FORUM

Ohio Coalition for the Education
of Children with Disabilities

January/February 2006
Volume XXIV, Issue 1

'Right to Vote' Includes ALL Americans

"Jimmy should be voting too!!" realized Karen Prokop.

Before the 2004 election primaries, Karen's younger daughter, Amber, had turned 18 and was registering to vote at her high school. That's when Karen was struck with the realization that her son Jimmy should also be participating in the electoral process.

Wondering about the voting rights of individuals with disabilities, Karen contacted Cuyahoga County Board of MR/DD Support Administrator Kate Oplinger and asked if there was anything in writing about the voting rights of people with disabilities. She wanted to know about assisting individuals in the booth, any special registration forms, etc. Kate furnished Karen with a registration packet and a notice of rights.

"I must say the registration form Kate sent was easier for Jimmy to sign because he prints his name for his signature, sometimes larger than he should," says Karen. "The space for the voter's signature on the registration form is larger than normal."

The memory of Jimmy's (and Amber's) first voting-day experience still brings a smile to Karen's face. Due to Jimmy's challenges, his understanding of the government process - as well as his knowledge of candidates and issues - is limited. During the last presidential election, he knew who the president and vice president were. Jimmy did not miss watching a single debate! Karen and Jimmy followed the debates together, along with Amber, who sometimes joined them.

Then, prepared for the worse, Karen took a copy of Jimmy's rights to the polls. Knowing that not everyone in their neighborhood is accepting of people with differences, Karen had proof-in-hand that people with challenges have the right to vote. One of Karen's concerns was that poll workers might have never faced someone like Jimmy wanting to cast a ballot.

"Considering that neither my son nor my daughter had ever voted before, I had no idea what to expect," says Karen.

Karen, Amber and Jimmy all signed in to vote. Karen told the poll workers that both of her children would need assistance with their first voting experience, but her son would need the most assistance.

While Karen showed her daughter the "ins and outs" of the voting process, Jimmy waited anxiously by the women at the table. As Amber voted, Karen and Jimmy went into one booth together upon a poll worker's suggestion.

Karen decided to cast her ballot first, so Jimmy could watch how she went through

see **JIMMY**, page 2

from page 1: Jimmy

the voting process. Jimmy was very attentive in watching his mother vote - so much so that when Karen skipped one, Jimmy reminded her, "You missed one, Mom!" This gave Karen an opportunity to teach Jimmy that people are not required to vote on all issues and candidates.

It was finally time for Jimmy to cast his very first ballot! Together, they got the ballot card into the holder. Being familiar now with her son's voting rights, Karen knew she could help Jimmy by reading and, if needed, actually punching Jimmy's ballot card for him.

Karen assisted her son by explaining what he was voting on in ways Jimmy could understand. As Karen had "missed one," so, too, did Jimmy. He skipped some of the selections when neither of them was familiar with the issue at hand.

In Jimmy's first time at the polls, the major local issue was the city school's tax levy. This is where Karen discovered that Jimmy and she had differing opinions. Jimmy inquired how Karen voted on the levy, and when she told her son, Jimmy voiced his strong opposition, very loudly!

"The school needs money, MOM!" Jimmy exclaimed.

Noticing everyone's attention had brought them into center stage, Karen turned ten shades of red from embarrassment! Karen began to get a sinking feeling that the people in the polls thought Karen was telling her son HOW to vote, rather than just explaining what was on the ballot. What people did not realize was that Jimmy became upset with his mother because he was voting FOR the school levy when Karen had voted against it.

"I guess this is when I realized a couple of things," Karen said. "First, Jimmy has his own opinions, and he has the right to let them be known through the voting process. Second, our votes had somewhat cancelled each other's!

"All I know," continued Karen, "is that if I expect others to respect Jimmy's rights, then it was also my responsibility to respect this one - and to assist him in being an active citizen in our community, participating in the voting process!"

EDITOR'S NOTE: Jimmy Prokop graduated from high school in 2003 and lives with his family in Parma, a Cleveland suburb. He has cerebral palsy, mild-to-moderate mental retardation and reads at a third-grade level. Jimmy's mother, Karen, describes her 23-year-old son as "having multiple disabilities, including a cognitive disability."

[Reprinted with permission from the September/October 2005 issue of CenterLine, a publication of the Cuyahoga County (Ohio) Board of MR/DD; written by Betty J. Skinner Volunteer Staff Writer]

Jimmy and Karen Prokop celebrate graduation.

Supreme Court Hears Burden of Proof Case

On November 14, 2005, the U.S. Supreme Court handed down their opinion on ***Schaffer v. Weast***. Petitioner Brian Schaffer has learning disabilities and speech-language impairments. For several years, he attended a private school.

