DISABILITY LAW

SECTION NEWSLETTER

This Issue

Vol. 7, No. 1, Winter 2003

Message From The Chair

By Richard R. Meneghello – Fisher and Philips, LLC

This edition of the Newsletter focuses on the special education component of disability law. After polling our membership, we recognized that many disability lawyers regularly practice in the special education arena, and we also recognized that we had not concentrated our efforts on addressing the many issues that arise in special education in our Newsletter. In the future, we will continue to reach out to each and every lawyer in our Section by addressing all of topics that regularly confront the disability lawyer in everyday practice. I would ask your help in this effort by contacting us and letting us know if you have any ideas for future articles or Newsletter themes – and I promise that we will not turn around and ask you to write the article (unless, of course, you *want* to write the article...).

My tenure as Chair of the Disability Law Section has ended after 12 months in the position, and I wanted to take this final opportunity to thank the many dedicated individuals who make this Section vibrant, relevant, and important. Although participation in Bar committees has diminished in recent years, I am very proud of the fact that participation in our Section has actually *increased* over the past year. We have retained a strong core of individuals who have helped the Section for years, including past Chair Bob Joondeph, incoming Chair Paul Alig, Chair-elect Liz Stevenson, and outgoing Treasurer Joe McKeever. At the same time, we have welcomed a new infusion of people who have begun to contribute to our Section and promise to continue the tradition of dedication, including Alice Plymell, Ted Wenk, David Gerstenfeld, Helen Russon, and Dennis Steinman. We have also benefitted from the efforts of our CLE Planning Committee, including Scott Hunt, Stephanie Harper, Dian Rubanoff, Karen Lee, and Bob Barsocchini. Rod Wegener from the Bar has also been very important in keeping our Section at the top of its game. Of course, there is always room for growth. If you would like to join us in our efforts, stop by and join us for a meeting. In 2003, we will meet on the fourth Friday of every month at 4:00 p.m. in the offices of Fisher & Phillips LLP, 1001 S.W. Fifth Avenue, Suite 1600, Portland. You can also join us by conference call – contact me for details. My final word as Chair is thanks. Thanks to everyone in the Section for making my job as Chair very easy, very enjoyable, and very rewarding.

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The Disability Law Section Executive Committee welcomes your comments, suggestions, and submissions for publication. Please feel free to contact any Executive Committee member to inquire about the Section or about the Newsletter. If you have any ideas for possible stories, please call Richard R. Meneghello, the Chair of the Publication Sub-Committee.

2003 Executive Committee Members

The purpose of the Disability Law Newsletter is to provide information on current developments in disability law and to provide a forum for the exchange of legal opinions and perspectives. Unless otherwise stated, opinions expressed in any article are solely those of the author and are not necessarily endorsed by the Executive Committee of the Disability Law Section or the Oregon State Bar.

The Disability Law Section Newsletter is published four times a year by the Oregon State Bar Disability Law Section Executive Committee, 5200 SW Meadows Road, Lake Oswego, OR, 97035-0889. Phone: (503) 620-0222 or 800-452-8260. TDD/TTY: (503) 684-7416 or 800-452-8260 ext. 416. Available in alternative formats.

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Congress To Continue Idea Reauthorization In 2003

By Bob Joondeph — Executive Director, Oregon Advocacy Center

In 2002, Congress began the process of reauthorizing IDEA. Following a series of congressional hearings, the process was put on hold while additional information was collected through a series of public forums conducted by the federal Office of Special Education Programs (OSEP) and through the solicitation of direct public comment via a link on the WebPages of the House Committee on Education & the Workforce: *http://edworkforce.hous.gov/*. (Still available for your comments!) In addition, Congressional leaders anticipated the release of a report by the Commission on Excellence in Special Education that was appointed by President Bush to study the present special education system and make recommendations for reform.

As one might expect, this process has engendered debate of a wide range of issues. Many professional and citizen advocacy groups have developed policy statements outlining their positions on key issues. Congressional debates preceding passage of the No Child Left Behind Act in early 2002 raised, but did not resolve, questions of IDEA full funding of discipline procedures. Republican and Democratic leaders have their own agendas. According to the National Disability Commission, some of the key issues that are likely to be taken up during reauthorization include: monitoring and enforcement; full funding; discipline; and eligibility and over-representation of students from culturally diverse backgrounds.

