

CHILDREN WITH SENSORY IMPAIRMENTS AND SPECIAL EDUCATION ISSUES

*By William L.E. Dussault, Esq
Law Office of William L.E. Dussault*

Within the panoply of special education conflict, due process hearings and litigation, services for and cases involving children who experience sensory impairments have formed their own peculiar subset of issues and precedent. Seldom do we see cases for this group of children involving categorical definition or evaluation. Placement and in particular, methodology or educational approach has been the major focus. This paper will explore the basic statutory and regulatory requirements, relevant changes in IDEA through the 1997 Amendments and selected trends in the methodology debate for children with sensory impairments.

For purposes of this article I will define children with sensory impairment as those who are deaf-blind, deaf, hearing impaired, and visually impaired including the blind. There are other children, particularly in lower incidence disability categories that will also experience sensory impairments. A district will need to be particularly aware of children who experience various types of neurological impairments that result in hyper- or hypo- arousal to sensory input, including children with autism spectrum disorder. These might include children who are sensitive to noise, touch, smell or taste. Children who have allergic sensitivity to items commonly used in the schools such as chalk or ink, or children who are impacted by “sick building syndrome” particularly with newly constructed school buildings all have issues in areas of sensory impairments that are newly developing. The medical and scientific communities are far from even a beginning consensus on how to deal with these concerns. As the concerns arise, the district will need to take a highly individual approach to each case, involve appropriate medical personnel and make individual accommodations. Many of the children with these types of sensory problems may fall within the protections of Section 504 of the 1973 Rehab Act or the Americans with Disabilities Act. Coordination between special education personnel and District 504/ADA compliance officials will be necessary to properly serve these children. However, these children or issues are not the primary focus of this piece.

I. Statutory Framework Regarding Sensory Impairments

A. 20 USC 1401(a)(1); 34 CFR 300.7(a)(1)

“The term “child with a disability” means a child evaluated as having . . . a hearing impairment including deafness...a visual impairment including blindness . . . who by reason thereof requires special education and related services.”

B. 34 CFR 300.7(c) Definitions of terms.

(2) “Deaf-blindness” means concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational problems that they cannot be accommodated in special education programs solely for children with deafness or children with blindness.

(3) “Deafness” means a hearing impairment that is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification that adversely affects a child’s educational performance.

(5) “Hearing impairment” means an impairment in hearing, whether permanent or fluctuating, that adversely affects a child’s educational performance but that is not included under the definition of deafness in this section.

(13) “Visual impairment including blindness” means an impairment in vision that, even with correction, adversely affects a child’s educational performance. The term includes both partial sight and blindness.”

(1)(i) “Autism” means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age 3, that adversely affects a child’s educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and UNUSAL RESPONSES TO SENSORY EXPERIENCES (emphasis added).

C. 34 CFR 300.24 Related Services.

(1) Audiology includes – (i) identification of children with hearing loss; (ii) determination of the range, nature, and degree of hearing loss, including referral for medical and other professional attention for the habilitation of hearing; (iii) provision of habilitative activities, such as language habilitation, auditory training, speech reading (lip reading), hearing evaluation, and speech conservation; (iv) creation and administration of programs for prevention of hearing loss; (v) counseling and guidance of children, parents, and teachers regarding hearing loss and (vi) determination of children’s needs for group and individual amplification, selecting and fitting an appropriate aid, and evaluating the effectiveness of amplification.

(6) Orientation and mobility services – (i) means services provided to blind or visually impaired students by qualified personnel to enable those students to attain systematic orientation to and safe movement within their environments in school, home and community, and (ii) includes teaching students the following as appropriate: (A) spatial and environmental concepts and use of information received by the senses (such as sound, temperature, and vibrations) to establish, maintain, and regain orientation and line of travel (e.g. using sound at a traffic light to cross the street); (B) to use the long cane to supplement visual travel skills or as a tool for safely negotiating the environment for students with no available travel vision; (C) to understand and use remaining vision and distance low vision aids; and (D) other concepts, techniques and tools.

