Committee Report

CONSENT CALENDAR

March 23, 2021

HOUSE OF REPRESENTATIVES

REPORT OF COMMITTEE

The Committee on Education to which was referred HB 581,

AN ACT relative to the burden of proof in special education hearings. Having considered the same, report the same with the following amendment, and the recommendation that the bill OUGHT TO PASS WITH AMENDMENT.

Rep. Glenn Cordelli

FOR THE COMMITTEE

Original: House Clerk
Cc: Committee Bill File

COMMITTEE REPORT

Committee:	**Education**
Bill Number:	**HB 581**
Title:	**relative to the burden of proof in special education hearings.**
Date:	**March 23, 2021**
Consent Calendar:	**CONSENT**
Recommendation:	**OUGHT TO PASS WITH AMENDMENT 2021-0823h**

STATEMENT OF INTENT

This bill is about leveling the playing field for parents of children with disabilities. If a parent believes their child is not getting the needed services from their public school, they can take steps up to filing a complaint for a due process hearing. At the hearing, however, the burden of proving their case is on parents, which is a very costly proposition – tens of thousands of dollars. School districts have the lawyers, records, and resources so have the upper hand. This bill shifts the burden of proof to school districts. The amended bill also creates a study committee to look at the process starting with individualized education program (IEP) meetings to find issues and what can be done to provide a fair system for families with a child with disabilities.

Vote 20-0.

Rep. Glenn Cordelli
FOR THE COMMITTEE

Original: House Clerk
Cc: Committee Bill File

CONSENT CALENDAR

Education

HB 581, relative to the burden of proof in special education hearings. **OUGHT TO PASS WITH AMENDMENT.**

Rep. Glenn Cordelli for Education. This bill is about leveling the playing field for parents of children with disabilities. If a parent believes their child is not getting the needed services from their public school, they can take steps up to filing a complaint for a due process hearing. At the hearing, however, the burden of proving their case is on parents, which is a very costly proposition – tens of thousands of dollars. School districts have the lawyers, records, and resources so have the upper hand. This bill shifts the burden of proof to school districts. The amended bill also creates a study committee to look at the process starting with individualized education program (IEP) meetings to find issues and what can be done to provide a fair system for families with a child with disabilities. **Vote 20-0.**

Original: House Clerk
Cc: Committee Bill File

Rep. Cordelli, Carr. 4
Rep. Mullen, Hills. 7
Rep. Ford, Rock. 4
March 15, 2021
2021-0823h
06/05

Amendment to HB 581

Amend the title of the bill by replacing it with the following:

AN ACT relative to the burden of proof in special education hearings and establishing a committee to study special education IEP and dispute resolution processes.

Amend the bill by replacing all after section 1 with the following:

2 Committee Established. There is established a committee to study special education dispute resolution options and the burden of proof in due process hearings conducted by the department of education.

3 Membership and Compensation.

I. The members of the committee shall be as follows:

(a) Three members of the house of representatives, appointed by the speaker of the house of representatives.

(b) One member of the senate, appointed by the president of the senate.

II. Members of the committee shall receive mileage at the legislative rate when attending to the duties of the committee.

4 Duties. The committee shall:

I. Examine "child find" IDEA requirements.

II. Examine the IEP process under IDEA including team participants, roles, and responsibilities, time frames, and parental consent.

III. Familiarize itself with federal IDEA and department of education options for dispute resolution in special education cases.

IV. Examine department and other agency supports for parents including information for parents on procedural safeguards and available remedies.

V. Examine department of education monitoring of:

(a) District compliance with IDEA, state law and rules.

(b) IDEA parental complaints leading to state administrative hearings.

VI. Opportunities and best practices for dispute resolution processes at the “early stages.”

VII. Consult with parents, other state agencies and experts, as needed.

VIII. Develop findings and recommendations based upon federal IDEA, parental and expert input, and best practices from districts as well as other states.

5 Chairperson; Quorum. The members of the study committee shall elect a chairperson from among the members. The first meeting of the committee shall be called by the first-named house member. The first meeting of the committee shall be held within 45 days of the effective date of this section. Three members of the committee shall constitute a quorum.

6 Report. The committee shall report its findings and any recommendations for proposed legislation to the speaker of the house of representatives, the president of the senate, the house clerk, the senate clerk, the governor, and the state library on or before November 1, 2021.

7 Effective Date. This act shall take effect upon its passage.

2021-0823h

AMENDED ANALYSIS

This bill provides that the burden of proving the appropriateness of a child's special education placement or program is on the school district or other public agency. This bill also establishes a committee to study special education dispute resolution options and the burden of proof in due process hearings conducted by the department of education.

Voting Sheets

1/22/2021 9:56:47 AM
Roll Call Committee Registers Report

(2)

2021 SESSION

Education

Bill #: HB581 **Motion:** OTP/A **AM #:** 0823h **Exec Session Date:** 3-16-2021

Members	YEAS	Nays	NV
Ladd, Rick M. Chairman	✓		
Cordelli, Glenn Vice Chairman	✓		
Boehm, Ralph G.	✓		
Allard, James C.	✓		
Lekas, Alicia D.	✓		
Moffett, Michael	✓		
Hobson, Deborah L.	✓		
Andrus, Louise	✓		
Ford, Oliver J.	✓		
Layon, Erica J.	✓		
Soti, Julius F.	✓		
Myler, Mel	✓		
Luneau, David J.	✓		
Shaw, Barbara E. Clerk	✓		
Cornell, Patricia	✓		
Tanner, Linda L.	✓		
Ellison, Arthur S.	✓		
Mullen, Sue M.	✓		
Ley, Douglas A.	✓		
Woodcock, Stephen L.	✓		
TOTAL VOTE:	20	0	

HOUSE COMMITTEE ON EDUCATION

EXECUTIVE SESSION on HB 581

BILL TITLE: relative to the burden of proof in special education hearings.

DATE: March 16, 2021

LOB ROOM: 301/303

MOTIONS: OUGHT TO PASS WITH AMENDMENT

Moved by Rep. Cordelli Seconded by Rep. Mullen AM Vote: 20-0

Amendment # 2021-0823h

Moved by Rep. Cordelli Seconded by Rep. Mullen Vote: 20-0

CONSENT CALENDAR: YES

Statement of Intent: Refer to Committee Report

Respectfully submitted,

Rep Barbara Shaw, Clerk

OFFICE OF THE HOUSE CLERK

1/22/2021 9:56:47 AM
Roll Call Committee Registers Report

(1)

2021 SESSION

Education Amendment

Bill #: HB581 **Motion:** OTP **AM #:** 0823h **Exec Session Date:** 3-16-2021

Members	YEAS	Nays	NV
Ladd, Rick M. Chairman	✓		
Cordelli, Glenn Vice Chairman	✓		
Boehm, Ralph G.	✓		
Allard, James C.	✓		
Lekas, Alicia D.	✓		
Moffett, Michael	✓		
Hobson, Deborah L.	✓		
Andrus, Louise	✓		
Ford, Oliver J.	✓		
Layon, Erica J.	✓		
Soti, Julius F.	✓		
Myler, Mel	✓		
Luneau, David J.	✓		
Shaw, Barbara E. Clerk	✓		
Cornell, Patricia	✓		
Tanner, Linda L.	✓		
Ellison, Arthur S.	✓		
Mullen, Sue M.	✓		
Ley, Douglas A.	✓		
Woodcock, Stephen L.	✓		
TOTAL VOTE:	20	0	

Rep. Cordelli, Carr. 4
Rep. Mullen, Hills. 7
Rep. Ford, Rock. 4
March 15, 2021
2021-0823h
06/05

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III. Familiarize itself with federal IDEA and department of education options for dispute resolution in special education cases.

IV. Examine department and other agency supports for parents including information for parents on procedural safeguards and available remedies.

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(b) IDEA parental complaints leading to state administrative hearings.

VI. Opportunities and best practices for dispute resolution processes at the “early stages.”

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2021-0823h

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Hearing Minutes

HOUSE COMMITTEE ON EDUCATION

PUBLIC HEARING ON HB 581

BILL TITLE: **relative to the burden of proof in special education hearings.**

DATE: **March 2, 2021**

LOB ROOM: **201/203** **Time Public Hearing Called to Order:** **2:30 PM**

Time Adjourned: **4:00 PM**

Committee Members: Reps. Ladd, Cordelli, Shaw, Boehm, Allard, A. Lekas, Moffett, Hobson, Andrus, Ford, Layon, Soti, Myler, Luneau, Cornell, Tanner, Ellison, Mullen, Ley and Woodcock

Bill Sponsors:

Rep. Cordelli	**Rep. Verville**	**Rep. Thomas**
Rep. Spillane	**Rep. McLean**	**Rep. Rouillard**
Sen. Reagan		

TESTIMONY

* Use asterisk if written testimony and/or amendments are submitted.

***Rep. Glen Cordelli – Bill Sponsor – Supports**

- Burden of proof should be school district in special ed hearings
- Must convince and show evidence

Mary Gibbens Stevens – Self

- Many parents face uphill battle to understand and advocate for their special ed students – process often long
- Can request a hearing if think child is not being educated fairly
- Parent friendly guide 281 pages
- Complicated and technical
- Process is not different whether asserting the case or defending – school is holder of the evidence should hold burden of proof
- Often schools cannot provide all IDEA mandates
- Doesn't think frivolous complaints would be filled

***Moria Ryan – Parent Advocacy Groups**

- Critical input to parents with spec ed kids
- Many inconsistencies in material that is released to parents for hearings
- Due process only provides 2 years of experience
- Often limited and opinionated or swayed to favor the school
- Progress and testing reports often not provided
- IEP students make up 20% graduating classes

Tiffany Capone – Supports

- Teacher and mother – special ed children
- Not fair for parents to provide all information needed in a due process hearing
- Hearing officers look to schools for info
- Money comes from parent's packets

Kate Shea – Self

- Many medical diagnosis can be costly and need for due process of the learning of the child

- Parents cannot get all help they need
- Burden of proof must be on the school for many reasons including financial
- Mediation requires an attorney for parent

***Becky Wilson – NHSBA – Opposed**

- Rarely do cases go to due process
- Shift burden of proof to the district for all cases filed regardless of who files

Patricia Eno – Parent

- Lots of disputes don't go to due process because of financial hindrance
- Lots of info is left out when presented to parents
- Lots of push off by districts

***Bonnie Dunham – Self**

- Not many due process hearings
- But when a due process is requested it is last resort

Joe Hannon – Parent – Supports

- Burden of proof should be with districts
- Perceived costs can cause hesitation to file
- Encourages passage

Mauren Tracy – DOE

- Help schools be proactive for special education
- Schools have money and expertise
- Right thing to do

Alicia Honston – Parent – Supports

- On order to advocate for her children had to read and understand IDEA rules and regulations
- Shift of burden of proof would help parents who are struggling with districts to provide proper education services

***Heather Young – Mother**

- Presented written testimony

Will Caruso – Parent

- Spend $20,000 to provide best practices for his child but nothing has been done by district to remedy the situation or implement the proper education
- Schools often retaliate
- Who watches the accountability of the school?
- Data is only as good as the people reporting it
- Supports bill

***Jennifer Blagriff – Parent**

- Presented written testimony

Respectfully submitted,

Rep. Barbara Shaw, Clerk

HOUSE COMMITTEE ON EDUCATION

PUBLIC HEARING on Bill # HB 581

BILL TITLE: relative to the burden of proof in special education hearings

DATE: 3-2-2012

ROOM: 201-203 **Time Public Hearing Called to Order:** 2:30PM

Time Adjourned: 4:00 PM

(please circle if present) all present

Committee Members: Reps. Ladd, Cordelli, Shaw, Boehm, Allard, A. Lekas, Moffett, Hobson, Andrus, Ford, Layon, Soti, Myler, Luneau, Cornell, Tanner, Ellison, Mullen, Ley and Woodcock

TESTIMONY

* Use asterisk if written testimony and/or amendments are submitted.

1) Rep. Glenn Cordelli - sponsor - supports
* written testimony
- burden of proof should be school district in special ed hearings:
- must convince and show evidence

2) Mary Gibbens Stevens - self
- many parents face uphill battle to understand and advocate for their special ed students - process often long
- can request a hearing if think child is not being educated properly
- parent friendly guide 281 pages
- complicated and technical
- process is not different whether asserting the case or defending - school is holder of the evidence should hold burden of proof
- often schools cannot provide all IDEA mandates
- doesn't think frivolous complaints would be filed

(3) Maria Ryan — Parent Advocacy Group
- critical input to Parents w/ sped kids
- many ~~inconsistida~~ inconsistencies in material that is released to parents for hearings
- due process only provides 2 years of experience
- often limited and opinionated or swayed to favor the school
- Progress and testing reports often not provided
- IEP students make up 20% graduating classes
- ★ written testimony on line in email

(4) Tiffanie Capone — self — supports
- teacher & mother — sped children
- not fair for parents to provide all information needed in a due process hearing.
- hearing officers look to schools for info
- money comes from parents packets

(5) Kate Shea — self
- many medical diagnosis can be costly and need for due process of the learning ~~of~~ of the child.
- parents cannot get all help they need
- burden of proof must be on the school for many reasons including financial
- mediation requires an attorney for parents.

