

THE STATE OF NEW HAMPSHIRE

DEPARTMENT OF EDUCATION

In re: Hunter P.

Docket No. IDPH 01-011

Decision

Introduction

Jurisdiction in this matter is under the Individuals with Disabilities in Education Act, 20 U.S.C. 1400 et. seq. (IDEA), N.H. RSA 186-C and the Regulations and Standards promulgated under those statutes. A prehearing conference was held on May 1, 2001. Pursuant to the terms of the prehearing order issued shortly thereafter, the parties agreed to waive the 45 day rule and the parties further agreed to attempt to arrive at an agreed-upon statement of facts so that the matter could be determined on cross Motions for Summary Judgment. The parties further agreed that if they were unable to do so, then a second prehearing conference would be held and the matter would proceed to a due process hearing.

A second prehearing conference was held on October 4, 2001 after several telephone conferences between the counsel for the parties and the Hearing Officer and an Order was issued shortly thereafter. The parties did submit an agreed-upon statement of facts, however both agreed that it was necessary to have witnesses testify as to certain issues and the matter proceeded to a due process hearing beginning November 1, 2001 and continuing on November 2, 2001 and December 7 and 12, 2001.

By agreement of the parties witnesses on behalf of Hunter P. testified first.

Procedural Violations

There were no specific procedural violations alleged in this matter, so none need to be addressed in this Decision.

Issues to be Determined

By agreement of the parties it was stipulated that Hunter P., d/o/b July 30, 1996. has a profound sensorineural hearing loss in both ears caused by damaged transducer or hair cells in the cochlea. Cochlea implant surgery was performed in the spring of 1999. On April 22 and 23, 1999 following a six week post-operative period, Hunter met with Suzanne Lenz, M.A., C.C.C.A., a clinical audiologist at Dartmouth Hitchcock Clinic in Lebanon, New Hampshire, who fitted him with the external components of his cochlea implant device consisting of a headpiece with a microphone and radio frequency transmitter, which was placed behind his outer right ear, a speech processor, and a cable which connected the headpiece to the speech processor. Hunter wears the speech

processor generally in a clip-on pouch fastened to his clothing. Ms. Lenz then activated and programmed the speech processor. In May of 1999 the School District identified Hunter as eligible for special education services based on his deafness. The cochlea implant must be programmed as will be discussed below, and that program is known as “mapping”. The dispute between the parties involves several limited issues. First, the parents take the position that the audiologist should be identified in Hunter’s IEP as a Related Service. The District believes it is not necessary to include the audiologist as a Related Service. Secondly, the parents request reimbursement for their transportation expenses for visits to the audiologist from their home in Stratham to and from the office in Lebanon, New Hampshire. Finally, the parents believe they should be reimbursed for the portion of the audiologist expenses that are not covered by insurance (i.e., the copays). The specifics of those requests with respect to reimbursement for transportation and audiologist expenses will be discussed below.

### Discussion

After a brief opening statement by counsel for Hunter P., the parents called Donald K. Eddington as their first witness. His C.V. is set out at Parents Exhibit 6. Mr. Eddington is employed at the Massachusetts Eye and Ear Infirmary, which is a teaching hospital connected to the Harvard Medical School. He has been the Director of the Cochlea Implant Research Laboratory in Massachusetts Eye and Ear Infirmary since 1983, and has been the Director of the Neural Prosthesis Research Program at the same facility since 1997. By agreement of the parties Mr. Eddington was certified as an Expert in the area of hearing and the science of cochlea implants. The laboratories with which Mr. Eddington is associated conduct research to improve cochlea implants by developing experimental ones in the laboratories. In addition, Mr. Eddington teaches courses at Harvard University and the Massachusetts Institute of Technology on hearing programs. To his knowledge, Mr. Eddington’s lab is the only one that does the neural prosthesis research in the United States. There are three or four other cochlea implant laboratories in this country. Mr. Eddington has substantial interaction with clinicians in the field and meets weekly with audiologists to go over individual cases of patients and their cochlea implants. He is not certified to treat patients.

With respect to Hunter, Mr. Eddington’s knowledge comes from reviewing documents in Hunter’s file. He was aware that Hunter is severely and profoundly impaired and has been from an early age. He was also aware that the cochlea implant was implanted at the age of three. Mr. Eddington never met the family before coming to testify and he has never met Hunter. He proceeded to describe using an overhead projector and diagram how a normal hearing person hears. He then proceeded to describe how a person with moderate hearing loss hears and how a person with a profound, severe hearing loss is impacted. In both cases of hearing loss either or both the hair cells and/or nerve fibers in the auditory nerve are impacted. In a person with a profound hearing loss such as Hunter there are few or no hair cells, so that it is impossible for the nerve fibers to respond to sound. In that case, a traditional acoustic hearing aid is of no assistance, and a cochlea implant is necessary. For a person with mild to moderate hearing loss a traditional hearing aid may be sufficient. With a cochlea implant there is a microphone and sound

processor which delivers electric stimuli to the nerve fibers, which has electrodes which are implanted into the cochlea. This sends an electrical signal to the brain stimulating hearing. The sound processor has a number of channels which must be adjusted to fit the individual person involved. This process is called "mapping". It is necessary for an audiologist to adjust the sound processor as the individual grows, and mapping is an ongoing process for a person with a cochlea implant. The microphone and antenna are external behind the ear and the sound processor is in a belt or in a shirt pocket or in some cases, externally behind the ear. The electrodes are implanted in the cochlea. S.D. 181 provides an excellent diagram of the ear and the cochlea implant.

