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# Iowa Department of Education

IN RE: Malinda J., a minor

Michael & Arlys J.,  
Individually and on behalf of  
Malinda J.,

Appellants,

v.

The Ankeny Community School District, and  
Heartland Area Education Agency No. 11,

Appellees.

Decision

(Admin Doc. SE-210)

#120

The above entitled matter was heard by Administrative Law Judge Carl R. Smith on November 17th 18th & 20th and December 9th and 14th, 1998 in Des Moines, Iowa. The hearing was held pursuant to Iowa Code Section 281.6 of the Rules of the Iowa Department of Education found in Iowa Administrative Code Section 281.6 of the Rules of the Iowa Department of Education found in Iowa Administrative Code 281-41.32 and the applicable regulations found within the Individuals with Disabilities Act (IDEA).

The Appellants in this matter were represented by Attorney Curt Sytsma of the Iowa Protection and Advocacy Services (P & A) and Attorney Al Shank from Omaha, Nebraska. The Appellees were represented by Attorney Sue Seitz from Des Moines, Iowa.

On October 25, 1998 the parties in this matter agreed on the issues that would be resolved within these proceedings. These issues include the following matters:

(1). The Appellants assert that Malinda J., a child with a significant hearing impairment, is being deprived of a free appropriate, public education (FAPE) because, in her current placement, teachers, aides and peers, according to the Appellants "... do not use English for significant portions of the school day." This issue largely deals with the particular communication and signing system being used at Lucas School, in Des Moines, Iowa, which the Appellants assert does not meet Malinda's basic needs for "...consistent exposure to adults and peers who use English--hearing peers who use English and signing peers who use English"

(2) It is also contended by the Appellants that Malinda's needs for assistive technology devices are not being met. This pertains to hearing aids and other assistive technology devices needed across environments and through the extended day and the extended week.

(3) The Appellants also asset that there are numerous flaws in Malinda's individualized educational program (IEP) including specific, objective, and measurable goals tied to developmental milestones in expressive and receptive language.

(4) The Appellants also contend that the school failed to provide needed sign language classes for the parents and failed to reimburse the parents for the cost of securing such classes. They also assert that the schools should have reimbursed Malinda's parents for additional speech and language services provided to Malinda outside of the school setting that focused on areas such as auditory skills (learning to discriminate sounds, etc.), as well as other assistive technology that the parents had purchased for Malinda.

(5) The Appellants in this matter also believe that Malinda is not being served in the least restrictive environment (LRE). They state that, "The Appellees are denying Malinda an education in the least restrictive environment by placing her in an out-of-district school with peers who do not use English for major portions of the school day." The latter assertion relates to the particular signing system used within the Lucas School program in Des Moines.

(6) The last issue put forth by the Appellants is that Malinda has been placed into an out-of-district program not based on her individual needs. They assert that her IEP was drafted to fit the out-of-district program parameters rather than her individualized needs. According to the Appellants, "... the Appellees have proposed that Malinda will be . . . taught in Pigeon (sic) or modified ASL for major portions of the school day--not because that language conforms to her communication needs, her linguistic needs, or 'the child's or family's preferred mode of communication,' but, rather, because an out-of-district school has chosen that language for its students without reference to Malinda or her specific and unique needs."

## I. Finding of Fact

The Administrative Law Judge finds that he and the State Board of Education have jurisdiction over the parties and the subject matter involved in the appeal.

Malinda J. is a five year old child with a severe hearing loss that affects her educational needs. There is no disagreement in this matter that Malinda qualifies as a student requiring special education under both the Individuals with Disabilities Act (IDEA) and within the Iowa provisions for special education (Chapter 256B, Code of Iowa). What follows is a chronology of the programs and services provided for Malinda up until the time of the Appeal.

### 1994-95 School Year

Malinda experienced ear infections as a young child and was first diagnosed by a physician (Dr. Mark Zlab) as having a moderate hearing loss and delayed in speech at the age of 17 months. In August of 1995, with Malinda being approximately two years old, Dr. Zlab noted that he was not sure that her loss was conductive or sensorineural and he recommended that she be fitted with an amplification device (small, behind the ear hearing aids) and receive a speech evaluation. According to correspondence from Dr. Zlab on August 30, 1995 (EXH. pa. 9):

. . . we need to address Malinda's hearing loss at the present time to help her establish better speech as well as to help her in her learning in the upcoming few months to a few years. Malinda and her family met with our audiologists to discuss various amplification possibilities. Malinda and her family will be hopefully working with our audiologists to get some type of amplification going and then I would recommend a speech evaluation after she gets some type of assistance with her hearing.

### 1995-96 School Year

Malinda was referred to the Heartland Area Education Agency for an evaluation and subsequently an Individualized Family Service Plan (IFSP) was developed (EXH 2, pa. 18-34). At about this time she began receiving early intervention services from Janice Singletary, a teacher of the deaf and hard of hearing for the Heartland Area Education Agency.

The AEA evaluation completed at the initiation of these services did provide information on such areas as social skills, speech and auditory and communication skills. Notable quotes from the evaluation (EXH 2, pa 20-22) addressing these areas include:

Malinda's social skills include playing by herself and playing beside other children at daycare who are doing the same activity. She has lots of facial expression and good eye contact with others. . . She will tease others when doing something that she is not supposed to be doing by looking and smiling. Malinda communicates by pointing to what she wants. . .

The exact nature of her hearing loss has yet to be determined. . . Besides hearing concerns Mrs. J's main concern for Malinda is her speech and language development. She reports Malinda's verbalizations have increased since tubes were put in her ears some time ago . . .

Malinda was observed . . . on December 13, 1995 at the Ankeny Family Worship daycare center. Malinda played well independently, she had a good attention span, and she was cooperative with her teachers. . . She communicates her wants and needs by pointing . . .

The first IFSP was carried out at Malinda's private preschool, Ankeny Family Workshop, in the Fall of 1995. In addition to Ms. Singletary's interventions Malinda was provided speech and language services by Phillip Swift, a speech and language pathologist employed by the Heartland Area Education Agency. It also appears that she was receiving services from a school social worker (Mr. Gary Welch) and an audiologist (Wendy McLaughlin) during this time.

In the notes prepared by the School Social Worker in December of 1995 (EXH. 2, pa. 25) it is apparent that Malinda's parents were concerned about both her hearing loss and the impact on this loss on her social relations. According to these notes, "The parents are concerned that the hearing won't get any better and whether Malinda will fit in with her peers." The record also indicated that among the primary outcomes designated for Malinda at this time in her IFSP was that "Malinda will learn and use receptive and expressive sign language vocabulary". (EXH. 2, pa. 29). A particular signing system is not noted at this time does not appear to become an issue until shortly before this Hearing.

It is also noted in the records (EXH. 3, pa. 35) that there remained some uncertainty regarding the extent of Malinda's hearing loss. According to a report from the Iowa ENT clinic sent to Wendy McLaughlin, an audiologist with the AEA:

. . . there is still some concern regarding actual hearing levels. I would like to be able to tell you exactly how Malinda is hearing, but as you know, that is somewhat difficult.

A review of Malinda's program was held in the Spring of 1996. Among other components of this report, it appears that Malinda's parents were looking at options to provide for the best education for her at that time. The contested program being provided now for Malinda was apparently among the options that the parents were looking into in the Spring of 1996. According to Gary Welch, the school social worker (EXH. 4, pa. 39):

They (the parents) have visited Lucas School for Hearing Impaired and have an interest . . . They have indicated that they are not interested in the Developmental Preschool program at East at this time. She still attends the Ankeny Family Worship Center for preschool.

It should also be noted that, at the time of this review, an annual goal dealing with learning and using receptive and expressive sign language was identified as a goal but was not specific as far as a particular signing system.

### 1996-97 School Year

In the Fall of 1996, when Malinda turned three, a new evaluation was completed by Heartland Area Education Agency and an individualized educational program (IEP) was done. This IEP was carried out in the Ankeny Community School District's developmental preschool with an interpreter provided with continued itinerant support services from Ms. Singletary, speech and language services, audiological services, transportation and assistive technology through the provision of an auditory trainer device. In the team summary report leading to this IEP there is mention of the status of Malinda's use of signing (EXH. 6, pa. 52):

Malinda is very eager to learn new signs. She can sign approximately 40 words independently when shown a picture and/or object. She is willing to imitate most signs, unless they seem too complicated for her.

