STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION

[Student] v. Branford Board of Education

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Before: Attorney Margaret J. Slez, Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Is the student eligible for special education and related services?

2. Has the Board offered an appropriate IEP reasonably calculated for a deaf student with a cochlear implant to receive educational benefit?

3. Is the auditory-verbal therapy at CREC Soundbridge necessary in order for the student to make educational progress?

4. Are the parents entitled to reimbursement for the cost of transportation to and from CREC Soundbridge?

5. Are the parents entitled to reimbursement for the cost of summer sessions at CREC Soundbridge?

6. Is the Board obligated to provide an FM system/device for the student's use in a private preschool setting?

7. Is the Board obligated to provide oral-motor therapy?

PROCEDURAL HISTORY:

Due process hearing was requested by letter from the parents dated October 1, 2001, and the hearing officer was appointed that date. (H.O.-1.) Prehearing conference took place on October 10, 2001. Hearing of this matter was convened on October 24, 29, 31, November 7, 8, 27, 28, 2001. On the first day of hearing, the Board submitted an Offer of Judgment which was rejected by the parents. (H.O.-2.) To permit the parties to complete testimony and submit briefs, two motions were granted for the extension of time for mailing the final decision and order. The record was closed on December 17, 2001, upon the simultaneous submission of briefs by the parties. The hearing officer then further extended the date for mailing of the final decision and order to December 31, 2001, in order to allow sufficient time to consider the parties' briefs in drafting the decision.

FINDINGS OF FACTS:

1. The four year old student was born with profound bilateral sensorineural hearing loss which was identified when the student was five months old. At seven months, the student received hearing aids and at eight months began the Birth-to-Three program through the American School for the Deaf. A speech pathologist worked with the student at home for two one-hour sessions per week. The parents' goal was for the student to listen and speak. After seven months it became apparent to the parents that the student was not hearing conversational speech or loud environmental noises.

2. At nineteen months of age, the student received a Nucleus 24 cochlear implant and, one month later, the device was stimulated. A coclear implant is a prosthetic device that includes a surgically implanted electrode array placed in the cochlea. An externally worn microphone picks up sounds, transfers them to an externally worn processor which converts the acoustic information to electrical signals, sends them up to a transmitter coil secured to the student's scalp with a magnet, across the skin, to an internal receiver which stimulates the implanted electrodes based on the speech processing "MAP" designed specifically for the student. The electrodes stimulate the fibers and the brain "hears." (Exhibits P-4, P-6)

3. A cochlear implant is not a hearing aid but, rather, a tool that provides the student with auditory access to the sounds of the environment as well as speech and language. The student is a profoundly deaf child and must continually learn to attach meaning to the received auditory stimulation. The student's parents and teachers must be trained to effectively enable the student in use of the implant to listen, speak, and learn naturalistically through daily life. In effect, the student's auditory age was 0 months when the cochlear implant was stimulated in October 1998 at the chronological age of twenty months. (Exhibit P-4)

4. Since June 1999, the student has been receiving auditory-verbal therapy at CREC (Capitol Regional Education Council) Soundbridge with Ellen Gill as the auditory-verbal therapist. Auditory-verbal therapy is the application and management of technology, strategies, techniques, and procedures to enable children who are deaf to learn to listen and understand spoken language in order to communicate through speech. Auditory-verbal therapy is diagnostic, with each session being an on-going evaluation of the child's and the parents' progress. Children systematically learn to use their hearing aids or cochlear implants to listen to their own voices, the voices of others, and the sounds of their environment in order to understand spoken communication and develop meaningful conversations. Auditory-verbal therapy encourages and follows natural language and speech development. The parents and therapist help the child to integrate hearing, language, and spontaneous speech into the child's personality. Through the auditory-verbal approach, maximum use of hearing is developed in order to learn spoken language through listening rather than watching. The auditory-verbal therapist is a qualified educator of the hearing impaired, an audiologist, and/or speech-language pathologist who has received advanced, specialized instruction and practical experience through university courses, specific auditory-verbal therapy centers, and/or from certified auditory-verbal clinicians. (Exhibit P-21, pp. 5-8.) The goal of auditory-verbal therapy is to close the "language gap," the difference between a child's chronological age and his or her language-age equivalency as shown on testing results. (Exhibit P-21, p. 19-20.) In this case, the student's language growth has not yet progressed to a point where it is functionally equivalent to the language level of peers with typical hearing, although the student appears to be fast approaching that goal.