D. 34 CFR 300.346 Development, review, and revision of the IEP.

(a)(2) Consideration of special factors: “The IEP team shall –

(iii) in the case of a child who is blind or visually impaired (the IEP shall provide for instruction in Braille and the use of Braille unless the IEP team determines, after an evaluation of the child's reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the child's future needs for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the child;" No specific reference to the use of Braille as a communication medium appeared previously in either EHA or IDEA. To a significant degree this legislatively resolves any methodology dispute concerning Braille. Braille now must be considered first for all children who are blind and the IEP team must make a determination that it's use is not appropriate.

(iv) addresses the issue of communication needs for children who are deaf or hard of hearing. It states that the IEP team shall "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;"

While subsection (iii) gives some substantive direction regarding the methodology dispute for children with visual impairments and blindness on the use of Braille, subsection (iv) provides little substantive guidance on the issue of what type of communication methodology is to be used for children who are hard of hearing or deaf. Subsection (iv) does little more than frame the elements of the typical disputes in deaf education cases with no real direction as to how the dispute is to be resolved.

(v) the IEP team shall "consider whether the child requires assisted technology devices and services". Since the inclusion of the assisted technology provisions in IDEA in 1990, this requirement has been implicit in the Act. The new obligation on the IEP team to consider assisted technology makes the implicit requirement explicit. By including it in the section of special factors that appear to be related primarily to children with hearing or visual impairments, it suggests the requirement that the school district may need to expand its inventory of assistive technology devices. It may now be much more common place to see districts' being required to provide Kurzweil readers, Opitcons, dictation machines and tape recorders, specially adapted computers with dictation software and increasingly sophisticated FM amplification systems. These devices are available on the market to individuals within the sensory impairment categories, but are seldom provided through school district assisted technology programs at the present time.

(c) Statement in IEP – the federal regulations make it quite clear that if any of the special considerations in this section are determined by the IEP team as

needed by the child in order to receive FAPE, such services or particular devices (including an intervention, accommodation, or other program modification) **MUST BE INCLUDED** or described in a statement in the child's IEP.

(E) 34 CFR 300.380 Comprehensive System of Personnel Development

While the 1997 Amendments eliminated the discretionary programs as they were previously codified, some discretionary authority pertinent to children with impairments remains. In section 673 dealing with personnel preparation, subparagraph (b) references low incidence disabilities and authorized activity. It provides that the Secretary of the Department of Education may issue grants under paragraph (2)(D) for "preparing personnel who provide services to visually impaired or blind children to teach and use Braille in the provision of services to such children." Section (2) (E) authorizes grants for "preparing personnel to be qualified educational interpreters, to assist children with disabilities, particularly deaf and hard of hearing children in school and school related activities and deaf and hard of hearing infants and toddlers and preschool children in early intervention and preschool programs." Section (3) under the definition of low incidence disabilities at paragraph (A) defines a visual or hearing impairment or simultaneous visual and hearing impairment as a low incidence disability. Section 673(b)5 specifically addresses preparation in the use of Braille requiring that "the Secretary shall ensure that all recipients of assistance under this subsection who will use that assistance to prepare personnel to provide services to visually impaired or blind children that can appropriately be provided in Braille will prepare those individuals to provide those services in Braille." Since there has not previously been a specific federal requirement that children who are blind or visually impaired be served with Braille, the grants for personnel preparation in this area will become extremely important. It is reasonable to assume that there is a shortage of teachers who are qualified to provide education to children who are blind and visually impaired in the area of Braille. During the time that that teacher backlog remains a problem providing Braille education and material to blind or visually impaired students may be difficult for local education agencies.

Section 681 of the Reauthorization Bill deals with the development of a national technical assistance support and dissemination network. Subparagraph (b)(5) requires that "the general welfare of deaf and hard of hearing individuals is promoted by-(A) bringing to such individuals understanding and appreciation of the films and television programs that play an important part in the general and cultural advancement of hearing individuals; (B) providing, through those films and television programs, enriched educational and cultural experiences through which deaf and hard-of-hearing individuals can better understand the realities of their environment, and (C) providing wholesome and rewarding experiences that deaf and hard of hearing individuals may share." LEA's who serve deaf and hard of hearing individuals will need to resort to this national technical assistance

program to obtain the materials necessary to meet these requirements at the earliest possible opportunity.

