SUPPORT
SB0926 - Burden of Proof

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A beast of a burden

There is a bill in the General Assembly (HB 1198) to ensure that school systems bear the burden of proof when disagreements with parents over the special education services provided cannot be resolved other than by a due process hearing.

My wife and I live in Laurel with our daughter, Erin. Erin has Down syndrome and has been included in the general education classroom in her neighborhood school since kindergarten. She has thrived in that environment and I think her classmates have benefited from her presence as well.

Ten years ago, however, we had to go to through the legal process of mediation — with the prospect of a due process hearing if mediation was unsuccessful — to make that happen because the school system recommended placement in a segregated classroom in another school. If a due process hearing had been necessary, we would have borne the burden to prove a negative: that the school system had not provided the appropriate supports and services to enable Erin to succeed in her neighborhood school, the same school her brother and sister attended.

In common legal disputes, "burden of proof" is simply the obligation of the party seeking relief to produce evidence to prove its argument. When it comes to special education, disagreements have little in common with typical legal disputes, and nothing is ever simple.

First of all, there is the language of special education, with its acronym-filled vocabulary, that requires a glossary just to communicate. It is not the parents who have come up with this language, yet they are expected to be fluent.

Then there is FAPE, or Free Appropriate Public Education, which is what students with IEPs (Individual Education Plans) are guaranteed. Despite the good intentions behind the word "appropriate" — meant to individualize the education depending on a student's needs — the word is often used in the negative, i.e., "This service (placement, etc.) is not appropriate for your child." Or worse: too many parents have been reminded their child is "not entitled to a great, or even a good education, just an appropriate education."

And then there is LRE, or Least Restrictive Environment. There is an accepted maxim that "special education is a service not a place." Yet disputes can center on where a student receives special education services. The law, IDEA (Individuals with Disabilities Education Act) says that the default placement should be the Least Restrictive Environment, which, whenever possible, is the general education class in the student's neighborhood school.

In special education, the standard notion of burden of proof is flipped on its head: despite the fact that in the majority of due process cases parents are the party seeking relief, parents have limited resources and access to proof. Simply put, parents bear the burden while school systems have the proof. That is why it is unfair for the legal burden of proof to be on parents.

In its 2005 Schaffer v. Weast decision, the Supreme Court was not trying to be unfair. Its "in the absence of a state statue or regulation" language clearly meant for states to decide the burden of proof in due process. New York and New Jersey have already acted — both passed burden of proof laws like HB 1198 after Schaffer-Weast. By passing HB 1198, our legislators have an opportunity to tell the Supreme Court and the nation that Maryland, the "leader in education," will lead by doing the right thing.

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More work needed toward workplace equality

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