

**Special Education Due Process Hearing Decision
Parent v. Union 51 (Windsor)
December 3, 1997**

Case No. 97.176

Representing the Parent: Jim McGurty, Maine Advocacy Services

Representing the School: Ralph Newbert, Director of Special Services

Hearing Officer: Carol B. Lenna

THIS HEARING WAS HELD AND THE DECISION WRITTEN PURSUANT TO TITLE 20-A MRSA, §7207 et. seq., 20 USC, §1415 et. seq., AND IMPLEMENTING REGULATIONS.

On October 9, 1997, the Department of Education received a request for a special education due process hearing from the mother, on behalf of the student (DOB:). The student is eligible for special education services under the category of "deaf". The student currently attends the Windsor Elementary School.

The pre-hearing conference was originally scheduled for Friday, October 31, and the hearing for Friday, November 7. After confusion about the outcome of mediation, the Hearing Officer ordered a one-week delay to give the parties the opportunity to reach settlement if possible. The pre-hearing conference convened on Friday, November 7, and the hearing convened on Monday, November 17, in Augusta, Maine. The parent called three witnesses. The school called no witnesses. The hearing officer called two witnesses. Twenty-two documents were entered into the record as joint exhibits; seventeen additional documents were entered by the school. The record of this hearing closed at 12:30 p.m., November 17, 1997.

Following is the decision in this matter.

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I. Preliminary Statement

The student is a x year old student who is eligible for special education services under the category of “deaf¹”. The current IEP, agreed to by the parties in May 1997, places the student in a regular fourth grade class in the public elementary school in Windsor with the full-time support of a teacher of the deaf.

For the past six years, beginning in preschool, the student has had the services of a full-time Cued Speech Transliterater with the student in class. At the PET in May, the team determined that the student was not making adequate progress and should have a full-time teacher of the deaf. The school did not rehire the transliterater for the coming school year. During the summer the school advertised for a teacher of the deaf, but was unable to locate and hire someone to fill the position. When school began the student was without the services of either a teacher of the deaf or a cued speech transliterater. A teacher of the deaf who was working with the student outside of school agreed to contract with the school to work with the student for four mornings a week, for a limited time, until a permanent teacher could be hired.

In early September the PET heard a presentation from staff of a soon to open regional program for deaf and hard of hearing children to be housed at a primary (K-3) school in Waterville. The parents visited the program, rejected it as not being age appropriate for the student, and too far from their home - about 40 minutes one way. Throughout the month of September and into October the position of full-time teacher of the deaf remained vacant and the school and parents continued to disagree about the student’s placement at the regional program. On October 9, 1997, the Department received a request for hearing. It is the position of the parent that the school has not acted aggressively enough to locate and hire a teacher of the deaf to implement the student’s IEP. They argue that the school began to see the regional program in Waterville as a solution and ceased to actively search for a teacher. They contend that the cued speech transliterater was released when no backup plan was in place at the beginning of the school year. They maintain that the student’s program requires the services of a transliterater, in addition to a teacher of the deaf, in order for her to receive educational benefit.

It is the position of the school that they have made sincere efforts to fill the vacant position in order that the student’s IEP can be implemented at the local elementary school. They contend that the regional program is an appropriate alternative for the student and that the student should be placed there until the position is filled.

¹ The student’s IEPs list her in the category of “deaf”, however outreach observations from Baxter School refer to her as “hard of hearing”, and audiological evaluations from 1989 and 1994 seem to put her within the definition of “hard of hearing”. (See, Chapter 101. Section 3.3, 3.4 and Exhibits J-4, J-10, J-11)

II. Issues for the Hearing

1. Has Union 51, Windsor, and acted in good faith to locate and hire staff to implement the student's IEP?
2. Is placement at the Waterville Regional Program for deaf children an appropriate alternative for the student until a Teacher of the Deaf can be hired by Windsor?
3. Is the staffing proposed in the current IEP appropriate to meet the student's needs? Specifically, a Cued Speech Transliterater, in addition to a teacher of the deaf, necessary in order for the student to receive educational benefit?

No procedural issues were raised by the parents.