The audiological section of the same report (pa. 53) states:

Malinda's hearing was assessed on August 23, 1996 at Boy's Town National Research Hospital. Concerns had been expressed that she was not making gains that had been expected and parents were looking for a second opinion on her hearing loss.

This Exhibit (6) also indicated that an auditory trainer had been ordered for Malinda and that she had received new hearing aids about this time. Apparently the IEP team also considered placement at Lucas School at this time as noted within the section of the IEP dealing with "Other Options Considered" (pa. 60).

At the end of the 1996-97 school year Malinda received extended year special education services in the Summer of 1997 in the form of itinerant services from Ms. Singletary and speech and language services (EXH. 9, 76-79).

Apparently Malinda's progress within this program was less than satisfactory from the parent's viewpoint. On April 16, 1997 the parents requested and independent evaluation from Boys Town Research Center in Omaha, Nebraska and stated:

There has been differences in her IEP that we have not agreed upon and we feel an independent evaluation would definitely improve the situation and help determine educational goals for our daughter, Malinda. (EXH. 10, pa. 80)

### 1997-98 School Year

The record does not indicate that an independent evaluation was completed at Boys Town as requested. Instead, an independent evaluation from the Iowa Children's Hearing Loss Center in Council Bluffs, Iowa was provided in the Fall of 1997. This was apparently agreed to by the parents after reviewing several possibilities. The AEA did provide the parents with the criteria for the potential location of an independent evaluation (EXH. 17, pa. 100i).

The evaluation questions that were to be answered in this evaluation were prepared by school personnel and the parents (EXH. 17, pa. 105). These included:

- What impact does her hearing impairment have on acquisition of preacademic concepts and cognitive skill development?
- What impact does her hearing impairment have on social skills development? How does this effect (sic) her ability to interact with peers and make friends?
- What additional resources and/or strategies that are specific to the needs of early childhood hearing impaired students are recommended?
- At what level is she functioning regarding speech and language?
- How does she receive language in general?
- How is she receiving sign language?
- How does her receptive mode of receiving language assist her in building a language base?
- How does she respond to her own interpreter?
- How is she developing in comparison to other children her age?
- What is her functional hearing?
- What goals and objectives for speech should be attained during the next year?
- What goals and objectives for language should be attained during the next year?

This listing of the particular evaluation questions suggest that this was a comprehensive look at Malinda's needs driven by the primary questions that both the educators and the parents had at this time.

Among the many observations and recommendations made by the Evaluation Team of the Hearing Loss Center was the opinion that Malinda would profit from more intensive instruction with other signing peers and adults (EXH 17, p. 107). It states:

Malinda currently appears to be isolated and unable to communicate with her peers. Interaction is stilted when communication is non existent. She is

surrounded by hearing children whose primary mode of communication is verbal/auditory, and her language level (primarily labeling nouns) is such that she does not yet appear able to access ideas and messages of other children through an interpreter. Merely putting students in constant personal contact is not sufficient to secure interaction

This report goes on to point out the importance of Malinda's acquisition of communication via a "mass of critical peers" . . . who can receive and express communication with her". They also recommended that a "circle of friends" should be identified if such a "mass of critical peers" cannot be provided. In the overall report from the Hearing Loss Center it should be noted that the need for signing peers was identified by four of the authors of this report (Bakkerud, Anderson, pa. 107, Murdoch, Bahl, pa. 111).

This independent evaluation also addressed other program needs for Malinda under the section titled "Additional Recommendations" (pa. 116):

Malinda would benefit most from a classroom staffed by a teacher of the deaf/hard of hearing who is proficient and fluent in a sign communication mode . . . Malinda would benefit most from as much 1 to 1 teaching as possible, with preferably no more than 1 to 5 small group instruction situations . . . Malinda would benefit most from a classroom with a critical mass of peers who can sign . . .

This report also address the issue of techniques and strategies for sign language and concluded:

. . . At this time, it is more important to get the concept or idea understood than to get signs for every word. Also, efforts should be concentrated on adding, when appropriate, more noun signs, action verbs . . . adjectives . . . pronouns . . . and prepositions. All these can be taught in the daily experiences of play activities and do not necessarily need to be taught in isolation.

While the educators and parents considered these recommendations Malinda continued to receive her education within the Ankeny School District in the Ankeny developmental preschool at the Des Moines Area Community College (DMACC) with an interpreter and a special education teacher not specifically trained in the area of hearing impairments.

It should also be noted that the issue of speech services being paid for by the parents was raised in the Fall of 1997 (EXH. #61). This letter, sent to the AEA from Malinda's father, contends that the AEA should be paying for such services. This strongly suggests that Malinda's parents were quite concerned regarding the intensity of the services she was being provided in the speech and language area.

Apparently, there were still concerns regarding the extent of Malinda's progress within this program. At a meeting held on April 15, 1998, it was agreed that Malinda would receive four half days each week of extended year services for the summer of 1998: June 15-July 16 in the hearing impaired classroom at Lucas School in the Des Moines District and the Des Moines Area Community College preschool July 30-August 13, with an interpreter. A transcript of this meeting was provided by the Appellants in this matter. There are two points from this meeting that would appear particularly relevant to our discussion of the points raised in this Appeal.

First, in regard to the process involved in the selection of the Lucas School for the Fall of 1998 there is an exchange recorded between Michelle Mullins and Ms. J. (Arlys) and Mr. J (Mike) that seems to lend insight into the process of program selection:

Michelle: So you're thinking of Lucas in the fall?

Arlys: Not full day. Just a half day.

Mike: Just half a day.

Arlys: Because we have talked a little bit with Tom Mitchell about this and said would it work if we would send Malinda down there for half day and then bring her back in the afternoon for a preschool here in town. And he thought that would be a great idea. And I have also talked with him about putting her with the older children (the five and seven year olds). I go: "We want Malinda to learn signs; she needs to see it; I don't want her around preschool children that are just going to do basic signing. So he has agreed that he can put her with the five to seven year olds.

It should be noted that this summer extended year program was to be the first time that Malinda was involved in a school program largely consisting of other students with hearing impairments. During the Spring of 1998 there was an additional meeting (May 27, 1998) at which time the IEP team discussed the plans for Malinda's program for the Fall of 1998. In reviewing the transcript of this meeting it appears that Malinda's parents and school personnel were having a difficult time agreeing to the exact nature of her program needs across such dimensions as intensity of services, inclusion needs and what settings would best meet her needs in the Fall of 1998. The parents were also wanting to have more specific data regarding Malinda's current progress while school officials were suggesting that it was important to provide more specific progress data after the summer program and that a more comprehensive review of Malinda's overall status could be provided in the Fall of 1998. There was also extensive discussion of the various program elements to be provided for Malinda including the intensity of speech and language services. In addition, the parents were requesting a reevaluation to answer the following questions:

Communication - "What level is Malinda functioning with communication skills? Receptive and Expressive

Language - "What are Malinda's language skills at this time? Receptive and Expressive

Social Functioning - "How is Malinda interacting with her peers in a group setting?" (EXH. 26, pa. 160)

### 1998-99 School Year

Prior to the beginning of the 1998-99 school year Malinda's parents informed school personnel that Malinda would not be attending the Developmental Pre-school at East Elementary on Tuesday and Thursday afternoons (EXH. 28, pa. 162). They cited a number of concerns regarding the teacher in this setting and also indicated that they had discussed with Mr. Mitchell in Des Moines the possibility of Malinda staying at the Lucas School for those afternoons but that did not seem possible.

There were several meetings involving school officials and Malinda's parents in the Fall of 1998 leading up to the time of the filing of this Appeal. The results of the reevaluation of

Malinda was shared on September 9, 1998. In addition to this meeting the IEP team, including Malinda's parents met on September 14th and October 12th to discuss her IEP. Many of the points of contention at these meetings subsequently became portions of this Appeal.

Within the student and family vision section:

Malinda's family expects her to be at age appropriate levels in language over the next year and will be adequately prepared and qualified for kindergarten. Malinda's family wants to see her mainstreamed in the Ankeny School System, which includes educational, social, and extra-curricular activities.. . . Malinda needs to be immersed in language in a form that is complete, comprehensible, and consistent (SEE-II). Studies show that children using SEE read on grade level.

Within the section dealing with why accommodations, modifications, adaptations or services cannot be provided in the general education environment (pa. 185):

The general education (sic) does not include signing peers for Malinda to communicate with. Communicating through an interpreter is not a direct means of communication for Malinda.