(6) Becky Wilson — SVHSBA — opposition
- rarely do cases go to due process
- shift burden of proof to the district for all cases filed regardless of who files
- ★ written testimony email

(7) Patricia Eno — Parent
- lots of disputes don't go to due process because of financial hinderences
- lots of info is left out ~~of~~ when presented to parents
- lots of push off by districts

(8) Bonnie Dunham — self —
- not many due process hearings
- but when a due process is requested it is last resort
- ★ written ~~testimony~~ submitted by email

HB 581

(9) Joe Hannon - parent - support
- burden of proof should be with districts
- perceived costs can cause hesitation to file
- encourages passage

(10) Maureen Tracy - DOE
- help schools be proactive for special education
- schools have money and expertise
- right thing to do

(11) Alicia Honston - parent - supports
- in order to advocate for her children had to read + understand IDEA rules & regulations
- shift of burden of proof would help parents who are struggling with districts to provide proper education services

(12) Heather Young - mother
* written testimony submitted by email

(13) Will Caruso - parent
- spent $20,000 to provide best practices for his child but nothing has been done by district to ~~hold them~~ remedy the situation or implement the proper education
- schools often retaliate
- who watches the accountability of the school?

- data is only as good as the people reporting it.
- supports bill

(14) Jennifer Blagriff - parent
- written testimony submitted

Respectfully submitted,
Rep. Barbara Shaw, Clerk

House Remote Testify

Education Committee Testify List for Bill HB581 on 2021-03-02

Support: 104 Oppose: 38 Neutral: 0 Total to Testify: 9

Export to Excel

Name	City, State Email Address	Title	Representing	Position	Testifying	Signed Up
Ryan, Moira	Londonderry, NH army51kilo@hotmail.com	A Member of the Public	Myself	Support	Yes (5m)	2/24/2021 2:50 PM
Eno, Patricia	SALEM, NH marktrisheno@yahoo.com	A Member of the Public	Myself	Support	Yes (4m)	2/26/2021 11:55 AM
Stevens, Mary	Kittery, ME mstevens@gibbonsstevens.com	A Member of the Public	Myself	Support	Yes (3m)	3/1/2021 2:04 PM
Wilson, Becky	Concord, NH bwilson@nhsba.org	A Lobbyist	New Hampshire School Boards Association	Oppose	Yes (3m)	3/1/2021 9:33 AM
Capone, Tiffanie	Alton Bay, NH tcapone74@icloud.com	A Member of the Public	Myself	Support	Yes (3m)	3/1/2021 7:05 AM
Dunham, Bonnie	Merrimack, NH Bsdunham12@gmail.com	A Member of the Public	Myself	Support	Yes (2m)	3/1/2021 8:08 PM
Shea, Kate	Goffstown, NH klynshea4618@gmail.com	A Member of the Public	Myself & Parents of Special Needs Children	Support	Yes (10m)	3/1/2021 10:40 PM
Mandh, Darlene	Hopkinton, NH dmcote88@gmail.com	A Member of the Public	Myself	Support	Yes (0m)	2/27/2021 5:12 PM
Cordelli, Glenn	Center Tuftonboro, NH glenn.cordelli@leg.state.nh.us	An Elected Official	Myself	Support	Yes (0m)	2/28/2021 8:15 AM
FRIEDRICH, ED	LOUDON, NH erfriedrich@yahoo.com	A Member of the Public	Myself	Support	No	2/28/2021 8:28 AM
Covert, Susan	Contoocook, NH scovert@comcast.net	A Member of the Public	Myself	Oppose	No	2/28/2021 10:15 AM
Pospychala, Erin	WILMOT, NH erinmvp@gmail.com	A Member of the Public	Myself	Support	No	2/28/2021 10:36 AM
Forsyth, Rebecca	Exeter, NH rltforsyth@gmail.com	A Member of the Public	Myself	Support	No	2/28/2021 1:18 PM

Carter, Jaime	Londonderry, NH gundyja@hotmail.com	A Member of the Public	Myself	Support	No	2/28/2021 2:41 PM
Walbridge, Zoe	Rochester, NH zoewalbridge@gmail.com	A Member of the Public	Myself	Support	No	2/28/2021 4:02 PM
Symms, Jane	Farmington, NH janesymms6_1@yahoo.com	A Member of the Public	Myself	Support	No	2/28/2021 4:04 PM
McWilliams, Rebecca	Concord, NH rebecca.mcwilliams@leg.state.nh.us	An Elected Official	Merrimack 27	Oppose	No	2/28/2021 5:17 PM
Gordon, Laurie	Weare, NH Lmgord23@gmail.com	A Member of the Public	Myself	Oppose	No	2/28/2021 8:48 PM
Perencevich, Ruth	Concord, NH rperence@comcast.net	A Member of the Public	Myself	Oppose	No	2/28/2021 9:19 PM
Damon, Claudia	Concord, NH cordsdamon@gmail.com	A Member of the Public	Myself	Oppose	No	2/28/2021 9:28 PM
Corell, Elizabeth	Concord, NH Elizabeth.j.corell@gmail.com	A Member of the Public	Myself	Oppose	No	2/28/2021 9:53 PM
barnes, ken	hopkinton, NH kbarnes@kenbarneslaw.com	A Member of the Public	Myself	Oppose	No	2/28/2021 10:19 PM
st.martin, tom	candia, NH rockygorgenh@gmail.com	A Member of the Public	Myself	Oppose	No	2/28/2021 11:33 PM
Murphy, Nancy	Merrimack, NH murphy.nancya@gmail.com	A Member of the Public	Myself	Support	No	3/1/2021 3:50 AM
Greenwood, Nancy	Concord, NH nancgreenwood@yahoo.com	A Member of the Public	Myself	Oppose	No	3/1/2021 7:07 AM
LITTLEFIELD, SHANNON	HAMPTON, NH shshshannon@hotmail.com	A Member of the Public	Myself	Support	No	2/27/2021 7:00 PM
Hegarty, Rebecca	Plymouth, NH faulkner.rebecca@gmail.com	A Member of the Public	Myself	Support	No	2/27/2021 10:53 PM
Walbridge, Tracy	Rochester, NH tracywalbridge@gmail.com	A Member of the Public	Myself	Support	No	2/24/2021 5:35 PM
Pitarys, Tara	Londonderry, NH nhmommyof4@yahoo.com	A Member of the Public	Myself	Oppose	No	2/24/2021 5:45 PM
Casey, Bebe	New London, NH bcasey1996@comcast.net	A Member of the Public	Myself	Support	No	2/24/2021 6:12 PM
DiPietro, Jon	Manchester, NH jon@jondipietro.com	A Member of the Public	Myself	Support	No	2/25/2021 11:25 AM

Banfield, Ann Marie	North Hampton, NH Banfieldannmarie@gmail.com	A Member of the Public	Myself	Support	No	2/25/2021 8:39 PM
Culliton, Penny	Temple, NH pculliton@comcast.net	A Member of the Public	Myself	Oppose	No	2/26/2021 3:45 PM
Reagan, Senator John	Deerfield, NH kathryn.cummings@leg.state.nh.us	An Elected Official	Senate District 17	Support	No	2/26/2021 11:40 AM
Hussey, Heather	Barrington, NH hdhussey@gmail.com	A Member of the Public	Myself	Support	No	2/26/2021 10:36 PM
Pauer, Eric	Brookline, NH secretary@BrooklineGOP.org	A Member of the Public	Myself	Support	No	2/26/2021 6:47 PM
Dermody, Beth	Hopkinton, NH bethdermody@yahoo.com	A Member of the Public	Myself	Support	No	2/27/2021 12:47 PM
Morse, Tracy	Weare, NH Tmnh603@gmail.com	A Member of the Public	Myself	Support	No	2/27/2021 4:20 PM
Thompson, Jessica	Concord, NH Jthompson0406@gmail.com	A Member of the Public	Myself	Support	No	2/27/2021 4:24 PM
Vogt, Robin	Portsmouth, NH robin.w.vogt@gmail.com	A Member of the Public	Myself	Oppose	No	2/27/2021 4:00 PM
Borzi, Catherine	Valdosta, GA cate.borzi@yahoo.com	A Member of the Public	Myself	Support	No	2/27/2021 4:03 PM
O'Neil, Jennifer	Hampton, NH Jenaoneil@icloud.com	A Member of the Public	Myself	Support	No	3/1/2021 2:32 PM
Bevill, Robert	Merrimack, NH bob@bevill.com	A Member of the Public	Myself	Support	No	3/1/2021 3:17 PM
Bevill, Rachael	Merrimack, NH rbevill@gwmail.gwu.edu	A Member of the Public	Myself	Support	No	3/1/2021 3:24 PM
Spencer, Louise	Concord, NH lpskentstreet@gmail.com	A Member of the Public	Myself	Support	No	3/1/2021 3:33 PM
Bartlett, Rep Christy	Concord, NH christydbartlett@gmail.com	An Elected Official	Merrimack 19	Support	No	3/1/2021 3:39 PM
McNamee, Brigid	Concord, NH brigidmcnamee@yahoo.com	A Member of the Public	Myself	Support	No	3/1/2021 3:41 PM
Torpey, Jeanne	Concord, NH jtorp51@comcast.net	A Member of the Public	Myself	Support	No	3/1/2021 4:14 PM
Lisa, Provost	Manchester, NH Provost.Lisa@gmail.com	A Member of the Public	Myself	Support	No	3/1/2021 4:30 PM

Wiley, Susan	sandwich, NH seeksusan@myfairpoint.net	A Member of the Public	Myself	Oppose	No	3/1/2021 4:30 PM
Nardino, Marie	Andover, NH mdnardino@gmail.com	A Member of the Public	Myself	Support	No	3/1/2021 4:30 PM
Jakubowski, Deborah	Loudon, NH Dendeb146@gmail.com	A Member of the Public	Myself	Oppose	No	3/1/2021 4:31 PM
Blagriff, Jennifer	Hopkinton, NH jenniferblagriffpt@gmail.com	A Member of the Public	Myself	Support	No	3/1/2021 5:16 PM
Garland, Ann	LEBANON, NH annhgarland@gmail.com	A Member of the Public	Myself	Support	No	3/1/2021 5:39 PM
Istel, Claudia	Acworth, NH claudia@sover.net	A Member of the Public	Myself	Support	No	3/2/2021 12:42 AM
Stinson, Benjamin	CONCORD, NH benrkstinson@gmail.com	A Member of the Public	Myself	Support	No	3/2/2021 2:16 AM
Lavallee, Gena	Hollis, NH Genabrie1@yahoo.com	A Member of the Public	Myself	Support	No	3/2/2021 6:05 AM
Finocchiaro, Laura	Brookline, NH Lfinocchiaro93@gmail.com	A Member of the Public	Myself	Support	No	3/2/2021 6:19 AM
Brookmeyer, Janet	Grantham, NH brookmeyermusic@gmail.com	A Member of the Public	Myself	Oppose	No	3/2/2021 6:24 AM
Wazir, Safiya	Merrimack, NH s.wazir@leg.state.nh.us	An Elected Official	My constituents	Support	No	3/1/2021 6:18 PM
Drehobl, Heidi	Milton mills, NH hedum@msn.com	A Member of the Public	Myself	Support	No	3/1/2021 6:36 PM
Taylor, Stephen	Plaistow, NH 1stcorinfa@gmail.com	A Member of the Public	Myself	Support	No	3/1/2021 7:08 PM
Adams, Dan	Hancock, NH danieladams9@gmail.com	A Member of the Public	Myself	Support	No	3/1/2021 7:08 PM
Lewandowski, Jean	Nashua, NH jlewando@hotmail.com	A Member of the Public	Myself	Support	No	3/1/2021 7:15 PM
Ray, Robert	Dunbarton, NH robraynh@ieee.org	A Member of the Public	Myself	Support	No	3/1/2021 7:16 PM
HILLSGROVE, Heather	Alton, NH Heatherl98@yahoo.com	A Member of the Public	Myself	Support	No	3/1/2021 7:19 PM
Hillsgrove, Jason	Alton, NH Jasonh724@yahoo.com	A Member of the Public	Myself	Support	No	3/1/2021 7:21 PM