Key indicators of where reauthorization is heading are contained in the recently published report of the Commission on Excellence in Special Education: *A New Era: Revitalizing Special Education for Children and Their Families*. That report makes three major recommendations:

Major Recommendation 1: Focus on results-not on process.

IDEA must return to its educational mission: serving the needs of every child. While the law must retain the legal and procedural safeguards necessary to guarantee a "free appropriate public education" to children with disabilities, IDEA will only fulfill its intended purpose if it raises its expectations for students and becomes results-oriented-not driven by process, litigation, regulation, and confrontation. In short, the system must be judged by the opportunities it gives and the outcomes achieved by each child.

Major Recommendation 2: Embrace a model of prevention not a model of failure.

The current model guiding special education focuses on waiting for a child to fail, not on early intervention to prevent failure. Reforms must move the system toward early identification and swift intervention, using scientifically based instruction and teaching methods. This will require changes in the nation's elementary and secondary schools as well as reforms in teacher preparation, recruitment, and support.

Major Recommendation 3: Consider children with disabilities as general education children first.

Special education and general education are treated as separate systems, but in fact share responsibility for the child with disabilities. In instruction, the systems must work together to provide effective teaching and ensure that those with additional needs benefit from strong teaching and instructional methods that should be offered to a child through general education. Special education should not be treated as a separate cost system, and evaluations of spending must be based on all of the expenditures for the child, including the funds from general education. Funding arrangements should not create an incentive for special education identification or become an option for isolating children with learning and behavior problems. Each special education need must be met using a school's comprehensive resources, not by relegating students to a separately funded program. Flexibility in the use of all educational funds, including those provided through IDEA, is essential.

The report goes on to focus on six major areas for which it provides specific recommendations. Those areas are:

- Federal Regulations, Monitoring, Paper Work Reduction and Increased Flexibility
- Assessment and Identification
- Finance
- Accountability, Flexibility and Parental Empowerment

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Representing Parents and Children In Special Education

By Dana R. Taylor – Hagan Dye Hirschy & DiLorenzo, PC

I represent parents and their children who qualify, or may qualify, for special education under the Individuals with Disabilities Act (IDEA) at 20 U.S.C. '' 1400 et seq. An attorney's role in representing the parent/child requires a balanced approach in gaining the trust of both the parents and the school to solve the riddle of why a child is not learning in the public school environment. Representation usually begins with a negotiation stage, typically a meeting where parents and school officials convene to consider the child's Individualized Education Plan (IEP). If the parties should fail at this stage to solve the issues that brought the parents to an attorney, the next stage involves conflict resolution. This second stage offers procedures that range from initiating an investigation by the Oregon Department of Education to an arbitration hearing followed by judicial review.

The initial hurdle usually encountered in representing parents is gaining their trust. In most cases, parents already feel some degree of betrayal after trusting school officials whom they regarded as "the professionals." Gaining the trust of the school is equally important because the school may have already gone a few rounds with the parents, and it will initially regard the parents' attorney as the "mouth" hired to bulldoze the school into submission. If everything falls apart at the negotiation stage, it becomes a lose-lose situation for everyone. The child suffers because a satisfactory education plan will be delayed. The parents and school will have to bear the expensive burden of litigation, and the vital cooperative relationship that must exist between home and school will be destroyed. The role of the parents' attorney is to offer reasonable solutions while at the same time creating a record to establish unreasonable resistance by the school if negotiations should fall apart. That record should motivate the school to stay at the negotiating table and work with the parents to find a solution.

My approach adopts the premise that the IDEA's statutory and regulatory process, when followed, will work in providing a Free Appropriate Public Education (FAPE). From that vantage point, I see parents generally coming to me after the school has attempted to take shortcuts around the rules. Explaining the applicable rules to the parents will satisfy the initial hurdle of gaining their trust, because the "playing field" then appears before them and the logic peculiar to this area of the law becomes understandable. The next step is to devise a plan to demonstrate how compliance with those skirted rules will lead toward a reasonable solution. This approach will focus on the law and detract from the emotional issues that often interfere with the cooperative communication that must take place under IDEA. Clear identification of the school's resistance against following particular rules and pressing for compliance will gain credibility with the school and cause all parties to focus on the intellectual task of what is preventing the child from learning. In most cases, insisting on compliance with IDEA's rules will result in a satisfactory result. In those cases where the school and parents cannot agree, the attorney's efforts to create a record should minimize the cost of litigation.

