speech and language pathologist, also testified that STUDENT needs intensive auditory input and listening opportunities, along with the expectation that he will vocalize and use verbals. (Footnote 6) Ms. Hiddleston testified that 30 minutes per week of group speech and language services is not sufficient for STUDENT. Because he has a severe delay in speech and language, STUDENT needs daily assistance, with carry-over of skill development to the classroom.

Vicki Ishida, director of the resource program for hearing-impaired children at

Echo Horizon School, testified that STUDENT needs to develop listening, speech and language skills, and that he needs daily services to learn functional language. (Footnote 7) She also stated that his parents need education and support because so much of STUDENT's early learning occurs at home. Ms. Ishida testified that STUDENT needs intensive services in speech and language, and auditory skill development whether from his classroom teacher or another person. She stated that 30 to 60 minutes of speech and language services are minimal, especially if provided in a group setting. Ms. Ishida stated that STUDENT also needs intensive daily 1:1 articulation practice at the most basic phonetic level, with carry-over throughout the day in class and at home.

Kay Schneider, an educator of deaf children for 28 years, emphasized the importance of offering speech and language services and auditory training at an early age. (Footnote 8) She stated that STUDENT needed these services when he was first assessed by the District in 1994 and that he continued to need such services as he moved through the District's program. Ms. Schneider also testified that STUDENT needed the expectation that he would vocalize and that he should have been encouraged to communicate orally, not solely through sign language. Ms. Schneider reiterated the need for STUDENT to receive intensive services because he is capable of developing spoken language. She stated that 30 to 60 minutes per week of group speech and language services is insufficient for STUDENT to develop spoken language. She also stated that STUDENT needs carry-over into the classroom of speech and language skills developed in 1:1 sessions.

The District's speech and language specialist, Josefina Preuit, was the only District witness to testify concerning STUDENT's educational needs. (Footnote 9) She contradicted the testimony of Petitioner's four expert witnesses, stating that one hour daily of individual, intensive speech and language services would be "counter-productive" for STUDENT due to his age and the "laborious process" required to learn to speak. Ms. Preuit offered the generalization that, if a child is forced to learn to speak too quickly, later, as an adult, he will "hate his speech and language pathologist." Ms. Preuit characterized individual speech and language therapy sessions as requiring drills to repeat sounds and syllables over and over.

The Hearing Officer finds the testimony of Petitioner's expert witnesses regarding STUDENT's needs to be more credible and persuasive than that of the sole District witness. Ms. Preuit's testimony criticizing intensive 1:1 training appeared to the Hearing Officer to be based on facts and experiences unrelated to STUDENT's unique situation. There was no evidence that the current intensive sessions which STUDENT is receiving at the CCHAT Center are in any way harmful to him or counter-productive. Quite the contrary, the intensive sessions, provided in a "loving and supportive environment," have helped STUDENT to progress significantly in developing speech. (Testimony of Ms. Dye.) Ms. Hiddleston has provided daily 1:1 speech and language sessions to STUDENT since his enrollment at the CCHAT Center in May 1997. Ms. Dye has been serving STUDENT in 1:1 auditory training and aural habilitation sessions since October 1996. Both of these witnesses know STUDENT well and are well-qualified to testify concerning his needs. Further, the testimony of all four of Petitioner's experts is based on many years of

experience in the field of education and therapy for children with hearing impairments.

Therefore, the Hearing Officer finds that STUDENT needs daily, intensive, 1:1 assistance in a structured setting to develop his residual listening skills and to learn oral speech. STUDENT also needs constant daily encouragement to vocalize and an expectation that he will verbalize rather than use only sign language. Christopher needs to have his individual auditory training, and speech and language therapy carried over into the classroom and into his home to ensure that his skills are reinforced and retained. STUDENT's parents also need to receive training and support to assist with his educational program at home.

