This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania

Special Education Hearing Officer

DECISION

IN RE: A STUDENT IN THE MONTGOMERY COUNTY INTERMEDIATE UNIT

Date of Birth:

Dates of Hearing: 09/17/08; 10/06/08; 10/20/08

OPEN HEARING

ODR No. 9122/08-09 LS

Parties to the Hearing:	Representative:
Parents	Parent Attorney: None
Montgomery County Intermediate Unit 1605 West Main Street Norristown, PA 19403-3290	MCIU Attorney Karl Romberger, Esq. Fox, Rothschild, LL.P. 10 Sentry Parkway, Suite 200 P.O. Box 3001 Blue Bell, PA 19422-3001

Date Record Closed: November 17, 2008

Date of Decision: December 2, 2008

Hearing Officer: Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Student , now [] years old, was born with severe to profound hearing loss. Student received a cochlear implant at age 1 and recently received a second implant. From birth to age 3, Student received home-based early intervention services through MHMR services, specifically, Montgomery County ARC (MARC) and was to transition to the Montgomery County Intermediate Unit 3—5 year early intervention program (MCIU/EI) at age 3.

Beginning in July 2006, MCIU/EI began an auditory/oral pre-school program. Prior to establishing its own program, MCIU contracted with the [] School to provide services to 3—5 year old children with severe hearing loss, including children with cochlear implants. Student had been receiving services from [] School staff as part of Birth to Age 3 EI services through MARC and had attended the [] School toddler class for two year olds at his Parents' expense to supplement those services. Student's Parents elected to enroll him in the [] School pre-school auditory/oral class for three year olds and continue with the four, then five year old classes at [] School rather than send Student to the new MCIU program. Proceeding without counsel, Parents filed a due process complaint in August 2008 to recover their out of pocket costs for tuition and transportation from September 2006 through the 2008/2009 school year, contending that the MCIU class is not appropriate for Student and that [] School has provided, and continues to provide, an appropriate program and services to assure that Student derives maximum benefit from his cochlear implants and improves his auditory skills, speech and receptive and expressive language. The family's ultimate goal is to prepare Student to

succeed in a regular education setting with non-disabled students beginning with kindergarten in the 2009/2010 school year.

ISSUE

Is the Montgomery County Intermediate Unit Early Intervention Program required to reimburse Student 's Parents for Student's private pre-school tuition and transportation costs for the 2006/2007 and/or 2007/2008 and/or 2008/2009 school years?

FINDINGS OF FACT

1. Student is a [] year old child, born []. Student is a resident of Montgomery County and is eligible for early intervention services (Ages 3—5) from the Montgomery County Intermediate Unit (MCIU). (Stipulation, N.T. p.15)

2. Student has a current diagnosis of deafness in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(3); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. p. 15)

3. Student was first identified through the newborn hearing screen administered at the hospital where he was born. The diagnosis was confirmed at Children's Hospital of Philadelphia (CHOP) shortly thereafter. Student was fitted with hearing aids by eight weeks of age, based upon advice that early amplification would yield a better outcome in terms of speech/language development. (N.T. pp. 22, 23, 108, 109, 700; P-1)

4. The current intervention model is to identify a child with hearing loss by the age of 1 month, fit him/her with hearing aids by age 3 months and begin early intervention services by age 6 months. With all components in place, a child with severe hearing loss can develop language/communication skills commensurate with hearing peers and able to be educated in a regular classroom by age 5. Although this model was implemented, Student, had a minimal response to the hearing aids. (N.T. pp. 108, 109, 112, 113; P-1)

5. Student received Birth to Age 3 Early Intervention Services through the Montgomery County MHMR service agency, ARC. (MARC). MARC provided occupational and physical therapy services and contracted with [] School, a school for the deaf. The primary focus of the birth to age 3 program was educating the family to implement language-building strategies in the home throughout the day. (N.T. pp. 113—117, 140, 141, 149—151, 703, 706, 709)

6. the local [] School is affiliated with the original [] School established in Massachusetts approximately 143 years ago. Since its inception, [] School has followed the auditory/oral model to maximize listening/communication skills with the goal of full participation in the community. Every [] School teacher participates in a mentoring program by experienced staff focused on developmentally appropriate practices for

auditory speech/language development for children from birth to age 5, as well as peer coaching. (N.T. pp. 38, 39, 42, 43)

7. Doctors at CHOP advised the family that Student was a candidate for cochlear implants, which replace the damaged hair cells that normally conduct sound waves to the auditory nerve. If the auditory nerve is functioning, the cochlear implant ultimately allows the brain to process sound. Based upon research on brain development, children generally receive a first implant around age 1 and a second implant by age 5 in order to maximize the ability to process auditory information and language development. Student received a left ear cochlear implant just after his 1st birthday, and the right ear cochlear implant just before his 5th birthday. (N.T. pp. 24, 98—102, 110, 116, 416; P-1)

8. At age two, Student began attending the [] School toddler program at his Parents' expense to supplement his home-based services. Enrollment in that program was encouraged by a CHOP educational consultant, but was not included in Student's Birth—3 IFSP. (N.T. pp. 25, 118, 119, 142, 149, 150, 704; P-1)

