

**M.O.R.E. Commission
Special Education Select Working Group**

MEETING MINUTES

**Thursday, December 4, 2014
10:00 A.M. in Hearing Room 1D of the LOB**

The meeting was called to order by Rep. Michelle Cook at 10:09 A.M.

The following select working group members were present: Rep. Michelle Cook (Chair), Rep. Brian Becker (Chair), Rep. Terrie Wood (Chair), Atty. Howard Klebanoff, Patrice McCarthy, Timothy Connellan, Mike Regan, Deborah Richards, Robert Namnoum, Shelley Davis, George Rafael, Rep. Jay Case, Kim Planas, and Betsy Gara.

Rep. Michelle Cook welcomed everyone to the meeting and informed all those present that the meeting would be televised by CT-N.

The minutes of the previous meeting were approved.

Rep. Michelle Cook introduced the topic of the day's meeting: the burden of proof in FAPE Hearings.

Scheduled Speakers:

Attorney Susan Freedman of Shipman & Goodwin testified first. Her written testimony may be accessed on the M.O.R.E. Commission Special Education Select Working Group website, available here: <http://www.housedems.ct.gov/MORE/sped/meetings.asp>

Rep. Terrie Wood asked how many Boards of Education Shipman & Goodwin represents.

Ms. Freedman answered that the firm represented at least 100 educational entities both public and private.

Rep. Terrie Wood asked how many other law firms have as large a practice as Shipman & Goodwin in this area of the law.

Ms. Freedman answered that no other firm had as extensive a practice in this area of the law.

Rep. Terrie Wood asked how often Ms. Freedman felt that parents made unrealistic demands on school boards.

Ms. Freedman replied with an estimate of around 50%-60% of the time. She also noted for the record that most school boards are reluctant to go through the hearing process because of the cost. Mediators are usually able to sort out any unrealistic demands made by parents.

Howard Klebanoff asked if Ms. Freedman felt that there was a burden on both sides. He further stated that the school board has to show that its program is appropriate to the child while the parents concurrently have to demonstrate that their child has been inappropriately identified based on their unique circumstances. He then asked if there is a balance in the way that these laws are being implemented and followed.

Ms. Freedman responded by stating that the Supreme Court looked into this matter very carefully. She said that the law safeguards the parents at every step of the process. In addition to this, the law established strict regulations for boards of education. She reiterated her point that the burden of proof should be on the party seeking the hearing and not solely on school boards. She said that it is impossible for the board to keep up with the continuously changing elements of the hearing process. Not only is it an unrealistic expectation but it also disrupts and adds unnecessary time to the hearings.

Howard Klebanoff stated that if a parent turns to due process to try to delay the matter, the parent is now responsible for the board's legal fees. He then asked if Ms. Freedman thought that changing training for hearing officers would have a positive effect. He also asked how many cases Ms. Freedman had been involved in where the case was decided by the burden of proof.

Ms. Freedman replied that, in her experience, the burden of proof affects the length and cost of hearings as well as the relationship between educators and parents, but not the outcome of the case. She mentioned that Congress did intend to safeguard the school district from the unfortunate situation where a parent files for due process in a malicious way that is not intended to help the child. In this case the district is permitted to seek legal fees from the parent if the cost of the case were to become too expensive.

Rep. Michelle Cook asked how many cases the firm averages in a given year that involves burden of proof issues.

Ms. Freedman replied that she personally handled three or four each year. She said that districts usually settle cases during the mediation process because they simply cannot afford to go to a hearing.

Rep. Brian Becker asked how long the speaker has been practicing in this area.

Ms. Freedman replied that she had been practicing in this area for 23 years.

Rep. Brian Becker then asked how often the party requesting relief is the school district.

Ms. Freedman replied that around 10%-15% the district is requesting relief.

Rep. Becker then clarified that this means that 85%-90% of the time the parent is the party requesting relief. He then asked if the length of hearings could be cut down if hearing officers focused more to the issues that were raised in the initial complaint rather than on new issues raised during the hearing itself. He then proposed that, rather than shifting the burden of proof, a solution might be to not allow hearing officers to entertain issues that were not in the initial complaint.

Robert Namnoum stated that everyone agrees there is a need to better train hearing officers and asked if Ms. Freedman had a list of specific training needs.

