

This is a redacted version of the original hearing officer decision. Select details may 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**

---

File Number: 6801/06-07 KE  
Child's Name: A.B.  
Date of Birth: xx/xx/xx  
Type of Hearing: Open

**For the Student:**

[Redacted]

Victor Meitner, Jr., Esq.  
546 Skippack Pike  
Blue Bell, PA 19422

**For the School District:**

Dr. Jeanmarie Mason  
Montgomery County Intermediate Unit  
1605 West Main Street  
Norristown, PA 19403-3290

Karl A. Romberger, Jr., Esq.  
Fox, Rothschild, O'Brien & Frankel  
1250 South Broad Street, Suite 1000  
Lansdale, PA 19446-0431

Due Process Hearing Request Date:	July 7, 2006
Hearing Dates:	January 17, January 26, March 12, 2007
Date Record Closed:	March 29, 2007
Decision Date:	April 11, 2007
Hearing Officer:	Daniel J. Myers

## Background

Student is a 3 year, 11 months old child with profound hearing loss and a cochlear implant. Her parents rejected the 2006-2007 program and placement proposed by the Montgomery County Intermediate Unit No. 23 (IU) at its new early intervention auditory verbal classroom. Instead, her parents enrolled Student into the auditory verbal preschool program of the private school with which Student had already been familiar at the time of the IU's offer. Student's parents now seek reimbursement of private school tuition, transportation costs, and legal fees. For the reasons described below, I find for the IU.

## Issues

Whether or not the IU's proposed program and placement for 2006-2007 is appropriate?

Whether or not Student's parents are entitled to tuition reimbursement for the Private School?

## Findings of Fact

1. Student, whose date of birth is xx/xx/xx, is a 3 year, 11 months old resident of the IU who was born with a profound binaural hearing loss. (P1; P2; P4; P9; N.T. 982) <sup>1</sup>
2. In October 2003, at around 6 months of age, Student's local mental health and mental retardation (MH/MR) agency began providing "Birth to Three Early Intervention" (B-3EI) hearing impaired services in Student's home two times per week. Student's MH/MR agency contracted with the [Redacted] School (Private School) to provide in-home auditory-oral services to Student. (P3, pp.23, 25; P5; IU2; N.T. 275-277, 283, 319, 338-339, 606-608, 639, 986)
3. For purposes of this decision, the terms "auditory-oral," "auditory-verbal," "O/A," and "O/V" are used interchangeably to refer to a model of teaching that maximizes auditory perception and verbal expression while eliminating any tactile or visual communication, including sign language. See In Re M.K. and the Carbon-Lehigh IU, Special Education Opinion No. 942 (1999). The theory behind this teaching model is to prevent the student from becoming "sign-dependent" and to develop the same mode of auditory-verbal communication as his or her typical hearing peers. (N.T. 381, 620)
4. On or about April 19, 2005, just before her second birthday, Student received a cochlear implant at the Children's Hospital of Philadelphia's (CHOP) cochlear implant center. (N.T. 368, 989)

---

<sup>1</sup> References to "N.T." are to the transcripts of the January 17, January 26, March 12, 2007 hearing sessions. References to "P," "IU," and "HO" are to Parent, IU, and Hearing Officer exhibits, respectively.

