

PROTECTING YOUR CHILD'S EDUCATIONAL AND CIVIL RIGHTS

I. BE THE PARENT AND LEAVE THE “ADVOCACY” TO OTHERS

There are several self-help advocacy books on the market for parents with kids in special education.¹ They're very good and I recommend them. They try to teach parents how to “advocate” for their child in the special education system. The problem I have with this notion is that it's contrary to what parents really do in this process because they do not advocate in the sense that we're accustomed to as attorneys. In fact, because of the emotions involved in this process and complexities in the law – which is more difficult than it should be – even attorney/parents are at a distinct disadvantage in this process. Further, where there is disagreement, the matter is converted into an adversarial process where parents are pitted against district counsel who may treat the matter as a lawsuit going to trial.

When we requested due process for our son, I'll never forget opening the mail and getting district counsel's letter, with it's letterhead listing numerous attorneys. I didn't show the letter to my wife because I knew that if she saw it she'd be very upset and concerned. I wondered about whether I bit off more than I could handle, since I didn't specialize in school law. I thought about parents who are not attorneys and wondered how they fare in going through this process. I would wager that their chances are not good. And it should not be that way.

This article discusses how to increase those chances. I found that there are two things that parents can do. First, they need to educate themselves about their child's disability so that they thoroughly understand it, know how it affects their child at school

¹ Wright, “From Emotions to Advocacy” (2002) is one such book.

and how the school can help their child be academically successful. This is a big project. Fortunately, parents don't have to do it all alone, although, as discussed below, much of it is done independently. Parents should build a reliable team of private treaters for their child, people that they trust, whose opinions they can rely upon in the event of disagreement with their school. These specialists will help educate parents about their child's disability and will offer guidance with regard to strategies in helping them succeed in school.

In my case, we requested an expedited due process – asking that the hearing occur as soon as possible. My son had a number of treating professionals already, specialists that we had consulted independently of any disagreement with our school. However, I realized that we didn't have one expert that the school had, and that was an education expert. To find one, I called education departments at several local universities. I was fortunate to find someone who was very knowledgeable and helpful to us. If I had to do this all over again, I would take the first opportunity to contact such an expert for advice to go over the curriculum to get input regarding how my child can succeed in the school year in the least restrictive environment. It's an on-going process and I believe that, to the extent you can find good experts this will increase your chances for a favorable outcome.

The second way to increase your chances for success is to not do it all by yourself. This can be an overwhelming process. As noted above, there are people you can consult with who can help you – professionals who specialize in education and your child's disability. Here again, however, I wonder how people who don't have access to such professionals cope through this process. It is very expensive and time consuming.

Much of it is not covered by insurance. Moreover, to take the parent out of the role of advocate, you really need a professional advocate that you can rely upon or a lawyer who specializes in this area. Again, more money.

In our son's case, I initially hired a very good special education lawyer. Like most attorneys in this area, I was charged on an hourly rate. As an attorney who bills his clients on both a contingency and hourly basis, I know that my hourly clients sometimes have a hard time paying these bills. Yet, I know that this is the rate I must charge. Most parents are in the category of clients who can't afford a lawyer and I was no exception. So it became clear early on that I was going to have to make an economic choice between bringing the necessary experts to due process and having counsel. I chose presenting evidence over representation and proceeded pro se.

We did openings and the hearing officer stopped the case because the district's counsel had provided a NOREP² on the day of the hearing that changed the issues materially, making much of what was being argued seemingly irrelevant. The scary part for me was that I didn't realize what had occurred—the effect of the NOREP, which was in the form of a letter (mailed but not received by the date of the hearing), instead of the standard form—because, in civil trials party settlement offers are inadmissible. Fortunately the matter was continued. Further, had I succeeded in my request for an expedited hearing, I wouldn't have had time to prepare or retain the education expert that I had previously overlooked.

In short, in the heat of the process, I realized that I was making mistakes and needed counsel for this process to be successful. Again, I wondered what do “lay”

² Notice of Recommended Educational Placement.

parents do when they go through this – my belief is that they lose a lot, not because of the merits of their position, but simply because the process is foreign and complicated.

So, I retained counsel again. Finding the right match for a lawyer is also an important process. It's no different than finding a good teacher for your child. For the lawyers who specialize in this area, you are to be commended. It is a difficult process and it's hard to represent people who are going through an emotional legal proceeding where the outcome is so critically important.

Thinking back now, I realize that there is a better way to approach this process. Parents should consult with counsel before the matter reaches the crisis of due process. But, they need enough core knowledge to know when this is necessary. In our case, we had never had a prior dispute with the LEA; so when one occurred, we were not ready for what this entailed. Each year you learn something new. Since, this is an on-going relationship between your child, your district and you, every year you have a new opportunity to make changes. Ours has been to retain counsel along the way to help us sort out the legal issues associated with this process. Again, this is another area where parents may not have sufficient means to retain counsel; this is another area where such families will be at a distinct disadvantage. And this is unfair and was surely not intended by Congress.