Ms. Freedman stated that there is a wide range of needs. She said that many officers are well trained, but, because of the variation of styles, many school districts and parents do not know what to expect in a hearing until they are assigned a specific hearing officer. A possible solution would be to train hearing officers to only address the issues raised from the beginning in the initial complaint.

Andrew A. Feinstein, Andrew A. Feinstein Attorney at Law, LLC, testified next. His written testimony may be accessed on the M.O.R.E. Commission Special Education Select Working Group website, available here: <http://www.housedems.ct.gov/MORE/sped/meetings.asp>

Rep. Terrie Wood clarified that the mission of the MORE Commission Special Education Select Working Group was to determine how to provide special education in a more effective manner.

Howard Klebanoff asked how many cases Mr. Feinstein worked that he felt turned on the burden of proof.

Mr. Feinstein replied that there were none.

Rep. Brian Becker asked Mr. Feinstein if he felt that the current burden of proof standard caused due process hearings to last for longer periods of time.

Mr. Feinstein stated that he did not believe this to be the case and said that shifting the burden of proof will have no effect on the length of these hearings.

Betsy Gara commented that, in her experience with various school boards across the state, it was incorrect to say that school districts are not trying to provide services with the best interests of students in mind. She said that, much of the time, school boards are faced with immense budget pressure and that efforts to force regionalization do not always work to save money (although efforts to encourage districts to share services may be effective).

Tim Connellan agreed with Ms. Gara that the idea of boards of education not caring about the best interests of children was untrue. He said that, in his experience, these often unpaid volunteer school board members do a high quality job and keep the welfare of children in mind when making decisions.

Mr. Feinstein offered to provide articles proving that many school board meetings revolve around the cost of special education programs and that many school boards do not go forward with the hearing process because they believe the cost outweighs the benefit.

Rep. Jay Case agreed that school boards are concerned with the costs of hearings, but said that parents who want the best services for their children are also concerned about the cost of proceeding to a hearing.

Rep. Terry Wood noted that any legislation will need to go through the Education Committee, the members of which will choose whether or not to act on any part of the working group's final recommendations.

David Lenihan, Legislative Liaison, Connecticut Association of School Business Officials (CASBO), testified next. His written testimony may be accessed on the M.O.R.E. Commission Special Education Select Working Group website, available here: <http://www.housedems.ct.gov/MORE/sped/meetings.asp>

Howard Klebanoff stated that mediators should be trained and that parties should have the right to select their mediators. He said that the SDE does not take advantage of training resources that are available to them. The case is the same regarding hearing officers. He asked that if having more experienced and better trained mediators would help to keep the cost of hearings down.

Mr. Lenihan said that he would have to defer to SDE, since he has not participated in a due process hearing. He stated that anything that speeds up process of getting to a resolution is a step in the right direction.

Attorney Sylvia Ho, who is a State Department of Education Hearing Officer, presented next. She is a 1987 graduate of Boston College Law School and is currently an appointed arbitrator and litigator with the Hartford Superior Court. She meets for

mandatory hearing officer training on a monthly basis at the SDE offices. There she is briefed (along with her colleagues) by various staff in the due process department on the latest litigation and procedural developments around the country related to special education. Twice a year she attends a training hosted by regional hearing officers and experts in the area of special education. This year she attended a regional training in Providence, Rhode Island and participated in a national remote training via multiple webinars. Throughout her career with SDE working as a hearing officer, Ms. Ho has been assigned 46 cases, 6 of which have been adjudicated. During the 2013-2014 year, over 200 cases were filed, but only 15 were fully adjudicated. She highlighted the hearing officer application process, which included tests of her ability to identify and highlight critical issues in simulated hearing scenarios. She also briefly touched on her understanding of the burden of proof in the context of special education due process hearings.

She stated that a student with a disability is not entitled to a cadillac program rather something that is aimed at progress. Federal law provides for a procedure in which parents and boards of education may resolve disputes:

Parents identify a problem and request due process → Board of education tries to resolve the problem with the parents → Voluntary mediation (the vast majority of cases between boards of education and parents are settled either privately or through mediation) → Hearing process (a small number of cases reach this point)