Section 685 provides for coordinated technical assistance and dissemination through institutes, regional resource centers, clearing houses, and programs that support SEA and LEA programs. Under subparagraph (c) specialized technical assistance is authorized which includes “(2)(B)(i) assistance “to schools and agencies serving deaf blind children and their families” and “(2)(C) to address the post secondary education needs of individuals who are deaf or hard of hearing.”

In section 687 the Secretary is authorized to make grants and to enter into contracts and cooperative agreements for technology development, demonstration, and utilization. Included within those activities is (b)(2)(E) “Supporting the implementation of research programs on captioning or video description.” Section 687 (c) describes educational media services which the Secretary is required to support

- “(2) providing video description, open captioning or close captioning of television programs, videos or educational materials through September 30, 2001; and after fiscal year 2001, providing video description, open captioning, or close captioning of educational, news, and informational television, videos, or materials;
- (3) distributing captioned and described videos or educational materials through such mechanisms as a loan service;
- (4) providing free educational materials, including text books, in accessible media for visually impaired and print disabled students in elementary, secondary, post secondary, and graduate schools;” and
- (5) “providing cultural experiences through appropriate non-profit organizations, such as the National Theatre of the Deaf, that-(A) enrich the lives of deaf and hard of hearing children and adults; (B) increase public awareness and understanding of deafness and of the artistic and intellectual achievements of deaf and hard of hearing persons; or (C) promote the integration of hearing, deaf, and hard of hearing persons through shared cultural, educational and social experiences; . . .”

The obligations of the Secretary in part D clearly evidence Congress’ intention to provide a greater range of services and options for children with sensory impairments through more focused personnel preparation, technical assistance, information dissemination, technology development and cultural development.

The amendments in the Reauthorization Bill that are directly relevant to children with sensory impairments demonstrate that their national advocacy groups were very effective in their lobbying efforts. It would be reasonable for SEA’s and LEA’s to assume that the success experienced by the advocates

representing children with sensory impairments in the legislative arena will now be turned to implementation of the new provisions contained in the Act.

II. Educational Methodologies

Questions of competing education methodologies have arisen with respect to the education of children in many different disabling categories. For example, for children in the category of learning disability it has not been unusual to see conflicts over whether a Slingerland approach is better than an Orton-Gillingham approach or some other Direct Instruction methodology. In the area of autism there is certainly newly developing conflict in methodology between various approaches including the Lovaas Method, the TEACH Method, Applied Behavior Analysis, facilitated communication (FC) etc. But conflicts over methodology have been most heated and are at the center of the vast majority of the cases for children who are deaf/hearing impaired and for the visually impaired.

A. Blind/Visually Impaired Students

The 1997 Amendments to the related services definition, including orientation and mobility services, and to the IEP requiring consideration of "Special Factors" including Braille services (unless determined to be inappropriate) may have resolved some of the underlying debate about the appropriate approach to use when educating visually impaired or blind children. However, while the substantive methodology question may have been resolved for the blind or visually impaired child, the implementation issues have not been resolved at all and may in fact become extremely difficult. The difficulty will arise because of the lack of available trained personnel to provide these services at the LEA level. The expense of transfer of educational material to a Braille media and the lack of well qualified and experienced educators who are capable of teaching both Braille and orientation and mobility are going to be problems for districts. Districts will have to gear up rapidly to meet this challenge as both Braille and O & M services will need to be considered for all blind and visually impaired students.

There will also be the challenge and concomitant expense of providing access to currently available technology for these students. Computers and software applications are currently available that allow for direct dictation to a computer. Readers, reader devices and computer programs also allow a much greater use of written language by individuals who experience blindness or visual impairments. These technical applications are available, but expensive. Local school districts are certainly going to have to expand their access to technological devices if they are to properly serve these students.