Within the supports needed section (pa. 185a):

ICN classes, Des Moines Public Schools sign language classes, and individual tutoring are offered to parents to provide consistency between sign systems at home and school.

The parents also proposed a document titled "Communication Plan" which they wanted to have included as part of Malinda's IEP. According to the parents, they understood that this was to be a part of the IEP (Ms. J. Test., pa. 1199) while team members indicate that this plan was not accepted and a page of the IEP that was contested in these proceedings (pa. 185m) indicated that the team did not agree to this plan. This plan would require that SEE II be used as Malinda's sign language system. The parents also suggested several expressive and receptive language goals (EXH. 31, pa. 185p) that they wished to have included within Malinda's IEP.

While the record and testimony is somewhat confusing on exactly what did transpire during these Fall 1998 meetings, there is a parent notice, dated 10/27/98 that was sent to Malinda's parents (pa. 185h). The following information is within the section describing the proposed or refused action of the agency:

The parents have requested that Malinda be instructed using an English based sign system, specifically SEE-II. The IEP team is recommending a program which utilizes a communication policy and philosophy which would enable Malinda to make progress toward her IEP goals. The recommended program has adopted Pidgeon (sic) Signed English which is also recognized as American Sign Language in English Word Order. This approach allows for flexibility in meeting individual students needs and is consistent with previous instructional methodology utilized in previous educational settings. Malinda has experienced success with the adopted methodology of the recommended program. In addition this is a methodology issue which need not be addressed in the IEP and is left to the discretion of the district.



An additional parent notice (EXH. 31, pa. 185j) was apparently sent at the same time and dealt with the issue of the parents request for hearing aids, batteries and ear molds. In response to the same question noted above the record reflects:

Parents have requested that the school provide Malinda with a hearing aid, batteries, and ear molds as well as reimbursement for parental expenses for providing these devices. The team found that an auditory trainer is appropriate in an instructional setting. Malinda can derive educational benefit from an auditory trained used alone without hearing aids. The district has provided an auditory trainer.

It should also be noted that Malinda's parents secured another evaluation of Malinda from the Central Institute for the Deaf in Saint Louis, Missouri on November 3, 1998 (EXH. 44). The stated purpose of this was to provide an evaluation of Malinda's hearing, speech, language and intellectual abilities. It should be noted that among the recommendations from this report was "Malinda is in need of a full-time special education as a hearing-impaired child with children of similar age and ability. She should have a teacher who specializes in the education of deaf children". Among the witnesses in this Hearing was Dr. Ann E. Geers, from this program, who testified as to the assessments completed and also shared her opinion that Malinda is not a candidate for an inclusive setting at this time (GearsTest., pa. 166).

Within these proceedings we heard a number of witnesses representing those professionals working directly with Malinda in delivering her special education instructional and support programs, a number of professionals representing evaluations of Malinda's needs and progress, professionals representing "state of the art" debates within the deaf and hard-of-hearing fields and Malinda's parents. It is obvious that we still have significant disagreements regarding how best to meet Malinda's needs and the consequences for making certain program decisions. This Administrative Law Judge has also been presented with volumes of information on a very complex young woman and a very complex professional field that seems to still be far from, despite assertions from some, reaching consensus on how best to meet the needs of students like Malinda. Added to this complexity is a myriad of interpretations by courts, hearing officers, and the Department of Education regarding how to specifically interpret state and federal requirements in situations such as this.

While it is not possible to capture all of the information that was woven throughout this five day hearing it would seem valuable to try to capture the threads of testimony that complimented the record presented to the administrative law judge. The record of these proceedings covers 1,976 pages and includes information gleaned from 22 witnesses. A summary of the primary threads of this Hearing and the input provided by some of the witnesses follows.

### **Choice of Signing System**

A primary point of contention in these proceedings is the question of what particular signing system is needed by Malinda in order to gain educational benefit in her program. As suggested above the parents are contending that the use of a particular system, SEE-II, is most similar to the language spoken in her home (English) and has, in their opinion the greatest likelihood of helping Malinda achieve near her potential. A primary witness called by the Appellants was Dr. Barbara Leuke-Stahlmann, from the University of Kansas, who provided testimony regarding her own experiences as a parent of a student with hearing impairments and as a researcher in the field. Dr. Leuke-Stahlmann provided an overview

of the various signing systems that are used in the United States. She described these systems across a continuum according to the similarity of the systems to the English language. On the one end is SEE II (Signing Exact English) which is closest to an English base and at the other end is the ASL (American Sign Language) which, according to testimony, is not an English based system, is a separate language and is commonly used within the deaf community. The signing system of Pidgin Signed English (PSE) is considered "in-between" these two ends of the continuum. Our Hearing had considerable discussion regarding the extent of overlap across these systems.

Dr. Leuke-Stahlmann supported the decision made by Malinda's parents in using a SEE-II system and testified regarding her opinion that this system offered the greatest potential to increase Malinda's learning potential. Several other points asserted by Dr. Leuke-Stahlmann include:

She needs to be--her peers need to be . . . kids who use grammatically correct English. She needs to be exposed to teachers and interpreters and other children who speak and use, express English the way that we all do and --all that opportunity that we all had (Leuke-Stahlman Test. pa. 467-468).

We have to have access to communication, and that means hearing people at school have to learn to sign. And there's all kinds of ways that that's being done (Leuke-Stahlman Test. pa. 470)

Other witnesses we heard seem to place more importance on the active involvement with Malinda in a communication system rather than the natural superiority of one particular signing system. Dr. Brenda Schick, from the University of Colorado, testified that the superiority of a SEE-II system is not as firmly established as suggested by Dr. Leuke-Stahlmann. She also asserted the importance of Malinda acquiring and using a signing system in which she can be an active member of any group that she is a part of. As Dr. Schick asserts:

. . . probably the most important thing for Malinda is to be in a language-rich environment with lots of difference language going on (Schick Test. pa. 864)

In response to a question regarding the importance of a particular signing system Dr. Schick stated:

I would like to see people really focusing on signing complexly, really having rich vocabularies, signing complex ideas rather than focusing a lot on how much it represents English or whatever. . . the complexity of the sign language is a more important issue than the surface-level form of the sign language. (Schick Test. pa. 865-866)

This contrast in perceptions regarding the importance of a particular signing system as opposed to the active use of any system contributing to a student's communication behavior seems to capture much of the testimony around this topic. Malinda's parents believe that the SEE-II system offers the greatest potential pay-off while the witnesses representing the Ankeny Schools, Heartland Area Education Agency, Des Moines Schools and the outside evaluators from the Iowa Hearing Loss Center seem to support a more conceptually based system. While the ultimate answer of which signing system is beyond the scope of these proceedings and the expertise of the administrative law judge, we will have to answer the question of the extent to which the particular signing system used with Malinda impacts her

chances of receiving a free, appropriate public education or whether this choice represents a methodology question alone. From the parent's perspective they also want to see a program that provides the intensity necessary to bring her skill up to "grade level, to age appropriate" (Ms. J. Test. pa. 1344).

### **Least Restrictive Environment**

This hearing also deals very directly with the notion of what setting is needed in order for Malinda to receive an appropriate education. A number of elements related to this question which we have to consider include the training of the teacher, the curriculum provided, the potential role of an interpreter and the perceived need for a "critical mass" of signing peers. When asked to describe the setting desired for Malinda, her mother stated that she wanted Malinda served with a small group of children in the Ankeny School District and with children with strong English skills so that they can communicate with Malinda through speech. (Ms. J. Test. pa. 1327,1355). From the other point of view the witnesses called from the Appellees, representing the professionals working with Malinda and the evaluators from the Iowa Children's Hearing Loss Center uniformly assert that Malinda is in need of a "critical mass" of signing peers in order to receive an appropriate education. This position was captured in the words of Janice Singletary, the Heartland AEA Teacher of Hearing Impaired who has worked with Malinda for several years who shared the following response when asked if she agreed with the need for a full-day program and Lucas School for Malinda and why:

Yes . . . Because we've tried several different settings . . . She's been with an interpreter for a few years, and all the testing--I mean although she is working on my goals satisfactorily, over--her language is below where she should be at her age. And I'm very concerned about the service--about that she is not with a teacher of the hearing impaired who is broadening, drawing out her language, that she is not with peers that can sign to her. I feel--I feel in my heart very sorry for her that she's in a place where kids cannot communicate with her, and I've seen it over and over again. She plays alone in a corner. She--I just feel terrible. (Singletary Test. pa. 1149-1150)

We also had testimony from other "outside experts" with conflicting impressions regarding the needed instructional setting for Malinda. As stated earlier, Dr. Ann Geers, from the Central Institute for the Deaf testified that Malinda requires a program with a teacher of the deaf and with other students with deafness or hearing impairments (Geers Test. pa. 155) while Dr. Luetke-Stahlman testified that Malinda could be served in an integrated setting with appropriate supports (Luetke-Stahlman Test. pa. 474). Obviously, this ALJ is confronted with a myriad of conflicting opinions regarding what constitutes an appropriate program for Malinda. Only a careful review of the data collected, professional opinions expressed and integrity of the process followed can ultimately answer this question- at least for the purposes we are called upon to address in proceedings such as this.

