

EDUCATION, ENERGY, AND THE ENVIRONMENT COMMITTEE

SENATE BILL 926

COUNTY BOARDS OF EDUCATION – DUE PROCESS PROCEEDINGS FOR CHILDREN WITH DISABILITIES – BURDEN OF PROOF

POSITION: SUPPORT

The Youth, Education, and Justice Clinic at the University of Maryland Carey School of Law represents students who have been excluded from school through suspension, expulsion, or other means. Because many of the clinic's clients have disabilities, our legal representation often involves special education matters. **The Clinic strongly supports Senate Bill 926**, which would require a county board of education to bear the burden of proof in due process proceedings that initiate from a due process complaint regarding the provision of special education services. SB 926 would help the families who are most likely to need assistance navigating the complicated world of special education, while not creating any new obligations for the state, school districts, or teachers.

The expense and complexity of due process hearings prevent most families of children with disabilities from vindicating their rights when they disagree with a school about their child's education. School districts are usually represented by counsel¹ and have the further advantage of being repeat players.² To effectively make their argument, families need attorneys and experts.³ Special education attorneys have the expertise to guide parents through a due process hearing. As such, families represented by counsel are more likely to succeed in due process hearings than unrepresented families.⁴

But most families of children with disabilities cannot afford to hire attorneys or experts.⁵ This is significant because students from low-income families are more likely to be identified for special education services than non-low-income students.⁶ Moreover, after they are identified, many low-income students with disabilities are placed in a more restrictive educational environment. A recent study found that low-income students with disabilities are more likely to be placed in substantially separate classrooms (spending

¹ Debra Chopp, *School Districts and Families Under the IDEA: Collaborative in Theory, Adversarial in Fact*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 423, 453 (2012).

² Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1438 (2011).

³ Elisa Hyman et al., *How IDEA Fails Families Without Means: Causes and Corrections From the Frontlines of Special Education* 20 J. GENDER, SOC. POL'Y & L. 1, 111, 141 (2011)

⁴ Chopp, *supra* note 1, at 451.

⁵ Hyman et al., *supra* note 3, at 113; Leonard Wills, *Access to Justice: Mitigating the Justice Gap*, AM. BAR ASS'N (Dec. 3, 2017), <https://www.americanbar.org/groups/litigation/committees/minority-trial-lawyer/practice/2017/access-to-justice-mitigating-justice-gap/>.

⁶ LAURA A. SCHIFTER ET AL, THE CENTURY FOUNDATION, STUDENTS FROM LOW-INCOME FAMILIES AND SPECIAL EDUCATION (2019), <https://tcf.org/content/report/students-low-income-families-special-education/>.

less than 40% of the day in the general education classroom) than their non-low-income peers.⁷ This is one point where race and disability intersect in Maryland: only a third of our State’s Black students with disabilities spend more than 80% of their school day in a general education classroom, compared to 55% of white students with disabilities.⁸ Students placed in substantially separate classrooms generally have less challenging curricula, little to no social interactions with nondisabled students, and worse academic outcomes than students with disabilities placed in general education classrooms.⁹ Thus, the families with the greatest need to challenge their child’s individualized education program (IEP) are usually those least able to effectively do so. The rights guaranteed to children and families by the Individuals with Disabilities Education Act (IDEA) become meaningless if the majority of parents are unable to exercise them and seek meaningful redress.

Placing the burden of proof on the complaining party puts low-income families at an even greater disadvantage. Without legal representation or access to experts, even families with a strong case are likely to lose because their lack of expertise and access to information prevent them from meeting the burden of proof. Shifting the burden of proof to school districts is a common-sense solution because districts have the most access to and knowledge of a child’s educational records.¹⁰ School district personnel trained in special education are much more equipped to explain the standardized testing, classroom observations, and other data that accompany special education decisions.¹¹

Furthermore, school districts have an affirmative responsibility to provide each student with disabilities a free appropriate public education.¹² When a parent challenges the district’s decision, only the district is fully aware of its rationale in making that decision. Therefore, the district—not the parent—is best positioned to identify and explain the factors that led to its decision. The district is best situated to explain the different types of educational programs and services it offers, describe the various educational placements available, and, in the end, explain its decision against the burden of proof.¹³ As a result, the district should be the party required to prove that it fulfilled its statutory obligations under the IDEA.

