

## Case Notes by Carla

*Petersen By and Through Peterson v. Hastings Public Schools*,  
831 F.Supp. 742 (D. Neb. 1993).

Keywords – expert witnesses; language rights (choice of language)

In *Petersen*, the parents of deaf school children sued the school district for using a signing system that modified Signing Exact English (“SEE-II”) and incorporated features of ASL. The IEPs for the deaf children were challenged by the parents in a due process hearing. The hearing officer ruled in favor of the school district, and the parents appealed to the United States District Court. The District Court ruled that the parents failed to prove by a preponderance of the evidence that the school district violated the Individuals with Disabilities Education Act (“IDEA”).

In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the Supreme Court discussed the proper role of the school district in reviewing compliance with the IDEA. The review focuses on whether the “individualized educational program developed through the IDEA’s procedures was reasonably calculated to enable the child to receive educational benefits.” *Id.* at 748-49, citing, *Rowley*, 458 U.S. at 206-07. The *Rowley* Court was careful to admonish courts not to impose their view of the proper methodology to use in teaching deaf children; rather, courts should defer to the states as long as the method was reasonably calculated to enable the child to receive educational benefits. Here, the parents challenged whether the school district’s methodology used by the school district was reasonably calculated to enable the child to receive educational benefits.

### The Modified System – if it looks like a duck

The parents wanted their children to be educated in English. The school district had adopted a signing system which used SEE-II signs 85% of the time and ASL principles were incorporated in the other 15% of the time.

During the hearing, both the parents and the school district employed expert witnesses. Plaintiffs’ expert, Dr. Barbara Leutke-Stahlman, explained the various sign systems used in deaf education on a continuum including Oral English, Cued Speech, Signing Essential English (SEE-I), Signing Exact English (SEE-II), Signed/Manual English, Pidgin Signed English and American Sign Language.

Leutke-Stahlman explained that the school district had employed a modified SEE-II system that included “(1) directionality; (2) duplicate signs to show plurals of irregular words; (3) incorporation of the number in pronouns; (4) incorporation of number in time; (5) location of the person and things in the signing space; (6) locatives; (7) negative incorporation; (8) eye gaze and facial expression; (9) multiple meanings, especially when a concept is introduced; (10) topic comment; (11) finger spelled loan signs; (12) use of some prefixes and suffixes more consistently than others; (13) use one sign for multi-sign words; and (14) all markers signed when written word is presented.” *Petersen*, at 746.

As well, interpreters were directed to use these features when it appeared that the student did not understand the SEE-II rendition. The features of ASL incorporated into the signed system are well known in ASL linguistics.

The school district's expert, Dr. Brenda Schick, favored the use of ASL, though she suggested SEE-II was valuable for teaching word order. Schick opined that SEE-II is difficult to use and takes longer to sign because of the large number of lexical items that must be used. She indicated that younger deaf children have a harder time understanding it and that SEE-II is difficult for interpreters to use accurately. In fact, Dr. Schick cited Dr. Leutke-Stahlman's research for the proposition that "some SEE-II interpreters err as much as 49% of the time while practiced SEE-II interpreters err, on average, approximately 20% of the time." *Id.* at 746 n. 5.

Even though the school district purportedly required the interpreters to use SEE-II, the testimony suggested that the interpreters were actually using Pidgin Signed English. A videotape of the interpreters was reviewed by the experts. The court noted that "while the poor interpreting was disturbing," the school district was attempting to remedy the poor interpretation by contracting with a state agency to provide interpreters. Sadly, this standard sufficed under the Supreme Court's decision in *Rowley*: "the intent of the act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." *Rowley*, 458 U.S. at 192.

Two issues arise in this portion of the opinion. First, the contrived system for signing in English was not being used. It is unclear whether it was not used because the children did not understand the SEE-II signs or because of the quality of the interpretation. It would be interesting to see what type of interpretation was provided after the agency interpreters were retained. Were the new interpreters better SEE-II signers and the modifications to the SEE-II system did not have to be incorporated? If the interpreters were not more fluent at SEE-II signing but were more fluent in ASL, then presumably the modifications would have been incorporated more often than not. The problem, of course, with any reported case is that it only gives a snapshot of a human circumstance at a point in time and standing alone cannot answer the questions that arise from reading the case.