5. A cochlear implant is an electronic device surgically implanted to stimulate nerve endings at the area of the spinal ganglia or surviving tissue of the inner ear (cochlea) in order to receive and process sound and speech. The device has two parts, one that is a permanent, surgically implanted internal device attached to the skull and, the second that is an externally worn speech processor that attaches to a port in the implant. (71 Fed. Reg. 46570 (8/14/06); N.T. 626)
6. In many ways, there is no substantive difference between serving a child with a cochlear implant in a school setting and serving a child with a hearing aid. The externally worn speech processor connected with the surgically implanted cochlear implant device is similar to a hearing aid in that it must be turned on and properly functioning in order for the child to benefit from his or her education. (71 Fed. Reg. 46571 (8/14/06); N.T. 400, 427)
7. In June or July 2005, Student began attending, at private expense, Private School's toddler program two mornings per week. Private School's toddler program is not academic in nature, but rather serves as an introduction to the school as well as to other Private School students and families. (P27, p.246; P28, p.365; N.T. 339, 414, 608, 659-660)
8. In March 2006, MH/MR reduced Student's in-home B-3EI services from two home visits to one visit per week, in part because she was making progress with her cochlear implant and speech and language skills, and in part because she was already attending Private School's toddler group for six hours per week. (N.T. 419, 610, 988)
9. On March 23, 2006, the Private School employee providing B-3EI services to Student in her home reported that, in 8 months Student had progressed, according to the Brigance Inventory of Early Development Skills, a full year in gross motor skills and speech/language skills, and 1.5 years in fine motor, self-help and social/emotional development skills. (P27,p.247; N.T. 900) She had made over a year's growth in expressive language skills and was nearly age level in receptive language skills. (P27, p.248)
10. On March 31, 2006 the IU issued an Evaluation Report (ER) as part of its responsibility to transition Student from MH/MR's B-3EI program to the IU's "3 years to 1<sup>st</sup> Grade Early Intervention" (3-1<sup>st</sup> EI) program. The ER indicated that Student: Understood at least 100 words/phrases; Participated in activities; Easily followed simple directions; Answered routine/familiar questions; and Spontaneously produced some one and two syllable words. (P27, p.254; IU6, p.1; N.T. 227, 577-578)
11. On May 3, 2006, an IEP meeting was conducted with Student's parents and counsel, IU personnel, and personnel from Private School, to develop Student's 3-1<sup>st</sup> EI IEP. There was no dispute regarding Student's A/O IEP goals. The parties

- did dispute, however, where those goals should be implemented. Parents and Private School personnel recommended that Student attend Private School. IU personnel recommended that Student attend a new auditory-oral classroom that the IU intended to create in time for the upcoming 2006-2007 programming year. (N.T. 229, 273, 279-282, 440; IU10, p.2)
12. On May 19, 2006, a CHOP Speech and Language Evaluation indicated that Student's receptive and expressive language skills were within normal limits for a hearing child her age. Her speech production skills were close to age appropriate. The evaluation recommended continued services from a teacher of the deaf, as well as speech therapy services. (P27, p.330; N.T. 909-910)
  13. On June 13, 2006, Student's parent visited the auditory-oral classroom that the IU intended to open the following month. At that visit, the IU proposed revising its proposed May 3 IEP to include the speech and language therapy that had recently been recommended by the May 19 CHOP evaluation, as well as payment for one week of tuition at the Private School to assist Student's transition from the Private School to the IU classroom. (N.T. 67, 158, 300-301, 326-328, 1031; IU12)
  14. On June 16, 2006, Student's parents rejected the proposed IEP. (IU13) On July 7, 2006, Student's parents requested a due process hearing. (IU 15)
  15. The IU's O/A classroom received Pennsylvania Department of Education approval on June 30, 2006, (NT 236; IU20).
  16. On or about July 10, 2006, the IU's auditory oral preschool classroom opened at a local YMCA in Montgomery County. (N.T. 28, 69, 111-113, 235; IU17)
    - A. The classroom has a hard-wired FM system with four speakers mounted on the wall, as well as a portable FM speaker and microphone. Because some of the students also have personal FM systems, the teacher also wears their microphones while teaching. Reverberation and background noise levels are professionally monitored. The classroom meets recommendations of the A.G. Bell Association's Components of a Quality Auditory-Oral Program. (N.T. 886-888) Each day begins with equipment checks by the teacher, checking both the Students' personal equipment as well as the classroom equipment. (N.T. 110, 115, 333, 402-408; IU17)
    - B. The class operates from 8:30-1:00 each day. (N.T. 106). It contains a teacher and one assistant, with 4-5 children, depending upon the day of the week. (N.T. 92-93) All 5 current students have hearing aides, and one is in the process of receiving a cochlear implant. (N.T. 94, 178, 269) From July 2006 to present, Student would have been the only student in classroom with a cochlear implant. (N.T. 94, 269)
    - C. Students engage in developmentally appropriate preschool activities including circle time, calendar activities, story activities, color and number concepts activities, recess, snack, lunch and gym. (N.T. 110, 115-116, 143, 383-84, 444-445) The brand name curricula and/or assessment tools