Again, parents need to learn the law to the best of their ability. However, until you feel that you've become an expert in this area – and that won't occur for a long time if at all – retained counsel or a trusted professional advocate is an important component in this process. For parents who cannot afford this, unfortunately they are at a distinct disadvantage and this is not an appropriate outcome.

In the end, I don't advocate being an "advocate" because I don't think that this is a realistic goal. Rather, as a parent of a child with a disability who has been through due process – and beyond -- I believe that it's enough to be the parent and, where possible, to leave the advocacy to others. I'd rather be the person who knows the facts about my son and what can be done to accommodate his disability in school. In the long run, separating the role of advocacy – by giving it to someone else -- adds to your credibility and helps to separate your emotions from the process – in a very emotional and user unfriendly system. This will assist you in your ultimate objective of obtaining an appropriate IEP for your child.

Unfortunately, there are few shortcuts in this area and it's an expensive and time-consuming process – often unnecessarily so. Even without conflict, this knowledge base can be very expensive to attain and maintain. But, if you're successful in doing all of this, you'll be prepared to evaluate school programs and your child's progress. Moreover, you may become so well versed in these areas that you'll be less emotional about the process – you'll know the parameters of your child's disability and what can be done by the district to address it to provide your child with a sound education. Ironically, to some, you'll sound like an "advocate"; but, you're not – you're just a good parent. We're not advocates because, while we're certainly doing our best to keep up with our kids, their complicated development, their school and their academic and social success therein, we don't have the luxury of being emotionally unconnected to the "client" because we're talking about our child.

Moreover, there is a material disadvantage to being your own "advocate". In this Circuit, you're not going to be paid for your time – and it's a considerable venture to

oppose a district in due process. Even when you win your case – no matter how good of a job you’ve done, even if you’re the best lawyer in the state – you won’t get reimbursed for the attorney time that you have put into that result, however difficult or arduous it may have been to attain. The Third Circuit has held that parents who succeed in due process are not entitled to attorney’s fees, even when they are the prevailing party.³ As discussed below, to minimize the costs of this process, parents need to know this up front – go it alone and you won’t get paid for your time – and balance this against the possibility that you may not get reimbursed for attorney costs should the matter resolve before due process. As a corollary, you should “go it alone” only where you are confident that you can work a relatively quick resolution to the process and, even there, if necessary, you should consult with a special education lawyer in the process.

More substantively, apart from the effect on your damages outcome, being an attorney/parent and, therefore, an advocate by profession, may impact negatively upon your chances for a favorable outcome in another more subtle sense. For example, in our due process, our profession was used against us during cross-examination and was cited to the hearing officer by opposing counsel to point out that we were not mere neophytes to the legal system – even though we are completely inexperienced in the area of school law and the due process system, which is very different from the civil trial system. In the end, being an attorney/parent merely raised the danger of being charged with knowledge that we did not necessarily have.

The end result is that parents, even attorney-parents, are at a disadvantage when pitted against a district’s counsel because this is a complicated process and such parents may be presumed to know things that they do not in fact know and have no reason to

³ Woodside v. The Sch. Dist. Of Phila., 248 F.3d 129 (3rd Cir. 2001).

know under the circumstances. Rather, the reality is that they're just parents trying their best to navigate a confusing and complex system – like everyone else.

Moreover, as discussed below, you have better things to do with your emotions and time than put them into the role of being labeled as an “advocate” for your child. You must gather all the information about your child and organize it; you need to understand all that you can about your child’s disability; you need to gather together an effective group of treaters, who will provide the best chance for your child’s developmental, social and educational success; you need to vigilantly monitor your child’s progress and plan for your child’s educational and social advancement. Moreover, in this regard, you must balance such planning against the ever-changing canvas of your child’s development and the fact that, to whatever extent possible, you should let your child learn to adapt his or her conditions to the non-disabled environment.

If this is successfully done, your emotions will no longer be a weakness in the process. After deciphering complicated material and dismantling baseless arguments that suggest why your child does not deserve a particular placement or service, you will at least have the strength in knowing that your position is a reasonable one and your cause just. Because, by this time, you will have thoroughly investigated your child’s disability and the school’s educational system; you will have tested your position by consulting with experts and have investigated your legal position, finding it to be justified. You will have done everything you can to resolve the dispute. And you will at least come to the conclusion that, if you lose, it won’t be because you haven’t tried to do what is right for your child or because of a lack of understanding or preparation.

In our case, we won at due process, but lost on a second –tier appeal. However, we felt confident in our position and took the matter to federal court, where the matter was concluded. We were obviously disappointed by the second tier decision – and that valuable time was wasted as a consequence with regard to our requested placement – but we had a strong belief in our position. We had a great lawyer who, apart from being competent, did a good job keeping us focused and calm. It was a difficult and expensive process, which I would not wish on anyone; but as parents you sometimes don't have a choice but to go through it.