On cross examination Mr. Eddington said he has worked with a school for the deaf with respect to cochlea implants. He agreed with counsel for the District that a cochlea implant will not allow a non-lingual child to understand speech. It will take time to acquire the ability to process the information, particularly with a child like Hunter who never heard, as opposed to a child who had hearing and lost it due to illness or trauma. He said that with a young non-hearing child it is critical to get the correct mix of signals through the mapping process in the cochlea implant, otherwise the child's first exposure to words will be distorted and the brain will not be able to descramble the information properly.

G. Michael Moon testified as the second witness on behalf of Hunter P. His CV. is set out at Parent Exhibit 7. He is a teacher of the deaf and is the Director of HEAR in New Hampshire. HEAR in New Hampshire opened in 1999 and is an auditory oral preschool, kindergarten and school for deaf children. HEAR in New Hampshire does not employ sign language of any kind to teach hearing-impaired children. It employs an auditory oral approach. It provides an option for parents of hearing-impaired children other than sign language.

Mr. Moon has known Hunter and his parents since the summer preschool session in 1999 (the school's first program since its opening). Mr. Moon has had constant contact with the parents since that time and Hunter has been in the program continuously since July 1999. As is set forth in Paragraph 6 of the Agreed Upon Statement of Facts, Hunter receives auditory training, speech training and language development/habilitation both from a deaf educator and a speech/language pathologist at HEAR in New Hampshire. Such training is for the purpose of learning listening skills and learning to comprehend and use spoken language. The deaf educator, after consultation with other teaching staff, also sends audiological observation reports to the audiologist, Suzanne Lenz, regarding changes in Hunter's performance in the school setting. Hunter's IEP provides for five hours per week of speech therapy and three hours per week of service (two individual and one group) from a teacher of the acoustically handicapped at HEAR in New Hampshire (see Paragraph 7 of Agreed Upon Statement of Facts). Mr. Moon believed that Hunter has made progress in both his listening and speaking skills. He also testified that Hunter will continue to develop the skills he needs for listening and speaking as he matriculates at HEAR in New Hampshire. There is no audiologist on staff primarily for financial reasons. There is, however, daily contact with audiologists. It is necessary that the school interact with the audiologists for the students because the students' equipment

must work efficiently and be constantly monitored, particularly those students with cochlea implants.

When Hunter arrives at school each day, the first item of business is to do a thorough check of his equipment and then to do a sound check. This process occurs for each child, regardless of the type of hearing device worn by the student. There are presently three students at HEAR in New Hampshire who wear cochlea implants. The audiologist's involvement with Hunter's school program includes the requirement to insure that the implant is properly functioning. There have been occasions where HEAR in New Hampshire staff could not determine if the implant was working properly and as such they had to be in contact with the audiologist to deal with that issue. The HEAR in New Hampshire staff does not provide mapping services for Hunter. All of the maps in the processor have been inserted and are adjusted by the audiologist. The school staff provides information to the audiologist regarding Hunter's progress in his academic programs so that the audiologist can adjust the maps in the cochlea implant. It is necessary for a number of visits between Hunter and the audiologist to occur to adjust the maps. The audiologist will also see Hunter on occasion at the request of school personnel or the parents. If Hunter's cochlea implant is not properly mapped, it would inhibit his ability to learn. In addition, if the equipment fails or malfunctions it is necessary for the audiologist to adjust it accordingly.

On cross-examination Mr. Moon acknowledged that he is not licensed as a speech language pathologist, though he was, years ago. In addition he is not an audiologist. In response to questions relative to equipment problems during Hunter's matriculation at HEAR in New Hampshire Mr. Moon recalled battery failures, a cord problem, a magnet problem and the need for a new processor all having occurred. Mr. Moon attended team meetings and recalls assistive technology being discussed in addition to the cochlea implant. This academic year (2001-2002) Hunter is at HEAR in New Hampshire three hours each morning and then attends a program at the local school in the afternoon. Mr. Moon has worked with eight to ten children with cochlea implants in his career. Mr. Moon's testimony concluded the hearing on November 1, 2001.

By agreement of the parties the hearing on November 2, 2001 began with a School District witness taken out of order, to wit, Dr. Marilyn Neault. Dr. Neault's C.V. is at S.D. 253-267. She is the Director of Audiology Services at Boston Children's Hospital. She is a licensed audiologist in the State of Massachusetts and has a C.C.C.A. in audiology from the American Speech Language Association. She has been an audiologist for 29 years. She is the primary provider of services for cochlea implant patients at Children's Hospital and is an assistant professor of Otology and Laryngology at Harvard Medical School. She also conducts trainings at various schools regarding particular needs of individual children and lectures generally in educational settings regarding cochlea implants. Her current caseload is approximately 138 children with cochlea implants. Dr. Neault was certified by agreement of the parties as an expert in pediatric audiology with a specialization in cochlea implants. Dr. Neault described a cochlea implant as an electrical device implanted to stimulate the auditory nerve. It is not an assistive learning device. It is an artificial sense organ. An FM system is a device to