Congress To Continue Idea –

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- Transition Services
- Teacher and Administrator Preparation, Training and Retention.

In summary, Congress will most likely be taking on the major issues of whether the federal government should fully fund its special education mandate or only increase funding; how to address over-representation of minority children in special education; how to attract and retain skilled educators; how to increase accountability while reducing paper work; and how to strengthen early childhood and transition services. Of special interest to attorneys, of course, will be the perennial issue of whether the due process provisions of IDEA need to be reformed.

Representing School Districts In Special Education Disputes

By Graham M. Hicks — Miller Nash, LLP

When the school district lawyer is asked to represent a district in a special education dispute, he or she enters a different universe. To be able to give competent advice and speak the unique language used in the special education world, the lawyer must be thoroughly familiar with the Individuals with Disabilities Education Act (20 USC § 1400 et seq) ("the IDEA") and the federal regulations promulgated under the IDEA (34 CFR pt 300) and the corresponding state statutes (ORS Chapter 343) and regulations (OAR 581-015-0001 et seq), as well as administrative and court decisions interpreting those laws.

The IDEA imposes substantive and procedural requirements intended to ensure that disabled students who meet eligibility requirements are provided a free appropriate public education ("FAPE") consisting of specially designed instruction and related services designed to meet their unique needs in accordance with an individualized education program ("IEP"). The district must have available a wide range of alternative placements for eligible students and ensure that each student is placed in the least restrictive setting appropriate. Decisions regarding a student's eligibility, IEP, and placement are made by a team, which includes the child's parents and various professionals. If the parents disagree with any of those decisions, they may request an administrative hearing, known as a due process proceeding, to challenge the decision. A due process hearing is a full evidentiary hearing conducted by a state-appointed administrative law judge. Either party may appeal the decision to state or federal court. In most cases, parents may recover attorney fees if they prevail in the proceeding.

When representing a school district in a due process proceeding, the lawyer must begin work immediately. Due process cases move quickly and there is a lot to do. The law requires that the hearing officer enter a final order no more than 45 days after the request for hearing is filed. Although this deadline is usually extended by agreement or upon a motion by the district, the typical case goes to hearing within two or three months. Although preparation for the hearing will depend largely on the issues raised by the parents, the following steps should be taken, or at least considered, in every case.

The first step is to gather all school district records regarding the student, including the personal files of any district employee who has been involved with the student. If the parents have relevant documents which have not been made available to the district, such as records of independent evaluators, private physicians or psychologists, or other outside experts, request copies of those documents from opposing counsel. If production is refused, file a motion to compel production of the records.

As soon as the records have been obtained, review, organize, and analyze them. Prepare a chronology and a summary of the key documents. Develop a list of questions to ask staff members when you meet with them. Begin evaluating the strengths and weaknesses of the case.

Next, talk to everyone at the district who knows anything about the case. Interview teachers and other staff who have recently worked with the child. Talk with school personnel who have recently evaluated the child. Interview each member of the team who made the decision in question. Others who may have knowledge of critical events may include the special education director, building administrators, educational assistants, the school counselor, the school psychologist, and related service providers such as speech therapists and physical therapists. Ask about the child's progress and how that progress can be demonstrated. Seek clarification of points that seem unclear from the records. Attempt to resolve any alleged or suspected procedural errors. Find out if there are additional records regarding the student that have not been provided to you.

Most due process hearings involve a battle of experts. As early in the case as possible, determine if an outside expert will be needed and, if so, identify and retain an expert. Although the district undoubtedly has staff members with impeccable credentials, their objectivity may be questioned because of their employment with the district. An outside expert may be helpful in bolstering the testimony of the district's pro-

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Juvenile Rights Project Awarded Grants for Special Education Advocacy