### **Individualized Educational Program**

The Appellants believe that a number of flaws are present in Malinda's individualized educational program (IEP). They are particularly concerned that their proposed communication plan was not included as part of the IEP and that the IEP did not incorporate their suggestions in the expressive and receptive language areas. The Appellants have also expressed concern regarding the extent to which Malinda is demonstrating progress within her program. Finally, the parents seem to be suggesting that their input has not been valued in planning Malinda's program. In relation to this latter

point this ALJ posed a question to Malinda's mother regarding her perception of the parent in the IEP process:

Q. How--what do you believe constitutes "meaningful participation as a parent" in this [IEP] process? I mean what role do you think that you have as a member of the team from your perspective?

A. Okay. The member of our team is to --I know my daughter best. And that's my role, is to let the team know what I feel is best for my daughter.

Our role as being parents is to let them know about Malinda. We spend more time with her than anybody else, and so we need to bring that to the table of what we believe is right for our daughter and work with the team members on what is right for our daughter.

Q. . . . Does that convert in your mind that--does that mean that your opinions or positions would prevail over the other people in a staffing meeting . . .

A. Not prevail. I would say everybody needs to--work together. I would certainly want our point to be--you know, we'd bring it forth, and they would at least listen to--to us and taken into account.

The witnesses from the school perspective consistently contended that Malinda is receiving an appropriate program and that her needs have been consistently considered. They furthermore contend that they considered the recommendation of her parents and in some cases, such as with the proposed communication plan, could not agree with what was being proposed by the parents (EXH. 3, pa. 185m).

### **Assistive Technology/Support Services**

It is not contested that Malinda requires assistive technology in order to benefit from her education. Her parents were diligent at an early age in securing hearing aids for Malinda. These aids have been consistently provided by the parents and recently supplemented by an auditory trainer/FM system provided by the school (Lyons Test. pg. 1598). In these proceedings the parents are requesting reimbursement for the hearing aids they have provided up to this point while the school is contending that they have provided the necessary amplification equipment through the auditory trainer/FM system. At the heart of this issue is the policy governing the purchase of assistive technology. According to the direct testimony of Mr. Jim Doyle, the Special Education Supervisor from Heartland AEA (Test. pg. 1920):

Q. . . .What is the policy of Heartland AEA regarding purchasing hearing aids for students who are hearing impaired?

A. The policy --the policy wouldn't be any different than assistive technology devices in this--in the sense, that if you have a student that needs the particular assistive technology, then we would be--that would--that would have to be discussed at the IEP meeting . . .

Mr. Doyle went on to discuss the various avenues that would be explored in providing the funding for such devices and reiterated the position that if this device was determined to be necessary for a student to secure FAPE that such a device would be provided.

Within the support services realm we have two issues that were discussed by the witnesses in this hearing. The first issue is the provision of signing classes for Malinda's parents. Her father reviewed the number of classes that had been taken and paid for by the parents on their own. Apparently there was not extended discussion of these classes within the IEP context. In this hearing it appears that the parents were offered information on sign language classes offered by the AEA and LEA (Test. of Jim Doyle, 1910-12, Tom Mitchell 567-69).

Another area of support services that is in contention in these proceedings is the level of speech and language services that have been provided for Malinda. Malinda's parents have been paying for supplementary services on a private basis for several years. As mentioned earlier, they have felt that these services were necessary for Malinda to move forward in her communication skills. Furthermore, they contend that the school "took into consideration" their private pay services in determining the level of services to be provided by the AEA.

### Procedural Issues

This Hearing also presents a number of issues that relate to procedural issues impacting Malinda's program. The parents assert, for example that Malinda has been placed into a program not individually designed to meet her needs. At the heart of this question are concerns regarding the Communication Policy of the Des Moines Schools.

According to the Communication Policy for the Deaf and Hard of Hearing Program of the Des Moines Public Schools (EXH. 45), this district has adopted a specific policy regarding the signing system used in their programs. This policy supports the philosophy of total communication and goes on to state:

Through careful study the Des Moines school district has adopted Pidgeon (sic) Signed English (PSE) which is also recognized as American Sign Language (ASL) in English Work Order as the basis for sign usage. This approach allows for flexibility in meeting individual needs. . . all signing would be conceptually accurate, visually clear, emphasize finger spelling, utilize ASL features, and follow the grammatical structure established by the district . . . SEE systems are incompatible with conceptually accurate systems and will not be used.

The issue of whether the adoption of such a policy precludes meeting the individual needs of a student was a focus of much discussion during this Hearing. The Supervisor of this program in Des Moines, Mr. Tom Mitchell, testified regarding the factors leading up to the need for such a policy and the intent of this policy. According to Mr. Mitchell (Mitchell Test., pa. 527-28) they had people, prior to the adoption of this policy, working in the program coming from different perspectives and using different signing systems which tended to hurt the programming provided for students. This led to a committee being formed by the study in 1992 to develop their Communication Policy. According to Mr. Mitchell, members of the staff visited programs nationally, such as Gallaudet University, and reviewed the literature available at the time. According to Mr. Mitchell's testimony (Mitchell Test. pa. 594) this Policy does seem to limit the signing systems accommodated in the Des Moines System:

Q. Can your program offer--can even consider the option of providing a SEE-II approach for a child whose first language base is SEE-II when they come to you?

A. We consider that educational methodology, and we would refer back to our communication policy

Q. And so it is decided not by the IEP team, with Malinda's or anyone else's, but it was decided six years ago?

A. The educational methodology in our program was decided, yes.

The Appellants in this matter obviously believe that this policy fails to honor the decisions made by a parent as to which signing system will represent the "native language" of their child. From the school's perspective they seem to be asserting that without some degree of uniformity they would be constantly dealing with a moving target as far as methodology which they believe would detract and hamper their overall program. From this ALJ's perspective this debate is quite frustrating. These proceedings have amply demonstrated that the professional debates that may surround one particular system versus another may overshadow the primary point that brought us all together: What are the needs of Malinda and how can these best be met? This ALJ was also reminded of the confusing picture that's faced by parents such as Malinda's who are diligently seeking what is best for their daughter and who may be hearing conflicting professional perspectives that may, in some circumstances, be fodder for the academic debates but confusing and disturbing for the parent who is just wanting what's needed for their child. It seems in circumstances such as we have here that the professional community would better serve their constituents by building bridges across varying viewpoints rather than gulfs between such unless it can be reliably demonstrated, through replicated research across varying populations, that one particular methodology is superior to others and that other, competing methodologies should be limited for consideration because of demonstrated harm to the persons for whom they are supposed to help.

It should be noted that the Appellants have clarified (Ms. J. test., pa. 1359) that the parents are not insisting upon a pure use of SEE-II with Malinda. Instead, they wish to system to be more on the English side of the spectrum versus the ASL side as demonstrated in our Hearing. The ability to take complex signing systems and break them down even further to a "side of the scale" notion would seem to get into a web of specificity/complexity that is best left to direct service personnel and parents rather than administrative law judges. This perspective mirrors what would seem to be the reasoning in the Rowley decision, to be discussed in more detail in the next section.

The Appellants point out the nonacceptance and integration of the parent's proposed "Communication Plan" as another example of the IEP team not providing the parents the weight they should be afforded in the IEP process. According to Mr. and Ms. J., in preparing a "Communication Plan" they were taking advice as suggested from the State of Iowa and Department of Education in a publication dealing with the IEP process (Their Future . . . Our Guidance, 1998). It certainly would be a concern if the parents are following a process as suggested by the State only to be rejected by school personnel in the IEP process. In reviewing the suggested outline for the communication plan it does seem to this reader that the "Communication Plan" we reviewed does exceed the intent as outlined in the State publication that does not suggest the specificity of particular signing systems.

