

COMMONWEALTH OF PENNSYLVANIA  
HOUSE OF REPRESENTATIVES  
SUBCOMMITTEE ON SPECIAL EDUCATION

\* \* \* \* \*

PUBLIC HEARING IN RE: HB 2438 and 2536

\* \* \* \* \*

BEFORE: BARBARA MCILVAINE SMITH, CHAIRWOMAN  
Frank Andrews Shimkus, Patrick J. Harkins,  
Chris Wakeley, Dennis M. O'Brien,  
Members

HEARING: Thursday, October 2, 2008  
Commencing at 9:13 a.m.

LOCATION: Sykes Hall  
110 West Roseland Avenue  
West Chester, PA 19383

WITNESSES: Dennis McAndrews, Gerard Oleksiak, Ken  
Oakes, Andria B. Saia, Felicia Hurewitz,  
Tracey Plunkett, Chuck Peleak

Reporter: Ben Hunter Mengel

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21  
22  
23  
24  
25

I N D E X

OPENING REMARKS

By Representative O'Brien 3 - 6

By Chairwoman 6 - 7

TESTIMONY

By Mr. McAndrews 7 - 25

By Mr. Oleksiak 26 - 36

By Mr. Oakes 36 - 56

By Ms. Saia 56 - 80

By Dr. Hurewitz 80 - 97

By Ms. Saia 97 - 98

By Ms. Plunkett 98 - 101

By Mr. Peleak 101 - 102

CLOSING REMARKS

By Chairwoman 102

CERTIFICATE 103

## P R O C E E D I N G S

1  
2  
3  
4  
5  
6  
7  
8  
9  
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11  
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CHAIRWOMAN:

Good morning. We are now ready to start. And it is my greatest pleasure and honor to introduce the Speaker of the House, Dennis O'Brien. He's brought forth some very important legislation that will be a major shift in policy to the benefit of parents with special needs children. So take it away.

REPRESENTATIVE O'BRIEN:

Representative Barbara McIlvaine Smith, I also want to point out that you had a very similar piece of legislation. And I would welcome moving your piece of legislation, because we're all about doing the right thing here. And this issue is really fundamentally about fairness and it's about doing the right thing for the children. And that breaks down in this discussion and in this legislation in a number of different ways.

The federal government had, through a lawsuit, just changed the burden of proof. And that may sound somewhat esoteric, but it's not for the families that are dependent upon these services. There's a reason that burden of proof was the other way. And it should not be resolved or looked at as a

1 fiscal issue. This is a policy issue. These are our  
2 kids. And if you want to make the best fiscal  
3 argument, then doing the right thing, presenting the  
4 most chance for developmental achievement, is where we  
5 want to be because we're the ones that pour the  
6 dollars into the silos. But if they operated silos,  
7 then the kids aren't going to be successful. And over  
8 the lifespan of that kid, the dollars would be  
9 exponentially more necessary.

10                   So it starts at the earliest possible  
11 point. And that means that those individuals, the  
12 infrastructure, those that we trust our children with,  
13 they hold the cards. They see the kid. They should  
14 share the information. Parents don't get to see the  
15 kid in the educational setting every day. That's one  
16 of the resources. It's not just the psychologist and  
17 the evaluations. It's who's seeing this kid and where  
18 the kid fails and what the necessary supports are,  
19 what's successful. And that has to be shared in an  
20 inclusive, interactive way. It's what we're doing  
21 here. And it's not about taking something and putting  
22 it in a vacuum and saying, you know what, some day  
23 this is my ace. This is my ace in the hole. I'm  
24 going to play it, and I'm going to win in a due  
25 process hearing. It's not due process.

1                   Now, the one thing that I look at --- and  
2 I believe we kind of threw it in there, but to me,  
3 doing evaluations within 60 days is absolutely  
4 critical to this conversation. And sometimes it's the  
5 small points that issues turn on. Because if I have a  
6 kid and I find out that something's not working and  
7 it's March, why do I have to wait until September?  
8 And all placements are filled, the School District's  
9 designs are already in place. And then they say,  
10 well, you know what, it's probably the right thing to  
11 do, but it's too late. We don't have room over here,  
12 or we don't have a chance to do this. And my kid's  
13 crying and my kid's failing. And then next year, it's  
14 going to be even more a heavier climate. It's all  
15 about putting the things in place for an effective  
16 timeline. And we should build aesthetic response that  
17 brings everyone inclusively into that system.

18                   So again, I think there's a number of  
19 things the --- it's not about the dollars. You know,  
20 if you want to look at New York and New Jersey,  
21 they've shifted the burden back the other way. And I  
22 know we have some more people here who are going to  
23 testify about this today. So if I leave you with  
24 anything, people are going to flesh this out. And we  
25 have said to Mary McDaniel --- where's Mary? There

1 she is. She snuck in up here. She has done an  
2 absolute wonderful job in consultation with  
3 Representative McIlvaine Smith and a number of other  
4 people in building advocacy around --- this is not  
5 taken lightly. It is absolutely necessary. And I  
6 want to thank you for holding this very important  
7 hearing here today.

8 CHAIRWOMAN:

9 Thank you so much for coming. Are you  
10 going to be able to stay for a while?

11 REPRESENTATIVE O'BRIEN:

12 I'll stay for a while. I have ---.

13 CHAIRWOMAN:

14 If you were here, that would be great.

15 REPRESENTATIVE O'BRIEN:

16 Yes. I just have to make a couple phone  
17 calls.

18 CHAIRWOMAN:

19 Okay. And I'm sorry. I forgot to  
20 introduce myself in the hustle and bustle. I'm Barb  
21 McIlvaine Smith. I'm the state representative for  
22 this district in West Chester. And it's been my great  
23 honor to be appointed by the Speaker of the House as  
24 the Majority Chairwoman for the Subcommittee on  
25 Special Education. As a freshman, that is a true

1 honor. We've held a number of hearings throughout the  
2 last year and ten months. And we've gathered a lot of  
3 information, so that next term, we will be able to  
4 move forward.

5           There's a lot of information to put in  
6 this bill and see things change for our children. And  
7 these bills are very important that the Speaker has  
8 brought forward. And the bill that's referred to,  
9 that I have, was based primarily on the New Jersey  
10 legislation, that they did return the burden of proof  
11 back to the School District. And that's where mine  
12 came from. There's no competition here. We just need  
13 to do the right thing. So I would call forward,  
14 please, our first testifier, Dennis McAndrews.  
15 Dennis, it's great to see you back here again to help  
16 us understand these issues.

17                     MR. MCANDREWS:

18           Thank you for inviting me. It's a  
19 privilege to appear before the Committee today to  
20 discuss the compelling need for three reforms to our  
21 special education system in Pennsylvania.  
22 Fortunately, the reforms that we discuss today do not  
23 involve complex legislative initiatives or additional  
24 costs to the taxpayer. Rather, they involve, first  
25 and foremost, a recognition of our obligations as a

1 Commonwealth under both federal law and our inherent  
2 moral obligations to children with disabilities, to  
3 provide equal educational opportunity for these  
4 children, and to provide a level playing field when  
5 disputes arise between the parents and school  
6 districts. These three issues involve a time within  
7 which evaluations of special education students should  
8 be completed, the assignment of the burden of proof at  
9 due process hearings, and the need for fully  
10 independent Office of Dispute Resolution to make  
11 supervised special education due process hearings.

12           As introduction, children with  
13 disabilities in the United States possess a right to a  
14 free, appropriate public education since the passage  
15 of the Education for All Handicapped Children Act in  
16 1975. The act was later renamed the Individuals with  
17 Disabilities Act, or IDEA. And the focus of special  
18 education services has changed substantially since the  
19 inception of the EHA in 1975.

20           In 1975, over two million children with  
21 disabilities received no education at all in the  
22 United States. I sometimes have the privilege of  
23 talking with those parents. And it is something you  
24 don't forget when they describe what it was like to  
25 walk their child into kindergarten and to be told to



1 go home forever. Therefore, the purpose of the EHA in  
2 1975 was access to special ed service because so many  
3 children in the United States received no special  
4 education at all at that time. Significant efforts  
5 were required to create and implement special ed  
6 programs all from scratch in order to meet the needs  
7 of a diverse population of children with a variety of  
8 academic, emotional, social, physical and behavioral  
9 needs.

10           Beginning in 1975, the federal government  
11 also began to extensively fund research into the  
12 unique process by which children with disabilities  
13 learn to read, write, compute, socialize and behave.  
14 Within 20 years, an extraordinary body of research was  
15 created in support of scientifically-based  
16 construction in these critical areas of learning.  
17 This body of knowledge simply didn't exist in 1975,  
18 when special education was in its infancy.

19           As a result of these developments, in  
20 1997, Congress changed the focus of special education  
21 from access to special education to progress,  
22 achievement and results. This is a huge change, and  
23 it's based on scientific research. Mere access to  
24 special education services is no longer sufficient  
25 under federal law or under the research that we now

1 possess. Because the research now shows that children  
2 with disabilities can, in the overwhelming majority of  
3 circumstances, learn to read, write and compute at or  
4 near grade level with appropriate scientifically-based  
5 construction. And, that the use of positive  
6 behavioral and social programs will allow students  
7 with these issues to function appropriately in school  
8 and in society.

9           And as a result, the clear focus of  
10 special education, now and since 1997, has been on  
11 developing programs which will allow children to reach  
12 independence and self-sufficiency, to become  
13 productive citizens. Not every school system has  
14 adequately responded to these major changes in IDEA,  
15 especially those that require the use of  
16 scientifically-based instruction and positive  
17 behavioral intervention for students. Many districts  
18 have only begun to implement these programs, all of  
19 them with inadequate materials and teacher training.  
20 The result is that students with disabilities can lose  
21 extraordinarily valuable time in attempting to make  
22 adequate progress and to close the gap with non-  
23 disabled peers.

24           From the beginning of the special  
25 education mandate in 1975, a need has been recognized

1 for a fair, impartial and expeditious resolution  
2 process to adjudicate disputes between schools and  
3 families regarding the provision of FAPE. And you may  
4 hear about the cost of due process today or in  
5 discussion.

6           Due process hearings are held an average  
7 of 1.4 for every 10,000 special ed students. It is an  
8 infinitesimally small number of hearings nationwide,  
9 given the number of students with disabilities; 1.4  
10 for every 10,000 students. This system of resolution  
11 has always involved inherent advantages to school  
12 districts, as school officials possess unlimited  
13 access to resources, teachers and support personnel  
14 within the district and to access the student's  
15 classroom for observation and the development of  
16 testimony by the district's many experts. However,  
17 districts are represented in due process hearings by  
18 publicly-funded attorneys, along with supplementary  
19 insurance coverage to pay for these services.  
20 Districts also can access Intermediate Unit experts  
21 and other witnesses at public expense to assist them  
22 in their presentations at due process hearings.

23           The courts have also held that the  
24 opinions of public education professionals in school  
25 districts and Intermediate Units are entitled to

1 substantial weight by the simple fact of their  
2 positions in public educational agencies. As one who  
3 has represented parents at due process hearings for 20  
4 years, I can state that most cases on behalf of  
5 children with disabilities involve an uphill battle,  
6 because of the inherent advantages enjoyed by school  
7 districts at due process hearings.

8           These inherent advantages were only  
9 enhanced over the past several years. In 2004,  
10 Congress amended IDEA to require a complicated and  
11 detailed statement by parents who request a due  
12 process hearing regarding the precise nature of the  
13 complaints which they seek to raise at the hearing,  
14 together with the specific resolution which the parent  
15 seeks in order to resolve the complaint. School  
16 districts may then file a motion to dismiss the  
17 parents' complaint for lack of specificity. And some  
18 hearing officers have required extraordinarily  
19 specific complaints, which can only be accomplished by  
20 a skilled attorney, a resource which many parents  
21 cannot access as they pursue an appropriate education  
22 for their child.

23           Even with none of these amendments to  
24 IDEA in 2004, the Supreme Court placed another hurdle  
25 in the path of parents, and those who represent them,

1 by ruling for the first time that the burden of proof  
2 in due process hearing under IDEA rests upon a parent  
3 who challenges the school district program. The  
4 Decision in Schafer v. Weast overturned nearly 30  
5 years of decisional law in Pennsylvania, which held  
6 that school districts must bear the burden of proof to  
7 establish that the district has offered up free and  
8 appropriate public education. This practice of  
9 placing the burden of proof on districts worked well  
10 for many years, 30 years, and makes abundance sense.  
11 Fortunately, the Supreme Court recognized that states  
12 may be able to create their own rules under IDEA  
13 regarding the burden of proof. And a number of our  
14 sister states have already done so.

15           A return to the burden of proof of school  
16 districts is based upon simple common sense. The  
17 district's access to records, classrooms, witnesses  
18 and publicly-funded counsel all provide such  
19 extraordinary advantages to school districts that it's  
20 virtually unconscionable to place the burden of proof  
21 upon a disabled child and his parents to prove a  
22 negative, that the school district is failing to  
23 provide an appropriate education for the child.

24           As I often tell my clients before we  
25 pursue a due process hearing, the road to establish a

1 denial of appropriate programming will be difficult,  
2 especially given the fact that school district  
3 witnesses see your child in the classroom during the  
4 entire school day, and we are virtually never present  
5 in the classroom to observe what actually has  
6 occurred. Their only witness in due process hearings  
7 to what happened in the classroom in most cases is a  
8 child with disabilities, while the district possesses  
9 almost unlimited experts to justify the district's  
10 conduct.

