

**TESTIMONY OF ATTORNEY ANDREW A. FEINSTEIN
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ON RAISED BILL NO. 7176
TO COMMITTEE ON EDUCATION
CONNECTICUT GENERAL ASSEMBLY
FEBRUARY 20, 2007**

Mr. Chairman and Members of the Committee,

I am an attorney in private practice. I represent children with disabilities and their parents attempting to secure free, appropriate public educations from their local boards of education in Connecticut.

Raised Bill No. 7176 purports to incorporate changes in federal law into the Connecticut special education law. It does no such thing. Rather, it makes substantial changes in the law and, in doing so, upsets the current balance between school boards and parents in determining appropriate education for children with disabilities.

Raised Bill No. 7176 makes a number of changes in Section 10-76h of the Connecticut General Statutes. I wish to comment in detail on two of the proposed changes.

1. Burden of Proof

Section 1 of Raised Bill No. 7176 transfers the burden of proof in a due process hearing from the school board to the party requesting the hearing. It is true that, in *Schaffer v. Weast*, 546 U.S. 49 (2005), the United States Supreme Court ruled that, in Individuals with Disabilities Education Act (IDEA) cases, absent any law or regulation to the contrary, the ordinary rule that the burden of persuasion falls on the party bringing the action applies. But, the *Weast* Court explicitly stated that it was not deciding the issue of whether a State could, by regulation, assign the burden of persuasion to the school board to demonstrate that its proposed Individualized Education Plan (IEP) was appropriate, 126 S. Ct. at 537.

The Connecticut Regulations state "In all cases, however, 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," *Reg. Conn. State Agen. § 10-76h-14(a)*. Indeed, Connecticut Attorney General Richard Blumenthal was quoted in the New York Times as saying, "We think that as of right now, unless the federal government tells us otherwise, we can continue to do as we have done with our system. ...We believe that our regulation embodies a valid state policy that articulates our belief that school boards are in a better position to muster the facts and expertise in any contest with ordinary parents." New York Times, November 17, 2005 at p. 28. So, nothing in the Supreme Court's decision in *Weast* requires that the burden of proof be placed on the party initiating the action.

The change is not, therefore required. It is not desirable either. Over 90% of all due process cases brought are initiated by the parents. This is not surprising. The law is set up so that the school district convenes a Planning and Placement Team (PPT) meeting at which the district proposes a program and placement for the child for the coming school year. The parents are supposed to be equal partners in these PPT meetings, but the reality is that the school-based team ordinarily consists of eight or ten people and the parents are overwhelmed. At the PPT meeting, the district proposes a program and placement which goes into effect in five days unless the parents bring a due process action and invoke stay put. The district only needs to initiate a dues process action when it wants to change a child's program mid-year or when it wants to force an evaluation or challenge a parent's request for an independent evaluation. So, parents initiate the lion's share of due process requests because the system is designed that way.

The principle question before a hearing officer in a due process hearing is whether the district offered an appropriate IEP to the student. The elements of the student's program are

recorded, in somewhat skeletal form, on the IEP document, but vital features such as schedule, characteristics of classmates, instructional methodology used, and behavioral plans, are often not contained in the written document. These features are usually essential to determine whether the program in fact meets the child's special education needs. Prior to the hearing, information about these elements is often in the sole possession of the school board. There is simply no way that a parent can prove the inappropriateness of a proposed program without this information. That is why many states that impose the burden of proof on the parents require that the school board present its case first. Connecticut has no such requirement and Raised Bill No. 7176 does not change the Connecticut practice of requiring the party bringing the hearing to present their evidence first.

More importantly, determining the appropriateness of an IEP requires a careful analysis of the child's special education needs and a comparison of those needs to the program being offered. The district has staff members who are with the child all day, every day. The parent is limited to occasional observations and reports of experts. The district is in possession of most of the relevant information concerning both the needs of the child and the program being proposed. It makes sense for the district to have to demonstrate the appropriateness of its program prior to obligating the parents to demonstrate the inappropriateness of the program.