Barton School

The preschool class at Barton School for children with aural handicaps which STUDENT attended during the 1996-97 school year was a total communication class. STUDENT's teacher, Sally Carrera, testified that she used speech, sign language, finger spelling and gestures to communicate with the children in class. Classroom activities included use of classifying games which she has developed, a "math their way" calendar, journaling, and opportunities for integration with normally developing peers at various times during the half-day schedule. (Testimony of Ms. Carrera.)

During that year, STUDENT received 30 to 60 minutes per week of speech and language services in a group setting from the speech and language specialist, Ms. Preuit. (Pet. Exhs. 20, 24; testimony of Ms. Preuit.) Ms. Preuit worked with STUDENT and two or three other children three times per week--twice on a pull-out basis, and once in class. Ms. Preuit testified that she rarely, if ever, worked 1:1 with STUDENT, and only did so if other children were absent. She testified that she favored the small-group setting because it allowed the children to practice good communication skills with each other without an authority figure involved. During the 1996-97 school year, STUDENT received no intensive 1:1 services on a daily basis, resulting in continued lost opportunities to develop his residual hearing and oral speech.

Based on the credible testimony of Petitioner's expert witnesses, the Hearing Officer has found that 30 to 60 minutes per week of group speech and language services are insufficient for STUDENT. The group services at Barton School did not meet his need for daily, intensive, 1:1 speech and language assistance to develop oral language. Further, the Barton School placement provided no auditory training to help STUDENT develop his residual hearing. The auditory trainer device which STUDENT used during the 1996-97 school year was not a substitute for appropriate auditory training because increased amplification alone was not sufficient to teach STUDENT how to listen. (Footnote 10)

For the foregoing reasons, the Hearing Officer finds that the 1996-97 placement for STUDENT at the Barton School preschool class for children with aural handicaps was not designed to meet STUDENT's unique needs, and did not meet those needs.

Educational benefit

STUDENT received virtually no educational benefit from the preschool special day class for children with aural handicaps at Barton School. In fact, the District's approach to educating STUDENT reflected a certain sense of preordained futility unrelated to STUDENT's actual potential. STUDENT's IEPs for the 1996-97 school year established few goals and reflected very low expectations for him in the area of oral language. Petitioner's experts repeatedly pointed out that the lack of meaningful IEP goals, along with reduced expectations, had significant impact on STUDENT's progress in developing listening skills and speech. (Testimony of Ms. Schneider, Ms. Dye, Ms. Hiddleson, Ms. Ishida.) The District's reduced expectations for STUDENT in the area of oral language are best summed up in the following statement from the May 1996 IEP, "...due to the severity of the [hearing] loss, it may not be possible that STUDENT's speech will be at a normal level and this was discussed with the mother." (Pet. Exh. 20.) PARENT testified that District representatives at that meeting presented this message in even more stark terms by telling her that STUDENT would not be able to speak and she should think about his using sign language all his life.

During the 1996-97 school year, STUDENT's actual progress in the Barton School program was de minimus in keeping with the low level of expectation. According to the written report of his teacher, Ms. Carrera, STUDENT was able to use one or two signs to communicate, and able to say single words such as "bird" by March 1997. (Resp. Exh. 25.) In her testimony at hearing, Ms. Carrera clarified that STUDENT's spontaneous utterances often had no meaning and that he could say the word "bird" only if he were shown a picture of a bird. STUDENT's vocabulary consisted mostly of nouns, and he would name something he saw using sign language and vocalization. (Testimony of Ms. Carrera.) When STUDENT was with normally developing children, Ms. Carrera observed him communicating with single signs, gestures and "pulling and pushing" to take the other children to what he wanted them to see or do. STUDENT's growth in other areas, such as self-help, pre-academics, psychomotor skills, and social and physical skills was within normal developmental limits.