11           And I'd invite you to think of the  
12 situation where you were required in your own personal  
13 life to prove a negative, that someone else hadn't  
14 done something, and they had all the access to  
15 everything that had occurred. That's a pretty unusual  
16 burden in the law, and frankly, in life. And the only  
17 person on your side who saw it day to day was somebody  
18 who couldn't testify because of their status as a  
19 child with disabilities. I'm an okay lawyer, but  
20 that's a tough row to hoe. And you know, switching  
21 that burden now upon the child and the child's parent,  
22 under those circumstances, I think, just doesn't make  
23 sense.

24           I'd now like to speak briefly about the  
25 60-day time period that Speaker O'Brien spoke of

1 regarding evaluations. In 2004, IDEA was amended to  
2 require that school districts conduct evaluations and  
3 re-evaluations of students within 60 calendar days of  
4 a parental consent to conduct the evaluation. IDEA  
5 left open the possibility that states could require  
6 different time periods than 60 calendar days reflected  
7 in federal law. Historically, Pennsylvania maintained  
8 a 60 school day period to conduct the evaluation, and  
9 this time period was subject to a great deal of  
10 criticism.

11           The recent regulations to the  
12 Pennsylvania State Board of Ed generally brought  
13 Pennsylvania in line with the 60 calendar day period  
14 for evaluations, but unfortunately excluded the summer  
15 months from the 60 calendar day calculation. This  
16 exclusion of the summer months is devastating to many  
17 kids with disabilities and should be modified through  
18 legislation so that Pennsylvania can conform with the  
19 many other states which conduct evaluations within  
20 IDEA's presumptive 60 calendar day period. The impact  
21 of excluding summer months is often profoundly harmful  
22 for students with disabilities.

23           I'd like to provide a common circumstance  
24 that we see repeatedly, in our work on behalf of  
25 parents and kids with disabilities. Sometime toward

1 the end of the school year in April or May, the  
2 parents learn for the first time that their child with  
3 disabilities is experiencing significant struggles in  
4 school and that the child is in danger of failing or  
5 failing, or at the very least, is not making adequate  
6 progress. Sometimes it's a disciplinary referral.  
7 Things happen in the Spring and they have a meeting  
8 with staff. And they suddenly find that things aren't  
9 going that well.

10           It's also important when we consider  
11 this; that children with disabilities often experience  
12 social promotion, where inadequate progress, be it  
13 academic, emotional, behavioral or social, is masked  
14 behind passing grades. And there's little meaningful  
15 progress reporting during the school year. Schools  
16 unfortunately have incentives to socially promote kids  
17 with disabilities. They can be tough to handle. They  
18 can require a great deal of services. And there is an  
19 incentive to move them through the system as rapidly  
20 as possible.

21           It's not uncommon for parents at meetings  
22 with teachers in April or May to learn of a serious  
23 lack of progress for the first time. The parent then  
24 requests an evaluation or re-evaluation of the child.  
25 It's common for a district to take about two weeks to



1 provide any Permission to Evaluate form to the parent  
2 in order to obtain consent for the evaluation. Even  
3 if the parent promptly returns this evaluation form to  
4 the district, it would now be mid-May to early June.  
5 And if the school district's last day of school is in  
6 early to mid-June, with school re-opening after Labor  
7 Day, the evaluation report will generally not be  
8 completed until October, with an IEP not finalized to  
9 adjust the child's educational program until late  
10 October or early November, which can be six to seven  
11 months after a parent first learned about the child's  
12 problems in school. That's an eternity for a kid who  
13 needs help.

14                   That's an eternity for a family. There  
15 is no child-centered reason for this. This time  
16 period is simply far too long to wait to meet the  
17 needs of a student with disabilities. Virtually one  
18 half a school year would be lost in this process with  
19 the child falling farther and farther behind in the  
20 area of weakness, be it academic, behavioral, social  
21 or emotional.

22                   It's also important to note the  
23 district's evaluation has to be completed at some  
24 point. It's not one that won't be done. It's got to  
25 be done at some point. And no child-centered reason,

1 whatever, exists to delay an evaluation to address the  
2 needs of a child with disabilities. If the evaluation  
3 finds that adjustments are necessary to the  
4 educational program, which is very common under these  
5 circumstances, the school district may well be liable  
6 for compensatory education services due to the delay  
7 in adjusting the child's program. And therefore, even  
8 from a fiscal perspective, no solid justification  
9 exists for Pennsylvania to come in line with the  
10 federal presumption that other states do, that  
11 evaluations and re-evaluations occur within 60  
12 calendar days.

13           The last issue about which I will speak  
14 today is a truly independent Office of Dispute  
15 Resolution with an independent oversight board. Since  
16 the inception of the federal mandate for special  
17 education in 1975, Congress has required independent,  
18 impartial and fair procedures to resolve disputes  
19 between parents and school districts with regard to  
20 appropriate programming for children with  
21 disabilities. Significant concerns have been raised  
22 in some quarters with respect to the process in  
23 Pennsylvania for implementing and supervising special  
24 education due process hearings. I speak today in  
25 support of a transparent and fully independent Office

1 of Dispute Resolution, which is the office that  
2 oversees the special education due process system, and  
3 that the Office of Dispute Resolution should itself be  
4 subject to an outside bipartisan board, which would be  
5 created to monitor and ensure the independence of ODR.

6 I come before you today with what I  
7 believe to be a unique background and perspective. I  
8 serve in wide variety of capacities in Pennsylvania's  
9 special education system. My law firm represents  
10 parents in special education due process proceedings,  
11 but we've also represented several school districts  
12 over the years in a variety of capacities, most of  
13 which have been designed to assist districts in  
14 obtaining funding from outside agencies to assist  
15 those districts in meeting the needs of children with  
16 disabilities.

17 For 15 years, I served as a part-time  
18 special education due process hearing officer. In  
19 those 15 years, I believe I had a reputation for  
20 fairness and impartiality and was even aware of  
21 circumstances where both school district and parent  
22 attorneys jointly agreed and requested my appointment  
23 as a hearing officer. I also twice served as an  
24 appellate hearing officer in Pennsylvania during  
25 periods when other trained hearing officers were

1 unavailable to serve in that capacity. Finally, I  
2 served as Interim Counsel for the Office of Dispute  
3 Resolution when no experienced Counsel was available  
4 to serve in that function. I've been trained as a  
5 hearing officer, and in the somewhat distant past,  
6 have trained hearing officers to serve in that  
7 capacity.

8           Even when I disagreed with  
9 representatives of ODR and the various hearing  
10 officers, and my disagreements have sometimes been  
11 substantial, I have not questioned the basic skills or  
12 integrities of persons in the hearing system, and  
13 don't intend to do so today. Indeed, I have  
14 maintained excellent relationships with virtually  
15 everyone within the existing system, despite our  
16 disagreements.

17           But any adjudicative system must involve  
18 not only absolute impartiality and fairness, but the  
19 appearance of such total impartiality and appearance.  
20 In the eyes of too many families, special education  
21 advocacy groups and parent representatives, the  
22 influence of Pennsylvania's public educational  
23 officials and agencies have become too great in the  
24 operation of the due process system.

25           Naturally, we could all debate whether

1 this fact is or is not true. And the various sides to  
2 this issue would offer statistics, anecdotal evidence  
3 and other arguments to justify their positions. I am  
4 one who would rather focus upon the best process to  
5 ensure not only rigorous impartiality in the system,  
6 but also to ensure public confidence in the system  
7 through a public perception on the part of all  
8 stakeholders that the system is fair, efficient and  
9 impartial.

10           Because the special education system is a  
11 remedial program to serve the needs of children with  
12 disabilities, and since most due process hearings are  
13 initiated by parents who believe that the district has  
14 failed to implement an appropriate program on behalf  
15 of their child, the child and the parents are the most  
16 important stakeholders in achieving a clear and strong  
17 perception that the system is and will always remain  
18 thoroughly fair and impartial to all concerned.

19           It's with these thoughts in mind that I  
20 strongly recommend an independent oversight board, as  
21 set forth in the proposed legislation for the Office  
22 of Dispute Resolution. The current legislative  
23 proposals ensure that the board will involve  
24 bipartisan representation with individuals from a  
25 variety of valuable perspectives, experience and

1 insights. So the board will involve no additional  
2 costs to the current process, but will provide a  
3 system with what must be the coin of the realm: public  
4 confidence and public perception of rigorous  
5 impartiality and fairness in the due process system.  
6 Thank you.

7 CHAIRWOMAN:

8 Thank you so much, Dennis. I'm also  
9 going to introduce my colleagues now. To my right,  
10 Representative Frank Andrews Shimkus, and I forget the  
11 district.

12 REPRESENTATIVE SHIMKUS:

13 Lackawanna.

14 CHAIRWOMAN:

15 Lackawanna County. And to my left,  
16 Representative Patrick Harkins from Erie.

17 REPRESENTATIVE HARKINS:

18 First District.

19 CHAIRWOMAN:

20 First District. You're the one that  
21 passed me on the highway the other day. And Patrick  
22 Harkins is our secretary of the Education Committee.  
23 And I also neglected to introduce Chris Wakeley, the  
24 Executive Director of the Education Committee in the  
25 House.

1 I will start with a question, if I could.  
2 Let's see. How many due process hearings have you  
3 attended with clients of yours?

4 MR. MCANDREWS:

5 Over the years, I've probably been a  
6 participant in, I'd estimate in the vicinity of 40 to  
7 60 a year, something like that. Most cases don't go  
8 to hearing. Most cases, you request a hearing, and  
9 the overwhelming majority of cases resolve shortly  
10 thereafter.

11 CHAIRWOMAN:

12 And out of those hearings, how many were  
13 you able to succeed with the parents?

14 MR. MCANDREWS:

15 Oh, that has been a variety of systems.  
16 Some with the burden of proof on the district, some  
17 the burden of proof now is on the parent. You know, I  
18 would say that we prevail in somewhere between 60 to  
19 75 percent of hearings. That would be my estimate.  
20 You know, we have a better percentage than statewide,  
21 because an awful lot of those hearings are done by  
22 parents who aren't represented, who have no counsel  
23 and who just go in and wing it. So they are at an  
24 enormous disadvantage. You know, we certainly try to  
25 provide representation without charge to the parents

1 as much as we humanly can. There's only so many cases  
2 you can handle.

3 CHAIRWOMAN:

4 And if I could understand the process a  
5 little bit better, could you explain to me, when you  
6 go in --- you know, you have gathered all the  
7 information that you can, are you able to ask the  
8 school district for some records or anything from them  
9 when you prepare for the case?

10 MR. MCANDREWS:

11 Yeah. There is an exchange of records  
12 before a due process hearing. We can request records  
13 from the district. We don't always get all of them  
14 before the hearing. And you know, I don't look to  
15 anybody acting in bad faith. We're supposed to get  
16 all the records. We're supposed to get them  
17 expeditiously. It doesn't happen. And the reason is,  
18 we send the request to the attorney for the district,  
19 who sends it typically to the director of special  
20 education, who then asks people for records.

21 I can't say with surety why we don't get  
22 all the records. But we usually have to make several  
23 requests. We may get the special ed file but not the  
24 regular ed file. We may get the administrative school  
25 district file but not other parts of the file. Trying



1 to get nursing, discipline, attendance records is very  
2 difficult. We routinely ask for the state plan that  
3 the school district has provided. I can count on one  
4 hand the number of times we've gotten in before the  
5 hearing. We ask for certification of teachers. We  
6 almost never get those prior to the hearing.

7           There are no depositions or  
8 interrogatories before the due process hearing. It is  
9 intended to be a rapid system with a relatively full  
10 disclosure of the records. We get most of the  
11 records, but we don't get all of them. And we don't  
12 get the pieces that I've indicated. Sometimes we get  
13 them during --- I did a hearing that was several  
14 months ago, where it was during the hearing, I kept  
15 realizing that there were more and more records that  
16 hadn't been provided. The district's initial  
17 evaluation had never been provided. And we had to ask  
18 for that during the hearing. So I guess my years as a  
19 prosecutor, not knowing what the defendant is going to  
20 say, has helped because you get it oftentimes as the  
21 hearing is progressing.

22           CHAIRWOMAN:

23           Thank you very much for your testimony.

24           MR. MCANDREWS:

25           Thanks for the opportunity.

1                   CHAIRWOMAN:

2                   Now, our next testifier will be the  
3 director of the PSEA, Gerard Oleksiak. I can't  
4 remember ---.

5                   MR. OLEKSIAK:

6                   Good morning, Chairwoman McIlvaine Smith.  
7 Speaker O'Brien, thank you. And the members of the  
8 House Subcommittee, thank you. My name is Jerry  
9 Oleksiak, and I am a special education teacher with  
10 more than 30 years of experience in the classroom.  
11 I've worked for the Upper Merion Area School District,  
12 the Bucks County Intermediate Unit and the Montgomery  
13 County Intermediate Unit, primarily with students with  
14 emotional and behavioral problems.

15                   I'm currently on leave from my teaching  
16 position, and serving as a director of the  
17 Pennsylvania State Education Association. I'm also  
18 joined today by Bernie Miller, who's our director of  
19 education services for the PSEA. And on behalf of  
20 more than 187,000 members, I want to thank you for the  
21 opportunity to offer the Association's testimony on  
22 House Bill 2438.

23                   PSEA recognizes the importance of  
24 balancing the concerns and interests of educators,  
25 schools and parents when establishing how best to meet

1 the educational needs of exceptional students in the  
2 Commonwealth. We believe that the federal government,  
3 the United States Supreme Court and the Pennsylvania  
4 State Board of Education have found that balance  
5 regarding which party bears the burden of proof in the  
6 dispute regarding special education services.

