

Felicia Hurewitz, Ph.D.

610-202-9333

345 Farwood Rd. Wynnewood Pa 19096

Testimony before the PA House of Representatives
Special Education Subcommittee

October 2, 2008

I would like to thank Rep. McIlvaine Smith and members of the House Special Education Subcommittee for listening today.

I represent the government workgroup of the Autism Society of America's PA Chapters, a group which has been advocating for the rights of students with autism and other disabilities for the past three years, as the special education regulations were revised. I also speak as a parent of a child with a disability, and as a Developmental Psychologist at Drexel University, where I conduct applied research in autism interventions. In addition, for the past eight years, I have been directly involved in advocacy for students in special education in the Commonwealth.

To illustrate the position of families involved in special education disputes, let's talk about three-year-old Ryan and his family. When Ryan was two and half, his parents became concerned about his development. He wasn't saying any words, he wasn't playing typically with toys, he wasn't making eye contact or responding to his name. His pediatrician said not to worry, but the parents were worried. They finally were able to get him evaluated in Feb. of 2007, whereupon he was diagnosed with PDD-NOS, an autism spectrum disorder. Like many in this position, Ryan's parents decided that they would do whatever it took to allow Ryan to grow up to have opportunity and independence. They immediately signed up him for speech, social and occupational therapies for 20-30 hours a week. They enrolled him in playgroups, and they arranged for parental training so they could learn how to extend and reinforce his therapies across his entire day. So, Ryan's father works 8-4, while his mother takes Ryan from therapy to therapy, agency to agency. When Ryan's father comes home from work at 4, that is when the mother goes to work, from 5-9. She comes home just in time to see Ryan off to bed.

To teach a child like Ryan, you must be "on" every moment. He does not learn in a passive environment, and does not automatically "pick up" language or social interactions on his own, as most children do. Ryan is responding dramatically to the therapies with his parents' heroic efforts. Miraculously, at around 3 Ryan began speaking, and even putting words together in phrases. Today at 3 1/2 he makes eye-contact with people he knows well. He plays with his train sets, and with his plastic animals, and with his toy drum. He no longer gets overwhelmed in loud or crowded places. Ryan's situation really brought home for me what researchers have been claiming for some time, that early, quality interventions for children with autism can fundamentally alter the trajectory of their development.

You may ask where was the local educational agency in this equation. Back when Ryan was diagnosed, the family was offered by their district 2 hours a week of assistance by a special education teacher. Ryan's parents didn't think that was sufficient. But they were too exhausted to try to fight it, and quite frankly all their time, and every cent they earn, is going to pay for Ryan's therapies.

When Ryan turned 3 he was offered by his school district a segregated preschool placement that was populated primarily by non-verbal children. Only limited related services were offered. Ryan's parents and his private evaluators felt that Ryan could thrive with push-in services at a typical preschool, where he could model the typical social behaviors and speech of his peers.

Currently the parents are still taking Ryan to all his therapies, and to his typical preschool. They are paying for this out of pocket. But I just don't know how long they are going to be able to continue on this schedule, with no vacations, no time together as a family, just switching off between wage-earning and therapies.

Ryan's story is common in Pennsylvania, and throughout the country. For these families, the Supreme Court majority decisions in Schaffer v. Weast and Arlington v. Murphy were the final straw. Ryan's parents are among the lucky ones – they both have Masters degrees and jobs. With two salaries, they at least have the resources to scrape by, if they are willing to forego savings, retirement, and vacations.

I can state unabashedly, that special education due process disputes are less fair and less likely to result in a positive outcome for students than they were eight years ago. Why? First, the 2004 reauthorization of the IDEA, imposed a two year statute of limitations on due process claims. Secondly, recent Supreme Court decisions have had a chilling effect on parents' ability to advocate for their children.

As you are aware, the 2005 Schaffer v. Weast majority decision by the US Supreme Court resolved that the burden of persuasion should be born by the party filing the complaint, consistent with many other areas of civil litigation. Since it is almost always the parents who would contest a district-proffered IEP, the Schaffer decision *de facto* puts the burden on the parents.

In rendering this decision, the Schaffer Majority declined to consider the vast informational and resource inequalities between the parents and School District. This imbalance is best summarized in Justice Ginsberg's dissenting opinion in Schaffer,

"Parents are ill-equipped to bear the burden of proof in special education due process cases. The school district is . . . in a far better position to demonstrate that it has fulfilled [its statutory] obligation than the disabled student's parents are in to show that the school district has failed to do so. . . The vast majority of parents of children with disabilities lack knowledge about the educational resources available to their child and the sophistication to mount an effective case against a district-proposed IEP."

The Majority in Schaffer assumed that Burden would make little difference for the bulk of cases, and would only have force when the evidence supporting each side was exactly balanced. Unfortunately, it hasn't turned out that way.

