



# Legal Consequences of a Tuition Assistance Grant Program for Students with Disabilities

BY WILLIAM H. HURD

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**Legal Consequences of a  
Tuition Assistance Grant Program  
for Students With Disabilities  
Forward**

For the parent of a child with disabilities, ensuring that child receives the best education possible can be a time-consuming task and often includes persuading their local school system to offer a service different from that which the school is willing to provide.

This can sometimes lead to a clash of wills – from local IEP meetings to due process and even to the courtroom.

Trust me – no one looks forward to this: Not parents, not teachers, and not the school system. But many school systems tend to operate in a “one size fits all” environment, and no matter how superb a school’s program may be, there will always be students with special needs who require a more specialized education that is often too challenging for a system trying to educate a broad range of children.

That’s why five states – Arizona, Florida, Georgia, Ohio and Utah – have scholarship programs for students with disabilities. There, parents can receive a state scholarship that partially covers the cost of tuition at a private school (or a different public school). There’s no need to go through yet another IEP meeting, engage in due process or create an adversarial relationship with the schools. In this case, *parents* are the ones who decide what is best for their child.

Such a proposal (called Tuition Assistance Grants for Students With Disabilities) has been made for several years in Virginia, but it has failed to pass both houses of the Virginia General Assembly in the same year. Opponents have thrown up a series of spurious legal arguments against the idea, but until now no one has taken the time to knock them down, one by one.

In this paper, former Virginia Solicitor General Bill Hurd walks us through the background of the federally-mandated special education process, including both its strengths and weaknesses. His paper articulates how a TAG Grant would work in Virginia and identifies the chief legal arguments used by opponents of TAG legislation. Most importantly, he shows why those arguments lack merit.

For someone interested in understanding the basics of special education law and process, Bill Hurd’s paper is a “must read.” And for advocates of providing more choices for the parents of children with disabilities, Bill Hurd’s paper is indispensable.

Judith "Tessie" Wilson  
Member, Fairfax County School Board  
December 2009



**Legal Consequences of a Tuition Assistance Grant Program  
for Students with Disabilities**

**by William H. Hurd**

Virginia is home to many excellent public schools; however, even the best public schools cannot always provide the special education needed by children with disabilities. Sometimes, it is necessary to enlist the services of private schools, instead. Private schools designed for particular types of disabilities – such as dyslexia or autism – can be especially valuable in helping families and school districts obtain an appropriate education for their children.

Congress recognized the important role played by private schools when it enacted the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400, *et seq.* This important federal legislation is the cornerstone of special education law in the United States, and it provides for public payment of private school costs in certain circumstances. As this article will explain, however, the procedures for accessing those funds under the IDEA are often cumbersome, contentious and unproductive. Given these shortcomings, five States have now adopted scholarship programs to give parents an alternative to the IDEA.<sup>1</sup> While the funding in these state programs is typically more limited than what might be hypothetically available under federal law, access to the funds is far easier to obtain. And, because parents are allowed to choose between the IDEA and the state program, parental rights are enhanced.

Virginia does not yet have such a program; however, in recent years, State Senator Walter A. Stosch (R-Henrico) has introduced legislation that would give parents this same

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<sup>1</sup> These five States and their statutes are: Arizona, A.R.S. § 15-891, *et seq.*; Florida, Fla. Stat. § 1002.39; Georgia, O.C.G.A. § 20-2-2110, *et seq.*; Ohio, O.R.C. § 3310.41, *et. seq.* and Utah, Utah Code Ann. § 53A-1a-701, *et seq.*

option.<sup>2</sup> Under the Stosch legislation, parents of children with disabilities would be eligible to receive tuition assistance grants (known as “TAG” grants) to help defray the costs of private educational placement.<sup>3</sup> Opponents of this proposal – chiefly, public school officials and teacher union representatives – have successfully persuaded legislative committees to defeat the measure each year it has been proposed. In so doing, they have relied heavily on two lines of argument, one based on the alleged *financial* implications of a TAG program, the other based on the alleged *legal* implications of the program.

Issues surrounding the financial implications of a TAG program have been addressed elsewhere.<sup>4</sup> This article will address the legal implications. The first part of this article will explain the background of the IDEA and review its basic procedures. The second part will address the shortcomings of the IDEA as they relate to accessing public funds for a private placement. The third part will explain the advantages of a TAG program, for both parents and the public. The fourth part will identify the chief legal arguments used by opponents of TAG legislation and will show why those arguments lack merit.

## **I. A HISTORY OF DISCRIMINATION AND A NATIONAL RESPONSE**

In the early 1970’s, discrimination against children with disabilities was rampant. Indeed, “a majority of handicapped children in the United States were either totally excluded

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<sup>2</sup> See SB 956 (2009); SB 759 (2007) and SB 545 (2006). Similar legislation, HB 2104, was introduced in the House of Delegate in 2009 by Delegate William R. Janis (R- Goochland, Henrico and Louisa).

<sup>3</sup> In its initial version, the Stosch legislation would have provided TAG funding for any child eligible for special education services; however, in the 2009 version of the bill, the funding would have been more targeted, limited to children with a diagnosis of autism.

