

Position Paper of The Arc of Pennsylvania with Respect to the Pennsylvania Second Tier for
Decisions in Special Education Cases
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In the early years of the Pennsylvania special education due process system, the Commonwealth decided to use a “two-tier” system to decide special education due process matters. Under federal special education law, states may create either a one-tier system with all appeals moving directly to court (state or federal), or a two-tier system whereby the decision of a trial-level hearing officer is subject to review by a specified state review officer. Until the early 1990s, Pennsylvania’s second tier involved a review by the Pennsylvania Secretary of Education. This system proved unmanageable for two major reasons: First, substantial delays occurred in obtaining decisions by the Secretary following appeals from the first level of due process. Naturally, the position of Secretary of Education involved a great many responsibilities, and the timely review by the Secretary’s Office of voluminous records to decide special education matters provoked unworkable. Second, because the Commonwealth is directly involved in the funding and oversight of school district special education programs, an inherent conflict of interest existed in decisions by the Secretary with regard to the very programs with the Commonwealth is required by federal and state law to regulate and to fund.

Consequently, in the early 1990s, Pennsylvania established a new system of second-tier review of special education due process decisions. The Secretary of Education appointed panels of three review officers based upon the recommendation of the Right to Education Office (now named the Office for Dispute Resolution). Originally, one panel of three appellate review officers heard all appeals from the decisions of trial-level hearings officers; however, as requests for due process hearings in Pennsylvania expanded, it became necessary to recruit, hire, train, and employ several different panels of three appellate hearing officers.

The currently two-tier system has been the subject of mounting criticism from parents, attorneys, school districts, and other interested parties over the past several years. Pennsylvania remains one of a minority of state which use the two-tier system, and The Arc of Pennsylvania believes that the currently two-tier system in Pennsylvania should be eliminated, and replaced with a one-tier system which emphasizes appropriate recruitment, training, and compensation for a highly professional group of first level hearing officers, which all appeals to proceed directly to court.

The Arc of Pennsylvania has observed several major failures of the currently second level of due process. These failures are described in more detail below. They include highly inconsistent second level decisions, widely carrying “judicial philosophies” within the panels themselves, and the expenditure of valuable resources on a two-tier system which provides no additional decisional integrity prior to review by a deferral or state court. In combination, these failures often completely undermine children and their families’ access to a timely, fair and impartial review process.

Inconsistent Decisions – Detailed analysis by The Arc of Pennsylvania of the operation of the Pennsylvania Special Education Appeals Panel reveals that the different panels decide even the most basic issues in widely divergent manners. For example, while one panel routinely holds that all special education decisions are bound by a “one or two year statute of limitations”, other

panels have refused to strictly follow this limitation period, especially where Child Find violations are at issue. The application of Least Restrictive Environment principles has also been the subject of extremely divergent decisions by the panels, with some panel decisions strictly applying the *Oberti* decision of the Third Circuit, and other systematically deferring to school district decisions to place children in segregated settings. These disparate standards violate the principle of equal treatment under the law.

“Judicial Philosophy” – The current Appeal Panel system has been the subject of widespread criticism in the field due to the dramatically different judicial philosophies which each panel, indeed, each panel member, brings to the decisional process. Consistent rules and guidelines have not been established or enforced governing the Appeals Panel process. Because of the perceived conflict of interest, the Pennsylvania Department of Education has appeared very reluctant to intervene in the day-to-day operations of the Panels, even in situations where the different Panels have adopted contradictory or questionable policies and procedure. This lack of accountability has permitted Panels to unilaterally establish standards of evidence and burdens of proof that produce markedly different outcomes for similarly situated children in different parts of the state. Again, these disparate standards violate the principle of equal treatment under the law.

No Greater Decisional Integrity – The fundamental purpose of the Appeals Panel is to improve the integrity of decisions. The Arc of Pennsylvania asserts that maintenance of the second tier in due process hearing system has provided no greater level of decisional integrity in Pennsylvania than the one-tier system employed in most states. No credible evidence exists that Pennsylvania makes more accurate decisions through the use of its second-tier system, and thus the employment of a multitude of second-tier decisions-makers serves no useful purpose and represents a financial drain upon the Commonwealth’s special education resources. These monies would be far better spent by enhanced recruitment, training, and compensation of hearing officers at the trial level and by providing support to them in terms of research and clerical assistance (where necessary) to meet applicable federal deadlines for rendering special education decisions.

In adopting this decision, The Arc of Pennsylvania seeks to address weaknesses and failures in the design of Pennsylvania’s current appeals process. Our observations are not intended to denigrate the individuals who serve as appellate hearing officers. Their task is often enormous, as their written decisions must be rendered within an exceptionally short time frame to meet the federal requirements of promptness and finality. Every Appeals Panel member serves on a part-time basis for modest compensation. Unlike other appellate tribunals, Pennsylvania Special Education Appeals Panel do not possess a central legal staff to assist with their work and to insure that the Panel’s decisions are consistent, and, when they are not consistent, to schedule argument before an en banc tribunal to reconcile such decisions. Quite simply, the parameters of IDEA regarding prompt decision-making by the second tier create a substantial obstacle to the successful implementation of any two-tier system, even a system without Pennsylvania’s current flaws.

The Arc of Pennsylvania strongly recommends that the second tier in Pennsylvania’s Special Education currently two-tier system in Pennsylvania should be eliminated, and replaced with a

one-tier system which emphasizes appropriate recruitment, training, and compensation for a highly professional group of first level hearing officers, which all appeals to proceed directly to court.