7           The issues and implications of placing  
8 the burden of proof on the school district in all  
9 special education cases, as would be required under  
10 House Bill 2438, are numerous. PSEA's position is  
11 that the United States Supreme Court in Schaffer v.  
12 Weast was correct in holding that the burden of proof  
13 should be placed upon the party filing for due  
14 process.

15           Under the situations where the school  
16 district requests the due process hearing, the  
17 district has the burden of proving why they are  
18 seeking a change in the student's IEP. Similarly,  
19 when a change in placement is proposed by the school  
20 district in a due process hearing, the district must  
21 provide all relevant data and establish how the  
22 district will meet the student's needs in the proposed  
23 placement. They must detail the appropriate  
24 supplementary aids and services that is offered in the  
25 current placement, as well as those services needed to

1 support the proposed placement. And it must determine  
2 which school members of the IEP team will ensure that  
3 the student has an opportunity to make meaningful  
4 progress. The same burden of proof requirements  
5 should apply in cases in which it is the parents who  
6 request due process concerning a change in the IEP  
7 and/or placement.

8           In support of our position, we note that  
9 in working on the recent version of the Pennsylvania's  
10 Chapter 14 Special Education Regulations, the State  
11 Board of Education carefully considered this very  
12 issue. In that consideration, the Board determined  
13 that our State should abide by the Supreme Court's  
14 determination in the Schaffer case. Specifically, the  
15 burden of proof was discussed in round tables,  
16 hearings and through testimony, during which advocates  
17 raised many of the same arguments they are raising now  
18 in support of this legislation. After careful  
19 consideration, the State Board, like the United States  
20 Supreme Court, took the position that the burden of  
21 proof should fall on the party who requests due  
22 process. This is a decision with which we agree.

23           If the Legislature acts to nullify the  
24 action taken by the State Board of Education, we are  
25 concerned that there will be a dramatic increase in

1 the number of due process hearings, leading to the  
2 loss of teachers' most valuable gift: time and  
3 resources that will be spent to prepare for and  
4 participate in the due process hearings. In our view,  
5 this would cause a diversion of staff and resources  
6 away from educating a group of special needs students.  
7 Can we support such a diversion?

8           We are particularly concerned that if  
9 House Bill 2438 is approved, in those rare cases where  
10 we have parents who have repeated differences with  
11 school members of the IEP team, they will be  
12 encouraged to litigate such differences, going  
13 directly to the courts instead of attempting to seek  
14 resolution through the IEP process and cooperative  
15 collaboration with the school staff.

16           Finally, we note that the Individuals  
17 with Disabilities Education Act, IDEA, was revised in  
18 2004 to reduce the number of re-evaluations the  
19 district must perform per year at the parents'  
20 request. This change was made to prevent an abuse of  
21 the re-evaluation process, while preserving the rights  
22 of parents to request re-evaluations at reasonable  
23 intervals. This change is an example of the  
24 importance which Congress has placed upon the need to  
25 ensure that instruction and resources are not diverted

1 away from students in situations where parents  
2 continually question the decisions of educators.

3           We submit that this fundamental approach  
4 to the balancing of parental rights against the needs  
5 of the district to focus upon educating special  
6 education students will be thwarted if the proposed  
7 bill is approved and the Legislature shifts burden of  
8 proof to the districts in all cases. We hope that the  
9 information you have heard related to the trends in  
10 federal government and the implications at the local  
11 level will help you to understand our position of  
12 opposition to House Bill 2438. Thank you for the  
13 opportunity to be here today. And Bernie and I would  
14 be happy to answer any questions you may have.

15           CHAIRWOMAN:

16           Thank you, Jerry. I have a question.  
17 How do you respond to the statements that Dennis  
18 McAndrews made that the school district has the  
19 advantage, and the parents really are at a  
20 disadvantage when it comes to proving that negative?

21           MR. OLEKSIAK:

22           I'm not here to speak for school  
23 districts. Clearly, they would not be happy with the  
24 treasurer of the PSEA speaking for them. I can tell  
25 you from my experience, I have not been directly the

1 person involved in due process hearings, but I have  
2 been involved in doing a lot of preparatory work for  
3 due process hearings in my role as a behavioral  
4 specialist in my building. And from my own  
5 experience, I know through experience in the IUs and  
6 in Upper Merion, we do all we can as teachers to work  
7 with our administrators, to make sure that any  
8 relevant data that we have is available.

9           And teachers I know that have been  
10 involved in due process hearings spend a lot of time  
11 reviewing, preparing, looking back, answering  
12 questions, responding to challenges before they're  
13 even at the due process hearing. The district should  
14 cooperate, absolutely. I don't see why the districts  
15 couldn't provide the information they needed. My  
16 experience has been that they have.

17           CHAIRWOMAN:

18           And also, the 60 calendar days not  
19 including the summer, how do you respond to that?

20           MR. OLEKSIAK:

21           The 60 calendar days is a relatively new  
22 switch in the recent changes to Chapter 14. And we'd  
23 like to see a cycle of that work its way through  
24 before we would have any strong positions on freezing  
25 or unfreezing the summer months. Let's see if Chapter

1 14 will work with those new changes.

2 CHAIRWOMAN:

3 And as a former teacher myself, and as a  
4 mother with special needs children, actually, you  
5 know, I have a problem with the summer passing before  
6 my child is going to get the needed attention that he  
7 or she needs. How do you respond to that as a --- you  
8 have two children?

9 MR. OLEKSIAK:

10 I do.

11 CHAIRWOMAN:

12 And as a teacher, how would you respond  
13 to that if that were your child that was not going to  
14 get any help that she or he needed?

15 MR. OLEKSIAK:

16 Again, I have seen it in my experience  
17 that those regulations have been --- districts have  
18 done what they can to work with parents over the  
19 summer. I think districts and teachers are not in  
20 the, generally in the position of, or taking the  
21 position of adversaries with the parents. We want to  
22 do all we can to work with the parents, to answer  
23 their concerns, to address their needs. And that's  
24 why I was in the classroom all those years, and I ---  
25 you know, again, in my experience, we want to work



1 with them. It doesn't need to be an adversarial  
2 situation. There are many opportunities along the way  
3 at meetings and conferences, formal, informal, for  
4 parents to express their concerns. And in the vast  
5 majority of cases, those concerns are addressed.

6 REPRESENTATIVE SHIMKUS:

7 Sir, your statement, if the Legislature  
8 acts to nullify the actions taken by the State Board,  
9 we're concerned there will be a dramatic increase in  
10 the number of due process hearings. Doesn't that  
11 suggest that the current system isn't working, that if  
12 there were a large number of due process hearings, it  
13 kind of reflects that there are a large number of  
14 people who are frustrated, who can't seem to get the  
15 answers they need?

16 MR. OLEKSIAK:

17 I think there are people frustrated. But  
18 again, I believe there are opportunities in the  
19 current system to address those frustrations. I have  
20 seen --- you know, we live in a litigious society.  
21 And teachers and administrations, school districts are  
22 facing more and more challenges along those lines.  
23 One or two can be a tremendous burden on the district  
24 and on the teaching staff to prepare and address the  
25 issues involved. It is a very difficult and expensive

1 process for districts and teachers.

2 REPRESENTATIVE SHIMKUS:

3 Thank you.

4 REPRESENTATIVE HARKINS:

5 Just one question, Jerry. In your  
6 opinion, what could we do to speed the process up  
7 currently?

8 MR. OLEKSIAK:

9 It's all about working together. It's  
10 about communicating. It's about teachers and IEP  
11 teams really functioning as a team. I know, again, as  
12 a teacher, I welcomed parental involvement. I wanted  
13 parental involvement. We would go out of our way. I  
14 mean, there were times when I would go to parents'  
15 homes and go to their work sites to have conversations  
16 with parents about their students. It matters that  
17 much to the teachers in the classroom.

18 REPRESENTATIVE HARKINS:

19 If you had a situation where it was April  
20 and the child was diagnosed with special needs or ---?

21 MR. OLEKSIAK:

22 Those are really district issues.

23 REPRESENTATIVE HARKINS:

24 Exactly. And the burden is on them. You  
25 know, finances at the end of the year, trying to catch

1 up with them, but what would you say, you know, how  
2 would you force that or push it?

3 MR. OLEKSIAK:

4 Well, as I teacher, many times I did, as  
5 much as I could with the district. But the districts  
6 are operating with limited time, limited resources.  
7 They do all they can, I think, in the great majority  
8 of cases, to address those needs, given the resources  
9 that they have. If we had unlimited resources and  
10 unlimited time, then that would be a different issue.  
11 But frequently, we don't.

12 REPRESENTATIVE WAKELEY:

13 One question, Jerry. You talked in your  
14 testimony about school districts requesting due  
15 process hearings as well. Do you have a breakout, or  
16 perhaps the School Board Association may have this, a  
17 breakout of how many of these requests for due process  
18 hearings are initiated by the school district versus  
19 the parents? Do you have an opinion on that?

20 MR. OLEKSIAK:

21 I don't have that information. I don't  
22 know if Bernie does.

23 MR. MILLER:

24 We don't have that number.

25 REPRESENTATIVE WAKELEY:

1           Okay. All right. I would just be very  
2 interested to know.

3           MR. OLEKSIAK:

4           The School Board might. I'm not sure.

5           REPRESENTATIVE WAKELEY:

6           That would be my assumption, but we'd  
7 like to see the data. I think that would be useful.

8           MR. OLEKSIAK:

9           I don't know if we have access to that,  
10 but we'll see what we can find out.

11          REPRESENTATIVE WAKELEY:

12          Okay. Thanks.

13          MR. OLEKSIAK:

14          Thank you. Thanks for your time.

15          CHAIRWOMAN:

16          And now we're going to hear from Ken  
17 Oakes, who is the chair of Early Childhood and  
18 Education Committee for Arc of Pennsylvania. Good  
19 morning, Ken.

20          MR. OAKES:

21          Good morning. Just a quick aside. I  
22 think the Office of Dispute Resolution would have that  
23 data that you're looking for.

24          CHAIRWOMAN:

25          Okay. Thank you.

1                   MR. OAKES:

2                   My name is Ken Oakes, and I am here today  
3 representing The Arc of Pennsylvania. I am a member  
4 of The Arc of PA board of directors, and live in  
5 Philadelphia, but I'm originally from Erie. Big smile  
6 on Mr. Harkins' face. I serve as the co-chair of The  
7 Arc of PA's Systems Advocacy and Governmental Affairs  
8 Committee. And I chair the Early Childhood and  
9 Education Subcommittee. I also represent The Arc of  
10 PA on the State Task Force on the Right to Education.  
11 It is the Education and Early Childhood Subcommittee  
12 where The Arc's idea to seek burden of proof and  
13 independent Office for Dispute Resolution,  
14 that's a mouthful, legislation was first developed.

15                   The Arc is the largest and oldest  
16 advocacy organization in the United States for  
17 citizens with intellectual and developmental  
18 disabilities and their families. For some 60 years,  
19 it has been the mission of The Arc of Pennsylvania to  
20 work to include children and adults with intellectual  
21 and developmental disabilities in every community and  
22 school. We work with our 35 local chapters in 47  
23 counties to pursue this mission through public policy  
24 and systemic advocacy, public awareness and community  
25 resources.

1           The Arc of PA is very grateful to Speaker  
2 O'Brien for his strong commitment to students with  
3 disabilities, and we thank Representative McIlvaine  
4 Smith and the members of the subcommittee for your  
5 work and for giving us the opportunity to be here  
6 today. The majority of my testimony will focus on the  
7 burden of proof legislation, House Bill 2438, but I  
8 will comment on the importance of an independent  
9 Office of Dispute Resolution.

10           I have worked in the field of special  
11 education and disability advocacy for 32 years. I've  
12 had the unique opportunity to be a special education  
13 teacher, a public school administrator and a volunteer  
14 advocate assisting families. As you can imagine,  
15 these roles have had their own unique experiences.  
16 Just as an aside, I was the special ed director in  
17 Philadelphia. So that will tell you how unique the  
18 experience was.

19           When I was an administrator in the  
20 process, I never felt unfairly challenged by the  
21 burden of proof requirement. I always had far more  
22 resources and legal support at my disposal than any  
23 parent who ever sat across the table from me. As a  
24 volunteer advocate, I knew that if the burden of proof  
25 had been with the families I was working with, they

1 would have had a very difficult time making a clear  
2 and compelling case for their children.

3           When Schaffer v. Weast was decided by the  
4 U.S. Supreme Court, The Arc felt that a great  
5 injustice had been done to families and children with  
6 disabilities. It always made sense to us that school  
7 districts or intermediate units should have the burden  
8 of proof, since it was the local education agency, or  
9 LEA, that had the requirement to provide a free and  
10 appropriate public education, or FAPE, in the  
11 least restrictive environment, or LRE, as defined by  
12 IDEA and state regulations.

13           The Arc of PA believes that it is  
14 practical, productive, time-saving and cost-minimizing  
15 to have the LEA, which has the easiest access to the  
16 student records, teachers and experts that work with  
17 the child on a daily basis, testify first at the  
18 hearing. In fact, the Supreme Court acknowledged that  
19 school districts have a natural advantage over parents  
20 in a dispute in that they have the teachers,  
21 therapists, nurses, psychologists to observe the child  
22 all day, to testify without charge, assess the  
23 students and to write IEP progress  
24 reports.