used in the classroom are: “Creative curriculum” and “Read, Play and Learn,” AUSPLAN, SPICE, and Castles. (NT 57-58, 63, 72, 118, 127, 132)

- D. A speech/language therapist visits the classroom on Tuesdays and Thursdays for a total of six hours, during which time she assists the teacher in integrating speech and language services into the daily instruction. (N.T. 88, 179) On Wednesdays, a hearing support teacher assists in the classroom and on Fridays a different hearing support teacher visits, both of whom provide individual auditory activities with the children. (N.T. 146) The entire instructional team meets monthly. (N.T. 99, 101-102, 129, 141, 188, 190, 220, 393)
  - E. There are 5 or 6 other classrooms in the YMCA’s daycare center, containing IU students’ typical preschool peers. IU students engage in snack and gym activities with typically-hearing peers, and the gym teacher wears FM microphones during those activities. (N.T. 115)
17. The IU’s auditory oral classroom teacher is a certified teacher of the hearing impaired, with a master’s degree in deaf education from Gallaudet University. Her teaching experience includes 13 years at the Pennsylvania School for the Deaf and 3 years at the Elwyn Early Intervention Opportunities School. During that time, she has taught 3 children with cochlear implants. (IU18; IU21; IU22; N.T. 21-22, 29-30, 36-38, 85, 121-122, 142, 376-378, 938)
- A. The speech/language therapist has a teaching certificate in communication disorders and a certificate of clinical competence from the American Speech Hearing Association (ASHA). She has 15 years experience and has provided speech and language therapy to five children with cochlear implants. (N.T. 164-168, 206-207, 219, 222; IU18; IU21)
  - B. The IU employs a cochlear implant consultant who is state certified in elementary education, in education of the hearing impaired, and as a special education supervisor. She is also certified through the Educational Consultant Training Program (“ECTP”), which is an intensive training program at CHOP. The IU’s cochlear implant consultant trains IU staff, supports its O/A classroom, and troubleshoots cochlear implant issues. (N.T. 668-675, 683; IU 18; IU21)
  - C. The IU employs a licensed audiologist who is also a licensed speech/language pathologist and who is certified as a teacher of the hearing impaired, and as a special education supervisor. He provides the audiological related services to the IU’s O/A classroom. (N.T. 229, 312, 650; IU18; IU21)
  - D. Finally, the IU’s supervisor of the O/A program has a doctorate in audiology, state licenses and ASHA certificates of clinical competence in both audiology and speech/language pathology. She is state-certified in elementary education, speech/language, education of the hearing impaired, and as a special education supervisor. She has experience as an audiologist at the Cincinnati Speech and Hearing Center in its preschool oral program, experience at Capital Area IU as a teacher, S/L pathologist,

and audiologist, and direct teaching experience with at least 15 students with cochlear implants. (N.T.330, 334, 361, 363, 423, 938; IU18; IU21)