One area yet to be mentioned for students who are blind or visually impaired is training in the use of a guide dog. The advisability of this method of assistance in orientation and mobility remains the subject of some debate both within and between the two major national advocacy organizations for the blind, the National Federation for the Blind and American Counsel for the Blind. It is possible that a guide dog could be considered an adaptive technology for the blind (though no such argument has yet been made in Court to my knowledge). However, it is far more likely the claim will soon be made that orientation and mobility training should include training in the use of a guide dog.

B. Issues for Children who are Deaf or Hard of Hearing

There is much less legislative resolution on methodology disputes for children in this area. The 1997 Amendments' inclusion of communication needs for a child who is deaf or hard of hearing within the special factor section of the IEP outlines the issues to be considered, but does not provide specific direction on how conflict over those issues should be resolved as it did for the blind or visually impaired through a reference to Braille. This area of conflict has been complicated by a tendency to oversimplify the issues. Opposing parties often frame the conflict as a debate between a "total communication" approach or an "oral/aural" approach. In fact the methodology conflict is much broader than that.

Let us start by defining some of the critical terms. The National Association of State Directors of Special Education (NASDSE) in 1996 published Educational Service Guidelines for deaf and hard of hearing students. The Guidelines are a result of the cooperative efforts of all of the major organizations holding a position in the deaf education methodology dispute. The Guidelines define Total Communication as "a philosophy of communication which employs a combination of components of oral and manual teaching modes using sign, lip reading, finger spelling, use of residual hearing, speech and sometimes cued speech." Oral education is defined as "a philosophy of teaching deaf and hard of hearing individuals to make efficient use of residual hearing through early use of amplification to develop speech and to use speech reading skills."

A simplified statement of the argument in favor of total communication is that it relies on a system of manual/signed communication to develop early language skills. This allows the student to increase the content of his or her learning. Speech will come later once basic language skills have been developed. A corollary of the argument is that reliance on only spoken language may deprive that student of the richness of early language development.

The proponents of an oral only approach argue that the children in a total communication environment where manual language systems are used rely primarily on the manual or signed English methodology and do not learn to develop their residual hearing. Reliance on the manual approach is said to hinder future development of written language and to restrict the child's ultimate inclusion in a society that relies on spoken language. There is no clear consensus in the deaf education community as to which approach is better and whether the claims of either side are correct or not. There is a great deal of dispute on research and research findings provided by proponents of each methodology.

This does not represent the only conflict within the field. There are also significant arguments that "total communication" is not in fact "total" in that it relies heavily on signed manual forms of communication to the exclusion of the development of oral language. There are also significant arguments as to which signed or manual languages to be used. In fact there are at least three commonly used manual language systems.

- a) Pigeon signed English or PSE; while maintaining English syntax (word order) PSE incorporates more conceptual signs that clearly do not follow direct written English.

- b) Signed Exact English; This is the closest parallel to written English. Even with Signed Exact English it is common to see word endings, contractions, plurals, conjunctions and prepositions dropped.
- c) American sign language. This is not a direct parallel to written English. It has a vocabulary and syntax all its own. A student would learn ASL as a basic language (L-1), then learn written English as a second language.

There is also a relatively new educational approach that has been adopted by certain portions of the deaf “community” known as the bilingual/bicultural approach (bi/bi). It reflects an intent to recognize the deaf as a separate cultural community. American sign language is the language of instruction and English is approached both in written and spoken form as a second language. Deafness becomes a cultural attribute and not a disability.

The conflict in cases involving the provision of a free and appropriate public education to children who are deaf or hard of hearing has thus become much broader in implication than involving only questions as to which general methodology to use, total communication, oral aural or bi/bi. We are now also asked to resolve questions of cultural respect, “heritage”, identity within a discrete and separate “community” and specific language usage.