School districts bear the burden of proof in due process hearings in at least five other states.¹⁴ Connecticut, for example, requires that “in all cases . . . the public agency has the burden of proving the appropriateness of the child's program or placement, or of the

⁷ *Id.*

⁸ DATA DEEP DIVE: STUDENTS WITH DISABILITIES, MD. DEP’T OF EDUC. 11 (Feb. 16, 2023), <https://marylandpublicschools.org/stateboard/Documents/2023/0228/DeepDiveStudentsWithDisabilitiesPart2.pdf>.

⁹ Schifter et al., *supra* note 6.

¹⁰ Thomas A. Mayes et al., *Allocating the Burden of Proof in Administrative and Judicial Proceedings Under the Individuals with Disabilities Education Act*, 108 W. VA. L. REV. 27, 73-76 (2005).

¹¹ *Id.* at 74.

¹² 34 C.F.R. § 300.101 (2006).

¹³ Mayes et al., *supra* note 10 at 75.

¹⁴ CONN. AGENCIES REGS. § 10-76h-14 (2000); DEL. CODE ANN. tit. 14, § 3140 (West 1983); N.J. STAT. ANN. § 18A:46-1.1 (West 2008); NEV. REV. STAT. ANN. 388.467 (West 2015); N.Y. EDUC. LAW § 4404(c) (McKinney 2007).

program or placement proposed by the public agency.”¹⁵ New York, like SB 926, places the burden of proof on the school district, but shifts the burden to families “seeking tuition reimbursement for a unilateral parental placement.”¹⁶

Importantly, there is no evidence to suggest that SB 926 would significantly impact the number of due process hearings that the state must respond to.¹⁷ An examination of two states that shifted the burden to school districts is informative when predicting how SB 926 will affect Maryland. New York, which passed identical legislation to SB 926 in 2007, saw no increase in the number of due process hearings after it shifted the burden of proof to school districts.¹⁸ New Jersey, which passed legislation in 2008 to shift the burden of proof to districts in all due process proceedings, saw a short-lived increase in the number of hearings.¹⁹ However, the number of hearings soon returned to previous levels.²⁰ Based on the experiences of New York and New Jersey, Maryland would likely see little to no impact on the total number of due process hearings.

Additionally, SB 926, if passed, would not require school district employees to change their documentation processes. The bill does not create any new record-keeping requirements and shifting the burden of proof does not change the evidence that a party must provide. Instead, SB 926 merely acknowledges that school districts already have control of the educational records and data at issue in a due process hearing and shifts the burden to the party that has the best access to and knowledge of that evidence.²¹

SB 926 recognizes the many obstacles that families face in their quest to ensure that their children receive an appropriate education. By shifting the burden of proof to school districts, SB 926 takes an important step toward leveling the playing field in due process hearings and allows for decisions based on the entirety of the evidence.

For these reasons, the Clinic asks for a favorable report on SB 926.

This written testimony is submitted on behalf of the Youth, Education, and Justice Clinic at the University of Maryland Francis King Carey School of Law and not on behalf of the School of Law or the University of Maryland, Baltimore.

¹⁵ CONN. AGENCIES REGS. § 10-76h-14, *supra* note 14.

¹⁶ N.Y. EDUC. LAW § 4404(c), *supra* note 14.

¹⁷ FISCAL AND POLICY NOTE, SENATE BILL 926, DEP’T OF LEGIS. SERVS. 3 (March 8, 2023), https://mgaleg.maryland.gov/2023RS/fnotes/bil_0006/sb0926.pdf (predicting SB 926’s impact on the number of due process hearings to be “relatively modest”).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Mayes et al., *supra* note 10, at 73-76.