18. Rejecting the IU's proposed O/A program, Student's parents enrolled Student into the Private School's preschool program for the 2006-2007 school year. (N.T. 1074; P27, pp. 221-223, 326)
  - A. Private School is a licensed private academic school, located in Delaware County, that provides auditory oral hearing impaired services to children up to six years old. Private School's preschool program operates from 9-12:30 each day, providing each child with daily individual auditory speech and language services. It also has speech language pathologists "pushing" into the classroom. (N.T. 567, 601-602, 618, 658)
  - B. Private School has 15 preschool students, 7 of whom have cochlear implants. In Student's classroom, there are 5 students, 3 of whom have cochlear implants. None of the children at Private School are typically-hearing preschoolers. (N.T. 249-250, 443, 592, 625, 637, 658)
  - C. Private School is staffed and supported by highly qualified personnel. Private School's director, who is present at the school on most days, is an audiologist and adjunct professor of audiology at LaSalle University, as well as a lecturer and trainer for the ECTP. Private School has three licensed speech and language pathologists on staff, two of whom have additional certifications as teachers of the hearing impaired. (N.T. 525, 528, 592, 599-603, 628; P24)
  - D. Private School tuition is \$11,000 per academic year. (N.T. 611)
  - E. For at least six years before the IU opened its O/A classroom, i.e., from 2000 to 2006, the IU placed its hearing impaired preschool students at Private School to receive O/A hearing impaired services. (N.T. 248, 365-366, 995)
  
19. Because MH/MR and the IU are separate agencies, it is not unusual for children to switch service providers when they transition from MH/MR to the IU. (N.T. 294)
  - A. For at least the last six years, however, hearing impaired children in Montgomery County did not experience such transition because both MH/MR and the IU contracted with the same service provider, i.e., Private School, to provide hearing impaired services. (N.T. 365-366, 995)
  - B. For the 2006-2007 school year, the IU decided, as a matter of policy, not to switch providers for the 7 children that the IU had placed at Private School at public expense in previous school years. (N.T. 295, 298, 365-366, 372-373, 412, 610, 647) Thus, 7 of Private School's current 15 students are publicly-placed by the IU pursuant to the IU's policy. (N.T. 647)
  - C. The IU policy does not include sending to Private School at public expense those children who had been privately enrolled in Private School's toddler program. Student is the only child in this category. (N.T. 298)

- D. IU program costs for a 168 day program are \$15,528.24. (N.T. 666)
20. In September 2006, in contrast to previous evaluations by Private School personnel and CHOP, Private School's speech and language pathologist noted speech intelligibility concerns, and significant speech and spoken language delays. (N.T. 561-563, 917-918; P25, p.200)
21. Sometime during Fall 2006, Private School's director observed the IU's O/A classroom. (N.T. 641, 644-645)
- A. He observed children who were older than, and had higher level auditory speech and language skills than, Student. He concluded that the IU's O/A teacher would converse at a very fast pace with those students, and that Student would not be able to keep up with them or access curriculum. (N.T. 616, 645-646)
  - B. He also does not believe that the IU's O/A teacher has sufficient training and experience to adequately balance all of her students' different needs, nor does he believe that she will have the necessary daily and continuous support that the classroom will need. (N.T. 617-618, 644, 653)
  - C. He also is concerned about IU's emphasis on mainstreaming when the Student may not have the communication skills to access information that typically hearing children could communicate back and forth. (N.T. 614)
  - D. Finally, he is concerned that he observed no other children with cochlear implants, because it would help Student socially to see others wearing a similar device. (N.T. 625)
22. In October 2006, Jean Moog, the nationally renowned director of The Moog Center in St. Louis, prepared an evaluation concerning Student. (P26, pp. 202-218) She also testified at the due process hearing. While she found Student's overall voice quality to be age appropriate (P26, p. 216; N.T. 817), she further concluded that Student's speech was very difficult to understand and that Student was significantly behind in spoken language. (N.T. 761, 779) She believes Student needs more intensive instruction focused on the development of spoken language. (N.T. 751, 755) She believes the IU's proposed IEP goals are not challenging enough, and she also believes Student requires more than 30 minutes per week of individualized, pull-out speech and language therapy conducted in a separate, quiet room, not in the classroom. (P26, pp.368-369; N.T. 762, 767, 770-771) Finally, Ms. Moog testified that cochlear implanted children are commonly placed in classrooms with hearing aid children. (N.T. 791-792)
23. Both Private School and the Moog Center are members of a group of private A/O schools called "OPTION Schools," and both have received millions of dollars of financial assistance from the Oberkotter Foundation. One of the principles promoted by Oberkotter and OPTION schools is to maximize and concentrate skilled A/O instruction resources by, at least in part, discouraging regional competition from other auditory-oral programs. Pursuant to this principle, the Director of Private School, on more than one occasion, voted against the

