

Will the Courts Go Bi-Bi? IDEA 1997, the Courts, and Deaf Education

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ABSTRACT: *An innovative instructional philosophy in the field of deaf education—bilingual-bicultural (bi-bi) education—is likely to raise new questions for courts to consider in interpreting the Individuals with Disabilities Education Act. This article reviews past litigation concerning the education of children who are deaf or hard of hearing and explores the new language of IDEA '97 as it affects communication issues for these children. Arguing that IDEA '97 and the 1999 implementing regulations make it more difficult for schools to ignore the primary language and preferred mode of communication of children who are deaf, the authors speculate that courts may be less likely to view language and communication modes as educational methods and, therefore, less likely to defer to the decisions of school authorities than in past court cases.*

An innovative instructional philosophy in the field of deaf education—bilingual-bicultural (bi-bi) education—may bring a new question before the courts. This fairly new and often controversial educational approach in the field of deaf education involves exposure to and acquisition of two languages, American Sign Language (ASL) and English. It also involves exposure to and involvement in two cultures, the Deaf culture and the Hearing culture (capitalization of the “d” in the word deaf refers to a culture and community in which ASL is the language of interaction and the rules of the culture surrounding the language are observed). Bi-bi involves using ASL as the primary, and often sole, lan-

guage of interaction in the first 6-7 years of life with children who are deaf and exposing children to all aspects of Deaf culture (Paul, 1987).

Undoubtedly, the issue of how best to educate a child who is deaf whose primary language of interaction is ASL and who has had limited exposure to English will stir up a variety of challenges for educational systems that are currently accustomed and prepared to teach children who are deaf using methods that are English-based. It is likely that these challenges will result in debate about the methods used to educate the child who is deaf whose native language is ASL. If this debate finds its way into the court system, how will the issue be analyzed in light of the Individuals with Disabilities Education Act Amendments of 1997 (IDEA '97)?

In previous litigation the federal courts have generally taken a "hands off" approach when it comes to mandating a particular method of instruction for children who are deaf. At the same time, the courts have also ruled against educational discrimination in the public schools toward children whose primary language is not English (e.g., *Castaneda v. Pickard*, 1981; *Lau v. Nichols*, 1974;). But how might a plaintiff approach the courts when debating how to provide a free appropriate education to a child who is deaf and whose native language is ASL, a language that has no written or spoken form? How might the courts rule on such a case in light of their past decisions and the new language of IDEA '97?

It is likely that these challenges will result in debate about the methods used to educate the child who is deaf whose native language is ASL.

This article reviews past litigation concerning the education of children who are deaf or hard of hearing and explores the new language of IDEA '97 as it affects communication issues for these children, all with the purpose of speculating about the future influence of IDEA '97 on the courts in terms of children whose native language is ASL. Part I of the article provides a brief history and background of deaf education in the United States. Part II examines the judicial history surrounding the deaf education debate. Part III discusses IDEA '97 as the amendments relate to issues surrounding the education of children who are deaf or hard of hearing, including children who are ASL users. Part IV concludes with implications and aspirations based upon the information in the article.

HISTORICAL BACKGROUND

The formal education of children who are deaf began in the United States in the late 1800s, when Thomas Hopkins Gallaudet brought French Sign Language to the United States. Gallaudet was instrumental in bringing together a

large number of children who were deaf to be educated at a new school, the American School for the Deaf and Dumb (Gannon, 1981). These children brought with them a variety of home-made signs. These home-made signs, combined with the French Sign Language to which these children were exposed, began to transform into a new and different language that came to be known as "The Sign Language." Gallaudet convinced legislators that children who were deaf could learn when given the opportunity to be educated using sign language. As a result, college programs were created that would prepare teachers to educate children who are deaf, and schools for the deaf began to be legislatively mandated in most states (Gannon). These state schools for the deaf came to be seen as a haven by individuals who were deaf. The school for the deaf was home, a place where children who were deaf could freely communicate using sign language, a visual-spatial language that was developed by individuals who were deaf.