5. While in the Birth-to-Three program, the student received year-round services and until the student's third birthday, February 28, 2000, the auditory-verbal therapy at CREC Soundbridge was provided at no cost to the parents. The student was receiving two one-hour auditory-verbal therapy sessions per week.

6. On November 18, 1999, February 14, 2000, and February 28, 2000, the PPT met to discuss the student's educational placement after exiting the Birth-to-Three program. The parents' rejected the Board's proposed IEP which provided for two half-hour speech-language therapy sessions per week at the Board's Early Years Center ("EYC') and consultation by the student's CREC Soundbridge auditory-verbal therapist at the EYC once a month. (Exhibit B-24.) At an IEP meeting on March 17, 2000, the Board agreed to pay for continuing the student's auditory-verbal therapy twice a week at CREC Soundbridge through the end of the 1999-2000 school year. The proposed IEP dated March 17, 2000, recommended speech therapy one hour per week at the EYC but there was no testimony or documentary evidence that this recommendation was ever implemented. (Exhibit B-23.) The Board did not pay for the student's auditory-verbal therapy during summer 2000.

7. At the beginning of the 2000-2001 school year, there was no agreement that the Board would pay for the student's auditory-verbal therapy twice a week at CREC Soundbridge.

However, on or about September 21, 2000, after a phone call to Linda Chipkin, the EYC administrator/supervisor, from an attorney acting on behalf of the parents, the Board agreed to pay for the student's auditory-verbal therapy for the 2000-2001 school year. The Board did not pay for auditory-verbal therapy sessions during summer 2001.

8. During the 2000-2001 school year, IEP meetings were held on October 13, 2000, November 15, 2000, January 24, 2001, and June 13, 2001. (Exhibits B-20, B-15, B-16, B-10, B-4, B-6.) At all times the Board has contended that auditory-verbal therapy sessions at CREC Soundbridge are not required in order for the student to make educational progress and that services to be provided by the Board speech-language pathologist, Diane Ainson, at the EYC are sufficient and appropriate to meet the student's needs. No Board personnel have any training or experience in auditory-verbal therapy or working with an audiologist in adjusting/re-programming the student's MAP, the individualized "listening program" that is stored in the memory of the student's cochlear implant speech processor.

9. In September 2001, the student began attending a private, regular education preschool program selected and paid for by the parents. Although the Board agrees that an FM system/device is necessary for the student to benefit from the educational setting, the Board has declined to provide an FM system/device for the student's use at the private preschool until this case has been decided.

10. At no time has the Board reimbursed the parents for transportation to and from auditory-verbal therapy sessions at CREC Soundbridge.

11. The Board produced no witnesses whose testimony adequately demonstrated specific training and experience with the unique needs of a preschool-age, profoundly deaf child who has received a cochlear implant.

12. The Board agrees that the program at the EYC is not an appropriate placement for the student at this time and failed to credibly demonstrate that the EYC was ever an appropriate placement for the student.

13. The student has made more than five years of spoken vocabulary growth since the cochlear implant was stimulated in October 1998. However, because the student is a profoundly hearing-impaired child, there will always be difficulties acquiring and mastering new vocabulary, grammar, and syntax. In addition, there are many speech sounds that are not present or not stable in the student's speech production and mastery of those sounds will be highly dependent on the quality of the student's MAP which, in turn, is dependent upon close coordination between the MAPping audiologist and those who provide services to the student. (Exhibit B-9 and Testimony of Dr. Kimberly Peters, rehabilitative audiologist)

14. In August 2001, the student was evaluated by Lyn Lund at Yale New Haven Children's Hospital, Pediatric Rehabilitation Services, to determine the student's need for occupational therapy. The student was found to have impaired oral motor control, sensory aversive behaviors related to feeding, and a hyperactive gag response which often leads to vomiting. Between August and November 2001, the student has received occupational therapy and has made some improvements. Ms. Lund's report, dated November 7, 2001, recommends continued occupational therapy intervention on a weekly basis to continue improvement in the student's sensory registration and feeding skills "over the next several months." (Exhibit P-27)

15. There was no clear evidence or testimony to demonstrate that the parties discussed extended school year services at any IEP meeting.