25           For many years prior to Weast,

1 Pennsylvania school districts and intermediate units  
2 did have the burden of proof, regardless of who  
3 requested the due process hearing. Unfortunately, the  
4 court did not foresee the negative impact of this  
5 decision in states such as Pennsylvania that had not  
6 assigned the burden of proof in their due process  
7 regulations or statutes. Without such clarification  
8 and armed with Weast, many LEAs across the  
9 Commonwealth are taking the position in every case in  
10 which a parent requests due process that the parent is  
11 the party seeking relief, and therefore, automatically  
12 carries the burden of proof.

13           It is not necessarily the case that the  
14 parent is the one attempting to change the status quo.  
15 Often it is the LEA that is seeking to change  
16 placement or modification in the child's current  
17 program or services. A parent's resistance to such  
18 efforts should not saddle them automatically and  
19 unfairly with the burden of proof, particularly when  
20 it is the district or IU and not the parent that is  
21 attempting to force a change, such as placement. Many  
22 parents are unrepresented during due process hearings  
23 due to the cost and/or ability to find legal counsel  
24 with the knowledge to represent them.

25           When LEAs were assigned the burden of



1 proof, there was a sense of predictability in the  
2 system, as the district or IU clearly proceeded first  
3 and identified the issues in the case to the hearing  
4 officer. Without a clear statutory assignment of  
5 burden of proof, it is assured that due process will  
6 take more time and require more money on all sides.  
7 And the parents will be at a disadvantage. Additional  
8 pretrial proceedings are now necessary in order to  
9 sort through the issues to ascertain who bears the  
10 burden of proof. This delays the hearings and burdens  
11 the system unnecessarily.

12           The hearing process is now more  
13 complicated than ever before, as parents or their  
14 attorneys must recognize and argue technical legal  
15 issues. All of this drains financial resources from  
16 both schools and families. Few parents will go to due  
17 process with the resources to secure adequate legal  
18 representation and expert witnesses with sufficient  
19 knowledge of special education and the law.

20           In addition, this prolonged process will  
21 force parents to take time away from their jobs and  
22 care of their children. It is a certainty that even  
23 parents with meritorious claims will not pursue due  
24 process because of the burdens placed on them as the  
25 party seeking relief. Thus, the very legal system put

1 in place to protect Pennsylvania's most vulnerable  
2 children will be incapable of ensuring appropriate  
3 education outcomes for them in a timely manner.

4           The Arc of Pennsylvania strongly affirms  
5 that many of the rights, benefits and successes of  
6 students in today's special education programs were  
7 driven by parents who were given a voice through due  
8 process. In 1972, the Pennsylvania Association for  
9 Retarded Children, now known as the Arc of  
10 Pennsylvania, took the bold and unprecedented step of  
11 suing the Commonwealth of Pennsylvania to ensure that  
12 school-age children with mental retardation be allowed  
13 to attend public school with their brothers and  
14 sisters. After 36 years, parents must still fight and  
15 argue for the rights set forth in PARC v. the  
16 Commonwealth and now established in IDEA and state  
17 regulations.

18           We're urging the Pennsylvania Legislature  
19 to take the affirmative step of adopting a statutory  
20 provision which assigns the burden of proof in due  
21 process proceedings to school districts and  
22 intermediate units. This basic standard of fairness  
23 will continue to provide predictability in the system,  
24 clarity of the issues and cost savings during the due  
25 process, so that the goal in achieving appropriate

1 educational outcomes for Pennsylvania's children with  
2 disabilities will be achieved in the shortest amount  
3 of time. The Arc of Pennsylvania strongly supports  
4 House Bill 2438 and asks the Special Education  
5 Subcommittee to move it out of committee without  
6 delay.

7                   Now to share with you some of The Arc's  
8 positions on legislation that would establish an  
9 independent office for dispute resolution and Speaker  
10 O'Brien's House Bill 2536. Again, The Arc of  
11 Pennsylvania is very grateful to the Speaker, who  
12 demonstrated his leadership on these important issues.

13                   As you know, the Commonwealth maintains a  
14 system for the adjudication of special education  
15 matters. Under this system, a hearing officer acts as  
16 the independent fact finder, conducting an evidentiary  
17 hearing held in the local school district. Because  
18 IDEA requires that hearing officers be independent of  
19 LEAs, it is necessary that the Commonwealth maintain  
20 an administrative entity with sufficient independence  
21 and neutrality to manage the selection, training,  
22 supervision and assignment of hearing officers.  
23 Unfortunately, the current Office for Dispute  
24 Resolution, or ODR, is funded through the Pennsylvania  
25 Department of Education and has historically been

1 housed in the PaTTAN Harrisburg office, an entity  
2 managed by Intermediate Unit Number 13 in Lancaster  
3 County.

4           For a number of years now, The Arc of  
5 Pennsylvania has had concerns regarding the neutrality  
6 of ODR and the lack of independence from the  
7 Department of Education. The Arc supports legislation  
8 that would make the Office for Dispute Resolution  
9 truly independent of PDE. Doing so would eliminate  
10 any possible conflict of interest and any appearance  
11 of pressure by the state education agency. These  
12 concerns include the potential for interference in  
13 personnel matters and a bias in favor of school  
14 districts.

15           The Arc also believes that any reform  
16 should include the following to provide greater  
17 independence for ODR. First, a direct appropriation  
18 for ODR that is not dependent upon the review and  
19 approval of Pennsylvania Department of Education.  
20 Two, ODR should be housed in a truly independent and  
21 neutral location and not within a public school  
22 agency, such as an intermediate unit or PaTTAN.  
23 Three, any reforming legislation should direct that  
24 ODR be governed by a publicly accountable board of  
25 directors appointed by the Governor and the

1 Legislature with a significant representation of  
2 parents of children with disabilities. Indeed, The  
3 Arc of Pennsylvania supports appointing a majority of  
4 parents with children who are being educated in  
5 schools where they are spending at least 60 percent of  
6 their school day in a general education setting with  
7 their non-disabled peers. Fourth and final, the  
8 newly-constituted Board should be mandated to  
9 institute safeguards so that no public official or  
10 private individual can improperly influence or  
11 pressure the Office of Dispute Resolution.

12           Without the development of a complete and  
13 effective separation from the Pennsylvania Department  
14 of Education, public confidence in the special  
15 education system will continue to be called into  
16 question. And the effectiveness of ODR staff and  
17 hearing officers will be negatively impacted.

18           The Arc of Pennsylvania support efforts  
19 to reform the Office for Dispute Resolution and  
20 establish a truly independent and neutral system to  
21 hear disputes between families and school districts or  
22 intermediate units. We particularly like Senate Bill  
23 1415, which was introduced by Senator Rhoades. The  
24 Arc of PA has not yet taken a position on House Bill  
25 2536 because many of our members have expressed

1 concerns with the lack of safeguards that would ensure  
2 that the Board is not dominated with appointees who  
3 favor segregated educational programs.

4           Pennsylvania ranks 46th in the country  
5 when it comes to how much time during the school day  
6 students with disabilities spend in general education  
7 with their non-disabled peers. Pennsylvania can and  
8 should be doing better, and excluding from an ODR  
9 governing board those parents whose kids are included  
10 at least 60 percent of their day, will only serve to  
11 keep our state in the inclusion cellar.

12           Thank you again for this opportunity to  
13 be with you today. The Arc of Pennsylvania and our 35  
14 local chapters across the Commonwealth stand ready to  
15 work with you to see these two important legislative  
16 efforts come to fruition.

17           CHAIRWOMAN:

18           Thank you very much, Ken. Back to your  
19 point, your first point about the ODR, that it should  
20 not be dependent upon the review and approval of PDE,  
21 so you're suggesting that PDE should be totally  
22 excluded from any oversight? Should it be included,  
23 should they at least be allowed to attend and watch  
24 over what's going on so that they have a grip of  
25 what's going on?

1                   MR. OAKES:

2                   Certainly. The Arc works in partnership  
3 with the Bureau of Special Education very closely.  
4 And I think it's appropriate for the Department and  
5 the Bureau to be a part of the process, combined with  
6 the process to ensure its effectiveness, but certainly  
7 not to have oversight.

8                   CHAIRWOMAN:

9                   Okay. And I know you're saying to have a  
10 truly neutral location, but knowing as little as I  
11 know about the way government works, somebody's always  
12 sort of got to have that agency --- I mean, it's got  
13 to be located within some sort of an agency somewhere,  
14 housed within the government. So what agency do you  
15 think should oversee it?

16                   MR. OAKES:

17                   Well specifically, our concern is that it  
18 not be housed within a school district, an  
19 intermediate unit, PaTTAN or within the Department.  
20 So any other agency of government where it could be  
21 located and maintain its independence would be  
22 agreeable.

23                   CHAIRWOMAN:

24                   And I know you say that The Arc has not  
25 taken a position on 2536 yet. Does The Arc --- are

1 they deciding on it? Are they discussing it? Are  
2 they going to either be for it or against it?

3 MR. OAKES:

4 The answer is yes.

5 CHAIRWOMAN:

6 Yes, okay.

7 MR. OAKES:

8 We have a committee that's working on  
9 that. And we actually have a meeting next Monday, ---

10 CHAIRWOMAN:

11 Okay.

12 MR. OAKES:

13 --- a telephone conference to  
14 specifically talk about that. And the issue really  
15 comes from The Arc's position that we should be doing  
16 more to include students with disabilities in the  
17 general education setting. And it's just that we want  
18 to make sure that in any legislation, that there is  
19 some language that ensures that a majority of parents  
20 that would be appointed would represent school  
21 children who are in public schools and part of the  
22 general education setting for some part of the day.

23 CHAIRWOMAN:

24 And just to be the devil's advocate a  
25 little bit, I did visit our Chester County



1 Intermediate Unit, where they do have a lot of  
2 children with special needs. A lot of them are very  
3 disabled. And my youngest was, mentally and  
4 physically. So I would not have chosen for her to be  
5 in a regular classroom. It really would have been  
6 much more appropriate for her to be housed in a  
7 setting such as the CCIU because they were --- they  
8 have equipment and all their teachers are special ed  
9 teachers. So they're all there to work with and  
10 understand the needs of those children. So my  
11 question is, if parents choose to not go along and say  
12 that they want their child in the regular classroom,  
13 they still have the choice, do they not, to put them  
14 in like a CCIU placement?

15 MR. OAKES:

16 Absolutely. Also, with The Arc, they  
17 filed the lawsuit against the Commonwealth. And we  
18 were the first people to argue that kids should be in  
19 public school, not in church basements and YMCAs, et  
20 cetera. And even though The Arc has that position  
21 that more students should be a part of the general  
22 education setting, we also hold the position that  
23 special education, as defined by IDEA and state  
24 regulations, is an individualized program and that  
25 it's one kid at a time, one set of parents, one team,

1 one IEP. And wherever the team makes the decision  
2 that that's the least restrictive environment, then  
3 that's what it is. We just don't want to see people  
4 automatically put in a certain area because of their  
5 disability, but rather, that it be a choice on the  
6 continuum.

7 CHAIRWOMAN:

8 Okay. Great. Thank you so much.

9 MR. OAKES:

10 Absolutely.

11 REPRESENTATIVE SHIMKUS:

12 Thank you, Mr. Oakes, for your testimony.  
13 And I appreciate the work of Arc. We're very close to  
14 The Arc.

15 MR. OAKES:

16 Oh, they're great. They're great people.

17 REPRESENTATIVE SHIMKUS:

18 Help me to understand this. It seems to  
19 me that there is a need for some change. But in the  
20 testimony of the PSEA, I also --- it got my attention  
21 that I feel that --- or at least I'm asking you, 2438  
22 as it's currently written, if you factor in what PSEA  
23 said, it sounds like there's not enough resources if  
24 we're going to make these changes, that what this will  
25 wind up doing is piling more responsibility on staff

1 and on teachers. And you might have more children  
2 affected in a negative way just because there aren't  
3 enough resources.

4                   And I guess what I'm asking you is, in  
5 your analysis of 2438, do we need to add something in  
6 there, an amendment or something to provide more  
7 staffing, to provide more resources, to provide more  
8 funding and make sure that if we make any changes,  
9 that we don't wind up making changes that we can't,  
10 that we're expecting too much of the teachers?

11                   MR. OAKES:

12                   I actually have a couple thoughts. We  
13 have to remember that the old system was exactly what  
14 we're asking for. It put the burden of proof on the  
15 LEA. So we're only talking about going back to what  
16 we actually had. And the idea that we're going to  
17 have this massive flow of people into the system just  
18 doesn't prove itself out through the data that was  
19 collected by ODR over the years. We heard from Mr.  
20 McAndrews about the actual number of due processes  
21 that are filed and then the fewer number that even  
22 actually go to hearing.

23                   So I guess The Arc doesn't believe that  
24 we're going to see flood gates opened up. We tend to  
25 believe that having the burden of proof on the family

1 creates an even greater drain on the system because  
2 they may not have the representation, so the system  
3 goes slower. And whatever placement or change of  
4 placement or change of program the parents are seeking  
5 or the district is seeking prolongs, perhaps, a bad  
6 placement or a bad program.

7           And I guess the third question is, more  
8 money? The Arc of Pennsylvania, they would stone me  
9 if I said, don't give special ed more money. But as  
10 somebody who was a special education teacher and an  
11 administrator, one of the biggest problems that we  
12 have at IEP meetings, and I'm sure that PSEA would  
13 agree with this, is that the amount of time that  
14 teachers have to attend these meetings and to prepare  
15 is so miniscule compared to the need. And so if there  
16 was anything that could be done, if we could figure  
17 out a way to free up teachers, not necessarily to take  
18 them away from their teacher responsibilities, but  
19 perhaps to pay them some overtime or something as they  
20 prepare.

