

The Central Susquehanna Intermediate Unit (CSIU) is the fiscal agent for the Office for Dispute Resolution (ODR), and has served as a fiscal agent in some capacity since the program's inception in the 1970s. At no time during the three decades CSIU has provided fiscal support to ODR (or its predecessor offices under different names) has the federal Office of Special Education Programs (OSEP), of the U.S. Department of Education, raised concerns related to this fiscal arrangement.

CSIU respectfully sets forth this written testimony regarding pending House Bill 2536.

1. The proposed plan to remove ODR from its current administrative configuration and place it with an independent board puts Pennsylvania's receipt of federal funds at risk.

34 C.F.R. 300.511(b) places the responsibility of a due process hearing system on the state educational agency, here, PDE. The language of this regulation is clear:

"The hearing described in paragraph (a) of this section must be conducted by the SEA or the public agency directly responsible for the education of the child, as determined under State statute, State regulation, or a written policy of the SEA."

34 C.F.R. 300.511(b) (emphasis added)

Therefore, CSIU respectfully submits that due process systems are to be administered by the SEA, here, PDE, (and its fiscal agent) rather than other agencies or branches of government. IDEA further provides that if a State does not comply with the requirements of IDEA, various penalties may be imposed, including the withholding, in whole or part, of payment to the state of federal funds. 34 C.F.R. 300.604(b). This risk, and the risk of other potential punitive measures, is not warranted.

The Individuals with Disabilities Education Improvement Act of 2004 (IDEA) makes clear that the agency responsible for the due process hearing system, which in Pennsylvania, is the Department of Education, *must* conduct the due process hearing.<sup>1</sup> Thus, IDEA, by placing the responsibility for conducting a due process hearing on the

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<sup>1</sup> "(b) Agency responsible for conducting the due process hearing. The hearing described in paragraph (a) of this section must be conducted by the SEA or the public agency directly responsible for the education of the child, as determined under State statute, State regulation, or a written policy of the SEA." 34 C.F.R. 300.511(b). (emphasis added).



state department, statutorily limits the CSIU role to that of fiscal administration. CSIU has fully abided by this statutory requirement and at all times, appropriately and accurately and completed its fiscal responsibility to administer ODR.

In the contract documents between PDE and CSIU, CSIU, as grantee, is clearly identified as the fiscal agent only:

"The Grantee will serve as the primary fiscal agent for the funds to be expended under the programs described in this Rider."

CSIU Rider to Master Agreement Executed by the Parties Between June and September 2007, page 2, paragraphs "B" and "C". (emphasis added).

As the fiscal agent, CSIU receives funds from the Pennsylvania Department of Education (PDE) for the sole purpose of providing fiscal support to ODR. Such fiscal support includes preparing a detailed budget for submission to PDE for approval, close monitoring of the expenditures to ensure compliance with the budgetary constraints, and bringing to the task the expertise of decades of experience ensuring that federal funds are spent in accordance with all federal and state guidelines, policies, rules and regulations. At no time has CSIU interfered with the substantive aspects of the ODR program, such as selecting hearing officers, setting hearing officer training agendas, or in any way influencing the substantive aspects of special education due process hearing officers' duties.

2. The cost of replicating the ODR program through another mechanism can only be done at a cost far greater than the funds currently allotted to the ODR budget.

ODR is located within the Pennsylvania Training and Technical Assistance Network (PaTTAN) building and, as such, benefits fiscally from shared resources with other PaTTAN projects. During fiscal year 2007-2008, the budget was approximately two million dollars. The 2008-09 budget is now three million dollars. This is a result of the decision by the State Board of Education to convert Pennsylvania from a two-tier state, that is, an initial hearing at the LEA level followed by an appeal to the appeals panel, to a one-tier state, with a state level hearing only, with any subsequent appeals to state or federal court. By doing so, PDE, and by association, ODR, has had to assume all costs of hearing officers and a substantial portion of stenographic services,



previously assumed totally by the LEA (the hearing officer costs) or shared costs between ODR and the LEA (stenographic services).