In 1997, Brian's parents sought to have him placed in a public school in the Montgomery County (Maryland) Public Schools System. The Schaffers were not satisfied with the provisions of the Individualized Education Plan (IEP) developed for Brian. Brian was enrolled in another private school and the Schaffers initiated a due process hearing challenging the IEP and seeking compensation for the cost of Brian's subsequent private education. The *Schaffer* case seeks to answer whether the parents must prove that the IEP is inadequate or whether school districts must prove that the IEP is adequate.

Note: This case was decided under the pre-2004 version of the IDEA as it was in effect at the time of the prior proceedings. However, the Court believed that nothing in the 2004 amendments materially affected the rule announced by the Court.

Writing for the majority, Justice O'Conner noted that the IDEA provides mandates for the states to follow in structuring their special education programs. The IDEA establishes "impartial due process hearing[s]" to challenge the appropriateness of an IEP. Congress propounded legislation on the central components of the hearings, but was silent on the burden of proof. Thus, the Court found:

"If parents believe their child's IEP is inappropriate, they may request an 'impartial due process hearing.' [20 U.S.C.] §1415(f). The Act [IDEA] is silent, however, as to which party bears the burden of persuasion at such a hearing. We hold that the burden lies, as it typically does, on the party seeking relief."

Rule: Thus, in general, the party seeking an "impartial due process hearing" regarding an IEP has the burden of persuasion. If the parents request the hearing, they are responsible for proving that the IEP is inadequate. However, if the school district requests the hearing, the district would bear the responsibility of proving the IEP was adequate. The court notes that this is a rare occurrence, usually occurring "if [the district] wish[es] to change an existing IEP but the parents do not consent or if parents refuse to allow their child to be evaluated." The district's right to request a hearing was clarified by the 2004 amendments to IDEA.

Several of the *amici* briefs (briefs filed by non-parties in support of a particular side of the argument) argued that the Court find that states may override the default rule placing the burden on the party seeking the hearing and always place the burden on the school district. However, as Maryland had no such regulation in place, the Court declined to rule on that issue.

Policy Implications at the State Level

For now it appears that *Schaffer* will not impact "impartial due process hearings" conducted in Ohio. Like Maryland, Ohio has no regulation regarding the burden of persuasion during these hearings. Further, whether States may put in place statutes, the U.S. Sixth Circuit Court of Appeals, under whose jurisdiction Ohio falls, had

see **BURDEN OF PROOF**, last page

CAFS Program Funds Dry Up;

Overview and Background

The Community Alternative Funding System (CAFS) is Ohio's payment system used to cover specific habilitation services for Medicaid eligible individuals.

The Ohio Department of Mental Retardation and Developmental Disabilities (ODMR/DD), through an inter-agency agreement with the Ohio Department of Jobs and Family Services (ODJFS), operates the Community Alternative Funding System (CAFS), also referred to as the Habilitation Center Program. under a federally approved Medicaid state plan. The approved plan defines the requirements for service delivery and coverage.

The CAFS program pays for day program services for people enrolled on a Home and Community Based Waiver or for people who live in Medicaid MR/DD (ICF/MR) facilities, and therapy services for children in special education classes in Ohio's public schools. As such, there are three main types of CAFS providers currently: county boards of mental retardation and developmental disabilities, public school districts, and some private providers. All CAFS providers are certified by the Ohio Department of Mental Retardation and Developmental Disabilities as Habilitation Centers.

Ohio's CAFS program began in 1989 and was designed as a financing mechanism to "draw down" federal Medicaid money into Ohio to help pay for services which were already being provided by county boards of MR/DD. Since its inception, the CAFS program has paid out nearly $2.5 billion, about $1.5 billion coming from the federal government.

The Ohio program was approved prior to The Omnibus Budget Reconciliation Act of 1989 (OBRA 1989), which included a number of provisions designed to slow the growth in Medicare spending. As a result, Ohio's program was "grandfathered" in. It was then expanded to include services being provided under Individualized Education Plans (IEPs) to some children in Ohio's special education classes, particularly as many county boards transferred school-aged programs back to the public school districts. More recently, the state sought further amendments to its state plan by requesting reimbursement rate changes and the elimination of nutrition services. This request brought the state's plan under scrutiny.

Notice of Non-Compliance

Unfortunately, the federal Centers for Medicare and Medicaid Services (CMS) notified the Ohio Department of Job and Family Services in August 2004 that the state of Ohio was out of compliance in the structure and processes that served as the framework for the CAFS program. Areas of non-compliance cited by CMS include the following specific categories:

Free Choice of Provider: Federal law requires that recipients have free choice of any qualified willing provider. CMS asserted that CAFS services in schools limit the recipient's access to services provided by private providers.