9. Based upon their own research and the advice of Student's doctors, Parents determined that Student needed early, intensive therapy in an auditory/oral educational model to maximize Student's ability to benefit from the cochlear implants and function well in the hearing world. Parents' concern with assuring that Student received the best possible services was intensified after attending the A.G. Bell convention in June 2006 and learning that there is a "window of opportunity," extending from birth to age 5, for acquiring optimum speech/language skills. (N.T. pp. 25, 102, 118, 705—708)

10. The characteristics of an auditory/oral education program include: An emphasis on the development of auditory speech and language skills; a well-qualified professional staff trained in the areas of audiology, technology, and speech/ language development; low student-teacher ratio and an acoustically sound environment. Audition, training the child to hear and listen, is an important component of speech/language services in an auditory/oral program for a child with cochlear implants. At [] School, the program also emphasizes parent training and intensive one to one auditory language therapy. (N.T. pp. 91—94, 104, 677—680)

11. Student's transition, at age 3, to MCIU as the early intervention service provider coincided with MCIU's development of its own auditory/oral pre-school classroom, which served 5—6 children when it began operating. After an evaluation during the summer preceding expected enrollment, MCIU recommended that Student receive language support services in its new classroom. (N.T. pp. 256, 276, 310, 352734; P-2, IU-7)

12. The MCIU auditory/oral classroom has a three member staff. The class is taught by a masters level, Pennsylvania certified teacher of the hearing-impaired with 17 years experience teaching pre-school age children, including teaching children with cochlear implants, teaching in sign-supported classrooms, and 3 years experience teaching an auditory/oral pre-school classroom before helping to develop the MCIU auditory/oral

program. A classroom aide assists the teacher. There is also a masters level speech pathologist, who is licensed and certified in Pennsylvania and has 16 years experience. She previously worked with children who have cochlear implants and in an auditory/oral classroom. The third staff member is a masters level, certified teacher and cochlear implant consultant who assures that the children's implants are functioning properly, serves as a resource for other staff members with respect to cochlear implants and how they function, as well as speech/language skill development in children with cochlear implants, and as a resource for parents. (N.T. pp. 276—278, 303, 549, 550, 556--561, 579, 581, 610—615, 668—670, 688—690; P-8)

13. The MCIU program is provided in an acoustic classroom with a soundfield FM system. The educational program follows both a literacy-based and a center-based pre-school curriculum. The class infuses speech and language tasks throughout the school day and includes an auditory skills training curriculum and music. The MCIU program was developed with the advice of professionals knowledgeable in the area of auditory/oral education, and meets the A.G. Bell Association checklist standards for a Quality Auditory/Oral Program. (N.T. pp. 280—282, 284—286, 337, 421—427, 429—431, 487, 571, 572, 590—593, 644, 680, 681; P-28)

14. The MCIU auditory/oral classroom is located in a building which also houses a day care program and other pre-school classes, providing opportunities for inclusion with typically developing peers. Currently, typical peers are included in the auditory/oral class once each week for Choice Time, an organized hour long "free play" period at the beginning of the school day. Beginning with the current school year, Choice Time replaced snack time as the weekly period of classroom inclusion. The change was based upon experience indicating that the hearing impaired students derive greater benefit from direct opportunities for language skill development with staff during snack time than from the limited social interaction with typical peers during that time. The weekly Choice Time inclusion period also provides a greater opportunity for social interaction with typical peers than inclusion during snack time. Daily playground activities, a weekly gym class, and special events, provide other opportunities for integration with typical peers. (N.T. pp. 282—284, 289, 596, 597, 598, 603-- 605)

15. Children from ages 3—5 attend the MCIU program in a mixed group. Beneficial effects of mixed age grouping include older children modeling language and social interactions for younger children, thereby enhancing the skills of the younger children, and enhanced self-concept for the older children derived from "teaching" the younger children, inviting cooperation and other pro-social behaviors. Based upon the professional judgment and experience of the MCIU supervisor, mixed age grouping has been an effective method of meeting the needs of children with disabilities, including the children in the auditory/oral class. A skilled teacher is able to present the same materials/lesson to children of varying developmental stages and abilities. (N.T. pp. 292—300, 562, 563; P-6)

16. In addition to providing integrated individual and/or small group speech/language therapy in the auditory/oral classroom, the speech pathologist is in the classroom for

additional time as needed to meet the needs of the children for additional services, to provide support for speech/language skill development techniques and to serve as a consultant to the classroom teacher. The MCIU speech therapist was originally in the classroom twice each week, and is currently in the classroom three days/week The speech therapist determines the need for individual speech therapy based upon each child's needs and abilities in accordance with her professional judgment. (N.T. pp. 316, 337, 340, 341, 345, 564, 566, 567, 585, 586, 615—618, 637—649)

