



Seminar Outline

Oh the Changes We've Seen – Major Developments in Special Education Over the Past Twenty Years

I have been involved in disability law issues for my entire legal career since graduating from law school in 1978, I first began to practice in the field of special education in 1988. The Handicapped Children's Protection Act of 1986 which provided for payment of attorney's fees when parents prevail in due process proceedings expanded access to the legal system for parents who lack resources to hire private counsel. This development increased the level of advocacy, and therefore litigation, in special education matters. The extent to which this has been a positive development depends upon the viewpoint of the observer. To parents of children with disabilities, this increased level of advocacy has kept school districts honest and accountable, while school district officials often view the presence of attorneys and advocates to be unduly burdensome and to interfere with their ability to make educational judgments free from fear of litigation.

Before 1986, relatively few due process hearings were requested in Pennsylvania, and even fewer hearings were actually held. (Hard statistics from this era were not readily available to the author and the preceding statement is based upon interviews with relevant professionals from that era). These hearings were relatively informal, and were conducted in Pennsylvania by hearing officers who served on a very part-time basis. These hearing officers were often employees of local public school agencies or were college professors who received limited training in legal proceedings. By the 1996-1997 school year 456 requests for due process were made. This figure reached a high of 1036 requests in 2004-2005 (the year before IDEA-2004's new Statute of Limitations became effective) and tapered off to 817 in 2008-2009.

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The entire process of administrative decision-making is far more comprehensive, complex, and lengthy than twenty-five (25) years ago, although for many reasons beyond the availability of attorney's fees in special education matters. Other factors include the level of scientific information which now exists in the field of special education, the availability of private psychologists to evaluate students and to advocate on their behalf, and the explosion of information on the internet which allows parents to advocate (with or without attorneys) on behalf of their children.

Special education services for students with disabilities as well as the legal system which protects the rights of those children both bear virtually no resemblance to the field prior to the Education for All Handicapped Children Act of 1975 – and only slightly mirror the system I encountered in 1988. The EHCA established the right of children with disabilities to a free appropriate public education. Between 1975 and my entry into the field of special education in 1988, the focus of special education law was access to services, rather than issues such as Least Restrictive Environment and Scientifically-Based Instruction. During that initial time frame, special education classes were often created from scratch, and the quality of these programs varied widely. By 1988, however, the initial “building stage” of special education programming was largely over, and substantial research had been funded and completed, and was nearing a critical mass of information to enlighten everyone in the field of special education regarding appropriate techniques to educate children with disabilities. As expressly stated in the current Preamble to IDEA, the current focus is no longer upon access to education, but rather meaningful benefits and positive results for children in special education programs.

The bullet points below reflect areas of major change during my twenty (20) plus of advocacy and special education.

- The Evolution of Due Process and Special Education Litigation - - professionalization of the due process system, expanded appeals to federal court (does the Commonwealth Court hear any of these cases anymore?) and the elimination of review of hearing officer decisions by the Secretary of Education and (later) by the Pennsylvania Appeals Panels.
- Recognition that a student's needs drives the program, rather than the student's diagnosis or classification of disability.
- Least Restrictive Environment - - Oberti through Gaskin – How much has really changed?
- Compensatory Education - - recognition of that right in Lester H. v. Chester Upland School District and its progeny, the expansion of the extent of that right in

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subsequent years, and the designation of parents as the persons who select and implement compensatory education services.

- Infants, Toddlers and Preschool Services - - The expansion of entitlement to appropriate services to children before the age of beginners for school districts
- Cordero and Interagency Cooperation - - how satisfactory is the system developing and implementing programs for low incidence, high-needs children with disabilities?
- Tuition Reimbursement and the expansion of private schools, both day and residential, both in-state and out-of-state.
- Compensatory Damages under IDEA, Section 504, and the Americans With Disabilities Act - - ebb, flow, and uncertainty, including the rise and fall in educational matters of Section 1983.
- The Americans With Disabilities Act and the re-discovery of Section 504 of the Rehabilitation Act.
- Transition - - IDEA-2004 has changed the legal landscape, and the real changes are yet to come as families become truly aware of the meaning of IDEA-2004.
- Free Appropriate Public Education - - the concept means something much different today than in 1988, with the advent of research-based instruction for children with learning disabilities, behavior disorders, autism, hearing impairment, and a variety of other disabilities.
- Learning Disabilities - - Response to Intervention and reduction of reliance upon ability/achievement discrepancy, as well as the availability of research-based instruction.
- Discipline and behavior management - - The trend from aversive to positive intervention.
- Burden of Proof - - has now shifted to the parents in most cases, the availability of expert witness fees has been reduced under IDEA and our system has become more formal from complaint through the hearing through closing arguments.
- Charter schools - - Choices now exist, but the track record is uneven.
- Paraprofessionals - - recognition of the need to obtain qualified individuals and to implement a certification process.
- The Use of Special Needs Trusts - - to preserve an entitlement to Medical Assistance and as a vehicle to implement compensatory education.
- Federal Educational Rights and Privacy Act - - Protections or Roadblocks for Children?
- No Child Left Behind and high stakes testing.

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