

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

Child's Name: [REDACTED]

Date of Birth: XX/XX/XXXX

Dates of Hearing: June 30, July 1, July 2, 2009

CLOSED HEARING

ODR# 9811/08-09 KE

Parties to the Hearing:

Parents:
[REDACTED]

Representatives

Parent Representative:
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School District:
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Date Record Closed: July 23, 2009

Date of Decision: August 1, 2009

Hearing Officer: Daniel J. Myers

INTRODUCTION AND PROCEDURAL HISTORY

[REDACTED], (Student),¹ a [REDACTED] year old [high school]-grade student in the Canton Area School District (District) initiated this action on March 11, 2009, to contest the District's proposal that Student receive a residential full-time hearing support program at the [REDACTED] State School for the Deaf (State School). The District contends that it cannot provide a free and appropriate public education (FAPE) closer to Student's home. Because the District has not sufficiently considered specially designed instruction, related services, supplementary aids and services, and support for school personnel that might enable a less restrictive placement, I find for the Student.

ISSUE

Whether the District's proposed program and placement is appropriate?

FINDINGS OF FACT

1. Student, a cooperative and friendly [REDACTED] year old (born XX/XX/XXXX) resident of the District (SD-51),² has CHARGE syndrome, a complex medical condition relating to a number of birth defects. (SD-80)³ Student's Performance IQ has been listed at 71, Full Scale IQ at 67, and an adaptive composite score in the extremely low range at 45. Student's instructional reading level is first grade. (SD-72, p.21). Student has a one to one

¹ Future references to [REDACTED] will be to "Student" and will be gender neutral to further protect Student's confidentiality.

² References to "NT" are to the transcripts of the hearings. References to "P", "SD" and "HO" are to the Parent, School District and Hearing Officer exhibits, respectively.

³ CHARGE is an acronym describing the features of the disability: [REDACTED to preserve medical privacy] (NT 564-565)

- personal aide in the regular classroom. (SD-80, pp.3, 13) Student requires a curriculum of life skills and functional academics with opportunities to engage, interact and form relationships with non-disabled peers. (P-9, p. 7-8) Student is not as emotionally mature as typically developed same-age peers and would suffer negative social and emotional effects if removed from family and community. (NT 341, 586-589)
2. Student has profound hearing impairment, and Student's first language is American Sign Language (ASL). (SD-72, p.19; SD-78, p.4; SD-84, p. 45; P-9, p.7; NT 76, 223, 529, 579-580) Student is the only deaf student in the District's high school. (SD-78, p. 12; NT 103) Student uses a combination of signs, body language, unique gestures and speech approximations to interact with adults and peers. (SD-80, p.12) Student has a communication device called a Mini-Mercury, but uses it only during speech/language class. (SD-84, p.84; NT 190, 207, 574-75, 580)
 3. Student's greatest need is a deeper knowledge of ASL, which will facilitate more communication and result in educational benefit from Student's other academic courses. The District does not have a full-time hearing support program. (NT 103) Last year, only one of Student's teachers, an Intermediate Unit (IU) hearing support teacher, was fluent in ASL. (NT 76) A District speech and language (S&L) therapist was very skilled, but not fluent, in ASL. (NT 76) None of Student's other teachers were fluent in ASL. (NT 77-78) Consequently, Student received only one hour a day of hearing support, which is not adequate to teach ASL to the degree that Student needs. (NT 509)

4. The District believes that ASL immersion in a residential setting, where Student would be required to use ASL all day, every day, is the only way Student can receive FAPE. (NT 206-210, 238-240, 247-248) Through exposure to role models and peers using ASL day in and day out, Student would receive direct and indirect ASL instruction in an immersion setting. (NT 195-196, 220-221, 227) District staff are not sufficiently proficient in ASL to provide Student with the level of immersion that the District believes is necessary. (NT 178-179, 211, 221, 230-231, 510, 448-449) Student cannot receive sufficient exposure to ASL with just a single teacher proficient in ASL. (NT 221) Last year, because the proficient ASL teacher was an itinerant teacher working for the IU and the S&L teacher (who was less proficient, but skilled, in ASL) worked for the District, they coordinated to some extent, but not much. Thus, Student has developed some sight vocabulary and the ability to match phrases to pictures, but still lacks the ability to read sentences with connective language. (NT 193-194; 290; 571)
5. For three years (2006-2007, 2007-2008, and 2008-2009), the District has recommended that Student receive full-time instruction in ASL at a location such as State School. Because State School is nearly two hours one-way from Student's home, the District recommended residential placement. (NT 65) Student's parent preferred placement at a neighborhood school with additional hearing support. (SD-40; NT 103) Each year, the parties resolved their dispute via settlement agreement under which the School District agreed to place Student in Student's neighborhood school while Parent agreed to hold the District