The Schaffer Court misunderstood how this process truly functions in states like PA. Unlike many other types of litigation, parties in Pennsylvania's special education administrative hearings do not have the right to formal discovery procedures. This means that the party going first must put on a case relatively blind to what the other side might say or argue. When the Burden of Proof shifted here in PA, so did the order of putting forward the case. Now, per ODR rules, if the parents filed they must go first.

While preparing for this testimony, I asked several PA attorneys and parents how the Schaffer decision has affected them. What I was told was disturbing. Judith Gran, an attorney from the Public Interest Law Center in Philadelphia, analyzed 50 Special Education Appeals Panel cases from 2005, just prior to the Schaffer decision, and 50 cases in 2007, after the Schaffer decision. She found that parents prevailed or partially prevailed in 58% of cases prior to Schaffer, and 44% post-Schaffer.

Furthermore, as Ms. Gran explained to me, the process post-Schaffer is much more expensive for parents. Attorneys need to lead with a strong case. This means, by the first day of the hearing, the entire case must be prepared; expert witnesses must be found, prepped, and paid to appear on that first day. These expert witnesses may charge several thousand dollars a day. Recall, owing to another Supreme Court decision, Arlington v. Murphy, those funds are not recoupable even if the parents prevail.

In the common scenario where the case settles on the first day of the hearing, parents are now in a precarious position. They have incurred tens of thousands in attorney and expert fees in preparing the case. They are aware that their odds of prevailing, even for a truly meritorious case, are slim. I personally know of many families who have accepted unsatisfactory or marginal settlements in lieu of incurring the risk of going forward. Some of these parents just plain ran out of money to pay all these fees. For some families, like Ryan's parents, they choose to go into debt paying for the endless therapies or private education out of pocket, rather than gambling funds on attorney fees.

It must be remembered that unlike other sorts of litigation, for IDEA cases do not result in big windfalls at the end for prevailing parties. Parents do not win damages under the IDEA. Generally, the most parents can obtain is two years of compensatory education or tuition for the student, and attorney fees and costs, minus the expert fees that are no longer available.

Please keep in mind that in this process the attorneys get paid, the experts get paid, the school administrators get paid — regardless of the outcome. It is the family who is gambling their mortgage, their retirement, or another child's college education on the outcome of these hearings. These issues are very high-stakes for Pennsylvania's families. Therefore I ask you to support House Bill 2438, to help even the playing field.

I also favor House Bill 2536, and the creation of an independent Office of Dispute Resolution. It is inappropriate that the Pa Dept. of Education, which can be named as a defendant in due process hearings, is also the entity that has the power to hire and fire hearing offices, and to determine their training. For years PDE had influence over the Special Education Appeals Panel. In the end this Panel was seen as so biased, and the decisions so arbitrary, that both sides of the fence, Parents and School Districts, sought its removal.

Now that PDE has direct oversight of the first tier hearing level, I think we will see that bias creeping in. Already the system we have is not functioning, at least not from the perspective of families. Take as a case in point a quote by one of our current hearing officers. She actually stated (on a nationally publicized live training tape) that she didn't really understand objections, and she suggested that it was reasonable for newly trained hearing officers to "toss a coin" in their heads in order to determine a ruling.

When families spend tens of thousands of dollars to stand before a hearing officer for adjudication regarding the fate of a child with a disability, at the very least they deserve a hearing office who has been formally trained in procedures regarding objections, the rules of evidence, and legal "due process".

House Bill 2536 envisions establishing a neutral ODR, run by an independent board. This board would be imbued with the power to create and amend due process procedures. We need new procedures, and the clarification of old ones.

In particular, I ask you to consider the plight of parents who do not have the funds to hire an attorney, or do not want to risk their entire savings on the outcome of a case. Unrepresented parents are particularly vulnerable, and they need the protection of an independent ODR. It is confusing that the rules of evidence as applied in special education due process hearings are unwritten and seemingly arbitrary. *Pro se* parents frequently see parts of their case tossed out during a pre-hearing conference, off the record, without even a written opinion. It is often challenging for self-representing parents to obtain records from the school district, including assessment protocols used in school district evaluations. (The IDEA and PA chapter 14 allow parents "access", but not necessarily copies of records.) Imagine having to bear the Burden of Proof for a case without even having copies of the records! Even experienced litigators that I know have chosen to not represent themselves and their children, owing to concerns about ODR's unwritten "rules".

While Commonwealth Court has clerks on staff who will assist *pro se*'s by sending them sample motions, or by walking them through initial filings, ODR has no such system. Parents are completely on their own. At a meeting early last month, PA Special Education Director John Tommasini expressed that he is not willing to commit additional funds to helping these parents. So it is up to you and your fellow legislators to pass this bill, which will allow parents to have a fair shot at due process.

Thank you for this opportunity to speak today.