But, there is a better way. Wouldn't it be great if you could avoid all of this conflict, and the inefficiency of a dispute in the IEP process, by knowing ahead of time what your district was planning for your child and what can be done to create an appropriate placement and plan? Well, you can, particularly where the district cooperates and itself is interested in avoiding conflict. And, since both parties benefit, there should be no reason why such information shouldn't be readily exchanged. Educational placement and the design of an IEP should not be a one-way process developed behind closed doors without parental input. Districts can move forward and avoid conflict by presenting parents with information about their proposed IEP before the IEP meeting. They should permit parental observation of any available program or placement. They should provide all evaluations or other data used to construct the draft IEP ahead of time and any underlying testing results. In this way, parents can comment before the IEP and the process can be shortened and disputes circumvented. Further, for parents, there's nothing to be lost by submitting reports at or before the IEP in support of what you have in mind for your child, if you have them; moreover, if the district is being a true partner

in the IEP process, you really shouldn't have to go to considerable expense to do this, mere discussion should be enough. The level of outside involvement – from experts and attorneys – will be determined by the level of cooperation from the district; the more cooperative the district, the less likely you'll need to bring in outside professionals. Congress intended this to be a relatively costless process; yet, for some reason, it has become a hotbed for controversy and this is wrong.

Moreover, apart from your natural inclination to do so, to facilitate this process it is also important to maintain good relations with your child's school. Parental involvement in the school is also a way to experience and understand your child's school community. You will gain a better understanding of your child's school and his or her ability to function within it. Due process may strain that relationship, but it shouldn't destroy it. Parents have a right to disagree with their school over its proposed education plan for their child. Districts should understand this right and, in good districts, they will even positively respond to such matters by implementing changes that have been suggested. Parents are an essential resource for improving a school's performance and their opinions should be respected.

If parents become well educated about their child's disability, how it affects their child's academic attainment and what can be done at school to accommodate these disabilities, their suggestions in the IEP process should necessarily be an essential part of the overall education plan for their child. Nevertheless, sometimes, parental views are disregarded.⁴ This should not occur.

⁴ In "Emotions to Advocacy", Peter Wright described one parent's reaction to this process as follows:

"One father, a businessman who specializes in marketing and sales, describes his feeling about school meetings:

Sometimes a district will contend that they are the educational professionals and that parents should defer to their recommendations. This “we know best” attitude really has no place in this process. While parents do respect school opinions, this view necessarily discounts parental input and, as discussed above, if parents have done their research on their child, they will necessarily have a lot to offer in this process.

As much as possible, parents have to be prepared to be problem solvers. You need to be prepared as much as possible with potential solutions. This is particularly true where districts do not propose alternative programs, which also should not occur. If you effectively learn all you can about your child, the curriculum and suitable accommodations, this can help address opposing views.

Another problem occurs when districts have low expectations. As discussed below, this problem is a long-standing one and is one reason why IDEA and other school legislation, such as NCLB, were enacted.

Logically, your knowledge about your child and the law should go a long way toward dispelling such incorrect notions and bias to eliminate or minimize conflict before it starts. At the IEP, you and the district should share similar expectations about your

There is something about this team business where you sit around a big table and it's just you on one side, and six or seven school people on the other side. I always feel intimidated when I go to meetings. I feel like I did when I was eight years old and had to go to the principal's office. I was in trouble then and it feels like I'm in trouble now!

Id. at 34. Such feelings are pretty common. We were no different. Although our son had early intervention services since age 2, and we had been to IEP's since that time—many attended solely by one of us, without a cadre of experts or counsel—we were unprepared for any conflict when it occurred when Alex became enrolled for Kindergarten. Then, when we had another IEP before due process and brought in experts, our son's treaters, the dynamics of the meeting changed. It really shouldn't be necessary to go to this expense. A parent's view should be carefully incorporated into the IEP plan particularly when they come prepared with a body of knowledge about their child. Moreover, if the district provides the parents with information ahead of time, the process becomes more efficient because parental and private treater input can be readily incorporated into the IEP document during the meeting itself. Feelings of intimidation and parental anxiety can easily be reduced by leveling the field of knowledge about the process and by knowing ahead of time where disputes may be found, if any.

child. However, if you find that the district has lower expectations for your child that doesn't make sense to you, don't be afraid to follow your parental instincts.