- harmless for denial of FAPE claims. (SD-1,p.2; P-81; P-82; SD-2; SD-3; P-26, p.4; SD-78, p. 4)
6. On January 8, 2009, the District again recommended that Student receive full-time hearing support placement at State School. (SD-84, pp.50, 52; NT 60, 99) Parent rejected the District's offer on January 22, 2009. (S-84, p.52) On March 11, 2009, Student's parents filed a request for due process hearing.
 7. District and IU officials believe it is difficult to recruit ASL proficient teachers to the area. The IU's collective bargaining agreement does not permit it to pay more than a \$43,231/year starting salary. (NT 145, 152) Because there are so few students in the area who are deaf and hard of hearing, the IU requires its hearing support teachers to drive 45 minutes to 1 hour between assignments, sometimes more than 1,000 miles per month. (NT 141, 150, 241-242) In fact, Student's current IU ASL-proficient teacher recently left her higher-paying IU position in order to work full-time in a local school district for lower pay but much less travel. (NT 146, 230, 243, 245-246) The IU has not yet hired a replacement. (NT 109, 143-144) Bloomsburg University, which is 1.5 hours from the District, has a teacher preparation program for deaf and hard of hearing instruction. (NT 243)
 8. The District has not advertised for ASL proficient teachers, but asks every teaching candidate whether s/he has any sign language experience. (NT 79) The District does not know whether any of its current teachers have had ASL training. (NT 79) The District has not requested the IU to contract to provide more deaf or hard of hearing services. (NT 148, 153-154)

9. The District has not tried to install an FM hearing system. (NT 75) The District has not provided an interpreter. (NT 80) The District does not know if it has provided a note taker. (NT 80) The District has not made available any system of computer assisted real-time captioning. (NT 80) The District has not adapted classroom visual aides, such as the SMART Boards that are in every classroom, to meet Student's needs. (NT 81) The District has not upgraded assistive technology provided to Student 5 years ago. (NT 81-82; 182; SD-84,p.46) The District has not sought assistance in obtaining services from the Pennsylvania Training and Technical Assistance Network (PaTTAN) or the Pennsylvania Department of Education, other than to seek advice on compliance matters. (NT 80-82, 113, 119, 125, 176) The District has not offered ASL training to Student's peers and fellow students. (NT 79)
10. A number of summer camps and other programs are available in neighboring states where teenagers who are deaf or hard of hearing can develop their sign language skills and form relationships with similar peers. (NT 399-400, 464)
11. An interpreter is someone who is not allowed to rephrase, reteach or change the message in any way. (NT 206, 233) An interpreter is not an appropriate accommodation for Student due to Student's limited language development. (NT 206-207, 231-232)
12. An intervener is a para-professional who serves as a social, environmental and communication facilitator for children who are deaf-blind. An intervener is not an interpreter who translates exactly what is said; but someone who brings communication to whatever the child's level is. An intervenor could be a teacher

of the Deaf. (NT 592-93, 596-97, 609-10) A person trained as an interpreter can work as an intervener for a student with disabilities without violating any ethical rules, as long as she does not represent that she is interpreting to the student exactly what others say. (NT 206, 601)

13. In a co-teaching model with increased hearing support services for two or three hours a day rather than one hour per day in an isolated, one on one model, a hearing support teacher could spend part of the day co-teaching in a regular class and then spend the rest of the day teaching ASL courses to other people in the District. (NT 593-94, 610, 613-614)
14. Due process hearing sessions were conducted on June 30, July 1 and July 2, 2009. Exhibit HO 1 was admitted into the record. (NT 689) Student Exhibits P-9 and P-17 through P-30 were admitted into the record. (NT 683) Student exhibits P-1 through P-7 were not admitted into the record. (NT 683) District Exhibits SD-39, SD-45, SD-51, SD-60, SD-61, SD-63, SD-68, SD-72, SD-78, SD-80 through SD-82, SD-84, SD-99 and SD-100 were admitted into the record. (NT 688) District Exhibits SD-70 and SD79 were not admitted into the record. (NT 688)