Hinebauch, Mel	Concord, NH melhinebauch@gmail.ocm	A Member of the Public	Myself	Support	No	3/1/2021 7:22 PM
Bergeron-Beaulieu, Jane	Litchfield, NH jbergeron@nhasea.org	A Lobbyist	NH Association of Spec. Education Administrators	Oppose	No	3/1/2021 7:49 PM
Appleton, Hunter	Alton bay, NH Happleton1996@gmail.com	A Member of the Public	Myself	Support	No	3/1/2021 7:49 PM
Ryan, Maryann	Londonderry, NH mr0302gma@gmail.com	A Member of the Public	Myself	Support	No	3/1/2021 7:54 PM
Ryan, Thomas	Londonderry, NH mthomasryanm@gmail.com	A Member of the Public	Myself	Support	No	3/1/2021 7:55 PM
Eversby, Jane	Londonderry, NH Janeeversby@hotmail.com	A Member of the Public	Myself	Support	No	3/1/2021 7:56 PM
Gibbs, Elizabeth	Newport, NH Chezedg@yahoo.com	A Member of the Public	Myself	Oppose	No	3/1/2021 10:44 PM
Kring-Burns, Nancy	Hollis, NH Nancy.kringburns@gmail.com	A Member of the Public	Myself	Support	No	3/1/2021 10:55 PM
Reed, Barbara	N. Swanzey NH, NH moragmcp83@outlook.com	A Member of the Public	Myself	Support	No	3/2/2021 1:33 AM
Porter, Lisa	Hollis, NH tlporter13@yahoo.com	A Member of the Public	Myself	Support	No	3/2/2021 7:36 AM
Platt, Elizabeth-Anne	CONCORD, NH lizanneplatt09@gmail.com	A Member of the Public	Myself	Support	No	3/2/2021 7:52 AM
Doherty, David	Pembroke, NH ddoherty0845@gmail.com	A Member of the Public	Myself	Oppose	No	3/2/2021 8:00 AM
Spielman, Kathy	Durham, NH jspielman@comcast.net	A Member of the Public	Myself	Oppose	No	3/2/2021 8:05 AM
Spielman, James	Durham, NH jspielman@comcast.net	A Member of the Public	Myself	Oppose	No	3/2/2021 8:09 AM
Piemonte, Tony	Sandown, NH tony.piemonte@leg.state.nh.us	An Elected Official	Myself	Support	No	3/2/2021 10:02 AM
Love, RepDavid	Derry, NH davidlove4rep@gmail.com	An Elected Official	Rockingham 6	Support	No	3/2/2021 10:02 AM
Walker, Kelly	Hollis, NH Walker.kelly45@gmail.com	A Member of the Public	Myself	Support	No	3/2/2021 7:00 AM
Porter, Todd	Hollis, NH admiral5555@yahoo.com	A Member of the Public	Myself	Support	No	3/2/2021 9:12 AM

Benard, Patrice	Manchester, NH playchords@gmail.com	A Member of the Public	Myself	Support	No	3/2/2021 10:58 AM
Greene, Bob	Hudson, NH bob.greene@leg.state.nh.us	An Elected Official	Hillsborough District 37	Support	No	3/2/2021 10:59 AM
Kinara, Tonya	Manchester, NH tlkinara@gmail.com	A Member of the Public	Myself	Support	No	3/2/2021 10:59 AM
Baker, Stacey	Hollis, NH Staceytaylor@charter.net	A Member of the Public	Myself	Support	No	3/2/2021 8:29 AM
hatch, sally	Concord, NH sallyhatch@comcast.net	A Member of the Public	Myself	Oppose	No	3/2/2021 8:36 AM
Osborne, Jason	Auburn, NH HouseRepOffice@leg.state.nh.us	An Elected Official	Myself	Support	No	3/2/2021 8:44 AM
Young, Heather	Rochester, NH heatherdonnell2006@yahoo.com	A Member of the Public	Myself	Support	No	3/2/2021 8:46 AM
Rakoski, Ronnieann	Concord, NH ronnieann.rakoski@DDC.NH.GOV	State Agency Staff	Council member Shawnna Bowman	Support	No	3/2/2021 8:54 AM
Raspiller, Cindy	Mont Vernon, NH raspicl@hotmail.com	A Member of the Public	Myself	Support	No	3/2/2021 9:32 AM
Brown, Howard	Mont Vernon, NH hobro39@hotmail.com	A Member of the Public	Myself	Support	No	3/2/2021 9:33 AM
Brown, William	Mont Vernon, NH brownwd95@gmail.com	A Member of the Public	Myself	Support	No	3/2/2021 9:34 AM
Brown, Morgan	Mont Vernon, NH mmbrown1998@gmail.com	A Member of the Public	Myself	Support	No	3/2/2021 9:35 AM
dostie, donald	Colebrook, NH dadostietrucking@gmail.com	An Elected Official	Myself	Support	No	3/2/2021 9:36 AM
Sheehan, Vanessa	MILFORD, NH vsheehan16@yahoo.com	An Elected Official	Hillsborough District 23-Milford	Support	No	3/2/2021 9:46 AM
Stapleton, Walter	Claremont, NH waltstapleton@comcast.net	An Elected Official	Myself	Support	No	3/2/2021 11:38 AM
Green, Dennis	Hampstead, NH Dennisgreen1776@gmail.com	An Elected Official	Rockingham district 13	Support	No	3/2/2021 12:02 PM
mcgee, mikiko	Lyme, NH mmcgee@lymeschool.org	A Member of the Public	Myself	Oppose	No	3/2/2021 12:24 PM
Torosian, Peter	Atkinson, NH FlyBirdAir@aol.com	An Elected Official	Rockingham Count District # 14	Support	No	3/2/2021 12:27 PM

Dressler, Amy	Sunapee, NH adressler@plainfieldschool.org	A Member of the Public	Myself	Oppose	No	3/2/2021 12:37 PM
Kelley, Marcy	Sanbornton, NH mkelley@bownet.org	A Member of the Public	Myself	Oppose	No	3/2/2021 12:52 PM
Hartmann, Jill	Chester, NH jill@hartmannlearning.com	A Member of the Public	Myself	Support	No	3/2/2021 12:56 PM
Koch, Helmut	Concord, NH helmut.koch.2001@gmail.com	A Member of the Public	Myself	Support	No	3/2/2021 12:57 PM
Pike, Jennifer	New London, NH jennifer-pike@comcast.net	A Member of the Public	Myself	Support	No	3/2/2021 1:04 PM
Beaudoin, Lisa	Peterborough, NH lisab@ablenh.org	A Member of the Public	ABLE NH	Support	No	3/2/2021 1:05 PM
Kosnitsky, Carol	Penacook, NH ckosnitsky@comcast.net	A Member of the Public	Myself	Oppose	No	3/2/2021 1:07 PM
Hall, Andra	Greenfield, NH drandrahall@gmail.com	A Member of the Public	Myself	Oppose	No	3/2/2021 1:17 PM
Irwin, Virginia	Newport, NH biddy.irwin@gmail.com	A Member of the Public	Myself	Oppose	No	3/2/2021 1:28 PM
Villani, April	Pembroke, NH jcalumna@yahoo.com	An Elected Official	Myself	Support	No	3/2/2021 2:14 PM
Hannon, Joe	Lee, NH joehannon4nh@gmail.com	A Member of the Public	Myself	Support	No	3/2/2021 2:33 PM
Toulmin, Heather	Hanover, NH heathertoulmin@gmail.com	A Member of the Public	Myself	Support	No	3/2/2021 2:36 PM
Dickinson, Jeff	Concord, NH jdickinson@gsil.org	A Member of the Public	Granite State Independent Living	Support	No	3/2/2021 2:44 PM
Nuneaz, Hershel	Pelham, NH hershel.nunez@state.leg.nh.us	An Elected Official	Myself	Support	No	3/2/2021 5:30 PM
Houston, Alicia	Nashua, NH ahouston617@gmail.com	A Member of the Public	Myself	Support	No	3/2/2021 3:46 PM
Dyer, Allison	Nashua, NH Allie_scott@comcast.net	A Member of the Public	Myself	Support	No	3/2/2021 4:03 PM
Villani, John	Pembroke, NH john.villani@gmail.com	A Member of the Public	Myself	Support	No	3/2/2021 6:13 PM
Stokes, Karen	Rochester, NH Jstokes@metrocast.net	An Elected Official	Myself	Support	No	3/2/2021 6:15 PM

Iacopino, Carol	Weare, NH cgundy@comcast.net	A Member of the Public	Myself	Support	No	3/2/2021 9:02 PM
rouillard, claire	Goffstown, NH cdrouillard@comcast.net	An Elected Official	Myself	Support	No	3/1/2021 8:18 PM
Dewey, Karen	Newport, NH pkdewey@comcast.net	A Member of the Public	Myself	Oppose	No	3/1/2021 8:29 PM
Ryan, Jack	Londonderry, NH jackjryan@gmail.com	A Member of the Public	Myself	Support	No	3/1/2021 8:44 PM
Jachim, Nancy	Newport, NH nancyjachim@gmail.com	A Member of the Public	Myself	Oppose	No	3/1/2021 8:46 PM
BELMONTE, KAREN	Hollis, NH kare307@yahoo.com	A Member of the Public	Myself	Support	No	3/1/2021 8:55 PM
Maisttison, Maureen	Hollis, NH maisttisonm@outlook.com	A Member of the Public	Myself	Support	No	3/1/2021 9:10 PM
St. John, Michelle	Hollis, NH stjohnmichelle@gmail.com	A Member of the Public	Myself	Support	No	3/1/2021 9:35 PM
Chorma, Maureen	Brookline, NH mfford34@hotmail.com	A Member of the Public	Myself	Support	No	3/1/2021 9:36 PM
Arnold, Neil	Marlborough, NH krisarn@myfairpoint.net	A Member of the Public	Myself	Support	No	3/1/2021 9:43 PM
Weber, Jill	NH, NH jill@frajilfarms.com	A Member of the Public	Myself	Support	No	3/1/2021 9:57 PM
Manseau, Joline	Hollis, NH Joline.msndeau@gmail.com	A Member of the Public	Myself	Support	No	3/1/2021 10:32 PM
Casino, Joanne	Concord, NH joannecasino@comcast.net	A Member of the Public	Myself	Oppose	No	3/1/2021 10:37 PM
Piche, Kelly	Hollis, NH kellydpiche@gmail.com	A Member of the Public	Myself	Support	No	3/1/2021 10:40 PM
Briggs, Ronald	Concord, NH Rongb1950@gmail.com	A Member of the Public	Myself	Oppose	No	3/1/2021 7:48 AM
Straiton, Marie	Pembroke, NH m.straiton@comcast.net	A Member of the Public	Myself	Oppose	No	3/1/2021 8:45 AM
Blanchard, Sandra	Loudon, NH sandyblanchard3@gmail.com	A Member of the Public	Myself	Oppose	No	3/1/2021 9:43 AM
Borge, Rachel	Manchester, NH Rachelm.borge@gmail.com	A Member of the Public	Myself	Oppose	No	3/1/2021 10:51 AM

Borge, Joshua	Manchester, NH Jrborge@comcast.net	A Member of the Public	Myself	Oppose	No	3/1/2021 10:52 AM
Borge, Samuel	Manchester, NH Samborge02@gmail.com	A Member of the Public	Myself	Oppose	No	3/1/2021 10:53 AM
Jones, Andrew	Pembroke, NH arj11718@yahoo.com	A Member of the Public	Myself	Oppose	No	3/1/2021 11:22 AM

Testimony

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March 8, 2021

VIA EMAIL:
HouseEducationCommittee@leg.state.nh.us
Concord, NH 03301

RE: HB581

Dear Mr. Chairman and members of the Education Committee,

Thank you so much for taking the time to listen to my testimony regarding HB581. It was an honor to speak with you and answer your questions. I would like to follow up on a few questions that arose during my testimony.

We discussed that a person who brings a complaint against another will typically bear the burden of proving the basis of the complaint. It should be noted that courts have held, "special policy considerations, convenience and fairness" may justify a deviation from that practice. There is no requirement that the burden of proof be borne by one party.

Rather than looking at general practices, a decision on HB 581 should be based on the purpose of IDEA: the education of our most vulnerable students. The procedure under IDEA is intended to be an efficient administrative proceeding. The parties do not have a right to a jury trial and the proceeding is not held before a judge. The question of burden of proof should be determined by standards of fairness, not by what happens in other situations.

Justice Ginsburg stated, "[p]lacing the burden on the district to show that its plan measures up to the statutorily mandated 'free and appropriate public education' will strengthen school officials' resolve to choose a course genuinely tailored to the child's individual needs." Schaffer v. Weast, 546 US. 49 (2005). Shifting the burden of proof to the school district may encourage schools to invest resources in the education of disabled students rather than investing in litigation expenses.

Thank you again for your service on this and other important educational issues.

Mary Gibbons Stevens, Esq.

Written Testimony

Support of HB 581 Bill

3/2/21

William Caruso
3hemlockdr@gmail.com
603-455-5710

RE: Son 8yrs old non-verbal autistic

First off, I am a proud dad of my son who has this disability. He is the most infectious loving child you could have. Unfortunately, he has a disability and so does his IEP team, student's services director who herself has a long history of ruining children's lives. Special education should not be run by the schools, however a separate state-run program implemented in the schools. The school districts have proven that they are not capable of implementing the programs needed in a non-bias ethical way.

My son has attended school now for 4 years and the school district has repeatedly refused to teach him proper speech using traditional styles of methods. Not due to his disability but due to the progress would not meet the schools needs to fake the data. This leaves my son disable, he has zero speech and zero ways to communicate.

During remote learning my son has made more progress than he would in school face to face due to the lack of injuries he sustains "I have a notebook full of pictures as proof". He has been head butted, finger caught in door, being left to put his hands in a toilet full of feces, and received a severe concussion taking him out of school for months. This is due to the poor and dishonest school district and how they treat my child. If my son makes one thing clear he does not want to be around these people that hurt him at school.

Fake Data explained. The data is only as good as the people that collect it. They constantly change programs an implementation styles to harvest the easy data to show slight progress however when the progress stops the program changes direction. Easy to prove. The commitment starts when the fun stops.

My son has a god given right to an education, he is not a dog, we should not be coaxed into moving to another town or shipping my son across NH like a ups package. He is a human being and will be treated like one but not by the school.