provide distance hearing. Dr. Neault distinguished between a cochlea implant and a hearing aid and said these are not similar. She also described mapping as the programming of a cochlea implant to deliver correct stimulation to the patient so as to provide the best communication. An audiologist must use a planning strategy to stimulate the implanted electrodes in the cochlea. He/She must also determine the least amount of electrical current that can be used to stimulate the sound to the patient (i.e., to set the T levels). The audiologist must determine the maximum electrical current that can be fed to the implants and still be comfortable to the patient (i.e. set the comfort level). The audiologist must then determine the frequency of sounds in appropriate order (i.e. base sounds, treble sounds, etc.) and finally a computer command must be given to activate the microphone so that the user can hear the sound in the room and it can be appropriately monitored. Mapping is the adjustment of electrical current levels to a surgically implanted device and is not a form of habilitation. Mapping is not an evaluation in and of itself. However the child should be evaluated on a regular basis if implanted with a cochlea implant. Dr. Neault testified that she has never dealt with an issue of a public school paying for mapping service. She has no familiarity with this issue. Bills are always sent to the medical insurance company and mapping is always considered a follow up to the surgery and the insurance company is made well aware of that.

Beth P., Hunter's mother, testified as the next witness on behalf of Hunter. As indicated in the Agreed Upon Statement of Facts, Hunter was born July 30, 1996 and has lived his entire life in Stratham, NH with his parents, Beth and David P. and his brothers, Justin, age 10, and Adam, age 8. Hunter has a profound sensorineural hearing loss in both ears, caused by damaged transducer or hair cells in the cochlea. Such hearing loss means that Hunter's inner ear nerve endings do not respond to sound softer than 90 dB. In the months after his birth, Hunter's parents and professionals with whom they consulted suspected hearing loss. His condition was confirmed by an auditory brain stem response test administered at the Mary Hitchcock Memorial Hospital on September 2, 1997. Hunter's parents and his two brothers have normal hearing capacity. Their regular means of communication among themselves and with Hunter is through oral speech.

According to Mrs. P., Hunter went through two different sets of hearing aids on the advice of an audiologist and neither one was successful. The family kept searching for more information to allow Hunter to hear. Prior to age 2 it was concluded that hearing aids were not going to be effective for Hunter. The family looked into 2 different cochlea implant devices by different manufacturers and decided to go with the Clarion device. The parents and Hunter went to Dartmouth Hitchcock Medical Center to see the audiologist and the Center requested cognitive testing at the Clark School for the Deaf. That testing occurred and the Clark School wrote a report to the Medical Center. Representatives of Dartmouth Hitchcock and the parents discussed the need for the parents to agree to place Hunter in a program with complete follow-through and that without it, Hunter would not receive the benefits of the cochlea implant. In essence, the parents were requested to and did agree to be totally committed to the program. Dr. Johnson performed the cochlea implant surgery on March 3, 1999. Subsequently Hunter saw Suzanne Lenz (and also Linda Strojny on occasion). There have been a total of 19

visits to the audiologist at Dartmouth Hitchcock Center in Lebanon since the cochlea implant

was activated in April 1999. Those visits occurred on the following schedule:

1999	2000	2001
5/7, 5/20, 8/25, 11/15	3/20, 6/15, 7/3	1/29, 2/6, 2/13, 3/19
12/14, 12/27	9/27, 12/13	4/3, 4/17, 7/5, 10/15

Hunter has also seen Dr. Johnson a few times within the time period described above. Most of the 19 visits were for mapping or sound field testing. One visit involved a problem with the headpiece and another a problem with the processor. The meetings with Suzanne Lenz were set up either by Ms. Lenz, the parents or Hear in New Hampshire. All of the appointments were necessary in the opinion of Mrs. P. As indicated in the Agreed Upon Statement of Facts, on May 24, 1999 the School District identified Hunter as eligible for Special Education Services based on his deafness. Hunter began early intervention in April 1999 and then entered Hear in New Hampshire in the summer of 1999. Mrs. P. agreed with the substance of the testimony of Mr. Moon relative to Hear in New Hampshire. With respect to Hunter's progress in the "hearing world", it was Mrs. P.'s opinion that over the 2 1/2 years since the cochlea implant was implanted Hunter has gone from being totally deaf to a functioning child who is able to answer simple questions. She will call him for dinner from the other room and he will hear her and respond to her. Before the implant, Hunter could be standing as a fire truck went by with all alarms blaring and be unable to hear a single sound.

When Hunter was initially identified as requiring Special Education Services, Mrs. P. knew little about the Special Education process or what constituted related services. She came to learn much more as time passed based primarily on information provided to her by another parent. In late 1999 she first learned that audiology could be included in an IEP as a related service. She requested that the school reimburse her for transportation expenses for transporting Hunter to school and the School District did so. However the District would not agree to pay for the transportation for visits to the audiologist, since the audiologist was not included in the IEP. In addition the parents have incurred expenses for co-pays for visits to the audiologist which generally are \$ 10.00 each. At all team meetings subsequent to the initial request for reimbursement for transportation to the audiologist Mrs. P. continued to raise that issue and the District continued to refuse to make that payment. According to Mrs. P., Bing Hawes indicated that he was told by his attorney that this was a medical expense and that the District did not have to pay for it. She has submitted bills to the District for the co-pays and has not been compensated for these either. She claimed that she never made any claim for appointments with the doctor for Hunter.