THE ORAL VS. MANUAL DEBATE

In September 1880, the second International Congress of the Education of the Deaf was held in Milan, Italy. This conference brought a change in the methods used to educate children who are deaf throughout the world when participants voted against the use of sign language in educational programs (Gannon, 1981; Winefield, 1987). Educators, including many American educators, were convinced that educating a child who is deaf using sign language was an injustice because sign language was not a true language. In the opinion of educators at that time, sign language was just a system of gross gestures with which people who were deaf communicated. Educators felt that in order for children who were deaf to be educated well, they must learn to speak and use the language of the hearing. In the United States, as in most countries, the oral method became the primary method of instruction for educating children who were deaf or hard of hearing. Sign language, however, was alive and well among deaf people. Even at institutions where oral methods of education were being used, sign language was often the so-

cial language used among the deaf students in attendance (Winefield).

Although sign language was still present in the educational system, it became the "wicked stepchild" of deaf education (Gannon, 1981). Children who "failed" to be educated with oral methods were placed in classrooms using sign language. Sign language was still not thought to be a true language by either hearing or deaf individuals. The work of linguist William Stokoe changed all that. Stokoe took an interest in sign language after working at Gallaudet University in Washington, D.C., the only liberal arts university for the deaf in the world. His research revealed that the sign language used by deaf individuals in the United States was indeed a language (Stokoe, 1960). Stokoe was able to identify syntactical and grammatical foundations of sign language that were the equivalent of English and all other spoken languages. His groundbreaking research brought new interest and intrigue to the language of the deaf. What was once called "the Sign Language" was now given a new name, American Sign Language (ASL).

Now educators of the deaf had a new component to consider when determining the best way to educate children who are deaf. Where did ASL fit into the picture of deaf education? ASL has no written or spoken form, and its grammatical structure looks nothing like English (Paul, 1996). Therefore, most educators felt that the recognition of ASL as a true language should have no effect on the way children who are deaf were taught, and until recently it has not. Most educators felt that English should continue to be the language of instruction since these children who are deaf lived in a hearing world where English skills held the key to success. Many professionals in the field of deaf education felt that Stokoe's findings had little impact on education issues (Gannon, 1981). Students continued to learn to use their residual hearing with the help of hearing aids, worked to achieve intelligibility in spoken English, and focused heavily on written English and lipreading to learn new concepts and ideas about the world.

THE DEVELOPMENT OF ENGLISH-BASED SIGN SYSTEMS

Many children who were deaf still struggled with learning English, especially those who had profound hearing losses. The move away from oralism as a panacea, and the increased interest in sign language in the 1960s, brought about the development of manual codes of English (Stedt & Moores, 1990). The feeling of the time was that children who are deaf needed a visual way to learn English. With this thought in mind, David Anthony, an educator of the deaf who was himself deaf, set out to develop a sign system that would present English in a visual, manual form for children who are deaf. His work and experiences while educating children who are deaf led him, along with a group of adults who were also born deaf, to develop the first manually coded English system (Gustason, 1983). The focus of their efforts was on developing a new system of signs that would represent English on the hands. By borrowing signs from ASL and creating new signs to visually represent portions of the English language, a new sign system was created (Luetke-Stahlman & Luckner, 1991). This visual representation of English was given the name SEE I, Signing Essential English. In 1971, fundamental differences among the members of the original Anthony group caused a split that resulted in two separate groups. Anthony went on to publish a two-volume series on SEE I, while the group that split off created, printed, and published their own system. This second system of manual English codes became known as Signing Exact English II, commonly known as SEE II (Gustason, Pfetzing, & Zawolkow, 1973). In time, signed English systems used simultaneously with spoken English and combined with the development of auditory and speech skills came to represent a philosophy of educating children who are deaf that was called total communication (Luetke-Stahlman & Luckner).