17. Advantages of integrated and/or small group speech/language therapy include direct involvement of the social aspects of language development in instruction, and promoting generalization of language skills presented in the natural environment. In the MCIU classroom, individual or small group (2 students) speech/language therapy is provided in the classroom during the "Choice Time" hour not during the time whole group, structured activities are being taught.(N.T. pp. 350, 351, 424, 428, 515—517, 564, 565, 568, 569, 583, 584, 587, 626, 627, 630, 632, 633, 637, 650—652, 661, 673, 674)

18. The first MCIU IEP for Student offered two integrated 30 minute speech therapy sessions each week, delivered either individually or in a small group, in addition to the speech/language skill development activities and tasks provided during the entire program day through the oral/auditory curriculum. The amount of speech/language therapy initially offered was based upon an assessment of Student's needs, and the fact that Student was receiving educational services but not speech/language support through his IFSP, and, therefore, no frequency recommendation from a speech/language therapist was available. The amount of direct speech/language therapy was subject to adjustment depending upon continuing assessment of the Student's needs and progress. (N.T. pp. 311—313, 317—323, 364, 618—632, 635, 650, 665, 666; P-2, IU-7)

19. Student's Parents visited the MCIU classroom in July 2006. They were dissatisfied with the proposed IEP and delivery of services in the MCIU classroom. Parents' concerns centered on the teacher/child ratio, the absence of individual speech therapy as a daily service, the mixed age grouping, and the inclusion of non-disabled children in the classroom. Parents did not believe that Student would benefit from inclusion opportunities. The root of Parents' concern, however, was that the newly developed MCIU auditory/oral pre-school program was as yet untried, resulting in "unknowns" such as how the inclusion model and speech therapy delivered in a small group and in an integrated setting could assure that Student's progressed in acquiring language skills. Parents were also concerned that the MCIU model was different from the [] School class that they were familiar with, and the auditory/oral classes described in articles they read and at conferences/workshops they had attended. (N.T. pp. 24—26, 291, 367, 382, 711—719, 724—729, 732, 733, 738, 776, 789, 790)

20. On the other hand, Parents had spoken to Student's doctors and other parents and had the opportunity to observe children who had attended the [] School pre-school program. They were impressed with its record of success and the high praise it received. (N.T. pp. 24, 705, 719)

21. [] School's Director testified that [] School has not provided opportunities for interaction between its students and typically developing hearing children because its research did not support the conclusion that [] School students would definitely benefit from inclusion opportunities. [] School also believes that premature mingling of hearing-impaired children with normally hearing peers can be detrimental to the language development of hearing-impaired children. [] School has, however, recently begun a class for typically developing children on its campus through which it can provide inclusion opportunities for students with hearing loss for whom such interaction is appropriate, *i.e.*, hearing impaired children whose communication skills are sufficiently developed as determined by the [] School staff. (N.T. pp. 48—50, 64, 65, 76, 77, 82)

22. Parents rejected the proposed MCIU program and placement and enrolled Student in the [] School pre-school program. After two subsequent IEP meetings with MCIU at which MCIU again recommended that Student attend its auditory/oral pre-school program, Parents continued Student's pre-school education at [] School. (N.T. pp. 368—370, 378, 441, 456—459, 476—480, 737; P-12, P-14, P-15, IU-7, IU-19, IU-24, IU-26)

23. At [] School, Student receives five sessions of individualized speech therapy each week, as well as a weekly "fused" or integrated therapy session, where the speech pathologist works with the class as a whole, and other periods when the speech pathologist rotates around the room to provide speech support to the classroom teacher. (N.T. pp. 45, 46, 83, 84, 127, 165, 166, 178, 179, 722, 723, 739)

24. According to the [] School educational philosophy and model, every child accepted for enrollment at Clark receives pull-out, individual speech therapy daily. A child who does not need that intensive level of speech services would not be appropriately enrolled at [] School. (N.T. pp. 55, 56, 68, 69, 84, 127)

25. At the end of Student's first pre-school year, [] School administered assessments which revealed that Student continued to have significant language delays, but had made progress in language development. According to a comparison of scores on the Receptive-Expressive Emergent Language Test-Third Edition (REEL-3), a parent and teacher checklist, in a seven month period, Student had made approximately six months to a year's progress in language age equivalency with respect to both both receptive and expressive language, leaving him app. 9 months below typically developing peers. (N.T. pp. 161, 738, 739, 744; P-3)

26. With respect to the Mac-Arthur-Bates Communicative Development Inventory (CDI), anecdotal reporting noted a significant expansion of Student's vocabulary and language complexity, but the scores showed an age-equivalency increase of only two to three months during the seven month period between tests in the measured skills of vocabulary production, irregular nouns and verbs and sentence complexity, resulting in a delay of approximately 19 months compared to typically developing peers with normal hearing. (N.T. pp. 738, 739; P-3)

27. Comparisons between the beginning and the end of the school year were either not made or not reported by [] School with respect to the Goldman-Fristoe Test of Articulation (GFTA-2), the Expressive One Word Picture Vocabulary Test (EOWPVT) and the Receptive One Word Picture Vocabulary Test (ROWPVT). Standard scores on the EOWPVT and ROWPVT were 66 (1st percentile) and 76 (5th percentile), respectively. No age equivalencies were reported for either test. Neither standard scores nor percentile ranks were reported for the GFTA-2. (N.T. p. 750; P-3)

