

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

OAH No.: L-2002020373

D. D.

Petitioner,

vs.

FOOTHILL SELPA,

Respondent.

Early Intervention Services Act
Gov. Code § 9500 et seq.

DECISION

This matter was heard by Carolyn D. Magnuson, Administrative Law Judge of the Office of Administrative Hearings, on April 23, 24, and 25, 2002 and on June 18 and 19, 2002 in Glendale, California.

Howard J. Fulfroost, Attorney at Law, represented the Foothill SELPA.

Bruce A. Goldstein and Jay C. Pletcher, Attorneys at Law, represented the Petitioner.

Oral and documentary evidence was received, and the record was left open for the parties to submit post-hearing briefs. The parties' initial briefs were both submitted on August 12, 2002, and the reply briefs were both submitted on August 19, 2002. The record remained open for the judge to consider the Respondent's motion to exclude from consideration some of the exhibits appended to Petitioner's initial brief. After a review of the challenged materials and consideration of the arguments presented, the motion was denied and the matter submitted on August 26, 2002.

Issue

The issue to be decided in this fair hearing is whether Foothill SELPA has offered the Petitioner appropriate early intervention services. If the determination is that the services offered were not appropriate, there is the further question of what, if any, reimbursement the family is entitled to.

Factual Findings

1. At the time of hearing, Petitioner was a sixteen-month-old girl who was born profoundly deaf. She lives with her parents and two older siblings.

2. When Petitioner was two months old, her deafness was diagnosed. Shortly thereafter, Petitioner's mother contacted the Foothill SELPA, and Petitioner became a Foothill SELPA consumer. A month or so later, Petitioner was fitted with hearing aids which she wore until she had a cochlear implant ("CI") in mid March 2002.

3. Almost immediately her diagnosis, Petitioner's parents determined that they wanted Petitioner to have an audio/verbal program of communication. Under this type of program, a deaf child is taught to communicate by interpreting sounds and speaking. Other types of communication such as sign language, visual cues and pictures are avoided, and the child's environment is made language rich. Because the child spends most of his or her time at home, the family must be very involved in the program.

4. A CI is an electronic device that is inserted into the cochlea. An external processor converts acoustic signals into electronic signals that are inserted directly into the cochlea and are transmitted to the brain. The processor is mapped (programmed) to stimulate the cochlea in various ways. The purpose of mapping is to program the processor to deliver the electronic impulses in a way that maximized the individual's ability to make sense of the sounds being received. Over time a person with CI may receive many different maps. When a child receives a properly mapped CI, he or she is able to hear in the same way that normally hearing people do but without the same ability to make distinctions in sound. Although a child can hear post CI, s/he is not able to understand speech. For this to occur, the child must be taught auditory skills. However, with proper therapy, the CI child's development should parallel a hearing child's and ultimately s/he should have normal speech and communication skills.

5. From May 2001 through February 2002, the Foothill SELPA provided speech therapy and special education services to Petitioner in her home. In late November 2001, an Individual Family Service Plan ("IFSP") meeting was held to review the Petitioner's earlier IFSP. Petitioner had met some of the earlier goals, and new goals were proposed. The team was able to agree on some services at this meeting, but met again in December where additional agreements were reached. A third meeting was held after it was known that Petitioner had been approved to receive a CI. Ultimately Foothill SELPA offered to provide Petitioner with the following services:

a. 1 hour session twice a week of individualized instruction in the home provided by the same credentialled deaf and hard of hearing teacher (DHH) who was already working with Petitioner.

b. 1 hour session twice a week of speech and language therapy in the home to be provided by the same therapist who was already working with Petitioner.

- c. 1 hour a month of vision/mobility services.
- d. 1 hour a week of occupational therapy.
- e. 2 hours a week of participation in a group of parents of deaf that was to be adapted to be more CI relevant.
- f. Quarter hour sessions twice a month of audiologic services.
- g. 1 hour a month of service coordination.

6. Petitioner's parents felt that this proposed program did not adequately meet Petitioner's needs post CI. They discontinued Foothill SELPA's services and enrolled Petitioner in the Oralingua program. Oralingua presently provides services to 25 children under the age of three. Half of those are CI. Ninety percent of the children who go through this program are mainstreamed in their home schools by first grade. Oralingua has two full time audiologists on staff. One is an educational audiologist who works with the children in the school setting. The other is a clinical audiologist with training in CI who is able to troubleshoot any CI processor problems. Petitioner's family feels it is particularly important to have this resource readily available for her.

7. At Oralingua Petitioner is seen twice a week for an hour by a therapist who is a certified auditory/verbal therapist who has years of experience working exclusively with deaf children and post CI children.¹ The therapist and Petitioner's mother work together with Petitioner. In this way, while the child is learning auditory skills, the mother is learning techniques to use with Petitioner at home to enhance those skills.