CUED SPEECH

In addition to the new English codes that were being developed with the intent of assisting children who are deaf in the development of English skills, an entirely different type of system was

being developed by Dr. R. Orin Cornett, the vice president for long-range planning at Gallaudet University. In 1966, Dr. Cornett created a new system called cued speech in an effort to combine the advantages of the oral approach with the benefits of visual/manual cues. The system is composed of eight different handshapes placed in four different locations around the face. These cues represent the syllabic and phonetic features of speech, and when combined with what is observable on the lips, are meant to create a full visible representation of spoken English to the individual who is deaf (Schwartz, 1996). Cornett envisioned his invention as a tool to be used in assisting individuals who are deaf in the development of spoken English; he did not develop it with the intention that it would become a substitute for sign language (Gannon, 1981). Nonetheless, it has been adopted as the primary mode of communication for some children and some programs educating children who are deaf or hard of hearing (Schwartz). It is seen as primarily an oral approach to educating children although it does incorporate manual cues.

BILINGUAL-BICULTURAL EDUCATION

As English cues and sign systems were being developed, adult users of ASL began to study the language that they embraced. In addition, ASL had been given the "stamp of approval" with the work of Stokoe, and individuals who were Deaf, as well as some hearing educators, began to ask why ASL was not being used in the education of children who are deaf. This new awareness of and interest in ASL as a language has led to the development of a new philosophy within the field of deaf education. For approximately 10 years, educators of the deaf have been experimenting with a new educational approach for children who are deaf. The educational philosophy behind the approach is called bi-bi, or bilingual-bicultural education. This term is nothing new to the world of general education, but in the realm of deaf education, bi-bi is a relatively new concept. The idea behind the bi-bi approach is that children who are deaf will be more successful at acquiring a first language, and in turn subsequent languages, if that first language is ASL (Walworth, 1990). ASL is a legitimate

language very different from English in its grammatical structure. According to the bi-bi approach, once a child has acquired fluency in ASL, that child can then receive formal instruction in English through spoken (if possible), written, and signed forms (using signed English systems). Beginning at age 6 or 7 and continuing through junior high and high school, children who are being educated with a bi-bi approach are exposed to English grammar and syntactical rules in a formal way through formal methods. English is learned as a second language, with focus on written English (Israelite, Ewoldt, & Hoffmeister, 1992; Stuckless, 1991). Children who are trained using a bi-bi approach will theoretically arrive at school with language competence; however, that language will not be English.

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The bi-bi approach is gaining support throughout the country. In 1999, 40 state schools for the deaf reported that they were offering educational support through the use of ASL ("Federal Reports," 1999). Although this does not mean that a true bi-bi approach is being used in these schools for the deaf, it does imply that they are seeing the value of ASL and are incorporating the language into the fabric of educational programs for children. At least 10 of these schools across the country have adopted bi-bi as a primary approach to educating children who are deaf and hard of hearing and provide this approach as an option to families of enrolled children (Strong, 1995). Many of these families are comprised of hearing parents who have chosen to learn and use ASL in their homes in addition to English, broadening the number of individuals who might now choose to be involved in an educational program that emphasizes the bi-bi approach (Strong & Prinz, 1997; Watkins, Pittman, & Walden, 1998).

What will happen when a child who is deaf whose parents have been providing her or him with an ASL-rich environment with little or no exposure to English in any form ends up in a public school setting where there is no ASL-to-English program in existence? Or what if the child ends up in a school district that provides an English-only approach for children who are deaf? How will the courts recognize bi-bi and deal with a dispute revolving around educational programming for a child who is deaf when the issue at hand is not one of modality (visual/manual or oral/auditory) by which *English* is presented to a child, as it has been in the past, but an issue of instruction in a different language, ASL?

Needless to say, educating children who are deaf can be an extremely controversial issue. This controversy, which began soon after the birth of formal education of the deaf in the United States, remains as a central focus in the field today. Not only are educational methods scrutinized and debated, but the decision of how best to communicate is also always at the forefront. The debate on what communication system is best for a child who is deaf is not only heated among educators but is often an emotionally charged issue between parents and educators. The child with a hearing loss often struggles, not because of educational methods per se, but because of *communication* methods used in the classroom and the linguistic barriers that often result. Educational systems and parents frequently are at odds when it comes to a decision about philosophical approaches, such as an aural-oral approach or a total communication approach; a decision about communication modes like SEE I, SEE II, or cued speech; or a decision about language, namely, whether the child is educated using only English-based systems or both ASL and English. When battles about these approaches cannot be resolved by school districts and parents, they find their way into the courts.