21           But typically, when you go to an IEP  
22 meeting, you have a teacher and a parent, and maybe if  
23 you're lucky, a building principal shows up or the  
24 speech therapist, if it's a typical IEP meeting. If  
25 it's a problem IEP meeting, you'd need a room like

1 this, big and massive IEP team meetings.

2           So I think that if anything could change  
3 in the system that we could add to what we want to do,  
4 it would be to figure out a way for teachers to have  
5 the time and the resources to really dig into the IEP,  
6 and to really prepare the IEP and to work with  
7 families, before they actually sit down at the  
8 meeting. This man is very unique. He went to  
9 people's homes, and I congratulate him and thank him  
10 for that. I actually went to a prison one time to  
11 hand deliver an IEP so the parent could look at it.  
12 So there are teachers out there that do pretty amazing  
13 things.

14                   REPRESENTATIVE SHIMKUS:

15           Well, that was, you know, my concern. I  
16 realize that was kind of a dumb question to ask you if  
17 you need more money. But my concern is and my  
18 experience is that sometimes we make these laws, and  
19 we say, okay, now implement them.

20                   MR. OAKES:

21           Uh-huh (yes).

22                   REPRESENTATIVE SHIMKUS:

23           Here, go and make it happen. Pay no  
24 attention to that man behind the curtain, you know.  
25 And I respect the teacher as the front line and

1 always, you know, want to get the teachers' input in a  
2 lot of these things. So when I hear teachers saying,  
3 we're concerned about whether or not this is going to  
4 wind up benefiting the kids, I say, I think the  
5 principles of both of these bills are good, something  
6 that I would want to support. But I only want to  
7 support them if they can be implemented effectively.  
8 And so there may be some changes that are necessary  
9 before you put them into action.

10 MR. OAKES:

11 Thank you.

12 REPRESENTATIVE HARKINS:

13 I would just like to thank you for the  
14 way you spelled everything out very clearly. I'm very  
15 proud to represent the Barber Center in the heart of  
16 my district, and I'm sure you ---.

17 MR. OAKES:

18 My first teaching job was at the Gertrude  
19 Barber Center with kids who had severe ---.

20 REPRESENTATIVE HARKINS:

21 It's a shining star up in Erie.

22 MR. OAKES:

23 Uh-huh (yes).

24 REPRESENTATIVE HARKINS:

25 It's been there for many years. And I

1 often say, where would we be without the insight and  
2 forward thinking of Dr. Barber? She's since passed,  
3 but again, I'm very proud of this. And I'm sure you  
4 are.

5 MR. OAKES:

6 Yes.

7 REPRESENTATIVE HARKINS:

8 But you spelled out, you know, questions  
9 or comments and concerns that I've received from not  
10 only my district, but people outside of Erie that deal  
11 with the Barber Center that are very active with The  
12 Arc. Some are in the middle, I think, in terms of  
13 agreement on all these issues on this. It's very  
14 important that we get this moving. And I just wanted  
15 to thank you.

16 MR. OAKES:

17 Thank you. Could I just say one more  
18 thing? I think that the history of The Arc is to push  
19 the envelope. And as I mentioned in my testimony,  
20 that it really has been parents who have pushed the  
21 envelope. We wouldn't have what we have today. We  
22 wouldn't have PARC. We wouldn't have Public Law  
23 94-142, which then became IDEA, if parents didn't say,  
24 it isn't right, it isn't working, we need to change  
25 this, we need to do more. And so The Arc represents

1 parents.

2 I want to make the point that teachers do  
3 the same thing, that teachers are always pushing the  
4 envelope themselves, sometimes all by themselves in  
5 the school district. And so I think meeting in the  
6 middle is an excellent idea. Because I think we all,  
7 at the end, only want to see the best thing for that  
8 particular kid and that particular family. So thanks  
9 very much.

10 CHAIRWOMAN:

11 Thank you very much, Ken. Now we'll  
12 have, I'm sorry, Andria Saia?

13 MS. SAIA:

14 Saia.

15 CHAIRWOMAN:

16 Saia, thank you. Levin Legal Group,  
17 Pennsylvania School Board Association. Thank you very  
18 much, Andria, for being here.

19 MS. SAIA:

20 Thank you. I'd like to thank the  
21 Committee chairpersons for giving PSBA, Pennsylvania  
22 School Boards Association, and me the opportunity to  
23 testify today on House Bills 2438 and 2536. I have  
24 represented public school districts in the  
25 Commonwealth of Pennsylvania for nearly ten years.



1 One of the things that I neglected to include in my  
2 written testimony was that I also represent parents  
3 against charter schools. And I'm currently  
4 representing a parent in Maryland. So important to me  
5 is public education and public education work, that  
6 I've gone back to this esteemed university to get my  
7 Master's in Special Education because my legal advice  
8 needs to reflect what is appropriate educationally.  
9 So I am passionate about education and public  
10 education.

11 I am a little disturbed by the testimony  
12 that we've received today that fairness and doing the  
13 right thing --- connotes that school districts aren't  
14 doing the right thing, or that school districts are  
15 doing the wrong thing. School districts are every bit  
16 as invested in the education of children and the  
17 education of children with special needs. And  
18 everyone else, parents, Arc, teachers, we're all in  
19 this together. Certainly, no one went into public  
20 education for the money or the glory. So I think that  
21 we should keep that in mind, that this is not about  
22 what really looks like negligent school districts.  
23 And I don't think that the bills were really put into  
24 place because school districts are negligent. But  
25 there's been a lot of talk that really sort of said

1 that to me. It's been very disturbing.

2           The first issue in one of the bills is  
3 the burden of proof. And I think that you've heard a  
4 lot of testimony about that. And I don't know that  
5 there's a lot that I can add that people haven't said,  
6 except for these things. The American system of  
7 jurisprudence is built on the idea that you are  
8 innocent until proven guilty. By placing the burden  
9 of proof on school districts, they were guilty until  
10 they could prove themselves innocent. The Supreme  
11 Court in Schaffer said this. The Supreme Court  
12 specifically rejected the idea that school districts  
13 are automatically doing the wrong thing, or that  
14 Congress intended IDEA to say that school districts  
15 are automatically doing the wrong thing until they  
16 could prove they're doing the right thing.

17           I've heard lots of talk today about how  
18 manifestly unfair it would be to have parents have to  
19 represent their issues because school districts have  
20 the staff and the documents and so forth. The  
21 American system of jurisprudence, namely that you are  
22 innocent until proven guilty, applies across the  
23 board. And this is not the only situation in which  
24 the plaintiff does not bear the particular expertise  
25 that the defendants would. If we're going to talk

1 about that type of fairness, quote, unquote, look at  
2 medical malpractice. Certainly, people injured by  
3 doctors do not have the expertise that the doctor and  
4 the hospitals have. Look at products liability.  
5 Certainly, people injured by products do not have the  
6 expertise, the manpower, the money that the companies  
7 that build these products do. The U.S. Supreme Court  
8 in Schaffer said, listen, we understand that that's a  
9 concern. But we believe that Congress has, quote,  
10 unquote, leveled the playing field. And we've leveled  
11 the playing field by doing such as a procedural  
12 safeguard.

13           In no other area of the law does a  
14 defendant have to explain with precision how to sue  
15 them, except for special education. Procedural  
16 safeguards provide right to the documents, not just in  
17 an exchange of documents for the due process hearing,  
18 but right to the documents at any time. The Family  
19 Education Rights and Privacy Act also provides right  
20 to the documents.

21           I would agree with Mr. McAndrews that  
22 sometimes documents do not come in a giant lump pile.  
23 This is because they're not kept in one place. So to  
24 get the documents, people need to take the time out of  
25 their day away from whatever else they're doing, to go

1 to the nurse, to go to the office, to go to  
2 registration or the attendance office, to go to these  
3 different teachers. And sometimes they are not all in  
4 the same place, and we deliver them in piecemeal. But  
5 that doesn't stop parents from asking for litigation.  
6 And they can always go to the hearing officer, and the  
7 hearing officer can come down on the district and say,  
8 listen, they're asking for documents. You need to get  
9 them. Some of my school districts are better than  
10 others at getting those documents. But in the end, we  
11 provide everything that anyone can put their hands on.

12           The other issues of procedural safeguards  
13 is the right to have your attorney's fee paid. So  
14 there are many, many, and I think this number is  
15 growing every day, of attorneys that are willing to  
16 represent parents, because if their case is true, and  
17 they're right about it, they're going to get paid for  
18 it. They will receive their attorney's fees.

19           So the Schaffer Court looked at all of  
20 these things, having to tell parents how to sue us,  
21 having to give them documents. Let's not forget, and  
22 there was some discussion from several people who  
23 spoke about the fact that we're in the classroom with  
24 them. The school district is there. The teachers are  
25 in the classroom every day. Chapter 14 in IDEA

1 specifically indicated that parents have to have the  
2 right to go in and observe in their classroom. You  
3 know, so that was even addressed in the legislation  
4 that we already have. So I think that Congress has  
5 truly leveled the playing field. And I think that the  
6 U.S. Supreme Court spent a good bit of time explaining  
7 this to us in Schaffer v. Weast.

8           The other thing that I want to say about  
9 the burden of proof is --- and doing this for nearly  
10 ten years, I have practiced under an array of  
11 situations. I practiced under the old ODR with many,  
12 many hearing officers and an appeals panel, and now  
13 practicing without an appeals panel and just a panel  
14 of five hearing officers. I've practiced in all of  
15 these different ways. And these hearings, when  
16 parents have the burden of proof, they have to tell  
17 me, they have to tell the school district what is  
18 wrong. What is it that you're complaining of?

19           There is a complaint process in IDEA, but  
20 I don't find it as precise as Mr. McAndrews might  
21 suggest. They need to say what they think is wrong.  
22 And that could be, I don't like the IEP. As I stated  
23 in my written testimony, that IEP could be 30, 40, 60  
24 pages long. It's a needle in a haystack, if you want  
25 to ask me what exactly is wrong with that document.

1 So then the school district gets to hear from the  
2 parent, hear from their questions of our witnesses,  
3 hear from the questions of their own witnesses exactly  
4 what the problem is. And then we get to respond.

5           When the burden of proof went the other  
6 direction, district would have to go first and say,  
7 well, we kind of think this is what they're  
8 complaining of. And here are my many, many, many  
9 witnesses that might sort of, as a buckshot approach,  
10 address the issues that they're claiming. And then  
11 parents would testify and we could have been  
12 completely wrong about what the issues were. We could  
13 have missed the mark by a mile. And then I'd have to  
14 bring in rebuttal witnesses to come back again. And  
15 that is a true delay of the process, to have to add  
16 another day of hearing, have to schedule around  
17 everybody, the hearing officer, the attorney, the  
18 parents, the school district, around the holidays and  
19 everything else to get to a hearing to do rebuttal  
20 testimony because we didn't understand what the  
21 parents wanted.

22           I don't see why special ed should be  
23 treated differently than any other area of American  
24 jurisprudence. I don't see that there are claims for,  
25 that it's not fair for me to have to represent myself

1 against the doctor because they know more or against  
2 Ford Motorcar because they know more, you know, about  
3 their Pintos that blow up. I'm just a poor consumer,  
4 and what do I know about their cars? It's no  
5 different. I think that the system works better, and  
6 it's why it's the basis of American jurisprudence. So  
7 I would suggest that returning the burden of proof is  
8 not going to be the magic bullet that anybody suggests  
9 that it is.

10                   The second proposed change in House Bill  
11 2438 is revising the 60-day calendar evaluation  
12 timeline to exclude the summer break. There was some  
13 statement by Speaker O'Brien about making sure that  
14 kids are evaluated and identified so that they can  
15 continue --- so that they can begin receiving  
16 services. And I agree. But let's remember that early  
17 intervention services for the younger children, three  
18 to five and earlier, have that 60-day timeline without  
19 a break for the summer. So when we're talking about  
20 early identification for our young ones, that is  
21 already happening.

22                   When we get to school age, I did not hear  
23 a single person talk about the change in IDEA and  
24 Chapter 14 to reflect the fact that we want more done  
25 prior to evaluation and labeling than focusing on the

1 evaluation process.

2                   RTI, Response To Intervention, this is  
3 the theory that if we provide good teaching,  
4 scientifically-based programs, the appropriate  
5 intensity, perhaps children will not ever need to be  
6 identified. These things are in place beforehand.  
7 Chapter 14 speaks specifically to, you can't find a  
8 child eligible until you've shown that you have  
9 implemented scientifically-based programming and that  
10 it hasn't worked, which means you've done your  
11 responsive intervention. You've tried to see if you  
12 can avoid the special education label.

13                   For many of our children, the special  
14 education label, the outcomes are not good. I've done  
15 a lot of research in my graduate program. And the  
16 outcomes for students who spend their lives in the  
17 special education process are not good. They're not  
18 good in terms of college. They're not good in terms  
19 of heightened drop-out rates. They're not good in  
20 terms of heightened criminal activity rates and  
21 criminal prosecution. There's a lot to consider,  
22 which is why best practices is now being reflected in  
23 the law. We want to avoid the label of special  
24 education if we can. So before we get involved in the  
25 evaluation process, we want to do things like response



1 to intervention, providing these specific,  
2 scientifically-based programs.