Perhaps the best guidance on how to work through these issues is found in the NASDSE guidelines referenced above. At page 23 of the guidelines the authors state “ensuring that placements are made on an individual basis is vital and will require an LEA to have available various alternative placements in addition to the regular education environment.” They recommend that the IEP placement committee should consider the following factors: “communication access, child’s preferred language or mode of communication, social and emotional development, degree of hearing loss, opportunities for instruction through direct communication, interpreter quality and availability, availability of peers who are deaf or hard of hearing, academic level, qualifications of personnel, access to support services, cultural and linguistic needs, availability of technology, parental choice and child’s placement preference, and language abilities of the child.” On page 38 the guidelines note “since assessment should be conducted using the student’s primary language and preferred communication mode at all times the assessment will normally begin with a careful non-ideology based analysis of the student’s language and preferred mode of communication.” The guidelines also specifically reference Federal policy guidance developed by the Office of Special Education and Rehabilitative Services in the Federal Register October 30, 1992. This policy was re-issued in a memorandum form on February 4, 1994 to all chief state school officers by the Office of Special Education Programs, (Tom Hehir, 1994).

Page 50 of the guidelines indicates that “educators should consider and support the placement preference of the student, parents, and family . . . A knowledgeable and involved parent is essential to any child’s development . . . The opportunity to interact socially with similarly aged peers with whom a child can communicate both freely and easily is an important component of natural childhood development. Members of the IEP team must understand clearly the importance of these out of school hours . . .” An additional resource to consider

is an article by Barbara Goldberg entitled Families Facing Choices Options for Parents of Children who are Deaf or Hard of Hearing in the May 1995 issues of ASHA.

It is unfortunate that educational and scientific research on issues of educational methodology for children who are deaf or hearing impaired do not result in any clear consensus. Many articles can be found supporting either side of the debate. With no clear cut winner on either side, expert witnesses can point to defects in the statistical analysis, survey procedure or sampling approaches in either side's material. For example, one could compare the conclusions reached in an article by Susan M. Knell and Elizabeth A. Klonoff entitled Language Sampling in Deaf Children: A Comparison of Oral and Signed Communication Mode in the Journal of Communication Disorders number 16 (1983), pages 435 - 447 with a similar study done by Kenneth E. Brasel and Stephen P. Quigley which was reported in an article entitled Influence of Certain Language and Communication Environments in Early Childhood on the Development of Language in Deaf Individuals published in the Journal of Speech and Hearing Research Volume 20:95-107 (1977). The former article reports that children in the oral group perform significantly better on a number of tasks than children in a total communication group, while the later reports that "the two manual groups (of children) performed significantly better than the two oral groups on every test measure employed."

The arguments that are typically made is that one methodological approach is "better" than the other. A "better than" approach is nearly always going to fail since we know from the Rowley decision that an appropriate education does not need to be the "best" approach, merely one that has a reasonable probability of providing educational benefit.

Attached to this article as exhibit 1 are excerpts from a Memorandum Decision on a Special Education Due Process Appeal to Court reached by King County Superior Court Judge Warren Chan in November of 1980 (case #79-1-02311-6). The case involved two young girls ages 11 and 9 who had several years experience in one school district in an oral/aural program before moving to another school district which attempted to place the children in a total communication program. The parents disagreed and placed the children in a private educational program. The excerpts from the Opinion note the Judge's reasoning in determining that the private oral/aural program was the appropriate program.

Attachment 2 includes excerpts from a Decision reached in July of 1986 by Administrative Law Judge Janice A. Grant of the Office of Administrative Hearings for the State of Washington Superintendent of Public Instruction in cause number 86-16. In this case hearing impaired parents sought to place a hearing impaired daughter at a private educational facility in St. Louis, Missouri which uses an oral/aural program rather than a school district's proposed total communication program. The Judge found in favor of the total communication program.

Attachment 3 references a case decided by Administrative Judge William Lemke in 1992. This is actually a series of cases that came before the Judge over

a period of several months. It reflects the debate over which manual language is to be used by this child. On page 2 of his Decision the Judge notes “agreement on the mode of sign language is essential to development of a number of the aspects of the child’s IEP. The parties are at an impasse on this issue.” The Judge went on to formulate a structure for how the decision on which language should be reached, but did not reach the decision itself.