HB581 would be the start of changing the poor special education environment in NH, it needs to be done now. My sons best most important learning years are being wasted by the school district on purpose out of spite because we are parents that are educated and involved. The more pressure we put on the school to do the right thing, the more they ruin my son's education. Using his learning as leverage

to break our hearts. I have spent in upwards of $25,000 on my son's education and my budget does not renew every year like the schools or state. His education is failing on all levels, the team is a disaster the special education student services director is the worst, meanwhile the superintendent turns a blind eye with weak unsupportive misleading emails or no help in which to offer. Our speech pathologist admitted at an IEP meeting after 3 years she has no idea what to do or how to teach him, she somehow does not work there anymore.

There is no possible way for me to get the help for my child that he desperately needs I'm out of money and gaining more heartbreak daily to watch my son struggle at everyday life being held back and permanently disabled by the school system.

Of course, the schools are against HB581, if your winning 98% of the cases why level the playing field to give the parents and special needs students a chance. Just the fact we even argue and meet over this issue means there is a serious issue. Its not the number of wins or loses but the number of cases by parents that is important and want better for their kids than the low-level education provided.

Thank you for your time, please feel free to reach out with any questions.

William Caruso
3hemlockdr@gmail.com
603-455-5710

JENNIFER PIKE
34 DOGWOOD LANE
NEW LONDON, NEW HAMPSHIRE 03257

March 2, 2021

HouseEducationCommittee@leg.state.nh.us
Members of the House Education Committee

Re: HB581 - Amend RSA 186-C:16-b to shift the burden of proof in special education hearings to the school district.

Dear Members of the House Education Committee,

My name is Jennifer Pike and I live in New London, NH. I moved to New Hampshire in 1997 to provide my children with a better quality of life. I am writing to ask that you help provide my youngest son, with multiple disabilities, a chance at a better quality of education by shifting the burden of proof in special education hearings to the school district by supporting HB581 and enacting the following change:

> 1 New Paragraph; Special Education; Due Process Hearing; Burden of Proof. Amend RSA 186-C:16-b by inserting after paragraph III the following new paragraph:
> III-a. In all hearings the school district shall have the burden of proof, including the burden of persuasion and production, of the appropriateness of the child's program or placement, or of the program of placement proposed by the public agency. This burden shall be met by a preponderance of the evidence.
> 2 Effective Date. This act shall take effect 60 days after its passage..

For 13 years I was a stay-at-home mom, addressing the needs of my three older children in addition to the enormous demands of my youngest son who has complex medical needs. Charlie, who is now 16 years old, has Agenesis of the Corpus Callosum, Autism, Epilepsy, Septo Optic Dysplasia, Anxiety, Disruptive

Mood Dysregulation Disorder, Ehlers-Danlos Syndrome, and more. Though he has many on-going struggles, he is a very caring and incredibly determined young man. He requires multiple weekly therapies and frequent appointments with physicians and other health professionals.

About eight years ago, our life changed suddenly when I was informed by the New London Police Department of the illegal and vile activities my ex-husband had been involved in. Since then, I have been trying to unravel and repair the damage that was done. I have gotten divorced and have been in litigation with the bank over my house regarding my homestead right.

I have had to fight daily to maintain a supportive environment for all my kids, but primarily for Charlie. As a result of his disabilities, any change in his daily routine can cause significant behavioral challenges. It is critical that any changes are introduced to Charlie slowly and with numerous supports in place.

Not only do I find myself fighting to maintain my homestead right, but sadly, I find myself constantly running into barriers put before me by the school district on a regular basis. It is difficult to detail the struggles I have had over the past ten years without it sounding implausible, but I assure you my experiences are true.

Early on, recommendations immediately were made from outside professionals that went ignored. Now, I can understand the District trying to provide intervention until it is proven unsuccessful, however, after ten years of no meaningful progress, it is way beyond time for intensive intervention from outside sources.

In addition to denial of intensive intervention for my son, I have been constantly denied a member of my son's IEP team by being denied access to the data that all the other staff members have access to. Upon request after request for data, I might get a piece of data, but for years, more than likely I would never get the data I requested for literally months.

Report cards were also not even given to me for a period of several years – from about the end of 3rd grade through about 6th grade if I recall correctly! Again, when I requested report cards, I was told they would be coming… and then they never would! How can I be considered an equal member of the team when I have

literally no data on my son's academics, yet when we met, I was told he was doing "just fine"!!! Really? Where is the data?

As I said, my son is 16 years old now. He is currently reading at a 2.3 grade level. When he was in Kindergarten, I was given data that showed he was reading then between a 1.8-2.3 grade level! I have requested intensive reading intervention over and over. He was scheduled to receive 2 hours of intensive reading instruction 1:1 per day, as agreed by the team, until the Associate Director left her position. The Director made a unilateral change to my son's IEP on the 1st day of 9th grade year and decreased the 2 hours of intensive reading instruction 1:1 to 30 minutes of 1:1 intensive reading instruction which ended up being 45 minutes every other day.

First, reading at a 2.3 grade level is not an acceptable reading ability in my opinion, given that he has not even been getting reading services on an everyday basis until about one week ago! My son has a great desire to graduate with a High School Diploma and go to a two-year College, however, I do not know how he will ever be able to make up that much ground in this placement. The whole purpose of IDEA Law is for every child with a disability receive an appropriate education that meets their unique needs, that prepares them for further education, employment, and independent living. Unnecessary barriers presented by the District, preventing parent participation as a team member, should be considered an act of obstruction to FAPE.

The pandemic has also presented inconceivable challenges over the past year. So much so, that Charlie's aggression caused the police to be here on numerous occasions, resulting in me ultimately filing a Voluntary Chins Petition. Now Charlie has the Fast Forward wrap around service working with us, as well as a Juvenile Probation & Parole Officer as we were not getting appropriate supports from school district.

Charlie's coordination of care can be overwhelming; however, the progress he continues to make is a direct result of our hard work. Now that Fast Forward (wrap around team), his JPPO, as well as, Attorney Mary Gibbons Stevens, are all involved, they agree that he requires an out of district placement, however the school district refuses to even discuss it. I am a single mom, with no child support and no income and the District is fully aware of this, hence, they will not agree to anything without requiring me to take this to due process which I cannot afford.

There are also no funding sources to assist with due process either, thus, leaving every single mom and low-income family helpless against the District that has an Attorney Firm (Drummond & Woodsum in my case) on retainer.

I have always been a very independent and self-sufficient person; however, I find myself in an impossible situation. I have many concerns, as you can imagine, however my biggest concern is that Charlie will never receive a sincere chance for FAPE until the School Districts are held accountable. Until this happens, none of our children will have a chance to lead a meaningful and productive life. In addition, the costs will skyrocket for supporting these young adults that have not been educated appropriately or prepared for further education, employment, and independent living. Please remember the effects of your actions on families like mine when you are considering your vote today and support HB581 to amend RSA 186-C:16-b to shift the burden of proof in special education hearings to the school district.

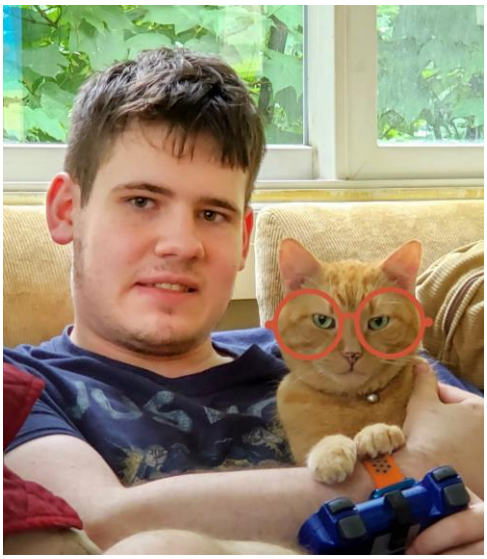
Should you have any questions, please feel free to contact me at 526-2456.

Thank you for your time and service.

Sincerely,

Jennifer L. Pike

Jennifer L. Pike



Charlie Pike, 16yo with Romi

NEW HAMPSHIRE
COUNCIL ON
DEVELOPMENTAL DISABILITIES

March 1, 2021

Dear members of the House Education Committee,

My name is Shawnna Bowman. I am a parent representative on the New Hampshire Council on Developmental Disabilities and Chair of the Policy Committee.

On behalf of the New Hampshire Council on Developmental Disabilities, I am writing in **support** of **HB 581** relative to the burden of proof in special education hearings.

As a parent of students receiving special education services I can speak to the challenges of ensuring that my children are receiving a free and appropriate education as guaranteed under the federal Individuals with Disabilities Education Act. In the event parents and school districts cannot come to a consensus on how to best provide supports for a student receiving special education services, they may resort to mediation or due process.

Due Process is a formal hearing to obtain a ruling on disputes between a school district and parents regarding a child's education. Unfortunately, due process inherently leaves parents at a disadvantage. School districts are represented by attorneys compensated for their wealth of resources and legal experience. Most parents caring for a child with a disability cannot afford representation. Additionally, parents may not be able to gain access to all of the necessary resources for a fair representation of their argument.

School Districts are deemed experts in special education services. Their access to information regarding supports available to them, institutional knowledge and the professional experience of working with other students receiving special education services creates an advantage over parents.

We urge you to **support HB 581** relative to the burden of proof in special education hearings. As the experts, the school district should be required to provide proof of the success of their implemented individualized education plan regardless of who has filed the complaint.

Thank you for your time and consideration.

Best,

Shawnna Bowman
Chair, Policy Committee for the Council on Developmental Disabilities

2½ BEACON STREET, SUITE 10 CONCORD, NEW HAMPSHIRE 03301-4447
603.271.3236 FAX 603.271.1156 TTY/TDD 1.800.735.2964 WWW.NHCDD.ORG

March 2, 2021 Re: HB 581

Rep. Rick Ladd, Chair
House Education Committee
Legislative Office Building, Room 207
33 North State Street
Concord, NH 03301

Dear Rep. Ladd and Members of the House Education Committee,

I am writing to ask you to please support for **HB 581 – *AN ACT relative to the burden of proof in special education hearings.*** As the parent of an adult son who benefited from the special education services he received in under NH's special education rules, I know that we were fortunate. While our school district and I didn't always agree on everything, we were able to work together using informal means to resolve any disagreements. Sometimes though, parents and school districts find that they need to use more formal dispute resolution options, including filing for a due process hearing.

Due process hearings are not common; in the past 5 years, NH has held an average of 3 due process hearings each year, or about 1 due process hearing for every 10,000 NH students with disabilities. One positive reason for that low number is that NH's special education law and rules include many opportunities for meaningful parent involvement in the special education process, procedures that facilitate reaching agreement, and an array of alternative dispute resolution options that parents and schools can often use to resolve disputes without having to file for a due process hearing.

There is also the harsh reality that there is an inherent imbalance in due process hearings that discourages parents from filing. Of the 16 due process hearings held in the past 5 years (about half filed by parents), parents prevailed in 1 and partially prevailed in a second case.

Due process hearing procedures are complex and overwhelming; parents would almost never choose to file for a due process hearing unless they truly believed that it was their best, or only, way to obtain the special education services or educational placement their child with a disability needed. While parents can go to a due process hearing without legal representation, when they do, they rarely prevail, and the costs of paying for an attorney make the process prohibitive for most parents. Federal and State law provide alternative dispute resolution (ADR) options, including mediation, but those options require the voluntary participation by both parties. So, if a school district refuses, the parent may find that filing for a due process hearing is their only remaining option to resolve the dispute.

School districts almost always have more knowledge of the special education laws than parents, and they have access to more resources, including evaluators, special education experts and attorneys. Since those resources are funded by tax dollars, including those paid by the parent, the parent is put in the unenviable position of paying for both their own (if they can find one) and the school district's attorney! Some of the other points that support a school district bearing the burden of proof in due process hearings are that schools/districts have:

- a legal responsibility under IDEA to ensure that a FAPE is available to each child with a disability;
- a stronger understanding of, and experience with, IDEA and its procedures;
- better access to resources, including teachers, evaluators and related services personnel;
- the resources, experience and legal representation they need to present an effective due process case; and
- control over the potential witnesses who have worked directly with the child and are in the employ of the school.

In most due process cases, the evidence is clearly weighted in favor of either the school district's or the parent's position. Sometimes, though, the evidence presented by the 2 parties is closely balanced. In those cases, the "burden of proof" standard is used. The Federal Individuals with Disabilities Education Act (IDEA), is silent on the issue of burden of proof, but in the 2005 Schaffer v. Weast decision, the Supreme Court determined, even while recognizing that school districts have a "natural advantage" over the parents in a dispute, that unless state law assigns the burden of proof on one party or the other, the burden of proof is placed on the party that requested the due process hearing.

In her dissenting opinion in this case, Justice Ginsburg wrote that while courts typically assign the burden of proof to the party initiating the proceeding, she was "persuaded that, 'policy considerations, convenience, and fairness' call for assigning the burden of proof to the school district in this case". Judge Ginsburg noted that school districts have the responsibility to offer each child with a disability an IEP that meets that child's unique needs, and added "the proponent of the IEP, it seems to me, is properly called upon to demonstrate its adequacy." In developing its proposal, the school district should have already gathered the data and other information to clearly demonstrate to the parents that its proposal was appropriate, so it should not pose a hardship for the district to demonstrate the appropriateness of that same proposal at a due process hearing.

If NH passes HB 581, we will not be the first state to take such a position. Most states had no law placing the burden of proof on one party or the other, but prior to the Schaffer v. Weast decision, there were at least 7 states that assigned the burden of proof to school districts, regardless of whether the hearing was initiated by the parent or the school district. Since then, several other states (including New York and New Jersey) have changed their state statutes to place the burden of proof in special education due process hearings on the school district.

