Testimony to the Texas Senate Committee on Education
Interim Charge 1, 80th Legislature

Presented by
Christopher Borreca, J.D.
Partner, Bracewell & Giuliani LLP
Houston, Texas
August 18, 2008

Personal Biography

Christopher P. Borreca, partner with Bracewell & Giuliani LLP's Houston office, joined the firm in 1991 . Mr. Borreca was the Education Director of the Center for the Retarded, Inc. in Houston for nine years before becoming an attorney and has extensive experience in special education issues. Mr Borreca represents public school districts as well as private schools in school law related issues. Mr. Borreca also serves as an adjunct professor of education law at the University of Houston Law Center. He is a graduate of Peabody College of Vanderbilt University, The University of Wisconsin at Madison, and The University of Houston Law Center. Mr. Borreca is also currently serving as President of the Education Law Association, an international non-profit association dedicated to the dissemination of accurate information pertaining to education law topics. He is also on the Board of Governors of the Center Serving Persons with Mental Retardation, the Foundation for the Retarded, and the Board of Advisors of the Incarnate Word Academy, all in Houston, Texas .

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Thank you Madam Chairperson Shapiro and members of this Committee for this opportunity to speak to you today. My name is Chris Borreca.

I am an attorney with the law firm of Bracewell & Giuliani LLP in Houston, Texas. I am proud to represent a number of school districts in the Gulf Coast area and to also represent the Texas Council of Administrators of Special Education (TCASE) before the Texas Legislature.

I have been asked to present the legal concerns and difficulties of schools in dealing with the special education dispute resolution and due process system and to present some specific recommendations to the Committee to improve this part of the system. It is an honor to be asked to do so.

As Chairperson Shapiro correctly identified at the last hearing, the issue of special education in Texas is one of great complexity. I heard many excellent ideas from school staff and parents alike at the last hearing and will elaborate on a few of them in a minute. But first, indulge me in a few overview statements.

The Problem in Perspective

Before discussing some of the specific recommendations to improve the dispute resolution system, I thought it wise to spend a moment reflecting on some figures and data in order to put the nature of these concerns into some perspective.

As you know, in the State of Texas, we have nearly ½ million students receiving special education services. In the 2006-2007 school year, there were 329 formal hearing requests for due process and only 45 were fully adjudicated. That means, of that very few percentage of

parents who took the time to formally file for a request for a hearing, 86% were resolved by the District. It can be presumed that generally that meant the parent was satisfied with the resolution. As you heard from North East ISD at the last hearing, 13 complaints were filed last year in a district of over 7,200 special education students. This panel remarked correctly that this was an admirable record and it is one, Senators, that is actually replicated by school district after school district. Here in Austin, for example, with a special education population of over 7,500 students, there were no requests for due process last year and only 4 complaints and 3 requests for mediation In an informal survey of my clients, I found similar statistics, in fact, many reporting far fewer hearing requests or official complaints to the Agency. I am not discounting the very real angst and emotion a parent may feel when they believe that their child is not being served well by their public school district. The statistics, however, simply do not portray a system that is broken or in crisis, at least as determined by looking at the frequency of complaints or hearing requests.

Positive Practices Are Occurring

Despite the fact that I believe that Texas school districts, in large part, have a very satisfied constituency, I know many districts are implementing innovative practices designed to further decrease the number of complaints and create a more satisfied collaborative relationship with parents. For example, it is not unusual to find school districts and advocacy organizations, such as Advocacy, Inc., joining together to provide joint workshops for parents and school staff on the procedural rights and protections offered by the law. The mere fact that these are "joint presentations" works wonders to build credibility among both groups.

Certain districts are in the process of developing parent support groups and liaisons between parents and school administrators. Such efforts seek to provide a safe opportunity for parents to bring up concerns early and have such issues addressed before they fester into formal complaints or requests for hearings. As mentioned at the last hearing, the TEA-provided mediation service has been very effective in reducing due process hearings and handling complaints. The mediators are well trained and very responsive to parent and district concerns. Both parents and school districts are initiating these services.

Districts are also training staff and parents in facilitated IEP meetings which promote collaboration at IEP meetings, improve listening and communication skills and in facilitating consensus. While the Region XIII Education Service Center is actively engaged in this initiative

with local districts here in the Austin area, similar activities are occurring throughout the State. Districts are also spending significant resources in training special educators in innovative and research-based teaching practices. When parents can see that staff members understand the science of teaching as well as the special needs of their individual child, confidence rises and tensions ease

What are the Problems?

While my task today is to discuss the adversarial system itself and possible issues and resolutions to problems within that discrete area, I have difficulty separating the issues of conflict from the issues of special education service delivery and the legal system we operate under. It is my belief that several aspects of this law contribute to the adversarial process you have come to learn about from your constituents. Let me explain.

1 . In my opinion, the first aspect of this law that contributes to the adversarial process is the law's vague standards regarding the nature of the services to be provided and the changing interpretation of their meaning over time.