Children are likely to live up to what you believe in them. If you believe they won't accomplish a lot, then, chances are, they won't. The danger of low expectations seems to be a constant theme in these cases. In its worst incarnation, it can be a mere subterfuge or pretext to lower district responsibilities and thereby deprive a child of his or her educational right. During the Republican Convention in August, Secretary of Education Rod Paige, cited such dangers when addressing his support for "No Child Left Behind" ("NCLB") and the President's current educational policy as follows:

We inherited a great nation. So must our children! No nation whatever the size of its armed forces or economy can sustain greatness unless it educates all, not just some, of its citizens. . . . But there were also schools where young minds were left unengaged; good teachers left unsupported; standards left unused. Kids who passed through these schools were robbed of their life's potential. And so were we. . . . On a personal note: In my youth I attended segregated schools. I was in college when the Supreme Court announced Brown versus Board of Education. I felt liberated that day. I thought true equality would soon follow. It did not. While Brown opened the schoolhouse door to all it did not guarantee quality education for all. President Bush saw this two-tiered system as unacceptable! He proposed [No Child Left Behind ("NCLB")] a plan[.] High standards; measurable goals; real consequences and resources to get the job done. He promised results. . . . [NCLB] challenges what the President calls the 'soft bigotry of low expectations.' Its goal is simple: all students read and do math at grade level. . . . Now schools are held accountable for making real progress. If they don't, parents have real choices such as after-school homework help, or the choice of another school. . . . Although much work remains, our choice is simple: We can either build on these achievements – or return to the days of excuses and indifference.⁶

As discussed elsewhere in the PBI materials, in this regard, NCLB, which is an amendment to Title I of the Elementary and Secondary Education Act of 1965,⁷ merely amplifies the goals and objectives that Congress had in mind when passing IDEA and can support the rights of disabled children. In passing IDEA, Congress expressly found that:

⁶ Dr. Rod Paige's speech, 8/31/04, at Republican Convention.

⁷ 20 U.S.C. 6301, et seq.

(3) Since the enactment and implementation of the Education for All Handicapped Children Act of 1975 [discussed below, the predecessor to IDEA] this Act has been successful (4) However, *the implementation of this Act has been impeded by low expectations*, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities. (5) Over 20 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by (A) having high expectations for such children and ensuring their access in the general curriculum to the maximum extent possible; (B) strengthening the role of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home. . . .⁸

As the Secretary of Education and the President observed, the soft bigotry of low expectations cannot be tolerated. As parents, you are the best assessor of your child's expected performance and if you conclude, after thoughtful research and consideration, that your child can do better – you're probably right.

II. PARENTS AS “EXPERTS” REGARDING THEIR CHILDREN

One of the unusual characteristics of due process is that everyone who testified did so as an expert, except, seemingly the parent. Administrators and teachers who had limited contact with our child offered expert opinions even though, at the time, they barely knew him. This is the way the system is set up. Districts will do an evaluation and they can become wedded to those conclusions. Sometimes they won't be open to change; sometimes they will. Meanwhile, parents' views may be discounted because they will be portrayed as being emotionally based or because they are not education experts—even though they know their child the best.

Parents need to respond to this by coming prepared with expert support for their position. Unless the matter is a trivial dispute—and if so, you should not be in due process in the first place -- you will probably need experts to support your position. This

⁸ 20 U.S.C. Section 1400©(3)-(5).

will include any specialist for a related service – such as speech or occupational therapy – education experts and psychologists, if applicable. Parents will also need to document their views regarding their child – through photos and/or other evidence. They will need to support their testimony with the testimony of their child’s private service providers and/or specialists to increase their chances for a favorable outcome. People who know your child may also provide relevant information for the hearing officer and record.

Again, if this sounds like it’s a full-blown trial, that’s because that’s what it is – however informal the setting. And this makes due process very expensive. Unfortunately, this will economically preclude many from needed relief.

The reality is that most parents know more about their child than anyone else. Therefore, whenever someone suggests something that just doesn’t seem to fit their child, it’s only natural for parents to question this and perhaps even to disagree. And there’s nothing wrong with that.

However, this parental instinct is just a first step. In medicine, if a doctor suggests something that doesn’t seem right, you get a second opinion. In education, it is just as critical to not become a passive participant and blindly follow district recommendations. Sometimes they’re wrong. Parents have a right to disagree and express themselves in this regard. And districts must never hold that against them. Rather, their input should be valued and implemented. A brief history of the development of current special education law, and its impetus, tells why.

