

Connecticut School Attorneys Council

c/o CABE
81 Wolcott Hill Road
Wethersfield CT 06109
860-571-7446 / FAX 860-571-7452

TESTIMONY

On behalf of the Connecticut Council of School Attorneys (COSA), I would like to speak in favor of Raised Bill 5425, Section 3, which would amend Connecticut General Statutes § 10-76h(d)(1) to place the burden of proof on the party requesting the hearing in a special education dispute. First, it is worth noting that this would effectively place the burden of proof on the school district in any case where the school district initiates the hearing request, in addition to placing the burden on the parents, guardians, or DCF in cases where the parent or guardian initiates a hearing. The number of cases in which school districts initiate hearings is not an overwhelming percentage, I am sure, but it does impact those cases in which the school district is required to initiate a hearing under the Individuals with Disabilities Education Act (IDEA) to defend an evaluation when it makes a decision to deny a parent's request for an independent educational evaluation (IEE) or where, as required by state law, the school district's recommendation is for an out-of-district placement for a child with a disability, but the parent or guardian does not consent to such a placement. The burden of proof would also continue to reside with the school district in cases where the district initiates a hearing to obtain a hearing officer's order changing the student's placement for a period of 45 school days in disciplinary cases where the student with a disability has violated the code of conduct and the violation is

deemed a manifestation of the child's disability, but the district contends that the student poses a danger to students or staff at the school.

According to extensive research conducted by the Connecticut Association of Boards of Education (CABE), Connecticut is one of only 2 states in the nation that have not adopted the IDEA preference for placing the burden of proof on the moving party, following the United States Supreme Court decision in *Schaffer v. Weast* in 2005. Forty-eight other states either had that as the rule prior to the Supreme Court decision or adopted that rule following the Supreme Court's decision. We have not heard reports coming out of these other states that parents are at any significant disadvantage following the adoption of that rule.

Casting a vote in favor of this provision does not cast a vote against children with disabilities or parents of children with disabilities. This is about the proper allocation of the burden of proof in American jurisprudence. As noted by the United States Supreme Court, in the absence of some compelling reason, the burden of proof is placed on the party who brings the action to prove his or her case. Each of the reasons advanced by the parent advocacy community, most notably that the information is in the hands of the school district and therefore it is "only fair" that the school district hold the burden of proof, has been rejected by the United States Supreme Court. This argument was rejected because parents have the right to obtain copies of all documentation associated with their child's educational program, and they have the right to an independent educational evaluation of the child by an independent expert, at public expense. That expert, if he or she renders an opinion in favor of the position of the parent, can be called by the parent as a witness in any subsequent due process hearing, and if the parent prevails in the hearing, payment for the witness' expert testimony is a compensable cost paid by the school district as part of the prevailing party's attorney's fees and costs. In our experience,

there is no shortage of evaluators ready, willing, and able to provide this service to parents and children with disabilities in this state.

Casting a vote in favor of this provision is a vote in favor of public education, and in favor of Connecticut's school districts. The current system imposing the burden of proof on the school district in every case leads to longer due process hearings and higher costs in every case that proceeds to a hearing. Knowing that it has the burden of proof, the school district must almost always trot out the full panoply of witnesses to defend every aspect of a child's Individualized Educational Program (IEP), often in response to a broad allegation that the child's program "does not offer a free appropriate public education". There are often between five and ten people in each case involved in providing services to the child, and the school district must present testimony from each witness, subject to cross examination by parent counsel each time. Full due process hearings that include testimony from parents, parent experts, and school district witnesses often take up 10-12 days of hearings over the course of many months. Some hearings have exceeded 20 days and have lasted well over a year. While these hearings are going on, district administrators and staff are diverted from the business of educating not only the student at issue in the hearing, but many other students as well. This has an impact on the quality of the educational programming provided to other children with and without disabilities. The Supreme Court expressed dismay that in the information presented to them, a due process hearing could cost \$8,000 to \$12,000. We estimate the average cost of a due process hearing in Connecticut at many times that number; the district's legal fees alone are often in the range of \$20,000 to \$30,000, and the parents' legal fees are usually more in the range of \$50,000 to \$75,000. Most districts can little afford the significant resources needed to adequately defend these cases, both in terms of attorney's fees and staff time, resources, and attention. While the allocation of the burden of proof is certainly not the only factor in this result, it is a significant contributing factor.

Diverting resources into the hearing process necessarily diverts those resources away from improving instruction, paying teachers, providing professional development, training teachers in newer and more effective methods of instruction, and improving outcomes for all students. In these challenging economic times, most school districts in the state would have to make a choice between hiring another teacher (or saving a teacher's job), and setting aside money in the budget to defend a due process hearing, especially factoring in the high costs of potentially having to pay the parent's attorney should the family prevail in the hearing.

The monumental costs associated with special education litigation have another, certainly unintended consequence in this state. Settlements of special education disputes increasingly shift education funding dollars away from public education to private schools, where parents who are able to commit significant resources to private school education are able to unilaterally place children, and then sue the school district for reimbursement of the costs. Even if the school district believes that it has provided good services to the child at issue, the district often chooses the less expensive path of settlement, rather than the expensive and resource-consuming path of litigation. The dollars for these settlements come out of each town's education budget, and go directly to funding expensive private schools, many of which are not even approved by the state for the purpose of providing special education programming. If the school district agrees to make the placement advocated by the parents through the IEP, then part of the cost is passed back to the state to fund through the excess cost reimbursement grant. If the Committee is looking for a concrete step to take in the direction of limiting or reducing the excess cost reimbursement budget, this is one such step that will help to realign the hearing process and bring such costs under control.

Shifting the burden of proof to the school district in every case in Connecticut has had another, perhaps unintended, consequence that was noted by the Supreme Court in its decision.

It intensifies what is already an adversarial process, making it the presumption and the prevailing attitude that the teachers are not providing adequate services, that their expertise is suspect and subject to challenge by experts outside the school system. One hearing officer's decision some years ago reflected this back to the parties by stating that the district, who had submitted the testimony of its teaching staff in support of its program, "presented no experts" while the parents had presented "expert testimony". The world of special education is increasingly an emotional battlefield, where every person on the field believes that he or she represents the position that is in the best interests of the children. Shifting the burden of proof away from the party bringing the hearing request to the school district in every case only intensifies the adversarial nature of this process by immediately putting the teachers in a defensive posture. This is not where you want teachers to be when you want them to put forth their best efforts on behalf of all children. As pointed out by the Supreme Court, this runs counter to the presumption in the IDEA itself that our teachers are the experts who develop programs for children with disabilities in cooperation with parents and who should have our confidence. The Committee can recognize the expertise and the important contributions made by Connecticut's public school teachers and related services staff by passing this change to the statute, which would return the burden of proof issue to its proper balance. This is a vote in favor of public education.

Michelle C. Laubin, Esq.
Immediate Past President, COSA
Berchem, Moses & Devlin, P.C.
75 Broad Street
Milford, CT 06460
(203) 783-1200
mlaubin@bmdlaw.com