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**MEMORANDUM**

To: Attorney Stephen P. Wright  
From: Attorney Andrew A. Feinstein  
Re: Burden of Proof in Special Education Hearings  
Date: November 4, 2011

During the course of the State Board of Education meeting on November 2, 2011, you asked me to supply you with information on state laws or regulations assigning the burden of proof in special education due process hearings. This memorandum responds to that request.

**Overview & Changes Since Schaffer.** In *Schaffer v. Weast*, 546 U.S. 49 (2005), the Supreme Court ruled that, absent state law or regulation affirmatively placing the burden of proof on the school district, the burden of proof in IDEA due process cases would be placed on the party requesting the hearing, which, in Connecticut, is the parent in 90% of the cases. Prior to *Schaffer*, the majority of Courts of Appeal that had considered the issue placed the burden on the school district to demonstrate the appropriateness of the program and placement it proposed. Hence, before the *Schaffer* decision, school districts had the burden of proof in 30 states, the party seeking relief had the burden in 18 states, and the party challenging the IEP had it in 3 states. Today, school districts have the burden of proof in 6 states, and the party seeking relief (the parent) has the burden in the remaining 45. (These numbers add up to 51 to include Washington DC.)

It is worth noting that Connecticut took the lead in filing an amicus curiae brief with the Supreme Court opposing placing the burden of proof on the parents. See, 2005 WL 1031635 (U.S.). (If you do not have access to Westlaw, I would be pleased to send you a copy of the brief.)

**States Imposing Burden of Proof on School Districts.** Currently, six states impose the burden of proving the appropriateness of the proposed IEP on the school district. They are:

**Connecticut.** RCSA § 10-76h-14(a) provides: "In all cases ... the public agency has the burden of proving the appropriateness of the child's program or placement, or of the program or placement proposed by the public agency." This regulation has been in place for thirty years.

**Delaware.** 14 De Admin. Code 926 § 11.10 states "The burden of proof and persuasion in the due process hearing shall be on the public agency which is a party to the proceeding." This regulation existed prior to the *Schaffer* decision.

**New Jersey.** N.J. Stat. § 18A: 46-1.1 states “Whenever a due process hearing is held pursuant to the provisions of the "Individuals with Disabilities Education Act," 20 U.S.C. s.1400 et seq., chapter 46 of Title 18A of the New Jersey Statutes, or regulations promulgated thereto, regarding the identification, evaluation, reevaluation, classification, educational placement, the provision of a free, appropriate public education, or disciplinary action, of a child with a disability, the school district shall have the burden of proof and the burden of production.” The statute was adopted in 2008.

**New York.** Education Law § 4404 (1) states: “The board of education or trustees of the school district or the state agency responsible for providing education to students with disabilities shall have the burden of proof, including the burden of persuasion and burden of production, in any such impartial hearing, except that a parent or person in parental relation seeking tuition reimbursement for a unilateral parental placement shall have the burden of persuasion and burden of production on the appropriateness of such placement.” This statute was adopted in 2007.

**Nevada.** The Nevada legislature, in the spring of 2011, passed, and the Governor signed, AB318, which provides: “Whenever a due process hearing is held pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 et seq., regarding the identification, evaluation, reevaluation, classification, educational placement or disciplinary action of or provision of a free appropriate public education to a pupil with a disability, and a school district is a party, the school district has the burden of proof and the burden of production.” The law took effect July 1, 2011. It has not yet been codified.

**West Virginia.** West Virginia Policy 2419, Regulations for the Education of Students with Exceptionalities, at Chapter 11, Section 1.C.3.A., 126 SCR 16, states: “The burden of proof as to the appropriateness of any proposed action, as to why more normalized placement could/could not adequately and appropriately service the individual’s education needs, and as to the adequacy and appropriateness of any test or evaluation procedure, will be upon the school personnel recommending the matter in contention.” This provision predates the decision in *Schaffer*.

You also specifically asked about Mississippi.

**Mississippi.** Mississippi Code Annotated § 37-13-143 establishes the procedures for special education hearings. Both the statutory section and the State Board Policy of the Mississippi Department of Education are silent on the assignment of the burden of proof in due process hearings. I have been unable to locate any federal court decision that discusses the burden of proof in Mississippi due process hearings.