- admission of the IU's cochlear implant consultant into the ECTP training program, not on the basis of her personal qualifications but rather to preclude local O/A program competition. (N.T. 695, 654-656, 796, 827-832)
24. Private School and Moog Center professionals are impressive experts whose opinions generally are entitled to great weight. I recognize that the theory underlying a non-competition principle in deaf education may be valid. See Flour Bluff Independent School District v. Katherine M., 91 F.3d 689, 693 (5<sup>th</sup> Cir. 1996) For purposes of judging witness credibility, however, I am unable to separate the degree to which non-competition principles (as compared to Student's particular needs) influence the opinions of Student's experts. I therefore conclude that, where there is evidence that Private School and Moog Center experts receive substantial financial assistance from organizations promoting non-competition principles, and where those professionals do make some decisions based upon non-competition principles, I cannot give credibility to the portions of their expert opinions that either are critical of potential competitors (such as the IU) or that promote placement at one of their own schools.
25. A due process hearing was conducted in this matter on January 17, January 26, March 12, 2007. Parent exhibits P1-P28 and P30-P32 were admitted without objection. P29 was admitted over the IU's objection regarding Student's failure to comply with the disclosure timelines. (N.T. 1078) IU exhibits IU1-IU18 and IU20-IU24 were admitted without objection. IU19 was not admitted because it was dated after the June 2006 IEP at issue in this case. (N.T. 1080) <sup>2</sup>

### **Discussion**

Student's parents seek reimbursement for Private School tuition. There are three prongs to the decision to award reimbursement for a unilateral placement of a student at a private school. First, the IU must not have offered Student a free appropriate public education (FAPE.) Second, if the IU has not offered FAPE, Student's parents must establish that the private school is appropriate for Student. Third, if FAPE has not been offered and if the private school is appropriate, I must weigh the equities in the case. Florence County School District 4 v. Shannon Carter, 510 U.S. 7, 126 L.Ed.2d 284, 114 S. Ct. 361 (1993); School Committee of the Town of Burlington, Mass. v. Dept. of Education of Mass., 471 U.S. 359, 105 S. Ct. 1996 (1985)

The United States Supreme Court has held that the burden of proof in an administrative hearing challenging a special education IEP is upon the party seeking relief, whether that party is the disabled child or the school district. Schaffer v. Weast,

---

<sup>2</sup> In addition, between hearing sessions, I asked Student's counsel to give each page of his exhibits a unique page number. (N.T. 598) As a result of that renumbering, it appears that the curriculum vitae of the Director of Private School, was inadvertently not numbered. Accordingly, I have numbered that document as P24, pages 191A-191E.



\_\_\_ U.S. \_\_\_, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005); In Re J.L. and the Ambridge Area School District, Special Education Opinion No. 1763 (2006) Because Student's parents seek relief in this administrative hearing, they bear the burden of proof in this matter, i.e., they must ensure that the evidence in the record proves each of the elements of their case. The U.S. Supreme Court has also indicated that, if the evidence produced by the parties is completely balanced, or in equipoise, then the party seeking relief (i.e., Student's parents) must lose because the party seeking relief bears the burden of persuasion. Schaffer v. Weast, *supra*. Of course, where one party has produced more persuasive evidence than the other party, the evidence is not in equipoise.

