Dennis McAndrews, ESQ T1

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Preliminary Remarks

It is a privilege to appear before this Committee to discuss the compelling need for three reforms in our special education system in Pennsylvania. Fortunately, the reforms I will discuss today do not involve complex legislative initiatives or additional cost to the taxpayer. Rather, they involve, first and foremost, a recognition of our obligation as a Commonwealth, under both federal law and our inherent moral obligations to children with disabilities, to provide equal educational opportunity for these children and to provide a level playing field when disputes arise between their parents and school districts.

These three issues involve 1) the time within which evaluations of special education students should be completed, 2) the assignment of the burden of proof at due process hearings, and 3) the need for a fully independent Office for Dispute Resolution to manage and supervise special education due process hearings.

Introduction

By way of introduction, children with disabilities in the United States have possessed a right to a free appropriate public education (FAPE) since the passage of the Education for All Handicapped Children Act (EHA) in 1975. The Act was subsequently renamed the Individuals with Disabilities Education Act (IDEA), and the focus of special education services has changed substantially since the inception of the EHA in 1975.

In 1975, over 2 million children with disabilities received no education at all in the United States. Consequently, the focus of the EHA in 1975 was access to special education services. Because so many children in the United States received no special education at all, a

significant effort was required to create and implement special education programs, often from scratch, to attempt to meet the needs of a diverse population of children with a variety of academic, emotional, social, physical, and behavioral needs.

Beginning in 1975, the federal government also began to extensively fund research into the unique mental processes by which children with disabilities learn to read, write, compute, socialize, and behave. Within twenty years, an extraordinary body of research was created which supported scientifically-based instruction in these critical areas of learning. This body of knowledge did not exist in 1975. As a result of these developments, in 1997 Congress changed the focus of special education under IDEA from access to special education services to progress, achievement, and results. Mere access to special education services is no longer sufficient, as research now shows that students with disabilities can, in the overwhelming majority of circumstances, learn to read, write, and compute at or near grade level with the appropriate scientifically-based instruction, and that the use of positive, behavioral and social programs will allow students with these issues to function appropriately in society. As a result, the clear focus of special education since 1997 has been upon developing programs which will allow children to reach independence and self-sufficiency in order to become productive citizens.

Burden of Proof

Not every school system has responded to the major changes in IDEA which require the use of scientifically-based instruction for students. Many districts have only begun to implement these programs, often with inadequate materials and teacher training. The result is that students with disabilities lose extraordinarily valuable time in attempting to make adequate progress and to close the gap with their non-disabled peers.

From the beginnings of the special education mandate in 1975, the need has been

recognized for a fair, impartial, and expeditious resolution process to adjudicate disputes between schools and families regarding the provision of FAPE. This system has always involved inherent advantages to school districts, as school officials possess unlimited access to resources, teachers and support personnel within the district, and to access the student's classroom for observation and the development of testimony by the district's many experts. Moreover, districts are represented at due process hearings by publicly funded attorneys, often with supplementary insurance coverage to pay for these services. Districts can also access Intermediate Unit experts and other witnesses at public expense to assist them in their presentations at due process hearings. Moreover, courts have held that the opinions of the public educational professionals in school districts and intermediate units are entitled to substantial weight by the simple fact of their positions in public educational agencies. As one who has represented parents at due process hearings for 20 years, I can state that most cases on behalf of children with disabilities involve an uphill battle because of the inherent advantages enjoyed by school districts at due process hearings.

These inherent advantages were only enhanced over the past several years. In 2004, Congress amended IDEA to require a complex and detailed statement by parents who request a due process hearing regarding the precise nature of the complaints which they seek to raise at a due process hearing, together with the specific resolution which the parent seeks to resolve the complaint. The school districts may then file a motion to dismiss the parents' complaint for lack of specificity, and some hearing officers have required extraordinary specificity and redrafting of complaints which can only be accomplished by a skilled attorney, a resource which a great many parents cannot access as they pursue an appropriate education for their child.

Even after these amendments to IDEA in 2004, the Supreme Court placed another

significant hurdle in the path of parents and those who represent them by holding, for the first time, that the burden of proof in due process hearings under IDEA rests upon the parent who challenges a school district's program. This decision in Schaffer v. Weast overturned nearly 30 years of decisional law in Pennsylvania which held that school districts must bear the burden of proof to establish that the district has offered a free appropriate public education. This practice of placing the burden of proof on districts worked well for these many years and makes abundant sense. Fortunately, the Supreme Court recognized that states may be able to create their own rules under IDEA regarding burden of proof, and a number of our sister states have already done so.

A return of the burden of proof to school districts is grounded upon simple common sense. The district's access to records, classrooms, witnesses, and publicly-funded legal counsel all provide such extraordinary advantages to school districts that it is virtually unconscionable to place the burden of proof upon parents and their disabled child to prove a negative -- that the school district failed to provide an appropriate education to the child. As I often tell my clients before we pursue a due process hearing, "the road to establish a denial of FAPE will be difficult, especially given the fact that school district witnesses see your child in the classroom during the entire school day, and we are virtually never present in the classroom to observe what actually has occurred. Our only witness to the implementation of the district's Independent Education Plan (IEP) is your child with disabilities, while the district possesses almost unlimited experts to justify the district's conduct."

Under all of these circumstances, utterly no logical basis exist to continue to place the burden of proof upon children with disabilities and their parents in special education due process proceedings.