Thus, this fiscal year, ODR has already had to budget for an additional million dollars. Despite this, the three million dollars allotted to ODR does not encompass the total costs associated with running the program. The following costs were not subject to CSIU's fiscal administration:

- ✓ By sharing a physical plant with PaTTAN, ODR does not incur expenses such as rent and utilities, and the myriad of costs associated with maintaining an office complex.
- ✓ ODR utilizes the PaTTAN resources at no cost to the program to include mail and postage services, telephone systems, computer server systems, shared office equipment such as telephones, copiers, faxes and scanners, printing services, supplies, conference call capabilities, and technology services such as videoconferencing and videotaping programs.
- ✓ Because ODR is part of the PaTTAN computer network and server system, PaTTAN assumed the costs of bringing ODR's antiquated computer database system up to date to ensure the accurate collection of statistics.
- ✓ Because ODR is part of the PaTTAN web system, PaTTAN assumed the costs of redesigning the ODR website in conjunction with PaTTAN's overhaul of its associated website.

The cost of administering ODR through an independent contractor would result in the expenditure of hundreds of thousands of dollars to duplicate the services ODR currently receives, either through allotted federal funds or as a "tenant" within the PaTTAN system and budget.

3. Successful ODR programs will be impacted by a transfer of the office to an independent board.<sup>2</sup>

The proposed house bill states that the entire ODR operation will be removed from its current structure and moved under the auspices of an Independent Board. HB 2536 addresses the due process system, but hearings are only a portion of the work done by ODR. This fails to take into consideration the myriad of programs and supports ODR *successfully* provides to parents of children with disabilities and the educational agencies who serve them, with fiscal support from CSIU.

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<sup>2</sup> Information in this section is from the ODR Annual Report 2007-2008.



ODR consists of five different areas of service: the two statutorily-mandated processes of due process hearings and mediation, and the three voluntary areas of Individual Education Program (IEP) Facilitation, ConsultLine, a parent helpline, and training on conflict resolution. ODR publicizes these services through numerous presentations state wide, as well as through exhibition opportunities associated with parent, professional, and legislative conferences.

Due process hearings and mediation are the two federally-mandated systems provided by ODR. Mediation is a free, voluntary service provided by ODR to parents of children with disabilities and educational agencies when both sides agree to mediation.

IEP Facilitation is another free, voluntary service provided by ODR to parents of children with disabilities and educational agencies when both sides agree to facilitation. IEP Facilitation is a relatively new alternative dispute resolution tool and has been in place at ODR since an initial pilot in October 2004 following the receipt of federal grant monies to pilot the process.

ConsultLine is a free service provided to parents of children with disabilities and advocates by ODR staff. ConsultLine receives approximately 4,000 calls a year from parents and advocates and has the ability to respond to calls in Spanish via a bilingual Specialist, as well as any other language through a contract with a translation service. The four ConsultLine specialists answer questions and provide information about special education programs and the laws governing them. Parents are also provided materials and access to other resources to assist them in their understanding of special education and law.

Additional information about all of the above services, along with results of satisfaction surveys completed by participants, can be found in the ODR Annual Report 2007-2008, posted on the ODR website at <http://odr.pattan.net>.

The fifth area of service provided by ODR is a conflict resolution training known as "Dispute Resolution Skills Training". This is a proactive, six-step process for conflict resolution geared towards both parents and educators designed to be implemented at the local (school district) level, to avoid the need for further litigation. Such training is responsive to OSEP's concern that Pennsylvania reduce the number of due process requests it receives each year.

Finally, a significant partnership has been formed among ODR and "The IDEA Partnership at NASDSE" (National Association of State



Directors of Special Education) and Consortium for Appropriate Dispute Resolution in Special Education (CADRE) (an OSEP-funded project). The IDEA Partnership is dedicated to improving outcomes for students with disabilities by collaborating with state agencies and stakeholders through shared work and learning. The IDEA Partnership reflects the collaborative work of more than 55 national organizations, such as the NASDSE, technical assistance providers such as the CADRE (an OSEP-funded project), and organizations and agencies at the state and local level.

Pennsylvania, through ODR, has been selected as one of a handful of states who will play an integral part in the roll out of training developed by NASDSE and CADRE, similar to Pennsylvania's dispute resolution skills training, referred to as "Creating Agreements in Special Education". With the assistance of resources and speakers from NASDSE and CADRE, ODR will be introducing to Pennsylvania parents and schools the *Creating Agreement* training model, designed to teach participants how to resolve special education conflicts at the local level, thereby fostering improved relationships, and reducing the number of due process hearings each year.

ODR is in the process of inviting superintendents from the eastern part of the state, along with a leadership team from his or her district, to participate in this ground-breaking initiative. At this summit, leaders in special education dispute resolution, including Marshall Peter of CADRE, and Joanne Cashman with the IDEA Partnership at NASDSE, will be speakers. ODR, in turn, will be asked to lend its expertise and experience to other states interested in implementing this training model.