DISCUSSION AND CONCLUSIONS OF LAW

Burden of Proof

The United States Supreme Court has held that, in a special education administrative hearing, the burden of persuasion (which is only one element of the larger burden of proof) is upon the party seeking relief, whether that party is the disabled child or the school district. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005); L.E. v. Ramsey Bd. Of Education, 435 F.3d 384 (3d Cir. 2006) If the evidence is

not in equipoise, but rather one party has produced more persuasive evidence than the other party (regardless of who seeks relief), then the Supreme Court's ruling is not at issue – in that case the party with the more persuasive evidence wins. In this case, Student bears the burden of persuasion because Student alleges that the District's proposed program and placement is inappropriate.

FAPE

Students with disabilities are entitled to FAPE under both federal and state law. 34 C.F.R. Part 300; 22 Pa. Code Chapter 14 A school district offers FAPE by providing personalized instruction and support services pursuant to an IEP. FAPE does not require IEPs that provide the maximum possible benefit or that maximize a student's potential, but rather IEPs that are reasonably calculated to enable the child to achieve meaningful educational benefit. Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 533-534 (3d Cir. 1995), cert. denied, 517 U.S. 1135 (1996); Board of Educ. of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 73 L.Ed.2d 690, 102 S.Ct. 3034 (1982)

The District argues that, before undertaking a least restrictive environment (LRE) analysis, the hearing officer must first determine what FAPE is for Student. (District brief at 16) (citing W.M. ex rel. S.M. v. Southern Regional Bd. Of Educ., 2006 WL231104 (D.N.J.)) The District contends that, after years of experience and consistent with expert recommendations, it is impossible to provide FAPE for Student in the District's own buildings, and FAPE cannot possibly provided by this District in any program other than a separate school for the deaf. (District brief at 16)

The only basis for the District's argument is its belief that a qualified ASL teacher cannot be found in the District's rural community to teach Student for more than one

hour per day. (NT 140-145, 241-242) The District also argues (without evidence in the record) that, even if an ASL-proficient teacher could be found, the District could not offer a salary as competitive as the IU.

The record, however, contradicts the District's argument. Student's former ASL-proficient hearing support teacher recently left her higher-paying position with the IU specifically to work, full-time, in a neighboring school district. (NT 146, 230, 243, 245-246) Clearly, local school districts can recruit full-time hearing support teachers who are proficient in ASL, and they can do so at a lower salary than the IU pays.

The specific program offered by the District for the provision of FAPE is full-time deaf or hard of hearing impaired support. (SD84, p.51) Nothing in the record establishes that it is impossible for the District to provide this program in its own buildings. Despite having recommended full-time instruction in ASL for the last three years (SD-1,p.2; P-81; P-82; SD-2; SD-3; P-26, p.4; SD-78, p. 4), the District has never advertised for ASL proficient teachers (NT 79), does not know whether any of its current teachers have had ASL training (NT 79), and has not requested the IU to contract to provide more deaf or hard of hearing services. (NT 148, 153-154) As just noted in the paragraph above, school districts in the area are capable of hiring full-time hearing support teachers who are proficient in ASL for less than the IU pays. Thus, the record does not establish that it is impossible for the District to provide a full-time deaf or hard of hearing impaired support program within its own buildings.

Least Restrictive Environment (LRE)

Congress requires that, to the maximum extent appropriate, children with disabilities are educated with children who are not disabled. 20 U.S.C. §1412(a)(5)(A);

34 CFR §300.114(a)(2)(i) Congress further requires that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment shall occur only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. Id.; 34 CFR §300.114(a)(2)(ii)

The U.S. Department of Education has added the requirement that the placement decision must be as close as possible to the child's home, and in the school that the child with a disability would attend if nondisabled, unless some other arrangement is required. 34 CFR §300.116(b), (c) To comply with its LRE obligation, the District must ensure that a continuum of alternative placements is available. 34 CFR §300.115 The Third Circuit has found that a residential placement can be the least restrictive environment for particular, severely disabled, children. Bd. Of Educ. v. Diamond, 808 F.2d 987, 992 (3d Cir. 1989); Kruelle v. New Castle County Sch. Dist., 642 F.2d 687, 693-95 (3d Cir. 1981)