In March 1997, Ms. Preuit also evaluated STUDENT's progress in language, speech and hearing in the Barton preschool program. She noted that STUDENT's voice was "frequently quiet," and that he seemed to be aware of "some loud environmental sounds." (Resp. Exh. 26.) He had no physical barriers to speech production, but was still not able to generate meaningful speech. Ms. Preuit noted that STUDENT used a combination of sign, gesture and voice to communicate, often copying certain sounds when modeling was provided. (Resp. Exh. 26.) He was still using random vocalization to gain attention from adults so that his needs could be met.

The District has attempted to justify STUDENT's minimal progress in developing speech and language skills by arguing that STUDENT was progressing in sign language. The District claims that sign was the language

that STUDENT preferred to use and, thus, was his primary language. However, as already noted above, STUDENT's progress in sign language was extremely slow. In March 1997, after two and one-half years in the District's programs, STUDENT was using one to two signs to communicate. (Pet. Exhs. 26, 29.) Ms. Dye testified that this low number reflected unreasonably low expectations, considering STUDENT's time in the program. Ms. Hiddleson also testified that by March 1997, after two and one-half years in the District's program, STUDENT's progress in signing was minimal.

As for the District's claim that STUDENT's preferred mode of communication is sign language, the Hearing Officer finds this position has little meaning under these circumstances. As the above evidence indicates, STUDENT did not learn to use oral language during his time in the District's programs. Thus, to suggest that he somehow made a choice in favor of sign language rather than spoken English is disingenuous, considering that STUDENT never learned an alternative mode of communication to sign language. Further, Ms. Dye testified that speech will not happen for STUDENT if he is learning to sign and there is no expectation of verbal language in the classroom.

The Hearing Officer also notes that STUDENT's parents consistently expressed their desire to have STUDENT learn to communicate through spoken language, specifically English. (Testimony of PARENT, see also Pet. Exhs. 4 (pg. 23), 5 (pg. 24), 7 (pg. 41), 9 (pg. 53), 20 (pg. 71), 29 (pg. 89), 31.) The parents' wishes were either overlooked or simply ignored by the District as STUDENT moved through its programs. In legislative findings, the California State Legislature has declared that "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 proficiency." (Cal. Ed. Code Sec. 56000.5(b)(2).) Although some minimal efforts were made to teach STUDENT to speak, in general, the District's programs displayed a distinct emphasis on sign language. STUDENT's unique mode of communication is evolving and clearly can include significant amounts of oral language. The Hearing Officer finds that the District's programs for STUDENT during the 1996-97 school year did not significantly respect, utilize or develop STUDENT's spoken language, contributing to his lack of educational progress in those programs.

In sum, the Hearing Officer finds that STUDENT received no significant educational benefit in the special day class for aurally handicapped preschoolers at Barton during the 1996-97 school year. STUDENT made virtually no progress in learning to speak during that year. Further, what little progress STUDENT made in learning sign language was minimal considering the amount of time he had been enrolled in the District's programs.

Conforms to the IEP; least restrictive environment

The Hearing Officer has already found that STUDENT's placement at the Barton School was not designed to meet his unique needs, and did not provide him with educational benefit. In light of these findings, it is not necessary to proceed with further analysis of whether these placements conformed to

STUDENT's IEPs and provided him with the least restrictive environment.

* * *

The Hearing Officer concludes that the District failed to provide STUDENT with a free and appropriate public education during the 1996-97 school year. The programs which the District provided at Barton School were not designed to meet STUDENT's unique needs for daily, intensive, 1:1 services providing auditory training, and speech and language skills to help him learn spoken English. Further, the District's program provided STUDENT with no educational benefit in that he learned virtually no oral language and little sign language of consequence during that year.

Issue No. 2: Has the District offered Petitioner an appropriate placement for the 1997-98 school year?