On cross examination Mrs. P. said the insurance company did not cover the cost of the cochlea implant hardware. She is requesting reimbursement for 17 of the 19 visits to Hanover and 32 cents per mile and 200 miles per visit (the Hearing Officer calculates that

to be \$1,088.00). In addition the parents are requesting reimbursement of \$130.00 in copays, for a total claim as of the date of the testimony of \$1218.00.

Ronnie Sue Duby testified as the next witness on behalf of Hunter. She knows the family as a result of interaction at Hear in New Hampshire. Her daughter, Lauren, attends school with Hunter and is also deaf. She suffers from moderate to severe deafness in one ear and is totally deaf in the other. Lauren has been in the school since the summer of 1999 and she had hearing aids prior to the cochlea implant, which were unsuccessful. Dr. Johnson performed the cochlea implant surgery on Lauren in February of 2000. Lauren also works with Suzanne Lenz at Dartmouth Hitchcock Medical Center. Ms. Duby requested her local school district to reimburse her for mileage to and from Dartmouth Hitchcock Medical Center to visit with the audiologist and her local school district agreed to pay for that transportation. She submits mileage vouchers and is reimbursed. Ms. Duby indicated that the special education person in her district, Jane Healy, told her that she had been contacted by another school district complaining that Ms. Healy's school district should not reimburse the family for visits to the audiologist. Ms. Duby became concerned when she heard this and requested a letter from the school district saying that payment would be made. That letter was submitted and is part of the exhibits at Parent Exhibit 12.

There was one remaining witness on behalf of the parents and Hunter, Linda Strojny, however she was unable to appear on November 2 due to a funeral she had to attend. Consequently, by agreement of the parties, her testimony was to be taken out of order. As such the next witness was a School District witness, Ann Bednar, who is a deaf education consultant. Ms. Bednar's resume is at SD 250-252. She works with various school districts and hard of hearing students including doing evaluations, observations, working as a team member and providing in-service training to school district staff. She is certified by agreement of the parties as an expert in the area of deaf education and as the educator of children with cochlea implants. She was not qualified as an expert in cochlea implants, however. To the best of her recollection, 5 of the students with whom she has worked over the years have had implants implanted at Boston Children's Hospital. Ms. Bednar knows Hunter and provided observation and reports to the School District beginning December 1999. In the summer of 2001 she sat in on 4 of 6 diagnostic sessions at the afternoon preschool. She has put in 5 hours to date this year in direct services with Hunter. In Ms. Bednar's opinion, once a cochlea implant is implanted, a student should be able to be oral in communication after an adjustment period has occurred. She testified that Suzanne Lenz does not provide oral habilitation to Hunter. She distinguished between habilitation and rehabilitation, saying that rehabilitation occurs with a student who was able to hear prior to losing his/her ability to hear, whereas habilitation involves a student who never heard at any time prior to the cochlea implant (this would apply to Hunter). She testified about the components of the IEP for Hunter including the goals and benchmarks that appear to be specifically written for a student with a cochlea implant. She acknowledged that the JEP provides (at page 60) for written recommendation requested from the audiologist as well as for ongoing communication with the audiologist as needed (see Related Services and Additional Information, paragraph 5D of IEP at page 60). She prepared the goals and objectives for the IEP. In

her opinion, if the cochlea implant was shut off for one day, most of the goals and objectives in the IEP could still be implemented. At the team meeting on August 27, 2001, she recalled Mrs. P. requesting that the audiologist be included as a related service and that the parties could not agree to this. In her opinion, the IEP was not written for a child with a cochlea implant, but instead was written for a deaf child. A review of the meeting minutes at page 83 clearly indicates that Ms. Bednar stated to Mrs. P. “no and the school can be responsible to make sure that implant functions. I agree with you on that. It’s already in your IEP that the school makes sure it is functioning and will coordinate with the audiologist.” (See page 83). In response to inquiries from the Hearing Officer, Ms. Bednar indicated that the statement referenced above meant that the School District’s responsibility was to insure that the cochlea implant in fact was operating, but not to insure that it was properly mapped. She saw the mapping as being more of a medical intervention that should not be included in the IEP. Consequently she was of the opinion that the parents should not be compensated for their transportation expenses to visit the audiologist for mapping services or for the co-pays to the audiologist. She testified about numerous people she contacted who said that in their experience parents were not reimbursed for transportation expenses for mapping.

On cross examination, Ms. Bednar acknowledged that she never asked any of the above-referenced individuals if a school district had refused to list an audiologist as a related service. She also said she never asked these same individuals if a school district had refused to honor a request for reimbursement for travel to the audiologist. She saw the audiologist as an arm of the physician so that it is strictly a medical billing issue that should not be paid for by the District. She further testified that the IEP could be implemented even if the cochlea implant did not exist (see Meeting Minutes at page 81). She further testified (see page 82 of exhibits) that mapping of the cochlea implant is not a critical component of Hunter’s education.