JUDICIAL HISTORY

Since the Supreme Court decision in *Board of Education v. Rowley* (1982), the federal courts, generally speaking, have deferred to school dis-

trict choices of methods and modes of communication with students who are deaf or hard of hearing. In part this is because of the *Rowley* decision, and in part it is because of the way that parents have framed their legal arguments. Nonetheless, in recent years, one can begin to see a shift in the arguments themselves and some awareness that modes of communication may not be the same as educational methodologies. The following brief review of selected court cases reveals various approaches to methodological disputes affecting children who are deaf or hard of hearing.

BOARD OF EDUCATION V. ROWLEY

The *Rowley* case (1982) was the first and arguably is still the most important IDEA case decided by the Supreme Court. The decision in *Rowley* interpreted the meaning of free appropriate public education (FAPE) and established the principle that courts should not favor one educational methodology over another as long as the school district's choice of methodology is providing educational benefit. The case involved a 5-year-old girl who was deaf. Amy Rowley had been placed in a general public kindergarten classroom and educated using an oral method in that setting. Her parents, who were Deaf themselves, requested that she be provided with a sign language interpreter and taught using a total communication approach. This educational method involves the use of an English-based signing system combined with speech, auditory skills, and visual/tactile cues (Schwartz, 1996).

Although the lower courts ruled in favor of Amy and her parents, the Supreme Court ruled against them, establishing in the process its well-known two-part test for determining whether a child is receiving FAPE. The first part asks whether the education agency has complied with the procedures of the Act. The second part asks whether the child's individualized education program (IEP) is reasonably calculated to enable a child to receive educational benefit. The Court concluded that Amy had received FAPE, primarily because she had received educational benefit from her specialized services and general classroom placement. Although the Court did not determine how much benefit would be enough for each child with a disability, it indicated that,

for children being educated in general classrooms, educational benefit could be evidenced by such measures as the ability to maintain passing marks and be promoted from grade to grade. The Court cautioned the lower courts against second-guessing educational agencies with respect to particular educational methodologies.

POST-ROWLEY CASES

Since the *Rowley* case, a number of other cases involving children who are deaf have been decided in federal court. In most of these cases, the courts have followed the Supreme Court's admonition in *Rowley*. In other words, they have declined to interfere with the education agency's choice of educational or communication methods as long as evidence indicated that the child had received some benefit from the educational program, the method of choice had been successful with children sharing similar disabilities, and there were no procedural violations (Yell & Drasgow, 1999). Several cases in particular illustrate how the federal courts have dealt with disputes over whether to allow children who are deaf to access information through their preferred modes of communication. These cases are *Lachman v. Illinois State Board of Education* (1988), *Petersen v. Hastings Public Schools* (1993/1994), *Logue v. Shawnee Mission Unified School District No. 512* (1997/1998), *O'Toole v. Olathe District Schools Unified School District No. 233* (1997/1998), and *King v. Board of Education of Allegany County* (1998).

In the *Lachman* case (1988)—probably the best known of the post-*Rowley* cases affecting children who are deaf or hard of hearing—a federal appeals court upheld Benjamin Lachman's placement in a self-contained total communication program. His parents had argued that he needed to be educated through the use of cued speech and that, without it, he could not be educated in the least restrictive environment (LRE), which they asserted was a general classroom in his neighborhood school. The court concluded that the real issue was not LRE but communication methodology, namely, whether English should be communicated to Benjamin through cued speech or signed English. It applied the principle established in the *Rowley* decision that "once a court determines that the

requirements of [IDEA] have been met, questions of methodology are for resolution by the State" (quoting *Rowley*, 1982, 458 U.S. at 208).