The above statements exemplify the impact and recognized local, state and national presence, and respect, that has been earned by the ODR. With this earned respect and exemplary programming, the CSIU finds it curious that HB 2536 seeks to interrupt a system that has become so successful. The establishment of a new independent bureaucracy will only negatively impact a system that is working, and working efficiently and effectively.

4. ODR is staffed by individuals with extensive experience in the special education field.

The Director of ODR is dually trained in both special education and the law, having extensive experience working with both children and adults with disabilities. Consultline staff are likewise educated professionals, with a minimum requirement of a Bachelor's Degree for the position,



with two of the four staff holding master's degrees. The ConsultLine Supervisor has extensive experience working with youth. The balance of the ODR staff are likewise trained well to complete their jobs and do so with compassion and care.

## 5. Conclusion

In conclusion, the CSIU as fiscal manager of the ODR, and manger of federal grant dollars to many other federal programs, including ODR programs and initiatives as listed above, we believe that 34 C.F.R. 300.511(b) clearly defines the responsibility the SEA (PDE) in the due process hearing system and that passage of HB 2536 will place PA's federal funds severely at risk. CSIU believes that the current structure and operation is working and working very well. It would be unfortunate if the excellent work of ODR be impeded in any way. Therefore, the CSIU requests that any legislation initiative, such as HB 2536, that creates an independent board not be considered by the General Assembly.

Thank you for your consideration.





## **THE PHILADELPHIA RIGHT TO EDUCATION TASK FORCE**

*Uniting for the Rights of Children Receiving Special Education Services  
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October 1, 2008

Members of the House Education Committee

**Re: House Bills 2438 and 2536**

The Philadelphia Right to Education Local Task Force is a federally mandated organization that provides systemic advocacy for children receiving specially designed instruction who attend public or charter schools in Philadelphia. We are submitting testimony for HB 2438 (Burden of Proof) and HB 2536 (Due Process).

### **HB 2438**

We are in support of shifting the Burden of Proof from the parents back to the Local Education Agencies (LEAs). In order to prove the District is not providing the necessary supports and services to provide FAPE (Free and Appropriate Public Education) for their children, parents who do not have the financial resources are required to provide the needed professionals to prove the child is in need and will benefit from a service or support. It was the intent of IDEA and Chapter 14 to develop safeguards and protections to provide students with disabilities FAPE in the LRE. By placing the burden of proof on families, this virtually strips away such safeguards. LEAs have experts on staff and on payroll, as well as educational and regulatory expertise. Parents usually have neither, and the costs and ability to secure needed experts allows only the most financially sound and legally savvy parent able to 'take on' an LEA.

Placing the burden on families impedes their access to the safeguards and rights guaranteed in IDEA and Chapter 14 to protect their children's right to an education.. By shifting the Burden of Proof back to the LEAs, LEAs will need to offer programs that provide FAPE with all necessary supports and services, and be able to prove the supports and services are appropriate for the children. This will ensure more accountability on LEAs and less responsibility on families, who were never intended to be the educational experts.

### **HB 2536**

We are in support of the Office of Dispute Resolution being separate and impartial entity from Pattan and the Commonwealth of Pennsylvania. The removal of this office from the aforementioned entities will create an independent and impartial office that will be able to make independent and impartial decisions on matters presented to them regarding children receiving specially designed instruction in the State of Pennsylvania. Currently, most decisions favor the LEAs. The LEAs may know who the Hearing Officer is before the parent knows and decisions may be made in advance of the actual hearing. PATTAN gives technical assistance to school districts

*Children are the Bottom Line!*





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and Intermediate Units which makes the relationship between PATTAN and the Department a familial one which may make impartiality difficult.

As the current law stands, parent, caregivers and children do not have a chance to receive the services and supports needed to achieve FAPE in the LEAs in Pennsylvania. By shifting the Burden of Proof back to the LEAs and having the Office of Dispute Resolution become an independent agency, children will have a chance to get a better education and develop skills which will last throughout their lifetime.

Thank you.

Cecelia Thompson, Chairperson  
Philadelphia Right to Education Task Force, IU#26

*Children are the Bottom Line!*



## **The Need for Independence of Office for Dispute Resolution**

### **Background**

The Commonwealth of Pennsylvania maintains a two-tier system for the adjudication of disputes between families and school districts related to special education matters. Under this system, a local hearing officer acts as the independent, first-tier fact-finder who conducts an evidentiary hearing held in the local school district. Following the decision of the local hearing officer, one or both parties may appeal the decision to the second tier of the process which consists of a panel of three appellate, state-level hearing officers.

