



Testimony of Support

Due Process Proceedings for Children With Disabilities

Burden of Proof, SB 0926

By Howard County Autism Society

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The Howard County Autism Society is supportive of legislation proposed to shift the burden of proof in special education due process cases from the parents to the school system. According to IDEA, the school district has the professional capacity and legal responsibility to develop and implement a student's Individualized Education Program (IEP) as part of the child's entitlement to a free appropriate public education (FAPE). In cases where families and the school district disagree on the provision of FAPE by the school district, county school districts like HCPSS should bear the burden of proving that the proposed program is appropriate for the student. Assigning this responsibility should not put a strain on the school system considering that its employees developed the IEP.

The reality is that the majority of parents are simply unable to afford counsel, and may have difficulty paying to retain expert witnesses needed to challenge their child's program, something they are entitled to do under federal law if they disagree with any aspect of the program offered by the school district or any action refused by the district. Many parents proceed *pro se* (without legal representation) at IDEA administrative hearings. The school district, however, is virtually always represented by counsel at such hearings. The school district's counsel is familiar with the procedural and substantive requirements of IDEA, as well as the concepts of "burden of proof" and the mechanisms used for coming forward with evidence to meet that burden. Placing the burden of proof on a *pro se* parent also creates a significant risk that an inadequate IEP will nonetheless be upheld, defeating the IDEA's statutory mandate of providing a free appropriate public education to all children with disabilities.

Additionally, the IDEA administrative hearing process provides only limited access to information. Parents cannot engage in the full range of discovery options that are available during a court trial. This has serious

implications for parents attempting to protect their child's statutory right to a free appropriate public education. The school system has a great deal of information that may be presented in the form of testimony or in documents that the parent may receive only five days before a hearing. In the face of this information imbalance, having a parent have to face a school system lawyer at a hearing in order to exercise the parent and child's disagreement with a school-system proposed action, a statutorily-granted right, is a David and Goliath scenario, but it happens repeatedly. In Maryland, Goliath almost always wins, even when the parent is represented.

Because IDEA assigns primary responsibility for developing the educational program to the school district, the school district should have assembled the requisite evaluations and other supporting data and presented them at the IEP meeting at which the proposal was made. To the degree the school district prepared such materials for the IEP meeting, there should be little additional burden for the district to assemble those materials and present its rationale in order to persuade an impartial factfinder that it has met IDEA's substantive requirements. Having failed to persuade the parents of the merits of its position, as the IEP team process hopes for, the school district is entitled to set forth its own proposal at a hearing, but the district should bear the burden of proof. If school districts are not required to justify their proposals at a hearing when they have failed to achieve a consensus at the IEP meeting, it will only encourage them to give short shrift to the IDEA's parental participation requirements and procedural protections. The ultimate result is that children with disabilities will be deprived of educational programs that reflect the important input of the parents who know the child best.

There is no harm to school districts from requiring them to bear this burden in order to reinforce and protect parents' procedural rights and involvement in developing the IEP. Since the school district is expected to support and justify its proposals it makes in meetings with parents, who are equal members of the IEP team, the school district should *already* be prepared to present that very same information to and persuade a neutral fact-finder.

For these reasons, the Howard County Autism Society supports the proposed legislation.

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