<sup>4</sup> See Susan L. Aud., Milton and Rose D. Friedman Foundation, Virginia Chamber of Commerce and the Thomas Jefferson Institute for Public Policy, *The Fiscal Impact of a Tuition*

from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to drop out.” *Board of Educ. v. Rowley*, 458 U.S. 176, 179 (1982) (internal quotation marks and citations omitted). The children who suffered such treatment numbered in the millions. *Id.* at 189.

Faced with such an intolerable situation, parents and civil rights groups began turning to the federal courts, where they sought relief on constitutional claims. Among these cases were two landmark decisions: *Mills v. Board of Education of District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972), and *Pennsylvania Assn. for Retarded Children v. Commonwealth*, 334 F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp 279 (1972). Ordering an end to discrimination and exclusion, each case crafted a remedy requiring local school authorities to provide educational services to children with disabilities, and each gave parents the right to a hearing governed by principles of due process. These two cases contributed most prominently to action by Congress in 1975, when it enacted a predecessor to the IDEA, the Education for All Handicapped Children Act. *See Rowley*, 458 U.S. at 180, n.2.<sup>5</sup>

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Assistance Grant for Virginia’s Special Education Students (April 2007), *available at* [http://www.thomasjeffersoninst.org/pdf/articles/TAGgrant\\_study.pdf](http://www.thomasjeffersoninst.org/pdf/articles/TAGgrant_study.pdf).

<sup>5</sup> This federal special education law has seen a name change since it was first adopted in 1975 as the Education for All Handicapped Children Act. The name, Individuals with Disabilities Education Act, was first applied in 1990. Following legislative reauthorization in 2004, the law is sometimes known as the Individuals with Disabilities Education Improvement Act; however, it is still most commonly known by the educationally apt acronym, “IDEA.”

## **The IDEA**

The IDEA arose as our nation's response to the discrimination and exclusion that children with disabilities once suffered at the hands of many local school authorities. As such, the IDEA has two great, overarching purposes. The first is to institute a system where school districts not only must end such discrimination and exclusion, but must affirmatively provide every child with disabilities a "free appropriate public education" tailored to his or her individual needs. 20 U.S.C. § 1400(d)(1)(A). The second purpose is to empower parents to hold school districts accountable for the faithful performance of these duties, not only by giving parents an equal seat at the table when their child's education program is developed, but also by giving them the right to an "impartial due process hearing" in the event of an impasse. 20 U.S.C. § 1415(f).

Under the IDEA, Congress provides money to the States to "ensure that all children with disabilities have available to them a free appropriate public education ['FAPE'] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living." 20 U.S.C. § 1400(d)(1)(A). Those funds are then re-allocated to local school districts for use in defraying costs of their special education programs. Along with the federal funds comes an obligation for the school district to abide by certain standards in developing individualized education programs ("IEPs") for children with disabilities.

The IEP is the "primary vehicle" and "centerpiece of the [IDEA's] education delivery system." *Honig v. Doe*, 484 U.S. 305, 311 (1988). It is a written document developed by an "IEP team" that includes, *inter alia*, the child's parents, his teacher and local school division representatives. See 20 U.S.C. § 1414(d)(1)(B). The IEP must contain a statement of how the

child's disability affects his involvement and progress in the general curriculum, annual goals, criteria for evaluating progress toward those goals, and a statement of services and accommodations the child will receive. 20 U.S.C. § 1414(d)(1)(A)(i). In addition, the IEP generally must contain an explanation of where the child will be placed for the school year governed by the IEP. *See A.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 682 (4th Cir. 2007). The placement need not be in the public schools. Sometimes, both the school system and the parents agree that the placement should be in a private school that can address the child's individual needs. When a private school placement is part of the agreed IEP, payment for those services comes from public funds. 20 U.S.C. § 1412 (a)(10)(B).

### **Public Funding of Unilateral Private Placements**

When the school system and parents disagree on placement, there is, of course, no requirement that parents use the public schools to educate a child with disabilities. Parents retain their basic constitutional right to direct the education of their children, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), a right that includes the freedom to use an appropriate private school (or home school) option instead. Typically, the right to use an option other than the public school must be at the parents' expense; however, the IDEA provides that, under limited circumstances, parents may place their child in a private school at public expense, *even where the school system opposes that placement*.

In order to obtain public funding for such a unilateral private placement, parents must show, at a minimum, three things. First, they must show that the program offered by the public school was *inappropriate*. *See, e.g., Forest Grove Sch. Dist. v. T.A.*, 129 S.Ct. 2484, 2496 (2009). Second, they must show that the program offered by the private school was *appropriate*.

*Id.*<sup>6</sup> Finally, as a practical matter, the parents must show compliance with certain procedural steps outlined in the IDEA. Specifically, they must show that, *before* moving their child into the private program, they gave the school system *notice* that (i) they reject the placement proposed by the school system (stating their concerns), and (ii) they intend to enroll their child in a private program at public expense. 20 U.S.C. § 1412 (a)(10)(C)(iii). Such notice must be given in writing at least ten days before the move to the private placement, or it must be given during the last IEP meeting before the move occurs. *Id.*<sup>7, 8</sup>

As the Supreme Court has repeatedly explained, “parents who unilaterally change their child’s placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk.” *Forest Grove*, 129 S.Ct. at 2496 (citations and internal quotation marks omitted). In other words, failure to make the requisite

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<sup>6</sup> While *Forest Grove* is the most recent Supreme Court case to address the issue of public reimbursement for a private placement, the case is not new in its recognition of the concept. Instead, *Forest Grove* relies on two earlier cases, *School Comm. of Burlington v. Department of Ed. of Mass.*, 471 U.S. 359 (1985) (holding that, when a public school fails to provide a FAPE and a child’s parents place the child in an appropriate private school without the school district’s consent, a court may require the district to reimburse the parents for the cost of the private education) and *Florence County School Dist. Four v. Carter*, 510 U.S. 7 (1985) (holding that reimbursement may be appropriate even when a child is placed in a private school that has not been approved by the State).