At the June 18, 1997 IEP meeting, the District offered Petitioner placement in the aurally handicapped special day class for preschool children at Barton School for the 1997-98 school year. This is, of course, the same special day class which STUDENT attended during the 1996-97 school year, before he moved to the CCHAT Center. In its offer, the District expanded the goals and objectives for STUDENT, and increased the speech and language services from 30 to 60 minutes per week to 30 to 90 minutes per week to include increased classroom consultation. (Pet. Exh. 34.) Speech and language services are still to be offered in a group setting, and all other aspects of the placement remain as provided during the 1996-97 school year. (Pet. Exhs. 33, 34; testimony of Ms. Roberts.)

Joan Roberts, the director of special education, testified that the Barton School class for preschoolers with aural handicaps was the only placement option available to STUDENT in March 1997, and remains the only available alternative for him in the District. The evidence establishes that the clear emphasis in that preschool class is on the teaching and use of sign language, even though the District identifies the class as using a total communication approach. (Testimony of Ms. Dye, Ms. Carrera.) The Hearing Officer has already found that STUDENT needs services designed to help him develop oral language. The Hearing Officer has also concluded that the Barton preschool class was not an appropriate placement for STUDENT during the 1996-97 school year. Adding just 30 more minutes per week of classroom consultation in speech and language for STUDENT will not correct that placement's deficiencies. Ms. Dye testified that an additional 30 minutes of speech and language consultation time in the classroom was still insufficient to meet STUDENT's needs. As discussed above, STUDENT needs intensive, 1:1 services on a daily basis in order to remediate his severe speech and language delays. Further, the District has presented no evidence which indicates that STUDENT would receive educational benefit by continuing in essentially the same program that failed him in the past.

Therefore, the Hearing Officer finds that the District's offer to continue STUDENT in his prior placement at Barton School, with an additional 30

minutes per week of classroom consultation in speech and language, will not provide a placement designed to meet STUDENT's unique needs. The Hearing Officer also finds that the Barton School placement will not provide STUDENT with educational benefit because it is effectively the same placement as last year's. The Hearing Officer concludes that the District's placement offer for STUDENT for the 1997-98 school year is not appropriate.

Issue No. 3: If Petitioner has not been provided a FAPE for the 1996-97 school year, are his parents entitled to reimbursement for costs of his unilateral private placement at the Children's Choice for Hearing and Talking (CCHAT) Center from May 1997 through the date of decision? Is the CCHAT Center an appropriate placement for Petitioner for the remainder of the 1997-98 school year?

In *Burlington School Comm. v. Mass. Dept. of Ed.* (1983) 471 U.S. 359, the U.S. Supreme Court held that parents of disabled children may receive retroactive reimbursement for the tuition and related expenses of unilaterally placing their child in a private special education program. Such reimbursement is an appropriate remedy where the school district has failed to provide the child with a FAPE and the private placement is determined to be proper under the Act and reasonably calculated to provide educational benefit to the child. (*Burlington*, supra, at 369-370; see also *Rowley*, supra, at 207.)

The Hearing Officer has determined that STUDENT was denied a FAPE during the 1996-97 school year, and was not offered an appropriate placement for the current, 1997-98, school year. Petitioner has requested retroactive reimbursement for the costs, including transportation, which his parents have incurred for his placement at the CCHAT Center from May 6, 1997, to the present. The Hearing Officer will review STUDENT's educational program at the CCHAT Center to determine if it is designed to meet his unique needs, is providing him with educational benefit, and is provided in the least restrictive environment.

The evidence indicates that the CCHAT Center has provided an auditory/oral program for STUDENT in a reverse mainstream, half-day preschool class for children with hearing impairments and children who hear normally. (Pet. Exh. 38.) The curriculum is thematic, and the program includes parent education, participation, and support. STUDENT's class currently includes four other hearing-impaired children and three normally hearing children, with one teacher and one instructional aide. (Pet. Exh. 38.) STUDENT receives intensive 1:1 auditory training (30 minutes daily), and intensive 1:1 speech and language services (30 minutes daily), with group language instruction in class for 30 minutes two times per week. (Testimony of Ms. Dye, Ms. Hiddleston; Pet. Exh. 38.) The CCHAT Center also encourages carry-over into the classroom of the speech and auditory skills which STUDENT is learning in his 1:1 sessions. (Testimony of Ms. Dye.) Each of these components--i.e. 1:1 auditory training, 1:1 speech and language services, classroom carry-over, and parent education--addresses STUDENT's unique needs as previously described above. Thus, the Hearing Officer finds that the CCHAT Center is providing STUDENT with an

educational program designed to meet his unique needs.