A. Current Legislation Exists Because of Past Discrimination Against Children On The Basis of Race, National Origin and Handicap

As Secretary of Education, Rod Paige, noted above, it was a great day when the United States Supreme Court expressly recognized elementary education as being a fundamental constitutional right in Brown v. Board of Education, 347 U.S. 483 (1954). There, Thurgood Marshall convinced the United States Supreme Court that “separate but equal was not equal” and that segregationist policies are destructive and have a “tendency to [retard] the educational and mental development of . . . children and to deprive them of . . . the benefits they would receive in a[n] integrated system.” Id. at 494. In reaching its decision, the Court reversed 58-year-old precedent that legitimized this process because it found such systems to be immoral and fundamentally wrong.⁹ In reaching this conclusion, the Supreme Court stated that:

⁹ Brown is a critical case now more than ever where districts seek to separate disabled children from their non-disabled peers by contending “it’s best for the child”. In Brown, the United States Supreme Court laid such platitudes to rest as follows:

“Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other ‘tangible’ factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

In Sweatt v. Painter, [339 U.S. 629], in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on ‘those qualities which are incapable of objective measurement but which make for greatness in a law school’. In McLaurin v. Oklahoma State Regents, [339 U.S. 631], the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: ‘. . . his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.’ *Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. [Quoting a state court that nevertheless found in favor of segregation, the Court stated]:*

‘Segregation of . . . children in public schools has a detrimental effect upon the [segregated] child[.]. The impact is greater when it has the sanction of the law; for the policy of separating the [children] is usually interpreted as denoting the inferiority of the [segregated] group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard – the Supreme Court’s term] the educational and mental development of [the segregated] children and to deprive them of some of the benefits they would receive in a[n] . . . integrated school system.’

Id. at 493-494.

In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity . . . is a right which must be made available to all on equal terms.

Id. at 493.¹⁰

And yet, again as Dr. Paige noted during his Convention Speech, even after Brown, despite the passage of anti-poverty and civil rights laws in the 1960s and 1970s, considerable resistance still remained against implementing these appropriate federal mandates for equality. Some of this resistance was explicit and even required military force to breakdown, to implement desegregation and open public school doors to African-American students. However, even today discrimination remains even though it is sometimes hidden away or disguised through “low expectations”.

Interestingly, Pennsylvania was actually where special education desegregation was first applied. In 1971, the Pennsylvania Association of Retarded Citizens (“PARC”) successfully brought suit against the Commonwealth of Pennsylvania and Department of Education, in a class action that challenged state law that permitted public schools to exclude retarded children from classroom education and training.¹¹ They were successful

¹⁰ “Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.” Id.

¹¹ The statute, 24 Purd. Stat. Sec. 13-1375, provided as follows:

“Uneducable children provided for by Department of Public Welfare. The State Board of Education shall establish standards for temporary or permanent exclusion from the public school of children who are found to be uneducable and untrainable in the public schools. Any child who is reported by a person who is certificated as a public school psychologist as being uneducable and untrainable in the public schools, may be reported by the board of school directors to the Superintendent of Public Instruction and when approved by him, in accordance with the standards of the State Board of Education, shall be certified to the Department of Public Welfare as a child who is uneducable and untrainable in the public

in obtaining a consent decree whereby the Pennsylvania Department of Education agreed to implement procedural and substantive due process changes in recognition of the right to education for mentally retarded children.¹²

To read the Pennsylvania law at issue in PARC v.PA today – a law that not only made it legal to exclude disabled children from the classroom and education, but devised the means by which this could be accomplished -- is chilling. Yet, it was on the books

schools. When a child is thus certified, the public schools shall be relieved of the obligation of providing education or training for such child. The Department of Public Welfare shall thereupon arrange for the care, training and supervision of such child in a manner not inconsistent with the laws governing *mentally defective individuals*.”

¹² See, Pennsylvania Assoc. of Retarded Citizens (PARC) v. Pennsylvania, 343 F.Supp. 279 (E.D. Pa. 1972)(Masterson), modifying, 334 F.Supp. 1257 (E.D.Pa. 1971). Notably, one of the participants in this litigation was a pro se parent, a lawyer, whose daughter was also a member of the class. While not going it alone, he spoke knowledgeably as a “parent” rather than as an “advocate” and was recognized by the court as follows in support for the court’s decision. Quoting the parent, the court recognized his claim that his fifteen year old daughter had been excluded from public education for her whole life:

I would just like to call to the Court’s attention what the realities of that situation are, and I think I can speak with some authority because for the last nine years, my fifteen year old daughter has been denied access to public education without due process, but consistently denied, and as a result of which we have had her in private schools for the last nine years. Now in those nine years, not counting the present year, not counting the year which started last summer, we have spent approximately forty thousand dollars on her private schooling, shall I say. At the present time we have her in private school, a residential school where we pay a tuition of twelve thousand dollars a year, and I want to say to the Court that what I am saying here too our situation is paralleled by many other situations of many other children, and their parents.

Now if a public facility were established that comes anywhere near striking the distance of appropriateness for my child, Your Honors can rest assured that I will welcome that public facility with open arms. The financial burden of giving my child private education is very considerable. There is no pride or status symbol involved in having a child in a private school such as the private schools to which my child and others in the same situation would go. In other words, it isn’t out of any feeling of status that I am undertaking this heavy financial burden. It is simply because there is no public facility.