<sup>7</sup> Under the IDEA, giving this notice is not an absolute requirement. Instead, the statute provides that, if notice is not given, reimbursement for private school expenses “*may* be reduced or denied.” 20 U.S.C. § 1412 (a)(10)(C)(iii) (emphasis added). As a practical matter, however, hearing officers and courts in Virginia tend to deny reimbursement completely where parents fail to give notice in strict compliance with the statute. *See, e.g., Prince William County Sch. Bd. v. Hallums*, Case No. 02-1005-A, 2003 U.S. Dist. LEXIS 27233, at \*25-26 (E.D. Va. Aug. 12, 2003) (denying reimbursement when parents gave nine calendar days written notice, even though parents later sent amended notice extending date for removal to ten business days from original notice date).

<sup>8</sup> Compliance with these three factors does not *guarantee* reimbursement for the parents. Instead, the courts “must consider *all* relevant factors, including... the school district’s opportunities for evaluating the child, in determining whether reimbursement for some or all of the cost of the child’s private education is warranted.” *Forest Grove*, 129 S.Ct. at 2496.

showing will leave parents with financial responsibility for the private placement, a fact that dissuades many parents from pursuing a unilateral, private placement, despite their dissatisfaction with the public school program. Indeed, as the Supreme Court has noted, “the incidence of private-school placement at public expense is quite small.” *Forest Grove*, 129 S.Ct. at 2496.

### **Due Process Hearings**

The IEPs proposed by school systems are usually accepted by parents without controversy; however, there is no requirement that parents accept what they are offered. On the contrary, the IDEA precludes school officials from making unilateral decisions about a child’s IEP. Instead, such decisions must be made by school officials and parents in collaboration. As the U.S. Department of Education has explained, “[t]he parents of a child with a disability are expected to be *equal participants* along with school personnel, in developing, reviewing, and revising the IEP for their child.”<sup>9</sup> If the parents and the school district reach an impasse over the contents of an IEP, either side may initiate an administrative proceeding – an “impartial due process hearing” – to bring the issue before a neutral hearing officer (or administrative law judge) for a decision.<sup>10</sup> In Virginia, hearing officers are typically lawyers in private practice who have received training through the Executive Office of the Virginia Supreme Court and the

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<sup>9</sup> Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, Notice of Interpretation 64 Fed. Reg. 12406, 12473 (March 12, 1999) (emphasis added); *accord* Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 73 Fed. Reg. 73006, 73018 (Dec. 1, 2008) (“parents should be equal partners in the educational decision-making process for their child”) (discussion by USDOE).

<sup>10</sup> See 20 U.S.C. §1415(f)(1)(A). Once the hearing is requested, parents and school system representatives are required to meet in a “resolution session” in an effort to settle the dispute without litigation. 20 U.S.C. §1415(f)(1)(B). Non-binding mediation is also an option if both parties desire it, either before or after a due process hearing is requested. 20 U.S.C. §1415(e).

Virginia Department of Education, and who devote a portion of their practice to serving as hearing officers. Case assignments are made by the Virginia Supreme Court. It is in these due process hearings that parents must first litigate any claim that the school system should reimburse them for a unilateral private placement.<sup>11</sup>

## **II. SHORTCOMINGS OF THE IDEA**

Notwithstanding the IDEA's high purposes and its innovative approach to empowering parents, the promises of special education often fall short for three reasons: (i) the legal standard by which school system programs are judged is very lenient; (ii) school systems have financial disincentives to providing adequate programs; and (iii) there is not a level playing field for adjudicating disputes between school systems and parents.

### **The Applicable Legal Standard**

Perhaps, the chief problem with the current system is the vague and less-than-demanding legal standard that school system programs must meet in order to comply with the IDEA. The statute says that their program must be "appropriate," but it does not give clear guidance on what that term means. Admittedly, it would be difficult to frame a single definition that would adequately address the multitude of individuals – and the variety of disabilities – covered by the IDEA. Yet, the lack of specificity makes it easy for school systems to cut corners and claim to be in compliance with the law.