According to an August 1997 report completed by the CCHAT Center staff, STUDENT has made progress in his speech and language skills since entering the program in May. (Pet. Exh. 37.) His overall verbal output, both spontaneous and imitative, has significantly increased, according to his therapist, Ms. Hiddleston. STUDENT consistently uses his voice when encouraged to do so and has been observed attempting to sing songs. (Pet. Exh. 37.) Ms. Hiddleston noted in the August report that STUDENT was beginning to produce a few words spontaneously and was using about 10 words meaningfully at that time. (Pet. Exh. 37.) The two experts not associated with the CCHAT Center--Ms. Schneider and Ms. Ishida--both testified that STUDENT is appropriately placed at the Center, and is progressing in the program. Therefore, the Hearing Officer finds that the CCHAT Center program has provided STUDENT with educational benefit.

The CCHAT Center program for STUDENT provides reverse mainstreaming by including normally developing children in his preschool class. This allows STUDENT to interact daily with his "language mode peers," as is favored under state law. (Ed. Code Sec. 56000.5(b)(4).) Ms. Dye testified that STUDENT is not now ready for full inclusion because he does not have enough oral language to interact successfully in a large class of normally developing children. She stated that the reverse mainstream classroom at CCHAT creates a "safe environment" for STUDENT because there are fewer normally developing children than in a regular class, and that he has done well interacting with both hearing impaired and normally developing peers. The placement which the District proposed would have continued STUDENT in a special day class with other hearing-impaired children only. The CCHAT Center clearly provides STUDENT with an education in a manner that promotes "maximum interaction" between children with disabilities and those who are not disabled. (See Ed. Code Sec. 56031.) Thus, based on this evidence, the Hearing Officer finds that the CCHAT Center provides STUDENT with the least restrictive environment. The Hearing Officer also finds that the reverse mainstream environment is particularly appropriate for STUDENT at this point in his education. The District's IEP was defective because it does not reflect STUDENT's needs or contain an appropriate placement or services. It is axiomatic that a unilateral private placement need not conform to a defective IEP.

Under Education Code Section 56441.8(d), early education services for preschoolers may be provided by the school district through a contract with a certified nonpublic, nonsectarian school. The CCHAT Center is a certified nonpublic school which received conditional certification with no corrective actions required effective October 8, 1997. (Pet. Exh. 38.)

The Hearing Officer concludes that Petitioner's parents are entitled to reimbursement for the costs of STUDENT's unilateral private placement at the CCHAT Center from May 6, 1997, through the date of this decision. The Hearing Officer also concludes that the CCHAT Center is an appropriate placement for STUDENT for the remainder of the 1997-98 school year,

including the extended school year. (Footnote 11)

Issue No. 4: Did the District fail to assess STUDENT for assistive technology, including augmentive communication? If so, is he entitled to compensatory education at the CCHAT Center as a remedy?

Petitioner has identified no specific section of state or federal law which requires that a school district assess a preschooler, over the age of three, for an assistive technology device or augmentive communication. The Hearing Officer is also aware of no such provision. Further, neither Petitioner nor the District has offered argument on this issue in their respective closing briefs.

Federal regulations under the IDEA define assistive technology services to include an evaluation of the child's needs, but do not mandate that such an evaluation occur. (34 CFR Sec. 303.12(d)(1)(i).) An assistive technology device is not defined in state law, but is described in federal regulations as "any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of children with disabilities." (34 CFR Sec. 303.12(d)(1); see also 34 CFR Sec. 300.5.)