Habilitation Center Certification and Contracting Requirements: CMS stated that providers cannot be required to contract with an entity other than the single state agency (ODJFS) prior to billing for Medicaid services.

Cannot Require Plans of Care for State Plan Services: CMS stated that plans of care such as Individualized Service Plans (ISPs)

Who Pays for Services Now?

or IEPs cannot be a requirement for coverage of Medicaid state plan services.

Comparability- Eligibility Cannot be Limited to Only Those Individuals with MR/DD: CMS stated that states cannot limit state plan services to individuals with a mental retardation or developmental disability diagnosis, nor by disease or condition.

Bundling of Services: CMS stated that states may not bill for services at a bundled rate, such as with Active Treatment & Skills Development and Support (SDS) services, when there is a discrete HIPAA code that can be utilized.

Variations in Rates: CMS asserted that the variation and range in rates was unreasonable.

Service Definitions: CMS asserted that the inclusion of Active Treatment, SDS, delegated nursing and delegated psychology in the State Plan Amendments (SPA) and rules was an unallowable expansion to the program.

CAFS Termination

The compliance concerns raised by CMS resulted in the need to either: (a) substantially expand CAFS, which would require a significant increase in expenditures of state funds, or (b) end the CAFS program. Again, fiscal constraints at both the state and local level made further expansion difficult and resulted in the decision by the state to end the CAFS program effective June 30, 2005. Am. Sub. H.B. 66, the state's FY 2006-2007 biennial operating budget, repealed all statues relating to habilitation centers as well as any direct references to the CAFS program.

School District Lawsuit & Settlement Agreement

The proposed elimination of the program quickly prompted lawsuits from several school districts. A June settlement in the lawsuit, however, effectively ended the legal challenge to the state's plans to eliminate CAFS, which had been found by the Centers for Medicare and Medicaid Services to be in violation of federal laws requiring more standardized payment for and access to services for people with mentally retardation and other developmentally disabilities.

The state previously had come to an agreement involving the Department of MR/DD and local boards and providers on how to fund adult services in lieu of CAFS, which CMS wanted shut down by June 30. Instead, the settlement dealt with services provided to children by about 220 school districts that had tapped into the CAFS funding stream for about $67-million in reimbursements in FY 2005. Under the agreement, schools would have received some $20-million, or about 30% of the old rate beginning in FY 2006.

The settlement also spelled out that the interim "bridge" plan, which would be put in place until CMS approved a long-term reimbursement program for Local Education Agency (LEA)-based Medicaid services, would include funding for occupational therapy, physical therapy, speech and audiology, and psychology services. More services and other details were to be included in the long-term plan. One of the key components of the settlement was its definitions of covered services and the

see **CAFS**, page 6

from page 5: CAFS

requirement that ODJFS pay the highest fee schedule rate for services if more than one applies to a reimbursement submission.

The Ohio Department of Education (ODE) agreed to be a partner with ODJFS in facilitating the implementation of the new program. ODE and ODJFS met with school district representatives throughout the summer to craft both a short-term "bridge plan" and a long-term plan. These two state plan amendments representing the interim and long-term plans for the new Medicaid School Program were submitted on August 1, 2005 for CMS approval.

CMS Rejects Short-term and Long-term Plans

Unfortunately, in November 2005 the Centers for Medicare and Medicaid Services (CMS) denied the State Plan Amendments (SPA) filed for the School Medicaid Program (both short and long term), as not being in compliance with Medicaid requirements, citing the following issues of concern:

(1) the services schools are providing are habilitational in nature rather than rehabilitational;

(2) lack of "statewideness";

(3) comparability of services to all Medicaid eligible children – not just school children;

(4) schools cannot be delegated the authority to make prior authorization for service quantities;

(5) Medicaid fair hearings would have to be held in addition to IDEA due process hearings;

(6) the payment methodology does comply with statutory requirements; and finally

(7) CMS did not believe the state did not provide enough information on the methodology used to develop fee schedules.

CMS had recommended the plans be filed under the Early and Periodic Screening, Diagnosis, and Treatment Program (EPSDT) rather than rehabilitation. Filing plans under EPSDT allows the services to be focused exclusively on children and allows CMS some leeway with issues such as rate and program uniformity ("statewideness"). The schools also requested that the plans be filed under the Ohio Department of Health administered EPSDT, but ODJFS continues to be adamant that it be filed under their current rehabilitation program due to concerns that if it is under EPSDT, it may be more difficult to limit costs.