The "bottom line" questions procedurally that has to be answered in this Hearing is whether Malinda's needs have been addressed with integrity in the IEP process and whether the vital role of her parents have been respected and honored in the process.

## II. Conclusion of Law

These proceedings deal with what is ultimately needed and appropriate for Malinda in order for her to satisfactorily progress within her specially designed educational program. Two major strands in this decision seem to rest with the notion of what constitutes a program "reasonably calculated to confer educational benefit" (Board of Education v. Rowley, 428 U.S. 179, 1982) for her and the setting (least restrictive environment) necessary to confer such benefit. We can incorporate most of the issues within these proceedings within these two broad themes, and such a strategy appears to be the point at which the Appellants in this matter framed their Appeal immediately preceding this Hearing. Laid upon these two broad based themes are the complex issues involved with educating students who are deaf or hard of hearing.

We also have to look carefully at the expectations we must meet in providing a student's IEP and the functional meaning of such terms as support and related services and supplementary aids and services. We must also visit the criteria we must use in deciding the extent to which any procedural violations have occurred in designing and delivering Malinda's program.

At the heart of these proceedings is our definition of what constitutes a free appropriate public education (FAPE) for a student such as Malinda. According to federal guidance in this matter:

"The term 'free appropriate public education' means special education and related services that--

"(A) have been provided at public expense, under public supervision and direction, and without charge;

"(B) meet the standards of the State educational agency;

"(C) include an appropriate preschool, elementary, or secondary school education in the State involved; and

"(D) are provided in conformity with the individualized education program required under section 614(d)." [Section 602(8)]

This overall definition of FAPE will guide much of our discussion of the many issues that have been raised in these proceedings.

The needs of students who are deaf have been addressed at the federal level by expanded discussion of considerations on appropriateness to be considered by IEP teams. For example, in a Department of Education Policy Memo (Lamar Alexander, October 26, 1992), the former Secretary Alexander stated, "... the unique communication and related needs of many children who are deaf have not been adequately considered in the development of their IEP's." He goes on to suggest that state and local agencies must consider the following factors in developing the IEP for a child who is deaf:

1. Communication needs and the child's and family's preferred mode of communication;
2. Linguistic needs;
3. Severity of hearing loss and potential for using residual hearing;

4. Academic level; and
5. Social, emotional, and cultural needs, including opportunities for peer interactions and communication.

The Amendments to the Individuals with Disabilities Act of 1997 add further weight to important considerations in designing an IEP for a student who is deaf when it directs that the IEP Team shall

“(iv) consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child’s language and communication needs, opportunities for direct communications 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 . . . (Section 614(d)(3))

In examining this question this ALJ has to return to how this matter has been dealt with in Board of Education v. Rowley (458 U.S. 179, 1982). In this decision, in reaching the FAPE threshold question the Court stated, “First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits?” (pp. 206-07). A delineation of the questions to be posed in looking at FAPE as a result of the Rowley ruling was recently asserted in a state level hearing in California (Eureka Union Sch. Dist./Placer County Office of Educ., 28 IDELR 513, ALJ Decision, California, 1998). This decision asserts that the IDEA and Rowley provide three factors for analyzing whether a placement is appropriate. This includes:

- (A) Was the proposed placement designed to meet the student’s unique needs?
- (B) Did the proposed placement conform to the student’s IEP?
- (C) Did the proposed placement provide the student with educational benefit?

While this delineation seems to place an excessive emphasis on the concept of placement rather than program, it does provide a sharpening of the questions that need, in this ALJ’s opinion, to be posed in proceedings such as ours. We will return to these questions later.

In this case the Appellants seem to be asserting that the methodology used in the Lucas School Program is both incompatible with the system used in Malissa’s home and will not provide her with sufficient benefit so as to constitute an appropriate program. As we address this question it is important to return to the words in the Rowley decision as follows:

In assuring that the requirements of the Act have been met, courts must be careful to avoid imposing their view of preferable educational methods upon the States. The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child’s needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child . . . Therefore, once a Court determines that the requirements of the Act have



been met, questions of methodology are for resolution by the states. (207-08).

With this beginning foundation it appears that we have to return to the notion of educational benefit as delineated within the IEP process and the extent to which the IEP developed for Melinda would seem "reasonably calculated to confer educational benefit". In this case such a judgment has to be largely based on the IEP that was in place at the time of Melinda's placement into the Lucas program with little progress data available at the time of these proceedings at which time Melinda had been involved with the Lucas program for less than three months, not including the extended year summer program offered in 1998. In looking at this question it would appear that the program developed by the Ankeny School District, Heartland Area Education Agency staff and the parents is afforded a degree of presumption of appropriateness. Balanced with these considerations are the LRE issues. In this case we have to recognize that the presumption is that students with disabilities will be educated with their non-disabled peers unless it is demonstrated that their educational needs require another setting. Such a need must be demonstrated, in this ALJ's opinion, before we can support the use of specialized settings.

### Choice of Sign System

As alleged by the Appellants, "Malinda's native language is English, and both signed and spoken English is used in the family home. To develop her skills in using English, Malinda needs consistent exposure to adults and peers who use English--hearing peers who use English and signing peers who use English. The Appellees are denying Malinda a free appropriate public education by proposing that she be placed with teachers, aides, and peers who do not use English for significant portions of the school day."

Within these proceedings one of our primary charges is to interpret such phrases as "language and communication mode" in Malinda's case. To what extent does this expectation apply to the various sign languages used in deaf education programs? What constitutes school personnel's consideration of a child's language and communication needs?

The Appellants assert that there are a number of deficiencies in Malinda's program at Lucas school that fail to meet the standard of appropriateness as defined at federal and state levels. The broad areas of concern that constitute their assertion of inappropriateness seem to center around:

1. That the signing system used at Lucas School is not appropriate in meeting Malinda's needs.
2. That the overall setting at Lucas School is not designed to meet Malinda's individual needs, and
3. That the program provided at Lucas School is inconsistent with the program being provided for her and home and is thereby inappropriate.

It should be noted that the Appellants present a number of subpoints under each of these broad areas that delineate their specific concerns.

At the core of this case is the notion of whether the particular sign language system needed by Malinda constitutes an essential part of her free appropriate public education and constitutes a failure to provide such if the school uses an incompatible system to that used

at home or whether the choice of sign language merely constitutes a choice of methodology. The Appellees in this matter have argued the latter.

As noted in a related Pennsylvania decision:

It should be mentioned at this point that it is not for this court to choose between two competing schools of thought in educating the hearing-impaired. Philosophical debates concerning the best method of educating the hearing-impaired are best left to educators who consider this problem their *métier*. (Visco v. School Dist. of Pittsburgh, 684 F. Supp., 1313, 1988).

It is important to also remember the words of Rowley that deals with the limitations that courts may have in reviewing the decisions made by IEP teams at the local level:

We previously have cautioned that courts lack the "specialized knowledge and experience" necessary to resolve "persistent and difficult questions of educational policy." We think Congress shared that view when it passed the Act . . . (reference)

This issue of competing methodologies was also addressed the U.S. District Court in Kansas (Logue v. Shawnee Mission Pub. Sch., 25 IDELR 587, 1997):

Parents--no matter how well motivated--do not have a right under IDEA to compel the school district to provide a specific program or employ a specific methodology for the education of their disabled child . . . Moreover, schools do not have to provide services to "maximize each child's potential." Rowley, 458 U.S. at 198. This the question is not whether CID is better, but whether the District offer an appropriate education.

Since the passage of IDEA 97 there have been other situations in which choice of sign language has been related to the provision of FAPE (Charlotte County Sc. Bd., 27 IDELR 650, 1997). This case involved an 11 year old student with a hearing impairment who was also considered gifted and talented. In this case it was determined that the student's interpreter, who used a combination of SE and Pidgin Signed English, was providing an inappropriate methodology. This case is similar to our proceedings in that the issues of signing methodology and parental choice of methodology were carefully considered. The facts under consideration seem to vary in that the Charlotte case involves an older student who was progressing well both academically and socially and whose placement in a regular classroom with an interpreter seemed to be firmly established.

The Appellees assert that PSE meets Malinda's needs and furthermore that such a decision is, in fact, a methodology issue unless it can be established that the failure to provide instruction in a particular signing system makes the provision of an appropriate program not possible. To support this notion they cite from E.S. v. Independent School District No. 196, 27 IDELR 503, 505 (8th Cir. 1998):

However, the IDEA does not require the District to provide E.S. the best possible education or to achieve outstanding results. . . . Requiring the District to change methodologies based on Ms. Stein's preferences "would be creating the potential that a school district could be required to provide more than one method. . . for students whose parents had different preferences." Petersen v. Hastings Pub. Sch., 31 F. 3rd 705, 708 (8th Cir.

