

# Connecticut State Advisory Council on Special Education

CONNECTICUT STATE DEPARTMENT OF EDUCATION • P.O. BOX 2219 • HARTFORD, CT 06145



December 4, 2014

RE: Burden of Proof and the State Special Education Regulations

Dear Representative Brian Becker, Representative Michelle L. Cook, and Representative Terrie Wood (Co-Chairs of the Special Education Select Working Group, Municipal Opportunities & Regional Efficiencies Commission), Senator Martin M. Looney, Representative Brendan Sharkey, Representative Andrew M. Fleischmann, Senator Beth Bye, and Representative Robert Sanchez.

Since 1975 the Connecticut State Advisory Council on Special Education has been authorized under the Individuals with Disabilities Education Improvement Act (IDEA) to advise the State Board of Education and the Connecticut General Assembly on unmet needs for Connecticut's students with disabilities. Under Chapter 164 Section 10-76i of the Connecticut General Statutes, the Council is further authorized to "advise the General Assembly, the State Board of Education and the Commissioner of Education" on special education matters.

The Council does not support, and continues to oppose any changes and/or modification to the current language regarding "burden of proof" in the State Department of Education's Special Education Regulations.

This part of the Department's special education regulations (Section 10-76h-14) addresses the question of who is responsible for proving, by a preponderance of the evidence, the appropriateness of a child's program or placement at a Due Process hearing. With certain exceptions, it requires the "public agency" (e.g., the school district) to establish the appropriateness of the program and placement it is providing, or proposing to provide, to a child. The Department proposed no changes to this Section in the draft revisions to the regulations it issued for public comment, and the Department did not recommend any changes in the final draft that has been submitted for review and approval by the State Board of Education. Nonetheless, the Council is aware that requests have been presented to the State Board of Education to change the existing burden of proof formulation, and is also aware that responses to surveys that were completed by local school districts in response to questions generated pursuant to Special Act 11-9 would seem to suggest that shifting the "burden" to the party that initiates a request for Due Process could result in savings for school districts. More recently, it also seems that the Special Education Working Group of the M.O.R.E. Commission has expressed interest in discussing "Burden of Proof" at its December 4, 2014, meeting.

The Council expressed concern in its correspondence of March 15, 2012, to the Connecticut State Board of Education, Commissioner of Education and leadership of the Connecticut General Assembly, regarding the fiscal information reported in the Summary Report issued on February 1, 2012 in response to Special Act 11-9. **It does not appear that there was a consistent formula or methodology used by the responding school districts to determine the fiscal impact of shifting the burden of proof from districts to the parents.** In addition to throwing into question the accuracy of the cost data reported, the survey results did not appear to offer any valid way to calculate the true cost savings (if any) to districts in shifting the burden of proof.

Putting aside Council concerns about the reliability of that survey data, the Summary Report does present some useful analyses of data maintained by the Department regarding complaint resolution and Due Process. For instance, the data show that over 80 percent of Due Process requests are initiated by parents. This implies that if the burden of proof were to be shifted to the "moving party," in the vast majority of cases it will fall onto the shoulders of parents. And, because parents generally have far fewer resources and significantly less access to information about programs and placements than do school districts, the Council believes this would be inherently unfair.

We concur with the State Department of Education's long-held position, as articulated in the Summary Report:

As the IDEA leaves to the states the management of the hearing system and the law itself is silent on the burden of proof, the standard in Connecticut articulates a valid state policy that school districts are in a better position to defend the appropriateness of an IEP. Districts are in control of following the procedural requirements of IDEA and of planning and offering an IEP which provides a child with an opportunity to derive meaningful educational benefit, the two criteria courts look at to determine whether an IEP is appropriate. (as quoted in Circular Letter C-9, Series 2005-2006).

These factors are especially compelling given that just over half of Due Process requests are initiated by parents who do not have lawyers representing them. In most cases this is because they cannot afford to hire an attorney, and are unable obtain representation through legal services organizations. Further, 20 percent of all hearing requests in Connecticut involve students with disabilities who qualify for free or reduced price school lunches. Approximately 40 percent of all students with disabilities live in poverty. As the Summary Report indicates, however, at the same time that poverty rates have been increasing for families with children who need special education and related services, sources of free- or low-cost legal representation have been drying up. Over the past five years, legal services providers have experienced significant budget cuts and have been forced to reduce their staff. Connecticut Legal Services - the legal services provider which serves the largest geographic area - now only provides legal representation in special education matters to individuals referred under a contract it has with the Juvenile Court system. Other traditional special education legal service providers such as the Office of Protection and Advocacy, Greater Hartford Legal Assistance and New Haven Legal Assistance have all had to reduce special education case representation due to significant budget cuts and staffing reductions.

Notwithstanding the fact that school districts currently bear the burden of proof, according to the Summary Report, over the past five years, school districts have prevailed in Due Process proceedings approximately 65 percent of the time. (In contrast, during the same timeframe, parents who represented themselves lost 25 out of 26 hearing decisions.) In fact, as the Summary Report indicates, the regulatory allocation of burden of proof had virtually no influence on the outcome of any fully adjudicated Due Process case during that period. That does not mean, however, that the question of which party bears the burden of proof is unimportant. Years before adoption of the federal IDEA or its predecessor, the Education for All Handicapped Children Act (P.L. 94-142), Connecticut established an independent fair hearing process to adjudicate disputes arising under state special education statutes. Then, as now, the architects of Connecticut's hearing mechanism realized that school districts held much more power and were in a much better position to produce evidence about

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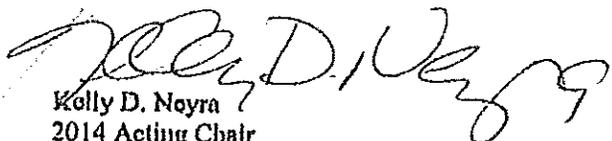
their own programs and processes than parents ever could be. To ensure fair results and create a somewhat more level "playing field," the burden of producing certain evidence was statutorily assigned to school districts. The current regulatory language maintains that longstanding state policy. Its underlying rationale remains sound, and the Council urges the Department, the State Board of Education, and the General Assembly not to abandon it.

In addition, the Council recommends that the State invest in programs that provide information to parents about special education and organizations that have staff available to provide free- or low-cost legal services to families who require assistance, so that parents are not forced to represent themselves at special education proceedings. These organizations include:

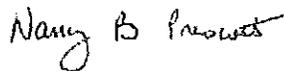
- the State Education Resource Center (SERC);
- the Office of Protection and Advocacy for Persons with Disabilities;
- the Connecticut Parent Advocacy Center;
- Connecticut Legal Services;
- Greater Hartford Legal Aid; and
- the Greater New Haven Legal Assistance Association.

Although the State Department of Education is exploring dispute resolution programs, such as The Center for Appropriate Dispute Resolution in Special Education (CADRE), there need to be alternatives available to parents until effective dispute resolution programs are in place in Connecticut.

Sincerely,



Kelly D. Noyra  
2014 Acting Chair  
Connecticut State Advisory Council on Special Education



Nancy B. Prosser  
Executive Director  
Connecticut Parent Advocacy Center



Craig B. Henrici  
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CC: Allan B. Taylor, Chairperson, Connecticut State Board of Education  
Stefan Pryor, Commissioner, Connecticut State Department of Education  
Charlene Russell-Tucker, Chief Operating Officer, Connecticut State Department of Education and  
Acting Chief, Bureau of Special Education, Connecticut State Department of Education