Service Provision Continues

Meanwhile, despite termination of the CAFS program and corresponding funding, schools are still required to provide services per federal requirements and state statutes under the Individuals with Disabilities Education Act (IDEA). Likewise, those in the county board system that are eligible recipients will continue to be able to access services through other programs.

Consumers who are residents of an Intermediate Care Facility for the Mentally Retarded (ICF/MR) will continue to be able to receive the Active Treatment service through their ICF/MR after June 30, 2005. Likewise, consumers who are enrolled in

see **CAFS**, page 7

from page 6: CAFS

Home and Community Based Services (HCBS) Waivers will continue to be able to receive the Skills Development and Support (SDS) service through certified waiver providers after June 30, 2005.

Those individuals who do not reside in an ICF/MR facility or who are not enrolled on an HCBS waiver may continue to receive professional therapy services through the use of the Medicaid card. These professional therapy services (e.g. OT, PT, Speech/Language) are those currently available to all Medicaid eligible consumers.

For school aged recipients receiving professional therapy services through their schools, the Department of Job and Family Services is exploring short and long term service options in addition to those professional therapy services already available to all Medicaid eligible consumers.

It is important to note, that any individual seeking services from a Medicaid Provider must meet the medical necessity criteria in order for Medicaid to cover the service.

Next Steps and Possible State Response to CMS Denial

The response to the denial from CMS is still being discussed. There are many different avenues being pursued. ODJFS, ODE and the Governor's office have discussed appealing this decision. However, an appeal process is quite lengthy and may not solve the major issues. Currently, ODE is waiting from additional perspective from school district representatives.

The School Medicaid Committee (comprised of statewide association and school district representatives) will be following up with ODJFS regarding filing new State Plan Amendments under EPSDT. This issue is also before the Steering Committee for the initial lawsuit initiated earlier this past spring. As part of the settlement agreement between ODJFS and the participating schools, ODJFS agreed that if filing the plans under the rehabilitative program were denied, they would re-file under EPSDT.

The schools may have to look at further litigation to solve some of these issues. Litigation of course is a costly and time consuming effort, but one that may have to be utilized. At this point, the Steering Committee and its representative school districts are reviewing options.

Conclusion

The close of the CAFS program and the inability to restart it places additional fiscal pressure on special education funding and therefore it is important to stakeholders to encourage the development of new and effective ways to address the problem. This situation compounds special education funding pressures that relate in part to the fact that the state's cost-based special education funding methodology is not fully funded because the weights are funded at 90% and they have not been updated in four years.

A New Year's Resolution...

Resolve to be tender with the young, compassionate with the aged, sympathetic with the striving, and tolerant with the weak and the wrong. Sometime in life, you will have been all of these.

--Lloyd Shearer

from page 3: Burden of Proof

previously decided that the burden of persuasion in these hearings fell on the party seeking the hearing. Thus, the rule announced in *Schaffer* is the current practice in Ohio.

However, the rule in *Schaffer* marks a potential change in the practice found in 24 states, including Florida, California, New York and Pennsylvania, as the First, Second, Third, Seventh, Eighth and Ninth Circuits had either placed the burden of persuasion on school districts or had not previously addressed the issue.

The question that remains after *Schaffer* is whether states may put in place statutes and/or regulations that place the burden of persuasion on school districts, regardless of which party seeks the hearing. Currently, Alabama, Alaska, Connecticut, the District of Columbia, Delaware, Georgia, Illinois, Indiana, Kentucky, Minnesota and West Virginia have some type of provision that always places the burden on the school district. The Court specifically refused to address whether these provisions are valid. Presumably, these provisions are valid and states can act to always place the burden on school districts.

FORUM is published by the Ohio Coalition for the Education of Children with Disabilities (OCECD), 165 West Center Street, Suite 302, Marion, Ohio 43302; telephone toll-free 800-374-2806 (Voice/TDD). Web site **www.ocecd.org**. E-mail **ocecd@gte.net**.

FORUM is printed on recycled paper.

This work is not copyrighted. Readers may duplicate and use any portion thereof. In accordance with accepted publication standards, please give proper credit.

Annual subscriptions are available for $10 for Consumers/Parents/Students; $20 for Professionals/Educators; $30 for Organizations.

Please include your mailing label when notifying us of any corrections or change of address.

Ohio Coalition for the Education
of Children with Disabilities
165 West Center Street, Suite 302
Marion, Ohio 43302

Nonprofit Org.
U.S. Postage PAID
Columbus, Ohio
Permit No. 2315