3           There was some discussion of a what if,  
4 the what-if child that in the spring we find out there  
5 are problems, and we want to make changes before  
6 September. But if we start the evaluation process,  
7 that won't be done until, I think, Mr. McAndrews said  
8 a half a school year has gone by. I couldn't disagree  
9 more. I worked very closely with my school district.  
10 If a child needs a change in placement, it can be done  
11 without waiting 60 days to finish an evaluation.  
12 That's just absolutely not the case.

13           And if, say, it is the case that the  
14 child is newly being identified, so we really do need  
15 that evaluation report, we need to go through the  
16 procedure to identify that child, school districts do  
17 evaluate over the summer. They don't evaluate  
18 everyone over the summer. But they do keep one or two  
19 of their psychologists on for the emergency situation.  
20 This is not the big, bad school district trying to  
21 avoid evaluations and then dragging it out a year so  
22 that they don't have to provide special education.

23           This situation does not come up often.  
24 If the child has already been identified, it's not a  
25 matter of waiting for a 60-day evaluation to make the

1 change in placement. You can make the change in  
2 placement based on the data. My understanding of the  
3 scenario, of this doomsday scenario is, you have a  
4 child who's had behavioral or disciplinary or hasn't  
5 made progress. That data alone can be the basis for a  
6 change. There isn't this doomsday wait 60 days and  
7 delay a half a school year to get that done.

8           The other thing is, and Speaker, one of  
9 the committee members brought this up, and I apologize  
10 for not mentioning your name, is that, this is about  
11 funding as well. There are not a million and one  
12 certified school psychologists just waiting out there  
13 to work for school districts during the summer. Most  
14 of them are ten-month employees. There is a dearth of  
15 certified school psychologists. Again, people don't  
16 go into education for the glory or the money. And  
17 then even if there were --- there is this magic amount  
18 of school psychologists just waiting to be hired for  
19 summer work, where does the money come from? Many of  
20 my school districts are facing tremendous cuts. The  
21 last budget was cut from the state. We're talking  
22 about a cut in school psychologists. We're talking  
23 about cuts in behavior therapists and specialists.  
24 We're talking about cuts in special ed staff. Where  
25 does this extra staff come from?

1                   And it's not just the school  
2 psychologists that we're talking about, because if you  
3 finish your evaluation report June 30th, you only have  
4 30 days under IEA to complete your IEP. Your IEP has  
5 an enumerated list of must-do participants. So now we  
6 need that school psychologist. We need the  
7 administrator. If the LEA is a different person, we  
8 need that person. We need a regular ed teacher of the  
9 student. We need a special ed teacher of the student.  
10 We need the parent during the summer months, when  
11 parents generally take vacations, while their kids are  
12 off from school. We need all of that to happen as  
13 well. Where is the funding for that?

14                   I think that one of the things that we  
15 need to consider is that when Chapter 14 was passed,  
16 it was thoroughly ready. Many meetings, many  
17 discussions, much testimony, and this is what we've  
18 settled on, because we considered some of these other  
19 factors that are very important to this process.  
20 Again, it doesn't do anyone any good if we just  
21 thought this is how it's going to be, but no one can  
22 fund it. Or this is how it's going to be, but there's  
23 no psychologist available to do that type of thing.  
24 Then what you have is you put the school district  
25 behind the eight ball, and now we do have a competent

1 claim because we didn't have anybody that could help  
2 during that situation.

3           There just isn't the alarming need of  
4 summer evaluations. And it just crosses all of the  
5 best practices and the funding and the logistical  
6 issues without answering any of those questions.  
7 There are many more questions that need to be answered  
8 before a bill like this is passed with just a simple  
9 statement that evaluations will be completed in 60  
10 days.

11           But the second of the two House Bills  
12 we're here to discuss today proposes the creation of  
13 an independent Board of Dispute Resolution, an  
14 independent ODR. Right now ODR runs through funding  
15 that is received through PDE from the federal  
16 government. I don't know how that funding stream is  
17 changing unless, again, the state is going to somehow  
18 magically come up with the money for this. The  
19 funding stream is what the funding stream is.

20           Another thing that I didn't hear a single  
21 person discuss so far is the fact that the hearing  
22 officer system is set up under the auspices of IDEA.  
23 IDEA says LEA shall have a system of impartial hearing  
24 officers. And if the LEA doesn't do it, the SEA  
25 should do it. It doesn't say, LEA, SEA or some other

1 independent board of political appointees. It says  
2 LEA or SEA. So the first question that I think needs  
3 to be answered, which no one has discussed so far, is  
4 whether or not it's even legal to have an independent  
5 Office for Dispute Resolution that is not manned by  
6 the LEA or the SEA.

7                   The second issue that I raised, again,  
8 that wasn't discussed is, I'm all for independence and  
9 I'm all for an unbiased system. School districts have  
10 as much at stake as parents do in having an unbiased  
11 system. We used to have a system where hearing  
12 officers could be parents' attorneys at the same time.  
13 We don't have that system anymore. I'm all for an  
14 independent and unbiased system.

15                   But will a board of politically-appointed  
16 members provide to us an unbiased system?  
17 Respectfully, I suggest that that won't be the case.  
18 We're going to have eight board members, largely  
19 politically appointed, which are going to change every  
20 time the political waves change. Certainly, the  
21 Speaker is not going to want the last Speaker's  
22 appointment, especially if it's Republican versus  
23 Democrat, and that's changed over. So the appointers  
24 changes, the appointees change, and then the  
25 appointees are probably going to want to make changes

1 to who the hearing officers are so that their own  
2 agenda is forwarded. I think that it's going to  
3 create an ever-revolving door of leadership in an area  
4 of the law that does not need that type of leadership.

5 I don't know what the board would do,  
6 other than pick hearing officers. But that doesn't  
7 really speak to what the board will do. So I see an  
8 ever-changing board of political appointees picking  
9 the hearing officers, because that's what the bill  
10 says that they'll do, which means we're going to have  
11 changing hearing officers. We won't have the year  
12 after year or the ability to garner experience from  
13 being through many, many hearings.

14 The system that we have now is a system  
15 of five hearing officers run through an office that I  
16 actually have a lot of respect for. I just --- as Mr.  
17 McAndrews and anybody else who practices in this area  
18 of the law has just as much at stake as anybody else  
19 in having a fair hearing officer. Their hearing  
20 officers that are currently in place were chosen by a  
21 panel of people, chosen from different backgrounds,  
22 different interests, different biases, so that the  
23 panel would be as fair a panel of hearing officers as  
24 we could have. I don't know how a board of political  
25 appointees would have done that better.

1                   Training is provided. Hearing officers  
2 are monitored. Hearing officers are watched by other  
3 hearing officers when they're new to the system, and  
4 occasionally observed later on in their career.  
5 Everybody wants the same thing. We want a dispute  
6 resolution process that works. And I don't see how  
7 what is proposed would work better than what we have.  
8 In fact, I see a lot of shortcomings in the  
9 suggestion.

10                   Thank you for allowing me the opportunity  
11 to share our perspectives on this. I would be happy  
12 to try to answer any questions --- there's one other  
13 thing I'd like to say about the board of independent  
14 Office for Dispute Resolution. Remember LEA, school  
15 districts have the right under IDEA to develop their  
16 own system. And if we're going to be faced with a  
17 system that's going to be working less smoothly than  
18 the one we have now, more school districts will just  
19 create their own and seek PDE approval of that. And I  
20 think that parents would be far less happy with that  
21 than a panel that was chosen by ---. Thank you.

22                   CHAIRWOMAN:

23                   Thank you, Andria. We appreciate your  
24 testimony. And I want to just make a comment and a  
25 question. I wanted to say that not all laws are

1 proven correct, and that's why we continually go into  
2 litigation to try and change some laws. There were  
3 things about Chapter 14 that I did not agree with.  
4 And certainly, we made our objections known. But  
5 things passed anyway. And there's still places around  
6 this Commonwealth that don't have ramps in and out of  
7 stores to make sure that disabled people can get in  
8 and out.

9           I know when I was looking for --- and I'm  
10 just using example. But when I was looking for an  
11 office for my district office in West Chester, one of  
12 the things that we were told was that it had to be  
13 handicapped accessible. And we went to an office, and  
14 it was the right price. We said okay. I said I need  
15 a ramp in here. And they looked it up, and they  
16 realized that they could get away with just installing  
17 a little doorbell on the door for me. Then my staff  
18 would have to go out and help the person in the  
19 wheelchair up the steps.

20           MS. SAIA:

21           Uh-huh (yes).

22           CHAIRWOMAN:

23           And that's their way of getting around  
24 it. I don't think that's right. So I'm just saying  
25 that just because it's on the books doesn't mean that



1 it's right. And I did appreciate your excellent  
2 argument and your passion. I have the same passion.  
3 But I wanted to ask you, you said you had the right to  
4 have your attorney's fees paid.

5 MS. SAIA:

6 Uh-huh (yes).

7 CHAIRWOMAN:

8 Is that if the parents win?

9 MS. SAIA:

10 Correct.

11 CHAIRWOMAN:

12 And if they lose, then they don't?

13 MS. SAIA:

14 Correct.

15 CHAIRWOMAN:

16 Correct, okay.

17 MS. SAIA:

18 And that attorney's fee, that fee-  
19 shifting statute --- well, there are several, sort of  
20 the civil rights agreement --- is fairly unique in  
21 terms of the law. Just as in most areas of the law,  
22 plaintiffs bear the burden of proof. It also stands  
23 that in most areas of law, you also bear the burden of  
24 your costs of litigation.

25 CHAIRWOMAN:

1           And also, technology should allow us to  
2 keep the documents pretty much in one place anymore.  
3 I find it sort of absurd that, you know, there's  
4 documents all over the place that everybody has to go  
5 get. I think with computers today, we can have all of  
6 our documents scanned and put into one place so there  
7 is a file so that even if they're kept in different  
8 departments throughout the school, there should be a  
9 central location for document placement so that there  
10 wouldn't be that problem.

11           MS. SAIA:

12           I actually couldn't agree more. My  
13 office, although not paperless, scans every piece of  
14 paper that comes in and out of our office so that even  
15 if the paper were gone, we could have a copy of it.  
16 I do have one school district that has such a system.  
17 I don't think it reflects every document. I don't  
18 think nursing records are all in that system. But  
19 I agree, and I agree that technology should help us be  
20 able to save more documents with less space, which is  
21 a huge issue for school districts. The funding of  
22 that technology is also another question.

23           CHAIRWOMAN:

24           Uh-huh (yes).

25           MS. SAIA:

1                   Because putting a system like that in  
2 place is not inexpensive. I know as a partner from a  
3 law firm that has one of those systems, which is much  
4 smaller than any public school district.

5                   CHAIRWOMAN:

6                   All right. Well, it would by school, I  
7 think, district itself. But also the complaint  
8 process, to ask what's wrong, perhaps there should be  
9 more specificity of the complaint. When you said that  
10 parents just say, well, I don't know the IEP, and then  
11 the district, if they were the ones that had the  
12 burden of proof, they'd have to sort of have gun shot,  
13 I don't agree that --- and yet --- actually, I should  
14 back up because I've never been to a due process  
15 hearing. And I don't know. But couldn't we require  
16 people to be more specific? And I'm asking you as a  
17 lawyer because I'm not a lawyer.

18                   MS. SAIA:

19                   Well, yes, I think that we could. I  
20 think that IDEA was trying to get at that. I have not  
21 had the experience where hearing officers had demanded  
22 ridiculously specific things from parents. In the  
23 case of parents that are unrepresented, which I had  
24 dealt with on many, many occasions --- I currently do  
25 work for Chester-Upland School District. And many of

1 those parents have not the financial or other  
2 wherewithals to get an attorney. But they also may  
3 not be able to accurately describe exactly what it is  
4 that is wrong. And there is a lot of effort that goes  
5 into that. I don't know that without the process of  
6 really having a discussion and having someone sit down  
7 and go through it with them, which I have done with  
8 unrepresented parents, that they would be able to come  
9 up with that on their own.

10           And I guess that problem remains either  
11 way. But then the school district isn't guilty until  
12 proven innocent on a charge it doesn't really  
13 understand. American jurisprudence got rid of guilty  
14 until proven innocent when we stopped burning witches.

15           CHAIRWOMAN:

16           And I take exception to innocent until  
17 proven guilty when it comes to the school district. I  
18 understand what you're saying, but I don't think we're  
19 trying to say that they're guilty. I think that, you  
20 know, again, as parents, we are just trying to find  
21 the best solution to help our child achieve. And it's  
22 really about being heard. And when you are one tiny  
23 person against a bureaucratic system, you are at a  
24 disadvantage. And having been on both sides of the  
25 fence, I can tell you that being the parent is very

1 difficult when it comes to looking for help for your  
2 child. But I thank you for your testimony today, and  
3 I'll ask my colleagues if they have any questions or  
4 comments.

5 REPRESENTATIVE SHIMKUS:

6 I have two quick questions. First, on  
7 the 60-day period timeline, if, as you suggest --- and  
8 I agree with you, by the way, that most school  
9 districts aren't just saying punch the time clock and  
10 say, oh, you know, school year's over. We'll see you  
11 in September. What's the problem then with  
12 legislating that? If most school districts are  
13 responsively acting, then why not just make that the  
14 law so that the few who might be the bad apples, so to  
15 speak, can't watch the clock and say, you know, see  
16 you?