HB 581 is intended to "level the playing field", to insert some balance into the dispute resolution process. Assigning the burden of proof to the school district will not encourage parents to file due process hearings frivolously or for an improper purpose; in such cases, IDEA (sec. 300.517(a)) could require the parents to pay for the school district's attorneys' fees. Additionally, the Council of Parent Attorneys and Advocates, Inc. (COPAA) found that there is no research showing that shifting the burden of proof to the school would increase litigation.

I truly appreciate NH's procedures that value parent participation in the special education process and that provide alternative options for resolving disputes. But, in those cases when a parent believes it is necessary to file for a due process hearing to obtain a free appropriate public education for his/her child, HB 581 will make that process fairer and more equitable.

I encourage you to please support HB 581. Thank you in advance for your consideration of my input.

Sincerely,

Bonnie A. Dunham
16 Wren Court
Merrimack, NH 03054
Tel. (603) 860-5445
Email Bsdunham12@gmail.com

Testimony for HB 581

Chairman Ladd and Education Committee members,

My name is Moira Ryan and I am here to speak with you regarding HB581. This bill would shift the burden of proof from parents to schools in due process hearings. This bill is critically important to students with disabilities who are struggling to access an appropriate education.

As a parent, I have had the misfortune to go through facilitated IEP meetings, state complaints, mediation, and due process. These processes are inherently biased and unfair. Here are some of the reasons why: Facilitated IEP meetings don't involve a facilitator who guides the conversation to move forward. In state complaints, the parent, as the filer, is required to submit everything they sent to the investigator to the school as well but the school is not required to send their information to the parent who is given no opportunity to refute or present additional evidence to address it. In addition, school districts have the use of attorneys whereas parents do not. Last, there is due process. Due process is an unfair, biased, and one-sided system. Why? School districts have access to ALL of the student's records and can observe the student in the school. Parents have been denied the ability to conduct observations with their own evaluators even though they have that right by law. I have a parent who is preparing to file for due process. She requested a complete set of records for her child She received approximately 40 pages for the student's 10+ years in school. There is no way the records are that limited. In my due process, the school turned over no current records and special education record that were 3+ years old. Exhibits are exchanged 5 days prior to due process and if the school has put in an exhibit that the parent wants to challenge with new evidence, it is virtually impossible to get it entered into the record. In my due process, we were not able to get any discovery or use any exhibits and had to rely completely on what the school gave us. They slanted things and misinterpreted them to suit their purposes. I was not permitted to hear all of the testimony, but the school LEA was able to hear all my testimony plus her employee testimony and with the breaks, she was able to tell those employees what she wanted them to say. In addition, the testimony of two school witnesses went missing (the evaluator and the classroom teacher) and were never entered into the record rendering the record inaccurate. I had an expert evaluator who taught at Harvard Medical School and did speciality residencies at Columbia. The school had an evaluator who got an 8 month Masters at Rivier College, had no medical training, and could not understand the statistical relevance of the outcomes of her testing. Yes, because my witness was not granted access to observe my son in school, more weight was placed on the less qualified evaluator. The situation was frustrating to say the least.

There were no pro bono options available to me. As a disabled veteran, I am on a fixed income, but I still had to pay thousands and thousands of dollars which were nothing to the district. Many districts carry Primex liability insurance which covers their due process expenses. And while my costs were equivalent to the price of a small automobile, what the district spent was not even a rounding error in their budget.

Because the school controlled the information, had unlimited funds, and did not have to prove anything, the deck was stacked against me and that was only the beginning of the problems.

My child is high functioning. Because of this, the school feels my child is less deserving of help. The school district, in their brief, stated that they were only required to give a bare minimum benefit. This is the Rowley standard which has been long overturned by Endrew F. Furthermore, the district failed to provide progress reports or provide all the services and altered different aspects of service delivery to minimize the cost and therefore diminishing the effectiveness. Now in grade 11, my child only writes on a 5th grade level, can not advocate, has difficulty navigating remote learning, and has lost almost two years of instruction which will impact both higher education, which is no longer a possibility and limit employment options. As a junior, his counselor should be helping him figure out what he can do after school. BUt school has given up on him and devalues his existence in the world. My child will not be able to attain gainful employment or live independently despite the fact that he has an IQ of 160.

CHildren with IEPs make up roughly 20% of any given graduating class. But they don't have the same access to the curriculum as their non disabled peers. This becomes very clear when you look at the proficiency data for children with IEPs statewide. Only 14% are proficient in math and 17% are proficient in reading. This leaves very little chance for independent living or self sufficiency. If we as a state continue to allow such a large portion of our graduating high school classes to be unemployable, that is unsustainable to keep our state solvent. The state will spend millions supporting kids, who with the proper training and services, could have been independent, tax paying members of society. It is completely unsustainable.

As Justice Ginsberg pointed out in her opinion on the Shaeffer v Weast case, "Understandably, school districts striving to balance their budgets, if '[l]eft to [their] own devices,' will favor educational options that enable them to conserve resources." *Deal v. Hamilton County Bd. of Ed.*, 392 F. 3d 840, 864-865 (CA6 2004). https://www.wrightslaw.com/law/caselaw/04/6th.deal.hamilton.tn.htm
In that case, a school district spent over 42 million in legal fees instead of providing services to an autistic child.

Many times school districts deny a few thousand dollars of services, often making this decision on the basis of staff and funding, and not on what the child needs. In my case, the district was denying $7K of services over 4 years which was less than the amount of funding they received from the federal government to support services for my son.

IDEA encourages collaboration and creative thinking between the parent and the school district to attain solutions that will benefit the child. To try and reach some level of balance, IDEA discourages or disallows schools from bringing an attorney to meetings unless the parent brings one first. But this is not the reality as districts have begun bringing in lawyers before the IEP team meeting has even occurred. Justice Ginsberg noted that ustice Ginsberg explained that if a school district does not have the burden of proof, the district is unlikely to try to reach consensus with a parent about an IEP:

> This case is illustrative. Not until the District Court ruled that the school district had the burden of persuasion did the school design an IEP that met Brian Schaffer's special educational needs. See ante, at 5; Tr. of Oral Arg. 21-22 (Counsel for the Schaffers observed that "Montgomery County ... gave [Brian] the kind of services he had sought from the beginning ... once [the school district was] given the burden of proof."). Had the school district, in the first instance, offered Brian a public or private school placement equivalent to the one the district ultimately provided, this entire litigation and its attendant costs could have been avoided. (Ginsburg dissent, page 4).
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> As Justice Ginsberg correctly ascertained, the schools create the IEP, they are tasked with implemented it, and reporting progress on it. THey have access to staff, information, and funds that parents do not. Without the burden of proof, the schools are more apt to create toxic, negative environments which ultimately damaged the children IEPs were intended to help.

The decision in the Schaeffer v Weast case was attained because the parent's state (Maryland) did not have a state law regarding who should have the burden of proof. The default position was the person bringing the action should have that duty. There were some states which already had that law in place. These states included AK, AL, CT, DC, DE, GA, IL, KY, MN, WV.

Today, this law has expanded to other states including NY, NJ, District of Columbia, Delaware, and Georgia.

What were are asking for here today is that our children become educated and independent. We want them to have gainful employment and the ability to be active participants in society. This law is not new and does not negatively impact the number of due process hearings filed. If anything, these states experienced a decrease in due process filings after this law was passed. With this in mind, I ask that you join the other states who have recognized the need for this law and pass it to help our children and secure their futures.

Testimony for HB 581

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KATE SHEA

29 TAMAR DRIVE

GOFFSTOWN, NH 03045

March 2, 2021

Dear NH Education Committee Chair and Members,

I testified today as a NH citizen and mother to four children, three of whom have autism and other special needs. I am also here as an unofficial volunteer – being a voice for other special needs families.

I have heard countless stories of parents simply needing a little support for their children – to no avail due to this burdensome process – such as the power line tree worker, who shared that his autistic 8th grader still could not read, because he had no ability to afford or figure out the unmanage process.

Our families in NH as in many other states have been dealing with many children with legitimately diagnosed medical issues that affect these children academically, behaviorally, developmentally, and emotionally in the school environment. The need for special education continues to grow and has turned into a living nightmare for most families in New Hampshire. I can tell you there is no such thing as a frivolous case in all of my encounters with the almost 2,000 parents from NH Autism Group and several other groups I help manage. These are often for children who are left to "fly under the radar" and belong to families that try to obtain help and quickly learn they cannot navigate the cumbersome and difficult process. These are families and children who are largely from financially disadvantaged situations already. Having a child with special needs is demanding and expensive – and there is not an option to not provide this type of help, so many of us find a way to get the help, sacrificing our health and wellbeing in the process to survive the journey.

I am here today as a mother who has lived this struggle, so much so that it torn our family apart and that struggle began in earnest when our children set foot in schools. This is not to say that we have not been able to gain common ground with the folks who have gotten to know our family over the years (now with kids in 3rd, 4th and 5th grades). After many years of struggling we were able to get some help – some of which is very good, some a work in progress. The path we traveled is all too common – leading to broken, financially strapped families struggling to hang on by their proverbial fingernails. When my now severely ill child with an acquired medical condition and autism was in first grade he cried nightly while I begged for help. He was not able to have anyone to even check in with him, while head of the PTA has a 1:1 para for her son due to anxiety. My child then went through a series of spirialing downward physically due to the massive amount of stress he

encountered over the following years of little to no help. He now has gotten some response, but without my ability to hire an attorney (having just gotten out of a 6-year complex divorce not of my choosing) we are not going to get very far. Can you imagine being a parent going through this with 1 child at once while working full time, dealing with the host of issues that child has to address outside of school and paying privately for things to make up for the lack of support?

What I am here to say however is – for any of us involved, it does not need to be this painful and hard – for anyone, not school administration which are usually teachers and assistant principals stretched thin – way too thin, and the system has an opportunity for us to work better together, not be using the legal system which is based on a system of opposition one party to the other.

As attorney Stevens mentioned earlier, the same evidence is still provided on both sides. A huge difference, however, is that parents might as well not even try to present evidence or spend the money to get help – because they lost before they started. Most of us have been told we cannot even go to mediation unless we have an attorney – this is a common request from educational advocates.

As it stands today, under I.D.E.A., schools already only have to 'consider' medical diagnoses not just accept them – and, coupled with the way this NH law is written now, leaves typically financially stretched and life burdened families with even more hardship. I speak not just for me, but many of the teachers and administrators who cannot say a word, but know things need to change.

Flipping the burden of proof makes sense both from a stretched educational system perspective, and also from a hardship to family's perspective. We need to encourage a more collaborative process. These matters are not frivolous or the same as a law suit in any way – these are generally matters of a child needing a weekly speech or occupational therapy session of 30 minutes, a child needing a little para professional support, and that's generally about all. Our neuro diverse kids need a common set of help – a set of things that is nearly standard for all and none of them should require fighting individually the same battle over and over and over. These supports are very basic and relate to providing a free and appropriate education justified by legitimate medical diagnoses and documentation – often way more than would even be required in a court of law. And because of the burden of proof, it is never enough. How would you feel being denied a wheelchair if you couldn't walk? How would you feel being forced to demonstrate you cannot walk because someone cannot "see it"? There is no difference here. Please help our kids and schools come together in a better way. Please let our families and schools work out a better process. We don't need to invest this kind of time and money to fight over whether a child needs basic supports and services.

Please approve and support this bill.

Sincerely,

Kate Shea

Addendum – added post testimony:

To address several of the School Board Administrator's points – she is correct, these situations do happen and should happen early in a child's education – this makes complete cost/benefit sense. Becky also is right in that this does already stretch school resources in the need to attend overly lengthy proceedings further consuming time and resources – why would we want to keep this the same? And in terms of it damaging a parent/school relationship – again, why would we keep this the same, I can vouch that these relationships have already been damaged. We can do better.

Good afternoon Mr. Chair, Committee members,

My name is Mary Stevens. I am an attorney with Gibbons Stevens Law Office in Kittery, Maine. I have been practicing law for more than thirty years and much of that time has been spent as a child advocate. One part of my advocacy has been in protecting the educational rights of disabled children and their parents under the Individuals with Disabilities Education Act (known as IDEA).

The purpose of IDEA is to ensure that disabled children are provided with a free and appropriate public education (FAPE) so that they can achieve further education, employment and independent living. In the big picture, compliance with IDEA causes states to invest money in the education of disabled children so they become productive members of society and are ultimately taxpayers who contribute to all aspects of our communities. IDEA grants legal rights to children and their parents.

Like many laws, the intent of IDEA is not always carried out in practice. The reality is that parents of disabled children often fight an uphill battle regarding their children's education. In addition to caring for their children, parents have to learn all they can about their child's disability. They become experts not only about their individual children, but about the condition or conditions that impact their development. Then they have to advocate for them to receive an appropriate education. When parents are treated as equal members of the team, the system can work well.

