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## **FAV – TESTIMONY IN SUPPORT S0926**

County Boards of Education – Due Process Proceedings for Children with Disabilities – Burden of Proof.

I first advocated for a burden of proof bill in 2011, at a priorities hearing before my county's delegation; I continued for several years afterwards when bills were introduced in Annapolis. And even though my child has graduated, this bill still matters very much to me as a matter of fundamental fairness and equity. I have seen first-hand, I *know*, the difference in a life between having a genuinely appropriate public education under IDEA and not. I support this bill because our current system *is too hard for parents, especially parents who aren't attorneys and can't afford one.*

Before I address the importance of this bill to Maryland's most vulnerable children and their families, especially lower income families, I'd like to address the unsubstantiated speculation I have heard over the years about shifting the burden of proof, speculation you'll undoubtedly hear this session. Those who oppose this bill, who want to maintain their unfair power over parents and the system, have repeatedly claimed shifting the burden of proof will cause a big increase in due process hearings. And yet, they have failed to provide any evidence that it's true (indeed, this claim is contradicted by the current and past fiscal notes). In contrast, the Maryland General Assembly has, over the years, been provided with data – by me and others - *demonstrating just the opposite.* New York (*with* the support of the New York teacher's union) and New Jersey are among several states with burden of proof bills. In the years immediately following passage of their bills, neither New York nor New Jersey saw an increase in the number of complaints filed. In fact, New Jersey had fewer complaints, New York about the same number, and both New Jersey and New York experienced a *decrease* in the number of due process hearings.

I have often heard opponents claim that putting the burden of proof on the “non-moving” party is antithetical to legal doctrine. That is false. While it is true that in most cases the burden is on the moving party, speaking as an attorney who practiced law for a decade, and then taught for over another decade, the reality is that in certain circumstances, when justice and fairness require it, the burden belongs on the nonmoving party. This is one such situation. It is unjust in due process hearings to have the burden on the moving party because it almost always ends up being on the parents, because each year a child gets a new IEP that, with a few exceptions, takes effect even over the parents' objections, and if the parents object, *they* bear the burden of proving the *district* violated *its* mandate

Schools are required by federal law to provide a free appropriate public education to students with disabilities. To achieve that, they are also required to work with parents to develop IEPs for those students. When disagreements arise, they are usually resolved in IEP meetings or mediation. And if these alternatives don't work, parents may request a due process hearing.

Both the prospect of due process, and the due process hearing itself, exist to hold the school district accountable to parents and meet the IDEA's requirements. In order to achieve this (to quote the late Justice Ginsburg), "policy considerations . . . and fairness call for the assigning of burden of proof to the school district . . ." *Schaffer*, 126 U.S. at 63 (Ginsburg, J., dissenting). The school district has superior access to critical information. The district, "familiar with the full range of educational facilities" and how similarly situated children have fared at them, is in a far better position to demonstrate compliance. *Schaffer*, 126 U.S. at 64 (citations omitted) (Ginsburg, J., dissenting). Schools also have the education and legal knowledge (lawyers), staff, funding, and access to experts, outside lawyers, and other resources. Finally, and critically, due process forces parents to ask principals and teachers to testify against their employers.

In stark contrast, parents are limited in resources, knowledge of their options, and access to experts and attorneys. **This is especially true for families who can't afford lawyers and experts.** And because of the nature of burden of proof, there have even been due process hearings in which school districts have not provided **any** evidence in support of the IEP they created - yet still won.

This inequity is very real. **A Maryland school district is 3x more likely to win than a parent, thus severely undermining the accountability of Maryland school districts to their children and families.**

(<https://www.baltimoresun.com/maryland/howard/cng-ho-burden-of-proof-special-education-hearing-20230217-5w2fp7ahwbhizp54vdekdtrjta-story.html>) (Between 2018-22, Maryland parents prevailed only about 26% of the time).

For parents without attorneys, it's worse: **Maryland parents without attorneys won zero due process cases in the last five years.**

(<https://www.baltimoresun.com/opinion/readers-respond/bs-ed-rr-special-education-burden-letter-20230304-4drmwtr6zb6rlopoksrvdaxiy-story.html>)

Finally, it is extremely disappointing that MSEA continues to oppose this bill instead of supporting our most vulnerable children. Especially when, as I have recently been informed, while MSEA points to the Blueprint as a reason to oppose the bill, *the State Superintendent of Schools, Mr. Choudhury, has apparently decided to resist the Accountability and Implementation Board's creation of a special education workgroup.*

**Moreover, MSEA's opposition stands in stark contrast to the New York teachers union, NYSUT,** which recognized the injustice of saddling special education parents with the burden of proof and advocated with parents in New York to pass its bill.

**As explained by the NYSUT in 2007 when New York enacted its burden of proof law:**

**"This corrects an injustice. It is unfair to put this burden on parents, especially those who do not have the financial means to hire an attorney and navigate the special education hearing process,"** said NYSUT Executive Vice President Alan B. Lubin, who thanked state Sen. Andrew Lanza, R-Staten Island, and Assemblywoman Cathy Nolan, D-Queens, for sponsoring the bill. "And, we applaud the governor for signing it."

"NYSUT Vice President Maria Neira noted the 585,000-member union worked with a coalition of more than 30 organizations - including the New York State Association for Retarded Children; Parent to Parent of New York; New York State Independent Living Centers; Cerebral Palsy of New York State and Disability Advocates - to convince the Legislature and Governor to approve the bill.

**"This is another example of how parents and teachers, working together, can form strong partnerships and accomplish great things for schoolchildren,"** Neira said. "Now, when there is a disagreement between school districts and parents on educating children with special needs, parents know they have a seat at the table and can advocate for their children without worry."

<https://www.nysut.org/news/2007/august/nysut-applauds-governor-for-signing--burden-of-proof--legislation> (emphasis added)

Maryland can be a national leader in disability rights in education by doing the right thing and passing this bill.

Thus, I respectfully request a favorable report for this bill.



Julie Reiley

*Former Positions and Honors:*

Maryland PTA Lifetime Achievement Award (2014)\*

MCCPTA Special Education Outstanding Parent Award (2012, 2020)\*

MCCPTA Special Education Committee Chair, Vice Chair and member (former)\*

Special Education Chair Westbrook PTA, Westland PTA, Walter Johnson PTSA (former)\*

Special Education Advisory Committee (SEAC) Co-chair (former)\*

Professorial Lecturer in Law, George Washington U. Law (2005-2016)\*

**\*The views expressed here are entirely my own.**