Because IDEA requires that hearing officers be neutral and independent of local educational agencies (at the first level of due process) and state educational agencies (at the second level of due process), it is necessary that the Commonwealth maintain an administrative entity with sufficient independence and neutrality to manage the selection, training, and assignment of hearing officers. In the three decades that the special education due process system has been in place, an agency funded and largely controlled by the Pennsylvania Department of Education (PDE) has provided most of these services. This agency is currently known as the Office for Dispute Resolution (ODR), although the agency has been known by different names in the past.

### **Our Position**

ODR is funded through PDE and historically has been housed in, and managed by, an Intermediate Unit near Harrisburg, Pennsylvania. Family advocates have become concerned over the past several years regarding the apparent loss of neutrality of ODR and its decline in independence from PDE. The natures of these concerns are set forth below, and some proposed solutions are described.

*Interference in Personnel Matters:* Family advocates have concluded that PDE views ODR as an agency fully within its control and direction. We have learned that high-ranking officials of PDE have routinely contacted supervisory staff at ODR to identify particular expectations of PDE concerning the employment of particular hearing officers and the policies to be employed by ODR. We believe that high-ranking officials of PDE have insisted, successfully, that certain hearing officers be removed from service despite lengthy, productive and respected careers. While hearing officers with perceived contacts with parents of disabled children have been removed for purported conflicts of interest, we understand that other hearing officers who work for, and receive weekly paychecks from, School Districts or Intermediate Units remain as hearing officers through the influence of PDE. These observations raise serious questions about the independence of ODR.

*Bias in Favor of School Districts:* ODR representatives appear to believe that they must obtain approval from PDE for any significant administrative actions. As well, over the past several years, we have increasingly observed that federally-mandated training sessions for hearing officers and ODR staff are heavily weighted toward the



perspectives of school districts, as these training sessions have become overwhelmingly presented by public education officials, including PDE representatives and school district attorneys, rather than by balanced panels or outside lecturers who possess a neutral approach with no agenda. Furthermore, although the Pennsylvania Special Education Appeals Panels are theoretically required to receive additional evidence under the Individuals with Disabilities Education Act, no Appeals Panel has ever conducted an evidentiary hearing in the fourteen (14) year history of the Panels. This failure blocks families from introducing additional expert evidence documenting their children's needs. These biases in training and procedures undermine the fundamental due process rights of children and their families.

Because of these boundary breaches and the resulting loss of even the appearance of neutrality, family advocates have ceased to believe in the independence of ODR. This unacceptable situation is likely to continue until ODR is provided true and complete independent status under which it does not rely upon PDE for constant approval of budgeting, administration, hiring, policy development and training decisions.

*Proposed Solutions:* It is strongly recommended that several reforms be implemented to provide greater independence for ODR:

- Direct Appropriation:** The Legislature should provide a direct appropriation for ODR which is not dependent upon review and approval by PDE. This approach is consistent with the funding of other independent agencies of state government.

- Neutral Location:** ODR should be housed in an independent location and not within a public school agency such as an intermediate unit.

- Balanced Governance:** The Legislature should enact enabling legislation directing that ODR be governed by a publicly accountable Board of Directors appointed by the Governor and the Legislative Leadership, with even representation between parents of children with disabilities and public school officials or within the Office of Child Development, as well as with independent experts in the fields of Special Education and physical, behavioral, cognitive and intellectual disabilities in children. The newly constituted Board should be mandated to institute safeguards so that any effort by any public official or private individual to improperly influence or pressure ODR to take, or refrain from taking, any material administrative action, or to compromise ODR's neutrality and independence is brought before the Board for review, public comment and action.



## **The Need for a State Regulation to Allocate Burden of Proof in Special Education Due Process Cases to School Districts**

### **Background**

In the common law, burden of proof is the obligation to prove allegations which are presented in a legal action. Under the federal Individuals with Disabilities Education Act (IDEA), parents and school districts have the right under due process to an administrative hearing when there is an unresolved disagreement over which special education services students should have to successfully meet their academic goals. Until recently, it has been understood, unless otherwise specified in a state's due process regulations or statutes, that the school district had the burden of proof in due process proceedings.