Attachment 4 includes excerpts from a brief prepared by Lawrence B. Ransom and presented in the State of Washington Administrative Special Education cause number 96-85 in which a Decision was reached in May of 1997. Excerpts from the Decision will also follow. The excerpts from Mr. Ransom’s brief outline the various cases discussing the “total communication” approach and the “oral/aural” approach. In addition to the cases cited by Mr. Ransom, we would also note a decision reached in O’Toole vs. Olathe Dist. School Unified School District No. 223, 963 F.Supp 1000(D.Kan.1997) in which the Court rejected a parent’s claim that a child should be placed in a private oral program rather than a school district program where the child would be mainstreamed in non-academic areas and taught utilizing sign language. Again the Court focused on the methodological dispute and found in favor of the district on the basis that the district complied with both the procedural and substantive requirements of the Act.

Attachment 5 is an excerpt from a brief prepared by this author in the same special education case in which Mr. Ransom’s brief was presented. In order to avoid the methodological conflict, we outlined the history of that conflict and attempted to couch the argument in terms of the long-term intent of education. We suggested that the purpose of education is to provide a child with the ability to inter-relate and communicate with the typical “mainstream” society. By teaching a signed approach you inherently restrict the child’s ability to communicate with that mainstream society. Judge Chan found this argument persuasive in the Appeal that was presented to him (see above).

The excerpts found in attachment 6 reflect the conclusions of law drawn by Administrative Law Judge Mary Radcliffe after hearing the testimony and arguments on which the previous briefs were submitted.

III. Conclusions

For those children who fall within the sensory impairment categories of blind or visual impairments many of the disputes on methodologies have at least initially been resolved by the Amendments to IDEA and their accompanying federal regulations requiring the implementation of orientation and mobility services as a related service and requiring the consideration of Braille as the prima facia method of providing education to children who are blind or visually impaired as part of the IEP. The burden will now be on the school district to demonstrate why Braille is not appropriate for the child rather than on the parent or advocate for the child to demonstrate why Braille should be provided.

For children who are deaf or hard of hearing no such resolution is proffered by the 1997 Amendments or the accompanying federal regulations. The methodology disputes will continue and must be based on a careful analysis of each child’s needs. Unless it can clearly be demonstrated that the child has been using one particular approach over an extended period of

time with some significant success and a district is now proposing to change that approach with no clear basis, it is likely that school districts be able to continue to offer the programs they currently have available rather than the programs that are individually appropriate to the child's needs. In terms of placement, it is also important to understand that there is no exception to the LRE requirements of the IDEA for deaf children. Although at various times it has appeared that the federal OSEP endorsed the placement of deaf students in state schools for the deaf or other segregated placements, the LRE requirements and considerations for deaf children are the same as for all other children with disabilities. The issue of "deaf culture" has been recognized by the federal OSEP, but it has not been addressed in special education law. Proponents of a separate system of education for deaf students continue to argue that while a regular education placement may offer the most opportunities for interaction with nondisabled students, it may also be the most isolating placement for some deaf students. By contrast, residential facilities for hearing-impaired students may offer considerably more opportunity for communication, socialization and participation with peers. Again, a determination of placement must be made for each deaf or hard of hearing child on an individual basis, with consideration of the least restrictive environment preference.

IV. Resources

The State of Washington has a program funded by U.S. Dept. of Education and the Office of the Superintendent of Public Instruction called the Washington Sensory Disabilities Services (WSDS). Through a combination of federal and state grants, this agency provides services at little or no cost to families and school districts. Services include information and referral, training for families and professionals, consultation regarding individual children, support for families, technical assistance and other resources to student birth to age 21 with sensory disabilities, including students who are deaf, hard of hearing, visually impaired, blind or deaf-blind. These services are available state-wide. WSDS works in collaboration with the Washington State School for the Blind and the Washington State School for the Deaf. Website: wsdsonline.org

The Washington State School for the Blind and the Washington State School for the Deaf are both located in Vancouver, Washington and provide residential as well as outreach services to families and school districts.

The Special Education Technology Center is located at Central Washington University in Ellensburg, Washington. Services include information and referral, assessment, training, and a lending library of equipment and materials. (509) 963-3350