17 MS. SAIA:

18 Well, I think that that comes down to  
19 funding. I mean, I worked all summer with school  
20 districts. So I know that litigation and evaluations  
21 and IEPs were still going on. In fact, it was an  
22 incredibly busy summer. But then that comes down to  
23 the funding issue. What about the school district  
24 that has just cut 1.5 psychologists? Who do they get  
25 to come to that meeting? How do they get teachers who

1 may be at the shore or on other vacation? How do they  
2 pull all of that together without being blown out of  
3 compliance by the law? If there's not going to be the  
4 funding for that, how can we expect every school  
5 district to be able to do that?

6 I represent the gamut. I represent  
7 Radnor Township School District and I represent  
8 William Penn and Chester-Upland School District. The  
9 finances, the wherewithal, the staffing, very  
10 different in those two school districts, and that's  
11 not something that's addressed by the law. I don't  
12 know what they would do if required to do these  
13 evaluations all summer long. I don't know where the  
14 staffing would come from for the evaluation or the IEP  
15 meetings.

16 The other issue that I raised in my  
17 written testimony that I neglected to mention was,  
18 part of the evaluation process is an observation. An  
19 observation of the child at home or at the beach  
20 doesn't help us with how we're going to program for  
21 the child within the school setting. How are we  
22 observing these children in the school setting? IDEA  
23 requires that observation to be part of the evaluation  
24 report. How does that get addressed? There are many,  
25 many logistical problems with this type of --- this

1 suggestion, which is why I think the process of  
2 Chapter 14 that came up with 60 days, except for the  
3 summer, brought all of this together. And I'm not  
4 seeing how that process should be set aside for this  
5 change. I don't see it changing the facts or the  
6 money or the logistics.

7 REPRESENTATIVE SHIMKUS:

8 My second question is about  
9 something that you mentioned. You've seemed to  
10 suggest or even almost predict that there would be a  
11 legal challenge coming through ODR. And my concern  
12 there is that we don't really want to draft or pass  
13 any legislation that is doomed to failure. Do you  
14 predict there are legal challenges coming?

15 MS. SAIA:

16 Absolutely. And I think that one of the  
17 things that Supreme Court said in Schaffer v. Weast  
18 was, we're not asked the question as to whether or not  
19 this type of --- I'm sorry, I'm mixing things up.  
20 Yes, I do see that there's going to be challenges to  
21 an independent ODR because I'm not sure how really,  
22 truly independent it is. I think that more likely  
23 what's going to happen is school districts are going  
24 to move forward with the consideration of setting up  
25 their own systems.

1                   REPRESENTATIVE SHIMKUS:

2                   Thank you very much for your testimony.

3                   CHAIRWOMAN:

4                   Thank you very much, Andria. And now we  
5 have our final testifier, Felicia Hurewitz. And she  
6 is a Ph.D. assistant professor at the Department of  
7 Psychology at Drexel. Thank you, Felicia.

8                   DR. HUREWITZ:

9                   Thank you. I would like to thank  
10 Representative McIlvaine Smith and members of the  
11 House Special Education Subcommittee for listening  
12 today. I represent the government workgroup of the  
13 Autism Society of America's Pennsylvania chapters, a  
14 group which has been adamantly advocating for the  
15 rights of students with autism and other disabilities  
16 for the past three years, and especially focusing on  
17 the special education regulations as they were  
18 revised. I also am speaking as a parent of a child  
19 with a disability, and like I said, I have experienced  
20 all the systems we're talking about today, including  
21 the due process system, et cetera.

22                   I'm also a developmental psychologist at  
23 Drexel University, where I conduct applied research in  
24 autism interventions. And in that role, I actually  
25 work with schools. So I have a number of partner



1 schools who help me with my research, including a  
2 private school and a charter school. For the past  
3 eight years, I have been also been helping parents in  
4 advocacy efforts, usually behind the scenes in  
5 addition to working full time at my job.

6           To illustrate the position of families  
7 involved in special education disputes, I want to  
8 give, as a case example, one family that I know well.  
9 And this is the family of three-year-old Ryan, who is  
10 a newly-diagnosed child.

11           When Ryan was two and a half, his parents  
12 became concerned about his development. He wasn't  
13 saying any words. He wasn't playing typically with  
14 toys. He wasn't making eye contact. He wasn't  
15 responding to his name. Basically, he would seem to  
16 be delayed in every area. His pediatrician said,  
17 don't worry about it. He's just a little behind  
18 because he's a boy. But they did worry. And they  
19 finally were able to get him evaluated in February of  
20 2007, where he was diagnosed with PDD-NOS, an autism  
21 spectrum disorder.

22           Like many in this position, Ryan's  
23 parents decided they would do whatever it took to  
24 allow Ryan to grow up to have opportunity and  
25 independence. They immediately signed him up for

1 speech, social and occupational therapies for 20 to 30  
2 hours a week. They enrolled him in playgroups. They  
3 arranged for parental training so they could learn how  
4 to extend and reinforce his therapies throughout the  
5 day.

6           So the way their family schedule works  
7 is, Ryan's father works from 8:00 to 4:00, while his  
8 mother takes Ryan around to all the different therapy.  
9 And then as soon as the father comes home, the mother  
10 goes off to work from 5:00 to 9:00 and slips in just  
11 in time to put Ryan to bed.

12           To teach a child like Ryan, you must be  
13 on every day. He does not learn in a passive  
14 environment. He does not automatically pick up  
15 language or social interactions, as most children do.  
16 So his parents are on all the time. Even when they're  
17 not working, they are always interacting with him and  
18 trying to give him therapy.

19           Ryan is responding dramatically to the  
20 therapies that his parents are giving him.  
21 Miraculously, at about three, Ryan began speaking and  
22 even putting together words and phrases. Today at  
23 three and a half, he makes eye contact with people he  
24 knows well. He plays with his train sets and his  
25 plastic animals and his toy drum in a rather typical

1 manner. He no longer gets overwhelmed in loud or  
2 crowded places. And to me, Ryan's situation really  
3 brought home what us researchers have been saying,  
4 that given quality interventions in a timely manner,  
5 we can fundamentally alter the trajectory of the  
6 developing child. And it has to be early.

7           You may ask, where was the local  
8 educational agency in this equation? Well, back when  
9 Ryan was diagnosed, the family was offered by their  
10 district two hours a week of assistance by a special  
11 education teacher. Ryan's parents didn't think that  
12 was sufficient. But they were too exhausted --- and  
13 you can imagine with their schedules, that they really  
14 were --- to try to fight it. And frankly, every cent  
15 they have is going into pay for Ryan's therapies.  
16 When Ryan turned three, he was offered by his school  
17 district a segregated preschool placement that was  
18 populated primarily by non-verbal children. Remember  
19 this is when he started talking. Only limited related  
20 services were offered.

21           Ryan's parents and his private evaluators  
22 felt that he could thrive with push-in services at a  
23 typical preschool, where he could model the typical  
24 social behaviors and speech of his peers. So  
25 currently, the parents are still taking Ryan to all

1 his therapies and to his typical preschool. And they  
2 are paying for this out-of-pocket. But they just  
3 don't know how long they'll be able to continue with  
4 this schedule, with no vacations, no time together as  
5 a family and no extra money at all that they can save  
6 up.

7           Ryan's story is common in Pennsylvania  
8 and throughout the country. For these families, the  
9 Supreme Court majority Decision in Schaffer v. Weast  
10 and also the decision in Arlington v. Murphy, which  
11 we're not focusing on too much today, were the final  
12 straw. Ryan's parents are among the lucky ones. They  
13 both have Master's degrees from very good colleges,  
14 and they both have jobs. With two salaries, they at  
15 least have the resources to scrape by if they are  
16 willing to forego savings, retirement and vacations.

17           I can state unabashedly that special  
18 education due process disputes are less fair and less  
19 likely to result in a positive outcome for students  
20 than they were eight years ago. And the main reasons  
21 for this was that the 2004 reauthorization of the  
22 IDEA, which imposed a two-year statute of limitations,  
23 made the process much more difficult for parents,  
24 first. And secondly, those two recent Supreme Court  
25 Decisions have had a chilling effect on parents'

1 ability to advocate for their children.

2           As we discussed at some length today,  
3 Schaffer v. Weast majority Decision by the Supreme  
4 Court resolved that the burden of persuasion should be  
5 borne by the party filing the complaint. And this has  
6 been discussed in the context of it being consistent  
7 with many other areas of civil litigation.

8           Despite what has been said, it is just  
9 about always the parents who are bearing the burden of  
10 proof on the district. It is not the case that when  
11 the district wants to change an IEP, the district  
12 bears the burden. As far as I know --- I'm not an  
13 attorney, but case law seems to have established that  
14 actually the person filing --- and the school district  
15 doesn't file on their own IEP. The parents file it.  
16 So the only time you ever have a school district  
17 bearing the burden is maybe when they're defending  
18 their evaluation. But in all cases, you have the  
19 parents filing and the parents bearing the burden.

20           In rendering their decision, the Schaffer  
21 majority declined to consider the vast informational  
22 and resource inequalities between the parents and  
23 school districts. This imbalance is best summarized  
24 in Justice Ginsberg's dissenting opinion in Schaffer  
25 where she says, parents are ill-equipped to bear the

1 burden of proof in special education due process  
2 cases. The district is in a far better position to  
3 demonstrate that it has fulfilled its obligation than  
4 the disabled parents are to show that the school  
5 district has failed to do so. The vast majority of  
6 parents of children with disabilities lack knowledge  
7 about the educational resources available to their  
8 child and the sophistication to mount an effective  
9 case against a district-proposed IEP.

10 I think it should be clarified here that  
11 the majority in Schaffer assumed that burden would  
12 make little difference for the bulk of cases, and that  
13 it would only have force when evidence supporting each  
14 side was exactly balanced. Unfortunately, it really  
15 hasn't turned out that way. The Schaffer Court  
16 misunderstood how the process truly functions in  
17 states like Pennsylvania. Unlike many other types of  
18 litigation, including those just brought up by Ms.  
19 Saia, the parties in Pennsylvania in special education  
20 administrative due process hearings do not have the  
21 right to formal discovery procedures. So when you're  
22 suing for malpractice and other areas, you get to do  
23 your formal discovery to know what the other side is  
24 going to say. You don't get to do that in these  
25 hearings. This means that the party going first must

1 go into the case relatively blind to what the other  
2 side might say or argue. When the burden of proof  
3 shifted here in Pennsylvania, so did the order of  
4 putting forward the case. And now, per ODR rules, if  
5 the parents filed, they must go first.

6           While preparing for this testimony, I  
7 asked several PA attorneys and parents how the  
8 Schaffer Decision has affected them. What I was told  
9 was disturbing. Judith Gran, an attorney from the  
10 Public Interest Law Center in Philadelphia, analyzed  
11 50 Special Education Appeals Panel cases from 2005,  
12 just prior to the Schaffer Decision, and 50 cases in  
13 2007 after the Schaffer decision was fully solidified  
14 in terms of interpretation. She found that parents  
15 prevailed or partially prevailed in 58 percent of  
16 cases prior to Schaffer, and 44 percent post-Schaffer.  
17 So that's a 14-percent difference right there.

18           I also wanted to mention that it was  
19 discussed here that in the testimony by --- I think it  
20 was PSEA, that the Pennsylvania Board of Education  
21 determined that our state should follow the Schaffer  
22 v. Weast Decision. However, that's actually not  
23 accurate. I have a quote here from the official  
24 minutes of the Board. And what they say is the State  
25 Board regulations do not address burden of proof, as

1 that is a matter not within the purview of the Board.  
2 So they didn't determine that they agree with  
3 Schaffer. What they determined is the use of the  
4 legislation to make this change.

5           Going back to what Judith Gran had  
6 analyzed, she told me beyond this 14-percent potential  
7 difference that we see post-Schaffer, the process  
8 post-Schaffer is also much more expensive for parents.  
9 Attorneys need to lead with a strong case. That means  
10 by the first day of the hearing, the entire case must  
11 be prepped. Expert witnesses must be found,  
12 prepared and paid to appear on that first day. These  
13 expert witnesses may charge several thousand dollars a  
14 day to prepare and to attend. Recall, owing to  
15 another Supreme Court Decision, Arlington v.  
16 Murphy, these funds are not recoupable even if the  
17 parents prevail. So what they're paying for those  
18 expert witnesses is out of pocket, and they'll never  
19 get it back.

20           In the common scenario where the case  
21 settles on the first day of the hearing, parents are  
22 now in a precarious position. They have incurred  
23 often tens of thousands in attorney fees and expert  
24 fees in preparing the case. They are aware that their  
25 odds of prevailing, even for a truly meritorious case,



1 are slim. I personally know of many families who have  
2 accepted unsatisfactory or marginal settlements in  
3 lieu of incurring the risk of going forward. Some of  
4 these parents just plain ran out of money to pay all  
5 these fees. For some families, like Ryan's parents,  
6 they choose to go into debt paying for the endless  
7 therapies or private education out of pocket rather  
8 than gambling funds on attorney fees that may be tied  
9 up for years, and they may not win.

10           It must be remembered that unlike other  
11 sorts of litigation, including those others that Ms.  
12 Saia mentioned, for IDEA cases, these cases do not  
13 result in big windfalls for the party that prevails.  
14 So you do not get attorneys who are willing to take  
15 these cases --- at least many, on contingency with the  
16 hope that they'll be paid in the end, you know, very  
17 well. There are very few attorneys who are willing to  
18 do that. Ms. Saia said that she knew a lot. I would  
19 love a list because I have parents calling me all the  
20 time. And I have nowhere to send them. So if I could  
21 get that list, it would be terrific. But I don't know  
22 of these attorneys who are taking these cases. They  
23 want their money up front or a retainer as the case is  
24 going on.