The special education program in Texas is an amalgam of policies and procedures flowing from the United States Congress, the US Department of Education, the Texas Legislature and the Texas Commissioner of Education. In addition, the statutes and the regulations are constantly interpreted and reinterpreted by the hearing officers assigned by TEA as well as by the federal district courts, circuit courts, and the U.S. Supreme Court. Because there are many terms in the law that are deliberately vague, understanding these court interpretations is essential to understanding the obligations of a school district and the rights of a student with disabilities in the legal context. Let me provide an example: The IDEA states that a student's placement should be as close as possible to the child's home and, unless his or her IEP requires some other arrangement, the student is to be educated in the school that he or she would attend if non-disabled. While that seems somewhat clear, the courts have uniformly interpreted this provision to allow a school district to provide certain types of services, primarily for low-incidence populations, in locations other than a student's home school. If, for example, I am the parent of a student who is deaf and needs interpretive services, do I have the right to demand that my child

attend the same school as my neighbor's children? If I am the special education director, coordinating services for a district of 10,000 students with disabilities, will I violate the law by providing classrooms at a central location for students who need the scarce resource of sign language interpreters?

There are many, many decision points in this law that are equally vague and each can lead to different interpretations and expectations from parents and school officials alike. To put it into context, the IDELR which is the primary national legal "reporter" of cases in this field is currently at Volume 50. Each volume contains over 1,300 pages of case law. That is the reason why there are legal workshops held for parents and school staff alike, namely, to explain the developing law and make sure the law is followed. Also, let me state on the record to correct any misinterpretation from the last hearing, TCASE has put on many such workshops and parents of students with disabilities have never been prevented from attending any such conference on the basis of their status as a parent.

As an attorney representing school districts, I can readily sympathize with the frustration of my clients who simply ask the question "What does the law tell me I should do?" As a former special education teacher and director of a private school for students with severe disabilities and simply as a parent myself, I can sympathize with a parent who asks "What are my legal rights here?" Such rights, vague to begin with, constantly change and shift with each term of the court and each term of the legislature.

2. The second aspect that contributes to the adversarial nature is the law's overt focus on procedural compliance.

In the article in your packet which I wrote for the National School Board Association (Exhibit A), I refer to this aspect as the legalistic model overlaying these educational services. While this has an admirable aim, it can serve to frustrate normal human interaction. How? For example, a parent comes to a principal to discuss a problem with the student's program. The principal meets and listens to the parent and then agrees to the changes suggested If those changes, however, rise to the level of a (technical term) "change of placement", then unless an ARD meeting is called with all the required members present and who also agree to those changes, or unless the parent signs consent in writing waiving the ARD meeting , the law has been violated if those changes are made. Another example: Before the school staff can even evaluate a child for eligibility for services, the school must provide the parent with a document explaining, in great

detail, how the parent can sue the school district when there is disagreement with the services offered or provided. At every decision-point in the development and provision of the child's program, there is opportunity for the legalistic framework to overshadow the educational framework.

3. The third aspect of the law that contributes to the adversarial process is the recent emphasis on decreasing the number of students in special education.

Whether it be via enhanced general education initiatives such as Response to Intervention (RTI) or efforts to reduce the disproportionality of students in special education based on race and ethnicity, this is one of the significant monitoring targets of both the state and federal government. These issues address eligibility for services. As districts put such efforts in place to better serve students through regular education, it can be expected that parents will grow frustrated when denied an evaluation or eligibility status as the Districts seek to implement these initiatives discussed at the last hearing by Kathy Clayton, TEA's director of special education services. One Texas hearing officer recently wrote, in finding a school district at fault for not declaring a child eligible for special education: *"It's clear that the (pre-referral) Committee was set up to provide a student (with) support and intervention before a special education referral is made. However, in practice, the Committee is merely an obstacle to parents who want to access the special education referrals."* In my opinion, this emphasis on reducing the special education population, in the absence of clear direction from either the Legislature or the Agency as to what is expected of the school district during the pre-referral process, is a "perfect storm" for future litigation.

4. Finally, the last aspect of the law that contributes that contributes to the adversarial nature is the fact that the law is simply not properly funded.

When first passed into law, the IDEA was to have been funded at 40% of the average per pupil cost to provide educational services to a non-disabled student. In reality, that figure is currently only about 17%. In real dollars, in 2007 alone , Texas would have received an additional **$ 1.2 BILLION** from the federal government had Congress actually provided what was authorized! This lack of funding, while not an excuse to deny needed services, prevents districts from providing those enhanced services that otherwise could be offered.

Specific Problems Which Need to Be Addressed in Texas and Proposed Solutions

1. Simple communication between the parent and the school district is hindered by the legalistic model and also by the failure to use proven conflict resolution methods. *Investigate the development of an Ombudsperson program within school districts and/or Regional ESC's and also support the training of facilitated IEP meeting experts to be available to any school district with such a need.*

Anecdotal reports indicate that parents who contact the Agency with a concern about their child's program will often be steered by Agency staff into filing a formal complaint or request for due process hearing before pursuing less adversarial and legalistic approaches. While the TEA mediation program is excellent and yields much benefit, once the legalistic model takes over, normal communication strategies are often ineffective or impossible. Districts or Regional ESC's should investigate the use of an "ombudsperson" model to investigate concerns and bring them to the attention of the school district administrators. In some instances, in other states, the ombudsperson has served an effective role of responding to parental concerns and grievances. (see Exhibit B, attached). In addition, parents and school district staff alike are often unaware of effective conflict resolution strategies, leading to parents feeling that they have not been heard and school staff feeling that they have been unfairly attacked. School districts that have initiated the facilitated IEP process report more consensus and positive outcomes. Such expertise should be made available to all of the state's school districts. Staff and parent training in effective conflict resolution strategies, such as those used by trained mediators, should be encouraged and made part of school district in-service opportunities.