*Schaffer vs. Weast* is a landmark decision by the U.S. Supreme Court which determined that the party "seeking relief" has the burden of proof in IDEA due process proceedings. The Plaintiffs in *Weast* sued the Superintendent of Maryland's Montgomery County School District (MCSD) for the costs of privately educating their son when the school refused to place their child in an appropriate classroom setting. The Schaffers argued that the placement proposed by MCSD did not meet their son's disability-related needs and therefore did not provide him with a free and appropriate public education (FAPE) as the IDEA requires. The Court highlighted to the Schaffer's that the federal IDEA statute was silent with respect to who has the burden of proof in due process proceedings. Because the two sides were in "evidentiary equipoise", and because the state of Maryland had no statutory provision assigning the burden of proof in due process proceedings, the Court concluded that the Plaintiffs had failed to carry their burden of proof, as they, not MCSD, were challenging the IEP placement.

Prior to the *Weast* decision, Pennsylvania's school districts had the burden of proof, regardless of who requested the due process hearing. Therefore, it was the obligation of the district to present its case first. Such an allocation of the burden made sense, as it is the school district that has the duty to provide FAPE to the child in the least restrictive environment (LRE). Moreover, it is practical, productive, time-saving, and cost-minimizing to have the school district, which has the easiest access to the student's records and the teachers and experts that work with the child daily, testify first at the hearing<sup>1</sup>. It is a fact that a large percentage of parents are un-represented during due process hearings. Assigning burden to the school districts created predictability in the system; as the district clearly proceeded first and identified the issues in the case to the hearing officer.

Unfortunately, the Court did not foresee the impact of its decision in states such as Pennsylvania that have not assigned the burden of proof in their due process regulations and statutes. Without such clarification, and armed with *Weast*, many school districts across the Commonwealth are taking the position in every case in which a parent requests due process that the parent is the party "seeking relief" and therefore automatically carries the burden of proof. It is not necessarily the case that the parent is the one attempting to change the *status quo*. Often it is the school district that is



seeking a change of placement or modification of the child's current program or services. A parent's resistance to such efforts should not saddle them automatically with the burden of proof, particularly when it is the school district, not the parent, which is attempting to force a change such as placement<sup>2</sup>. The Supreme Court specifically rejected this approach. "The rule applies with equal effect to school districts," it said. "If they seek to challenge an IEP, they will in turn bear the burden of persuasion before an administration law judge."

## **Our Position**

We strongly affirm that many of the rights, benefits, and successes of students in today's special education programs were driven by parents who were given a voice through due process. It is a fact that only 10 states plus the District of Columbia have put this into law. New Jersey may be soon to join the ranks with the recent passage of a burden of proof bill through their legislature. It is now Pennsylvania's time to take the affirmative step of adopting a statutory provision which allocates the burden of proof in due process proceedings to the school districts. This will guarantee predictability in the system, clarity of the issues, and cost savings during the hearing process so that the goal of achieving appropriate educational outcomes for Pennsylvania's children with disabilities can be maximized in the shortest amount of time.

Without a clear statutory assignment of burden of proof, it is assured that due process will take more time and more money on all sides. Additional pretrial proceedings are now necessary in order to sort through the issues to ascertain who bears the burden of proof. This delays hearings and burdens the system unnecessarily. The hearing process is now more un-navigable than before as parents now must recognize and argue technical legal issues.

It is important to recognize that few parents will go into this process without the resources to secure adequate legal representation and expert witness testimonies, sufficient knowledge of the law, and the ability to take time away from their jobs and care of their children. It is a certainty that even parents with meritorious claims, will not pursue due process. Thus, the very legal system put in place to protect Pennsylvania's most vulnerable children will be incapable of ensuring appropriate educational outcomes for them. We support statutory provisioning of burden of proof to school districts in due process proceedings.

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<sup>1</sup>In fact, the Supreme Court acknowledged that school districts have a "natural advantage" over the parents in a dispute in that they have the teachers, therapists, nurses, and psychologists to observe the child all day (and testify without charge) write the IEP progress reports, test the students and grade the tests.

<sup>2</sup>Such an automatic assignment of the burden of proof to the parent is particularly inappropriate if the district is attempting to force the student into a more restrictive placement. Such a policy contradicts the specific terms of the IDEA and its implementing regulations which clearly indicate that it is the district, not the parent, which must establish that the more restrictive placement is necessary in order to confer FAPE. 20 U.S.C. § 1412 (a) (5). See also 34 C.F.R. 300.550(b): "Each public agency shall ensure that to the maximum extent appropriate, children with disabilities....are educated with children who are not disabled" and that "special classes, separate schooling, or other removal of children with disabilities from the regular education environment occurs



only if nature and severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."