CONCLUSIONS OF LAW:

1. Under the IDEA, "deafness" means a hearing impairment that is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification, that adversely affects a child's educational performance. 34 CFR Section 300.7(c)(3). The student in this case has been diagnosed as profoundly deaf and, under the IDEA, is a child with a disability who is entitled to specially designed instruction, at no cost to the parents, to meet the child's unique needs. 34 CFR Sections 300.7(a) and 300.26.

2. Pursuant to 34 CFR Section 300.122(a)(1), the obligation to make FAPE available to all children with disabilities does not apply with respect to children between the ages of three and 5, and certain others, in a State to the extent that its application to those children would be inconsistent with State law or practice. In this case, however, the obligation to make FAPE available to the four year old deaf student is not inconsistent with Connecticut law which provides that "children requiring special education" includes any "exceptional child" who is "age three to five, inclusive, and is experiencing developmental delay that causes such child to require special education." C.G.S. Section 10-76a(3), (5). "Developmental delay" includes significant delay in communication and cognitive development, "as measured by appropriate diagnostic instruments and procedures and demonstrated by scores obtained on an appropriate norm-referenced standardized diagnostic instrument." C.G.S. Section 10-76a(6).

3. Under Connecticut and federal law, the Board has had an obligation to make FAPE available to the student since February 28, 2000, when the student became three years old. The issues in this case reflect the question of what constitutes FAPE with regard to this student. The services and placement needed by each child with a disability to receive FAPE must be based on the child's unique needs and not on the child's disability. 34 CFR Section 300.300(a)(3)(ii).

4. The student's cognitive and communication delay at this time is arguably not "significant." By all accounts, the student has made excellent growth in the development of spoken language in a very short period of time and the student's current cognitive-developmental functioning, as measured by the Board school psychologist using the Differential Ability Scales (DAS), measures overall within the average range. (Exhibits B-9, B-11.) Evaluation by the Board speech-language pathologist revealed that the student's speech at the word level is mildly delayed, spontaneous speech is compromised, volume is inconsistent, and there are gaps in the student's expressive language skills. (Exhibit B-19.) However, the highly credible testimony of Ellen Gill, the CREC Soundbridge auditory-verbal therapist; Michelle Briggs, the educational consultant at Manhattan Eye, Ear & Throat Hospital (MEETH); and Dr. Kimberly Peters, the rehabilitative audiologist at New England Center for Hearing Rehabilitation (NECHEAR); as well as the report (Exhibit P-4) of Nichole Czarnecki, supervisor of educational resources at the Lenox Hill Cochlear Implant Center at MEETH, regarding the student's test results, delays, and progress, described more areas of serious concern than did the testimony of Board witnesses. Gill, Briggs, Peters, and Czarnecki know the student better than any Board personnel. Since the student has never been the recipient of services delivered by Board personnel, the hearing officer must conclude that any and all progress which has been made by the student in acquiring listening and speech skills can be largely attributed to the intensive auditory-verbal therapy at CREC Soundbridge since June 1999.

5. In developing a child's IEP, the IEP team "shall consider" the strengths of the child and and the concerns of the parents for enhancing the education of the child. 34 CFR Section 300.346(a)(1)(i). Additionally, in the case of a deaf child, the IEP team is required to consider the child's language and communication needs, opportunities for direct communication with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode. 34 CFR Section 300.346(a)(2)(iv). Particularly important here, the IEP team must also consider whether the child requires assistive technology devices and services. 34 CFR Section 300.346(a)(2)(v). Regarding an FM system/device, the Board's simultaneous agreement of need and refusal to provide is without explanation.

6. Since the student is still developing speech and language based on what the student hears in the environment, the student should be enrolled in a preschool in which all children exhibit age appropriate speech and language skills. (Exhibit B-9.) The EYC is a Board program for special education students whose disabilities and needs are completely dissimilar to those of the student in this case; it is not a preschool in which all children exhibit age appropriate speech and language skills. The Board has never offered and, indeed, cannot offer such a preschool setting. Therefore, since the student's educational needs cannot be met by public school arrangements, the Board must fund the student's private preschool placement. Reg.Conn.State Agencies, Section 10-76d-1(c).