8. Most of Petitioner's initial Foothill SELPA services were provided by two women who would have continued to provide services under the proposed IFSP both are well educated and properly credentialed for the services they provide. Susan Simon is a speech and language therapist. Ms. Simon provided program coordination services for Petitioner in addition to providing her speech and language therapy. Although Ms. Simon has little experience with deaf children and has no experience providing speech and language services to CI children, she has attended four workshops on CI that totaled 8 days and has observed speech and language therapy with CI children for approximately eight hours. Ms. Simon testified that she would use the same techniques to work with Petitioner post CI as she had used with thousands of other children with speech and language issues. Ms. Janelle Green is a DHH teacher. She provided special education services to Petitioner. She too has no experience with post CI children, but has attended a conference to become familiar with the CI process. She believes that she is qualified to provide an auditory/oral special education program for Petitioner.

9. A child who has a CI must be monitored to make sure that the device is working properly. Therapists who routinely work with CI children are much better able to

¹ To be certified, an individual must have provided several hundred hours of supervised therapy using the auditory/verbal techniques and must pass a written test. Continuing education is required to maintain the certification.

make essential assessments because they know what progress in a CI child should look like. Experience is critical in providing appropriate services to a CI child.

10. Petitioner's parents believe that the proffered Foothill SELPA program does not benefit their daughter. The proposed therapists emphasized speech rather than listening and provided visual cues stimulation rather than stressing listening skills. They believe that the therapists are not adequately knowledgeable about CI to be able to create and implement an appropriate program. They are absolutely certain that continuing the same techniques post CI will not be successful. They believe that the therapists failed to adequately involve Petitioner's mother in the therapies they provided, failed to give sufficient audio stimulation to Petitioner, and failed to respect the family's desire that sign language not be used with Petitioner. The parents feel that the proposed therapists lack the skills and experience to monitor the CI or to fix any problems that may arise. Most importantly, however, under the Oralingua program, Petitioner has made exciting progress. The program is working for her.

11. Foothill SELPA, however, believes that it does offer an appropriate program provided by properly credentialed professionals that is designed to meet the Petitioner's specific needs. It points out that there is no one size fits all best practice and that some of the experts testified that it is appropriate to use other approaches than auditory in an auditory/verbal program.

Legal Conclusions

12. The Individuals with Disabilities Education Act ("IDEA") 20 U.S. C. sections 1471 et seq., is a federal statute that provides funding to States that choose to participate in that federal program. California has chosen to participate in receipt of funds through IDEA.

13. The California legislature has enacted the California Early Intervention Services Act "to provide appropriate early intervention services individually designed for infants and toddlers from birth through two years of age, who have disabilities or are at risk of having disabilities, to enhance their development and minimize the potential for developmental delays." (Welfare & Institutions Code § 95001(a)(1).) The Legislature has found that early intervention services "maximize the ability of families to better provide for the special needs of their child." (Welfare & Institutions Code § 95001(a)(2).) This state's lawmakers also have found that meeting the needs of infants with disabilities and their families requires appropriate services that are responsive to "family identified needs." (Welfare & Institutions Code §§ 95001(a)(5) and 95002.) The services should support and enhance the families' capability to meet the special developmental needs of their infant or toddler. (Welfare & Institutions Code § 95001(a)(3).)

14. When the infant's disability is one of hearing, the local educational authority ("LEA") is required to provide the early intervention services. Eligible infants are

assessed to identify the child's unique strengths and needs and to identify the services appropriate to meet those needs. (Welfare & Institutions Code § 95016(a).) Through the IFSP process, the LEA and family seek to identify the resources, priorities and concerns of the family and the supports and services necessary to enhance the families' capacity to meet the developmental needs of their child.

15. The parties here agree that the applicable standard for assessing an IFSP placement under Part C of IDEA is whether appropriate services are provided to meet the unique needs of the child and the family. The parties also agree that the *Rowley* interpretation of appropriateness, as applied to school-aged children under Part B of the IDEA, applies to infants and toddlers under Part C. Finally, the parties agree that an auditory/verbal mode of communication is appropriate for Petitioner.

16. The real question is whether the personnel designated by the FOOTHILL SELPA to provide the services offered have the necessary background, training and experience to implement an appropriate auditory/verbal program for Petitioner. The answer is that they do not.² While the Foothill SELPA personnel have the requisite credentials, credentials alone do not necessarily qualify an individual to provide all possible services under that credential. Conversely, the lack of a credential does not necessarily render a person unqualified to perform a service. If that person has a proven record of success, they are qualified to do the work.

17. The videotaped therapy sessions graphically demonstrated that degrees and credentials alone are not necessarily sufficient to qualify their holders to provide therapy to everyone. The sessions that were videotaped were not atypical and the criticisms by the experts of the techniques used with Petitioner by the teacher/therapist were justified. Since both women indicated that they did not intend to change their techniques in working with Petitioner post implant, the parents were correct in deciding that the services offered for Petitioner were not appropriate.