### **The IU's June 2006 IEP was appropriate**

To satisfy the first prong of the tuition reimbursement test, Student must establish that the IU did not offer FAPE. FAPE means special education and related services that are provided at public expense, that meet the standards of the state educational agency, and that are provided in conformity with an individualized education program. Stroudsburg Area School District v. Jared N., 712 A.2d 807 (Pa. Cmwlth. 1998) The cornerstone of FAPE analysis is an IEP that need not provide the maximum possible benefit, but must be reasonably calculated to enable the child to achieve meaningful educational benefit. Board of Education v. Rowley, 458 U.S. 176, 73 L.Ed.2d 690, 107 S.Ct. 3034 (1983); Ridgewood Board of Education v. M.E. ex. rel. M.E., 172 F.3d 238 (3d Cir. 1999) Whether an IEP is reasonably calculated to afford a child meaningful educational benefit can only be determined as of the time it is offered to the student and not at some later date. Fuhrmann v. East Hanover Board of Education, 993 F.2d 1031 (3d Cir. 1993); Daniel G. v. Delaware Valley School District, 813 A.2d 36 (Pa. Cmwlth. 2002)

### **The IU's proposed IEP is procedurally appropriate**

Mere procedural violations do not compel a finding that a student has been denied FAPE. The denial of FAPE will be found only where the violations of a procedural safeguard result in the loss of educational opportunity or prejudice the student's ability to receive FAPE. In Re J.D. and the Colonial School District, Special Education Opinion No. 1120 (2001); In Re K.B. and the Sto-Rox School District, Special Education Opinion No. 1477 (2004); In Re B.T. and the Harrisburg School District, Special Education Opinion No. 1577 (2005); In Re D.J. and the Philadelphia School District, Special Education Opinion No. 1745 (2006); 34 CFR §300.513 In addition, the applicable federal special education law does not explicitly require parental participation in site selection. White v. Ascension Parish School Board, 343 F.3d 373, 39 IDELR 182 (5th Cir. 2003)

Student argues that the IU did not provide her parents with sufficient information, in a timely manner, to permit them to determine that the IU program was appropriate. She notes that the IU program was not operating at the time of the IEP meeting, was still in the developmental stages even after it opened, and that Student has such a short, critical window of opportunity during which her brain will develop those areas required for

speech and voice development, that her parents cannot be required to take the mammoth leap of faith necessary for them to send their deaf child to the IU's proposed program. I reject these arguments.

Frankly, there are always risks, even with well-established programs. Objectively, however, nothing about the IU's proposed program and placement can be considered risky. The IU initiated transition of Student from MH/MR's B-3EI to the IU's 3-1<sup>st</sup> EI program several months in advance of Student's 3<sup>rd</sup> birthday. (P27, p.254; IU6, p.1; N.T. 227, 577-578) The IU prepared a thorough ER and IEP, revising that IEP after receiving additional speech and language evaluation test results from CHOP. (IU12; P27, p.330; N.T. 67, 158, 300-301, 326-328, 909-910, 1031) Student's parents visited the proposed IU classroom. (N.T. 67, 158, 300-301, 326-328, 909-910, 1031) IU classroom personnel are highly qualified, with substantial experience. (IU18; IU21; IU22) Finally, the IU's O/A classroom received Pennsylvania Department of Education approval on June 30, 2006, (N.T. 236; IU20) Careful IU planning is evident, both with respect to development of its O/A preschool classroom, as well as with evaluation of and programming for Student's particular needs. Thus, I conclude that the IU's proposed program and placement is procedurally appropriate.