By Brian Baker — Juvenile Rights Project

The Juvenile Rights Project, Inc., Oregon's only non-profit children's law firm, is pleased to announce two grant awards from the Oregon State Police and Oregon Criminal Justice Commission toward educational advocacy projects. In June, 2002, the firm was awarded an Edward J. Bryne Juvenile Violence Prevention Grant for it's innovative program School Works. The Byrne Grant is administered by the Oregon State Police and is available for the 2002-03 fiscal year and renewable for three additional years. School Works is an extension of JRP's education advocacy efforts that have been developed over the past several years and have included extensive state-wide training in special education and school discipline law, to children's advocates, including court personnel, DHS staff, county juvenile departments, CASA, and foster parents. School Works is loosely modeled upon Washington State's Team Child Project. School Works advocates, Angela Sherbo, Brian Baker and Mary Kane, attorneys, and Mark McKechnie, social worker, provide individual representation to JRP clients, ages 8 to 15, who need assistance with education and mental health issues. The team examines multiple factors to determine whether the child is progressing in his/her education, including academic progress, attendance, and school behavior. School Works advocates work closely with the child's dependency/delinquency attorney and work to create multi-disciplinary teams to address the child's global needs.

In November, 2002, JRP received a renewal of a grant from the Oregon Criminal Justice Commission for expanded representation of minority children in the Portland Public school system. This grant focuses on strategies to prevent minority-overrepresentation in the juvenile justice system through school stabilization. JRP attorneys work collaboratively with PPS middle schools and high schools to develop appropriate individual education

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fessionals. But time will be a factor, particularly if the expert needs to observe or evaluate the child before the hearing.

The next step is to objectively evaluate the district's case. What are the strengths and weaknesses? Which issues will the district likely win, and which will it likely lose? What is the district's primary objective in the case and what is the most efficient way of achieving that objective? What settlement options are possible?

As in other forms of litigation, most due process proceedings are settled. Settlement is often achieved through direct negotiations between the attorneys. Formal mediation is also available through the Oregon Department of Education, which will provide a mediator at no cost to the parties. Another option, currently being offered by the Department on a trial basis, is a settlement conference presided over by an administrative law judge with extensive experience in special education due process hearings.

If settlement negotiations are unsuccessful put the district's best offer in writing. If the offer is refused and the parents fail to obtain a more favorable result at hearing, the parents will, in most cases, be unable to recover attorney fees incurred after the date of the offer.

If the case goes to hearing, prepare in the same manner as you would for a non-jury trial. Select witnesses and prepare each one thoroughly. Identify and organize your exhibits (which must be disclosed to opposing counsel at least five days before the hearing). Prepare a prehearing memorandum, summarizing the district's position on each issue in the case and discussing the relevant legal authorities. Prepare an opening statement and a closing argument and outline direct and cross examinations.

Special education hearings are unique in many ways, but one fact more than any other sets them apart from most litigation. After the dust settles, the parties will have to continue working with each other. There will be more IEPs to prepare and placements to be determined. The relationship may continue for many years. If further battles are to be avoided, counsel for the district must keep this fact in mind at every stage of the proceeding.

Legal Challenges to the Oregon Budget Cuts Affecting People With Disability

By Paul Alig

Below is a summary of the legal challenges to the budget cuts that I am aware of. Most of this is taken from an article from the Register-Guard, by David Steves and the rest is based upon my own knowledge (I suspect this is not a conclusive list).

Oregon Health Plan

About 100,000 people would lose mental-health services, drug and alcohol treatment, prescription drug coverage and durable medical equipment such as oxygen tanks under a cut made last November by the Legislative Emergency Board - a panel of lawmakers that makes budget decisions when the Legislature isn't in session. **Legal argument:** The E-board exceeded its authority to change legislative policy. **Status:** This case was filed in Multnomah County Circuit Court by the Oregon Advocacy Center on behalf of the class and Michael Greene of Rosenthal and Greene, PC on behalf of the American Diabetes Association. After hearing cross motions for summary judgment Judge Jean Kerr Maurer ruled for the State of Oregon on February 12, 2003.

Oregon Health Plan Premium Co-Payment

A slimmer version called OHP Standard sought to limit state costs by imposing premiums and co-payments and fewer benefits primarily for childless, able-bodied adults. **Legal argument:** The federal and state government lacked authority to waive federal statutory protections against charging poor people too much for medical premiums. **Status:** Lawsuit filed in federal court by the Oregon Law Center.

