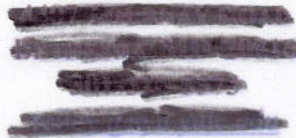


Julie Reiley Testimony in Support of
SB779 and HB1198

JULIE REILEY



Support SB779 and HB1198

Burden of Proof on School Districts in IDEA Special Education Due Process

My child has received special education services in Maryland for several years. Over the years, he's received some wonderful services. In addition, I have been honored to serve as the PTA Special Needs Liaison at my son's schools, a member of the MCCPTA Special Education Committee, and a SEAC Co-Chair in Montgomery County.

However, I have also encountered challenges along the way. Challenges that first brought me to advocate before my county's delegation over three years ago, to place the burden of proof on school districts in special education due process.

When my son was in the Preschool Education Program (PEP), my husband and I arrived at an IEP annual review and were told, out-of-the-blue, that he would be placed in a more restrictive setting. Because parental consent is not required to change or eliminate a child's services at an IEP annual review, we were told we must: (1) *accept this placement **sight unseen***; (2) *forego all of his special education services*; or (3) *proceed to mediation / due process*. Stunned, we chose mediation / due process. I was an attorney, so I represented my son.

The burdens preparing for the hearing were huge. I had to familiarize myself with federal and state law and procedures. I had to write a complaint, detailing how the district's actions failed to comply with the IDEA (schools districts may have insufficient complaints dismissed without a hearing). I had to gather information and prepare witnesses.

Then came the denials. The district denied me the right to speak to my son's educators about his IEP, or anyone in the school district except its attorney (who didn't ever speak personally to me). The district denied my request to observe the placement, stating I had no such right in due process. The district also denied much of my document request under COMAR, including instructional materials necessary to understand - and explain to the hearing officer - whether the placement was appropriate for, and would suitably challenge, *my* child. I was forced to file an emergency motion to compel to explain to the hearing officer why these denials violated my rights and my son's. While we resolved the dispute in mediation before any hearings, my take away was this:

The school district engaged in aggressive tactics aimed at making it impossible for me to meet my burden of proof and make a meaningful presentation to the hearing officer. If it was this hard for me, what is it like for parents who aren't attorneys, and can't afford one?

Fast forward a few years. It's late October when I learn my son is receiving a tiny fraction of the resource hours his IEP indisputably required. When I met with the principal, he refused to comply with

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the IEP. He offered a larger fraction of the hours, and if I didn't take it, I could sue, I had due process. The thought of going through all that again - *plus having the burden of proof* - was too much. I caved in. I accepted less than my son needed.

While this is my personal story, it is rooted in both (1) school districts' ability to change or eliminate services in an IEP annual review without parental consent, and (2) the overwhelming advantages school districts have over parents in due process. School districts have full access to therapists, teachers, and educational experts, records, instructional materials and placements – including how similarly situated children have fared at them. In stark contrast, parents do not have the same access to experts, instructional materials or records, do not know how different children have fared at different placements, may be denied access to the placement themselves, and are routinely expected to ask teachers to testify against the wishes of their supervisors, *all while bearing the burden of proof*. See generally *Schaffer v. Weast*, 126 U.S. 49, 63-67 (2005) (Ginsburg, J., dissenting).

This does not even address the issue of parents who cannot manage the significant financial burden of an attorney, but are expected to litigate a case against the school district's experienced lawyer. See generally, <http://www.burdenofproofmd.org/background-and-burden-of-proof/>. Clearly, there is a canyon between the IDEA as written and its practical application in due process, a canyon made wider and deeper when parents bear the burden of proof.

Opponents have pointed to *Schaffer v. Weast*, ignoring both Justice Ginsburg's dissent and the Court's judicial mandate to interpret statutes narrowly. They seem to believe the Supreme Court should have the final say on how Maryland addresses this issue, as if we in Maryland cannot do what's best for our state. We can. This body is tasked with legislating in the best interests of Maryland's citizens, and passing this bill would do just that.