### Expansion

The opinion provides some support for the concept that 'expansion' of the signed rendition might be appropriate in certain instances, at least in the educational setting. The parents complained that the interpreter became the teacher because the school district allowed "an interpreter to change the words translated to the student results in the student receiving education from someone other than the teacher." *Id.* at 750. The court disagreed and cited the parents' own expert who had testified that at times the interpreter must provide more than a strict translation when the student was unable to understand the SEE-II rendition. The court noted "this action by the interpreter *is largely acceptable*

regardless of which signing system is used.” *Id.* at 750 (emphasis added). The court amplified on the proper types of expansion:

When new words are used, the interpreter uses the new sign for the new word but also gives meaning to that word by giving signs which the student already understands. When a word has multiple meanings, the interpreter signs the word, but also places a context around the word by giving other signs more precisely describing its particular meaning in that instance. These modifications, and the others listed in defendant’s policies, seem appropriate to assist the language acquisition of hearing impaired students, who face substantial obstacles to achieving language proficiency regardless of the signing system used.

*Id.* at 754. This type of interpretation will be familiar to most interpreters. This practice of providing a fuller interpretation was endorsed by this court and should be a rebuttal to the often heard directive to interpret verbatim. Though it is difficult to say whether a court would extend this notion of the proper scope of expansion into settings other than K-12 elementary education, the fact that the practice was approved by this court provides justification for extending it into other settings.

#### Language Choice

In *Petersen*, the Court held that as long as the school district is following the procedures set forth in the IDEA regarding a free and appropriate public education that the parents have no rights to force the school district to use a specific method or specific signing system to use in teaching. However, the opinion also provided some support for the idea that the language of the ADA provides for choice by the consumer with respect to the accommodation provided and that language choice can be specified by the consumer. The opinion further suggested that when an obviously superior method of communication, as an accommodation, exists, the law might require that method over another effective method of the public entity’s choosing.

The parents claimed that the modified SEE-II system was in violation of the Americans with Disabilities Act, 42 U.S.C. § 12132 (1990), which requires public entities to furnish appropriate auxiliary aids and services to individuals with disabilities in order for them to enjoy the benefits of governmental services and programs. The Code of Federal Regulations defines auxiliary aids and services as including qualified interpreters who are “able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary.” *Id.* at 751-52. The parents argued that only SEE-II interpreters could be considered qualified and able to interpret effectively, accurately and impartially for their children.

Because the regulations indicate that the “expressed choice [of accommodation] shall be given primary consideration by the public entity....,” the parents argued the school district was required to give primary consideration to the choice of SEE-II interpreters.

*Id.* at 752. In other words, the regulations were not limited to the choice between accommodations (an interpreter rather than a CART operator), but permitted parents to choose among alternate types of the same accommodation (a SEE-II rendition rather than an ASL rendition). The court determined that this interpretation was not unreasonable and assumed that “the definition of auxiliary aides includes the use of a specific signing system.” *Id.* at 752 (emphasis added). This is a critical point that should be used in advocacy for ASL interpreters.

Often interpreters are not highly qualified. Deaf consumers either specifically request interpreters they know are competent or they request ASL interpreters believing that a more qualified interpreter will be assigned. This section of the opinion indicates that it is not unreasonable to specifically request a language when requesting a sign language interpreter. If the agency does not respect a request for a specific interpreter, at the very least it should respect the request for a specific type of interpreter. As long as the public entity could not show that the proffered interpreter was not equally effective, the deaf person’s specific choice of interpreter should be honored.

The request was unsuccessful in *Petersen*, because the court found that the school district’s use of the modified system was equally or more effective. The children were doing well in school and reading at or near grade level. The court found that the modified system constituted an effective means of communication.

Yet the court did not want to leave the *status quo* so blatantly unattended. Rather, focusing on the goal of the ADA, the court announced that “if only an ‘effective’ auxiliary aid is needed when a requested aid is vastly superior to the school district, the principal purpose of the act may be circumvented; the person with a disability may be relegated to a lesser service for what may prove to be no rational justification.” *Id.* at 752-53.

This announcement has implications beyond this case. For example, this language can be used to rebut the argument that deaf employees do not need access to video interpreters for telephone communication because of the availability of a TTY. Because VRS services are vastly superior to the use of a text based medium of telecommunication, *Petersen* would clearly support a reading of the ADA that requires VRS telephony over a TTY.