

M. Jeffrey Spahr, Esq. Testimony on the Burden of Proof in Due Process Proceedings

Let me start by stating that I am the father of a boy who has been receiving special ed services since age 3 (he is about to turn 14). I have been through the mediation process and have filed for due process in the past. As a result, my family has had to spend thousands of dollars fighting to get my son the services that he needs. That's thousands of dollars.

I have been active in the 'world' of special education and certainly have become familiar with many facets of the process. I have served as the President of the Connecticut Association of Children/Adults with Learning Disabilities (CACLD), and have been on the Connecticut Behavioral Health Advisory Committee. I am an Executive Committee member of Norwalk SPEDPartners (the Norwalk SPED parents' group). I am also the National Secretary for CHADD (the premiere ADHD organization nationwide). I have led the Autism Awareness program in our City as well as the ADHD Awareness program (my son is a child with both). As you can expect, I am involved in a number of other organizations and participate in a number of initiatives and activities.

By day I am the Deputy Corporation Counsel for the City of Norwalk and serve as its chief litigator (I have been there 27 years). As such, I certainly know my way around the courtroom and the legal process.

Having said all that, it is my firm opinion that switching the burden of proof onto the shoulders of the parents of a special ed child -- those shoulders that are already carrying so much weight -- is not only unfair but absurd.

First, let's examine why there is a push to make this change that has become the standard in the process. The OLR Research Report (2010-R-0054, February 3, 2010) stated as follows:

"Since most due process requests come from parents, this change would relieve school districts of the requirement that, when challenged, they prove the appropriateness of a special education placement or program".

My question would be, toward what end? What benefit would there be to the school district with this change?

Is it a question of money? Well, the District certainly has the 'deep pockets' in this regard compared to the parents. Let's examine this argument even further.

The attorneys' for the District and the administrations often claim that the change in the burden would reduce their costs. However, this is never explained. Why is this? I would challenge legal counsel with the following question: 'Do you mean to tell me that if the burden were switched that there would be a witness that you would not call? That you would write a shorter brief or not do as much research? Would you put less time or effort into the case? Obviously the answer is 'NO'. All the Burden of Proof regulates is who wins in case of a tie. With the burden on the District, it is incumbent for it to prove its case by a preponderance of the evidence. If this were

switched, they still would call the same witnesses, they still would put in the same time and effort and still write the same brief. I submit that there would be NO cost savings.

In addition, let's compare the cost of the proceeding for the parents vs. the District. At a hearing, the District would be calling as their witnesses those Social Workers, School Psychologists, Special Ed Teachers and other District officials that are already on their payroll (drawing a salary, benefits and pension). Having these District employees of the District conduct assessments and evaluations of the student, prepare reports and then testify does NOT cost the District any more money. They are already on the payroll.

On the other hand, for a parent to get an expert to testify they need to self-fund this. A typical neuro-psych exam would cost the family about \$2,500 -5,000. On top of that the parents would have to pay for their expert to testify (money that otherwise could be spent on ABA therapy, after-school programs, social skills sessions, or medication).

In addition, let's acknowledge the 500 lb gorilla in the hearing room -- the fact that these school employees are on the District's payroll, certainly can raise some concerns in some parents' minds regarding the objectivity of their testimony.

It is sufficient to say that in many ways the playing field is NOT level.

It should also be said that the LAST THING a parent wants to do is to bring a Due Process complaint. They would much more like to work with the District and their child's teachers in order get their child the services that they need and deserve. Taking on the school, challenging the teachers, and declaring failure on their part is not the way to make friends. Once the matter goes to Due Process it becomes strictly adversarial. The matter of the child's 'best interests' seems to slip away.

In addition, it would be much more expeditious for the parents and District to develop a plan that works. Certainly much more so than having to go through this legal process. To paraphrase the old saying -- 'Education delayed is education denied'. Parents do NOT want to go to Due Process given the time element involved.

Further, the District has all the access it needs to the child and the child's program. The parents do not. The District is in a much better position to see if and determine if a program is working or not. Usually, before the parents even have an inkling that the child's program is not working is well into the school year.

So, going into Due Process what advantages does the District have over the parent? Well, let's see: Money, resources, a paid staff, a retained law firm, access, experience, as well as a lack of urgency (at least not to the extent that the parent anguishes over it).

In conclusion, it is my firm belief that the State should keep the Burden of Proof where it currently exists - on the shoulders of the party that bound, by law, to provide an appropriate educational program to the Student (and not on the already burdened shoulders of the parents.).