Taking advantage of your interest in the burden of proof issue, I offer the following information:

Parents are poorly equipped to handle the burden of proof. Unlike schools, they lack familiarity with the IDEA and the due process hearing system. Virtually every school district in Connecticut retains counsel to represent it in due process hearings. Yet, more than half of due process cases are brought by parents pro se. Fifty-three cases between 2007 and 2010 went

through a full hearing and were decided on the merits. Of those cases, parents were represented by counsel in 32 matters, while school boards were represented by counsel in all 53 cases. Despite bearing the burden of proof, the school districts prevailed in 34 cases and won mixed decisions in another 5. Parents won 14 cases outright and another 5 mixed decisions. Interestingly, represented parents won 14 of 27 unmixed decisions, while unrepresented parents won only 1 of 21 cases they brought. Hence, even having the burden of proof, school districts are able to win virtually every due process case brought by an unrepresented parent.

Approximately 36% of children with disabilities live in families earning less than \$25,000 a year; over 2/3 earn less than \$50,000 a year. They are also 50% more likely to have high school education or less than other parents.<sup>1</sup> Parents with less money are less likely to be able to hire lawyers. Parents also have difficulty finding and affording expert witnesses. In due process cases, it is impossible to win without providing expert testimony. School districts can use their psychologists, therapists, and other employees as experts. But parents must hire and pay expert witnesses out of their own pocket and are unable to secure reimbursement for the cost of these experts even if they prevail. *Arlington v. Murphy*, 548 U.S. 291 (2006). Parents of children with disabilities are also 67% more likely to be unemployed than parents of nondisabled children.<sup>2</sup>

Unlike other statutes, IDEA imposes affirmative obligations on school districts. It requires them to affirmatively identify, evaluate, and provide a free appropriate public education to children with disabilities. In this way, an IDEA case differs from an ADA or civil rights case (e.g. §1983) against a school district. Those statutes are designed to remedy discrimination. Moreover, as remedial statutes, ADA and the civil rights statutes result in damage awards to plaintiffs. But there are no damages available in IDEA cases. In regular civil cases, discovery is available, including depositions, interrogatories, requests for production and the like. As a result, the parties know a great deal about each other's case before trial. But Connecticut permits no discovery in IDEA due process cases. Exhibits are exchanged five days before a hearing. The parent has the right to the student's education records. The absence of discovery is one reason why placing the burden on school districts make sense. Since IDEA cases revolve around whether school districts have met these obligations, they are best equipped to bear the burden. Schools have free access to information about the child and potential programs and services that are at issue in a hearing. Parents do not have the clear right to observe a proposed program in advance of hearings. "The school has an advantage when a dispute arises under the Act: the school has better access to the relevant information, greater control over the potentially more persuasive witnesses (those who have been directly involved with the child's education), and greater overall educational expertise than the parents." *Oberti v. Board of Educ.*, 995 F.2d 1204, 1219 (3d Cir. 1993).

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<sup>1</sup> Special Education Elementary Longitudinal Study (SEELS): The Children We Serve: The Demographic Characteristics of Elementary and Middle School Students with Disabilities and Their Households 23-24 (2002).

<sup>2</sup> The Individual and Household Characteristics of Youth With Disabilities: A Report from the National Longitudinal Transition Study-2 (NLTS-2) at 3-4 (2003).

School districts are intimately familiar with educational programs, special education law, and the due process hearing system. Many parents enter the IEP and hearing processes ignorant of their rights and the law of due process. D. Engel, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 Duke L.J. 166. Moreover, in the Second Circuit, hearing officers are required to defer to the school district witnesses. *Walczak v. Florida Union*, 142 F.3d 119, 129 (2d Cir. 1998). Hearing officers rely on the district witnesses because they work with and observe the child on a regular basis. In fact, schools often restrict the ability of parental experts to observe in the classroom, again reflecting the information disparity.

It is hard to conceive of an argument that the assignment of the burden of proof has much impact on the cost to districts. When an attorney brings a case on behalf of the child, the attorney knows to present strong expert testimony that the program proposed by the district is inappropriate. There are no reported cases providing a directed verdict for the child because the district failed to meet its burden. In other words, in due process hearings, the hearing officer weighs the evidence of inappropriateness adduced by the parent against the evidence of appropriateness propounded by the school district and makes a determination as to whose evidence is more compelling. So, in lawyered cases, the obligation to produce testimony is the same whether the burden is on the student or on the school district. In pro se cases, a district's lawyer would be well advised to present a clear case of appropriateness for fear that the hearing officer will bend over backwards to protect the right of the pro se party. Hence, without regard to where the burden lies, the case to be put on by the school board is the same and the cost of putting on that case is the same.

The change in the burden of proof would, however, send a strong message to local school districts that the level of appropriateness their educational programs need to meet for students with disabilities has been lowered. Indeed, the cost-savings claims of the proponents of the change make clear that a reduction in the districts' obligation to provide special education services is the aim of the legislation. If school districts took this message to heart, some children with disabilities will be offered weaker programs. If that happens, more parents will challenge the appropriateness of such programs, resulting in increased costs.