

"Federation Corner" column  
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### **Legislation to shift Burden of Proof in Special Education Due Process cases**

by Jeanne Taylor

MCCPTA Special Education Committee Chair and mother of 3 Special Needs children

For the second consecutive year, parents of special needs children and advocacy groups will be testifying before the Maryland General Assembly in support of legislation that would shift the burden of proof in special education due process hearings. If passed, Senate Bill 779 and House Bill 1198 would assign the burden of proof in special education due process cases to the local school districts.

Under the Individuals with Disabilities Education Act (IDEA), public schools are required to provide a free, appropriate public education (FAPE) for children with disabilities. Under the IDEA, each child who receives special education and related services must have an Individualized Education Program, or "IEP". The IEP is a legal document that is developed to describe the educational plan that has been designed to meet a child's unique needs. The IEP is developed by the school team and is controlled by the local school districts. While parents are invited to the meeting, they have no authority, and cannot make changes to the document.

When parents and local school districts can't agree on those needs, resolution can lead to a due process hearing before an administrative law judge where the burden of proof is on the disputing party, most often the parents or legal guardians.

Unfortunately, special needs families are at a huge disadvantage in the special education process, and this is especially true of special education disputes. One of the biggest challenges is that a new IEP goes into effect every year, *even if the parents/guardians disagree with it*. So, for example, if the school decides to eliminate services during the annual IEP, or change the student's school, the only option is for parents to initiate a due process hearing, in which case the parents bear the burden of proof.

Because parents typically lack the resources, expertise, and legal skills needed to navigate a legal proceeding, advocates for children believe that schools are in a better position to demonstrate their compliance with special education law than parents are to disprove it.

Effectively challenging an IEP is extremely difficult. Rules of evidence, procedure, the entire legislative scheme of the Individuals with Disabilities Education Act, the Americans with Disabilities Act, the Rehabilitation Act, civil rights law, state education law, state administrative law, legal ethics, state and federal rules of civil procedure, and appellate law all come into play. While attorneys for the school system fully understand this territory, the average parent (special needs or otherwise) has no training in these areas.

Proponents of the bills point to other reasons for shifting the burden of proof: school districts know what services, staffing, modifications, accommodations and placements are available, and how different children have fared with them. School districts also hold students' educational records and employ the people, such as teachers and principals, on whom the parents must rely for testimony in hearings.

Those who support the proposed change would like to see Maryland law follow other states like New York and New Jersey which shifted the burden of proof to the school system. Currently, school districts in Maryland can move (and have moved) for cases to be settled in their favor, without having to produce any evidence that the IEP provides the services that federal law requires.

Lastly, if the burden of proof is shifted to the school districts, the IEP process will become more collaborative and cooperative. As a result, the number of disputes between parents and schools will decrease. In the

end, placing the burden of proof on schools will promote accountability and lead to more correct outcomes for special needs children. The ultimate goal is to improve educational results for children with disabilities.

### **The Opposition**

Although there are several reasons to support the proposed legislation, opponents contend that the new law will increase the amount of record keeping for both special and general education teachers. Although this assertion has no basis in fact--the proposed legislation cannot change the requirements of the IDEA--the authors of the bill have included language to assuage those fears. In short, the new law is not intended to change specified record keeping requirements, or what constitutes a free and appropriate public education under federal law.

Opponents also maintain that the bills are backed by wealthy parents who are interested in obtaining non-public placements for their children. In some cases, when a child has very complex needs, the local school district may be unable to provide FAPE for students covered under the IDEA. When this occurs, the school district is responsible for paying for the non-public placement. The Maryland State Department of Education (MSDE) recognizes that these placements are an important part of providing a continuum of services for children with disabilities. According to MSDE, in FY2013, only five out of nineteen due process cases involved non-public placements.

### **The Supporters**

Child advocacy groups counter that shifting the burden of proof is warranted because it is typically low income parents who do not have the resources to advocate for their children. Last year the Maryland PTA testified in support of the proposed legislation for that very reason. When parents attempt to represent themselves, school districts can successfully move to dismiss the case or move for judgment because parents fail to understand the legal requirements. In these situations, decision is based upon the parent's failure to meet the burden of proof, not upon the appropriateness of the IEP. As a consequence, the child's needs may go unmet.

Advocates also point out that the special education dispute process can be so overwhelming and adversarial that many parents end up pulling their children out of the public school system. Some make a huge financial sacrifice by paying for special education private schools, and still others resort to homeschooling their children with special needs. These remedies go against the legacy of the IDEA--that all children with disabilities are entitled to a free, appropriate public education.

For more information on Burden of Proof go to [www.burdenofproofmd.org](http://www.burdenofproofmd.org)

*The views expressed in this column do not necessarily reflect formal positions adopted by the Federation. To submit an 800-1000 word column for consideration, send as an email attachment to the [montgomerycivic@yahoo.com](mailto:montgomerycivic@yahoo.com)*