Court decisions interpreting the IDEA have added some clarity, but those interpretations are, on the whole, not very helpful to parents. On the one hand, "Congress *did not intend* that a

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<sup>11</sup> Any party aggrieved by a hearing officer decision may seek review in a state court of competent jurisdiction or in a federal district court. *See* 20 U.S.C. § 1415(i)(2)(A). States may elect to use an administrative review as an intermediate step between the due process hearing and judicial review, *see* 20 U.S.C. § 1415(g); however, Virginia does not use this option.

school system could discharge its duty under the [Act] by providing a program that produces *some minimal* academic advancement, *no matter how trivial*. “ *County Sch. Bd. v. Z.P.*, 399 F.3d 298, 300 (4th Cir. 2005) (emphasis added) (quoting *Hall v. Vance County Bd. of Education*, 774 F.2d 629, 636 (4th Cir. 1985)). On the other hand, “[t]he IDEA does *not*... require a school district to provide a disabled child with the *best* possible education.” *MM v. Sch. Dist.*, 303 F.3d 523, 526 (4th Cir. 2002) (emphasis added). Indeed, the IDEA does not even require “that States maximize the potential of handicapped children *commensurate with* the opportunity provided to other children.” *Board of Educ. of Hendrick Hudson Central Sch. Dis. v. Rowley*, 458 U.S. 176, 189-90 (1976) (emphasis added). Under the IDEA, the issue is not whether the school system program is “better” or “more appropriate” than the private placement. So long as the school system program is “appropriate,” the school system prevails.

Given these broad rulings, school systems argue – often with success – that they only need to offer a program designed to provide “some” educational benefit. Yet, few parents would be satisfied sending their children to a school that adheres to such a low standard. This is especially true of parents whose children start off life with the challenge of disabilities. So, it is not surprising that many parents feel frustrated by the current system and would welcome another option.

### **The Financial Disincentives**

Nationwide, about fourteen percent of elementary and secondary school public students receive special education services under the IDEA.<sup>12</sup> This figure, while substantial, nevertheless represents a decided minority of all students and suggests a lack of local political clout in

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<sup>12</sup> See U.S. Department of Education, Digest of Education Statistics: 2008; *available at* [http://nces.ed.gov/programs/digest/d08/tables/dt08\\_050.asp?referrer=list](http://nces.ed.gov/programs/digest/d08/tables/dt08_050.asp?referrer=list).

scrambling for funds from school system budgets. School boards, perhaps understandably, tend to be more responsive to the interests of their “typical” students than they are to the needs of this minority population.

Compounding the problem is the short-fall in Congressional funding of special education. When Congress enacted the IDEA’s predecessor, the Education for All Handicapped Children Act of 1975, it authorized payment of 40 percent of the “excess costs” of special education. Yet, over the years, the amount actually funded dwindled into the low teens. Quite recently, the funding was boosted to 25 percent with the enactment of the American Recovery and Reinvestment Act in early 2009; however, the 40 percent goal still eludes school systems and the disability community.<sup>13</sup>

Moreover, in the minds of those who must allocate scarce school system funds, the *benefits* of special education are not always closely connected with its *costs*. As the Supreme Court has recognized, some of the major benefits of special education are long term and realized by society at large: “[P]roviding appropriate educational services now means that many of these individuals will be able to become a contributing part of our society, and they will not have to depend on subsistence payments from public funds.” *Rowley*, 458 U.S. 176, 201 n.23 (quoting 121 Cong. Rec. 19492) (1975) (remarks of Sen. Williams)).<sup>14</sup> On the other hand, the costs of providing special education are borne by specific agencies – school systems – out of their often-

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<sup>13</sup> See Press Release, Council for Exceptional Children, President Signs Legislation to Double IDEA Funding (Feb. 17, 2009), *available at* <http://www.cec.sped.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/HTMLDisplay.cfm&CONTENTID=11740>.

<sup>14</sup> See, e.g., Brief of Autism Society of America, Northern Virginia Chapter *et al.* as Amici Curiae Supporting Petitioners at 24, *Schaffer v. Weast*, 546 U.S. 49 (2005) (No. 04-698), 2004 U.S. Briefs 698 (noting the growing need for institutional care for adolescents with autism and reporting estimates of long-term savings where there is “widespread, early and effective” intervention).

overtaxed, current budgets. As a result, there is a tendency for the long term benefits to be obscured by the short terms costs. As one federal court has observed: “Left to its own devices, a school system is likely to choose the educational option that will help it balance its budget, even if the end result of the system’s indifference to a child’s individual potential is a greater expense to society as a whole.” *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 864-65 (6th Cir. 2004).

### **The Playing Field Is Not Level**

As envisioned by Congress, the due process hearing is supposed to take place on a “level playing field.” *Weast v. Schaffer*, 377 F.3d 449, 453 (4th Cir. 2004). In practice, however, school systems enjoy a decided advantage, as shown by the following:

**Experts:** Due process hearings are often battles of experts. A school system will bring forward its experts to testify that its proposed IEP is appropriate and/or that the parents’ program is inappropriate. If the parents are to have any hope of prevailing, they must bring forward experts of their own to show the opposite is true. In a word, “[i]n IDEA cases, experts are necessary.” *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 314 (2006) (emphasis added) (Breyer, J., joined by Stevens and Souter, JJ., dissenting).<sup>15</sup>

But that is not all. As three Justices also pointed out:

Experts are also *expensive*... The costs of experts may not make much of a dent in a school district’s budget, as many of the experts they use in IDEA proceedings are already on the staff.... But to parents, the award of costs may matter enormously. Without potential reimbursement, parents may well lack the services of experts entirely.