Unfortunately, there are many times that parents are not viewed as experts at the table and are not treated as equal members of the team. When that happens, and parents assert

that the school is not providing their child with FAPE, they can request a due process hearing. The hearing is intended to be an efficient administrative review, not lengthy litigation. The truth is, it is a complicated and difficult legal process. The federal and state laws and regulations are long and dense. The parent-friendly guide to NH special education regulations is 282 pages long. In addition to all of the caregiving and other responsibilities parents have, they have to familiarize themselves with hundreds of pages of detailed legal language in order to assert their child's right to an education. Even when they have some understanding of those rights, they are still at a disadvantage.

This bill is a step toward leveling the playing field. The school is the holder of all the information and evidence regarding the child's education. Parents do not know what happens at school on a day-to-day basis. It is not unusual for teachers or other staff members to give parents information "off the record." It is understandable that the same people are then be unwilling to speak up in a way that would impact their employment. Parents often have to fight with schools to obtain documents and other evidence. Even after several requests, all the information may not be provided. Since the school is the holder of the evidence, the school should bear the burden of proof at hearing.

In order for parents to prove that their children did not receive FAPE from the school district, they usually need the testimony of one or more expert witnesses. While schools have a variety of experts on staff, and calling those experts to testify may not cost the school district any extra money, parents must find and retain experts at their own expense. Shifting the

burden of proof to the school may alleviate some of the expenses incurred by parents in pursuing due process.

Finally, the school should bear the burden of proof at a due process hearing because it is the school that has an obligation to provide FAPE. Parents have their own responsibilities, but when it comes to educating a disabled child, that duty rests squarely upon the school district. The school district has the obligation to educate; the school district should have the burden of proving it has done so when parents raise a challenge.

The interests of justice require the passage of this bill because it protects the rights of the most vulnerable members of our society – disabled children.

The New Hampshire General Court
House of Representatives - Education Committee
107 North Main Street
Concord, NH 03301

RE: Testimony for HB 581

Chairman Ladd and Education Committee Members,

Please **support HB581** relative to the burden of proof in special education hearings.

My name is Tracy Walbridge. I live in Rochester, NH. I am a parent and serve on many boards, including the State Advisory Committee on the Education of Children with Disabilities Advising the NH Department of Education[1].

I am testifying in my personal capacity as a citizen.

Special Education Due Process is one of a parent's rights in the Procedural Safeguards[2]. Due process for parents is usually filed as a last resort, meaning parents have exhausted all other means of the Individualized Education Program (IEP) process including multiple meetings, resolution meetings, and mediation.

NH school districts rarely file for due process hearings, including not filing when they are legally required. A school district can file a due process complaint against a parent for very defined reasons:

- to compel a parent to provide their signature to evaluate
- to give consent to provide Special Education Services
- to defend their evaluations if a parent is requesting an Independent Educational Evaluation (IEE) paid for by the school district. *(The school district would have the burden of proof).*

Having filed for due process after requesting an Independent Educational Evaluation (IEE) for my own child who was struggling to access an appropriate education, I can share that the whole process is emotional, exhausting, and expensive for parents of children who are found eligible for special education.

From my experience and supporting other parents, the Granite State has a climate and culture of "no". What does this mean? This means NH school districts will ignore, postpone shared-decision making and say "no" again and again and again to parent participation in their child's Individualized Education Program (IEP).

[1] New Hampshire Statutes - RSA 186-C: 3-b
[2] New Hampshire Special Education Procedural Safeguards Handbook

When there is a disagreement, the NH school district-proposed IEP goes into effect unless the parent files for a due process hearing. Because if a parent files a due process complaint, the burden of proof is on the filing party. So, NH school districts will keep disregarding and refusing until a parent files.

- In 2019, 1 (one) due process complaint was decided by a hearing officer[3]
- In 2018, 4 (four) due process complaints were decided by a hearing officer
- In 2017, 3 (three) due process complaints were decided by a hearing officer
- In 2016, 3 (three) due process complaints were decided by a hearing officer
- In 2015, 1 (one) due process complaints was decided by a hearing officer

The data shows that parents are not exercising their rights in the Procedural Safeguards.

Historically in NH, when parents exercise any of the alternative dispute resolution actions, the process shows an imbalance of power.

- NH school districts have an attorney and/or contracted attorneys, paid by taxpayers, whose sole purpose is to give advice and legal representation to the school district.
- Paid by liability insurance, Primex, covers:
    - Initial due process ligation
    - Subsequent litigation
    - Payouts/settlements
    - Compensatory Education
        - GEER Funding paid almost all of the district compensatory education costs during COVID 19
- NH school districts expenses are not from an NH school district's general fund or bank account. They are paid by Primex.
- Under IDEA, mediation and due process is a confidential process but some NH school districts attorneys have placed an additional condition on most settlement agreements with a gag order, Non-Disclosure Agreement (NDA), which means that the parent(s) are not allowed to talk about their situation and settlement, if any, and **can not** continue to advocate for their child.

Placing the burden on NH school districts simply requires NH school districts to show that they are providing a student with an appropriate education, consistent with federal and state special education law.

Congress has acknowledged that parents are at a legal disadvantage[4] and has the Supreme Court of the United States, Justice Ginsgurg, dissenting, "the vast majority of parents whose children require the benefits and protections provided in the IDEA" lack "knowledg[e] about the educational resources available to their [child]" and the "sophisticat[ion]" to mount an effective case against a district-proposed IEP[5].

[3] Due Process Hearings by Date | Department of Education
[4] 20 U.S.C. §1400(d)(1)(b)
[5] Cite as: 546 U. S. (2005) 1 GINSBURG, J., dissenting SUPREME COURT OF THE UNITED STATES

It is easier for NH school districts to bear the burden than families, as the districts possess virtually all of the information regarding an educational placement and all their child's educational records. " 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, *"id.,* at 457. Accord *Oberti v. Board of Ed. of Borough of Clementon School Dist.,* 995 F. 2d 1204, 1219 (CA3 1993)[6]

Placing the burden to NH school districts does not unduly burden districts or taxpayers, as it ensures that tax dollars are being spent on effective programs and enhances district accountability.

I ask that you support HB581. Thank you for your time.

Sincerely,
Tracy Walbridge
Rochester, NH

Please provide a copy of this email to all committee members before the hearing, and I request this written testimony form part of the permanent and public record for this bill.

[6] Cite as: 546 U. S. (2005) 1 GINSBURG, J., dissenting SUPREME COURT OF THE UNITED STATES

New Hampshire School Boards Association

Barrett M. Christina, Executive Director
Travis Thompson, President, Exeter Regional Cooperative
Amy Facey, First Vice-President, Souhegan Cooperative
Brenda Willis, Second Vice-President, Derry Cooperative
Shannon Barnes, Past-President, Merrimack

25 Triangle Park Drive, Suite 101
Concord, NH 03301
Phone: (603) 228-2061
www.nhsba.org

March 1, 2021

Dear Chairman Ladd and members of the House Education Committee,

My name is Becky Wilson, and I serve as the Director of Governmental Relations for the New Hampshire School Boards Association. NHSBA is opposed to HB 581. This bill proposes to impose on New Hampshire school districts, the burden of proof at special education hearings conducted by the New Hampshire Department of Education.

Due process hearings, regardless of who carries the burden of proof, are significant investments for districts. Special education law in New Hampshire requires districts to move forward with a due process hearing in certain circumstances, although in many situations, disagreements are resolved or settled through mediation or other dispute resolution options, negating the need for a hearing. In fact, in 2019, only one case in New Hampshire was resolved through due process, in 2018- 4 cases, and in 2017-3 cases. Since 2011, the highest number of cases to be resolved through due process hearings, was 9 cases in 2011. These numbers and decisions can be found on the NHDOE website.

Mediations are often attended by school district leadership representing the district, and perhaps one other district staff member. Parents or guardians also attend and are able to bring an advocate or others to assist them. Mediations often last a full day, but can be highly successful in resolving a disagreement. Should a case not be resolved, school districts must prepare many more staff members for a due process hearing in anticipation of each staff member needing to participate in the trial. This can include extensive pre-trial conferences with legal counsel, interviews, extensive data collection, file preparation, and other required meetings prior to a hearing. These commitments remove staff from the classroom and service provision for large amounts of time; sometimes multiple days, or even weeks.

There is a large increase in legal fees to districts, as well, when a case goes to a due process hearing. In addition, districts at times, are ordered to reimburse parents for legal fees incurred as part of the due process hearing. This is in addition to any

unanticipated costs which may come from the findings of the hearings, such as out of district placements, additional services, etc.

School districts across New Hampshire will soon be setting their operating budgets for 2021-2022. Proposed budgets likely do not include the additional costs to legal fees, the additional staffing which will be needed when due process hearings increase, to cover classroom and special education teachers and providers who are needing to attend hearings, and do not include the potential increased costs of out changed placements or increased services which could come as a result of additional hearings. School districts will be put into a position once again, to shift monies within the operating budget to cover these unanticipated costs, and this will affect other programming and resources available to all students within the district.

School districts work diligently to work collaboratively with families to meet their IDEA obligations, and the additional statutes required by New Hampshire's special education rules and regulations, which already supersede many federal IDEA statutes. HB 581 as proposed, will increase the likelihood that parents will pursue due process hearings as a first step, as opposed to a final attempt to resolve disagreement.

Please do not hesitate to reach out with any further questions or if NHSBA can be of any further assistance.

Respectfully submitted,

Rebecca R. Wilson, NHSBA, Director of Governmental Relations

March 1, 2021

House Education
Room 207, Legislative Office Building
Concord, NH 03301

Re: HB 581, relative to the burden of proof in special education hearings.

Dear Representative Ladd and members of the committee:

My name is Heather Young and I live in Rochester with my husband and two children. I am asking you to support HB581, relative to the burden of proof in special education hearings.

As a parent to a child that receives special education services we are often faced with two things- continue to be beaten down by the school district on things that are a clear violation of state and federal laws or spend endless hours and money preparing for hearings when taking appropriate next steps to continue to advocate for the things our child needs.

My youngest child, Lucas, is ten years old and receives special education services through an individualized education plan (IEP.) My husband and I have spent hundreds of hours over the course of his life learning about rules and laws that support his need for accommodations, modifications and other additional supports in school. While we try to work in partnership with our school district at all times, we have experienced many times that we do not feel like a valued member of our son's IEP team. Despite the rules and laws in place, school districts do not always do what is best for the child and the family's voices are often silenced.

School districts often do not provide appropriate supports and services. Instead of putting money into additional supports and services students need they have unlimited dollars and time to spend on legal representation and technical support to their district leadership staff, at the expense of all of our tax dollars. Our school district brings in representatives from a law firm to intimidate families to a point of exhaustion, to not continue to push for what their child needs. It is not fair to families that do not have the time or money to continue to advocate for what their child needs and often times, what is required by law!

It is time that the school districts are held accountable for their actions and carry the burden, in relation to money and time, and that families do not get beaten down to the point of giving up. If this bill was current law, our son may still be in his local elementary school instead of placed in a private school that could better meet his needs.

Please support HB 581 relative to the burden of proof in special education hearings.

Sincerely,

Heather Young
603-312-0629
Heatherdonnell2006@yahoo.com

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February 16, 2021

RE: 2021 NH HB 581 (regarding the burden of proof at special education hearings)

To Whom It May Concern:

The New Hampshire Association of Special Education Administrators (NHASEA), which I have volunteered to represent, opposes House Bill 581.

The bill proposes to impose on school districts the burden of proof at special education hearings conducted by the New Hampshire Department of Education.

The term "burden of proof" encompasses two distinct concepts: (1) the burden of production; and (2) the burden of persuasion. The party bearing the *burden of production* must present its evidence first. The party bearing the *burden of persuasion* loses if the evidence is "closely balanced." E.g., *Schaffer v. Weast,* 546 U.S. 49 (2005). In most types of cases, the burden of production falls on the party bearing the burden of persuasion.

HB 581 imposes both burdens on school districts.

The bill is identical to 2020 HB 1232. On October 20, 2020, the House Education Committee voted 17-2 that HB 1232 was "inexpedient to legislate" and sent it to interim study.[1] On October 20, 2020 the interim study committee voted 13-0 to issue the following report: "Not recommended for Future Legislation." [2]

The NHASEA opposes HB 581 for three reasons.

1. The bill is unconstitutional insofar as it shifts the burden of *persuasion*. The New Hampshire Supreme Court has already ruled that a state law shifting the burden of persuasion onto municipalities causes them to lose more cases and thus violates Part 1, Article 28-a. *New Hampshire Municipal Trust Workers' Compensation Fund v. Flynn*, 133 NH 17 (1990).

2. Imposing the burden of *persuasion* on school districts is bad policy, as the U.S. Supreme Court explained in *Schaffer v. Weast*.

3. Imposing the burden of *production* on school districts is bad policy because it will unnecessarily prolong special education hearings.

[1] http://gencourt.state.nh.us/bill_Status/bill_docket.aspx?lsr=2442&sy=2020&sortoption=billnumber&txtsessionyear=2020&txtbillnumber=hb1232
[2] *Id.*

The rest of this letter elaborates on those three points.

HOW HB 581 WOULD ALTER CURRENT LAW

HB 581 proposes to amend New Hampshire's special education statute by adding the following as RSA 186-C:16-b, III-a:

> In all hearings the school district shall have the burden of proof, including the burden of persuasion and production, of the appropriateness of the child's program or placement, or of the program or placement proposed by the public agency. This burden shall be met by a preponderance of evidence.

Strangely, the bill includes no fiscal note, although it would have a fiscal impact by causing school districts to lose more cases.

