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## Network of Educators of Children with Cochlear Implants

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### Legal Implications of Educational Programming for Children with Cochlear Implants: The Story of Billy F.

By Lara A. Cleary

*Editors' Note: While it is not NECCI's policy to endorse one communication option over another, we believe the following case study may be of interest to our readership, especially for those who are involved in legal proceedings that address issues of placement.*

Billy F. was a smart, handsome three-year-old boy who was diagnosed with a profound hearing loss at the age of six months. Shortly after Billy turned one, he received a cochlear implant from a university hospital. At the age of three, and upon the recommendation of Billy's otolaryngologist and clinical audiologist, Billy's parents enrolled him at a private day school in a large metropolitan area that utilized an "oral-aural" approach to teach children with cochlear implants and hearing aids to talk. This school was, and continues to be, the only private school in the area that provided students aged three and older with the opportunity to utilize an exclusively oral-aural approach.

Upon enrolling in the school, Billy began to make significant progress in receptive and expressive language skills, behavior, and socialization skills. Unfortunately, Billy's local school district did not believe that Billy required the services provided by the private school and instead recommended that he attend a program that utilized a "total communication" approach (a blending of spoken language and sign language). Pursuant to the Federal Individuals with Disabilities Education Act ("IDEA"), the Federal law which governs the provision of special education services, local school districts are responsible for providing eligible students with disabilities a "free and appropriate public education" ("FAPE") from age three through 21. Billy's school district did not dispute that the private school could teach Billy to use spoken language, however, it believed that its total communication program was sufficient to provide Billy with an "appropriate education" under the IDEA. Upon the school district's rejection of their request for an oral-aural program, Billy's parents requested an administrative due process hearing to challenge the school district's decision. A law firm was retained by Billy's parents to litigate the administrative hearing.

### **Appropriate education for a child with an implant**

A central issue in the administrative due process hearing was the definition of an "appropriate education" for Billy. Unfortunately, the parents faced an uphill battle as previous case law had defined disputes between oral-aural and total communication programs as disputes of "educational methodology," and therefore within the discretion of the school district pursuant to the case of *Lachman v. the Illinois State Board of Education*, 852 F.2d 290 (7<sup>th</sup> Cir. 1988). In *Lachman*, the Seventh Circuit stated that as long as a school district is providing a procedurally and substantively correct Individual Education Plan to a student with a disability, parents do not have a right to compel a school district to provide the parent's preferred educational methodology. Therefore, in the case of Billy F., it was argued that an oral-aural approach was not just a methodological choice of the parents, but rather, what Billy required to learn to hear and speak. Although there were no Federal or state legal opinions on point with this argument as precedent, the attorney was able to locate two persuasive California administrative due process hearing decisions.

### **Due process decisions**

In *Eureka Union School District*, 28 IDELR 513 (CA, 1998), a school district attempted to place a three-year-old with aided hearing almost equal to the hearing of a nonhearing-impaired child in a total communication class for deaf/hard-of-hearing students. The parents objected, enrolled the child in an oral-aural program at a private school, and requested a due process hearing for reimbursement of tuition costs. The hearing officer examined the proposed district program for the student and concluded that it was inappropriate. The district program emphasized sign language, which the student did not need to communicate and would possibly have resulted in regression of the student's listening and speaking skills. The private program, however, provided the student with FAPE, since it addressed his auditory skills. Accordingly, the parents were entitled to reimbursement for the costs of the private program.

In *Duarte Unified School District*, 26 IDELR 351 (CA, 1997), a school district recommended placing an 11-year-old with a cochlear implant in a total communication program. The parents challenged their school district's recommended placement and requested what they felt was an appropriate placement at a school that utilized an oral-aural approach. The hearing officer held for the parents, finding that the District's proposed total communication program was not appropriate to meet the student's unique communication needs, which included the need to use and strengthen his oral language skills. Specifically, the hearing officer stated:

*[The student] requires a program that recognizes his auditory and oral skills and focuses on developing these skills. [The District's total communication program] would, instead, provide [the student] instruction in sign language, a mode of communication the evidence establishes [he] does not need.*

Additional support for Billy's parents' position was found in a Federal Office of Special Education Programs ("OSEP") *Letter to Cohen*, 25 IDELR 516 (1996). In this letter, OSEP stated, "It is especially important that a full continuum of alternative placements is made available to meet the unique communications and related needs of deaf and hard-of-hearing students. A full continuum would include providing both total and oral communication programs to meet the individual needs of all students, including implanted students. And as the technology advances, the needs of implanted students will be increasingly different from the needs of non-implanted deaf and hearing impaired students."

Relying on the two hearing decisions, the OSEP letter, and many supporting research studies, counsel for Billy and his family argued at the hearing that Billy required an oral-aural program to learn to talk, and that a total communication program would not meet his needs. Like a multisensory approach to teaching a child to read, an oral approach to teach a cochlear implanted child to talk is not methodology, but rather, what that child needs to meet the goal of talking. See *Briere v. Fair Haven*, 948 F.Supp. 1242 (D. Vt., 1996). (Student, due to the intensity of her learning disabilities, required instruction utilizing a multisensory approach in order to benefit from education.)

To further support this position, a nationally recognized expert in the field of deaf education was asked to observe both recommended programs and testify at the hearing. As the expert articulated at the hearing, also using reading instruction as an analogy, it is the end goal or "outcome" for the disabled child that must be the focus of special education programming. If the goal was for Billy to use his cochlear implant to learn to talk, he needed a highly intensive oral approach to reach this goal. Billy's parents sought a cochlear implant for him because they wanted him to be able to *utilize oral language as his sole means of communicating with society*. Moreover, no one in Billy's family knew sign language, so for Billy there was no purpose for him to learn to use sign language.

#### **The hearing officer's ruling**

The hearing officer ruled in Billy's parents' favor and ordered the school district to fully fund Billy's education at the private school. In his opinion, the hearing officer stated:

*Like the child who is the subject of the Duarte case, with his implant, the student has almost normal hearing. Accordingly, he has the ability to listen and talk exactly the same as a child without a disability if he has access to an exclusively oral education. Successful and life-long integration with peers without disability is the ultimate goal of special education in this country. As the Supreme Court articulated in Rowley, one of the goals of the IDEA is to provide disabled children with an attainable degree of personal independence.*

The hearing officer also specifically rebutted the dispute as an educational methodology issue. He stated, instead, that oral-aural programming for children with cochlear implants was "not a methodology issue, but rather what the child needs to satisfy the goal of talking." He further found that "If the goal for this Student is to use his cochlear implant to learn to talk, he needs a highly intensive oral-aural approach to reach this goal. The Parents sought a cochlear implant for him because they wanted their son to be able to utilize oral language as his sole means of communicating with society. For him, to be placed in a different program, would be potentially harmful in that it consumes valuable time in a narrow window of opportunity."

Billy's parents were therefore entitled to reimbursement for the past year's tuition at the private school, reimbursement for transportation, and prospective placement at the school for at least one year. The decision was not appealed by the school district. Billy continued to attend the private school and by age five presented as a happy hearing and speaking five year old. The full text of the hearing officer's decision, *Flossmoor School District #161*, is reported in the LRP "Individuals With Disabilities Education Act Reporter" at 38 IDELR 50, and is available at [www.whittedclearylaw.com](http://www.whittedclearylaw.com)

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