Notwithstanding the absence of an explicit assessment requirement in federal law, the clear implication of state law is that an assessment for assistive technology should be part of a hearing-impaired child's overall evaluation. Under Education Code Section 56320(g), assessments of children with low incidence disabilities (such as hearing impairments) must give attention to the children's unique educational needs, including, but not limited to, the need for specialized services, materials, and equipment. (See Education Code Section 56026.5 for the definition of low incidence disabilities.) Additionally, Education Code Section 56363.1 states that a school district is responsible for providing "specialized equipment," other than medical equipment, for use at school that is needed to implement the individualized education program.

Uncontroverted expert testimony established that STUDENT should have been evaluated for assistive technology devices. Ms. Schneider testified that it would have been appropriate to evaluate STUDENT for the use of an FM system in his preschool class at Barton. Ms. Dye testified that STUDENT should have been assessed for an FM system for classroom use at the time of the triennial assessment in April 1996. She stated that this was probably the only assistive technology device that he needed (in addition to hearing aids) at his age.

It is clear from a review of the evidence that the District failed to assess STUDENT's needs for assistive technology after he turned three. His teacher, Ms. Carrera, testified that when STUDENT received an assistive technology device (i.e. an auditory trainer) in his preschool class during the 1996-97 school year, no assessment was done. Ms. Carrera testified that the District provided one trainer for every child, apparently just as a matter of routine practice. She stated that preparation of the auditory trainer ear molds and amplification level was done by a District vendor based on an unidentified audiogram which the District provided to that vendor.

During the 1996-97 school year, STUDENT was monitored by Dr. Bradley Billings, an audiology consultant for the District. However, Dr. Billings did not provide an assessment of STUDENT's need for assistive technology or augmentative communication devices. Dr. Billings testified that he saw STUDENT only for monitoring purposes to identify problems, such as ear canal obstruction, hearing aid and ear mold difficulties, and possible change in hearing impairment.

Therefore, the Hearing Officer finds that the District did not assess STUDENT for assistive technology or augmentative communication from his third birthday in May 1996 until he left his District preschool class in May 1997. The Hearing Officer concludes that this failure to assess violated Education Code Section 56320(g), which requires that the assessment of a student with a low incidence disability give special attention to his need for "specialized services, material, and equipment."

Petitioner has requested compensatory education through placement at the CCHAT Center for the remainder of the 1997-98 school year as a remedy for the for the District's failure to assess him for assistive technology. This is the same remedy as was requested by Petitioner for the District's failure to offer an appropriate placement for the 1997-98 school year. There is no need to order the same remedy for the same time period under a different theory. The Hearing Officer has already concluded that Petitioner must be placed at the CCHAT Center for the remainder of the current school year, including the extended school year, because he was not offered an appropriate placement by the District. Therefore, the Hearing Officer finds that awarding Petitioner continued placement at the CCHAT Center for the remainder of the 1997-98 school year as compensatory education is unnecessary and duplicative.

ORDER

1. Within 30 days of the receipt of proof, the District shall reimburse Petitioner's parents for the costs and all related expenses, including transportation, of STUDENT's program at the CCHAT Center from May 6, 1997, through the date of this decision.
2. The District shall fund STUDENT's program at the CCHAT Center, including transportation to and from the Center, from the day after the date of this decision through the remainder of the 1997-98 school year, including the extended school year.
3. Within 15 days of the date of this order, the District shall convene an IEP team meeting and develop an appropriate IEP, including appropriate goals and objectives, for STUDENT for the remainder of the 1997-98 school year, and the extended school year. The IEP team shall include Linda Dye, director of the CCHAT Center, and any other CCHAT Center personnel which the IEP team deems appropriate and necessary. The IEP shall state that STUDENT's

placement for the remainder of the current school year, including the extended school year, is at the CCHAT Center. The IEP shall also specify that STUDENT's program at the CCHAT Center will include, but not be limited to, the following components: (a) intensive 1:1 speech and language training; (b) intensive 1:1 auditory training; (c) carry-over of speech and auditory skill training in the classroom; (d) reverse mainstreaming; and (e) parental support, education and training.