### **The IU's proposed IEP is substantively appropriate**

In order to be appropriate, an IEP must be reasonably calculated to confer meaningful educational benefit that is neither trivial nor de minimis. Rowley, supra; Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3<sup>rd</sup> Cir., 1988), cert. denied, 488 U.S. 1030 (1989); Fuhrmann, supra; Susan N. v. Wilson School District, 70 F.3d 751 (3<sup>rd</sup> Cir., 1995); Oberti v. Board of Education of the Borough of Clementon, 995 F.2d 1204 (3<sup>rd</sup> Cir., 1993); 20 U.S.C. 1412(a)(5); 34 C.F.R. 300.550 The IU is not required to maximize a student's potential. Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520 (3d Cir. 1995), cert. denied, 517 U.S. 1135 (1996); In Re K.N. and Bethlehem Area School District, Special Education Opinion No. 1225 (2002) In addition, federal regulators have determined that, in many ways, there is no substantive difference between serving a child with a cochlear implant in a school setting and serving a child with a hearing aid. 71 Fed. Reg. 46571

Student argues that the IEP is substantively flawed because the IU's O/A classroom staff lacks appropriate experience. Student also contends that the IEP goals are not sufficiently challenging, lack an understanding of auditory development, and require substantially more 30 minutes per week of speech/language therapy, which must be provided in an individualized pull-out environment. I reject these arguments.

On March 23, 2006, the Private School employee providing B-3EI services to Student in her home reported that, in 8 months Student had progressed, according the Brigance Inventory of Early Development Skills, a full year in gross motor skills and speech/language skills, and 1.5 years in fine motor, self-help and social/emotional development skills. (P27,p.247; N.T. 900) She had made over a year's growth in expressive language skills and was nearly age level in receptive language skills. (P27,

p.248) On May 19, 2006, a CHOP Speech and Language Evaluation indicated that Student's receptive and expressive language skills were within normal limits for a hearing child her age. Her speech production skills were close to age appropriate. (P27, p.330; N.T. 909-910)

My own, less-than-expert comparison of these evaluations of Student's needs against the proposed IEP and O/A classroom indicates that the IEP and O/A classroom are reasonably calculated to confer meaningful educational benefit. Expert opinions presented by Student that attacks the appropriateness of the IU's ER, IEP and O/A classroom might be persuasive under other circumstances, but lack credibility in this case. This is based upon convincing evidence that those experts 1) receive substantial financial assistance from organizations promoting non-competition principles, and 2) do make some professional decisions based upon those non-competition principles. (N.T. 695, 654-656, 796, 827-832) These factors render Student's expert opinions unreliable because I do not know the degree to which they are based upon Student's needs versus other, non-competition, considerations.

The IU's March 31, 2006 ER describes Student's functioning and needs. (P27, p.254; IU6, p.1; N.T. 227, 577-578) The IU's May 3, 2006 IEP is based upon those needs, and there was no dispute at that IEP meeting regarding Student's A/O IEP goals. (N.T. 229, 273, 279-282, 440; IU10, p.2) After the May 19 CHOP report, the IU's June 2006 IEP was revised to include CHOP's recommendation for speech and language therapy. (N.T. 67, 158, 300-301, 326-328, 1031; IU12) Further, the IU's classroom is technologically appropriate to meet Student's needs. (N.T. 28, 69, 111-113, 235, 333, 402-408; IU17) Classroom content is developmentally appropriate. (N.T. 110, 115-116, 143, 383-84, 444-445) Speech/language services and hearing support services are provided as appropriate. (N.T. 88, 99, 101-102, 129, 146, 179, 188, 190, 220, 393) And appropriate inclusion activities are built into the school day. (N.T. 115)

The IU's proposed IEP and O/A classroom placement are substantively appropriate. Thus, I conclude that Student has not satisfied the first prong of the tuition reimbursement analysis.

### **The private school is appropriate**

Once I have determined that the IU's proposed IEP is appropriate, I need not go further in the tuition reimbursement analysis. In Re C.W. and the Rose Tree Media School District, Special Education Opinion No. 1384 (2003) I will, however, provide additional discussion of the other elements of the tuition reimbursement test.