Linda Strojny testified as the final witness on behalf of Hunter P. Her testimony occurred on December 7, 2001. Counsel for the School District, Attorney McCormack, was ill and unavailable and Attorney Jeanne Kincaid represented the District. Ms. Strojny’s curriculum vitae is at Parent Exhibit 8. She is presently employed by Advanced Bionics Corporation, the manufacturer of the Clarion Cochlea Implant worn by Hunter. She testified at length regarding her extensive experience as an audiologist working with cochlea implants. For a lengthy period of time she was the educational audiologist for 175 schools in the State of Vermont and has serviced over 1000 clients in her clinical capacity who have cochlea implants. She has extensive experience in working with IEPs and being a member of IEP teams for children with hearing difficulties, including those with cochlea implants. She has also worked directly with teachers and staff servicing students with hearing difficulties, including those with cochlea implants. She has completed all workshops from implant manufacturers and has had technical training on the Clarion Implant Hunter uses. She has testified as an expert witness in the State of Arizona on behalf of a school district and has extensive experience with traditional hearing aids. By agreement of the parties, Ms. Strojny was qualified as an expert in the area of knowledge and operation of traditional hearing aids and cochlea implants, in the skills and duties of an audiologist and cochlea implant audiologist and in the area of

understanding the interaction between audiologists and educators in the field of special education.

Ms. Strojny has been directly involved in Hunter's case. Dartmouth Hitchcock Medical Center had a change in audiologists and Suzanne Lenz asked Ms. Strojny to become involved because she had not had experience with the initial mapping of a cochlea implant without another audiologist being present. In addition, Ms. Strojny was on hand on several other occasions when Hunter's implant was being programmed/mapped by Ms. Lenz. Exhibits SD 92, 93, 121, 134 and 141 are treatment notes from Ms. Lenz which reflect Ms. Strojny's presence at mapping sessions with Hunter. Ms. Strojny was present for a meeting on August 28, 1999. Ms. Strojny was primarily for support for Ms. Lenz. According to Ms. Strojny, Suzanne Lenz is the only audiologist in the State of New Hampshire who provides mapping services for cochlea implant patients. Since 1999 Ms. Strojny has communicated with Ms. Lenz regarding Hunter on several other occasions not otherwise described above. There was one instance where there was concern that the internal device may have been defective so she came over for testing and determined it was a software issue, and after making adjustments the problem was corrected. Ms. Strojny also consulted with Suzanne Lenz regarding some hardware problems. Ms. Strojny is familiar with all of Ms. Lenz's reports contained in the record. In her opinion an audiologist working with a cochlea implant student must go much further in depth than one working with a student with a traditional hearing aid. The primary difference is the need for mapping which continually evolves due to changes in the child as the child grows. In addition to mapping services the audiologist must provide sound field testing to track speech perception and should be in communication with the educators and family to insure that the implant is working and programmed best to fit the needs of the child. In addition the implant must be monitored on occasion when connected to the computer system. Audiograms must be performed on occasion and this is another responsibility of the audiologist. On one occasion it was necessary to replace the sound processor and the audiologist was directly involved in that process because the exact maps in the original processor needed to be replicated in the replacement. Hunter would also have to meet with the audiologist for what was described as optimization of the processor.

Ms. Strojny then described how a cochlea implant is mapped. The Clarion implant has 8 channels and each must be adjusted based on a large number of variables, including information from parents, educators, and the physician. Because of Hunter's young age the mapping process was akin to starting with an infant. In Hunter's case the decision was made to use an SAS strategy which is not used in all cochlea implant patients. In Ms. Strojny's opinion all of the visits made by Hunter to Suzanne Lenz were appropriate and necessary. Without Ms. Lenz's assistance the implant would not have assisted Hunter in hearing. The external equipment problems Hunter experienced were typical of cochlea implant patients. In Ms. Strojny's opinion the Parents made no unnecessary requests for treatment by Suzanne Lenz. The School District personnel have no involvement in the mapping of the cochlea implant, nor are they involved in sound field testing or performing audiograms. They are not trained or qualified to do so. Representatives from HEAR in New Hampshire attended some of the sessions between

Hunter and Suzanne Lenz in order to provide feedback to Ms. Lenz and keep Hunter on track in the office while Ms. Lenz was mapping. If the School District had an audiologist on staff there would be no need for the Parents to take Hunter to Suzanne Lenz. Ms. Strojny is familiar with Hunter's IEP. In her opinion lack of proper mapping would have a substantial negative impact on Hunter's learning and meeting his goals and objectives. Finally, she said the School District personnel cannot assume that the implant is working by checking it daily to make sure it is properly turned on.

On cross-examination by Attorney Kincaid Ms. Strojny agreed that there is no direct provision in the IDEA addressing cochlea implants. She agreed that the IDEA specifically provides that school districts are responsible for insuring that traditional hearing aids are functioning, but that the statute is silent with respect to cochlea implants. She also agreed that adults who have cochlea implants need to be mapped even though they are not in an educational setting. Ms. Strojny disagreed with Attorney Kincaid that a cochlea implant is strictly a medical device. She believes it is also an educational device because it is tied to a cognitive function. She said when she was working in the State of Vermont she recalled two students having cochlea implants wherein the school district paid for the mapping services. She had no knowledge if any federal funds were involved or what the source of payment had been. She agreed that the School District staff has the ability to change the programs on the Cochlea Implant by turning a dial. She believes this is a related service provided by School District personnel. She agreed that speech and language services are related services but in her opinion a speech pathologist would need additional training to work with a child with a Cochlea Implant over and above the standard training received by a pathologist. She further agreed that Ms. Lenz's report was shared with District personnel and that it is critical that the School District work with the audiologist and follow the audiologist's recommendations so that there may be regular collaboration and communication between the two. She believes School District personnel should have input as to whether mapping adjustment should be made based on their observations working directly with Hunter.