As was true in the *Lachman* case, the disputes in both the *O'Toole* (1998) and *Logue* (1997) cases did not concern native language per se but rather the communication modes by which the English language was being conveyed to students who are deaf. The public schools in both cases proposed to educate the plaintiff children using total communication. The parents of both children preferred exclusively aural-oral modes and asserted that their children were being denied FAPE by the districts' choices.

In *O'Toole* (1997), the federal district court concluded that "IDEA does not require the defendant to utilize one proven teaching method over another" (963 F. Supp. at 1014) and ruled that FAPE had been provided because Molly O'Toole's IEP was calculated to produce sufficient progress. The appeals court (*O'Toole*, 1998) upheld the district court decision, noting that an appropriate education was not guaranteed to maximize a child's potential. It stated that even Molly's parents did not deny that "in general, the debate about whether sign language

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or spoken language is the best way to educate the hearing impaired involves a dispute about methodology" (*O'Toole*, 1998, 104 F.3d at 709). Similarly, the district court in *Logue* (1997) concluded that Noah Logue's program was reasonably calculated to enable Noah to receive educational benefits and that educational methodology should be left to the schools as long as the school district's program was providing FAPE and the methodology selected was a proven one. The district court opinion was affirmed on appeal (*Logue*, 1998).

Like the Lachmans, the O'Tooles and the Logues had alleged that their children were not receiving individualized instruction to meet their

special needs. In all three cases, the courts rejected this argument and categorized the issue as a dispute over teaching methodologies in which the courts should not intervene.

In contrast to the above cases, the plaintiff parents in *Petersen v. Hastings Public Schools* (1993) urged the court to distinguish educational methods from methods used to *communicate* with a child who is deaf or hard of hearing. They argued that a signing system is a language, not an educational method such as a phonetic or sight-word approach to teaching reading.

The three children involved in the case had severe hearing impairments, and each required the services of a sign language interpreter in the school setting. The students used a strict SEE II system in their homes. The school, however, had adopted a modified SEE II system, and interpreters used this system in the classroom. The plaintiffs claimed that the modified SEE II system did not fulfill the FAPE requirement under IDEA, denying the children an individualized special education program.

The district court (*Petersen*, 1993) ascertained that the children were improving academically with the use of the modified SEE II system, resulting in passing grades and promotion from grade to grade. Therefore, the court concluded that each child's educational program was reasonably calculated to allow the children to receive the benefits intended under IDEA. Although the district court agreed that the parents' attempt to differentiate educational and communication methods was well taken, it found it unnecessary to rule on whether a signing system is a language. Nonetheless, it is noteworthy that a witness for the school district, the director of Special Services, stated that she was aware of no "methods" class that considered language to be a teaching method (831 F. Supp. at 749). The appeals court upheld the district court, adopting the *Rowley* position that courts should "not substitute [their] own 'notions of sound educational policy for those of the school authorities'" (31 F.3d at 707, quoting *Rowley*, 1982, 458 U.S. at 206).

Like cases before it, the controversy in *Petersen* (1993) was over the mode by which children who are deaf receive information in English. What made it unique, however, was the

argument that educational methodology can be distinguished from communication modes because a signing system is a language. In actuality, however, SEE II and all other signed English systems are not languages per se. On the other hand, they are also not educational methods in the usual sense but rather visual representations of the English language, a visual way of accessing spoken English. As such, they are primarily modes of conveying spoken English rather than instructional methods designed for curricular purposes such as teaching the grammatical structures of English. Although the district court in *Petersen* chose not to address whether to place communication modes in the same category as educational methods, the case brought to light potentially significant differences between them.

In contrast to the above cases, the 1998 case of *King v. Board of Education of Allegany County* actually raised the issue of the appropriateness of instruction in ASL versus an English-based system, namely, total communication. Mark King was a young child with multiple disabilities including Down syndrome and a hearing loss. The parents' expert witness asserted that ASL was needed in order for Mark to develop a language base from which to communicate. The public school's expert witness asserted that ASL "will not work with an individual with moderate to severe mental retardation. There is no empirical research that supports the view that ASL can be acquired as a communication tool with this population" (*King*, 1998, 999 F. Supp. at 758).