Now the moment a public facility is indicated, even just on the drawing board or on brochures, or papers of any kind which look reasonably appropriate, I will assure Your Honors that ninety-five per cent or more of all parents will rush to get their children in there because everyone of the parents is laboring under a backbreaking financial burden. We’re not talking about wealthy people here. We are talking about ordinary people, and I know a great many of them who send their children to the same school where I send mine, and I have had my child in one other school before this, and I have had her with a private tutor for a year.”

Testimony of Attorney Parent. Id. at 287, n. 17.

just 33 years ago. And today, in some places, it's spirit lives on; however, today the practice is much more difficult to recognize – because now it is not written down. Rather, it's the parents' burden to recognize when this occurs and to prevent such discrimination from being practiced against their child at school in whatever subtle form. And this is a hard thing to do.

The PARC v. Pennsylvania consent decree became a model for national implementation four years later, in 1975, with passage of the Education for All Handicapped Children Act of 1975 (“EAHCA”), which became effective in 1978. Yet, the forces in play continued to separate disabled children from their non-disabled peers. In fact, when it passed EAHCA, Congress expressly noted that:

[From] the most recent statistics provided by the Bureau of Education for the Handicapped [from 1973-74] . . . of the more than 8 million children . . . with handicapping conditions requiring special education and related services, only 3.9 million such children are receiving an appropriate education. 1.75 million handicapped children are receiving no educational services at all. . . .

The long-range implications of these statistics are that public agencies and taxpayers will spend billions of dollars over the lifetimes of these individuals to maintain such persons as dependents and in a minimally acceptable lifestyle. With proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence, thus reducing their dependence on society.

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Parents of handicapped children all too frequently are not able to advocate the rights of their children because they have been erroneously led to believe that their children will not be able to lead meaningful lives. . . .

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It should not . . . be necessary for parents throughout the country to continue [to] utilize[e] the courts to assure themselves a remedy. . . .

Meanwhile, in 1973, Congress passed Section 504 of the Rehabilitation Act of 1973 which provided that, “No otherwise qualified handicapped individual . . . shall

solely by reason of his handicap be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal assistance.”¹³ Section 504 added teeth to EAHCA because, unlike EAHCA, Section 504 provided parents for the first time with the right to attorney’s fees and did not require an exhaustion of administrative remedies, as did EAHCA before 1986. Further, during this time, these actions were also supplemented by Section 1983¹⁴ actions brought against schools, which deprived children of their right to education, a right guaranteed by federal statute, under color of law.¹⁵

B. Finding Inclusion and Appropriate Services – The Parent’s Role

In December 1990, these statutes, the EAHCA, and its successor, the Handicapped Children’s Protection Act of 1986 (“HCPA”), were amended to become, the Individuals with Disabilities Education Act (“IDEA”).¹⁶ Congress amended this statute again in 1997. Today, IDEA provides distinctive guideposts for inclusion, an important foundation of which is the mandate for providing education in “the least restrictive environment.” Courts interpreting IDEA have universally held that it is axiomatic that a disabled child cannot receive a Free Appropriate Public Education (“FAPE”) unless this education is provided in the least restrictive environment (“LRE”). The requirement for LRE comes from the civil rights movement. It’s a Congressional mandate for school districts to desegregate handicapped kids. As Congress stated:

¹³ 29 U.S.C. Section 794.

¹⁴ 42 U.S.C. Section 1983.

¹⁵ Further, in *Smith v. Robinson*, 468 U.S. 992 (1984), the United States Supreme Court addressed the question of whether education rights claims had to be brought exclusively under EAHCA or whether additional claims could be brought under Sections 504, 29 U.S.C. Section 794, or 1983, 42 U.S.C. Section 1983. The holding led to amendment of EAHCA, by passage of the Handicapped Children’s Protection Act of 1986 (“HCPA”). 20 U.S.C. Sections 1415(e)(4) and 1415(f), which provided for the award of attorneys fees. Moreover, Congress provided that this statute would not provide the exclusive remedy for a cause of action under Sections 504 or 1983.

¹⁶ 20 U.S.C. Sections 1400-1485.

(1) Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities. . . (5) Over 20 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by . . . (C) . . . ensur[ing] that special education can become a service for such children rather than a place where they are sent. . .¹⁷

LRE is a mainstreaming goal. IDEA requires school districts to proffer a continuum of alternative placements for the child in the regular education environment so that, "to the maximum extent appropriate, children with disabilities, including children in public and private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular education environment occurs only when the nature or severity of the disability of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."¹⁸

Your child belongs in the regular education class to the maximum extent appropriate. In claiming that your child cannot be educated among his or her non-disabled peers, the district may claim that such exposure may cause a hardship or anxiety for your child or that your child needs a different curriculum for an appropriate education. As for such emotional or hardship claims, you are the best judge of such matters. But, don't sell your child short. Through appropriate accommodations and supplemental aids and services, most emotional issues can be addressed in the regular education environment. Again, don't let low expectations or rigid notions change your

¹⁷ 20 U.S.C. Section 1400©(1),(5)©.