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<sup>15</sup> See P. Kuriloff & S. Goldberg, *Is Mediation a Fair Way to Resolve Special Education Disputes? First Empirical Findings*, 2 Harv. Negotiation L. Rev. 35 (1997) (detailing findings of study showing high correlation between use of experts and success of parents in challenging school district’s plan).

*Id.* (emphasis added) (citations omitted).<sup>16, 17</sup>

The situation would not be quite so badly skewed if parents were able to recover their expert fees when they prevail. However, the Supreme Court has ruled that, as currently written, the IDEA does not authorize such recovery. *See Murphy*, 548 U.S. at 300 (majority opinion) (holding that “prevailing parents may not recover the costs of experts or consultants”). Thus, even when parents prevail, their liability for expert fees means that they will not obtain for their child the IDEA’s basic goal of a “*free* appropriate public education.” 20 U.S.C. § 1400(d)(1)(A) (emphasis added).

**Lawyers:** Marshalling evidence from witnesses and negotiating the intricacies of the IDEA in a due process hearing require the assistance of skilled counsel. Many school districts have attorneys on staff. Others have substantial budgets for hiring outside counsel.<sup>18</sup> In an effort to offset these advantages, Congress has provided that parents who prevail in a due process hearing may obtain payment by the school system of their reasonable attorneys’ fees. 20 U.S.C. § 1415(i)(3)(B). Even so, engaging an attorney can often be a daunting task for parents. Many parents will be unable to find counsel skilled in this highly specialized area of the law, and others will be unable to afford the risk of losing and being left to pay a large legal bill out of their own resources. Thus, it is not surprising that schools are “much more likely to bring an attorney to a hearing than parents.” 150 Cong. Rec. S5350-51 (Statement of Sen. Kennedy).

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<sup>16</sup> Although Justices Breyer, Stevens and Souter dissented from the outcome in *Murphy*, the majority did not disagree with their assessment that experts are both necessary and expensive.

<sup>17</sup> *See, e.g.*, Atlanta Law Firm Charges to County Top \$1.7 Million, Chattanooga.com, Mar. 14, 2005, [www.chattanooga.com/articles/article\\_63675.asp](http://www.chattanooga.com/articles/article_63675.asp) (reporting that Hamilton County incurred more than \$690,000 in expert witness fees and expenses in one case).

<sup>18</sup> *See, e.g.*, Chattanooga.com, *supra* (reporting that the school system of Hamilton County, Tennessee, had incurred more than \$1.7 million in legal fees in one special education case, even though the case was not yet concluded).

**Deference:** Even when parental experts and school system experts both testify, they do not do so on even footing. Instead, hearing officers have been instructed to give “deference” to the school system. According to the Fourth Circuit, even when “[the school system’s] and [parents’] experts disagreed, IDEA requires great deference to the views of the school system rather than those of even the most well-meaning parent.” *A.B. v. Lawson*, 354 F.3d 315, 328 (4th Cir. 2004). This deference does not require the hearing officer simply to rubber stamp whatever the school system may say; however, it does require the hearing officer, metaphorically, to put his thumb on the scale in favor of the school system, thereby making it even harder for the parents to prevail.

**Burden of Proof:** The Supreme Court has decided that, at least in the absence of a different state law rule, “[t]he burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief.” *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). Thus, when the parents seek the hearing, they have the burden of proof. And, when the school system seeks the hearing, it has the burden of proof. On the surface, this may seem fair enough; however, because school systems can usually have their way simply by refusing to take the action parents request, it is almost always the parents who must ask for the hearing – and bear the burden of proof.

Imposing that burden on parents magnifies the advantages already enjoyed by school systems in terms of experts, lawyers and deference to school system witnesses. Moreover, the school district typically has a better opportunity to observe the child in an educational setting and to interpret those observations. Parents are entitled to access their child’s school records; however, the school district in large measure controls what records are created, what information is included in those records and what information is left for presentation orally or not mentioned

at all. And parents do not even have a recognized right to observe the educational placement proposed by the school district.<sup>19</sup> School districts are also uniquely positioned to make assertions about how well their programs have worked for students having similar disabilities and, because of privacy concerns, parents cannot readily obtain information to challenge those assertions. *See, e.g.*, The Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g(b)(1) (imposing non-disclosure requirements on student records as condition of receiving federal funds).

In sum, when it comes to a due process hearing, the playing field is not level. It slants decidedly in favor of the school system. Indeed, a review of recent hearing officer decisions in Virginia shows a record of overwhelming success by school systems in defeating claims brought by parents. During the two years between July 1, 2007, and June 30, 2009, eighty-two percent of the decisions were in favor of the school system; nine percent were in favor of parents and nine percent were split decisions, with each side winning one or more issues.<sup>20</sup>

This is not to say, however, that a due process hearing is a picnic for the school system. Hearings often last for several days. To prepare for such a long proceeding – and then to take part in it – inevitably distracts teachers and administrators from their normal educational duties. Hearings are also expensive, often requiring school systems to hire outside counsel at substantial

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<sup>19</sup> *See, e.g.*, Letter from Office of Special Education Programs to S. Mamas (May 26, 2004) (on file with author); 42 IDELR 10 (“[N]either the statute nor the regulations implementing the IDEA provide a general entitlement for parents of children with disabilities, or their professional representatives, to observe their children in any current classroom or proposed educational placement.”); *accord Hanson v. Smith*, 212 F. Supp. 2d 474, 487 (D. Md. 2002) (“There is no language in the IDEA requiring a school board to allow parents to visit the school of the proposed placement.”).