1994). As long as a student is benefiting from her education, it is up to the educators to determine the appropriate methodology.

These proceedings do share similarities with a case in Nebraska that was appealed to the Eighth Circuit Court of Appeals in 1994 (Petersen v. Hastings Public Schools, 31 F.3d 705, 1994).. In this case the Eighth Circuit concluded:

Despite the good intentions of the parents, the Act's [IDEA] requirements do not entitle them to compel the school district to provide their hearing impaired children with the specific system of signing. . . The Act requires the school district to implement a signing system that is reasonably calculated to confer educational benefits on the hearing impaired children . . . Were we to conclude that parents could demand that their children be taught with a specific signing system, we would be creating the potential that a school district could be required to provide more than one method of signing for different students whose parents had differing preferences.

In the final reply brief filed by the Appellants in this matter there is a clarification of what is being requested:

In preparing the issues for this appeal, therefore, [Parents] did not adopt the extreme position that a SEE-II system, and only a pure SEE-II stems, would satisfy the requirements of the IDEA. To the contrary, they have merely asked this ALJ to affirm that their daughter needs a sign system that is compatible with the language used in their home and consistent with the manually coded English systems originally recommended by the AEA. More specifically, they have asked this ALJ to reject, as inappropriate for Malinda, a communication policy that states, on its face, that "SEE systems are incompatible with conceptually accurate systems and will not be used." (Exhibit 45 at unnumbered page 2) (Reply Brief p. 10)

### **Least Restrictive Setting**

The Appellants in this matter suggest that the services that Malinda needs are best provided within the Ankeny School District with an interpreter. They also seem to contend that Malinda requires an interpreter who is using the same language as her parents are using at home. The Appellees, on the other hand, contend that there are a number of factors that are present within the program offered at Lucas School that define appropriateness and meet Malinda's needs. These include:

- A small group of students with similar instructional needs
- A teacher of the hearing impaired
- A critical mass of peers to assist with language development
- Intensive speech services available in special setting
- Signing used by all others in instructional setting

It is important to recognize that the Department of Education has provided policy direction on meeting the needs of deaf students (Deaf Students Education Services: Policy Guidance, October 22, 1992) that does address the issue of LRE with these students. It states:

The Secretary is concerned that some public agencies have misapplied the LRE provision by presuming that placements in or closer to the regular classroom are required for children who are deaf, without taking into consideration the range of communication and related needs that must be

addressed in order to provide appropriate services. The Secretary recognizes that the regular classroom is an appropriate placement for some children who are deaf, but for others is not. The decision as to who placement will provide FAPE for an individual deaf child--which includes a determination as to the LRE in which appropriate services can be made available to the child--must be made only after a full and complete IEP has been developed that addresses the full range of the child's needs.

As stated in Poolaw v. Bishop (23 IDELR 406), "The IDEA's preference for mainstreaming is not an absolute commandment". The language of IDEA directions regarding the least restrictive education determination requires that we provide a student's program within the general education setting "to the maximum extent appropriate" and provides that "when the nature or severity of the disability is such that education in the regular classroom setting with the use of supplementary aides and services cannot be achieved satisfactorily" that the student may be removed to a special education environment.

There does appear to be a preference for educating a student with disabilities in his/her home school whenever possible (34 C.F. R. 3000.552, 1990). Within the Iowa Rules of Special Education (1995) there is a decided preference for LRE but school districts are allowed the option of providing for a student's special education needs through contracting with other school districts. (IAC, 281-41.3(2)) As stated in the Iowa Administrative Code (281-41.4 (281):

Pupils requiring special education shall attend classes, participate in extracurricular activities and receive services in a general education setting to the extent appropriate.

Further direction on LRE expectations are captured in the words of Judy Schrag, former Federal Director of the Office of Special Education programs:

LRE sets forth a rule of conduct that must be followed in every case unless, in a particular case, it can be demonstrated that the general rule will have unacceptable consequences for the affected individual. Thus, LRE favors integration but allows separation. One reason for LRE specifically is that choices about appropriate placements should be made available within reason. LRE does this by being a presumption, not an ironclad rule . . . The federal statutes and the regulations implementing them, and the applicable judicial decisions, make it clear that LRE is a rebuttal presumption. But the statutes and regulations also demonstrate that LRE depends on and must be interpreted and applied in the context of appropriate education for the child . . . Decisions regarding educational placement must be based on the educational needs of each child . . . (17 EHLR, 279)

In this case the Appellants contend that the school has not established it's so called Burden of Proof regarding the extent to which Malinda can be educated in a less restrictive setting. They also challenge the contention made by the Appellees that Malinda requires a "critical mass" of peers who can communicate within the same system.

Although the LRE provisions at both federal and state levels certainly reinforce the presumptive intent in program selection, it is also recognized, as stated above, that there are circumstances in which a student may require a more restrictive setting. As stated in Section 256B.8 (Iowa Administrative Code):

It is not incumbent upon the school district to keep a child requiring special education in regular instruction when the child cannot sufficiently profit from the work of the regular classroom, nor to keep the child requiring special education in the special class or instruction for children requiring special education when it is determined by the diagnostic educational team that the child can no longer benefit from the instruction or needs more specialized instruction available in special schools.

It should also be noted that agencies are expected to provide a continuum of services that includes instruction in regular classes, special classes, special schools, home instruction and instruction in hospitals and institutions (IDEA Regs, 300.551). It would seem important to realize that, while we should seek to serve children in their neighborhood schools, that this is not always possible. In comment on legislative statements made during the enactment of IDEA the Court in the Tenth Circuit in 1995 (Murray v. Montrose Country Sch. Dist., 22 IDELR 558) states:

. . . they simply do not clearly indicate that Congress, in discussing mainstreaming or inclusion and the concept of the LRE for each disabled child, meant anything more than avoiding as much as possible the segregation of disabled children from nondisabled children. They in no way express a presumption that the LRE is always or even usually in the neighborhood school.

### **Individualized Educational Program**

The Appellants assert that Malinda is being denied a free appropriate public education because her IEP does not contain specific, objective and measurable goals tied to developmental milestones in expressive and receptive language.

The IEP requirements at both the federal and state levels reinforce the notion of the importance of this document and process in ultimately determining whether a student is receiving the benefit of special education. It is well documented that an IEP is intended to address the areas of concern that constitute the special education needs of a student (IAC, 281-41.66). In describing the intent of annual goals and benchmarks or short term objectives, a publication distributed by the Department of Education states:

Having identified how the child is doing in school, and, in particular, where he or she is having difficulty, the IEP Team focuses upon determining what educational goals are appropriate for the student, given those areas of difficulty. The goals must be annual and measurable and should be reasonable--what can the student reasonably accomplish in a year? The goals must include "benchmarks or short-term objectives." The goals must relate to helping the child be "involved in and progress in the general curriculum" and address other educational needs that arise due to the child's disability. (The IDEA Amendment of 1997: Curriculum, U.S. Office of Special Education, 1997)

It is also established that the IEP document and process must be judged from both procedural and substantive viewpoints. As stated in a recent decision out of the Tenth Circuit (Logue v. Unified Sch. Dist., 28 IDELR 609), "When reviewing the adequacy of an IEP, a court must first determine whether the school district 'complied with the IDEA's procedural requirements, including whether the IEP conformed with the substantive requirements of the act.' . . . We then examine 'whether the IEP was reasonably calculated

to enable [the student] to receive educational benefits.' . . . In these proceedings we have to apply both of these criteria to Malinda's program. Many of the substantive questions are posed in the other issues being raised in this appeal dealing with overall FAPE challenges. The procedural questions appear to be at the heart of this issue.

Within this issue is the importance of examining Malinda's IEP and the specific issue of goals and milestones and posing the question of whether any flaws detected in these aspects of her IEP actually reach a threshold that would invalidate the benefits of her IEP (*O'Toole v. Olathe Dist. Schs.*, 28 IDELR 177). We have to apply this criteria at the same time we realize that the IEP is an ongoing dynamic process. As stated in *O'Toole*, ". . . an IEP is a program, consisting of both the document from the perspective of the time it is written, the implementation of the program is an on-going, dynamic activity, which obviously must be evaluated as such." In these proceedings we have to examine Malinda's IEP in the context of her changing program location from the Ankeny School District to the Lucas School Program provided in the Des Moines Schools. While this change of location does not, in any way, negate our responsibility to provide meaningful goals and milestones and to demonstrate that the program is, in fact, providing education benefit, it does lead to our need to carefully examine the natural changes that may occur as a result of Malinda moving from the Ankeny School District into the Des Moines Schools.