¹⁸ 20 U.S.C. Section 1412(a)(5).

view if you believe your child will benefit from being educated among his non-disabled peers. The reality is that your child will grow up to live in a non-disabled world. And the time is now for assimilation and understanding – not just for your child, but also for his or her non-disabled peers.

As for our child, his best friend is a “non-disabled” kid. In fact, he’s quite advanced for his age. And they have a great time together. Parents should never feel like they need to prove that their child is worthy to be educated among his or her non-disabled peers. And yet, sometimes, this is exactly the position that they are put in by districts. Again, the pressure for a parent to present such evidence is a form of discrimination that should not be tolerated. Children do not need to prove that they are worthy to be educated among their non-disabled peers.

However, LRE is also not intended to present parents with a Hobson’s choice between mainstreaming – the desegregation of their child in education – and his or her right to receive appropriate educational programming and services. As one commentator stated:

School districts often tell parents that the law requires them to mainstream a child, even when the child needs individualized instruction that cannot be delivered in the regular classroom environment. [This is not true]. . . . While children should be mainstreamed “to the maximum extent appropriate”, they can be removed from regular classes for special education if this is necessary for them to learn.¹⁹

Necessary services should not come at the expense of a child’s mainstreaming opportunities under LRE. To the maximum extent possible, these services should be provided in the regular education classroom. Moreover, if, for example your child needs a special reading program to learn and this can only be provided on a 1:1 setting and not

¹⁹ Wright, “From Emotions to Advocacy”, at 135 (2002).

in a typical classroom of 20 or so students, then it may be necessary for your child to be taken out of the regular education class for that limited purpose. Therefore, if parents recognize that their child needs a specialized reading or other program, the district cannot deny this by contending that, to do so is not feasible because it would violate LRE and, therefore, FAPE. This is not true – the law is not intended to be a shield against providing such services. Rather, the child can simply receive this instruction in another class. Moreover, because the district must provide LRE along a continuum of alternative placements, and must provide supplementary aids and services to provide the child his or her education in the regular education class, where feasible, the district should implement the parents' suggestions for providing such services in the regular education classroom or have very good reasons for why this cannot be done. For example, perhaps the child can achieve his or her academic requirements through an aide, assistive technology devices or services, or through outside tutoring; this may be enough for the child to succeed in the regular education class. Parents need to thoroughly explore such possibilities. To do so, they will need a good knowledge base and have reliable experts for consultation.

One frustrating aspect here is that school districts may not have any suggestions as to how to do this. While not appropriate, they may withhold or resist providing information as to how to accomplish this – thereby leaving all suggestions to the child's parents. In such instances, you will need to be ready to have suggestions available.

To succeed in this process and make the difficult choice on placement and programming, parents must actively learn about their child's disability, its effect on his or her ability to learn in the regular curriculum, what adjustments are needed to permit your child to reach academic goals, and about how your child has progressed so far. The most

effective means to achieve these goals is through parent self education. Through such information, without “advocating” for a result, at the IEP you can present the facts that form the framework for your child’s appropriate placement and related services. In this process, your child’s treaters will be useful guides. However, here too, a parent must rely on instinct and self-education in order to evaluate such conclusions.

For example, in my son’s case, I realized fairly early on that I needed substantially more knowledge to follow and understand his condition. From a web search, I found a support group for families who had children with the condition. The group had professional links – with specialists from all fields (neurology, speech, education) – from where specialists submitted information for parents and other professionals in the field. Through this link, I increased my awareness of the issues associated with my son’s disability and connected with other parents facing similar situations. I also learned about a graduate speech course, which focused on his disability. I took the course, although at first, the school wouldn’t let me and I had to persuade them as to why it was so important. From the course, I obtained more information about the current state of research and this condition than I would have ever obtained from any specialist; I was even able to provide my son’s specialists with relevant articles in the field and could discuss with them their implications. The information was relevant and helpful in deciding upon an appropriate program for my son. Several of these articles even became exhibits at my son’s due process hearing.

Taking courses should not necessary, however. It just proved helpful in my case. I’ve also found relevant information in bookstores and on Amazon.com. The point is that parents need to be their own experts about their child’s disability and related conditions.

They need to know so much that they should try to avoid getting bogged down in the gamesmanship of “advocacy”. By earnestly presenting what your child needs from a position of knowledge, you should be able to critically evaluate educational choices; in this way, you can distinguish between what makes sense from what does not – and articulate why this is so.²⁰

In addition to learning about your child’s disability, you will need to learn about and understand different teaching methods and curricula. Parents will need to know what curriculum their school plans to use for their child and they must compare it to other curricula used in the field for their child’s disability. You will need to have your school’s special education plan that has been filed with the state. In this process, you will probably have to retain a special education specialist. You might find it worthwhile to bring such specialists to your child’s IEP meeting or to at least have a report in hand to present before such events.