III. Findings of Fact

1. In May 1997 the PET met to review and revise the student's program for the coming year. At this meeting the student's teachers voiced concern that the student was having difficulty with concepts being taught and was not doing grade level work. The possibility of the presence of a learning disability was mentioned. It was determined that in order to meet the student's needs a full time teacher of the deaf should be hired to work with the student in and out of the regular classroom. It was also decided that the Cued Speech Transliterater (CST) would not be rehired to continue to translate for the student in the classroom. (Exhibit J-16; Testimony Parent, Slater)
2. An IEP was written on that date, for services to begin in September 1997. No goals and objectives were developed to be implemented by the teacher of the deaf. (J-20)
3. By the start of the 1997-98 school year the school had been unable to locate and hire a teacher of the deaf to implement the student's program. At the beginning of school the student had no CST and no teacher of the deaf. A teacher of the deaf who had been working with the student outside of school agreed to work with the student in school as her time allowed. The school contracted with her to work with the student for 3 /12 hours per day four days per week. (Testimony: Slater, Parent; Exhibit S-3)

4. The PET met on September 10 to discuss the student's program and the problems of hiring a teacher of the deaf. Discussion centered around the student's difficulty with the fourth grade curriculum and the need for more intense instruction from a teacher of the deaf outside of the classroom. The student's fourth grade teacher stated clearly that the student was not presently able to do 4th grade work in the classroom. Staff from the proposed Waterville Regional Program for the Deaf presented their program design. The PET determined that the school would enroll the student in the Waterville program, but continue to search for a teacher of the deaf for the local school. The parents agreed to visit the regional program. (Testimony: Parent; Exhibit: J-15)

5. On October 1 the PET met to continue discussions of the student's program. Sending the student to the Waterville program continued to be discussed as an interim solution to the teacher vacancy. (Exhibit: J-14)

6. On October 17 the PET met to review the hiring efforts of the district and the student's potential placement at the Waterville program. A formal change of placement was recommended. (Exhibit: J-13, J-22)

7. The district continued, through November 9, 1997, in its efforts to locate and hire a teacher of the deaf to work with the student at the Windsor School. (Testimony Newbert; Exhibit S-1, S-2, S-4 through S-17)

8. A Psychological Evaluation was completed in November 1996. Among other findings the evaluator noted that the student "has a wide variation of scores on this intellectual assessment [which raises] the possibility of a learning disability. This needs to be monitored and more clearly assessed". At PET meetings in March, May, September, and early October 1997 the student's learning problems and the possible existence of a learning disability are noted. The student's former Speech and Language Therapist testified that she recommended testing to determine a learning disability in 1995. Testing to rule in or rule out a learning disability was begun by the PET on October 29. (Exhibits: J-1, J-17, J-12, J-13, J-16; Testimony: Sundquist)

9. A Speech and Language evaluation completed in December 1996 recommends, among other things, the "[c]ontinued utilization of a Cued Speech Transliterator throughout the school day". (J-2)

10. The student has had the services of a CST from Head Start, at age 4, until the end of the last school year. The student is considered fluent in cued speech, has some signed English, but does not know American Sign Language. The student has excellent auditory and speech reading skills. The student uses an FM auditory

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transmitter in class. The student communicates orally, and has speech intelligibility within normal limits. (Testimony: Parent, Slater, Sundquist; Exhibits: J-2, J-3)

11. The school advertised for a teacher of the deaf at the end of the 1996-97 school year in a "batch ad" along with other district vacancies. One person applied for the position, but declined the job citing salary considerations. In early August the school placed another ad in two Maine newspapers. No one applied. In November the school sent fax transmissions to various schools and universities having deaf education programs, and wrote the Department of Education and the Baxter School. In early November one ad each was placed in a Boston newspaper and three Maine newspapers. The school has received no applications from those ads. (Testimony: Newbert; Exhibits: S-1, S-2, S-4, S-5, S-6 through S-10, S-11 through S-17)

IV. Conclusions

1. Has Union 51, Windsor, acted in good faith to locate and hire staff to implement the student's IEP?

"Each school administrative unit shall implement a student with a disability's Individualized Education Program as soon as possible following the PET meeting... If a school unit is unable to hire or contract with the professional staff necessary to implement a student's...Program, the administrative unit shall reconvene a PET to identify alternative service options within 30 days of either the start of the school year or the date of the PET's development of the student's [IEP]." Maine Special Education Regulations, Chapter 101.Section 9.8.