A two part test is used to implement this statutory LRE requirement. Oberti v. Board of Education of Clementon School District, 995 F.2d 1204 (3d Cir. 1993) The first part of the test is to determine, by asking three questions, whether education in the regular classroom with supplementary aids and services can be achieved satisfactorily. The three questions are: (1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom with supplementary aids and services; (2) how do the educational benefits available in a regular class compare to the benefits provided in a special education class; and (3) whether there are possible negative effects of inclusion on the other children in the class.

The District has failed to comply with the first criterion of the first part of the Oberti test by failing to accord serious consideration to including Student in its own classrooms with supplementary aids and services. Although State School appears to be an excellent, high quality resource from which Student would benefit,⁴ the District simply looked at its existing program box and determined that it could not plug Student into that box. The District did not seriously consider whether there are any other, out-of-the-box ways in which Student could have been more included into the District's own classrooms.

The District has never considered providing more than one hour per day of services by a single ASL-proficient itinerant hearing support services teacher. (NT 76, 103, 509) The District has not attempted true coordination between the IU's ASL-proficient itinerant teacher and the District's own ASL-acquainted S&L teacher. (NT 193-194; 290; 571) The District has not tried to install an FM hearing system. (NT 75) The District has provided neither an interpreter nor intervener. (NT 80) The District does not know if it has ever provided a note taker. (NT 80) The District has not made available any system of computer assisted real-time captioning. (NT 80) The District has not adapted classroom visual aides, such as the SMART Boards that are in every classroom, to meet Student's needs. (NT 81) The District has not upgraded the assistive technology that it provided to Student five years ago. (NT 81-82; 182; SD-84,p.46) The District has not sought assistance in obtaining services from the Pennsylvania Training and Technical Assistance Network (PaTTAN) or the Pennsylvania Department of Education, other than

⁴ In fact, Student's future IEP teams, after seriously considering and monitoring less restrictive environments, may eventually conclude that the State School is the most appropriate LRE for Student.

to seek advice on compliance matters. (NT 80-82, 113, 119, 125, 176) The District has not offered ASL training to Student's peers and fellow students. (NT 79)

The second question of the first part of the Oberti test involves a comparison of the educational benefits available in a regular class and the benefits provided in a special education class. This portion of the analysis requires special attention to those unique benefits Student may obtain from integration in a regular classroom which cannot be achieved in a segregated environment, such as the development of social and communication skills from interaction with nondisabled peers. Oberti, supra Student is cooperative and friendly but not as emotionally mature as typically developed same-age peers. (NT 341, 586-589) Student requires a curriculum of life skills and functional academics with opportunities to engage, interact and form relationships with non-disabled peers. (P-9, p. 7-8) Student would suffer negative social and emotional effects if removed from family and community. (NT 341, 586-589) This record establishes that Student will benefit at least as much from remaining in the District as from moving to State School.

Finally, the third question to be asked in analyzing the first of Oberti's two-part test is the possible negative effects of inclusion on the other children in the class. The record contains no evidence of any negative effects of Student's inclusion on the other children in Student's District classes.

It is not necessary to move to the second part of Oberti's two-part test because the first part demonstrates that placement outside the regular classroom is not required. Nevertheless, the second part of the test, is to determine whether the district has mainstreamed the child to the maximum extent possible. Girty v. Sch. Dist. of Valley

Grove, 163 F.Supp.2d 527 (W.D.Pa. 2001) Even if the child receives less academic benefit in an inclusive setting, such setting may be warranted if the benefit of social modeling, language development and social skills development outweighs the potential academic benefit of a segregated setting. Girty, supra

The record establishes that this District's proposed placement at State School fails the second part of the Oberti test. As discussed above, the District failed to make reasonable efforts to accommodate Student in a District building with appropriate supplemental aids and services. Instead, when the District could not provide FAPE with its one-hour per day program with an itinerant IU teacher, the District gave up, deciding to send Student to State School rather than design a different program and placement tailored to the Student's capabilities and limitations, as the law requires.