Medically Needy Program

About 8,000 elderly and disabled people with incomes too high for the Oregon Health Plan had help with coverage until the program's elimination. **Legal argument:** The state violated federal Medicaid law by eliminating the program. **Status:** Lawsuit filed in Multnomah County Circuit Court by Legal Aid Services of Oregon, Oregon Law Center, and Steven Goldberg of Goldberg Mechanic Stuart and Gibson, LLP. Plaintiffs motion for TRO denied by Judge Henry Kantor, hearing on preliminary injunction pending.

General Assistance Program

The program provides checks to poor people with disabilities while they await approval for Social Security benefits. **Legal argument:** The cut ordered by then-Gov. John Kitzhaber exceeds authority to eliminate a program created by the Legislature. **Status:** Lawsuit filed in Multnomah County Circuit Court by Legal Aid Services of Oregon and the Oregon Law Center. Motion for TRO denied by Judge John A. Whitmayer hearing pending on preliminary injunction motion and the State of

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Juvenile Rights Project ...

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plans, identify community-based intervention services, and ensure due process for children in school disciplinary proceedings. During the 2002-2003 school year, JRP will provide individual representation to 30 middle school or high school freshman; train 150 parents and children's advocates on special education and school disciplinary processes; and in an expansion of last year's efforts, create a state-wide help-line to provide advice to families on education and juvenile law matters.

JRP will also continue to pursue state-wide education reform efforts on behalf of child welfare and delinquency clients through open dialogue, work group participation, settlement agreement monitoring, and legislative initiatives; to focus attention of increased coordination between the DHS, OYA, state Department of Education, and local school districts, in these times of budget limitations. These efforts are essential as recent research on education outcomes for foster children and minority children raises significant concerns regarding disproportionate involvement in school disciplinary proceedings, higher rates of drop-out, and a higher prevalence of disabilities; all of which contribute to poor education outcomes and limited success for these children as they enter adulthood. School Works staff welcome comments and questions and can be reached via the Juvenile Rights Project website: *www.jrplaw.org*.

Legal Challenges to the Oregon Budge Cuts...

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Oregon's Motion to Dismiss and Motion for Summary Judgment

Group Homes for the Mentally Ill

Ninety-six residents of two Portland centers would lose funding. **Legal argument:** The cuts amount to an unlawful eviction because the state had accepted responsibility for the residents' care. **Status:** Lawsuit filed in Multnomah County Circuit Court by Oregon Advocacy Center, and a group of private attorneys proceeding Pro Bono. The State of Oregon has suspended evictions until April.

Developmental Disability Services

About 1,800 adults with developmental disabilities would lose services so they can live at home and function in their communities. **Legal argument:** A federal court settlement requires the state to provide these services; the state would be breaking its legal obligation if it pulled back funding. **Status:** Negotiations under way to avoid a lawsuit.

Long-Term Care for Seniors and Disable People

More than 9,000 people whose impairments rated on a scale from 1 to 17 are scheduled to lose assistance; those assessed at 15 to 17 were cut off February 1, 2003 and those at 10 to 14 are to lose services April 1. **Legal argument:** Advocacy groups are encouraging people to seek new assessments in case their impairments are severe enough to deserve reclassification and qualify for services. Those whose assessment levels make them targets for cuts can demand administrative hearings. **Status:** Lawsuit is being contemplated.

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Pro Bono Opportunity: Long-Term Care Hearings

On February 1, 2003, approximately 4000 individual Oregonians who are elderly or suffer from long-term disabilities, received notices from the State of Oregon that they would be losing their In-Home or Facility based long term care due to the budget cuts. On February 19, 2003, the State of Oregon has indicated it will send similar notices to another approximately 5,000 Oregonians with more severe long- term care needs. After the initial notices went out, volunteers from Oregon's long-term care ombudsman's program helped to get thousands of those individuals re-assessed to an eligible level of care. Despite this effort thousands still remained assessed at an ineligible level of care. To date the State of Oregon has received approximately 400 requests for contested case hearings challenging the assessments. Hundreds more of these requests will be made after the next wave of notices are released. The ombudsman's program working in conjunction with the representatives from the executive committees of the Elder Law and Disability Law sections of the bar are arranging a massive effort to place many of these individuals with attorneys to represent them in the hearing process. If you would like to be involved in this effort please contact Meredith Cote at the Long-Term Care Ombudsman's office at (503) 378-6533; Jennifer L. Wright, Chair, Elder Law Section at (503) 370-6140; or myself, Paul Alig, Chair, Disability Law Section (503) 471-1134.