Within these proceedings the parents contend that they brought carefully considered proposals in the areas of receptive and expressive language that school personnel refused to include. The Appellees contend that these proposals were not truly individualized but rather reflected ideas found within the text of a witness who testified on behalf of the parents (Dr. Luetke-Stahlman).

It should be noted that the IEP that is being primarily contest in this component, which was prepared in the Fall of 1998 is based, in part, on the reevaluation information requested by Malinda's parents and contained in a team summary report (EXH. 31, pa. 171a-171e). This report contains specific information on the receptive and expressive language areas prepared by Janice Singletary (pa. 171d). The resultant IEP appears to this reader to contain annual goals addressing this are (example would be on pa. 175). A note written by the parents following this was sent by Malinda's parents seems to summarize the parent's position on what should have happened, from their perspective, in addressing the expressive and receptive language areas:

Attached you will find the expressive and receptive language skills that were discussed at our daughter Malinda J. IEP meeting on September 14, 1998. We the parents of Malinda, brought these necessary skill areas to the "team" with the expectation that they would be incorporated into goals . . . It is expected that these skill areas be incorporated into additional goals for Malinda. Arlys and/or I would be willing to work with your staff in developing goals for these crucial skills . . .

Attached to this note were four pages containing a list of skills in the expressive and receptive language skill areas. While differences may emerge between parental desires and team decisions, such a discrepancy does not equate, in this ALJ's opinion to a conclusion that the IEP does not contain specific, objective and measurable goals tied to developmental milestones.

### Assistive Technology/Support Services

In this area the Appellants allege that “. . . Malinda needs hearing aids and other assistive technology devices across environments and through the extended day and the extended week.” They further claim that the Appellees are denying Malinda FAPE by denying the public provision of hearing aids and other assistive technology devices beyond the school day.

In the Amendments to the IDEA signed in 1990, the definitions of the terms “assistive technology device” and “assistive technology service” were added to the IDEA. In looking for guidance regarding the intent of this section we find that OSEP clarified the intent of these provisions in a letter of clarification in 1993 (Letter to Seiler, 20 IDELR 1216). This letter states:

Historically, it has been the policy of this Office (OSEP) that a public agency was not required to purchase a hearing aid for a student who was deaf or hearing impaired because a public agency is not responsible for providing a personal device that the student would require regardless of whether he/she was attending school. However, this policy does not apply to a situation where a public agency determines that a child with a disability requires a hearing aid in order to receive a free appropriate public education (FAPE), and the child's individualized education program (IEP) specifies that the child needs a hearing aid.

This memo of clarification goes on to state, “. . . participants at the meeting held to develop a child's IEP must determine whether, in light of a particular child's educational needs, the public agency must make an assistive technology device and/or service available in order for the child to receive FAPE.”

The term assistive technology includes “any item, piece of equipment, or product system . . . that is used to increase, maintain, or improve functional capabilities of a child with disabilities.” “Related services” includes “such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education . . . (IDEA Regs. 300.5-300.6, 300.24).

In this Hearing the parents claim that Malinda required assistive technology in this area and that they were required in order for her to receive an appropriate education. The school, on the other hand, contends that they provided, in a timely manner, the assistive technology required for Malinda to receive benefit.

In examining this issue it is important to trace the series of IFSPs and IEPs developed over the time frame of December, 1995 (EXH 2) through October, 1998 (EXH 31). In examining the issue of hearing aids and other assistive technology devices across these exhibits leads to the following conclusions:

-Malinda had been fitted with hearing aids prior to her referral to the AEA for services and the parents continued to secure these through their own means from that time up until the time of this Appeal.

-The AEA provided audiological services beginning with Malinda's initial referral (EXH 2) through her current IEP. The record suggests an ongoing coordinated relationship between AEA staff and staff from Boy's Town (EXH. 6) or Iowa Head and Neck Clinic (EXH. 4).

-The family has been provided an F.M. auditory system that was purchased by the schools in 1997. Records indicate that this assistive technology was determined necessary for FAPE (EXH 16) and is used in school and at home (EXH. 19).

-The parents only recently requested reimbursement for hearing aids (September, 1998).

-It has been concluded that, at this time, the F.M. auditory system has been concluded to meet Malinda's amplification needs (Lyons Test. pa. 1590).

-AEA personnel have confirmed that if hearing aids are needed for FAPE that they will be provided (Lyons Test. pa. 1604)

From these data it would appear that the assistive technology needs for Malinda, namely hearing aids and the F.M. auditory system, and associated professional expertise, have been met for Malinda in an appropriate manner over the past several years through parental means and, when appropriate, the resources of the Ankeny School District and the Heartland Area Education Agency.

The Appellants also assert that several other support and related service needs are not being met. They assert that FAPE has been denied because the schools failed to provide signed language classes for the parents and refused to reimburse them for such. They also assert that Malinda requires training in the auditory skill area and that the schools failed to reimburse the parents for securing these services.

In regard to sign language instruction for the parents, the long standing direction from the Department of Education in this matter states:

Under the definition of "parent counseling and training," for example, an IEP for a deaf child could include training parents to use the mode of communication that their child uses as part of an educational program.

In order to determine whether services for a child's parents, such as training or counseling, should be included in a child's IEP, the team developing the IEP must determine that the service is needed in order for the child to receive an appropriate special education or other required related services in the least restrictive environment. Any related services provided for parents must assist the child in developing skills needed to benefit from special education or correct conditions which interfere with the child's progress toward the goals and objectives listed in the IEP. The service could precede the initiation of specially designed instruction to make the child ready for instruction, or the service and the special education could proceed concurrently. (emphasis added) (Letter to Dole, EHLR 211:399). (emphasis added)

In examining the situation presented in this appeal there are several questions that need to be posed. To what extent or at what point did the IEP team determine that signing classes for Malinda's parents should be a part of her IEP? While the Appellants assert that they were "encouraged" to attend classes (Appellants Brief, p. 43) does this convert into an IEP recommendation? To what extent do these classes contribute the ". . . the mode of communication that their child uses as part of any educational program"?



In reviewing Malinda's IFSPs and IEPs over the past several years we do find several references to the issue of sign language classes for her parents. Within her first IFSP (EXH. 2, pa. 25) is the following notation:

They (parents) expressed interest in books on hearing impaired children and sign language classes . . .

In the IEP developed on 5/30/96 (EXH. 4, pa. 39) we find the notation:

The minister of their (parents) church does provide some training in sign language.

Perhaps more important in answering the question of the need for sign language instruction for Malinda's parents is found in direct references within her IEPs to goals that are to be carried out in both school and home settings. On the IEP dated 10/97 (EXH. 16, pa. 100):

Malinda will respond to wh - questions in her everyday environment (with a note that this is for home and school and the persons responsible include speech pathologist, teachers and parents) (emphasis added).

In the IEP dated 10/97 (EXH. 19):

Malinda will increase her length and complexity of utterances by using various parts of speech in her everyday environment (also includes parent responsibility) (emphasis added).

Finally, in notifying the school prior to the last staffing in the Fall of 1998 (EXH. 31, pa. 170) the parents state:

G. Parent training - advanced sign language classes. Currently Faith Baptist College offers advanced sign language classes. Parents want more training in Signing Exact English Sign Language. Parents would like training on how to educate a deaf child in reading, writing etc. Parents want to know what concepts Malinda needs for Kindergarten. Would like suggestions from team of how to educate parents.

In this Hearing it appears that the parents were recently offered information on sign language classes offered by the AEA and LEA (Test. of Jim Doyle, 1910-12, Tom Mitchell 567-69). Despite these recent offers it appears that Malinda's parents had both expressed an interest in sign language classes over an extended period of time and that her program was built, in part, around the assumed competencies the parents were acquiring with their sign language classes. For these reasons it seems appropriate that the Ankeny Schools and/or Heartland Area Education Agency do bear a responsibility in relation to the cost of such classes.