She continued that the process is meant to accommodate a parent without an attorney who has a problem with his or her child's services. She also said that both sides have a burden during a special education due process hearing: the parent has the burden of coming forward with initial evidence that the student's program of education is not appropriate, the board of education bears the burden to show that the educational program is appropriate, and, when a parent has unilaterally placed a student in a private educational setting, the parent bears the burden to show that the private placement is appropriate. She stated that hearing officers must exclude repetitious or irrelevant evidence. However, when a parent is self-represented in hearing, they might not understand this concept and their right to be heard will take precedence. She said that, lately, the average hearing lasts two to three days and 20 day hearings are an anomaly. In her opinion, attorneys are the people who drag out the process. She stated that, if an attorney attempts to put 15 witnesses on the stand to make a point, she would likely tell them that their point has been made already. She reiterated that the hearing officer must give a fair hearing to the parents and that this is an emotional and difficult setting. She also said that she had never seen a case where the board of education was not trying to do the best it could for a student, and that the ultimate issue was the appropriateness of the services provided. She ended by stating that, in her experience, boards of education initiate cases about 30% of time.

Rep. Brian Becker asked how long Ms. Ho has served as a hearing officer.

Ms. Ho replied that she was appointed in 2011 by the State Board of Education.

Rep. Brian Becker asked whether any of Ms. Ho's cases have been decided by the burden of proof.

Ms. Ho replied that none of her cases had been decided by the burden of proof, although she did dismiss one case because a parent did not meet his or her burden to show that a particular program was appropriate.

Howard Klebanoff stated that hearing officers rarely have the correct training in educational law before they apply to become hearing officers, so they often have to learn on the job.

Ms. Ho stated that all hearing officers have backgrounds in administrative law. She also noted that many hearing officers have a background in family law.

Howard Klebanoff asked if it was possible to find out from SDE how many cases have been determined by the burden of proof over the years.

Ms. Ho responded that, in the vast majority of cases, the burden of proof does not have anything to do with the final decision of the case.

Rep. Michelle Cook asked if parents have the option to appeal if it is found that they did not meet their burden to move forward to a hearing.

Ms. Ho stated all hearing officer's decisions are final.

Rep. Michelle Cook asked that if most hearing officers learn on the job and how much training they receive.

Ms. Ho stated that the law requires hearing officers to be capable of learning. There are monthly training updates, but the training hearing officers receive as attorneys, before they are appointed to administer hearings, may vary widely.

Patrice McCarthy asked Ms. Ho if she has enough experience as a hearing officer to offer an opinion as to whether any cases that reach a hearing could have been resolved with a better mediation process.

Ms. Ho replied that, in her opinion, the answer to that question is no. She said that mediators do the best they can to offer help as a neutral source. She also made the point that all parties involved love and care for the student, there is just a simple disagreement on what services are appropriate for that student.

Tim Connellan asked Ms. Ho if there is a system of evaluation for hearing officers.

Ms. Ho replied that there is an evaluation system. She said that she is routinely observed while administering hearings and her decisions are constantly reviewed.

Kim Planas asked if it was correct that school districts initiate due process hearings 30% of the time.

Ms. Ho replied that she believed that was correct, but reminded members of the group that not all of the cases that enter the process actually go to a full hearing and most are resolved before that stage.

Rep. Michelle Cook opened the meeting up to questions and discussion for any of the presenters from working group members.

Patrice McCarthy commented that, in her experience with many school boards, no board has expressed the desire to limit programs to children with special needs, although they are concerned with the legal costs of the hearing process. She also made note that school boards are not directly involved in the hearing process.

Tim Connellan stated that, when he was employed as a director of pupil personnel services, he knew that the school district had the burden of proof and that hearings were expensive, so he did his best to avoid this cost. He continued that going through the mediation process can be much cheaper and can lead to better results at times. He said that school districts are disinclined from going through the process all the way to a hearing because they bear the burden of proof, so they settle earlier rather than paying for legal representation in a hearing. He also said that some hearing officers are viewed as more friendly to one side or the other, and that factors into the district's decision to move forward with a hearing. Lastly, he commented that parents do not have enough low-cost attorneys available to them in the cases when they want to move forward with a hearing.

George Rafael asked Ms. Ho how long the decision made by a hearing officer is binding.

Ms. Ho replied that a hearing officer's decision is final, but subject to appeal in federal district court. She said that the relief granted by a hearing officer may be clarified if one of the parties moves to clarify.

Rep. Michelle Cook stated that anyone who has additional information on this topic should feel free to submit testimony. She also reminded members that the next working group meeting would be held on the following Monday in Torrington.

Rep. Michelle Cook adjourned the meeting at 11:59 A.M.

Respectfully Submitted: Jonathan Ferrigno and David Desjardins