RSA 186-C was designed to implement the federal Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400, et seq. Approximately 29,000 students, 15 percent of all school-age children, qualify for special education in New Hampshire. [3]

The IDEA requires that school districts in participating states offer a "free appropriate public education" (FAPE) to every child with a disability who requires special education. To be "appropriate," a program must be "reasonably calculated to confer a meaningful educational benefit in light of the child's circumstances." *C.D. v. Natick Public School District,* 924 F.3d 621, 629 (1st Cir. 2019). Parents understandably want the "best" programs that will enable their children to reach full potential, but the IDEA does not require this. *Board of Education of Hendrick Hudson School District v. Rowley*, 458 U.S. 176 (1982).

The blueprint for each child's special education program is set forth in an IEP, which is developed by a team that includes school district personnel and the student's parents. 20 U.S.C. § 1401(9)(D). If parents or the school district cannot agree on a student's IEP or placement, either of them may file for a "due process hearing." 20 U.S.C. § 1415(b)(7), (c)(2), (f). These hearings are conducted by administrative law judges appointed by the New Hampshire Department of Education. RSA 186-C:16-a. Hearing officer decisions are appealable to state and federal court. 20 U.S.C. § 1415(i)(2). Parents who prevail at a due process hearing may recover attorney's fees from the school district. 20 U.S.C. § 1415(i)(3)(B).

According to the New Hampshire Department of Education, between 1978 and April 2020, IDEA hearing officer decisions ruled in favor of school districts 58 percent of the time, for parents 34 percent of the time, and reached mixed outcomes 8 percent of the time. N.H.

[3] A January 22, 2021 letter submitted to the House Education Committee by COPAA, an out-of-state organization, erroneously asserts that 169,169 New Hampshire children qualify for special education. In fact, that figure approximates New Hampshire's total school age population, not the number of IDEA-eligible students.

Dept. Educ., *Special Education Impartial Due Process Hearings in New Hampshire – A 45 year History, 1975-2020* (May 2020).

The U.S. Department of Education's regulations implementing the IDEA require that a school district obtain written parental consent before implementing a student's *first* IEP or *first* placement. 34 C.F.R. § 300.300(b)(1). For any *subsequent* IEP or placement, federal law allows the school district to implement its proposal unless parents file for a due process hearing and prevail.

The New Hampshire Board of Education's regulations significantly alter that balance of power. They require that a school district obtain parental consent (or permission from a hearing officer) before implementing *any* IEP or placement. N.H. Code Admin. Rules, Ed 1120.04. As a consequence, New Hampshire IEP teams strive to reach consensus and school districts make many compromises to secure parental consent. [4]

Although the special education statutes do not address the burden of proof, the law is nevertheless clear.

- The U.S. Supreme Court has held that the IDEA imposes the burden of *persuasion* on the "moving party." *Schaffer v. Weast,* 546 U.S. 49. This may be the party that filed for the hearing or the party challenging the IEP team's decision. E.g., *D.B. v. Esposito,* 675 F.3d 26, note 3 (1st Cir. 2012).

- The New Hampshire Board of Education's special education rules allocate the burden of *production*. The party filing for a hearing must present its evidence first, unless the hearing officer finds just cause for altering that sequence. Ed 1123.17(a).

HB 581 proposes to overturn those principles. The bill, if enacted, would require that school districts *always* present their evidence first and *always* bear the burden of proof in disputes over special education programs or placements.

Furthermore, by requiring that a school district obtain parental consent for any IEP or placement, New Hampshire has already given parents a powerful right not guaranteed by federal law. Shifting the burden of proof onto school districts is not necessary to even the playing field.

ARGUMENT

I. HB 581, if enacted, will be unconstitutional insofar as it shifts the burden of persuasion onto school districts.

Part 1, Article 28-a of the State Constitution prohibits the legislature from imposing new unfunded mandates on school districts. Article 28-a provides as follows:

[4] COPAA's January 22, 2021 letter to the Committee overlooks that idiosyncrasy of New Hampshire law. COPAA's letter incorrectly assumes that parents must file for due process whenever they disagree with the IEP or placement a school district offers.

> The state shall not mandate or assign any new, expanded or modified program or responsibilities to any political subdivision in such a way as to necessitate additional local expenditures by the political subdivision unless such programs or responsibilities are fully funded by the state….

The electorate ratified Article 28-a in 1984, nine years after Congress enacted what is now called the IDEA and three years after New Hampshire adopted RSA 186-C.

The New Hampshire Supreme Court's very first decision involving Article 28-a, *New Hampshire Municipal Trust Workers' Compensation Fund v. Flynn*, 133 NH 17, struck down a law similar to HB 581. The case involved an amendment to the state's workers' compensation statute. The statutory amendment, enacted after Article 28-a became effective, created a "*prima facie* presumption that cancer disease in a firefighter … is occupationally related."

This amendment essentially shifted the burden onto a town or city to prove that a firefighter's cancer was *not* occupationally related. The court concluded that "the existence of the presumption would in fact increase the number of successful claims," thereby increasing the cost for municipalities to provide workers' compensation insurance for firefighters. By imposing that new costs on municipalities, the statute violated Article 28-a.

HB 581 would likewise increase the number of successful claims against school districts. When the evidence is "closely balanced," school districts prevail under current law, but will lose under HB 581.

It is already difficult for school districts to prevail at special education hearings. Hearing officers, being human, naturally sympathize with students who have disabilities and with those students' parents. Hearing officers sometimes overlook that public resources are finite; when a school district spends more money on one student, it must either raise taxes or cut programs for other children. Furthermore, when parents of students with disabilities prevail at hearings, federal law allows them to recover their attorney's fees from the school district.

Those realities induce school districts to settle most special education disputes through mediation, thus avoiding a hearing.

Shifting the burden of persuasion will not only alter the outcome of hearings, but will also lead to more settlements (and more expensive settlements) in close cases. By "close cases," I mean not only cases where strong evidence supports each party's position, but also cases where the hearing officer is likely to sympathize with the student despite overwhelming evidence favoring the school district's position.

HB 581 will consequently increase local costs while offering no additional state funding to cover those costs. The bill, if enacted, would thus violate the state constitution.

II. Imposing the burden of *persuasion* on school districts is bad policy.

The U.S. Supreme Court's decision in *Schaffer v. Weast* lists several policy reasons for placing the burden of persuasion on the "moving party." These include the following:

- In American jurisprudence, the plaintiff ordinarily bears the burden of persuasion.

- Automatically placing the burden of persuasion on the district "assume[s] every IEP is invalid until the school district demonstrates it is not." The IDEA "does not support this conclusion." The IDEA "relies heavily upon the expertise of school districts to meet its goals."

- The IDEA compels the school district to explain to the student's parents, well in advance of any hearing, all the reasons for its proposals.

The U.S. Supreme Court recently reiterated that courts and hearing officers lack educational expertise and should consequently defer to the judgment of educators on the IEP team, so long as those educators "offer a cogent and responsive explanation for their decisions." *Endrew F. v. Douglas County School District,* 137 S.Ct. 988, 1001-02 (2017).

Placing the burden of persuasion on the school district would turn that principle upside down.

III. Imposing the burden of *production* on school districts is bad policy.

Peter Wright, a nationally recognized attorney who represents *parents* in special education cases, explained why it is unwise to require that school districts always present their case first at special education hearings.

> I always go first. This gives me control over the order of witnesses, and allows me to lay out the case and theme of the case in the manner I prefer.
>
> * * *
>
> I prefer to go first. I had a case in Pennsylvania were the school district had the burden of proof and was expected to go first. Opposing counsel and I agreed that I would go first, even though the school district had the burden of proof. The Hearing Officer refused to go along with our agreement and forced the school district to go first.
>
> What was the result?
>
> The due process hearing, a tuition reimbursement "'Carter" case, could have been completed in two or three days. Instead, the case continued for months. With nearly two weeks of testimony.

> Why?
>
> The school district attorney had to anticipate my case, the testimony of my witnesses, and had to cover every possible issue from A to Z in direct examination of school witnesses. The case that should have been clear, simple and quick became long, drawn out and slow. In the process, the issues in the case became more convoluted. [5]

I suspect that most attorneys who handle New Hampshire special education hearings agree with Mr. Wright, regardless of whether they represent parents or school districts.

Very truly yours,

Gerald M. Zelin

Gerald M. Zelin

[5] Wright, Peter W. D. "Schaffer v. Weast: How Will the Decision Affect YOU?" *Wrightslaw*, 2005, www.wrightslaw.com/law/art/schaffer.impact.pwright.htm.

MIKHAIL ZHUKOVSKIY
12 DOGWOOD LANE
NEW LONDON, NEW HAMPSHIRE 03257

March 16, 2021

HouseEducationCommittee@leg.state.nh.us
Members of the House Education Committee

Re: HB581 - Amend RSA 186-C:16-b to shift the burden of proof in special education hearings to the school district.

Dear Members of the House Education Committee,

My name is Mikhail Zhukovskiy, and I live in New London, NH. I am writing to ask that you help struggling students with disabilities get a chance to obtain a better education by shifting the burden of proof in special education hearings to the school district by supporting HB581 and enacting the following change:

> 1 New Paragraph; Special Education; Due Process Hearing; Burden of Proof. Amend RSA 186-C:16-b by inserting after paragraph III the following new paragraph:
> III-a. In all hearings the school district shall have the burden of proof, including the burden of persuasion and production, of the appropriateness of the child's program or placement, or of the program of placement proposed by the public agency. This burden shall be met by a preponderance of the evidence.
> 2 Effective Date. This act shall take effect 60 days after its passage..

I am a parent of healthy twin girls, currently 18 months old. We do not know what the future holds for our girls, but it is possible that one or both of them may become one of the 7 million public school students with disabilities.

If this happens, we may find that we need to advocate for our daughters before a school district or others in a position of authority. As has happened to other families testifying before this committee, it may come to pass that school

officials may deny us services that we feel would be necessary for our daughters. If that were to happen, and if we were in a legal proceeding against a school district, we would be at a distinct disadvantage. We work hard to make sure that our daughters are well-cared for and live in a comfortable home, free from hunger and other stresses. But we frequently live paycheck to paycheck. We would not have the money to pay expensive legal fees. A school district, on the other hand, would certainly be well-represented legally. If the burden to prove that our children are not receiving appropriate services were placed on us, chances are that we would lose.

This is the flaw with the legal framework governing these hearings, as currently legislated. It places those with the fewest resources and specialized knowledge to argue a legal case in the position of greatest responsibility in a special education hearing. Parents of disabled children are frequently facing severe challenges, are strapped for time and money, and are exhausted physically and emotionally, yet they are made to fight a bureaucratic system designed to defeat them.

Fairness demands that the roles be reversed. It is a school district's duty to ensure that every student receives an appropriate education, and those acting in a child's best interests should have no trouble proving that the level of services a student is receiving is appropriate.

To correct this injustice, I urge you to pass the legislation mentioned above. Should you have any questions, please feel free to contact me at misha354@gmail.com.

Thank you for your time and service.

Sincerely,
Mikhail Zhukovskiy

Dear Education committee members,

I am asking for your support of HB 581, which would transfer the burden of proof in Special Education Due Process Hearings to school districts. I firmly believe that the districts would act with more integrity to begin with if they knew they could reasonably be held accountable in Due Process. School districts would still be able to outman parents and spend exorbitant amounts on attorney fees that would allow them to defend any unreasonable claim of denial of Free and Appropriate Public Education from a parent. Here is a recent slice of my fight with the local school district that provided an excellent education to my non-disabled child.

For a parent in her twelfth year in dealing with the special education in New Hampshire, it could be difficult to find a starting place for my story. In my case, the District agreed to resolve one pending state complaint in February 2018 by promising some much-needed OT services from an outside vendor over that summer. After that meeting, the written agreement came, including a clause that neither my son nor I would make any claims against the district for acts or omissions, known or unknown, to date. I knew that such a clause was probably illegal and unenforceable, but the District knew I could not fight right then, as my mom was entering hospice. I signed, taking the temporary win, never expecting that a Hearing Officer, when presented with this document in 2019 at Due Process, would allow the school district to go back three years and in order to assassinate my character by bringing up their side of an issue that was not part of Due Process and I could not defend. The letter was illegal, as it did not come with required Written Prior Notice, paperwork that allows a parent to accept what is agreed as appropriate while declining services or actions that they disagree with for their child.

My son received and benefitted from the outside OT's evidence-based program, costing my district $2,500 (my insurance deductible), as measured and reported with weekly data sheets that had to be presented to administration for reimbursement. The entire evidence-based program would have cost about $3,000, with free training provided by the manufacturer. The program then would have been available to continue with my son, and also for every child in the District with Autism, ADHD, or CAPD. It requires oversight by a trained party, but daily use can be monitored by a paraprofessional. Despite the success and inclusion (by name) in my son's IEP for the next year, the school won against my challenge in a State complaint by presenting evidence (school OT's opinion at an IEP meeting) that said the program didn't work so they didn't continue with it. The OT had not attended the free training, and was not using the program properly, but she had trained others on its use. A simple adjustment was indicated in the protocol. On the very same day as this meeting where the OT claimed it didn't work, a progress report indicated that my son had made progress in the OT goal attached to the same program. This evidence that they used it and it did work was presented at Due Process in May, 2019. Despite the fact that I my due process complaint clearly indicated that the school was saying two opposite things about the same service, I did not have a lawyer at Due Process, so I lost. The district "won" a state complaint with one explanation and the Due Process with the alternative one, the town of Salem contradicted itself to the state of New Hampshire, and both contradictory statements were taken as evidence that the School District met their obligations.