Dorothy Eisenhaure, Speech Language Pathologist testified on behalf of the district. She has been a Speech Pathologist for 36 years, 21 of which were in public school and 15 in private practice. She again, working with students with Cochlea Implants approximately 10 years ago. In her opinion, the quality of the services that she renders as a Speech Language Pathologist would diminish if a Cochlea Implant is not properly mapped. Ms. Eisenhaure was certified as an expert by agreement of the parties in the area of Speech Language Pathology for children with Cochlea Implants. She testified regarding her extensive experience in the field.

Ms. Eisenhaure met Hunter's family at a conference in Maine on Cochlea Implants. After Hunter was implanted, she worked with him in the summer of 1999 for 4 sessions. She had an "Inservice" for the district staff to bring them up to speed relative to Cochlea Implants and how they function. In the summer of 2001 she had 12 sessions with Hunter as a "Diagnostic Piece" regarding whether or not a different mode of communication would be appropriate regarding Hunter's speech and intelligibility. In her opinion, the Speech Language Pathology Services provided for in the IEP (ST60 and 61) are

appropriate for Hunter. There was a team meeting in August of 2001 which Ms. Eisenhaure attended. There was a discussion from Mrs. P asking whether mapping was considered necessary for Hunter to access his IEP. She indicated that it was necessary if Hunter were to access information auditoraly.

Ms. Eisenhaure has experience with children with Chochlea Implants whose implants have simply failed to assist the students. She did not work with Ms. Lenz regarding Hunter, though she has read Ms. Lenz's reports which she considered helpful. Ms. Eisenhaure had no problems with Hunter's Chochlea Implant in the time that she worked with him.

On cross examination, Ms. Eisenhaure acknowledged that the Audiologist is responsible for mapping the Chochlea implant and not the Speech Pathologist. She agreed that if Hunter's Choclea implant is not functioning properly Hunter cannot access information auditoraly. The records of the team meeting minutes at SD82, 83 and 84 clearly indicate that Ms. Eisenhaure was of the opinion that it is necessary for the Chochlea Implant to function properly in order for Hunter's IEP to be carried out as written.

Patricia Willis, Director of Special Education for SAU 53 testified on behalf of the school district. Her testimony was relative to the earlier testimony of Ms. Dube. With respect to that child who has a Chochlea Implant she is familiar with that child's IEP and the Audiologist is not identified as a related service nor is transportation to and from the office of the Audiologist. The reimbursement that occurred in that instance was outside of the IEP in a situation where the school district agreed to reimburse the parent for the transportation expense in order to be agreeable. On cross examination she indicated that she does not have sufficient knowledge of Chochlea Implants to render an opinion as to whether they are a medical device or not.

Margaret Driscoll, Co-Director of Special Services for the District testified on behalf of the District. Her resume is set out at SD-246. She has known Hunter for most of his life and met the family in November of 1998 to get things moving with services for Hunter. He was identified as educationally handicapped as a result of his deafness in May of 1999. An IEP was developed in June of 1999 to take effect in August of that year. Speech therapy was set up with Ms. Eisenhaure. Hunter was placed in New Hampshire for the 1999/2000 school year. The parents were involved in parent training. With respect to the issue of the request of mileage reimbursement, this witness recalled that in April of 2000 Mrs. P was reimbursed for parent training at \$21.00 per week. She submitted two bills for travel to the Audiologist and upon receipt Ms. Driscoll called Mrs. P. wondering why she was being billed for this. Mrs. P. felt that she was entitled to reimbursement and Ms. Driscoll felt that a Chochlea Implant is not a hearing aid and is not assistive technology, but instead was a life long device not to be used only in schools. She researched the Federal Register State Regulations in Public Comments generated in the Federal Register with respect to reauthorization of the IDEA and felt that the school district was not responsible for mapping the Chochlea Implant. She recalled that some of the commenters for the reauthorization of the IDEA made specific requests that mapping services be included and they were not included. She recalls a comment indicating that the purpose

was not to impose new requirements on the general public. Ms. Driscoll spoke to other Special Education Directors who all agreed that Audiology services for mapping the Chochlea Implant should not be considered a related service. She reviewed the list of aids defined in the Federal Register and felt that a Chochlea Implant did not fit into the definition of an aid for Audiology services. She checked with the Parent Information Center who agreed with her that mapping should not be considered a related service. In her opinion this was a truly novel question with no real guidance in the laws. Mapping is obviously necessary for a person wearing a Chochlea Implant but that need is ongoing and pervasive and does not limit itself to educational purposes. In her opinion, mapping is a management issue for a Chochlea Implant and is not an educationally related service.

Ms. Driscoll recalled that the meeting in August, Mrs. P. was concerned about whether mapping would be covered by insurance and Ms. Driscoll felt that if the issue was finances, the district would offer one visit per year with mileage paid, however, this was not acceptable.