25           And there is no big win at the end. The

1 most that you can end up with is now, with the statute  
2 of limitations, two years of compensatory education or  
3 tuition for the child, a change in the IEP going  
4 forward and your attorney fees. That's what you end  
5 up with, no damages, no extras. Keep in mind that in  
6 this process, the attorneys get paid, the experts get  
7 paid, the school administrators get paid, regardless  
8 of the outcome. It is the family who is gambling  
9 their mortgage, their retirement or another child's  
10 education on the outcome of these hearings. These  
11 issues are very high stakes for Pennsylvania's  
12 families. And therefore, I would ask you to support  
13 House Bill 2438 to help even the playing field.

14           I would also to like to speak in favor of  
15 House Bill 2536 and the creation of an independent  
16 Office of Dispute Resolution. It is inappropriate  
17 that the Pennsylvania Department of Education, which  
18 can be named as a defendant in due process hearings,  
19 is also the entity that has the power to hire and fire  
20 hearing officers and to determine their training. For  
21 years, PDE had influence over the Special Education  
22 Appeals Panel. And in the end, this panel was  
23 perceived as very biased, and all parties on both  
24 sides of the fence, not all, but most asked for its  
25 removal.

1                   Now that PDE has direct oversight of the  
2 first or only tier, I think we will see that bias, or  
3 at least accusations of bias, creeping in. Already  
4 from the family perspective, the system is not  
5 functioning. And let's take as a case in point, a  
6 quote by one of our current hearing officers. And  
7 this quote, I just want to mention, I talked to a lot  
8 of attorneys about it. It doesn't concern attorneys  
9 that much, this quote. It concerns the families. So  
10 attorneys might think it's not a big deal, but  
11 families do. She said that she really doesn't --- or  
12 at least when she started, she really didn't  
13 understand objections. And she suggested on tape in a  
14 training tape for young hearing officers, she  
15 suggested that it was reasonable for newly trained  
16 hearing officers to toss a coin in their heads to  
17 determine a ruling to objections in a hearing.

18                   Now, I think when families spend tens of  
19 thousands of dollars to stand before a hearing officer  
20 for adjudication regarding the FAPE of a child with a  
21 disability, at the very least, they deserve a hearing  
22 officer who has been formally trained in procedures  
23 regarding objections, the rules of evidence and legal  
24 due process.

25                   House Bill 2536 envisions establishing a

1 neutral ODR run by an independent board. This board  
2 would be imbued with the power to create and amend due  
3 process procedures. And I believe we need some new  
4 procedures and clarifications of the old ones. In  
5 particular, I ask you to consider the plight of  
6 parents who do not have the funds to hire an attorney  
7 or do not want to risk their entire savings on the  
8 outcome of a case. Unrepresented parents are  
9 particularly vulnerable, and they need the protection  
10 of an independent ODR. It is confusing now that the  
11 rules of evidence as applied in special education due  
12 process hearings are unwritten and seemingly  
13 arbitrary.

14 Pro se parents frequently see parts of  
15 their case tossed out during a pre-hearing conference,  
16 off the record, without even a written opinion. It is  
17 often challenging for self-representing parents to  
18 obtain records from school districts, including  
19 assessment protocols used in school district  
20 evaluations. And I know we've had some discussion  
21 about this today. And I want to say that I've had, as  
22 a pro se, records denied, and the hearing officer ---  
23 what the hearing officer decided in this case was that  
24 I had the right to access the records, but not copies.  
25 So I was expected to put on a case while only being

1 able to review these records in the office of opposing  
2 counsel. But I wasn't actually allowed to have a  
3 copy. So a law actually gives access, but not copies.  
4 I think real lawyers can get around that. But pro se  
5 parents often cannot. And they often cannot get these  
6 records. Especially evaluation protocols are often  
7 denied in the interest of copyrights or in the  
8 interest of ethical standards for psychology. Imagine  
9 having to bear the burden of proof for a case without  
10 even having copies of the records. Because, that's  
11 what parents are being asked to do often today.

12           Even experienced litigators that I know  
13 have chosen to represent themselves and their children  
14 owing to concerns about ODR's unwritten rules. In  
15 other words, if you're not already practicing in this  
16 field, even if you know how to litigate, and even if  
17 you know special education, all these unwritten rules  
18 are going to be difficult to navigate.

19           Commonwealth Court here in Pennsylvania  
20 has clerks on staff who will assist pro se individuals  
21 by sending them sample motions, by walking them  
22 through initial filings, and by helping them just by,  
23 you know, giving them a little guidance if they don't  
24 understand something. ODR has no such system.  
25 Parents are completely on their own. At a meeting

1 early last month, I met, along with people from the  
2 Value Coalition, with Special Education Director John  
3 Tommasini. And we discussed the issue of pro se. He  
4 said that he was not willing to commit additional  
5 funds to helping these parents.

6           So it is up to you and your fellow  
7 legislators to pass a bill that will give us an  
8 independent ODR that might start to address some of  
9 these issues, including maybe having a system to  
10 support parents. And I do agree that sometimes parent  
11 complaints might not be sufficient. But I think that  
12 if there was some place they could call to get some  
13 guidance, you would see an improvement in that. Thank  
14 you very much for this opportunity.

15           CHAIRWOMAN:

16           Thank you very much for your testimony  
17 today, Felicia. Anybody have any questions?

18           REPRESENTATIVE WAKELEY:

19           One clarifying thing. And I don't know  
20 if you can address this issue or whether somebody in  
21 the audience can. You said in your statement, unlike  
22 many other types of litigation, parties in  
23 Pennsylvania special education administrative hearings  
24 do not have the right to formal discovery procedures.  
25 The reason why I raise that, there's been a lot of

1 discussion here today and a lot of testimony, you  
2 know, about the difficulty of getting records, about,  
3 you know, the burdens of being, the burden of, you  
4 know, for the school district's perspective saying, we  
5 don't know what the parents --- if you give us the  
6 burden, we don't know what they're going to say. So  
7 we have to spend all this money and take all this time  
8 trying to figure it out. On the other hand, what  
9 you're saying is because you can't do discovery,  
10 parents are in the same situation, where they don't  
11 know --- they don't have the information. Thus, they  
12 can't, you know, put together a particular case.

13           So I guess my question is, why is that  
14 the case that they don't have discovery? And the  
15 question would be, if both sides did have that, would  
16 that help in the process of perhaps resolving a lot of  
17 these disputes early on? You know, information is  
18 important. And you know, I think in a lot of  
19 conflicts, as we know, that a lot of times it's either  
20 misinformation or the lack of information that causes  
21 a problem. And if you can get that information, if  
22 you will, early in the process, whether it's through  
23 discovery or whatever, that you can resolve this  
24 issue.

25                           DR. HUREWITZ:

1 Well, please let me clarify one point  
2 that you made. And I think it was a really good  
3 point. Previously, school districts were in this  
4 position of, you know, shooting the gunshot out, the  
5 buckshot out, whatever it is, because they didn't know  
6 where the case was going. However, the IDEA in 2004  
7 clarified that the parents must present a position in  
8 the complaint. And if the school districts feel that  
9 it's not sufficient, the school district can go to the  
10 hearing officer and say, that's not sufficient. And  
11 the hearing officer makes a ruling on that. If the  
12 hearing officer rules that it's not sufficient, the  
13 case is dismissed or the parents make an attempt to  
14 rewrite it. So they do have a recourse.

15 However, let's take it the other way.  
16 Parent files the complaint. It's a sufficient  
17 complaint. The school district has no requirement to  
18 respond to sufficiently. Or at least the parents have  
19 no recourse if the school district doesn't respond  
20 sufficiently. In other words, the school district can  
21 answer the complaint with simply saying, we provide an  
22 appropriate education, and we stand by it. And here's  
23 the IEP. They don't have to give any more of what  
24 their argument's going to be. So now the districts  
25 are in a stronger position because they know exactly



1 what the parents are complaining about. But the  
2 parents actually have no idea what the district is  
3 going to argue back to defend their IEP.

4 In terms of why we can't have longer  
5 discovery, I think there's a lot of people here that  
6 can answer better than me. But I do think there's an  
7 issue just with timeliness, that you couldn't possibly  
8 keep the timelines that are in the IDEA and at the  
9 same time have the discovery procedures. That's my  
10 sense of it, that that would make it a much more  
11 normal proceeding. And you would start to see the  
12 timelines you see on the federal court that are  
13 several years rather than 60 days.

14 CHAIRWOMAN:

15 Thank you very much. I really appreciate  
16 your comments and your testimony today. Thank you.  
17 And I did see your hand going up, Ms. Saia. You  
18 wanted to respond, I'm sure.

19 MS. SAIA:

20 I was just going to offer a response to  
21 the idea of discovery. There is discovery. It's  
22 ongoing discovery. There's not an end point of  
23 discovery, because although it's one side, parents  
24 always have the right to access the documents. I've  
25 never counseled or had school districts suggest to me

1 that they don't want to give parents copies, because  
2 it's much easier for everyone to get copies, although  
3 I am aware that the law says access to and not copies  
4 of. Copies of could be something that the board could  
5 address, certainly.

6                   But discovery in terms of getting  
7 documents is ongoing for the child's entire  
8 educational career. Parents have a right to access  
9 the documents. FERPA gives them the right to access  
10 the documents, whether they're regular or special ed.  
11 The party that doesn't have any discovery at all is  
12 the school district, who is only entitled to the  
13 documents parents intend to use five days before.

14                   CHAIRWOMAN:

15                   Thank you very much. And I thank ---  
16 yes?

17                   MS. PLUNKETT:

18                   Yes. I just have a few questions,  
19 because I think it's imperative that we understand or  
20 we remember that this is just completely ---.

21                   CHAIRWOMAN:

22                   Please identify yourself for the record.

23                   MS. PLUNKETT:

24                   I'm sorry.

25                   CHAIRWOMAN:

1                   It's highly unusual that we take  
2 questions from the audience, because this is a  
3 hearing.

4                   MS. PLUNKETT:

5                   I'm sorry.

6                   CHAIRWOMAN:

7                   But I will allow it.

8                   MS. PLUNKETT:

9                   I'm sorry. My name is Tracy Plunkett.

10                  CHAIRWOMAN:

11                  Tracy Plunkett from?

12                  MS. PLUNKETT:

13                  I'm actually a parent, but also a  
14 legislative liaison for State Representative Stephen  
15 Barrar. I've lived it. I have dealt with this from  
16 every angle. I've dealt with the school district for  
17 due process, which brought me from advocating for  
18 families and myself to this legislative --- to make a  
19 difference.

20                  I think it's very important that we  
21 understand that this is not --- I'm not asking for  
22 anything more, just a reinstatement. But beyond that,  
23 I think it's important to stress and look at the  
24 resources, the difference of the resources. I lived  
25 it. If you look at what IDEA says, that it is in 14

1 Chapter --- in 1400, it's to ensure the rights of  
2 children with disabilities and the parents of such  
3 children.

4                   When you shift the burdens on the family,  
5 it actually puts such undue stress, and we don't have  
6 the resources. The school district has all the  
7 resources. And along with all the resources,  
8 something else that they have that needs to be  
9 understood is that --- and the representative for PSEA  
10 will actually mention, yes, that legal insurance ---  
11 the PSEA provides a lot of legal insurance for a lot  
12 of the school districts. They ---.

13                   CHAIRWOMAN:

14                   Okay. These are all things that we've  
15 already heard. Did you have a question?

16                   MS. PLUNKETT:

17                   Yes. My question is, what are the  
18 numbers of hearings that are brought up from the  
19 school district? I think that's an important ---  
20 versus the parent. I think as Committee Member  
21 Wakeley asked, that's something that we really need to  
22 understand before we can play this gloom and doom of,  
23 we're going to have this overwhelming difference. So  
24 I think that's something we should really look at.

25                   CHAIRWOMAN:

1 I've really opened a can of worms. Yes,  
2 would you like to identify yourself?

3 MR. PELEAK:

4 I would. I'm Chuck Peleak. I've been an  
5 attorney for 25 years, and the last couple of years an  
6 attorney for parents in these matters. This issue of  
7 discovery is crucial. So we need to understand what  
8 we're talking about here when we say discovery.

9 Let me give you a simple example. In the  
10 old days --- and I've represented plaintiffs and  
11 defendants. If I were representing the injured party  
12 in that case, I would take the deposition of the other  
13 person involved in that accident. I could take the  
14 deposition of the police officer who was called to the  
15 accident. I could take the deposition of witnesses to  
16 that accident. I could learn about the case through  
17 taking those depositions. I could serve  
18 interrogatories on the defendant driver to find out  
19 his or her account of what happened. I could serve  
20 other kinds of written requests, like a request for  
21 production of documents, which that driver would be  
22 required to produce. If the driver didn't produce  
23 them, I could get a subpoena.

24 It's because we don't have discovery in  
25 these cases that it must be recognized that the parent

1 is at a disadvantage when it comes to meeting his or  
2 her burden of proof.

3 CHAIRWOMAN:

4 I appreciate that. And I'm sure this  
5 Committee takes that to heart. You know, the goal of  
6 this Committee, the Subcommittee on Special Education,  
7 is really to allow the hearing of all testimony and  
8 then make the best decision on the part of all  
9 concerned. It is about fairness. It is about common  
10 sense. And I also wanted to say it's about doing  
11 right. So we will take all of this under advisement.  
12 I thank all of you for being here today. I appreciate  
13 all of your input. And I'm sure you will hear from us  
14 soon. Thank you again.

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16 \* \* \* \* \*

17 HEARING CONCLUDED AT 11:12 A.M.

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