The District argues that the Parent belatedly suggests other supplemental aides and services, such as the use of an Intervener, and fails to meet her burden of persuasion to prove that such supplemental aides and services are appropriate or even a reasonable option given the specific facts of this case. The fact that Student's parents belatedly suggested new LRE ideas, however, does not immunize the IEP team from its responsibility to seriously consider ways to provide FAPE in the least restrictive environment appropriate.

The District also argues that its own failure to articulate a range of supplemental aides and services was a mere de minimus procedural violation which did not deny a FAPE to the Student. To the contrary, the LRE failures in this case are procedurally significant.

The District also argues that it should not be required to create an entirely new program for one student. Experts testified that LRE for this Student is a comprehensive program for deaf and hard of hearing students. (NT 331-333, 461-463) The District argues, without evidence in the record, that such a program will require the hiring of no less than two additional staff (Intervener and Interpreter) for a single student. The record does not establish the degree of burden (if any) to be suffered by the District, and while special education services can be burdensome, special educators at the state, IU and local levels are capable of incredible creativity and flexibility.

The District argues that an environment where Student is restricted to direct communication with one ASL-proficient person would be most restrictive and that a school for the deaf is a regular education environment. (NT 585, 656) As noted in a footnote earlier, the IEP team may eventually conclude that State School is most appropriate for Student. At this time, however, the District and the IEP team have not complied with legal requirements concerning the degree to which they must attempt a less restrictive program and placement as close as possible to the child's home, and in the school that the child with a disability would attend if nondisabled. 34 CFR §300.116(b), (c)

Section 504

To the extent that the FAPE requirement under Section 504 differs from that under IDEIA, the difference appears to be a difference between merely failing to meet statutory and regulatory requirements (IDEIA) and either intentionally or deliberately indifferently failing to provide FAPE (Section 504). Mark H. v Department of Education, 513 F.3d 922 (9th Cir. 2008); K.R. v. School District of Philadelphia, 50

IDELR 190 (E.D. Pa. 2008); L.T. v. Mansfield Township School District, 48 IDELR 156 (D.N.J. 2007) The record in this case does not contain specific evidence that the District's FAPE denials occurred either with intention or with deliberate indifference. Accordingly, the District did not violate Student's Section 504 rights during the relevant time period.

CONCLUSION

Student requires a full-time hearing support program. The District contends that it cannot provide this program nearby and proposes that Student attend a residential State School. Because the District has not sufficiently considered specially designed instruction, related services, supplementary aids and services, and support for school personnel, that might enable a less restrictive placement, I find for the Student.

ORDER

- The District shall provide Student's full-time hearing support program within the District. Within ten days of this Order, the District shall convene Student's IEP team and develop an IEP that will enable Student to be educated in the general education environment of the Canton Area School District to the maximum extent appropriate.
- The IEP shall consider and discuss the following supplementary aids and services:
 - An intervener or other trained para-professional to serve as a social, environmental and communication facilitator for Student. The intervener should be proficient in American Sign Language and shall be available to work with Student for at least 80% of the school day. If the intervener is not already trained to the competencies for interveners identified by the Pennsylvania Deafblind Project of the Pennsylvania Training and Technical Assistance Network (PaTTAN), <http://www.pattan.net/teachlead/specialprojects4.aspx>, the District shall arrange for such training, either through PaTTAN or another appropriate provider.
 - Hearing Support services from a qualified teacher of the Deaf and Hard of Hearing for a minimum of two hours per day. Hearing Support may be provided via a co-teaching model in the general education classroom.
 - Co-teaching between general education teachers and a qualified teacher of the Deaf and Hard of Hearing.
 - Modifications of the general education curriculum.

- Facilitation of friendships and social networks.
- Transdisciplinary teamwork and collaboration among the professional staff, including collaboration between the speech therapist, Hearing Support staff and intervener so that all are working toward common literacy and communication goals and using similar strategies.
- Data-based instruction.
- An Assistive Technology Evaluation to consider technology and internet resources such as the use of PowerPoint software to generate word lists; websites where Student could work on IEP word lists; and training in the use of text messaging and email.
- Courses and other training in American Sign Language to be offered to Student's peers and to general and special education peers.
- Consideration of an Extended School Day.
- A summer camp or other program for young persons who communicate in American Sign Language.

Daniel J. Myers

Daniel J. Myers
HEARING OFFICER

August 1, 2009