Concerns have been raised about increased paper work for teachers. Even if that were the case, keeping this unfair burden on parents is not the answer. However, *a close look at the law and an independent analysis by the New Jersey PA show these concerns do not bear out*. See also handouts, <http://www.burdenofproofmd.org/background-and-burden-of-proof/>. Moreover, SB 779 and HB1198 themselves address these concerns: They do not change record keeping requirements, nor what constitutes a free appropriate public education. Finally, teachers benefit when students are more consistently, properly, placed, served, and supported, especially as more children with unique and diverse needs are educated inclusively. Perhaps most compelling, New York and New Jersey had the burden of proof on school districts before *Schaffer v. Weast*, and they took it back.

To quote the NYSUT when New York enacted its 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." <http://www.nysut.org/news/2007/august/nysut-applauds-governor-for-signing--burden-of-proof--legislation>

Maryland is a leader in education. Let's make Maryland a leader in special education civil rights.

THE MARYLAND COALITION FOR SPECIAL EDUCATION RIGHTS & BURDEN OF PROOF

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Background and Burden of Proof Nuts & Bolts

Burden of proof is the obligation to prove allegations presented in a legal action. Since *Schaffer v. Weast*, the burden of proof has been on Maryland *parents* when they request a special education due process hearing. In Maryland, because schools can change IEPs without parental consent in annual reviews, this means it's almost always parents who request due process, and parents who almost always bear the burden of proof in due process.

THIS ISN'T FAIR – which is why several states place the burden of proof on school systems (NJ, NY, NV, CT, IL, DE-with some variations):

The SCHOOL DISTRICTS HAVE SIGNIFICANT ADVANTAGES IN DUE PROCESS:

- School systems have full access to records, teachers, educational experts, therapists.
- School systems are almost *always* represented by counsel.
- Federal law imposes an affirmative obligation on school districts to provide an appropriate education to children.
- School systems have an obligation to provide the tools and processes necessary for an appropriate education and should be required to prove the effectiveness of their actions.

PARENTS HAVE SIGNIFICANT DISADVANTAGES:

Parents don't have the same access to documents and experts and school information

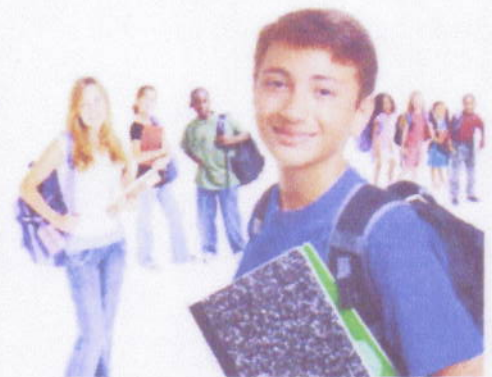
The IDEA does not provide pre-trial discovery – parents have no right to interview teachers and other school professionals in advance—yet school systems have access to all of this because they employ the people who will testify at hearing!

Many parents are unable to afford an attorney or experts- schools already have them; parents often can't afford the testing or evaluations while school districts employ therapists and other educational experts.

What is the Impact of Maryland's CURRENT Burden of Proof on Maryland's Families?

Schools "win" cases while presenting little or NO evidence in support of the IEP; this tends to happen when parents can't afford an attorney, and represent themselves – **thus Maryland's lower income families are hit hardest under the current burden of proof.**

Families of children with disabilities have dramatically higher rates of poverty and are less educated than the population as a whole, and thus far less likely to prevail against a school system.



For more information:

- [Burden of Proof in Special Education Due Process Single Fact Sheet](#)
- [Burden of Proof in Special Education Due Process Packet](#)
- [Burden of Proof – Fair to Children, Parents, and Teachers](#)
- [NJ Public Advocate White Paper on Burden of Proof](#)
- [MCCPTA Resolution on Burden of Proof in Special Education](#)
- [Open Letter to Maryland's Teachers – Burden of Proof in Special Education Due Process](#)
- [Schaffer v. Weast, 546 U.S. 49 \(2005\)](#) (under IDEA burden of proof in due process is on party seeking relief unless the state has its own law)

- Parish, Rose et al., *Material Hardship in U.S. Families Raising Children with Disabilities*, (Council for Exceptional Children, Vol. 75, No. 1, pp. 71-92 (2008)).

What is the Impact of Maryland's CURRENT Burden of Proof on School Systems?