The IU argues that its public placement is superior to the Private School because Private School offers no inclusion opportunities. The concept of least restrictive environment (LRE), however, is not controlling in evaluating parents' unilateral placements. Ridgewood, supra ; In Re A.Z. and the Warwick School District, Special Education Opinion No. 1783 (2006) Furthermore, for at least the last six years, the IU has placed its hearing impaired children with Private School for their hearing impaired services. (N.T. 365-366, 995) Even for this current 2006-2007 school year, 7 of Private

School's 15 students are publicly-placed by the IU. (N.T. 295, 298, 365-366, 372-373, 412, 610, 647)

Thus, I conclude that Private School is appropriate for Student. Of course, because I have also found that the IU's proposed program and placement is appropriate, the appropriateness of Private School is irrelevant in this case.

### **The Equities are in equipoise**

Both parties accuse the other of inequitable behavior. Student's parents feel the IU's policy of placing some of its students, but not Student, at Private School for this year is inequitable and possibly constitutes some sort of age-based bias. The IU contends that Student's parents and Private School personnel at the IEP meetings already had their minds made up to send Student to Private School. I reject both accusations.

The IU's policy is based upon its own previous 3-1<sup>st</sup> EI commitments to its older students. Those particular students whom the IU had previously placed at Private School for 3-1<sup>st</sup> EI services were permitted to choose between Private School and the IU's O/A classroom. This appears to be a reasonable and fair option that the IU is offering to the students as well as to Private School, for which almost ½ of its student population fits into this category. Student simply does not fit within that category of students because, while she received publicly-funded B-3EI services in her home from Private School personnel, and while she attended, at private expense, the Private School's toddler program, she was never previously placed by the IU at Private School for 3-1<sup>st</sup> EI services. The reasonable policy, when fairly applied, permits Student to attend Private school, but only at private expense.

With respect to the purported closed minds at IEP meetings, I conclude that parental follow up questions and visits to the proposed classroom indicate that Student's parents had not already made up their minds to send Student to Private School. They may have had unrealistic expectations, but I am convinced that these conscientious parents would have –and will – send Student to the program that they believe is best for her, regardless whether or not it is Private School, or the IU, or someplace else. Of course, as noted before, the IU's obligation is not to offer the best program and placement to Student, but rather a program and placement that is reasonably calculated to enable the child to achieve meaningful educational benefit. Parents always have the option to send their child elsewhere at private expense.

Both parties in this case have behaved reasonably and with integrity. In weighing the equities, I find them in equipoise. Under those circumstances, the U.S. Supreme Court has indicated that the party seeking relief (i.e., Student's parents) must lose on this issue because the party seeking relief bears the burden of persuasion. Schaffer v. Weast, supra. Because I have also found that the IU's proposed program and placement is appropriate, however, the equities are irrelevant in this case.

**No entitlement to transportation costs**

In addition to tuition reimbursement, Student's parents seek reimbursement of their costs of transporting Student to Private School. Because I find that they are not entitled to tuition reimbursement, I necessarily conclude that they are not entitled to reimbursement of transportation costs. Accordingly, I will not award reimbursement of transportation costs.

**No Hearing officer award of legal fees**

Student's parents also seek reimbursement of their legal fees. Only the courts, and not hearing officers, can award attorneys fees. 34 CFR 300.517; In re T.C. and the Council Rock School District, Special Education Opinion No. 1385 (2003) Accordingly, I will not award reimbursement of legal fees.

**CONCLUSION**

Student's parents rejected the 2006-2007 program and placement proposed by the IU at its new early intervention auditory verbal classroom, preferring instead Private School's auditory verbal preschool program. Because I find that the IU's offer is appropriate, the requests of Student's parents for reimbursement of private school tuition, transportation costs, and legal fees are denied.

## Order

The Montgomery County Intermediate Unit No. 23's June 2006 proposed program and placement for Student is appropriate.

The requests of Student's parents for reimbursement of private school tuition, transportation costs, and legal fees are denied.

*Daniel J. Myers*

Hearing Officer

April 11, 2007

Re: Due Process Hearing  
File No. 6801/06-07 KE  
, Student  
Montgomery County IU/EI