The district advertised for a teacher of the deaf to implement the student's program twice before the beginning of the school year. When no applicant expressed an interest in the job, the district contracted with a teacher of the deaf for a part of the school day, 4 days a week to work with the student in the classroom. The PET reconvened in early September to hear a presentation from staff developing a regional program for hearing impaired children in a neighboring town. At this meeting the PET made a determination to proceed with enrollment for the student in this program. The teachers for the program had been hired, but the program was not accepting students until later in the fall.

The actions of the school were appropriate up to that point. Regulations do foresee circumstances where professionals cannot be found to fill vacancies. Schools are directed to develop alternative, interim plans so that a student's right to a free appropriate public education is not compromised. However, having developed an alternative plan does not relieve the district from its obligation to continue its search to locate and hire the necessary staff. The evidence in this case supports the parent's

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contention that the school seemed to be content to place the student in the regional program where teachers of the deaf would be on staff and ceased their search to fill their own vacancy. The school presented no evidence that efforts were made to locate

a teacher of the deaf from early August until sometime in October. In fact, it appears that it was not until the parent filed for a due process hearing that efforts began again in earnest to proceed with the search.

From early October until the first of November, the district made an honest effort to advertise for a teacher of the deaf. However, no advertisements have appeared since November 9, and all recent advertisements have a stated deadline of November 14. For all practical purposes, there is not currently an active, open search for a candidate. Based on the minutes of the PET meetings since September, and the district's actions during the period since August, the district seems to be somewhat ambivalent about hiring its own teacher of the deaf as opposed to sending the student to the regional program. However, they made no argument at the hearing that the regional program was the appropriate placement for the student if a teacher could be located and hired.

2. Is placement at the Waterville Regional Program for deaf children an appropriate alternative for the student until a Teacher of the Deaf can be hired by Windsor?

The school has made a formal placement recommendation for the student to attend the regional program. At no time, however, did the school argue that this was the appropriate placement for the student, or argue that it was preferable to placement in the Windsor Elementary School if a teacher of the deaf could be located and hired. Therefore, placement in the regional program is addressed in this decision only as an alternative service option until professional staff can be hired to implement the student's IEP.

The parent's major concerns with the student attending the regional program are that the student will be removed from the student's neighborhood school to a program almost 30 miles away and be faced with less than ideal mainstreaming opportunities. If the student attends the program, the student would be placed with three significantly younger children during the period the student works with a teacher of the deaf, and would have to be bused to a third school to be with fourth grade peers.

Presently at the Windsor Elementary School, the teacher of the deaf is available for 3 1/2 hours, Monday through Thursday. During that time she works with the student on math and reading only. The balance of the time the student is in the regular classroom with a regular class teacher using an FM auditory trainer. On Friday the student works with a tutor who has no experience or training with hearing impaired students. The

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teacher of the deaf has made it clear that she cannot make a full-time, long term commitment to this position. A time limit was never given, and is not stated on the present contract, but the parties seemed to assume that it would be less than a full school year. There is no way to know when the position vacancy can be filled. The

comparison, then, must be the student's placement in the regional program with less than ideal mainstreaming opportunities with the student's placement in the Windsor School with no teacher of the deaf. Given these two options, placement in the regional program is the more appropriate. Testimony and evidence make it clear that the student is struggling to make educational progress and that the student's current level of academic functioning is significantly below a regular fourth grade class. Increasing the level of intervention so that the student might increase skill acquisition seems a high priority and certainly the better option for the short term. This is not an ideal solution, but does provide the student with a more intense instructional opportunity while preserving her right to education with non-disabled peers.

3. Is the current staffing proposed to implement the student's IEP appropriate? Specifically, is a Cued Speech Transliterator, in addition to a Teacher of the deaf, necessary in order for the student to receive educational benefit?