<sup>20</sup> *See* Virginia Department of Education, Hearing Officer Decisions, *available at* <http://www.doe.virginia.gov/VDOE/dueproc/HearingOfficerDecisions>. Computation of percentages does not include cases dismissed as settled or moot.

hourly rates. When school systems lose, the costs soar. In addition to paying their own attorneys, they also must pay the costs of any private placement found to be appropriate as well as the attorneys' fees of the parents' lawyer. While litigation can end at the hearing level, it often goes higher, first to federal district court and then to the federal court of appeals.

The process can take years, with legal fees increasing at each step. In one recent case lasting four years, a Virginia school system was finally ordered to pay over \$30,000 in reimbursement for tuition at a private autism school and over \$300,000 in attorneys' fees to counsel for the parents. *See J.P. v. Hanover County School Board*, Case No. 3:06cv28, 2009 U.S. Dist. LEXIS 68792 (E.D. Va. June 2, 2009) (case decided on remand to federal district court following appeal to the Fourth Circuit). Assuming that the school system's own counsel charged fees similar to what was awarded to the parents' lawyers, the school system's total liability for legal fees was *twenty times* the tuition in controversy. Spending that money on education – rather than litigation – would have made sense all the way around.

Beyond the monetary costs, such knock-down, drag-out legal battles impose heavy intangible costs as well. They not only poison relationships between the school system and the particular family involved, they also breed hostility between the school system and the larger disability community. School systems – like parents – deserve a better way to resolve their disagreements.

### **III. THE ADVANTAGES OF TUITION ASSISTANCE GRANTS**

Virginia has long used a system of tuition assistance grants to provide financial aid to students attending private colleges. *See Va. Code § 23-38.11, et seq.* Drawing upon this precedent, Senator Stosch's legislation envisions a TAG program with similar characteristics. The program would involve (i) a modest grant, renewable annually, (ii) paid by the

Commonwealth (iii) directly to a private school, licensed by the Commonwealth to operate a school for students with disabilities, and (iv) chosen by the parents for their child with disabilities, (v) after the child has spent at least one year in special education in a Virginia public school. There would be no need to show fault with the public school or to demonstrate that its program is inappropriate. Taken together, these features would create a program which, for school systems and many parents, would offer substantial advantages over the current dispute-laden IDEA procedures.

As noted in a 2007 study, the amount of the grant would be less than the average amount spent annually by the Commonwealth to educate a child with disabilities, thus resulting in an overall savings for taxpayers.<sup>21</sup> While a TAG grant may not be enough to fund the complete cost of a private school placement, it would give parents a helping hand. And the certainty of that assistance would, in many cases, be far more attractive than the uncertainty of costly litigation under the IDEA.

The grant would be paid by the Commonwealth – rather than by the local school system – thus enabling the school system to reallocate its savings to the benefit of other students. By paying money to the school – rather than to the parents – the program would avoid any risk of funds being diverted to other purposes. Similarly, by requiring that a private school be *licensed* in order to be eligible for the funds, the program would avoid any risk of “fly-by-night” schools popping up to take advantage of the new funding source. Licensing is performed by the Virginia Department of Education, *see* Va. Code § 22-1-319, *et seq.*; and, presumably, licenses are only granted to schools in which the public should have confidence. Key to the program is the fact that the choice of a school would be left to the parents, thus building on their right to direct the

education of their children and fixing upon the parents the responsibility for their choice. At the same time, the requirement that the child spend a year in special education in the public schools gives the public system a fair chance demonstrate its ability to help the child and, together with the modest size of the grant, helps ensure that parents will not remove the child precipitously.

More valuable, perhaps, than these features of the proposed TAG program is the *absence* of any requirement that that the school system be at fault in some way. Because the quality of the public school program would not be an issue, there would be no need for a hearing to decide that question. Thus, there would be no need for parents and school systems to spend hours upon hours in litigation, and there would be no need for either side to spend money on lawyers. Funds that are today spent in litigation could be spent on education instead. Harmonious relationships between families and school officials could be preserved. And, children would not be limited to a so-called “appropriate” education, a standard which, as used in IDEA disputes, is wholly uninspiring. *See supra* at 9. In short, when parents are able to accept TAG funds – and walk away from an IDEA dispute – everyone would be better off.

This is not to say that IDEA disputes would disappear altogether. Undoubtedly, there still would be some cases where parents would run the risks of litigation – and seek full reimbursement of private school expenses – rather than accept the certain but smaller level of assistance offered under the TAG program. However, the experience in Florida, which has one of the longest running disability scholarship programs, shows that a substantial reduction in due process hearings would be expected. In Florida, requests for due process hearings dropped from

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<sup>21</sup> *See Aud, supra* note 5.