2. TEA has too frequently maintained causes of action even after the school district has offered the relief requested by the parent or when, as a matter of law, the case should be dismissed. *A hearing or complaint should be automatically dismissed as moot in such instances when relief is granted by the school district. Summary judgment should be granted when causes of action fail to state a claim.*

School districts often learn of the nature of a parent's concern or problem for the first time only after a formal complaint or request for hearing has been filed. It is not unusual for the school district to offer the relief requested at a resolution session only to have the offer rejected simply due to attorney's fees not being granted. If the substantive relief is provided by the school district either at the resolution session or via conference with the parent, there should be no basis for a complaint or hearing proceeding any further and the issue should be treated as moot. In addition, the IDEA 2004 specifically made a point of requiring *detailed* requests for hearing with *specific* requests for relief to be identified. While the law allows the school district to request a more specific complaint, too often such requests are denied at the initial stage, leading to unwieldy and lengthy hearings or, in the case of the state complaint process, the needless production of hundreds of pages of documentation. Also, matters which fail to state a recognized cause of action should be dismissed prior to hearing. Examples include causes of action that reach beyond the statute of limitations, vague allegations or complaints arising from non-IDEA related matters (such as personnel decisions or issues of guilt or innocence in disciplinary matters), etc. Hearing officers should receive firm support from the Agency if a dismissal is warranted under such scenarios.

3. Special education should be thoroughly integrated in district level and site-based decision-making via TEC 11.251-253. General educators should be thoroughly versed in special education practices. *Focus should be provided by the Agency to assist general education with insuring that special educators are fully made a part of site-based decision making. In addition, the development of "best practice" academies for regular and special educators along with training in special education methods for regular educators should be made mandatory.*

As discussed above, the line between special education services and general education initiatives is growing thinner and thinner. General educators need to be completely aware of the law's mandates, the pre-referral process and all aspects of differentiating instruction to maintain students within the general education environment for as long as possible in a successful manner. This leadership should primarily arise from the building principal. In addition, certain bills were

proposed last session dealing with both the development of teacher academies (in the area of autism) and mandatory annual in-service training for general educators . These should be expanded, (in the instance of the academies to "all students with identified disabilities") and enacted into law. TEA should also develop and highlight a true clearinghouse for school districts to learn of innovative practices regarding dispute resolution.

4. Decisions of hearing officers appealed to federal court which result in a complete reversal needlessly cost a school district valuable time and funds. *TEA should bear the appeal costs of the school district's attorney's fees when a decision of a hearing officer, adverse to a school district, is reversed by final action of a reviewing court. In addition, the Agency needs to quickly post and re-post hearing officer decisions on its website and should also indicate the appellate outcome of any decision appealed.*

The IDEA allows for parents to receive their attorney's fees upon final order when they are found to be a "prevailing party". While the law allows the school district to recover its fees from either the parent or the parent's attorney under certain unique circumstances, such recovery is not likely to be initiated. The Agency is admirably undertaking training opportunities for hearing officers in the changing complexities of the IDEA and judicial interpretations. Reimbursing a school district its attorney's fees for an appeal of a decision of the State's hearing officer which is determined to have been erroneous, however, would serve to provide a further incentive for the Agency to follow the established law . Appellate outcomes of decisions should also be tracked by the Agency and used as part of the hearing officer review process. Such outcomes should be indicated on the Agency website. The Agency has also removed most of the hearing officer decisions from the website due to an overly broad and unnecessary interpretation of confidentiality concerns issued by the U.S. Department of Education's Office of Special Education (OSEP). (see Exhibit C) No other state in the country has taken as expansive of a view of confidential information as has the Agency. The decisions should be purged of only the information directly stated by the Department of Education in its letter of October 16, 2006 and should be reinstated as quickly as possible. The IDEA itself requires that the decisions be released to the public. The only way in which a decision issued prior to the time of the OSEP letter is by making a request under the PIA, a cumbersome and unnecessary step.

5. The current process for hearings does not allow sufficient time for the parties to work towards resolution and does not actively encourage the mediation process. *If a pre-hearing conference is held during the first thirty days following a request for hearing, the hearing officer should not refrain from commenting on the relative merits of the case nor refrain from strongly encouraging mediation.*

The IDEA now requires that the parent and the school district attempt to resolve the matter during the first 30 days following the filing of a request for a due process hearing. If a case proceeds beyond the now-mandatory resolution phase, the parties are obviously in disagreement over the resolution of the case. In some cases, however, TEA holds a pre-hearing conference during the a period of time reserved under federal law for case resolution. The hearing officer should either refrain from holding such a hearing during such time or , if a pre-hearing conference is necessary, encourage case resolution by commenting on the legal strengths of the case, if appropriate. Such judicial commentary is common (if not universal) in state or federal district court and often results in the parties reassessing their case in time to resolve their differences at mediation. While mediation cannot be made mandatory under the federal law, there is no prohibition against the hearing officer offering such commentary.