Although it is worth noting that there also is no empirical evidence to show that ASL *cannot* be acquired by individuals with cognitive delays, the *King* case is described here because the focus was on the choice of a particular language as the language of instruction. From the information in the court record, Mark was not a native ASL user. He had been exposed to English through signed English and speech but apparently had not developed English as his native language. The question was whether ASL or English (presented through signed English and speech) should become Mark's first and native language.

Because Mark had made some positive educational and nonacademic gains in the public

school's total communication program, the court ruled for the Maryland public school. The court also concluded that the local school district placement would be the LRE for Mark. The court dealt with the case as a dispute over educational methodology rather than a dispute over exposure to and instruction in one language versus another.

Thus far, none of the cases discussed has concerned a child for whom ASL was already the native language. Interestingly, however, the issue of ASL for such a child arose in a 1988 hearing that never reached the courts (*Jessica M.*). The deaf parents of Jessica M., a three-year-old girl who was profoundly deaf, rejected Jessica's proposed IEP because the language of instruction in her proposed program was English, not ASL. The parents argued that in order for their daughter to continue to progress developmentally, educationally, and cognitively she required an environment in which she could freely communicate and have full access to her own language. The hearing officer in the case ruled in favor of the parents. Although the case was not appealed, it suggests that if a case were argued correctly, bi-bi, unlike other means of communication common in the field of deaf education, might not be viewed by the courts as an educational methodology.

IDEA '97

Within IDEA '97 there are several new provisions that affect the education of children who are deaf. Moreover, the 1999 IDEA regulations lend support to the view that a child's native language is the preferred language of instruction for children who are deaf. They also reinforce the view that selection of a specific mode of communication should not be solely within the discretion of school personnel.

For the first time, native language is defined in the statute (20 U.S.C. 1401(16), Supp. III 1997), and the 1999 regulations extend the statutory definition by adding that "for an individual with deafness, native language means 'the mode of communication . . . normally used by the individual (such as sign language)' (34 C.F.R. 300.19, 1999). Native language, which the regulations equate with mode of communi-

cation, is important initially in evaluating a student's eligibility for IDEA services because tests and other evaluation materials must be provided and administered in the child's native language unless it is clearly not feasible to do so (34 C.F.R. 300.352(a)(1), 1999).

Moving beyond the evaluation requirements, the IEP provisions of IDEA '97 explicitly require IEP teams to consider the language and communication needs of children who are deaf or hard of hearing. Unlike the statutory definition just described, here a clear differentiation of language (e.g., ASL, English) and mode of communication (e.g., signed English, cued speech, aural/oral communication) are made. As a part of this consideration, the teams must examine "opportunities for direct communications with peers and professional personnel in the child's language and communication mode" and "opportunities for direct instruction in the child's language and communication mode" (20 U.S.C. 1414(d)(3) (B)(iv), Supp. III 1997). This terminology had appeared earlier in the Department of Education's Policy Guidance on Deaf Students Education Services (1992), which, in turn, had echoed concerns about the unsatisfactory status of education of children who are deaf that was expressed initially in the report of the Commission on Education of the Deaf (1988).

The 1999 regulations add that if the IEP team determines, after consideration of these factors, that a child needs a particular service in order to receive FAPE, the team must include a statement to that effect in the child's IEP (34 C.F.R. 300.346(c), 1999). Although allowing the IEP team to make the judgment about the communication mode to be used with a given child, these statutory and regulatory provisions seem to express a preference for instruction and communication in the language and communication mode normally used by the student, whether the language is English or ASL, and whether the communication mode is cued speech, SEE, or something else. One can foresee increased litigation if parents and educators on the IEP team disagree over the language or mode of communication that the school district wants to use to instruct children who are deaf or hard of hearing.

