

To: **SCPD/GACEC/DDC**

From: **Laura Waterland**

Date: **2/8/2018**

Re: **Potential Legislation Shifting Burden of Proof in Special Education Due Process Hearings**

This memo is a supplement to my Policy and Law Memo issued yesterday. There has been some discussion, starting last spring, about an initiative to change current Delaware law, codified at 14 Del. Code §3140, to shift the burden of proof in special education due process hearings from school districts to children with disabilities. There is currently some legislation in draft form that attempts to do this. The impetus appears to be that some districts are concerned about the amount of legal fees that they have had to pay over the last few years to private attorneys who have successfully represented children with disabilities in special education cases. In many cases, districts choose to settle cases with fees rather than taking them to hearing.

It is worth noting at the outset that very few cases go to due process hearing; in statistics from DDOE, for 2015-2016, there were only 6 hearings that went to adjudication, of 33 total requests. Twenty-five were withdrawn or dismissed, and the rest went to mediation. Earlier years averaged only 16 requests per year, with only a small fraction going to hearing. The legislature in the past has expressed concern that more children with disabilities and their families are not taking advantage of due process; it is therefore ironic that when children with disabilities and their families are now successfully asserting their rights, some want to change the law in an attempt to make it more difficult for them to succeed.

It is also worth noting that the law firm that handles many of these cases for children with disabilities is also extremely effective in representing children in Pennsylvania, where the burden of proof is on the family. Districts are likely mistaken in believing that changing the burden of

proof will stop them from having to expend funds in disputed special education cases. It is certainly possible that another motivation for the change is to try generally to discourage children with disabilities and their families, especially those without representation, from pursuing the relief and the process to which they are entitled to by law by making the process even more daunting and difficult.

By way of background, Delaware has placed the burden of proof on school districts since the 1970s. Delaware has a "time-honored" jurisprudence of placing the burden on public agencies. (The agency has the burden of proof in Medicaid appeals, for example). S.B. No. 160, which was introduced through the GACEC, codified the burden of proof in statute in 1983; however the statute only codified Delaware regulations (AMSES; AMPEC) dating back to the inception of the federal IDEA in the 1970s.

The United States Supreme Court in 2005 (*Schaffer v. Weast*, 546 US 49 (2005)) ruled that under the IDEA the burden of proof is on the petitioning party (the children with disabilities) by default, but that states can affirmatively designate by statute or regulation which party has the burden of proof. This means that if state law is silent on the subject, the burden is on the children with disabilities. While a number of state statutes are silent or explicitly place the burden of proof on the children with disabilities, the trend in recent years has been for states to adopt laws imposing the burden on public agencies. A number of states have ambiguous statutes or regulations.

Currently, Connecticut, Delaware, Florida, Nevada, New Jersey, New York, and Oregon explicitly place the burden of proof on the school district. Initiatives are underway in Pennsylvania and Maryland to shift the burden of proof from the children with disabilities to the districts.

Burden of proof is especially significant in special education cases. School districts are at an enormous advantage, as to a large degree their employees control the content and scope of evaluations and IEPs, as well as special education procedures. Districts are also the keepers of relevant records and information, and witnesses. Districts make the decisions to deny eligibility

or deny or limit the scope of services. Districts are in the best position to articulate and support those decisions, as they are the party with both information and specialized knowledge. Putting children with disabilities in the position of having to prove that a district is not providing appropriate services places them at a disadvantage in a daunting process that is already skewed in the district's favor. Bear in mind that the due process hearing is usually the first opportunity for the dispute to be heard by someone outside of the district. Shifting the burden creates an unfair and unnecessary barrier.

If in fact cases lack merit, districts should not be so quick to settle them, as only prevailing parties can obtain legal fees under special education due process rules. Children with disabilities in Delaware should not be punished because other families are achieving better outcomes due to the expertise of trained counsel. Finally, there can be no argument that shifting the burden of proof somehow benefits children with special education needs and their families. The change would only benefit school districts seeking to avoid having their decisions challenged.

For the foregoing reasons, the councils should consider opposing any legislative initiative to alter the current law. The burden of proof in due process hearings should remain with school districts.