6. The IDEA remains woefully underfunded at the federal level. *The State of Texas should advocate that all Texas Congressional representatives support HR 821 and S. 1159 .*

Although the federal government committed to contribute up to 40% of the cost of implementing the Individuals with Disabilities Education Act (IDEA), it currently only contributes about 17%. The states pay the remaining 83% of the costs. HR 821 and S. 1159 would increase federal funding for IDEA with mandatory funds over the next eight years (2015) and would ensure that the federal government "fully fund" its commitment to pay 40% of IDEA.

7. While the Agency has a Special Education Advisory Panel (appointed by the Governor), such a panel does not provide a opportunity for school district special education directors

to provide direct input to the Commissioner. *Develop a special education director advisory committee to provide an opportunity to meet directly with the Commissioner on a quarterly basis to review implementation issues and feedback regarding the complaint system, the due process system, and the effective implementation of the special education program within Texas.*

The day to day implementation of the special education program yields valuable data regarding positive practices and practical concerns resulting from policy implementation. There is no effective means of discussing the issues arising within a school district's special education program directly with the Commissioner. Issues regarding the hearing process or the complaint system, from the perspective of the special education director would be voiced and addressed in a timely manner. Vague regulations or those subject to multiple interpretations could be addressed before unnecessary litigation would occur. For instance, the implementation of the RTI model will surely need to be watched closely in the context of eligibility for services. Such issues, however, are going to be difficult to anticipate out of the context of implementation. An advisory panel devoted solely to school district concerns would serve as an effective check and balance on the efficacy of the Commissioner's regulations outside of the public comment period and after they go into effect.

LEADERSHIP
Insider
PRACTICAL PERSPECTIVES ON SCHOOL LAW & POLICY

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The adversarial process: Does it help or hurt our mission?

By Christopher Borreca

Upon signing the new reauthorization of IDEA on Dec. 3, 2004, President Bush noted that when schools are so busy dealing with costly and unnecessary lawsuits, they have less time to deal with students. He remarked that Congress had made the law "less litigious so it could focus on the children and their parents."

I was fortunate to be present to witness that occasion, and I welcomed the President's comments. Upon reflection, however, I question whether we have again missed an opportunity to meaningfully reform the adversarial aspects of IDEA.

The current reality

President Bush was not the first to recognize the tension inherent in the due process system created when the special education law was first passed in 1975 and amended when the law was reauthorized in 1986. Courts and hearing officers have made note of the unusual degree of hostility and bitterness that characterize many due process hearings.

In 1982 a hearing officer from Iowa offered an early observation:

"It never ceases to amaze me how educators and parents can be so close and yet so far apart in doing what is in the best interest of the student. This situation presents an almost classic case. Here, the parents are interested, caring, and dedicated. The educators are no less interested in what is best for [the student]. Yet, personality disputes and disagreements over inconsequential details of an education program have divided the persons most important to [the student's] future educational development."

A federal court in Virginia, upon reviewing the record of the 1992 case before it, offered how it was "struck by the speed with which the disagreement over Vernon's IEP was allowed to deteriorate into a wholly adversarial confrontation featuring entrenched, incompatible positions."

Around the same time, another federal judge in New Jersey sadly commented:

"It is regretful that this matter has ended up in litigation where the parties are pitted against each other instead of working together. It is difficult to imagine a worse scenario from the point of view of the child."

School districts have not avoided the scorn of the courts when defending their positions to the full extent of the law. In a 1990 case, a South Dakota court wrote:

"As a practical matter, one cannot help but wonder whether or not the act of the school district in filing an appeal for this reason was senseless. For the parties to incur legal expenses which could approximate $25,000 ... in order to save the school district $861 does not strike this Court as a prudent act of stewardship of public funds. ... At oral argument, counsel for the school district, upon being questioned as to the motivation behind the appeal, replied that it was based upon 'principle.' The Court finds no worthwhile 'principle' involved. The school board and its school administrators must share the responsibility for the decision to appeal."

These are not mild words, and school district attorneys come to realize early on that simple advocacy on behalf of their clients may often be perceived as irrational defense of a frivolous concept in the eyes of a disinterested jurist.

But districts are not alone in being the subject of judicial rebuke for taking adversarial positions. An Indiana federal judge in 1990 wrote of the parents in one case:

"[The hearing officer] testified categorically that the conduct of the plaintiff and counsel in the proceedings before her manifested needless adversariousness. This court is in total agreement. ... It is understandable that when one is confronted with the frustrations of this kind of disability and the attended emotional context, it may well be a human failing that causes one so situated to want to throw all of the rocks that can possibly be gathered at the school officials involved. It is apparent that a good deal of that took place, and it is also apparent that it was unnecessary. That pattern continued in the hearing before this judge. As understandable as same may be, this court does not conceive that the school authorities should have to pay for counsel to engage in needless adversariousness and unnecessarily protracted proceedings."