The provision of auditory training in this case relates to the provision of the speech and language services that Malinda's parents have paid for to supplement those services provided by the schools. The essential question here would seem to be the extent to which these services are required in order for Malinda to benefit from her program. Were these services a part of securing FAPE for her or were they considered "above and beyond" such a criteria. This would almost return to the notion of the difference between "an" appropriate program versus the "most" appropriate program. According to the Appellants the Appellees limited the intensity of one-to one speech and language services provided. According to their Hearing Brief (p. 45):

. . . having failed to evaluate Malinda's capacity for speech and her need for intense one-on-one therapy, the Appellees left a void that the parents were forced to fill to meet Malinda's needs. Thus, Lisa Taylor (private speech pathologist) began "fundamental" work on teaching articulation in 1996, and the Appellees did not even develop articulation goals until January of 1998 . . .

Malinda has been receiving speech pathology services beyond those provided directly by the Area Education Agency. Her IFSP (EXH. 4) from May, 1996 list speech pathology services of the Children Therapy Services. More recently, in the Fall of 1997, Malinda's father wrote a letter to the AEA (EXH. 61) expressing his desire to be reimbursed for out-of-pocket payment for speech services:

Our daughter, Malinda J., had an IEP meeting on Wednesday, November 19, 1997. During that meeting there was a discussion regarding speech therapy services that our daughter should receive during the coming year. In particular the frequency of visits and the length of each visit. Phil Swift, a member of our IEP team, went through some explanation as to how services are determined. The disturbing part of his explanation was that he considers any private speech therapy services in his determination. . . .

This letter went on to request reimbursement for parentally paid speech pathology services. There is no record of a response to this request nor is there an data indicating that the IEP team in subsequent meeting dealt with this request. The record does reflect (Trans. of May 27, 1998 meeting) that Malinda's parents continued to advocate for an increased intensity of speech services. It should be noted that at the 5/98 IEP meeting (EXH. 25) that Phil Swift, the speech and language pathologist, increased direct speech services for Malinda from 240 minutes per month to 360 minutes per month. Perhaps more significant is the fact that when Malinda entered the Lucas School program in the Fall of 1998 (EXH. 31) the record indicates that she was receiving 480 minutes of speech services per month.

This pattern of parental requests, a record silent in response to such requests and a dramatic increase in the provision of such services recently leaves the impression with this ALJ that Malinda did indeed require the intensity of services made possible only through the willingness of the parents to purchase such supplemental services themselves.

### **Procedural Issues**

It is clearly the intent of IDEA and state statutes governing the selection of instructional settings for students with disabilities that the IEP team first determines the needs of a student with disabilities and only then determines the settings in which such needs can best be met. This leads to a presumption for serving a student as close to home as possible but also allows for those situations in which a students complex needs require that the student be served in a specialized setting beyond his/her regular classroom, attendance center or even district of residence. As stated by Dr. William Lepley (1990), former Director of Education in Iowa stated:

When making placement decisions, staffing teams must first consider the student's neighborhood school. If that is not possible, then a self-contained classroom placement in a school as close as possible to the student's

neighborhood school must be considered with emphasis on integration which meets the needs of the student.

It is also important to recognize that the IEP team, as a team, is expected to make the decision as to the setting in which a student's educational needs can be met.

The Code of Federal Regulations (34 C.F.R., Appendix C - Questions 26) state the expectations regarding parental participation in the IEP process. Under the purpose of the IEP process the following purpose is stated:

Communication: The IEP meeting serves as a communication vehicle between parents and school personnel, and enables them, as equal participants to jointly decide what the child's needs are, what services will be provided to meet those needs, and what anticipated outcomes may be. (emphasis added)

While we must assure that the parents have truly been equal participants in the IEP process it is also clear that the intent is not there for the parents to act outside of the team in deciding the setting in which the child's needs can be met. As stated by a U.S. District Court in Colorado in 1994 (Urban v. Jefferson County School District, 21 IDELR 985):

The logical consequences of the parents dictating where the child will receive educational and transitional services is obvious and manifold-- school districts would no longer be able to convene IEP staffings or develop programs with any control over the utilization or allocation of resources. They would instead have to react to parental demand concerning location, and presumably also the content of their educational or related services. Such consequences would result in financial constraints which would totally frustrate the underlying purpose of the IDEA. (991)

The issue of choosing a centrally based specialized program and the relationship of such a decision to true individualization was addressed by the U.S. Court of Appeals, Fourth Circuit in 1991 (Barnett v. Fairfax County Sch. Bd., 17 EHLR 350). In this case the Court concluded the following if they accepted the notion that it was inappropriate to use such programs:

Adopting plaintiffs' position would require us to intrude upon the educational policy choices that Congress deliberately left to state and local school officials. Whether a particular service or method can feasibly be provided in a specific special education setting is an administrative determination that state and local school officials are far better qualified and situated than are we to make. Moreover, we believe that when devising an appropriate program for individual students, a school system may consider the feasibility of such a program . . .

One final note. The five days of this hearing brought forth an abundance of information regarding the determined efforts of all parties to design a program to meet Malinda's needs and help assure that she can succeed in life. Malinda has two parents who are deeply committed to advocating for her and providing the necessary supports to help overcome the challenges associated with a significant disability. They have been ably represented in these proceedings. School personnel from both the local and area education levels have consistently demonstrated their intense commitment to meeting Malinda's needs. They also have been ably represented. These five days demonstrate how significant differences

of opinion may occur among a number of persons, all committed to a common goal. This common commitment is Malinda's future.

### III. Decision

Because of the complexity of this Hearing this ALJ will comment on each of the issues separately.

On the first issue of the sign language system used with Malinda the District and AEA prevail. This ALJ does not conclude that the differences between the family and school rise to the level that compromises Malinda access to a free, appropriate, public education as assured under the IDEA and comparable state requirements. After extensive review of the materials generated around these proceedings he further believes that, in this case, the choice of sign system is a methodology issue to be decided by school personnel in cooperation with parents.

On the second issue of assistive technology (hearing aids and FM system) the District and AEA prevail. It would appear that Malinda is being provided the assistive technology required in order for her to receive FAPE. It also appears that this was provided by the district in a timely manner when such needs were identified through the IEP process with supportive information being provided through other outside sources.

On the issue of the adequacy of Malinda's IEP this ALJ concludes that any inadequacies in the process or products associated with the IEP do no rise to a level that jeopardizes educational benefit. The uneven progress profile emerging across Malinda's goals and objectives could be attributed to the process of securing an appropriate setting to deliver her program that includes changing personnel, setting and curriculum. It would seem important to follow this progress profile after Malinda has been in the Lucas program over an extended time. The process of addressing Malinda's needs through the IEP process, including the consideration of goals in the expressive and receptive language areas would appear to have been dealt with in an appropriate process. In summary, it is this ALJ's opinion that both the procedural and substantive components of the IEP process and product have been followed in this case and the District and AEA prevail on this issue.

On the issue of providing sign language classes for the parents the parents prevail. It is expected that the parents will be reimbursed for classes they have taken up to the point of this Hearing and that the ongoing need for such classes that enable Malinda's parents to continue their active role in assisting in the achievement of her IEP goals will be provided by the district and AEA.

On the issue of reimbursement for speech and language services the parents prevail. It appears to this ALJ that the intensity of these services leading up to the Lucas placement were influenced by issues related to available resources rather than Malinda's needs. This ALJ agrees with the parents assertion that it is not fair that the services they are purchasing themselves factors into decision making regarding the level of services to be provided.

On the issue of least restrictive environment (LRE) the District and AEA prevail. This ALJ believes that the decision regarding the proposed setting for services for Malinda was determined based on a strong data base of professional opinion and the specific individual needs that have been described for her on the basis of evaluation information from AEA staff and is consistent with evaluation information from outside sources including the Iowa Center and the Central Institute for the Deaf. It appears to this ALJ that an array of options have always been considered for Malinda and that the conclusion that she requires the programs and services offered at Lucas School are based on her needs rather than

bureaucratic or administrative factors. The Lucas program seems appropriate at this time. Obviously there is an ongoing responsibility to monitor the outcomes and progress associated with this program with the hope that Malinda's needs may eventually be met in a less restrictive setting.

On the due process issue of Malinda's placement decision overriding the discussion of her needs the District and AEA prevail. This case illustrates an ongoing consideration of the Lucas program for a number of years and a changing profile regarding the point at which this program would serve her needs. Such a record does not, in this ALJ's opinion support the notion that Malinda was placed in a unilateral manner without consideration of her needs.

Carl R. Smith  
Carl R. Smith, Ph.D.  
Administrative Law Judge

April 19, 1999  
April 19, 1999