On cross examination it was clarified that the offer of one time per year was for an annual update and not specifically for mapping. She felt that mapping was a follow-up for a medical procedure, even though Ms. Lenz is not a doctor.

Ms. Driscoll was the final witness. Counsel for the district made a fairly lengthy Closing Argument. Counsel for Hunter P. made no Closing Argument. The parties submitted Post Hearing Submissions at the request of the Hearing Officer.

### **REQUEST FOR FINDINGS AND RULING**

Each party submitted Requests for Findings of Facts and Rulings of Law. Those are ruled upon as follows:

### **SCHOOL DISTRICT REQUESTS FOR FINDINGS OF FACT**

The following Request for Findings of Fact are granted: 1,2,3,4, 5,6, 7, 8,9, 10, 11. 12, 13, 14, 15, 17, 18, 21, 28, 29, 30, 32, 33, 34. 35, 37, 38, 41, 42, 44, 45, 46, 48, 49. 50, 51, 54. Request number 16 is neither granted nor denied as there is insufficient information regarding insulin pumps, pacemakers and retina implants to render the testimony credible and because it is irrelevant. Request number 19 is neither granted nor denied. As worded it is accurate, however, if the Chochlea Implant is not properly mapped habilitation will not be possible. Request number 20 is neither granted nor denied. Request number 23 is neither granted nor denied. While it is an accurate statement, there is no request for any reimbursement with respect to the equipment in question. Request number 24 is neither granted nor denied as it is unclear to the Hearing Officer whether HEAR in NH personnel accompany Hunter to each and every visit with Suzanne Lenz. Request number 26 is neither granted nor denied. Request number 27 is neither granted nor denied. Request number 31 is neither granted nor denied in that the number of team meetings held is irrelevant to the issue at hand. Request number 36 is neither granted nor denied. Request number 39 is neither granted nor denied. Request number 40 is neither granted nor

denied. It is clear from the testimony that while the Cochlea Implant does not teach a child how to use language, an inappropriately mapped Cochlea Implant will prohibit habilitation. Request number 47 is neither granted or denied. Request number 52 is neither granted nor denied. The parents are not requesting district payment for maintenance and replacement of the device itself but only for reimbursement for mileage for mapping sessions with the Audiologist and for co-payments. Request number 53 is neither granted nor denied. Request number 55, 56, 57, 58 and 59 are also neither granted nor denied.

The district's credibility finding request number 2, 3, 4, 5, 6, 7, and 8 are granted. Request number 1 is denied.

The School District's Proposed Ultimate Findings of Fact are ruled upon as follows: Request number 1 is granted, request number 2 is granted, request number 3 is neither granted nor denied, request number 4 is granted.

To the extent that any of the requests which are neither granted nor denied are inconsistent with the decision rendered herein, they are deemed to be denied.

The School District submitted proposed Rulings of Law and they are ruled upon as follows: Request number 1 is denied as programming of a Cochlea Implant is found to be a related service pursuant to 34 C.F.R. 300.24 (b) (1). Request number 2 is denied. Request number 3 is denied. Request number 4 is granted. Request number 5 is granted. Request number 6 is granted. Request number 7 is granted. Request number 8 is denied to the extent that the School District requests a ruling that their decision to not identify the Audiologist as a related service or to reimburse the parents for mileage for mapping sessions with Suzanne Lenz or for co-payments was an appropriate decision. Request number 9 is denied.

The parents submitted Proposed Findings of Fact and they are ruled upon as follows: Request number 1,2,3,4,5,6,7,8,9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34 are granted. Request number 25 is neither granted nor denied however to the extent that it is inconsistent with the decision below as deemed to be denied.

The parents submitted Proposed Conclusions of Law and they are ruled upon as follows: Request number 1,2,3,4,5,6,7,8, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 20 are granted. Request number 9 and 19 are neither granted nor denied, however, to the extent that they are inconsistent with the decision of the Hearing Officer are deemed to be denied.

### **DECISION**

All of the witnesses in this case testified credibly and knowledgeably in support of their positions. In addition, the Parties entered into an agreed upon Statement of Facts that provides among other things that under his IEP Hunter receives auditory training, speech training and language development/habilitation both from a deaf educator and a speech

language pathologist at HEAR in NH. Such training is for the purpose of learning listening skills and learning to comprehend and use spoken language. The deaf educator, after consultation with other teaching staff, also sends audiological observation reports to the Audiologist, Suzanne Lenz, regarding changes in Hunters performance in this school setting (see Paragraph 6 of the Agreed Statement of Facts). The district believes that the Hearing Officer should take a narrow view of the IDEA and its implementing regulations and rule that because a Chochlea Implant is not an acoustical hearing aid and because the IDEA does not specifically identify a Chochlea Implant anywhere within its boundaries, the mapping services provided by Suzanne Lenz should not be identified as related services in the IEP but, instead, should be considered purely medical services other than for diagnostic or evaluation purposes and thereby not subject to the provisions of the IDEA. However, the Hearing Officer agrees with the parents argument that the Statute and its implementing regulations and the case law support a more broad reading of what are to be considered related services. Related services are defined in 34 C.F.R. 300.24 as follows:

300.24 (a) General. As used in the part, the term related services means transportation and other developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech language pathology and audiology services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes.