In 1994, a Texas hearing officer also criticized the manner in which parents handled themselves:

PENGAD-Bayonne, N. J.
EXHIBIT
A

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"It appears to this hearing officer that Jimmy's parents have adopted a hostile and uncooperative stance and are constantly looking for procedural errors upon which to file complaints. This hostile and suspicious attitude is counterproductive to Jimmy's educational progress."

Still, it is the school district that has ultimate responsibility for delivering the program, enforceable via this system of due process. Any reliance on the part of the school district to excuse its performance based upon the irrational behavior of the parents is likely to fall on deaf ears. As one Pennsylvania hearing officer noted in 1993:

"The district continually relies on the parents' lack of cooperation as its excuse for its failure to provide an appropriate education. It is undeniable that parental cooperation is an important ingredient of the partnership symbolized by the IEP. Nevertheless, the IDEA and the companion state law puts the responsibility on the school district, and the legislation and regulations provide parents with procedural safeguards, including a due process hearing, to ensure the child's rights to a free, appropriate public education (FAPE). Parental hostility is relevant to FAPE, but the focus is the district's responsibility, not the parent's fault."

How did we get here?

The irony is that the intent of IDEA and its predecessor legislation was to eliminate the need for these types of battles. As the congressional conference committee noted in its report on the 1975 bill:

"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. However, over the past few years, parents of handicapped children have begun to recognize that their children are being denied services which are guaranteed under the Constitution. *It should not, however, be necessary for parents throughout the country to continue utilizing the courts to assure themselves a remedy.* ... Congress must take a more active role ... to guarantee that handicapped children are provided equal educational opportunity." (emphasis added)

But the real problem may not reside in the emotionality of the issues, the expenditure of limited public dollars, or the behavior of zealous advocates who defend their clients' positions. The real dilemma may be the very system itself, which was created to assist in obtaining adequate services for students with disabilities but which has placed school and parents into perpetually adversarial relationships.

As the 9th Circuit Court of Appeals noted in a 1994 decision:

"Litigation tends to poison relationships, destroying channels for constructive dialogue that may have existed before the litigation began. This is particularly harmful here, since parents and school officials must—despite any bad feelings that develop between them—continue to work closely with one another. As this case demonstrates, when combat lines are firmly drawn, the child's interests often are damaged in the ensuing struggle."

Congress recently had an opportunity to truly reform the process and depart from the legalistic model of special education. Efforts to do so, however, were firmly resisted by professional organizations representing teacher groups, as well as the panoply of disability coalitions.

Some reform efforts approved by Congress were notable. Attorneys' fees can now be awarded against parents and their attorneys when frivolous matters are brought and pursued in bad faith. Procedural errors must actually result in educational harm before they can form the basis of a hearing officer's finding of fault.

Parents and school district personnel also must sit down in a good faith effort to attempt to resolve matters before a hearing is held. In reality, however, when attorneys are involved, this resolution meeting often has simply deteriorated into another battle over attorneys' fees.

A better way?

The reform needed to correct the problem the President acknowledged must come from a complete overhaul of the legalistic framework surrounding special education. That will require, perhaps, both parents and school districts to re-examine what might constitute the "due process" each side feels it is owed.

It is noteworthy that Congress resisted attempts to create a private cause of action under the No Child Left Behind Act. Thankfully, the courts have also refused to permit such lawsuits. The true answer in restoring the trust between school and parent lies not in creating more enforceable rights but in rethinking the enforceability mechanism itself.

As Neal and Kirp recognized early on in their remarkably prescient chapter in Kirp and Jensen's *School Day, Rule Days: The Legalization and Regulation of Education* (1986), "Legalization betrays a mistrust of schools. It may inhibit the discretion of professionals whose judgment should be exercised creatively on behalf of the child.

According to Neal and Kirp, "Legalization can be a blunt instrument, undermining healthy, as well as malevolent, exercise of discretion. Special education teachers now find themselves as 'defendants' in due process hearings ... a marked change from their self-perception as lone advocates for the handicapped child. From the viewpoint of the handicapped, it would be disastrous to alienate this group."

> **"Congress ... must undertake a thorough reform of the ability to haul a school district into a hearing."**

I am not so naïve that I fail to appreciate how difficult it is to put the genie back into its bottle. If Congress is ever to make IDEA less litigious, however, it must undertake a thorough reform of the ability to haul a school district into a hearing. Special interest groups—from advocacy organizations, to school district representatives, to hearing officers—must recognize that the inability to march into court upon the slightest provocation does not signal an end to these rights.

As a hearing officer in Maine aptly noted in a 1996 case, "Somehow this relationship, because of the student, must repair itself and become one of openness, listening, keeping commitments, and trust."

IDEA will come up for reauthorization again in just a few years. Perhaps the legalistic model we have created finally will give way to trust, cooperation, shared responsibility, and understanding between schools and parents. Fundamentally changing the due process system as we know it will go a long way to making that a reality.

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refers to documents in an official personnel file, a strong argument can be made that it also applies to an investigative report of employee conduct. In short, an investigative report is clearly a "record" that concerns matters that are quintessentially and solely personnel in nature. (It is important to note, however, that some states expressly provide for the disclosure of investigative reports into government employee misconduct. Also, the "personnel records" exemption alone would not justify denying the report to the employee who was investigated.)