28. Student was evaluated through the Cochlear Implant Program at CHOP a few months prior to receiving his second cochlear implant. On the ROWPVT, a standard score of 91 placed Student at the 27th percentile with an age-equivalent of 3 years, 11 months. On the EWOPVT, the standard score was 89, placing Student at the 27th percentile with an age-equivalent of 3 years, 8 months. The CHOP evaluation report noted “mildly delayed expressive language skills compared to normal hearing peers of the same age.” The report also recommended “consistent speech-language therapy to address further speech and language development” and that Student “continue with current services.” (N.T. pp. 210, 213, 214; P-24 at p. 5)

29. At the beginning and end of Student’s second year at the [] School pre-school, [] School administered four normed assessments: GFTA-2 ;
Clinical Evaluation of Language Fundamentals-Preschool, 2nd Edition (CELF-P2), a clinical tool for identifying and diagnosing language deficits in children ages 3—6; Expressive Picture Vocabulary Test, 2nd Edition (EVT-2), which measures use of vocabulary; Peabody Picture Vocabulary Test, 4th Edition (PPVT-4), a measure of vocabulary comprehension. Standard scores (SS) and percentile ranks (%ile) were reported as follows:

	Beginning	End
GFTA-2	Standard Scores/Percentiles not reported	
	SS	SS
CELF-P2 (%iles not reported)		
Sentence Structure	2	4
Word Structure	3	2
Expressive Vocabulary	4	4
Concepts/Following Directions	7	4
Recalling Sentences	4	5
Basic Concepts	4	5
(Scores below 7 = below average skills)		
Core Language Index	59	61
Receptive Language Index	67	67
Expressive Language Index	63	63
Language Content Index	63	67
Language Structure Index	59	63
(Scores below 85 = below average skills)		

	Beginning		End	
	SS	%ile	SS	%ile
EVT-2	76	5th	97	42nd
PPVT-4	81	10th	99	47th

(N.T. pp. 191—193, 198, 219; P-4, P-26, IU-21)

30. After the second IEP meeting with MCIU, the parties agreed to a reevaluation of Student. The revaluation, including an observation of Student in his [] School classroom, was completed by January 2008. The December 2007 progress report from [] School was also provided to MCIU. The results of the MCIU evaluation demonstrated that Student made progress in language development compared to typical peers, but that he also continued to have delays, particularly in the area of expressive language. The MCIU evaluator also administered standardized tests to assess Student's auditory skills and language development. On the GFTA-2 Student obtained a standard score of 87, within the average range for children of Student's age. The MCIU evaluator used the Pre-School Language Scale-4 (PLS-4) to assess receptive and expressive language. Student obtained a standard score of 89 in auditory comprehension, which is within the average range. Student's expressive communication score on the PLS-4 was 73, indicating a moderate delay. Several months later, the PLS-4 was also administered as part of the CHOP evaluation and yielded a similar auditory comprehension score and an improved expressive communication score: Auditory Comprehension SS=88 (21st %ile; age equivalent: 4 years, 3 months); Expressive Communication SS=84 (14th %ile; age equivalent: 4 years). The CHOP evaluation also reported Student's Total Language Score on the PLS-4 as 85 (SS)(14th %ile) and an age equivalent of 4 years, 1 month. (N.T. pp. 205, 460—468, 473--475; P-4, P-5, P-24, IU-21, IU-23)

31. At the IEP meeting which followed presentation of the reevaluation report, in addition to the recommendation that Student attend its auditory/oral pre-school class, MCIU offered to supplement the previously recommended integrated speech therapy with one individual session of speech therapy weekly. (N.T. pp. 744; P-15, IU-23)

32. Because Student was halfway through the second year in the [] School pre-school program at the time of the IEP meeting, Parents decided that Student should not be removed to a new class and elected to have Student complete the school year at [] School. (N.T. pp. 746)

DISCUSSION AND CONCLUSIONS OF LAW

There is no dispute in this case that Student is entitled to special education and related services from the Montgomery County Intermediate Unit (MCIU) as a child with a disability, specifically, profound hearing loss remediated by the use of cochlear

implants. The primary underlying issue is whether the MCIU's offer to provide auditory and speech/language services to Student in the auditory/oral pre-school classroom it established will adequately meet Student's needs, particularly in the area of speech/language development.[1]

Cases such as this, where parents of a child with a disability pursue a special education due process hearing to vindicate their unilateral choice of a program and services to address the child's special education needs, illustrate the limits placed on parental choice under IDEA. Although parents are always perfectly free to decide upon the educational services they believe will best meet their child's needs, if they seek public funding for their program choice, they must meet the applicable legal standards, which are clear, well-established and stringent with respect to tuition reimbursement.