It was clear from documents and testimony that the student's current educational progress is a concern for both the student's parents and the school. The student appears to be making limited progress with the gap between the student's chronological age and the student's developmental age widening. The PET in May attempted to address this concern by balancing the student's need for more intense intervention with the student's right to an education in the least restrictive educational environment by hiring a teacher of the deaf to work with the student both in and out of the student's classroom. Statements in the minutes indicate that the team recognized the student's need for continued cued speech support but they made a determination not to rehire the CST, expressing their hope that a teacher of the deaf could be found who was also proficient in cued speech. There was lengthy discussion about how the student's program might be structured and what to expect from this new staff, but no conclusions were reached regarding how and to what extent the new teacher would participate in the regular class, nor how the student would access classroom information the student previously received from the CST. No goals and objectives for this portion of the student's program were, or to date, have been written.

The student's current teacher of the deaf stated that she was unsure how effective a CST was in the classroom for the student. She explained that it was the ethical position of a CST not to presume or interpret for the client but to provide equal access to sounds in the environment. She expressed concern that this might not currently be meeting the student's needs. She expressed concern that the student might have a learning disability which interfered with the student's language processing. The teacher stated

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that, in her opinion, the student needed extensive interpretation of the language of the classroom. The student's former speech and language therapist stated that the student was denied access to spoken language without a CST. But, she too, expressed concern that the student might have a learning disability, and agreed that this would interfere with the student's ability to process language.

The record shows that as early as December 1996 at least four different professionals working with the student expressed concern that the student might have a learning disability in addition to the student's hearing impairment. The issue was raised at PET meetings in May 1997 and September 1997. A psychological evaluation in December 1996 noted that the student's scores "raise the possibility" of a learning disability and recommended that further assessment be considered.

There has been much discussion, but no assessment, to determine if a CST is an effective tool for the student in the classroom. Some have speculated that the student does not rely on the CST, because the student has language-processing problems. Others have argued that to deny the student a CST denies the student access to spoken language. The evidence does not support one argument over another. Whether or not the student requires a CST in the classroom along with a teacher of the deaf continues to be an unanswered question. It seems that this question can only be answered after an assessment to determine if the student has a learning disability as well as the student's hearing impairment.

4. Other Issues

"The IEP is the basis for educational programming and placement of the student with a disability". Chapter 101.Section 9.1. "Each Individualized Education Program shall contain the following components:..."A section describing the annual educational goals that the student may reasonably be expected to achieve during the effective dates of the Individualized Education program, with the addition of special education and supportive services..." Chapter 101.Section 9.3(B)

The student's current IEP does not currently contain any goals and objectives for that portion of the program to be taught by the teacher of the deaf. These goals and objectives were not developed in May when the student's program was changed. At four subsequent PET meetings in September and October the PET again failed to incorporate goals and objectives into the IEP to be carried out by the teacher or tutor. In fact there are no goals and objectives in the IEP that address the student's math or reading deficits, even though the PET has spent considerable time discussing these needs.

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V. Order

1. The school shall proceed to make arrangements for the student to attend the Waterville Regional Program for Deaf Children until a teacher of the deaf can be hired by the Windsor School.

2. The school shall, beginning December 15, 1997, place advertisements for a certified teacher of the deaf to be employed by the Windsor Schools. These advertisements shall appear once a month in area newspapers to include at least the Bangor Daily News, Weekend Edition, The Maine Sunday Telegram, and the Boston Globe. These advertisements shall continue until the end of the current school year. All qualified applicants shall be interviewed.

In the interim, the school shall do a survey of teachers of the deaf in neighboring districts to determine average salary requirements for such teachers. If the salary being offered by the district is not commensurate with neighboring districts, the district shall offer a stipend to applicants in order to bring the salary requirements in line with area districts.

Letters from the school shall be sent to teaching institutions with deaf education programs notifying them of the current vacancy for a teacher of the deaf. Follow up phone calls shall be made to each institution.

3. The school shall proceed to complete testing to determine if the student has a learning disability. In conjunction with this evaluation, the school shall complete comprehensive testing to determine to what extent the student uses cued speech receptively and to determine, if possible, to what extent the student can effectively use a cued speech transliterator in the classroom. This learning disability testing shall be completed within 45 school days of the October 29 PET meeting. The language testing shall be completed within 45 days of the receipt of this decision.

4. The PET shall convene immediately, within 15 days of the receipt of this decision, to develop IEP goals and objectives for the student that addresses all the student's special education services. The PET shall reconvene immediately upon receiving testing results and modify these goals and objectives as necessary.

Carol B. Lenna
Hearing Officer