

State Advisory Council On Special Education

STATE DEPARTMENT OF EDUCATION • 25 INDUSTRIAL PARK ROAD • MIDDLETOWN, CT 06457



March 12, 2010

Raised Bill No. 5425 An Act Concerning Special Education

A Comment from Brenda J. Sullivan, Chair Connecticut State Advisory Council on Special Education

Senator Gaffey, Representative Fleischmann, and Members of the Joint Education Committee. My name is Brenda Sullivan, Chair of the State Advisory Council on Special Education, also known as SAC. I am also a parent of a child with severe multiple disabilities of which cerebral palsy, blindness and severe seizure disorder are the most severe. I write to express the views of the SAC on **Raised Bill 5425, An Act Concerning Special Education.**

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

On March 19, 2007 our previous Chair, Dr. Jim Granfield, came before this Committee and testified on issues raised in **Bill 7176, "An Act Concerning Special Education."** Then on March 23, 2009 I appeared before you to reiterate the SAC's position on **Raised Bill 1142, "An Act Concerning Relief of State Mandates on School Districts."**

Today I am writing you once again on behalf of the SAC to respectfully request that you:

- *Support* Section 1: Membership of the State Advisory Council for Special Education
- *Oppose* Section 3 Subdivision (1) (d) changing the burden of proof.

Section 1: Membership of the State Advisory Council on Special Education:

In 1997, the Federal Law, IDEA established State Special Education Advisory Panels or (SEAP's) for the purpose of providing policy guidance on special education and related services for children with disabilities. These "Special Education Panels" are now in every state and U.S. territory.

According to IDEA, SEAP membership will be appointed by either the Governor or by any other "official" authorized under state law. In addition, membership appointments should be representative of the state's population in terms of ethnic/racial diversity and the types of disabilities found within the state as well as include individuals who are involved with and/or concerned about children with

disabilities. Panel membership therefore includes parents of children with disabilities, individuals with disabilities as well as professionals working with children with disabilities as outlined in IDEA section 300.168.

During the creation of IDEA, the Connecticut General Assembly had already passed legislation establishing a "Special Education Advisory Council" and it was therefore pragmatic to "officially" designate this group as the Connecticut Special Education Advisory Panel (although the term "Council" was retained in lieu of the term "Panel," per IDEA terminology).

In July 2006, the Connecticut General Assembly increased the authorized number of Special Education Advisory Council membership appointments (Chapter 164 section 10-76i) from the 25 required under IDEA to 38. The additional 13 appointments were intended to be filled by members of the General Assembly.

However, since the passage of this legislation, only a few legislators have made appointments to the Council and/or have personally participated in Council business. Prior Chairs and Membership Committees have attempted, with very limited success, to notify appointing authorities of various candidates that have expressed an interest in joining the SAC. As a result, during the past several years the Council has primarily carried out its functions with less than 50% of its intended and authorized membership level.

Due to the overwhelming number of appointing authorities, it has become very difficult for the Council to balance its membership among ethnic groups and to maintain an even representation among disability types. Currently the dominant ethnic group is Caucasian and autism is the most commonly represented disability. Half of our official appointments remain vacant.

For the last several years, the Council and the Bureau of Special Education have been working hard to address this situation. We reviewed Chapter 164 of the current Connecticut Statutes, sections 10-76i, the Council's legislative history, the IDEA section 300.168 as well as the membership guidelines of other state SEAPs to learn the details of the laws and how other states compare.

This analysis revealed that Connecticut is the only state with 38 appointments (most of which are by the Connecticut General Assembly) and that appointments in all other researched states are equally made by the Governor and the Commissioner (Superintendent) of Education. We collectively believe that the only practical remedy to the current situation consists of revising SAC's membership level via the passage of new legislation.

The Connecticut State Advisory Council requests your support in updating our membership state statutes so we can achieve the desired ethnic diversity and balanced representation of disabilities that is required by the Federal Law.

Section 3 Subdivision (1) (d) changing the burden of proof

The SAC strongly **OPPOSES THE REPEAL** of Section 3, Subdivision (1) of subsection (d) which states *"In making a determination as to the issues in dispute, the hearing officer or board shall review the evidence presented in the hearing with the burden of proof on the party requesting the hearing."*

The Council believes that this change will have the following negative ramifications:

1. It will create a financial hardship to families, a considerable number of whom are already burdened with high medical and support therapy costs;
2. It will create an even greater unfair advantage for school districts and a correspondingly greater unfair disadvantage for parents. School Districts already have multiple advantages over parents, especially during a Planning and Placement Meeting (PPT). The reality is that many, if not most; parents are currently unable to adequately defend their child's IEP due to having little to no training on properly interpreting evaluations as well as fully understanding IEP content and special education procedural safeguards. This is confirmed by the "2007/2008 Connecticut Special Education Survey Summary Report", in which parents reported (63.5%) they have not attended and/or received parent training sessions in the past year.
3. It will make it virtually impossible for parents to ever prevail against a District in a Due Process Hearing. The expertise of the Districts coupled with their control of student records already results in the majority of Due Process Hearings ruling in favor of the Districts. The Council is greatly concerned that the proposed Bill will "stack the deck" even further in ensuring favorable outcomes for the Districts, which, in turn, will also impede the Districts' mandate to provide FAPE (Free and Appropriate Public Education).