A. Legal Standards

Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, *et seq.*, and in accordance with 22 Pa. Code §14 and 34 C.F.R. §300.300, a child with a disability is entitled to receive a free appropriate public education (FAPE) from the responsible local educational agency (LEA) in accordance with an appropriate IEP, *i.e.*, one that is "reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress." *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982). "Meaningful benefit" means that an eligible child's program affords him or her the opportunity for "significant learning." *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3RD Cir. 1999). Consequently, in order to properly provide FAPE,

[1] Although Student also has educational and PT/OT needs, there is no dispute between the parties concerning those aspects of Student's program. Indeed, there was no evidence produced at the due process hearing which specifically challenged MCIU's ability to provide appropriate auditory skills training for Student in its pre-school program.

the child's IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. *Rowley; Oberti v. Board of Education*, 995 F.2d 1204 (3rd Cir. 1993). An eligible student is denied FAPE if his program is not likely to produce progress, or if the program affords the child only a "trivial" or "*de minimis*" educational benefit. *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F. 2d 171 (3rd Cir. 1988).

Under the interpretation of the IDEA statute established by the *Rowley* case and other relevant cases, an LEA is <u>not</u> required to provide an eligible with services designed to provide the "absolute best" education or to maximize the child's potential. *Carlisle Area School District v. Scott P.*, 62 F.3d 520 (3rd Cir. 1995).

In *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985), the United States Supreme Court established the principle that parents do not forfeit an eligible child's right FAPE, to due process protections or to any other remedies provided by the IDEA statute and regulations by unilaterally selecting a placement other than that offered by the LEA. Parents do, however, place themselves at financial risk if the due process procedures through which they must seek reimbursement of the costs associated with such unilateral placement result in a determination that the public agency offered FAPE.

To determine whether parents are entitled to reimbursement from an LEA for special education/early intervention services provided to an eligible child at their own expense, a three part test is applied based upon the *Burlington School Committee* case. The first step is to determine whether the program and placement offered by the agency

(MCIU in this case) is appropriate for the child. Only if that issue is resolved against the public agency are the second and third steps considered, *i.e.*, is the program proposed by the parents appropriate for the child and, if so, whether there are equitable considerations that counsel against reimbursement or affect the amount thereof. *See also, Florence County School District v. Carter*, 510 U.S. 7, 15, 114 S. Ct. 361, 366, 126 L. Ed. 2d 284 (1993); *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007).

In determining whether the Parents can prevail in this case and obtain tuition reimbursement, one additional legal standard applies—allocating the burden of proving that the MCIU auditory/oral class program is or is not appropriate for Student, and, if necessary, whether the [] School-PA program is appropriate for him. In *Schaffer v. Weast,* 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of proof. Consequently, in this case, it is Parents who must establish that the MCIU IEPs/NOREPs recommending placement in its auditory/oral pre-school class are not reasonably likely to assure that Student would receive a meaningful educational benefit from the proffered services. In other words, in order to meet the first prong of the tuition reimbursement analysis, Parents were required to prove that it is unlikely that Student would have made reasonable progress in speech/language development in the MCIU classroom from the date he should have transitioned there to the present, and that it is unlikely that Student would make reasonable progress in speech/language development from the present until the end of the 2008/2009 school if enrolled in the MCIU auditory/oral classroom. If Parents meet their burden of proving that MCIU has not offered an appropriate program/placement for

Student, they would then need to prove that the [] School is an appropriate placement and that there are no equitable considerations that preclude or diminish their right to be reimbursed for their out of pocket expenses for tuition and transportation.

B. Appropriateness of MCIU Auditory/Oral Classroom

In this case, the decision whether Parents are entitled to tuition reimbursement turns entirely upon whether the MCIU auditory/oral pre-school classroom is an appropriate placement for Student. Based upon the record in this case, I conclude that such program was reasonably calculated to meet Student's needs and assure meaningful benefit from the educational, auditory and speech/language services offered in the MCIU pre-school class. In other words, the evidence establishes that Student was and is likely to make reasonable progress if enrolled in the MCIU auditory/oral program.

The characteristics of an appropriate auditory oral classroom were described by witnesses from [] School (F.F. 10) The Director of the [] School first noted the essential need for a well-trained staff. Despite Parents' arguments that the MCIU staff does not have sufficient relevant training and experience, the record establishes that the three staff members and the MCIU program supervisor, all of whom testified credibly at the due process hearing, have extensive training and experience with deaf/hearing impaired students and experience with auditory/oral classrooms. *See* F.F. 12; N.T. 408—413. In addition to Pennsylvania licenses and certifications in speech pathology and teaching, including teaching of the hearing impaired, the MCIU program supervisor is a Pennsylvania licensed and certified audiologist. (N.T. p. 409)

Parents' belief that the MCIU staff is not qualified despite staff members' extensive credentials rests primarily on the premise that none of the staff engaged in the

same kinds of mentoring, trainings and practicums required of [] School staff. *See*, Parents' Closing Argument at 12, 13; N.T. pp. 40—43. There was, however, no evidence produced to establish that teachers in an auditory/oral classroom must be trained in the [] School model in order to be qualified. Parents' belief does not constitute such evidence, and, in fact, to a large degree flies in the face of common sense. Parents consider Student's [] School teachers and speech therapists well qualified, although the teacher and speech therapist during Student's first year in the [] School pre-school program each had less than two years experience. (N.T. pp. 177, 203). On the other hand, Parents completely discount the MCIU staffs' decades of combined experience, including experience with children who have cochlear implants. (F.F. 12)