Most state public records statutes contain a pre-decisional or intra-agency memorandum exclusion, modeled off a similar exclusion in the federal Freedom of Information Act. The concept is sometimes expressed also as the doctrine of Executive Privilege. The purpose of this exemption is to "preserve the process of agency decision-making from the natural muting of free and frank discussion which would occur if each voice of opinion and recommendation could be heard and questioned by the world outside the agency." O'Reilly, 2 Federal Information Disclosure §15.02. Because the purpose of the exemption is to encourage unfettered analysis and unvarnished opinion, the exemption protects pre-decisional deliberative materials from disclosure even after the agency makes a final decision on the matter.

Your state's public records law may also have a catchall provision which prevents disclosure of documents if it would adversely affect a legitimate governmental interest. Because this is an undefined standard, the statute may require the governmental entity to seek a protective order, so a judge can rule on the merits of the asserted governmental interest.

Governmental interests concerning the confidentiality of the investigative report may include: (1) protecting the student's privacy and protecting him or her from further harassment (discussed above); (2) encouraging students to report teacher misconduct by protecting confidentiality; (3) protecting the confidentiality of witnesses to encourage their participation in future investigations; (4) enabling the teacher to successfully rehabilitate in another school assignment; and (5) protecting the victim's constitutional right of privacy.

Analyzing the confidentiality of an investigative report concerning a teacher's sexual harassment of a student is certainly complex under the typical provisions of a public records statute. The arguments in support of confidentiality summarized above offer a solid starting point for denying access to the investigative report. The applicable state public records statute must be read carefully, of course, to see how these standard exclusions are applied in your state.

Ultimately, outcome of a public records request for a sexual harassment investigative report may be uncertain. For this reason, a school district should consider asking its legal counsel (especially if it employs in-house counsel) to conduct these types of investigations in order to be able to assert the attorney work product and attorney-client communication privileges as additional bases for denying access. Having a school attorney do the investigation is a good idea particularly in cases expected to be high profile. The school attorney should review this option with the district before the onset of a sexual harassment investigation, since ideally if this approach is used it should be invoked before the investigation begins. I&A

THE ROLE OF THE OMBUDSPERSON IN A PUBLIC SCHOOL DISTRICT

By: Peter M. Kelley, Boston Public Schools, Boston, Massachusetts

An ombudsperson can be defined as an official or quasi-official office where constituents come with grievances against the government.[1] As such, an ombudsperson "stands between, and represents, the citizen before the government."[2] Former political science majors may recall that the office of ombudsman originated in Scandinavian countries. The word ombudsman is of Norwegian origin, meaning "manager."[3]

In the United States, the creation of ombudsperson positions or offices is said to have originated in 1966, based largely upon the work of Walter Gellhorn.[4] In the 1970s the then emerging and growing United States ombudsman phenomenon was coined by the term "ombudsmania."[5] At that time, "ombudsmania" was viewed negatively as being in competition with the adversarial form of dispute resolution, particularly in the area of administrative law, and was met with some hostility by judges and lawyers.[6] Along

with the rise and acceptance of other forms of alternative dispute resolution has come the realization, however, that the adversary process can, at times, be bad social policy.[7] Thus, broadly speaking, "the ombudsman concept is said to spring from the question of how best to *inquire* fairly and quickly into asserted official impropriety or insensitivity."[8]

In the realm of public school districts, most notably urban public school districts, offices of ombudsman have been created as an

adjunct to other orders, rulings, and remedies in school desegregation cases.[9] In such cases, the ombudsperson serves the role of responding to parental concerns about the quality and extent of the school district's desegregative practices and, as a position created by the federal district court judge, has a broadly and independently defined role and authority.[10] Another similar kind of ombudsperson in school districts in an "Equity Ombudsperson," created to ensure the school district's compliance with its nondiscrimination and harassment policies.[11]

Prior to the commencement of the 2000-2001 school year, Boston Public Schools undertook the creation of the position of ombudsperson, related to neither of the above-cited reasons for a school district ombudsperson. Boston had, in fact, already achieved unitary status in its school desegregation case.[12] Additionally, Boston had created an Office of Equity, as one desegregation remedy, to investigate internally complaints of discrimination and harassment.

Boston's ombudsperson, as the position was originally posted, had oversight or responsibilities in the following areas:

- resolving conflicts at the school level over Code of Discipline penalties;
- informing parents about student assignment issues under Boston's Controlled Choice Assignment Plan;
- answering "any question from any citizen";
- coordinating the district's exam school enrichment program; and
- general record keeping and identification of systemic issues to the superintendent.

Boston Public Schools' ombudsperson originally reported directly to the superintendent. In any given year the ombudsperson responds to over 3,000 calls or inquiries on average from parents or others. Certainly, the peak time for this activity is at school opening, when the ombudsperson oversees a central office telephone bank, staffed by (otherwise) school-based parent coordinators, to respond to parental concerns related to student assignment and transportation issues as well as identifying students who do not report to school. An additional peak time is during Boston Public Schools' registration and assignment process in late winter.