Currently, Maryland school systems win 91% of special education cases

- *Maryland State Department of Education, Special Education/ Early Intervention & Complaint Investigation and Due Process Branch, Hearing Decisions, 2011.*

Currently, "Placing the burden on parents . . . poses significant roadblocks to students with disabilities to obtain appropriate educational services"

- *National Council on Disability Position Statement IDEA Burden of Proof: On Parents or Schools? p. 4 (August 9, 2005).*

WHAT WAS THE IMPACT OF PLACING BURDEN OF PROOF ON SCHOOL DISTRICTS IN OTHER STATES?

There's been no "Rush to the Court House" in NY and NJ!

New York and New Jersey both passed burden of proof bills after *Schaffer v. Weast* was decided.

- *Schaffer v. Weast* was a case that put the burden of proof on the party seeking relief – typically parents – unless states chose to have their own laws otherwise.

NY and NJ were the two most litigious states in the US when it came to due process

AND YET NY and NJ both saw *decreases* in cases that went to hearing after their respective state legislatures placed the burden on school systems.

New York State Education Department Annual Performance Reports, www.nysed.gov (available upon request); New Jersey: <http://www.directionservice.org/cadre/pdf/NJ%2008-09.pdf>

Shifting Burden of Proof in Special Education Due Process Fair to Children, Parents, and Teachers

Placing the burden of proof in special education due process cases on school districts instead of parents, recognizes that school districts are far better equipped to bear that burden than parents.

"Placing the burden on parents . . . poses significant roadblocks to students with disabilities to obtain appropriate educational services," *National Council on Disability Position Statement, IDEA Burden of Proof: On Parents or Schools? p. 4 (August 9, 2005).*

Concerns have been raised about the impact that shifting the burden of proof to school districts may have on Maryland's special education teachers. **However, a close look at the law, and an independent analysis, dispel these concerns:**

Parents remain bound by the IDEA; thus, shifting the burden will not allow parents to sue for "any" reason.

- The IDEA – *federal law* – specifies the circumstances under which a parent may file a due process claim. See generally, *Special Education Rights*, the Maryland Disability Law Center (2008) <http://www.mdciaw.org/wp-content/uploads/2010/02/pub-special-ed-handbook-Sept-2009.pdf>
- The IDEA requires parents to write a complaint that meets certain requirements, and allows school districts to ask the hearing officer to dismiss the complaint if it fails to meet these requirements.
 - See generally MSDE Guidelines for Special Education Mediations and Due Process Hearings <http://www.montgomeryschoolsmd.org/departments/specialed/resources/guidelines.pdf>

Shifting burden of proof does not change these requirements

Instead of a rush to court, New York and New Jersey saw *decreases* in hearings after their respective state legislatures placed the burden on

school systems post *Schaffer v. Weast*.

- New York State Education Department Annual Performance Reports, [www.NYSED.gov](http://www.nysed.gov) (available upon request); New Jersey: <http://www.directionservice.org/cadre/pdf/NJ%2008-09.pdf>

Shifting will not require more paperwork if IEPs already comply with the IDEA.

Members of the teacher's union have opposed this civil right and seek to keep the burden of proof on parents, incorrectly claiming shifting it will cause them more paperwork.

- If an IEP is challenged in due process, "[a] mere presentation of the already documented plan and progress should be sufficient to carry the burden of proof if the challenged IEP is truly adequate." See New Jersey Department of the Public Advocate, Division of Disability Advocacy, *Allocation of Burden of Proof in Special Education Due Process Hearings* at 13-14 (2007)(emphasis in original) http://www.edlawcenter.org/oldsite/ELCPublic/elcnews_070418_RecentReport.pdf

In fact, the New York teachers' union worked with parents as active proponents of the New York law placing the burden of proof on school districts; New York schools had held the burden of proof before Schaffer v. Weast, and the union welcomed it back, recognizing the burden was too much for parents, but completely fair for them:

<http://www.nysut.org/news/2007/august/nysut-applauds-governor-for-signing-burden-of-proof-legislation>

Please click [here](#) to view see our Frequently Asked Questions.

[1] The burden is on the parents year after year because schools can change an IEP from year to year without parental consent, thus when the parents disagree, they bear the burden.