

Education Advocacy Coalition for Students with Disabilities

HOUSE WAYS AND MEANS COMMITTEE

HOUSE BILL 294: EDUCATION—DUE PROCESS PROCEEDINGS FOR CHILDREN WITH DISABILITIES— BURDEN OF PROOF

DATE: FEBRUARY 8, 2023

POSITION: SUPPORT WITH AMENDMENT

The Education Advocacy Coalition for Students with Disabilities (EAC), a coalition of approximately 40 organizations and individuals concerned with education policy for students with disabilities in Maryland, supports House Bill 294 if it is amended to place the responsibility on school systems of bearing the burden of proof in all special education administrative proceedings.

Parents of children with disabilities face a number of barriers to the effective exercise of the rights granted to them and their children by federal and state special education laws. Families with children who have disabilities are poorer than those whose children do not have disabilities, and they are often unable to afford attorneys and needed experts when they disagree with any aspect of a program or service offered by, or refused by, their school system. As a result, if they are even able to navigate the thicket of procedures to exercise their right to a due process hearing, a number of parents proceed to these hearings without counsel, even though the school district is virtually always represented by counsel who is well-versed in the procedural and substantive requirements of the Individuals with Disabilities Education Act and Maryland special education law, including the production of evidence and the concept of burden of proof. Further, the school system's witnesses are generally considered to be experts in their fields, making it extremely difficult for parents who ask for a hearing to prove that the school system has failed to fulfill its obligation to their child.

Parents and guardians may not fully understand that bearing the burden of proof means that they must introduce sufficient evidence through documents and witnesses to make their case; failure to do so could mean that their case could be dismissed before the school system even has to call a witness. Even if parents have a strong case, they could lose simply because their inexperience and lack of knowledge of the law prevented them from successfully carrying the burden of proof by skillfully eliciting the required level of evidence.

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 who are attempting to protect their children's 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 the hearing. In the face of this information imbalance, requiring parents to bear the burden of proof creates a David versus Goliath scenario but in Maryland, Goliath almost always wins, even when the parent is represented by counsel.

Because the school district developed the proposal at issue, because the IDEA assigns primary responsibility for developing the educational program to the school district, because the school district should have previously assembled the relevant evaluations and other data supporting its position and

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presented them to the parents at an IEP meeting at which the challenged proposal was made, and because the school district has built-in experts in the form of its teachers, therapists and administrators, there should be little additional work for a school district to assume the burden of proof in a due process hearing. The United States Supreme Court has noted that school authorities are required "to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S.Ct. 988, 1001 (2017). If school districts are not required to justify their proposals at a due process hearing when they have failed to achieve consensus at an IEP meeting, they will only be encouraged to give short shrift to the IDEA's parental participation requirements and procedural protections. In fact, this happens repeatedly in Maryland districts when parents disagree with IEP teams and are told "So take us to a hearing" by IEP team members who know that parents will face an uphill battle to make their case.

School districts will not be harmed by bearing the burden of proof. In 2017, the Maryland General Assembly placed the burden of proof on school districts in situations in which the IEP team proposes to include restraint or seclusion on an IEP or when the team proposes to move a student off the diploma path, to the alternate assessment, or to non-credit bearing classes. The floodgates have not opened and school districts have not been prejudiced in any way by bearing the burden in these instances.

House Bill 294 proposes to shift the burden to school systems except when parents are seeking reimbursement for the unilateral placement of their child. This exception makes an unfair distinction between parents and is not rationally justifiable. All parents who seek due process hearings are attempting to protect the rights they and their children have in the special education process. For this reason, the EAC supports House Bill 294 if it is amended to strike the exception.

Respectfully submitted,

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The Maryland Education Coalition joins this testimony.

The Public Justice Center joins this testimony.