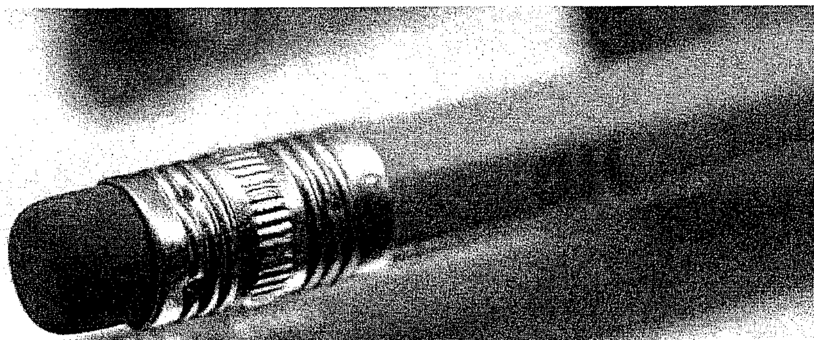
In the seven years since its inception, the ombudsperson has had what may be characterized as "duty creep." Namely, some original duties have migrated to other areas: resolving disputes related to student discipline has migrated more to the Chief Operating Officer's Office, where three Operational Leaders and a Special Assistant to the Chief Operating Officer hear student discipline appeals in a two-tiered process. With the dissipation of the grant monies supporting the Exam School Initiative, the extent of this program has decreased, while some of the student examination preparation duties have moved to the Teaching and Learning Office of Boston Public Schools' organization.

Concomitantly, other newly-created duties have been added to the ombudsperson position. So, for example, when Boston Public Schools tightened and added more formality to its residency policy, the ombudsperson's duties expanded to hearing appeals from parents, students, and their attorneys where applicable, about schools' decisions to dismiss students for failure to actually reside in the city of Boston. This task, particularly, might be at odds with the ombudsperson's more traditional role of facilitating and resolving parental concerns and grievances.

From the perspective of the school district attorney, the ombudsperson definitely relieves that office of the number of inquiries from parents that originate or, more usually, end up in the legal office that merely require an identification and interpretation of an already-existing Boston Public School policy. The ombudsperson allows in-house school attorneys to avoid interactions with parents, whose interests school counsel do not represent, but who expect and are entitled to answers to their questions and resolution of their concerns, where appropriate.

The ombudsperson, like other key policy-making school department staff, is an important component of the school district attorney's representation. Thus free and open communication between the ombudsperson and school district counsel is warranted to ensure consistent interpretation of school department policies and procedures. Since, however, the independence of the ombudsperson is a key component of the position, it is inappropriate for school attorneys to take an oversight or supervisory role over an ombudsperson. Although this independence of the ombudsperson could conceivably result in the resolution of issues or complaints at odds with the school district counsel's interpretation of policy (parenthetically, this has not occurred with Boston Public Schools), the remedy for that is to work with the superintendent and school board to clarify or modify such policies and procedures.

In conclusion, the position of an ombudsperson has some obvious advantages for a school department. Due to the inherently ill-defined nature of "inquir[ing] fairly and quickly into official impropriety and insensitivity," care should be taken to ensure alignment of job duties and responsibilities with that role. I&A



End Notes

1. Black's Law Dictionary 979 (5th ed. 1979).
2. *Id.*
3. American Heritage Dictionary 867 (2d college ed. 1982).
4. *E.g.*, W. Gellhorn, Ombudsman And Others: Citizens' Protectors In Nine Countries (1966); W. Gellhorn, When Americans Complain: Governmental Grievance Procedures (1966).
5. Verkuil, *The Ombudsman and the Limits of the Adversary System*, 75 Columbia Law Rev. 845 (1975).
6. *Id.*
7. *See Vance v. Ananich*, 378 N.W.2d 616, 617 (1985).
8. *Id.*
9. *E.g., Little Rock School District v. Armstrong*, 359 F.3d 957, 970 (5th Cir. 2004) (ombudsperson investigates allegations of race-based mistreatment in student discipline).
10. *See id.*
11. *See Hansen v. Ann Arbor Public Schools*, 293 F. Supp. 2d 780, 784 (E.D. Mich. 2003).
12. *See Morgan v. Burke*, 926 F.2d 86 (1st Cir. 1991).
13. *See Booker v. City of Boston*, No. CIV.A.97-CV-12534MEL, 2000 WL 1868180, *1 (D. Mass. Dec. 12, 2000).
14. This program was then funded under a federal grant to identify and prepare Boston Public School students to take the ISEE (Independent School Entrance Exam) for competitive admission to the district's three examination schools.
15. *Vance*, 378 N.W.2d 616.

48 IDELR 105
10 FAB 37
107 LRP 40142

Letter to Anderson

Office of Special Education Programs

N/A

October 13, 2006

Related Index Numbers

110.015 Office of Special Education Programs (OSEP)
375.015 Definitions
375.020 Disclosure Other than to Parents
470.030 Hearings and Hearing Procedures

Case Summary

States that routinely include certain types of information in administrative decisions made available to the public could find themselves liable for violations of FERPA and the 2006 Part B regulations. OSEP notified the general counsel for the Texas SEA that the agency needed to review each due process decision that it issued and remove any personally identifiable information before posting the decision on its Web site. Under 34 CFR 300.513 (d), OSEP observed, districts must remove personally identifiable information from due process hearing findings and decisions before making those decisions available to the public. OSEP pointed out that both the Part B regulations and the FERPA regulations define "personally identifiable information" to include a list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty. Thus, although the Texas SEA consistently redacted the names of the students and the parents from due process decisions before posting them on its Web site, OSEP explained that the SEA might need to take further action. "For example, [the SEA's] current policy of disclosing hearing findings and decisions that include student and parent initials, school district, school or grade, or for a child who has a low-incidence disability, could result in the identification of the child with reasonable certainty or make the student's identify easily traceable by members of the school's community," OSEP Director Alexa Posny wrote. OSEP advised the attorney that the best course of action would be for the SEA to review each due process decision individually and redact any information that could make the student easily identifiable.