18. There is no doubt that the Foothill SELPA and its employees want to, and fully intended to, provide an appropriate program of services for Petitioner. But, even with the best will in the world, it is not possible for tyros in post CI therapy to obtain in a matter of hours or days the experience and concomitant knowledge and insight needed to successfully support a post CI infant.

19. Foothill SELPA believes that the Petitioner takes an unreasonably restricted view of the methods that should be used with a post CI child. Evidence was presented that it is not harmful to mix types of input and is even beneficial. However, the witnesses who took the broader view of post CI therapy, while well qualified in the area of special education, were not really experts in CI.

² This determination should not be viewed as a general indictment of the abilities or services of Foothill SELPA or its employees. The finding is limited to this particular case.

20. There is a window of opportunity when a child is young to maximize the development of auditory brain structure and thus his or her ability to hear and speak. By the time the child is four or so, the window begins to close. Given the time constraints and the consequences of unsuccessfully taking a risk on an unproven approach, it is appropriate to listen to the opinions of those with special expertise in and experience with post CI development. These experts all opined that the proposed IFSP was not appropriate for Petitioner.

21. Petitioner has asked for reimbursement of the costs of placing her at Oralingua. Reimbursement is available only if, in addition to finding that the services offered to Petitioner were not appropriate, it is determined that the placement at Oralingua is appropriate. (*Adams* 195 F.3d 1147) For a placement to qualify as appropriate, it is not required to meet the IDEA definition of appropriate early intervention services. (*Florence County School District Four v. Shannon Carter* (1993) 510 U.S. 7.)

22. Foothill SELPA argues that the Oralingua placement does not meet this requirement because the therapist working with Petitioner there is insufficiently credentialed to provide all of the services Petitioner needs and because the facility is not a naturalistic environment.

23. The Oralingua therapist's qualifications to work with Petitioner and others like her were more than adequately established by the evidence. While it is true that Oralingua's program is center based and deals mostly with hearing impair children, those facts do not disqualify it as an appropriate placement. The evidence established that Petitioner is only at the facility for two hours a week and the vast majority of therapy is done by Petitioner's mother at home implementing the techniques demonstrated by the therapist. It does not appear that Petitioner interacts with the other children so their lack of hearing does not impact her environment.

24. Respondent may be correct that the Oralingua therapist cannot act as Petitioner's service coordinator, but there is no evidence that she is attempting to. To the extent that such evidence was offered, it established that Petitioner's mother is providing that service.

25. Foothill SELPA is correct in its contention that it is not required to provide a potential maximizing program or service for Petitioner. However, it was not established that another appropriate, but less expensive placement was available or offered to Petitioner. If such a placement is identified or if Foothill SELPA hires staff with the requisite experience to provide services to Petitioner, then the placement at Oralingua may not be proper.

26. Finally, Respondent argues that ordering Foothill SELPA to fund Oralingua would violate public policy because the decision would set a precedent that would adversely affect school districts statewide. As counsel pointed out, this decision has no

precedential effect on those that follow. Moreover, each case must be evaluated on its own merits no two situations will be the same.

27. Under the facts presented here, reimbursement for the cost of Petitioner's therapy at Oralingua is appropriate. Moreover, Foothill SELPA must continue to fund the placement until the time that another appropriate program is offered to Petitioner.

28. Grounds exist to grant the relief sought by Petitioner.

Order

WHEREFORE, THE FOLLOWING ORDER is hereby made:

1. Foothill SELPA will pay for Petitioner's participation in Oralingua from the date of this decision until changed through the IFSP process.
2. Foothill SELPA will reimburse Petitioner's family for the cost of her participation in the Oralingua program from her enrollment to the date of this decision.

Dated: September 23, 2002

Carolyn D. Magnuson
CAROLYN D. MAGNUSON
Administrative Law Judge
Office of Administrative Hearings

CERTIFICATION OF MAIL OR PERSONAL SERVICES

I, Lydia Padovani, declare as follows: I am over 18 years of age and have no interest in the above matter herein; my place of employment and business address is: Office of Administrative Hearings, 320 West Fourth Street, 6th Floor, Suite 630, Los Angeles, CA 90013

On September 3rd, 2002 I mailed the attached entitled action, in the city of Los Angeles, County of Los Angeles, State of California

DECISION RE: D.D., VS FORTHILL SELPA – OAH CASE NO. L2002020373

I mailed Certified and Regular in a sealed envelope, with postage thereon fully prepaid, in the United States mail. **IN AN ENVELOPE** addressed to each of the person(s) named below, at the address set out below each name:

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I hereby certify and declare under penalty of perjury, that the foregoing is true and correct.
Executed on September 30, 2002


