

www.sweetstevens.com

Ellis H. Katz
 Jane M. Williams
 Andrew E. Faust
 Sharon W. Montanye
 John G. Audi
 Jonathan P. Riba
 Richard B. Galtman
 Jennifer Donaldson
 Thomas C. Warner
 David T. Painter
 David F. Conn
 Angela J. Evans
 Mark Cherie Walz
 Karl A. Romberger, Jr.
 Kathleen M. Metcalfe
 Christina M. Stephanos

Of Counsel
 Charles N. Sweet

Paul L. Stevens
 (1947-2001)

Pennsylvania Special Education Funding Commission
 September 26, 2013

Testimony of Karl A. Romberger, Jr., Esquire
 Sweet, Stevens, Katz and Williams, LLP

Chairmen Browne and O'Neill and honorable members of the Commission, my name is Karl Romberger. Thank you for letting me have a few minutes to address with you the important issue of special education funding in the Commonwealth.

I am before you, in conjunction with the Pennsylvania School Boards Association, as an attorney with the law firm of Sweet, Stevens, Katz and Williams, LLP, where I practice in the area of special education and pupil services on behalf of public schools throughout the state. I have also been a special education hearing officer in the Commonwealth. In addition, I am the father of a young man with Down syndrome and Autism. I hope that with this wide-reaching background, I can help you with the task you now face.

Public funding for special education is vital. My wife and I could not have provided our son with the education he has received through Tredyffrin/Easttown School District and the public schools in this Commonwealth. If it were not for the generosity of local taxpayers, surely he would not be where he is today. Whether from the perspective of a family, a local agency, or the state itself, the financial cost for educating a student with significant impairments and support needs, and raising him to be prepared "for further education, employment, and independent living,"¹ is tremendous.

In addition, I submit to you, that the "life cost" to the parents and siblings of a young man or woman is an additional cost, borne by the family and not measured in dollars and cents. Nonetheless it is a cost greatly and directly affected by the public commitment to special education, a commitment that is indeed measured by dollars and cents. Kind words not backed by financial support are empty promises.

In 1991, the Commonwealth discontinued providing 100 percent funding for the excess costs of special education. Whether the expense was ever adequately funded, I am not here to say. But since that time, the expense has certainly shifted to the local level and, I suggest, to an increase in the familial "life cost."

In tandem with the leadership of Chairmen Browne and O'Neill and many others, the state through Act 3 has recognized this cost-shift. Under Act 3, the Commission is to identify three cost categories. Section 122(i)(6)(ii), in my analysis, suggests that Cost Category 3 is already largely identified as students "placed by the school district and served in public or private separate schools, residential placements or homebound or hospital placements." In

¹ This is the most recent departmental iteration of the IDEA's purpose, found in "background" to proposed rules issued by the U.S. Department of Education, 78 Fed. Reg. 57325 (Sept. 18, 2013) (proposing federal rules relating to maintenance of effort under Part B).

Southeast Region Office
 331 E. Butler Avenue
 PO Box 5069
 New Britain, PA 18901
 Tel: 215-345-9111
 Fax: 215-348-1147

Northeast Region Office
 2 S. Main Street
 Suite 303
 Pittston, PA 18640
 Tel: 570-654-2210
 Fax: 570-655-1875

www.sweetstevens.com

Southeast Region Office
331 E. Butler Avenue
PO Box 5069
New Britain, PA 18901
Tel: 215-345-9111
Fax: 215-348-1147

Northeast Region Office
2 S. Main Street
Suite 303
Pittston, PA 18640
Tel: 570-654-2210
Fax: 570-655-1875

my experience, this definition seems both workable and, for the most part, accurate with respect to where we find local budgetary strains.²

I can envision Cost Category 1 being students marked, in general, by average intellect and intact cognitive, social, behavioral, and emotional functioning, the sort of student in need of an educational intervention that, for most, would be available “off the shelf.” Although the initial cost of obtaining and implementing that intervention – purchase and training, mostly – can be surprisingly high, once obtained and once institutional competence is set, it can be repeatedly replicated, used by many and used many times.