206 in the 2003-04 school year to 158 in 2007-08, a decrease of nearly one-fourth. In the same period, fully adjudicated due process hearings dropped from 38 to 5, a decrease of 87 percent.<sup>22</sup>

#### **IV. THE LEGAL ARGUMENTS OFFERED BY TAG OPPONENTS LACK MERIT.**

The chief opponents of the Stosch legislation have been public school officials and the Virginia Education Association (“VEA”), two groups that have been generally fearful of enhancing parental choice in education. In trying to marshal legal arguments against a TAG program, they have pointed to three scenarios they say would lead to dire results. Yet, an examination of those three scenarios shows their fears to be unfounded.

In their first scenario, the opponents speculate that some parents who use the grant may become unhappy with the private school they chose and want to move the child back to the public school in the middle of the school year. They say that the public schools would be obligated to accept the child and provide special education services, yet the grant money will have already been spent. School systems are, of course, accustomed to receiving new students arriving in their communities during the middle of the school year. But what makes this mid-year transfer different, opponents say, is that taxpayers will end up having to pay twice – once in the TAG grant and once in the public school program.

While such mid-year transfers are possible, they are likely to be rare. If parents grow disenchanted with their child’s private school – and wish to return him to public school – they will usually make the change at the end of a school year, rather than at the middle. But, even if

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<sup>22</sup> Florida Department of Education, Exceptional Student Education and Student Services, Administrators’ Management Meeting Databook at 121 (2008), *available at* <http://www.fldoe.org/ese/pdf/databook.pdf>.

mid-year transfers presented a significant problem, there would be easy solutions. If a parent were to accept a grant, then transfer a child back to the public school mid-year, the parent could be required to repay the grant on a *pro rata* basis. This would not only discourage mid-year transfers, it would make sure that taxpayers would not suffer any loss. Another option would be to divide the grant into two installments, with the first installment being available to parents at the beginning of the school year and the second installment being available only when the second semester begins. If TAG opponents are truly concerned about mid-year transfers back to the public school system, they should seek to amend the Stosch legislation to include one – or both – of these solutions, not kill the bill entirely.

In their second scenario, opponents of TAG grants speculate that some parents might take the TAG money, move their child to a private school and then demand that the school system pay the *entire* amount of the private tuition. Again, the fears of TAG opponents are unwarranted. As explained above, the IDEA contains a procedure by which the public schools can be required to reimburse parents for the entire cost of a private placement; however, parents must show (i) that the public school program is *inappropriate*, (ii) that the private school program is *appropriate*, and (iii) that they have complied with certain *procedural* requirements. See *supra* at 5-6. Given these IDEA provisions, a well-designed TAG program would prevent parents from successfully abusing its benefits by taking the TAG money, then suing for more.

One way to guard against abuse of the TAG program would be to focus on the first of these three points and require parents to state, as a condition of receiving the grant, that they regard the school system's program as "appropriate." Such a statement would constitute an "admission against interest" that school systems could readily use to defeat any attempt by parents to sue for public funding under the IDEA. While such an approach sometimes has been

part of the TAG legislation presented to the General Assembly in recent years, it has the obvious drawback of excluding those parents who honestly do not believe the public school program is appropriate and who are unwilling to say that it is.

Another approach would be to limit the TAG program to parents who have *not* given the advance notice contemplated by the IDEA, and/or who have *renounced and waived* any intention to seek public funding under the IDEA for the year covered by the TAG grant. The legal result would be similar to the settlement agreements that parents and school systems have sometimes negotiated under the IDEA. Typically, such agreements involve a compromise under which the school system agrees to pay part of the costs of a private placement in exchange for an agreement by the parents not to sue for more.<sup>23</sup> Here is the key point: as a matter of experience, when such agreements are reached, parents do not renege on their promise not to sue for more and, if they were to renege on that promise, they would surely lose – and deservedly so. There is no reason to expect a different result when the agreement not to sue for more is part of a statutory program rather than an *ad hoc* agreement between parents and a school system.

Moreover, if any parents were so duplicitous as to obtain TAG funding, then sue for additional funding under the IDEA, they would face an insurmountable barrier. Under the IDEA, public funding of a unilateral, private placement is an “equitable” remedy, which means in layman’s terms that a court will not order such relief if it would be unfair under the circumstances. The hypothetical parents who obtained TAG funds by renouncing any intention

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<sup>23</sup> Of course, such agreements cannot always be reached and, when they are reached, they usually require hiring lawyers and often involve significant time and turmoil, disadvantages not shared by TAG grants.

to seek additional funding under the IDEA, then sought such funding anyway, would come to court with what the law calls “unclean hands” and, as such, would not be entitled to ask for equitable relief. Moreover, school system attorneys could successfully argue that a suit brought under these conditions is “frivolous, unreasonable, or without foundation,” thereby exposing the parents’ attorney to liability for the school system’s attorney’s fees. 20 U.S.C. § 1415(i)(3)(B)(i)(II).<sup>24</sup> With these safeguards in place, school systems need not worry about parents taking the TAG money, then suing for more.

In their third scenario, opponents of TAG legislation do not focus on the year when the grant would be used, but on the following year. They say that, once the child has spent a year or two in a private school, some parents might not seek a grant for the next year, but would ask for full reimbursement instead. In such a situation, the “unclean hands” argument would not apply because no misrepresentation would have been made. Parents could give their advance notice without hesitation because they would have already decided to forego a TAG grant for the new year in hopes of obtaining full reimbursement under the IDEA.

