



Pennsylvania School Boards Association

Testimony Regarding Special Education Costs and Regulations

Pennsylvania House of Representatives Republican Policy Committee

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By

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Good morning, I am Andrew Faust a partner in the law firm of Sweet, Stevens, Katz and Williams. The Pennsylvania School Boards Association (PSBA) would like to thank Chairman Saylor and the other members of the House Republican Policy Committee for the opportunity to comment on the costs of special education and regulations that inflate those costs. The perspective I would like to share is that of an attorney with over 23 years in the practice of special education law on behalf of school boards, although I am also the parent of a child who, until his graduation from high school last year, received special education services as a student with a specific learning disability.

PSBA appreciates the proposed funding commitment for 2010-11 basic education subsidy and the infusion of federal dollars to special education. Public schools need the resources to provide the interventions and support necessary for these children to succeed. Unfortunately, Congress has continued to provide insufficient funding for the Individuals with Disabilities Education Act and special education services. As many of you know, since 1980, the federal government has never come close to its promise of funding 40 percent of the costs for IDEA.¹

The shortfalls in funding from Washington were compounded in 1991 when Pennsylvania, which previously provided 100% funding of the “excess costs” associated with providing education to students with special needs, changed to a new system of funding that assumes an equal number of special needs children spread evenly across all districts and the costs incurred are equal.

Local property taxpayers bear the greatest burden of this shift in special education costs and they continue to escalate. According to The Build Initiative’s 2005 report on the *Cost*

¹ Federal funding for special education has never risen above 12 percent.

Savings to Special Education from Pre-Schooling in Pennsylvania, the proportion of children eligible for special educational services has grown from 8% in 1975 to 13 to 14% by 2003 to a total of 256,401 (students aged 5 to 18). The PennData report released in December 2009 based on 2008 Child Count data shows that the number of special education children has grown even more, to about 297,000 children. Enrollment is only part of the story as services expenditures have gone up too. More specifically, a quarterly report of the Task Force on School Cost Reduction found that the expenditures on speech pathology and audiology services alone increased by almost 140%.

Although special education subsidies have increased over the past years, except for last year, the state and federal dollars are insufficient to sustain districts' programs. The results from PDE's Report on Act 1 Referendum exceptions for School Year 2009-10 prove it. The reports shows that 31 school districts were approved for special education expenditures – the highest number of all exceptions approved last year. In the prior year's report for 2008-09, 78 school districts were approved for referendum exceptions for special education expenditures, again the most often used exception. And in 2007-08, 144 school districts were approved for special education exceptions, second to the pension obligation exception.

The cost shifting is further aggravated because of regulations and case law. Let me give you examples.

◆ Our hearing officers, and, until their recent elimination, our special education appeals panels here in Pennsylvania focus far more attention than their administrative counterparts in other states, on details and measurable precision with which a child's Individualized Educational Program, or "IEP," is written. Pennsylvania's mandatory IEP form comprises fourteen pages, blank, and a completed IEP typically sprawls to more than thirty pages. I have defended in hearings too numerous to count IEPs as lengthy as 90 pages, largely the result of exacting attention to detail that seems unique to Pennsylvania administrative review process. The information required in a typical IEP is, moreover, far more complex than that which would appear in a corporate tax return. A typical reading goal, for example, might require that the teacher predict—based on the child's carefully and repeatedly measured present academic levels and her likely rate of growth the exact number of words that the child will read correctly at a particular grade level on a timed reading probe one year in the future. Every weakness in the precision of the draftsmanship or the accuracy of the predicted growth could and

often does lead to an award of compensatory education, calculated minute-by-minute for every hour and every day of allegedly lost opportunity caused by bad paperwork. If compensatory education awards simply required that the offending school district make right its paperwork or other deficiencies by providing instruction directly to the child, most school districts would gladly oblige. In Pennsylvania, however, our hearing officers and appeals panels—with the support of reviewing courts—typically confer upon parents, not educators, the exclusive authority to determine how compensatory hours will be used for their child and to identify, in the private market, if they so choose, the practitioners they prefer to implement their child’s compensatory services. In *Heather D. v. Northampton Area School District*, 511 F. Supp.2d 549, 555 (E.D. Pa. 2007), for example, the United States District Court for the Eastern District of Pennsylvania upheld an administrative compensatory education award in the amount of 2428 hours, allowing the parents to expend as much as \$75.00 for each hour of compensatory service awarded. The result was a monetary award total of \$182,100.00.

◆ In 2005, the Commonwealth settled an eleven-year-old class action law suit against it by laying a substantial and unnecessary burden on the backs of already over-regulated school districts. The settlement in *Gaskin v. Commonwealth of Pennsylvania*, 2:94-cv-04048-ER, established a protocol to monitor supposed compliance with the least restrictive environment provisions of the IDEA. Under this protocol, every one of the Commonwealth’s 501 school districts is rank ordered on an annual basis by the percentages of time their students with disabilities spend in special education classrooms and schools. Those at the bottom of the list face targeted monitoring and corrective action that can cost each district tens of thousands of dollars and hundreds of hours of teacher training time. Because a defined number of school districts every year will always be at the bottom a rank-ordered list—regardless of whether they are actually complying with the requirements of the law—those districts endure scrutiny and costs to remedy conditions that might not otherwise require remediation.

◆ While our State Board of Education has made efforts in recent years to bring state special education regulations more closely in line with federal requirements, thus limiting the imposition of added mandates unique to the Commonwealth, our regulations, codified at Chapter 14 of Title 22 of the Pennsylvania Code, remain littered with mandates not required by the federal IDEA mandate. Among these are the excessively-broad definition of “developmental delay” for early intervention, 22 Pa. Code § 14.101(definition of “developmental delay”);

mandatory instructional aide training requirements, *id.* at § 14.105(a); arbitrary teacher caseload requirements, *id.* at § 14.105(b); pendency in birth-to-three services when children transition to preschool services, *id.* at § 14.102(a)(2)(xxxii); two year reevaluation cycles for preschoolers and children with MR, *id.* at § 14.124(c) and § 14.153(4)(iii); evaluation and reevaluation request procedures and timelines that have necessitated the hiring of more psychologists, *id.* at § 14.123; and mandatory “functional behavioral assessments” under circumstances when such assessments—and the personnel required to do them—are not required by federal law, *id.* at § 14.133(a). Compounding the burden of these regulatory extensions of the federal mandates are Pennsylvania Department of Education-mandated forms (Evaluation Reports, IEPs, Notices of Recommended Educational Placement, and many others) that impose content requirements not required by law, and others.

◆ A final area of added cost for Pennsylvania school districts is the so-called “dual enrollment” mandate. The Pennsylvania Supreme and Commonwealth Courts have expansively interpreted the language of Section 502 of the School Code, 24 P.S. § 5-502, to permit students placed by their parents in private schools to access a broad array of special education services from the public schools, including expensive and over-extended speech and language and occupational therapies, and to demand transportation to the public schools and back to the private schools, if necessary, to participate in these services. The cost of such unlimited access extends the fiscal obligation of local districts well beyond the very limited obligation to private school students imposed under the IDEA.

While PSBA supports the proposed increases in this year’s proposed budget for basic education subsidy. It urges you to be cognizant of the special education funding line-item too. Without the appropriate resources, school districts will continue to struggle to meet these needs along with improving the academic achievement of all students.