60-day Time Period for Evaluations of Children with Disabilities

In 2004, amendments to IDEA required school districts to conduct evaluations and reevaluations of students with disabilities within 60 calendar days of a parental consent to conduct the evaluation. IDEA left open the possibility that states could require longer time periods than the 60 calendar days reflected in federal law. Historically, Pennsylvania maintained a much-criticized 60 school days to conduct an evaluation. The recent regulations of the Pennsylvania State Board of Education generally brought Pennsylvania in line with the 60 calendar day time period for evaluations, but unfortunately excluded the summer months from the 60 calendar day calculation. This exclusion of the summer months is devastating to many children with disabilities, and should be modified through legislation so that Pennsylvania can conform with the many states which conduct evaluations within IDEA's presumptive 60 calendar day period.

The impact of excluding summer months from the evaluation period is often profoundly harmful for children with disabilities. A common circumstance of the effects of our current rule can be illustrated as follows. Toward the end of the school year, parents learn, for the first time, that their child with disabilities is experiencing significant struggles in school, and that the child is in danger of failing or, at the very least, is not making adequate progress. It is important to remember that children with disabilities often experience "social promotion", where inadequate progress--be it academic, emotional, behavioral, or social--is masked behind passing grades and with little meaningful progress reporting during the school year. It is not uncommon for parents at meetings with teachers in April or May to learn of such a serious lack of progress. The parent then requests that the school district evaluate or reevaluate the child. The district often takes two weeks to provide a "Permission to Evaluate Form" to the parent in order to obtain written

consent for the evaluation. Even if the parent promptly returns this evaluation form to the district, it is now mid-May to early June, and if the school district's last day of school is early to mid-June, with school reopening after Labor Day, the evaluation report will generally not be completed until October, with an IEP not finalized to adjust the child's educational program until late October or early November, which can be six to seven months after the parent learns about the child's failures in school.

This time period is simply far too long to wait to meet the needs of a student with disabilities. Indeed, virtually one-half of a school year would be lost in this process, with the child falling farther and farther behind in the area of weakness, be it academic, behavioral, social, or emotional.

It is important to note that the district's evaluation must be completed at some point, and that no child-centered reason whatever exists to delay an evaluation to address the needs of a child with disabilities. If the evaluation finds that adjustments are necessary to the child's educational program--a very common result of reevaluations under these circumstances--the school district may well be liable for expensive compensatory education services due to the delay in adjusting the child's program. Therefore, even from a fiscal perspective, no solid justification exists for Pennsylvania to fail to concur with the federal presumption that evaluations and reevaluations should occur within 60 calendar days.

Independent Office of Dispute Resolution

Since the inception of the federal mandate for special education in 1975, Congress has required independent, impartial and fair procedures to resolve disputes between parents and school districts with regard to appropriate programming for children with disabilities. Significant concerns have been raised with respect to the process in Pennsylvania for

implementing and supervising special education due process hearings from a variety of sources, and I speak today in support of a transparent and fully independent Office of Dispute Resolution which is itself subject to an outside, bipartisan board which would be created to monitor and insure the independence of ODR.

I come before you today with what I believe to be a unique perspective. I have served in a wide variety of capacities in Pennsylvania's special education system. Although my law firm represents parents in special education due process proceedings, we have also represented several school districts over the years in a variety of capacities, most of which have been designed to assist districts in obtaining funding from outside agencies to assist districts in meeting the needs of children with disabilities. For fifteen years, I served as a part-time special education due process hearing officer. In those 15 years, I believe that I had a reputation for fairness and impartiality, and was even aware of circumstances where both school district and parent attorneys jointly agreed to my appointment as a hearing officer. I also twice served as an Appellate Hearing Officer in Pennsylvania during periods when other trained hearing officers were unavailable to serve in that capacity. Finally, I served as interim counsel to the Office of Dispute Resolution when no experienced counsel was available to serve in that function. I have been both trained as a hearing officer, and in the somewhat distant past, I have trained hearing officers to serve in that capacity. Even when I have disagreed with representatives of ODR and with various hearing officers--and my disagreements have sometimes been substantial--I have not questioned the basic skills or integrity of persons involved in the hearing system, and do not intend to do so today. Indeed, I have maintained excellent relationships with virtually everyone within the existing system despite our significant disagreements.

But any adjudicative system must involve not only absolute impartiality and fairness, but

also the appearance of such total impartiality and fairness. In the eyes of too many families, special education advocacy groups, and parent representatives, the influence of Pennsylvania's public educational officials and agencies have become too great in the operation of the due process system. Naturally, we can all debate whether this fact is, or is not, true, and the various sides to this issue can offer statistics, anecdotal evidence, and other arguments to justify their positions. I, for one, would rather focus upon the best process to insure not only rigorous impartiality in the system, but also to insure public confidence in the system through a public perception on the part of all stakeholders that the system is fair, efficient, and impartial. Because the special education system is a remedial program to serve the needs of children with disabilities, and since most due process hearings are initiated by parents who believe that a school district has failed to implement FAPE on behalf of their child, the child and the parents are the most important stakeholders in achieving a clear and strong perception that the system is, and will always remain, thoroughly fair and impartial to all concerned.

It is with these thoughts in mind that I strongly recommend an independent oversight board for the Office for Dispute Resolution. The current legislative proposals ensure that the board will involve bipartisan representation with individuals from a variety of valuable perspectives, experiences and insights. Such a board will involve no additional cost to the current process but will provide the system with what must be "the coin of the realm"--public confidence and a public perception of rigorous impartiality and fairness in the due process system.