Further, to force the parents to demonstrate the inappropriateness of a somewhat vague proposed program is to force the proof of a negative. The field of logic informs us that the proof of a negative is often impractical because it involves negating a multitude of possibilities. Proving a positive, on the other hand, means defining the proposition and demonstrating its merit. In this case, proving that a proposed IEP is appropriate involves defining, with precision, what the district is proposing, and then showing that the interventions proposed will offer the

student an opportunity to make meaningful educational progress. Proving a negative means that the parent has to posit all possible interventions that could be provided under a draft IEP and then show that each and every one of these possible interventions would fail to offer the student an opportunity to make meaningful educational progress. For the sake of judicial efficiency, placing the burden on the school board makes far more sense.

Justice Ginsberg clearly articulated, in her dissent in *Weast*, 126 S. Ct. at 537, the policy reasons for retaining the burden of proof in special education cases with the Board. She notes that “The Individuals with Disabilities Education Act ... was designed to overcome the pattern of disregard and neglect disabled children historically encountered in seeking access to public education”. Unlike other civil rights statutes, the IDEA “casts an affirmative, beneficiary-specific obligation on providers of public education. ... The proponent of the IEP, it seems to me, is properly called upon to demonstrate its adequacy. Familiar with the full range of education facilities in the area, and informed by their experiences with other, similarly-disabled children, the school district is . . . in a far better position to demonstrate that it has fulfilled [its statutory] obligation than the disabled student’s parents are in to show that the school district has failed to do so.” Quoting *Oberti v. Board of Ed. of Borough of Clementon School Dist.*, 995 F.2d 1204, 1219 (CA3 1993), Justice Ginsberg noted, “In practical terms, the school has an advantage when a dispute arises under the Act: the school has better access to 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.”

Further, she noted that school districts have budget constraints. Left to their own devices, they will opt for educational interventions that let them spend less. “Placing the burden on the

district to show that its plan measures up to the statutorily mandated free appropriate public education,” Justice Ginsberg argues, “will strengthen school officials’ resolve to choose a course genuinely tailored to the child’s individual needs.” Indeed, she says, “a carefully designed IEP may ward off disputes productive of large administrative or litigation expenses”. In fact, nine states, including Connecticut, filed an amicus brief to the Supreme Court stating, “Having to carry the burden of proof regarding the adequacy of its proposed IEP . . . should not substantially increase the workload for the school.”

In sum, Connecticut is not obliged to change the burden of proof in special education administrative hearings and there are strong policy reasons not to make the change.

2. Age Out

Section 2 of Raised Bill No. 7176 would cut off special education benefits to a child upon the child’s 21st birthday. This is a substantial change in the law. Currently, a disabled child is entitled to benefits through the school year in which he or she turns 21. The students in this category are the most severely disabled in the state. They are the individuals who will immediately transition from special education services to other state services, particularly through the Department of Mental Retardation (DMR) or through the Department of Social Services (DSS). Adult services from DMR or DSS are virtually always inferior in quality and intensity to those provided by the school system. This is true because education is a critical element of school-provided services and is no factor at all in DMR or DSS services. Further, special education is an entitlement, while DMR and DSS services are discretionary.

It is true that the current law is somewhat arbitrary in its application. A child born on June 30, 1985 is entitled to special education services until June 30, 2006 while a child born a day later, on July 1, 1986 is entitled to special education services for one additional year, until

June 30, 2007. Nevertheless, the change contained in Raised Bill No. 7176 will, on average, strip six months of special education services from the most severely disabled young adults in Connecticut. And, at the same time, it will add to the burden already imposed on DMR and DSS, both of which agencies are plainly unable to meet their statutory obligations with available resources today.

Finally, section 1 of Raised Bill No. 7176, makes a wording change: replacing the statement that the hearing officer “shall have the authority to” with the simpler “may”. If the purpose of this change is merely to reduce the total number of words in the Connecticut General Statutes, it is unobjectionable. On the other hand, if this change is being made to replace the delimiting “have the authority” language with a more expansive “may”, the legislative history ought to be clear. C.G.S. §10-76h (d)(1) currently provides hearing officers with three specific grants of authority to act. The change in language raises the possibility that these three grants of authority will be interpreted as illustrative, rather than all inclusive.

In sum, sections 1 and 2 of Raised Bill No. 7176 make substantial and unwise changes in Connecticut’s special education law and should be rejected.

Thank you.

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