

**Testimony of Ken Oakes on Behalf of The Arc of Pennsylvania
Before PA House of Representatives Sub-Committee on Special Education**

October 2, 2008 - West Chester University, West Chester, PA

Good morning. My name is Ken Oakes. I am here today representing The Arc of Pennsylvania. I am a member of The Arc of PA board of directors and live in Philadelphia. I serve as the co-chair The Arc of PA Systems Advocacy and Governmental Affairs Committee, the chair of the Education and Early Childhood Sub-Committee, and I represent The Arc of PA on the State Task Force on the Right to Education. It is the Education and Early Childhood Sub-Committee where Arc's idea to seek Burden of Proof and an independent Office for Dispute Resolution legislation was first developed.

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

The Arc of PA is very grateful to Speaker O'Brien for his strong commitment to students with disabilities, and we thank Representative McIlvaine Smith and the members of the Special Education Sub-Committee for your work and for giving The Arc the opportunity to be here today. The majority of my testimony will focus on the Burden of Proof legislation, HB 2438, but I will comment on the importance of an independent Office of Dispute Resolution .

I have worked in the field of special education and disability advocacy for 32 years. I have had the unique opportunity to being both a special education public school administrator and a volunteer advocate assisting families. As you can imagine, both roles have had their own unique experiences.

When I was an administrator in the process, I never felt unfairly challenged by the “burden of proof” requirement. I always had far more resources and legal support at my disposal than any parent who sat across the table from me. As a volunteer advocate I knew that if the burden of proof had been with the families I was working with, they would have had a very difficult time making a clear and compelling case for their children.

When *Schaffer vs. Weast* was decided by the U.S. Supreme Court, The Arc felt that a great injustice had been done to families and children with disabilities. It always made sense to us that school districts or intermediate units, should have the burden of proof since it was the Local Education Agency, or LEA that had the requirement to provide a Free and Appropriate Public Education (FAPE) in the Least Restrictive Environment (LRE) as defined by IDEA and state regulations.

(My apologies for the special education alphabet soup.)

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

For many years prior to *Weast*, Pennsylvania school districts and intermediate units did have the burden of proof, regardless of who requested the due process hearing. Unfortunately, the Court did not foresee the negative impact of its decision in states such as Pennsylvania that had not assigned the burden of proof in their due process regulations and statutes. Without such clarification, and armed with *Weast*, many LEAs across the Commonwealth are taking the position, in every case in which a parent requests due process, that the parent is

the party "seeking relief" and therefore automatically carries the burden of proof.

It is not necessarily the case that the parent is the one attempting to change the status quo. Often it is the LEA that is seeking a change in placement, or modification of the child's current program or services. A parent's resistance to such efforts should not saddle them automatically and unfairly with the burden of proof, particularly when it is the district or IU, and not the parent, which is attempting to force a change such as placement.

Many parents are un-represented during due process hearings due to the cost and/or the ability to find legal counsel with the knowledge to represent them. When LEAs were assigned the burden of proof, there was a sense of predictability in the system; as the district or IU clearly proceeded first and identified the issues in the case to the hearing officer.

Without a clear statutory assignment of burden of proof, it is assured that due process will take more time and require more money on all sides, and that parents will be at a disadvantage. Additional pre-trial proceedings are now necessary in order to sort through the issues to ascertain who bears the burden of proof. This delays hearings and burdens the system unnecessarily. The hearing process is now more complicated than ever before, as parents, or their attorneys must recognize and argue technical legal issues. All of this drains financial resources from both schools and families.

Few parents will go to due process with the resources to secure adequate legal representation and expert witnesses with sufficient knowledge of special education and the law. In addition, this prolonged process will force parents to take time away from their jobs and the care of their children. It is a certainty that even parents with meritorious claims will not pursue due process because of the burdens placed on them as the "party seeking relief". Thus, the very legal system put in place to protect Pennsylvania's most vulnerable children will be incapable of ensuring appropriate educational outcomes for them in a timely manner.

The Arc of Pennsylvania strongly affirms that many of the rights, benefits, and successes of students in today's special education programs were driven by parents who were given a voice through due process. In 1972, the Pennsylvania Association for Retarded Children, now The Arc of PA, took the bold and unprecedented step of suing the Commonwealth of Pennsylvania to ensure that school-age children with mental retardation be allowed to attend public school with their brothers and sisters.

After 36 years, parents must still fight and argue for the rights set forth in *PARC v. The Commonwealth* and now established in IDEA and state regulations.

We are urging the Pennsylvania legislature to take the affirmative step of adopting a statutory provision which assigns the burden of proof in due process proceedings to school districts and intermediate units. This basic standard of fairness will continue to provide predictability in the system, clarity of the issues, and cost savings during the hearing process so that the goal of achieving appropriate educational outcomes for Pennsylvania's children with disabilities can be achieved in the shortest amount of time.

The Arc of PA strongly supports HB 2438 and asks that the Special Education Sub-Committee to move it out of committee without delay.

Now, to share with you some of The Arc's position on legislation that would establish an independent Office for Dispute Resolution and Speaker O'Brien's, HB 2536. Again, The Arc of Pennsylvania is very grateful to the Speaker for demonstrating leadership on this very important issue.

As you know, the Commonwealth of Pennsylvania maintains a system for the adjudication of special education matters. Under this system, a hearing officer acts as the independent fact-finder, conducting an evidentiary hearing held in the local school district. Because IDEA requires that hearing officers be independent of LEAs, it is necessary that the Commonwealth maintain an administrative entity with sufficient independence and neutrality to manage the

selection, training, supervision, and assignment of hearing officers. Unfortunately, the current Office for Dispute Resolution, or ODR, is funded through the Pennsylvania Department of Education and has historically been housed in the PaTTAN Harrisburg office, an entity managed by Intermediate Unit #13 in Lancaster County. For a number of years now, The Arc of Pennsylvania has had concerns regarding the neutrality of ODR and the lack of independence from the Department of Education.

The Arc of PA supports legislation that would make the Office for Dispute Resolution truly independent of PDE. Doing so would eliminate any possible conflict of interest and any appearance of pressure by the state education agency. These concerns include the potential for interference in personnel matters and a bias in favor of school districts.

The Arc also believes that any reform should include the following to provide greater independence for ODR.

1. A direct appropriation for ODR that is not dependent upon the review and approval of PDE.
2. ODR should be housed in a truly independent and neutral location and not within a public school agency, such as an intermediate unit or PaTTAN.
3. Any reforming legislation should direct that ODR be governed by a publicly accountable Board of Directors appointed by the Governor and the Legislature, with a significant representation of parents of children with disabilities. Indeed, The Arc of PA supports appointing a majority of parents with children who are being educated in s where they are spending at least 60 percent of their school day in a general education setting with their non-disabled peers.
4. The newly constituted Board should be mandated to institute safeguards so that no public official or private individual can improperly influence or pressure ODR.

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

The Arc of Pennsylvania support efforts to reform the Office for Dispute Resolution and establish a truly independent and neutral system to hear disputes between families and school districts or intermediate units. We particularly like Senate Bill 1415, which was introduced by Senator Jim Rhoades. The Arc of PA has not yet taken a position on HB 2536 because many of our members have expressed concerns with the lack of safeguards that would ensure that the Board is not dominated with appointees who favor segregated educational programs.

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

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

Submitted by:

Ken Oakes

The Arc of Pennsylvania, Board of Directors

Systems Advocacy and Governmental Affairs Committee, Co-Chair

Education and Early Childhood Sub-Committee, Chair