7. Pursuant to 34 CFR Section 300.24, "related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education including, among others, occupational therapy and audiology services. Specifically, audiology services include the provision of habilitative activities such as language habilitation and auditory training, and determination of a child's need for individual amplification. 34 CFR Section 300.24(b)(1). "Supplementary aids and services" means aids, services, and other supports that are provided in regular education classes or other education-related settings to enable a child with disabilities to be educated with non-disabled children to the maximum extent appropriate. 34 CFR Section 300.28. Since the Board has been unable to offer an appropriate IEP designed to meet the student's unique needs and the student has made demonstrable educational progress as a result of auditory-verbal therapy, the Board is obligated to reimburse the parents for the cost of transportation to and from CREC Soundbridge, to pay for auditory-verbal therapy at CREC Soundbridge for the 2001-2002 school year, and to provide an FM system/device at the preschool the student is now attending. With regard to occupational therapy services, there was insufficient testimony or evidence to support a finding that occupational therapy is necessary in order for the student to make educational progress.

8. Pursuant to 34 CFR Section 300.309, the Board must ensure that extended school year services are available as necessary to provide FAPE when a child's IEP team determines, based upon the unique needs of the child, that such services are necessary for the provision of FAPE to the child. As stated above, in this case there is nothing in the record to support a finding that extended school year services were discussed by the IEP team or offered in any IEP proposed by the Board. As stated in Walczak v. Florida Union Free School District, 142 F.3d 119 (2d Cir. 1998), however, an appropriate public education under IDEA is one that is "likely to produce progress, not regression." *Id*. at 130, quoting Cypress-Fairbanks Independent School District v. Michael F., 118 F.3d 245, 248 (5th Cir. 1997) (internal citation omitted), *cert. denied*, ___ U.S. ___, 118 S.Ct. 690 (1998). At the IEP meeting on February 28, 2000, Nichole Czarnecki, the educational supervisor at Lenox Hill Cochlear Implant Center, made Board personnel aware that without continued intensive aural habilitation and daily academic support, it is likely that the student's skills will regress. Where, as here, the student, parents, and professional personnel were working intensively and systematically to close the "language gap" between the student's chronological age and language age-equivalency and, as a result, the student was making significant, measurable progress, extended school year services should have been included in the IEP.

9. "[W]hether the parents of a disabled child are entitled to reimbursement for the costs of a private school turns on two distinct questions: first, whether the challenged IEP was adequate to provide the child with a free appropriate public education; and second, whether the private educational services obtained by the parents were appropriate to the child's needs. M.C. ex rel. Mrs. C. v. Voluntown Bd. of Ed., 226 F.3d 60, 66 (2d Cir. 2000) (citations omitted). Based on all the documentary evidence and witness testimony,

it is concluded that the IEP offered by the Board was not reasonably calculated to provide the student educational benefit. Although the IEP offered by the Board seemed to be the best it could offer, it was not designed to address the student's unique needs as a profoundly deaf, cochlear implant child who has successfully acquired the entirety of his speech and language skills by means of auditory-verbal therapy, including committed parental participation, and attendance in the regular education preschool setting.

FINAL DECISION AND ORDER:

1. To the extent that the parents have not yet been so reimbursed, the Board is ordered to reimburse the parents for auditory-verbal therapy sessions at CREC Soundbridge during the summers of 2000 and 2001.

2. The Board is ordered to pay for the student's auditory-verbal therapy at CREC Soundbridge, consisting of two one-hour sessions weekly, for the 2001-2002 school year.

3. The Board is ordered to reimburse the parents for transportation costs (mileage) to and from CREC Soundbridge for the period between February 28, 2000, and June 30, 2002.

4. The Board shall immediately provide the appropriate FM system/device, as determined by the student's rehabilitation audiologist, for use in the preschool attended by the student in the 2001-2002 school year.

5. The Board shall reimburse the parents for the tuition costs of the private preschool attended by the student during the 2001-2002 school year.

6. The Board shall convene a PPT meeting as soon as possible to revise the current IEP consistant with this order.

7. An IEP meeting shall be convened not later than April 15, 2002, for the purpose of discussing the student's transition to a Board program for the 2002-2003 school year and extended school year services, if appropriate, for summer 2002.