Yet, advance notice is not the end of the process; it is only the beginning. After a year or two of progress in a particular private placement, parents should have little difficulty showing that such placement is appropriate for the child; however, they would still have to show that the placement offered by the school system is *inappropriate*, just as they do now. Under the IDEA, so long as the school system’s placement is “appropriate,” the school system wins. Even if the private program would be better for the child, the school system still wins, and the parents recover nothing. Nothing in the TAG legislation would change this. Of course, if the program

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<sup>24</sup> The parents could also be held *personally* liable for the school system’s attorney’s fees if they brought suit “for any improper purpose, such as to harass, to cause unnecessary delay, or to

offered by the school system truly is inappropriate – and the private placement is appropriate – the parents would be able – and *should* be able – to receive full reimbursement, just as they can now under the IDEA.<sup>25</sup>

Not to be persuaded, TAG opponents have argued in reply that, once the child has done well in a private placement, the hearing officer will be biased in favor of that placement. They say that the hearing officer will not give the school system fair consideration when it tries to show that its program is also appropriate. Yet, one might just as easily argue that hearing officers would be biased *against* the parents, on the theory that the parents should have stuck with the TAG program instead of rolling the dice to obtain more. Neither argument is credible. Both arguments allege, in effect, that hearing officers will not act professionally and that, as a class, hearing officers will not perform the duties that they are trained to perform and, indeed, are sworn to perform. Such allegations run contrary to a basic principle of the law, which “presume[s] that public officials have properly discharged their official duties.” *Banks v. Dretke*, 540 U.S. 668, 696 (2004).

Moreover, if hearing officers were prone to be biased in favor of parents, the evidence of that bias would not wait until the General Assembly enacted a TAG program before showing up. Yet, thus far, TAG opponents have not come forward with any evidence of hearing officer bias in favor of parents. Indeed, given the high percentage of cases that hearing officers decide against parents (*see supra* at 14), it is very unlikely that opponents will ever be able to prove that

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needlessly increase the costs of litigation.” 20 U.S.C. § 1415(i)(3)(B)(i)(III).

<sup>25</sup> As the Supreme Court has explained: “[P]ublic educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State’s choice. This is IDEA’s mandate, and school officials who conform to it need not worry about reimbursement claims.” *Carter*, 510 U.S. at 15.

allegation. Any suggestion that the TAG program would cause hearing officers to be biased in favor of parents is wholly devoid of merit.

In addition to their three discredited scenarios, opponents of TAG funding sometimes complain about the ease with which parents would be able to move their child to a private school and access TAG funds. But this complaint is misplaced. Under the legislation proposed by Senator Stosch, the child must have received special education services from the public schools for at least one year in order to be eligible for TAG funding. This is a *more stringent* standard that required by federal law for parents who seek *full* funding under the IDEA. As the Supreme Court recently explained, parents may move their child into a private program and seek public funding even when the child has *never* spent time in a public school special education program. *Forest Grove*, 129 S.Ct. at 2496.

Of course, under the federal law, parents still must show that the public school program is inappropriate and that the private school program is appropriate. *See supra* at 5-6 (citing *Forest Grove*, 129 S.Ct. at 2496). Admittedly, no such showing is required under the Stosch legislation. After the child has spent one year in the public school program, it is enough for the parents to be dissatisfied with their child's progress. TAG opponents say that this gives parents too much freedom and that parents should be required to show that the public schools have done something wrong. But this alleged defect in the TAG legislation is actually one of its great strengths. Requiring the parents to prove some fault in the part of the public schools would inevitably require a hearing of some sort. And, in order to prevail in that hearing, parents would need to hire lawyers and educational experts to present their case. These costs could easily exceed the value of the TAG grant. Moreover, the process would foster dissention between parents and the school system. In short, requiring parents to prove that the public schools did something wrong

– or any other controversial point – would create the same IDEA-type problems that the TAG legislation is intended to avoid.

#### **IV. CONCLUSION**

Our society has long recognized that there is a public responsibility to provide for the education of our children. Yet, there is a crucial difference between (i) accepting that responsibility, and (ii) insisting that it only be carried out through schools operated by government. The former does not imply the latter. Our society also recognizes, for example, that there is a public responsibility to provide health care for children whose parents are unable to provide for them. Yet, no one has suggested that children receiving such assistance should only be treated by government doctors or at government-run clinics. Instead, the parents have been allowed to select their child's medical providers from an array of public and private options, while government has provided the financial support. The health care model – parental choice and government financing – is an innovative way to provide children with disabilities with the individualized education they require. It is a model that five States have already embraced. Virginia should do so as well.

### **About the Author**

William H. Hurd is a former Solicitor General of Virginia (1999-2004) and a former Deputy Attorney General for Health, Education and Social Services (1994-1998). He is now a partner in the law firm of Troutman Sanders LLP, where he devotes a significant portion of his practice to representing parents of children with disabilities in disputes with local school systems. Portions of this article are drawn from briefs filed by Hurd in cases where he provided such representation.



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*“... a wise and frugal government, which shall restrain men from injuring one another, shall leave them otherwise free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labor the bread it has earned. This is the sum of good government, and this is necessary to close the circle of our felicities.”*

*Thomas Jefferson*

*1801*

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