Act 3 added Section 2509.15 to the School Code, which helpfully requires the Department in subsection (b)(3) to “identify resources for programs and supports that benefit eligible students” in areas such as curricula adaptation, co-teaching, reading services and supports, and more. In my experience, state-level leadership has been missing for quite some time in this relatively easy-to-address area. One of the increased cost drivers, I believe, is that each school district has been left to itself to develop (or not) articulable and structured, systemic approaches to service identification and implementation. Left without state-level leadership, districts are buffeted by attorneys and experts demanding the latest (or sometimes reinvented) interventions, usually proprietary and fee-generating, on behalf of families. Without firm regulatory-quality state standards, local districts are always at peril for saying “no” and are almost always second-guessed.

Different from anticipated Cost Category 1 expenditures, Cost Category 3 expenses do not have a “life span” of repeatable benefits in an institutional sense. These extraordinary costs are constant and almost never expandable to the beneficial use of either other students directly or through developing staff competencies. Often, these expenses, at least initially, are not foreseeable and strain local budgets.

A public school district I represent was ordered to provide residential placement for two students. For the 2011-12 school year, the public school paid \$551,959.31 for these two students. At some point, the school district obtained a 4010 split for the Approved Private School placement. That, however, pays only 60 percent of the educational costs for the school term and does not include residential costs or the costs of summer programming.

According to the Superintendent, whom I hold in the highest regard, “[t]hese costs hurt our school district because they existed at some of the worst years for us financially after the economy had tanked. These costs necessitated our school district cutting administrators, classroom teachers, special education assistants, supplementary programs, and extracurricular programs.” In this particular school district, revenue sources were 2

² “Homebound,” however, is an imprecise description, the use of which I would discourage. In my experience, homebound is often used not for students whose conditions are extraordinary (and thus likely costly); but it is used in cost-unrelated disputatious situations where parents and the school do not agree on a placement, frequently with disciplinary overtones. Indeed, the most needy students require supports and services that make homebound a very undesirable, and usually not agreed-to, placement.

www.sweetstevens.com

Southeast Region Office
331 E. Butler Avenue
PO Box 5069
New Britain, PA 18901
Tel: 215-345-9111
Fax: 215-348-1147

Northeast Region Office
2 S. Main Street
Suite 303
Pittston, PA 18640
Tel: 570-654-2210
Fax: 570-655-1875

percent federal, 16 percent state, and 82 percent local. How the exact dollars are accounted, I do not know, but it does not take much thought to understand that the local taxpayers are bearing an extraordinary burden for extraordinary students that need these services.

Act 3 adds Section 2509.14 to the School Code under which school districts receive a pro rata share of set-aside funding based on the number of Cost Category 3 resident students. The set-aside funding shall be not less than 1 percent above the base-level. Is this really enough, really an adequate floor of funding?

The high cost of Category 3 is not a surprise. But this particular case study yields a sordid aspect of Pennsylvania's funding methodologies that I urge this Commission to study closely.

Act 3 did not include on this Commission a representative of the Department of Welfare. But I do know that the cost of educating students falling within presumed Cost Category 3 will be impacted by funding decisions made by such an "other agency." Section 612(a)(12) of the IDEA provides that the local public school district will be the "payor of last resort" for services that another public agency is supposed to provide.³ The IDEA also says that a public school does not pay for medical services.⁴ But in Pennsylvania the system for funding the various public agency obligations for our most developmentally complex and societal-vulnerable students is shamefully byzantine and feudally turf-protect at best, and often falls by default on the local public school, as it did in the case of the two students I have mentioned.

Under Title XIX of the Social Security Act, which is the legal genesis of Pennsylvania's Medical Assistance program, most Pennsylvania counties provide various mental and behavioral health and medical health services, including under the Mental Health and Mental Retardation Act of 1966, and the Mental Health Procedures Act of 1976. These laws obligate the County to provide and pay for certain things, including residential and behavioral health services.