The [] School director also listed several other important components of an auditory/oral classroom, such as acoustically sound classroom, specific auditory skills training, speech/language instruction fused into the entire school day and supported by the services of a speech therapist to assist/consult with the teacher, and low teacher/student ratio. (F.F. 10, 23) The MCIU program includes all of those components. (F.F. 13, 16)

There are, however, also several significant differences between the MCIU and [] School programs which Parents specifically cited to support their contention that the MCIU proposed placement was and is not appropriate for Student. Given that the MCIU auditory/oral classroom was just getting underway as Student was transitioning from the Birth—3 EI program, Parents' concerns about the differences between the MCIU and [] School programs are certainly understandable and should be addressed specifically.

Inclusion

There was considerable testimony and argument on the record devoted to whether/when it is advisable for children with cochlear implants to be educated with non-disabled peers, and "reverse mainstreaming" was a major concern cited by Parents in rejecting the MCIU auditory/oral class. (F.F. 19) *See also*, Parents' Closing Argument at 13.

The [] School philosophy is that it is not helpful, and may even be harmful, for children who use cochlear implants to be educated with normally hearing peers before the children with implants reach a certain level speech/language skills. (F.F. 21) Review of the record, however, reveals there is no real evidence concerning whether inclusion is appropriate or inappropriate for children with significant language delays due to severe hearing impairment. Although the [] School director referred to research support for [] School's non-inclusion philosophy, the only documentary evidence submitted by Parents, a review of the literature concerning inclusion, does not actually support that proposition. *See*, P-23. First, the authors of the literature review, the [] School Director and a speech therapist associated with [] School, but not on the [] School staff, note that there is no relevant research meeting the highest levels of rigor and reliability, *i.e.*, "meta-analysis of randomized, controlled studies or at least one well-designed randomized controlled study" or a "well-designed controlled study without randomization." P-23 at p. 1. Moreover, the authors found "very few studies focused on preschool children." P-23 at 1. One of the co-authors of the [] School literature review also noted the "dearth of research" on pre-school students in her testimony. (N.T. p. 227). A review of the literature cited by the [] School authors found 6 such studies

between 1981 and 2002. The only arguably negative finding from that literature review was an indication that "*oral language competence appeared to significantly influence feelings of self-esteem in the mainstream setting.*" P-23 at 1 (Italics in original). In addition, the studies indicated that hearing and non-hearing children tended to associate more with same-hearing peers. P-23 at 1. Among the hearing-disabled children, "*greater oral proficiency was significantly and positively related to increased interaction with hearing peers*." P-23 at 1 (Italics in original). The [] School authors' conclusion that "In other words, those children whose oral language proficiency was lower experienced significantly greater difficulty in the mainstream" is not supported by the descriptions of the conclusions of the studies quoted above. Other studies concerning school age children revealed that "Placement in mainstream vs. special school did not have a significant impact on achievement." P-23 at 2. Many studies at lower levels of rigor and reliability were completed before widespread use of cochlear implants and did not involve pre-school age children. P-23 at 2. Such studies, therefore, are even less relevant and reliable when applied to children such as Student, who attend a pre-school auditory/oral classroom and who began hearing with a cochlear implant around age 1. Finally, the [] School authors note that even the studies cited, which have limited application to Student, yielded "mixed results." The research touted by the [] School Director to support the philosophy of long-delayed interaction between hearing disabled and typical peers falls far short of supporting the notion that such inclusion is actually detrimental to hearing impaired pre-school age children. Rather, the testimony by Student's Mother, that she saw no harm in inclusion, just no clear benefit for Student, much more accurately reflects the conclusions of the limited research available. (N.T. p.

789)

As noted, Parents have the burden of proving that the auditory/oral classroom proposed by MCIU was inappropriate for Student at all times since it was offered. Parents cannot meet that burden by referring to MCIU's inability to provide them with unequivocal research support for the benefits of inclusion. In light of the research provided by the [] School Director, it is obvious, first, that such studies likely do not exist, and second, that the limited objective evidence available, as well as Parents' own testimony does not support the conclusion that inclusion would be harmful to Student. Moreover, evidence of Student's progress in speech/language development based upon his most recent test scores supports the conclusion that even under the [] School limited inclusion philosophy, Student is likely to benefit from inclusion experiences. *See* F.F. 28, 29, 30. Consequently, Parents' concerns with the MCIU program based upon the inclusion component of the MCIU class do not establish that the MCIU class was inappropriate for Student at any time.