Our position against changing the "burden of proof to party requesting a hearing" is shared by an overwhelming number of national organizations that advocate for persons with disabilities. I quote from two such sources:

In a brief (dated April 29, 2005), authored by ARC of the United States, Autism Society of America, Epilepsy Foundation, NAMI, United Cerebral Palsy, and the National Law Center on Homelessness & Poverty and submitted to the United States Court of Appeals for the Fourth Circuit, Schaffer vs. Weast in support of the Petitioners they argued the following:

- a) "Studies over the past 30 years have documented that school districts hold significant advantages over parents in the process for developing the IEP and at any ensuing due process hearings. These advantages demonstrate the need for the burden of proof to be on school districts to show at any due process hearing, that the IEP developed is appropriate"...
- b) School districts generally will have information not available to parents that is relevant in developing an IEP and at any subsequent due process hearings. "In practical terms, the school has an advantage when a dispute arises under the Act: the school has better access to the relevant information, greater control over the potentially more persuasive witness (those who have been directly involved with the child's education) and greater overall educational expertise than parents" ...
- c) The burden of proof dictates the structure of the proceeding, determining who must present their evidence first. See O'Neal v. McAninch, 513 U.S. 432, 436 (1995) (courts determine who has the burden to help control the presentation of evidence at trial") Unrepresented and inexperienced parents are at a disadvantage if they have to present their "case" first, not understanding what is expected of them and lacking the opportunity to model their presentation on that of the school district's experienced representative....
- d) Most parents who request an impartial due process hearing will be unrepresented by counsel and will not have participated in such a hearing before. See 150 Cong. Rec.

S5351 (daily ed. May 12, 2004) (Sen. Kennedy) (“Most parents don’t have access to any attorney, or must rely on low-cost legal aid. And data from surveys shows that even this help is in short supply.”) By contrast, the school district is normally represented by an attorney, a repeat player familiar with the formal and informal rules surrounding such proceedings. See *ibid* (“Those parents who have the courage to go it alone face schools that are well represented. State data shows that in 2003 schools were much more likely to bring an attorney to a hearing than parents were.”)

The National Council on Disability Position Statement to the Supreme Court of the United States “Individuals with Disabilities Education Act Burden of Proof: On Parents or Schools? Schaffer v. Weast” (Dated August 9, 2005). Drafted by Peter W.D. Wright who is the founder of WrightsLaw concludes the following:

“When Congress reauthorized IDEA in 2004, they wrote:

[T]he implementation of this title has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities.

It is undisputed that millions of children with disabilities were denied an education and excluded from school. Today, in 2005, there are significant problems with children not being taught basic reading, writing, arithmetic, and spelling skills so they can be economically self-sufficient and employable. The remedial nature of special education law, the procedural safeguards from *Mills*, decades of failure by schools to educate children with disabilities require that the school district bear the burden of proving that their proposed education program, denial of special education eligibility, or other action is proper, under the Act.

School districts should have the burden of proof in issues about IEP’s, placement, eligibility, and other matters related to an appropriate education.”

In addition, there are at least twelve states that have burden of proof legislation on the districts and there are more states currently changing their statutes from the “party who files for the hearing” back to the districts because it was such a hardship on parents.

Alabama	Illinois
Alaska	Kentucky
Connecticut	Minnesota
District of Columbia	West Virginia
Delaware	New York (changed in 2007)
Georgia	New Jersey (changed in 2007)

The Connecticut State Advisory Council on Special Education continues to fully support former Dr. Betty Sternberg’s statement in her Circular Letter C-9 dated February 22, 2006 to Superintendents of Schools, directors of Special Education and Local Boards of Education.

“I am not seeking to revise the state regulation to conform to the ruling in the Schaffer case. 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 the 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 determining whether an IEP is appropriate.”

There is overwhelming evidence that other states do agree that placing the burden of proof on the “party who files for the hearing” unfair and have either codified legislation putting the burden on the districts or reversing their position entirely. Several states that reversed their position (such as New Jersey) because there was overwhelming evidence that districts were “taunting” parents to file for a hearing, knowing that many families could not afford the legal fees. This resulted in parents accepting substandard Individualized Educational Programs (IEP) for their children with disabilities.

Ladies and gentlemen, families with children with disabilities already deal on a daily basis with hardship and stress in all facets of their lives, including the education of their children. On behalf of the State Advisory Council, I urge you to not add to these families’ difficulties by passing Section 3 of this Bill as currently drafted and let the burden of proof remain where it rightfully belongs – with the Districts.

Thank you for your time and consideration.

Sincerely,
Brenda J. Sullivan, Chair
Connecticut State Advisory Council on Special Education

