

COMMONWEALTH OF PENNSYLVANIA
HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON SPECIAL EDUCATION

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PUBLIC HEARING IN RE: HB 2438 and 2536

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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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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. West 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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HEARING CONCLUDED AT 11:12 A.M.

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