Of even greater relevance and importance with respect to the inclusion issue, however, is the evidence that there is little or no difference between the [] School and MCIU programs in this school year in terms of the level of typical peer interaction with the children in their respective auditory/oral pre-school program. *Compare* F.F. 14 and F.F. 21. In fact, the description of the level of integration with non-disabled peers in the MCIU program strongly indicates at least tacit agreement with the [] School philosophy of minimal integration of normally hearing and hearing impaired peers in the instructional setting. The children in the MCIU regular pre-school program and in the oral/auditory classroom are not brought together for any part of the pre-school

curriculum, but only for limited and relatively brief social encounters. (F.F. 14) In the MCIU program, the time for bringing the typical and hearing impaired children together was changed from snack time to free play for this school year because inclusion during snack time diminished the opportunity for the staff to develop language skills with the children in the auditory/oral class. (F.F. 14) The integration of disabled and non-disabled peers in the MCIU program, therefore, is carefully planned to maximize the benefits of inclusion and eliminate any potentially detrimental effects. The evidence concerning integration of typical and disabled peers in the MCIU program establishes that although the MCIU program provides regular inclusion opportunities, the staff recognizes that truly integrated education at the pre-school level must be balanced with the intense auditory speech/language skill development generally necessary and appropriate for children with cochlear implants.

Finally, since the opening of the [] School Academy at the beginning of the current school year, [] School now also provides opportunities for normally hearing peers and children with hearing loss, including children with cochlear implants, to interact during the school day to the extent appropriate for individual children in the auditory/oral classroom. With respect to integration/inclusion, the MCIU auditory/oral program was not functionally different from the current [] School model in the way it operated in the 2006/2007 and 2007/2008 school years, and is similar to the [] School program for the current school year.

Parents, therefore, did not prove that the MCIU program was or is inappropriate for Student based upon inclusion or "reverse mainstreaming" as Parents described that issue. Parents may well point to their Closing Argument (pp. 5, 7, 13) and their

testimony, where they expressed concerns about the lack of specific information in 2006 concerning how and when inclusion would occur. *See* F.F. 19. Lack of specific information concerning how inclusion would function, however, could only support a delay in accepting the MCIU program, at best, since such uncertainty could have been removed within several months after the MCIU program became fully operational. Certainly such concerns could not support Parents' rejection of the 2007 and 2008 IEPs. Moreover, Parents arguments with respect to the uncertainty of the inclusion program at the time the MCIU program began operating establish only that Parents would not accept the MCIU program unless they were sure that it would provide Student with benefits comparable to the [] School program. The legal standard, however, does not require such subjective confidence in order to conclude that the MCIU program was reasonably calculated to provide Student with meaningful benefit from his educational program.

Mixed Age Grouping

Parents were also concerned about the grouping of 3 to 5 year old children in the MCIU oral/auditory classroom, noting that MCIU provided no research establishing that the mixed-age class would be appropriate for Student. *See* F.F. 19; Parents' Closing Argument at p. 5. A LaSalle University speech/language pathologist, who provides contract and consulting services at [] School, and who co-authored the [] School review of the literature concerning inclusion, testified that she is unaware of any studies concerning mixed age grouping much less any objective information establishing that mixed age grouping is generally appropriate or inappropriate. (N.T. p. 229) Finally, as noted previously, Parents have the burden of proof in this case. Consequently, the IU was not required to prove that mixed age grouping in its auditory/oral classroom was and

is appropriate for Student. Rather, Parents had the obligation to establish that the MCIU class was not appropriate for Student due to the mixed-age grouping and/or any other feature or characteristic of the MCIU program. Parents' only basis for asserting that a pre-school class with mixed age grouping is not appropriate for Student was that [] School divides its pre-school classes into separate 3, 4 and 5 year old groups, yet even the [] School witnesses had no rationale for that decision, other than past practice and the belief that children of similar language ability should be grouped together. As the MCIU hearing support supervisor testified, however, there can be a variety of language and developmental needs in special education classes unrelated to age. (N.T. p. 293) Same age grouping in an auditory/oral classroom, therefore, does not guarantee that all children class will have the same language abilities. In addition, given the small number of children (5-6) in the MCIU auditory/oral classroom, the experienced teacher, and the number of staff in the classroom, there is no reason to disbelieve the MCIU teacher's testimony that she could individualize her instruction to meet the specific language needs of each child. *See* F.F. 15.

Amount of Individual Speech Therapy

The most important of the concerns expressed by Parents is whether Student would receive sufficient speech/language services to assure that he would continue to make progress in closing the gap with typically developing peers. The evidence, however, does not support the conclusion that the MCIU program was not reasonably calculated to assure that Student would continue to make progress in speech/language development without a daily period of pull-out speech/language therapy. First, the description of the MCIU program by the hearing support supervisor and the program staff

concerning the focus of the entire program on language and auditory skills development amply supports the conclusion that Student would have received sufficient individualized services throughout the school day to continue progressing in speech/language skills. *See* N.T. p. 619. The MCIU class is small and well staffed, providing frequent opportunities for individualizing instruction and services. (F.F. 16) The MCIU speech therapist testified credibly that she could and would have increased Student's level of services and worked with Student on a one to one basis if Student's needs warranted that level of speech/language therapy. (F.F. 16, 18) The MCIU witnesses had a reasonable basis for initially recommending two integrated weekly sessions of speech/language therapy for Student, either alone or with one other child, noting that Student's articulation errors were not unusual for a normally hearing child of the same age, and that Student was not receiving direct speech language therapy through his Birth-Age 3 early intervention program. (N.T. pp. 616—618; F.F. 18) Student's evaluation results also indicated that language skills were developing well. (F.F. 28, 29, 30) It was reasonable, therefore, to offer a lower level of intensive therapy services until and unless Student demonstrated a higher level of need.