The decision about whether or not to bring specialists to an IEP meeting depends on several factors. First, if you have a good relationship with the school, they should respect your input and, if anything is needed, reports should suffice. If there is resistance, you may need to employ an advocate or an attorney in this process. The important thing, however, is to come prepared.

²⁰ Unfortunately, this realization means that those without the means to obtain such information or the ability to digest and understand their child’s disabilities are at a distinct disadvantage. They are effectively disenfranchised from this process. Representation for these individuals is difficult because the law is so specialized. There are not many lawyers who do this work. As for me, this process has been quite expensive and we approach each year with the hope that it will cost less than the year before.

The goal here is to get to the point where you don't have to employ experts or attorneys to achieve an appropriate IEP.²⁰ Maintaining good relations may help and is an important part of this process. But, it may be difficult for parents when they have had prior disagreements with their district. Your ability to come prepared with information and proposals should at least hopefully keep such disagreements to a minimum.

But, a prepared parent may put a district on the defensive too. Can it be possible that a parent would intimidate a well-funded and professionally represented district? One should not think so. Districts are much more adept at this process than even the most prepared parent. Rather than being defensive of its programs, they should consider such matters as opportunities to incorporate new ideas into them and appreciate parental input. This was intended by Congress as a means to correct the absence of prior district curricular progress.²¹ Being prepared and knowledgeable about your child will help keep you focused on the issues and what needs to be done. And while it's important to be courteous, cooperative and gracious in your dealings with the district, where at all possible – and to resolve matters where possible -- *a child's education must never be "horse-traded"*. If you have no other choice, you may have to disagree and go through due process. If you do, hire an attorney if at all possible. Avoid putting yourself in the position of being both advocate and parent. It is not a good combination.

III. CONCLUSION

²⁰ Before our due process, while my son received early intervention services, my wife attended such meetings often without me or visa versa. There was never any serious dispute over needed services or placement.

²¹ As Congress stated in passing IDEA:

“(4) However, the implementation of this Act has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities.

If there is a silver lining in due process, it is that you will finally lock down information about the district's programs. You will obtain sworn testimony about the district's position regarding your child. You will have organized your child's records like never before.

Fortunately, my experience in this process has been limited – and it is my intent to keep it that way. I am not a special education lawyer, nor do I pretend to advocate for my child. Instead, I attempt to resolve all disputes in the most expedient way possible. It's a good outcome if we go through an IEP without a dispute. Moreover, there shouldn't be any dispute because, in most cases, these matters should be fairly simple.

Litigation should never ensue because a district has simply failed to implement a program before a parent has suggested it, where that program is feasible. Such “wet blanket” responses should have no place where the parties are earnestly trying to implement an appropriate placement or program. Education is necessarily an imaginative activity and no area demands greater imagination than the education of a child with disabilities.

Children with disabilities are part of every school population and, indeed, part of our common human experience. Such children deserve the right to fully participate in and contribute to their school community and to our society. Improving their educational outlook is not just a national priority that prompted Congress to take legislative action; it is, and should be, a school priority.

Children with disabilities are like all children. They're special and often very courageous. They need to be given credit for that admirable trait. For example, we've all heard news accounts about physically disabled children who have overcome physical

limitations to be active in sports, school or life. Such children are celebrated because they're heroes. They are readily accepted and often looked up to by their peers because they have succeeded against difficult odds. Other disabled children are no different and certainly deserve a chance to be heroes too.

For this to happen, schools must actively participate in IEPs, with ideas and suggestions, toward an earnest attempt to provide FAPE in the LRE. Further, there needs to be strong enforcement of education rights by the Office of Dispute Resolution, the Department of Education and other agencies.

For parents, they need to maintain an active role in helping their child – by learning all that they can about their child's disability and how their child can succeed in school. Here too, it must also be recognized that not all parents will be able to do this. But, their children don't deserve to fall through the cracks to be left behind. Because of the way the system is currently structured, many are and there needs to be change – to strengthen and not weaken IDEA and the rights of disabled children. This process should be easier. It shouldn't cost a lot of money and it should not take so much time.

Parents need to continue to learn about special education law and their child's condition. In our case, since our son's due process, I've tried to learn this area by joining the exceptional child committee of the Pennsylvania Bar Association and by attempting to gather interest with regard to forming a clinical program where law students and non-special education lawyers team with experienced counsel in this area to represent families who cannot afford to go through this process. Pennsylvania already has an excellent pro bono group that represents families, the Education Law Project; and it does a wonderful job in this area. However, resources are limited and much more action is needed to help

other parents throughout Pennsylvania. Frankly, there is a great need for more attorneys, including parent attorneys, in special education law.