PREVAILING PARTY ON EACH ISSUE

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

Petitioner prevailed on all issues heard and decided, with the exception that the duplicative remedy of compensatory education at the CCHAT Center for the remainder of the 1997-98 school year was not awarded.

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. (Cal. Ed. Code Sec. 56505(i).)

DATED: March 20, 1998 _____
JoAnn Irwin-Eshelman, Hearing Officer
California Special Education Hearing Office

Footnotes:

1. Ms. Kashar presented some issues for hearing from the 1994-95 and 1995-96 school years. Until May 3, 1996, when Petitioner turned three years old, he received early intervention services from the District pursuant to Part H of the IDEA. The Hearing Office does not have jurisdiction over issues concerning early intervention services provided to children under three years old. (17 CCR Sec. 52172(c)) Therefore, Petitioner's issues from the 1994-95 and 1995-96 school years will not be considered. 2. There was some delay in STUDENT's receiving his first hearing aids due to initial denial of his parents' request for the hearing aids by CCS and Aetna Insurance Co. 3. The CCHAT Center provides specialized auditory/oral programs for deaf and hard of hearing children from birth through 10 years of age. (Pet. Exh. 38.) 4. The Individuals with Disabilities Education Act (IDEA) 1997 amendments were signed into law on June 4, 1997. In this case, Petitioner's request for hearing was received about three weeks before the amended IDEA became law. Therefore, the Hearing Officer will apply the law in effect at the time of the alleged violations of the IDEA, in accordance with general rules regarding retroactivity. (Landgraf v.

USI Film Products (1994) 511 U.S. 244.) 5. Ms. Dye has a master's degree in speech and hearing with emphasis in audiology. She is a licensed audiologist and has a rehabilitation and clinical services credential for audiology. She has been the director and audiologist for the CCHAT Center for the past two and one-half years, and has also worked at Loma Linda University Surgery Medical Group as an audiologist and cochlear implant specialist. She is the co-author of three articles regarding the speech perception skills of children. 6. Ms. Hiddleston has a master's degree in speech and language pathology. She has a certificate of clinical competence from the American Language Speech and Hearing Association. She is also a certified auditory-verbal therapist. Ms. Hiddleston is in private practice and sees clients with hearing impairment for diagnostic purposes and ongoing therapy. Historically, about 60-70% of her clients have been children under the age of five. 7. Ms. Ishida has a master's degree in communication handicaps, and a deaf and hard of hearing credential. She also has a lifetime credential in communication handicaps and is a certified auditory-verbal therapist. For nine and one-half years she has been the director of the Echo Center, a resource program for hearing-impaired students at the Echo Horizon School, a nonpublic school serving hearing and hearing-impaired elementary-age students. 8. Ms. Schneider has a master's degree in special education and a lifetime credential as a deaf and hard of hearing specialist. She is also a certified auditory-verbal therapist. She has taught at the Oralingua School for the Hearing Impaired, a certified nonpublic school, for 28 years. She has also published two curricula guides and one monograph regarding integrating auditory learners in preschool. 9. Ms. Preuit has a master's degree in communication disabilities and a credential in language, speech and hearing services. She is also a licensed speech and language pathologist. She has been employed by the District as a speech and language specialist for five years. 10. The auditory trainer, also known as an FM system, is a device used in place of hearing aids while the child is in the classroom. The auditory trainer which the child wears is a receiver which feeds out environmental sounds and allows the child to focus on the teacher's voice, which is amplified with a microphone and transmitted to the child. (Testimony of Ms. Carrera, Ms. Dye.) 11. The IEP team has already determined that extended school year services are appropriate for STUDENT. (See Pet. Exhs. 29 and 34.)

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