On the other hand, there was no objective evidence supporting a definite need for Student to receive daily speech/language services outside of his pre-school classroom, which is the standard level of service at [] School. Rather than referring to specific needs that Student has for daily individual pull-out speech/language therapy, the testimony of the [] School witnesses defined Student's needs in terms of the [] School philosophy that every child at [] School needs daily one to one speech/language therapy and any child who does not need that level of service should not be at [] School. (F.F. 24)

Finally, Parents presented no evidence contradicting the testimony of MCIU's witnesses explaining the significant benefits derived from integrating individual and/or small group speech/language therapy into the classroom rather than providing such services on a pull-out basis. *See* F.F. 17. Parents argued that MCIU provided "No Evidence of Program Success for Student." Parents' Closing Argument at pp. 11, 12. In addition to MCIU having no obligation to provide such evidence, and the impossibility of demonstrating program success with respect to a child who never attended the MCIU class, there is some evidence concerning difficulty with transitions which leads to a reasonable inference that Student may particularly benefit from receiving speech/language therapy in an integrated setting instead of having to interrupt an ongoing activity to leave the room for speech/language therapy. *See* [] School Progress Reports P-5, p. 1 and P-26, p. 1), noting Student's difficulties with transitions and following a schedule different from classmates. *See also* N.T. pp. 757, 758.

Parents, representing themselves in this matter, did a commendable job of articulating their concerns and attempting to demonstrate that such concerns were serious enough to support the conclusion that the MCIU program is inappropriate for Student. It is certainly understandable that Parents' desire to assure that their child had the best possible program for developing normal language skills made them reluctant to leave a familiar program that was highly recommended to them, and in which they have great confidence. Parents did not, however, prove that the MCIU program would not provide Student with meaningful benefit. Consequently, Parents' claim must be denied based upon the first element of the *Burlington* standard for analyzing tuition reimbursement cases.

C. Appropriateness of the Private School Auditory/Oral Classroom

Although not a necessary component of the analysis in light of the conclusion that the MCIU offered an appropriate auditory/oral pre-school program for Student at all times, so much time and effort was expended by both parties with respect to the appropriateness of the [] School classroom that the issue deserves at least passing reference.

There is no serious question whether the [] School is appropriate for Student. Prior to establishing its own program, MCIU used the [] School to fulfill its obligation to provide an appropriate program to 3—5 year old children with severe hearing loss who needed an auditory/oral preschool program. Moreover, the evidence concerning the two programs revealed few significant differences between them in terms of content and methods of instruction. Both programs, *e.g.,* infuse language instruction throughout the curriculum, have the speech therapist complement the educational program and incorporate the educational domains of a pre-school program. *See*, F.F. 10, 16, 23. There are two primary programmatic differences between the [] School and MCIU programs: the amount and method of delivering Student's speech/language therapy and the mixed age grouping, as discussed above. Neither difference renders the [] School program inappropriate, just as neither difference makes the MCIU program inappropriate for Student.

MCIU contended throughout the hearing that a major difference between its pre-school program and the [] School is the amount of contact with non-disabled peers, further arguing that [] School does not meet the IDEA standards for providing services in the least restrictive environment (LRE). That, however, is a non-issue. Although it is

well-established that a public agency is required to provide maximum opportunities for interaction between eligible students and non-disabled peers, it is equally well-established that private schools are not required to assure that every IDEA standard is met as long as the program provided to the child meets his needs. *See Ridgewood, Florence County.*

Moreover, in this case, for the reasons discussed above regarding inclusion as currently practiced in both the MCIU and [] School programs, LRE considerations provide a very weak distinction between the [] School and MCIU auditory/oral classrooms. In addition, with respect to Student, specifically, the evidence establishes that there are ample opportunities to interact with non-disabled peers, including siblings and neighbors. (N.T. p. 759) There would be no basis, therefore, for concluding that the [] School was and is inappropriate for Student because it provided no opportunity for interaction with non-disabled peers during the school day during the 2006/2007 and 2007/2008 school years.

Nevertheless, as noted repeatedly in this decision, the applicable legal standards do not permit a decision that Parents are entitled to tuition reimbursement if both the MCIU program and the [] School program would appropriately meet Student's needs. Rather, if the responsible public agency, MCIU in this case, offers an appropriate program, as it has in this case, tuition reimbursement must be denied.

CONCLUSION

For the reasons explained in detail above, Parents have not established that the Montgomery County Intermediate Unit is required to reimburse them for Student's

tuition at the [] School and their transportation costs for the 2006/2007, 2007/2008 or 2008/2009 school years.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that Parents' claim for tuition reimbursement and transportation costs is **DENIED.**

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER

December 2, 2008