The other public agency is not excused from providing services even if the services might also be needed to provide a free appropriate public education ("FAPE").⁵ Despite the public school expressly being the payor of last resort for such services, in a perverse funding dynamic, the public school is required to pay for all services necessary for a FAPE when the other public agency fails to pay. The public school needs to pay up front and hope to thereafter recover those monies from the other public agency.

In the case of the two students mentioned, the other public agency had been providing residential and related services while the school district provided the educational component, and budgeted accordingly. At one of the regular 90-day review periods, the

³ 20 U.S.C. § 1412(a)(12).

⁴ 20 U.S.C. § 1401(26).

⁵ 20 U.S.C. § 1412(b)(i).

www.sweetstevens.com

Southeast Region Office
331 E. Butler Avenue
PO Box 5069
New Britain, PA 18901
Tel: 215-345-9111
Fax: 215-348-1147

Northeast Region Office
2 S. Main Street
Suite 303
Pittston, PA 18640
Tel: 570-654-2210
Fax: 570-655-1875

other public agency decided the students no longer needed residential care according to that agency's criteria; in each case, the student's progress was deemed stable. Mind you, for one student a medical expert has opined that merely surviving for another day is progress. Of course, a parent can appeal the other agency decision through an appeal process heard by the other agency's own designated agents. But even if successful, the parent is likely faced, once again, with 90-day review periods and perhaps another denial. The certainty that a family needs about the student is achingly absent in such a system and life becomes a matter of the family also surviving psychologically for just another day.

The rational parent will see the public school as the easier and better means to secure needed mental and behavioral health supports and, importantly, stability. The public school has to pay – it is first in line to pay such costs even if another agency should pay; the public school services are subject to “annual review” of an IEP (and pendency thereafter), and the IDEA has a fee-shifting provision making access to a lawyer more realistic. For me, knowing the law and knowing the anxiety of day-to-day living, the decision what to do is easy – sue the school.

The Economist magazine, in an article published August 3, 2013 (“*Locked In: The costly criminalization of the mentally ill*”) noted that the Cook County jail is either the largest or second-largest mental health institution in the U.S. Writing about a mentally ill recidivist called Ms. Aldridge, the article states:

Thomas Dart, the sheriff of Cook County jail, knows Ms. Aldridge will end up back in his cell soon because there is nowhere else for her to go. She is sentenced, like so many seriously mentally ill people in America, to rotate in and out of correctional facilities until she dies. Prisons and jails are the main mental-health facilities in the country, something Sheriff Dart describes as an “abomination.” He is also angry about how fiscally reckless it is. At only 42, Ms. Aldridge has already cost taxpayers \$719,436 for her arrests and incarcerations.

I submit to the Commission that the Commonwealth's public schools are unnecessarily burdened with similar, fiscally reckless costs when the public school becomes, by default, the provider of mental and behavioral health services to children and youth and when adequate sources of contributory revenue are not forthcoming.

We have heard over and over again that intervention at early ages is best and less expensive in the long run. A penurious and shallow commitment to special education funding, and a failure to rationalize youth-age interventions with the most correct agencies fulfilling the missions within their competencies, may very end in the Commonwealth paying greater costs much later, like the example of Cook County shows.

The Commission has much to consider and needs to consider it well. As I read Act 3, considering other ways to rationalize the costs of appropriately educating special needs students is within its remit. You are in a position to do a great thing, great for students, families, and our society's future. Families and schools need your commitment to adequately fund special education, to provide stability and predictability both to local

www.sweetstevens.com

Southeast Region Office

331 E. Butler Avenue
PO Box 5069
New Britain, PA 18901
Tel: 215-345-9111
Fax: 215-348-1147

Northeast Region Office

2 S. Main Street
Suite 303
Pittston, PA 18640
Tel: 570-654-2210
Fax: 570-655-1875

school budgets and to student services, to recognize that making sense of funding streams and implementation competencies is the better and more fiscally responsible course to take, and to eliminate perverse funding-based incentives and disincentives.