Judge / Administrative Officer

Alexa Posny, Director

Full Text

Mr. David A. Anderson

General Counsel

Texas Education Agency

1701 North Congress Avenue

Austin, Texas 78701-1494

Dear Mr. Anderson:

I am writing in response to your April 25, 2006 letter to the Office of Special Education Programs (OSEP) and the Family Policy Compliance Office, regarding your request for guidance concerning confidentiality issues raised by the Individuals with Disabilities Education Act (IDEA) and the Family Educational Rights and Privacy Act (FERPA) related to the public dissemination of special education due process hearing decisions. Please excuse the delay in our response. You request specific guidance related to the requirement to make a hearing decision publicly available after removing personally identifiable information under sections 615(h)(4) and 617(c) of the IDEA as amended in 2004. You indicate that the Texas Education Agency (TEA) currently posts due process hearing decisions on its website and generally includes the following information: 1) first and last initials of the parent and the student; 2) the name of the school district; 3) the name of the campus; 4) the grade to which the student is assigned; 5) the disability designation of the student; and, 6) related student educational information. You state that TEA received a parental request to remove from the website, the due process hearing decision concerning her son and requesting that no information about the hearing decision be made available to the public because it would identify her and her son as she is well known in her community for advocacy work on behalf of children with disabilities. Pending receipt of guidance, you indicate that TEA has removed the hearing decision from its website.

Although your inquiry is specific to the IDEA requirements, this response is based upon the relevant confidentiality provisions of both the IDEA and FERPA and their respective implementing regulations. The Department's Family Policy Compliance Office has reviewed this response. Under the IDEA regulations, at 34 CFR ? 300.622 (effective Oct. 13, 2006) (see also, ? 300.571 (1999)), and the FERPA regulations, at 34 CFR ? 99.30 (2005), with certain exceptions, prior written consent is required before an agency discloses personally identifiable information from the student's educational records. Under section 615(h)(4) and 34 CFR ? 300.513(d) (effective Oct. 13, 2006) (see also ? 300.510 (c) (1999)), the public agency must remove personally identifiable information before making due process hearing findings and decisions available to the public. The IDEA regulations, at 34 CFR ? 300.32 (2006) (see also ?? 300.21 and 300.500(b)(3) (1999)), define personally identifiable information as information containing: 1) the name of the child, the child's parent, or other family member; 2) the address of the child; 3) a personal identifier, such as the child's social security number or student number; or 4) a list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty. The FERPA definition, at 34 CFR ? 99.3 (2005) ("definition of personally identifiable information"), includes the following: 1) the student's name; 2) the name of the student's parent or other family member; 3) the address of the student or student's family; 4) a personal identifier, such as the student's social security number or student number; 5) a list of personal characteristics that would make the. student's identity

easily traceable; and 6) other information that would make the student's identity easily traceable, in general, these definitions are to be read congruously.

The determination regarding those personal characteristics or other information that would make it possible to identify the child with reasonable certainty or make the student's identity easily traceable, must be made on an individualized basis and not based on a general policy of disclosure, as TEA has set out in its letter. The public agency must consider the contents of each due process hearing findings and decision to determine which personal characteristics or other information contained therein would make it possible to identify the child with reasonable certainty or make the student's identity easily traceable if disclosed to the school's community or the community at large. For example, TEA's current policy of disclosing hearing findings and decisions that include student and parent initials, school district, the student's disability, grade, campus and other educational information, in a small school district, school or grade or for a child who has a low-incidence disability, could result in the identification of the child with reasonable certainty or make the student's identity easily traceable by members of the school's community. In general, factors to consider include, but are not limited to, the size of the district, school and grade and the prevalence and knowledge of the child's personal characteristics and other information (e.g., disability, initials, parent's advocacy work) within the school community and the community at large. In individually weighing these factors, the agency should determine the information or combination of information that would constitute personally identifiable information and remove it from the due process hearing findings and decision prior to its public dissemination.

This response regarding a policy, question, or interpretation under Part B of IDEA is provided as informal guidance, is not legally binding, is issued in compliance with the requirements of 5 U.S.C. 553, and represents the interpretation by the Department of Education of the applicable statutory or regulatory requirements in the context of the specific facts presented.

We look forward to our continued collaboration with TEA to support your work to improve results for children with disabilities and their families. If you have any questions, please contact Hugh Reid at (202) 245-7491.

Statutes Cited

20 USC 1415(h)(4)
20 USC 1417(c)

Regulations Cited

34 CFR 300.622
34 CFR 300.513(d)
34 CFR 300.32
34 CFR 99.3

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