Support for this prediction also comes from the expansion in the regulations of the definition of special education. In the statute, special education means “specially designed instruction” to meet the unique needs of a child with a disability. The regulations then define specially designed instruction as “adapting, . . . the content, *methodology*, or delivery of instruction (emphasis added).” The Department of Education’s (ED’s) analysis accompanying this definition makes the following point:

In light of the legislative history and case law, it is clear that in developing an individualized education there are circumstances in which the particular teaching methodology that will be used is an integral part of what is “individualized” about a student’s education and, in those circumstances will need to be discussed at the IEP meeting and incorporated into the student’s IEP. . . . In all cases, whether methodology would be addressed in an IEP would be an IEP team decision. (U.S. Department of Education, 1999, p. 12552)

The ED analysis illustrates this point by describing cued speech as “a mode of instruction.” It then differentiates “cued speech, which would be the basis for the goals, objectives, and other elements of an individual student’s IEP,” from “a day-to-day teaching approach, i.e., a lesson plan which would not be intended to be included in a student’s IEP” (U.S. Department of Education, 1999, p. 12552). In this context, cued speech seems to be perceived as a hybrid—both a “mode” of communication and a method of “instruction.”

Collectively, what these provisions and interpretations indicate is that, in developing an IEP for a child who is deaf or hard of hearing, more serious consideration must be given to the child’s native language or mode of communication. Furthermore, given the acceptance of the need for individually tailored instructional methods in some IEPs, a school district’s assertion that a given communication mode is a proven educational method is less likely to dispose of the issue than was true in the past. On the one hand, the terminology in the regulations arguably places communication methodology into the categories of language and communication mode. On the other hand, it also suggests

that some systems of English-based signing could be considered instructional methods that might need to be included in an IEP. In either case, these changes improve the position of parents who have adopted a bi-bi approach for their children. In summary, the recent statutory and regulatory changes concerning native language and mode of communication for children who are deaf or hard of hearing invite closer judicial examination of the issues surrounding what constitutes an appropriate education for such children.

To date, the courts have been reluctant to veer from the direction set by the *Rowley* case (1982) regarding decisions surrounding the issue of educational methodology. It is, perhaps, understandable that the courts would determine that a given signing system should be considered an educational method, not a mode of communication whereby a child accesses language. It is also understandable that the Supreme Court directed in *Rowley* that “courts must be careful to avoid imposing their view of preferable educational methods upon the States” (458 U.S. at 207). From the Court’s vantage point, it may have been prudent to reach this conclusion. As the appellate judges in the *Petersen* case (1994) expressed it, “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” (31 F.3d at 708). One must stop to ponder, however, whether the concept of providing each student with services that are individually tailored to facilitate that student’s progress is, in fact, what the IDEA is all about. This certainly seems to be the renewed and invigorated intention of IDEA ’97.

The changes in IDEA ’97 may have a good deal of influence over future case law. In fact, had *Rowley* been heard today, the decision might have been different in light of the fact that the primary language used by Amy and her parents was ASL (A. Rowley, personal communication, March 30, 1999). Based on IDEA ’97, one could also ask whether an educational environment in which a child who is deaf cannot access information using the language and mode

of communication normally used by the child will provide access to an education that will produce meaningful progress toward IEP goals.

IMPLICATIONS FOR PRACTICE

The influence of bi-bi educational programs in deaf education and the recent modifications in special educational law generate various implications for policymakers, courts, educators, and children who are deaf or hard of hearing. Among them are the following:

- The special factors that must be considered when writing a child's IEP could result in a large number of requests for specific educational methodologies, including communication methodologies or modes. Local school district policymakers may need to design policies that can keep this process in check, establishing clearly how to document meaningful progress toward IEP goals using the district's choice of communication mode and methodology, and determining when to accede to a request for direct instruction in the child's language or communication mode.
- In cases where specific, individualized communication modes are determined to be necessary, procedures and resources will need to be available to (a) obtain expert services to provide needed communication methods or modes, or (b) train current staff in implementing the selected methods. For students who are ASL users, districts may be required to hire as teachers or teacher aides individuals who are fluent in ASL. Similarly, for students who rely on a specific English-based system of communication, districts may be required to hire individuals who are fluent in a particular English-based system. (These needs have broader implications for programs that train interpreters.)
- School personnel must become knowledgeable about the requirements of IDEA '97 that affect methodologies and communication modes. Updating school personnel about the law is not such an easy matter, however, and requires continuing inservice efforts on a yearly basis.
- The number of court cases involving methodological disputes with children who are deaf

or hard of hearing is likely to increase. Local school districts and parent plaintiffs should be prepared to make more sophisticated legal arguments in elaboration of or in response to the new language of the statute and regulations.