As such, audiology services are clearly identified as related services under the regulation. Audiology is defined at 300.24 (b)(1) as follows:

- (1) Audiology includes -
- I. Identification of children with hearing loss;
  - II. Determination of the range, nature and degree of hearing loss, including referral for medical or other professional attention for the habilitation of hearing;
  - III. Provision of habilitative activity such as language habilitation, auditory training, speech reading, hearing evaluation and speech conservation's;
  - IV. Creation and administration of programs for prevention of hearing loss;
  - V. Counseling and Guidance of children, parents and teachers regarding hearing loss;
  - VI. Determination of children's needs for group and individual amplification, selecting and fitting an

appropriate aid and evaluating the effectiveness of amplification.

The introduction to that section defining audiology states that audiology “includes” I-VI. The word includes is identified and defined in Section 300.14 as follows: “Include. As used in the part, the term include means that the items named are not all of the possible items that are covered, whether alike or unlike the ones named.” As such, it is clear that audiology services are considered to be related services under the regulations implementing the IDEA and that the list identified in Section 300.24 (b)( 1) is not an exhaustive list. While it is clear from the record that mapping the Cochlea Implant is not in and of itself the provision of habilitative activities, it was also clear from the record and from testimony of numerous experts that if Hunter’s Cochlea Implant is not properly mapped, Hunter will not be able to receive the educational benefits provided for in his JEP including but not limited to, learning/listening skills, learning to comprehend. learning to use spoken language.

As indicated above, it is the District’s position that the Audiologist services in mapping Hunter’s Cochlea Implant are medical services. Medical services are defined in Section 300.24 (b)(4) as follows:

Medical services means services provided by a licensed physicians to determine a child’s medically related disability that results in the child’s need for special education and related services.

There is no dispute that Suzanne Lenz is not a physician and is not providing the services of a physician. She is an Audiologist performing audiology services which pursuant to Section 300.24 (a) is a related service in and of itself.

The Hearing Officer finds it difficult to agree with the School District that IDEA would provide that districts should be responsible for insuring that acoustic hearing aids used for mild or moderately hearing deprived students function, yet Cochlea Implant programming necessary for the habilitation of a profoundly hearing impaired student should not be. The Hearing Officer agrees with the argument raised by parents counsel that the IDEA as construed by the first circuit in *Timothy W. vs. Rochester. NH School District*, 875 F.2d 954 (1st Cir 1989) was intended to construe broadly the unique educational needs of children including their communicative needs and that the legislative history of the IDEA explicitly establishes that the IDEA intended to give priority to the education of children with the most severe disabilities among whom are deaf children. In addition, that case indicated that the IDEA requires that education for persons with severe disabilities be broadly defined. There is no dispute here that Hunter is identified under the IDEA as educationally handicapped. There is also no dispute that there is an IEP that is agreed upon and that it is based around Hunter’s use of the Cochlea Implant. The IEP in question specifically calls for consultation with the Audiologist and for appropriate educationally related Audiology services in the form of ongoing communication and consultation to obtain information from the Audiologist that may be of benefit in the educational environment and to assist the Audiologist in helping

Hunter to obtain maximum benefit from the Cochlea Implant. The Hearing Officer is satisfied that the Federal Regulation defining related services as well as the term “include” together with the case law discussed in the parents Memorandum of Law in support of their position together with the testimony of numerous witnesses that the Cochlea Implant must be functioning properly in order for Hunter to learn listening skills, learn to comprehend and use spoken language lead to the conclusion that Hunter’s Cochlea Implant must be properly programmed and that the programming is necessary for Hunter to receive FAPE. Linda Strojny testified that lack of proper mapping would have a substantial negative impact on Hunter’s learning and meeting his goals and objectives in the IEP. Dorothy Eisenhaure testified that if the Cochlea Implant was not functioning, Hunter could not access information audiologically. She also testified that the Cochlea Implant must function in order for Hunter’s IEP to be carried out as written. For all of the above reasons the Hearing Officer is satisfied that both the IDEA and its implementing regulations as well as case law construing the IDEA support a finding that the mapping services for Hunter’s Cochlea Implant are a necessary related service and that the Audiology services of Suzanne Lenz are a related service for Hunter’s IEP. The District is ordered to reimburse Hunter’s parents on a per mile basis for 17 trips to Suzanne Lenz’s office, 200 miles each, for mapping services for Hunter’s Cochlea Implant. The School District is not obligated to pay for any services performed by a physician with respect to Hunter’s Cochlea Implant including any surgical services, follow-up for to surgical procedures or equipment defects or replacement. The District is ordered to reimburse the parents \$130.00 for co-payments of \$10.00 each which were required to be paid in connection with the mapping services. The District will not be required to make any payment for services provided by any physician with respect to Hunter’s Cochlea Implant and payment is required only for the mapping services performed by the Audiologist. The School District is ordered to list audiology services under Hunter’s current IEP, to include appropriate services by qualified Audiologist for mapping services.

### **APPEAL RIGHTS**

If either Party is aggrieved by the decision of the Hearing Officer set forth above, either Party may appeal this decision to the appropriate Court of Jurisdiction. If an Appeal taken, the Parties shall have the right to obtain and electronic verbatim record of the Hearing from the Department of Education.

John P. LeBrun

02/19/02