

## **BURDEN OF PROOF LEGISLATION – Burden of Proof, Ho.Co. 2-22**

FOR the purpose of requiring the Howard County Board of Education to bear the burden of proof in due process proceedings that initiate from a due process complaint regarding the provision of special education services or a program for a child with disabilities in Howard County except under certain circumstances; and generally relating to the burden of proof in due process proceedings and the Howard County Board of Education.

State Senator Katie Fry Hester (D9) filed this legislation at the request of the Board of Education.

**WHAT IS DUE PROCESS?** Due process is a requirement under the Individuals with Disabilities Education Act (IDEA) that sets forth a regulatory basis for a formal set of policies and procedures to be implemented by schools for children in special education programs. Due process is intended to ensure that children with learning disabilities and other types of disabilities receive a free appropriate public education (FAPE).

**WHAT IS THE ‘DUE PROCESS HEARING’?** It is the formal way for parents to resolve disputes with a school about a child’s education. It is one of three main administrative remedies available to parents under the IDEA and Section 504 of the Rehabilitation Act of 1973 to resolve disagreements between parents and schools. Due process hearings are administrative hearings that are conducted, in many ways, like a court trial. Parents have the right to an impartial hearing officer, to present evidence, witnesses, and documents, and to make legal arguments. Since the hearing is a legal proceeding, parties will often choose to be represented by an attorney. The hearing officer issues a decision and then both parties have the option of appealing the ruling.

**WHAT IS BURDEN OF PROOF?** Burden of proof refers to “who” has to provide “what amount” of evidence to win a case. In a due process hearing, the standard of proof is preponderance of the evidence, meaning that to win the complainant (the person filing the complaint) must show that he/she is more likely right than wrong.

In criminal cases, the burden of proof always rests on the prosecutors. In civil cases, the burden usually is carried by the party filing the complaint or bringing the action. In due process hearings, which party has the burden of proof (the parent or the public agency) varies from state to state.

The question of which party has the burden of proof in an IDEA due process hearing—the parent or public agency—was addressed in the Supreme Court case *Shaffer v. Weast* (2005). While the IDEA is silent on the issue of burden of proof, the Supreme Court has held that, unless state law assigns the burden of proof differently, in general, the *party who requests the hearing* will have the burden of proving their case.

In the context of the IDEA law, it is usually parents who ask for the due process hearings. Therefore, they have the burden of convincing the administrative law judge that they are right and that the judge should rule in the child's favor. However, if a parent asks for an independent evaluation and the school system refuses and asks for a due process hearing, then the school system bears the burden of proving that its evaluation is appropriate and that it should not have to pay for an independent evaluation.

**THIS PROPOSED LEGISLATION WOULD ASSIGN THE BURDEN OF PROOF IN SOME CASES TO THE PUBLIC AGENCY INSTEAD OF PARENTS, MAKING IT SOMEWHAT EASIER FOR PARENTS TO PREVAIL AT DUE PROCESS HEARINGS SO THAT THEIR CHILDREN CAN RECEIVE A FAIR AND APPROPRIATE EDUCATION.**

**HOW DOES THE DUE PROCESS HEARING FALL INTO THE IEP PROCESS?**

Once a child has been identified as eligible for special education, an Individualized Education Program (IEP) is developed and put in place to provide that child with a Fair and Appropriate Education (FAPE). Disagreements between parents and school systems can arise when parents do not think that their child is being provided with FAPE. Parents can address their concerns with the school system through informal methods or by more formal methods like filing a complaint, seeking mediation or filing a complaint and seeking a due process hearing.

Before parents file for hearings, most have spent years trying to work with their schools, but keep hitting barriers, due to an imbalance of power. Parents spend years watching their children suffer, falling further and further behind their classmates. Going to a due process hearing is a last resort, and only a tiny percentage ever file for hearings, even when their child's program is clearly inappropriate. Parents are experts on their children, and the vast majority do not file for hearings unless serious problems exist

**WHO SUPPORTS THIS PROPOSED LEGISLATION?**

The Howard County Board of Education has stated:

**Special Education Burden of Proof**

Recognizing the school system's role in providing special education services under the federal Individuals with Disabilities Education Act (IDEA), the Board supports legislation that would shift the burden of proof to the school system in due process cases under Education Article §8-413. Shifting the burden of proof will allow local school systems to establish and reinforce a culture of partnership with parents. As the community advocates for parents, students, and staff, the Board feels this should be a norm rather than a burden.

WHAT OTHER STATES HAVE SHIFTED THE BURDEN OF PROOF TO THE SCHOOL SYSTEM?

<b>No change. Burden continues to be on school district.</b>	<b>No change. Burden continues to be on moving party.</b>	<b>Change. Burden is on moving party.</b>
Alabama	Colorado	Arizona
Alaska	Indiana	Arkansas
Connecticut	Kansas	California
Washington, D.C.	Louisiana	Florida
Delaware	<b>Maryland</b>	Hawai'i
Georgia	Michigan	Idaho
Illinois	Mississippi	Iowa
Kentucky	Oklahoma	Maine
Minnesota	New Mexico	Massachusetts
West Virginia	North Carolina	Missouri
New Jersey (2008)	Ohio	Montana
	South Carolina	Nebraska
	Tennessee	Nevada
	Texas	New Hampshire
	Utah	New York
	Virginia	North Dakota
	Wyoming	Oregon
		Pennsylvania
		Puerto Rico
		Rhode Island
		South Dakota
		Vermont
		Washington
		Wisconsin

Note, these states were as of 2005 when the Supreme Court decision was issued.

WHY IS THIS LEGISLATION NEEDED?

Parents are at a significant disadvantage in due process hearings - School districts have access to their own paid staff to serve as expert witnesses in hearings. In contrast, parents have to pay out-of-pocket for any expert witnesses that they would need in the

hearing. The vast majority of parents cannot afford to pay the thousands of dollars required to pay expert witnesses. Further, as a result of a Supreme Court decision, parents do not receive reimbursement for expert fees, even if they prevail in the hearing.

School districts nearly always rely on legal counsel in due process hearings, and the tens of thousands of dollars in legal fees are paid for by taxpayer dollars. Unlike schools, the vast majority of parents cannot afford to pay attorneys, and of course, parents receive no public money to pay for fees up front. As a result, most parents have no access to legal assistance to help them navigate the complicated and overwhelming hearing system.

Placing the burden of proof on the schools will help level the playing field. It will also promote: (1) merit based outcomes; (2) accountability by schools; (3) introspection and collaboration between schools and parents in the creation of IEPs; and (4) fundamental fairness.

#### DOES THIS LEGISLATION CONFLICT WITH THE FEDERAL IDEA LAW?

No. The Individuals with Disabilities Education Act (IDEA) is silent on the issue of burden of proof. A 2004 Supreme Court case, *Shaffer vs. Weast*, also does not require that states place the burden of proof on parties filing for hearings and permits states to place this on school districts.