- Both general and special education teachers will need to accommodate more language diversity and individualized communication modes in their classrooms. They will also need to create an environment that allows all children to be comfortable in a more language-diverse classroom.
- Deaf educators will need to make concerted efforts to collaborate and share ideas and information with general education teachers in order to implement appropriate modes of communication in general classrooms.
- Educators will need to work more closely with parents of children who are deaf in order to decide what language, communication mode, and communication methods will provide FAPE to the child. Under IDEA '97, educators ignore parental concerns at their peril.
- Children who are deaf or hard of hearing may be able to have increased opportunities for direct instruction in a language or communication mode that matches their individualized special education needs and enables them to make meaningful educational gains in the general curriculum.
- The emotional stress in home and school environments that results from different communication modes and languages at home and school may be reduced. (On the other hand, if schools ignore the intent of IDEA '97, increased litigation may result in greater stress levels than those experienced in the past for children who are deaf or hard of hearing, their parents, and their schools.)
- Children who are deaf or hard of hearing may be able to have greater opportunities to participate as equals academically and socially in inclusive environments.

The field of deaf education is replete with controversy over the best way to provide a child who is deaf or hard of hearing with exposure to language and educational opportunities to de-

velop that language naturally and effectively. These debates often end up in the court system where they are heard and resolved. In the past, however, the courts have largely viewed access to language and communication modes in the same category as instructional methods such as various phonic systems for reading instruction (e.g., Orton Gillingham) that are preferred by given parents. Most of the decisions in IDEA cases where communication mode has been the issue have been consistent with the directive in *Rowley* that courts should refrain from ruling on issues of educational methodology because such issues belong in the hands of education professionals. As a result, school districts often leave the courthouse with a decision in their favor, and children who are deaf or hard of hearing are left to piece together their education through an unfamiliar mode of communication, and in some cases, in an unfamiliar language.

Ultimately, of course, in our public schools all children who are deaf or hard of hearing need to acquire skills in English, at least in written English if not spoken English. Therefore, no child's education is or should be conducted entirely in ASL. However, IDEA '97 seems to express the view that one proven communication mode (including language) should be preferred over another proven communication mode if one is better suited to meet an individual child's educational needs.

As support increases for the bi-bi philosophy, it is timely to ask whether the courts will come to view bi-bi not as an educational methodology but as an approach that provides children who are deaf with access to their own language for at least part of their instruction. As IDEA '97 clearly indicates, the child's language and communication mode must be considered in making educational decisions. If, in fact, this new emphasis is recognized by the courts, all children who are deaf or hard of hearing could benefit from the freedom to use the communication mode and primary language that is genuinely effective for him or her. So the final question remains: Will the courts interpret IDEA '97 to allow school districts to retain control or to require them to share control with parents (and ultimately the courts) when the issue is choice of language or communication modes

used in instructional settings with a child who is deaf or hard of hearing?

The enactment of IDEA was intended to ensure a free appropriate public education to all children with disabilities. Certainly an appropriate education is one that involves access to information in a language or communication mode that reduces communication barriers for the child who is deaf or hard of hearing. Perhaps it is time to begin erasing the battle lines that have been drawn in the name of education of children who are deaf and hard of hearing and to begin openly evaluating the choices and selecting the option that is individually tailored to meet a given child's needs. Instruction in a child's native language and communication mode should be seen as more of an issue of equal access than an issue of educational methodology. Perhaps IDEA '97 and the popularity of the bi-bi approach have come together at the right time to ensure that children who are deaf or hard of hearing will receive an education equal to their abilities. If the courts do begin to see the difference between educational methods and access to instruction with the assistance of one's native language, in time we may truly begin to see the courts go bi-bi.

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