I did not originally choose Due Process, but was trying with some success to convince a full IEP Team of my son's needs. He needed outside placement, $$$, and the District agreed to pay for an intake evaluation from an Education service recommended verbally by NH Special Medical Services, an agency that purports to be family centered but "can't" go against a NH school they can't persuade. The

evaluation took place, a meeting agenda included “placement discussion” and then the administrator informed me that I needed to sign (without exceptions) a poorly written IEP including placement at the local high school where progress had stopped in order to allow Team to even discuss placement. I signed with exceptions, then got the “Due Process” threat. There was a follow up meeting already scheduled for after February vacation, which everyone knew we were to spend at Disney. On the Friday before vacation, I received, unexpectedly, notice that the Team (without meeting) had changed its mind and issued a WPN and “final offer” IEP, with a 14-day time line (4 days that I would be at home). Sign without exceptions or we take you to due process., it clearly stated. They filed for Due process despite having no legal basis to force my signature on an IEP and NH DOE allowed them to keep this fact hidden. I had already done a cross-file, I had been working hard for4 weeks to gather all the evidence to prove denial of FAPE, however the burden of proof had shifted to me.

The District has multiple responsibilities in Due Process. They must submit mutually agreeable dates that fit the time lines. They submitted dates that did not fit the time lines (due to a lawyer’s vacation) and were therefore given extra time to prepare their case. The district is required to produce a specific list of evidence that I was not to duplicate. Several hundred of their 800 pages were misprinted, so they were permitted to resubmit the entire packet late to the DOE, and just the misprinted pages to me, so I got to collate. This gave me a copy with the same evidence, different page numbers. They had the administrator that was on my witness list assist her lawyer, so she was able to monitor my case and make adjustments as she went. I asked for technical assistance with the subpoena process, and “copies” of subpoenas arrived, with no instruction that it was on me to have them served in 4 separate counties and in Massachusetts. I was later told by a special education attorney that NH DOE serves subpoenas for him whenever he asks. I had 2 witnesses, including myself, and the right to cross the district’s witnesses, but was interrupted with objections any time I tried to show evidence without phrasing in the form of a question, like a Jeopardy nightmare. I was only permitted to present my own testimony at the beginning and end of the process, and there I was stopped and accused of taking up too much time whenever I was nearing an important fact.

Perhaps the most ridiculous part of DP in New Hampshire, contributing to the insurmountable burden of proof, is the Post Hearing submission. Mentioned nowhere in the pro se guideline, and certainly not explained by the hearing officer, this is an extra opportunity for the staff of the district and their team of lawyers to defend their case, in writing. I was able to and did make my submission as well, without instructions, to the school district’s lawyer as well as the hearing officer, by 5 pm on the due date. The school district submitted after 11 pm, and then asked to resubmit the next day – just to clear up some typographical errors, they claimed. I had no reason to suspect this might happen, or opportunity to object, as my work schedule had been arranged to give me time off before the scheduled hearing dates, not after, already using up the balance of my vacation time. I was doomed and knew it.

I currently have an OCR (office of Civil Rights, federal) complaint being investigated against the district for one issue of retaliation, but I hope they will also hear how the district changed the eligibility category for my son during a “stay put” period on the Friday before Due Process. Tutoring that I had paid for in advance but the district agreed to provide in the stay put was never reimbursed, preventing me from having those funds to get a lawyer to appeal. Additional tutoring was added to the next IEP for a different course that the district would not even provide curriculum for, although it had been requested months before. This past week I confirmed my suspicions that the District had not provided an IEP signed August 8, 2020 to any service providers. They claimed that an old IEP was active, and promised to

get back to me soon when I questioned the goals in November. I can't submit this to NH DOE without having OCR drop my complaint, which is probably why they chose to retaliate in this manner.

There are many laws on the books that could support special education students and parents. Each has as a worst-case scenario, the "consequence" to the school that they are forced to adhere to whatever regulation they were ignoring. If a FERPA complaint, they are asked not to violate FERPA any more. Why would a parent bother? If a Due Process is by some miracle lost, they would have to provide compensatory education. If you catch an administrator lying to save the district money, that fits the definition of educator misconduct, where the parent again has the burden of proof. This could perhaps be used in Due process if deadlines aren't past and if your child has not aged out. Both of these avenues allow the school district to delay services, and the student can't really "double up" and receive the necessary services as well as the compensatory at the same time. They win when they lose.

Please support HB 581. My son is, at 18, still in need of transition services as well as academic services in order to fully participate as a productive member of the community. The district is refusing to provide any offer of placement, and remains dishonest or unresponsive in every interaction. I have just postponed an IEP meeting to go over progress, because I learned the wrong IEP is being implemented. The email said "canceled at the request of the parent" making it appear that I don't really care. If I refute this, a lawyer would later point out how nasty I was about a simple mistake, even though I can prove I requested the correct IEP be given to service providers 3 times.

Thank you all for your time and service to the educational process in New Hampshire. I am happy to answer questions or provide testimony in support of HB 581.

Sincerely,

Patricia Eno

90 Shadow Lake Road,

Salem, NH 03079

(603) 898-5045

marktrisheno@yahoo.com

Archived: Tuesday, April 6, 2021 9:04:20 AM
From: Erin
Sent: Monday, March 1, 2021 9:12:59 PM
To: ~House Education Committee
Cc: Erin Pospychala
Subject: HB581
Importance: Normal

Dear Education Committee Members,
First, I would like to thank all of you for your service to our state and to the education of NH's children. I appreciate the time you all spend in this important work.

I am writing to express my support for HB581, and to request that you vote in support of this bill. As a parent of a 10-year-old student with special learning needs, I know how essential an appropriate education is for all students to succeed. My daughter, who has Down syndrome, is an enthusiastic learner, has plans for a career and an independent life, and is already a full participant in our community. We are actively involved in planning for her educational programming along with our school district team, and we are very thankful that she has a supportive team of teachers who are invested in her success as a contributing member of society.

I strongly support HB581 because I believe that all children should have access to appropriate education as afforded them in IDEA. Currently, if students are not able to access an appropriate education because it is not provided by the local school district (for any number of reasons), the child's parents are often without options to rectify the situation. Litigation is very costly and most families cannot afford the time and the monetary cost of a legal process against a school district with far more resources. If parents are not able to hold the school district accountable through legal action, children may move through the educational system without making any meaningful progress and without anyone stepping in to make amends. If the school district, rather than the family, had the burden of proof in due process special education hearings, I believe there would be far more collaboration and problem-solving between school staff and parents to support a student's educational progress. The cost of legal proceedings would be saved both for school districts and for families if time was spent working together to meet the student's needs rather than preparing for legal arguments.

I ask that you carefully consider the implications of this bill, and that you vote in support of it for the sake of NH students with special learning needs. Thank you for your time and consideration. Please do not hesitate to contact me if you have any questions.

Many thanks to you all,
Erin Pospychala
Wilmot NH
603-526-7616

Archived: Tuesday, April 6, 2021 9:04:21 AM
From: Cate Borzi
Sent: Saturday, February 27, 2021 4:08:24 PM
To: ~House Education Committee
Subject: NH House Remote Testify: 2:30 pm - HB581 in House Education
Importance: Normal

The school is required to provide curriculums based on peer reviewed content. If they are providing this content, then there is no problem in them defending it.

On the other hand, if they are not using it, there is a far, far bigger problem that needs to be addressed. This makes them accountable for what is already required of them.

Cate Borzi

SPECIAL EDUCATION
IMPARTIAL DUE PROCESS HEARINGS
IN NEW HAMPSHIRE –

A 45 YEAR HISTORY
1975-2020

New Hampshire Department of Education
Concord, NH

May 7, 2020

Governor of New Hampshire

Christopher T. Sununu

The Executive Council

District 1	Michael J. Cryans
District 2	Andru Volinsky
District 3	Russell E. Prescott
District 4	Theodore L. Gatsas
District 5	Debora B. Pignatelli

New Hampshire State Board of Education

		Term Expires
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Kate Cassady	District 1	2020
Anne Lane	District 2	2021
Philip Nazzaro, Phd.	District 3	2022
Helen G. Honorow	District 5	2020
Cindy C. Chagnon	At Large	2020
Celina “Sally” Griffin	At Large	2023

Commissioner of Education

Frank Edelblut

Deputy Commissioner of Education

Christine Brennan

Governance Unit

Diana Fenton, Esquire, Chief

Compiled by Stephen W. F. Berwick

AN EQUAL OPPORTUNITY EMPLOYER

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Title IV, VI, and VII of the Civil Rights Act of 1964 – race color, national origin
The Age Discrimination in Employment Act of 1967
The Age Discrimination Act of 1975
Title IX of the Education Amendments of 1972 (Title IX) - sex
Section 504 of the Rehabilitation Act of 1973 (Section 504) - disability
The Americans with Disabilities Act of 1990 (ADA) - disability
NH Law against discrimination (RSA 354-A)

The following individuals have been designated to handle inquiries regarding the non-discrimination policies and laws above

Lisa Hinson-Hatz
State Director, Bureau of Vocational Rehabilitation
21 South Fruit Street, Suite 20
Concord, NH 03301
(603) 271-3471(V/TTY)
1-800-299-1647
Lisa.Hatz@doe.nh.gov

Section 504 Coordinator
Tina Greco
NH Department of Education
NH Vocational Rehabilitation
21 South Fruit Street Suite 20
Concord, NH 03301
(603) 271-3993
Tina.Greco@doe.nh.gov

State Office of Civil Rights (OCR)
Eric Feldborg
State Director of Career & Technical Education
21 South Fruit Street, Suite 20
Concord, NH 03301
(603) 271-3867
Eric.Feldborg@doe.nh.gov

Inquiries regarding Title VI of the Civil Rights Act of 1964, the Age Discrimination Act of 1975, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and/or Title II of the Americans with Disabilities Act of 1990 also, or instead, may be directed to

Boston Office
Office for Civil Rights
US Department of Education
8th Floor
5 Post Office Square
Boston, MA 02109-3921
(617) 289-0111

TTY (877) 521-2172
E-mail: OCR.Boston@ed.gov

Additionally, inquiries may also be directed to the

NH Commission for Human Rights
2 Chenell Drive
Concord, NH 03301-8501
(603) 271-2767

Equal Employment Opportunity Commission (EEOC)
1 Congress Street
Room 100, 10th Floor
Boston, MA 02114
(617) 565-3200

US Department of Education
Office for Civil Rights
Lyndon Baines Johnson Department of Education Bldg
400 Maryland Avenue, SW
Washington, DC 20202-1100
800-421-3481
FAX: 202-453-6012; TDD: 800-877-8339
OCR@ed.gov

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Introduction

In New Hampshire, special education impartial due process hearings are part of the New Hampshire Department of Education's Office of Dispute Resolution and Constituent Complaints under the Governance Unit, which in turn falls under the Office of the Deputy Commissioner. Part of the mission of the New Hampshire Department of Education's Office of Dispute Resolution and Constituent Complaints is to provide timely, impartial administrative processes to constituents that promote free and appropriate public education to all New Hampshire residents.

Under the Individuals with Disabilities Education Improvement Act (IDEIA) Part B, special education impartial due process hearings are the principal vehicle for resolution of disputes between parents of children with disabilities and school districts. The right of parents of children with disabilities to have an impartial binding review of any disagreement over the program offered by the local or regional school district is a central procedural protection in the IDEIA.

The parent obtains a due process hearing by submitting a written request to the school district with a copy to the Office of Dispute Resolution and Constituent Complaints at the New Hampshire Department of Education (hereinafter, the "SDE"). Under some circumstances, school districts may use due process hearings to contest decisions by parents.

New Hampshire operates a single-tier hearing system. That is, the New Hampshire State Department of Education (SDE), rather than the Local Education Agency (LEA), conducts all impartial due process hearings requested by LEAs or by parents or guardians and there is no provision for SDE review of hearing officer decisions. The decision of the hearing officer is final and can only be appealed to either state superior court or to federal district court.

When enacted in 1975, P.L. 94-142, the predecessor of IDEA and IDEIA, special education impartial due process hearing procedures were a way to resolve special education disputes easily and promptly. Over time due process hearings became formalized, legalistic in nature, costly

and at times highly adversarial not only in New Hampshire but in Connecticut, Iowa, Kansas, New York and other states as well. Additionally, due process hearings can be costly in terms of time, money and emotional energy for all parties concerned. From the school district's perspective, no other form of hearing in the school setting is as broad, as well regulated, or as intrusive into the administrative and professional decisions of district staff as the hearing under the IDEA. For parents, the lengthy preparation for a hearing, the need to take time off from work with attendant loss of pay, the anxiety, the win/lose atmosphere, and the wait for a decision, too often increase alienation and sustain antagonism with the school district. All too often, the conflict between parents and school district remains unresolved, or even worsens, regardless of who "won" the hearing.

Hearing Officers

The hearing officer's primary responsibility is to implement state and federal laws and regulations in resolving the dispute in the interest of the student. To this end, the hearing officers must wisely exercise broad authority in their handling of the hearing and the scope of appropriate relief granted, if any.

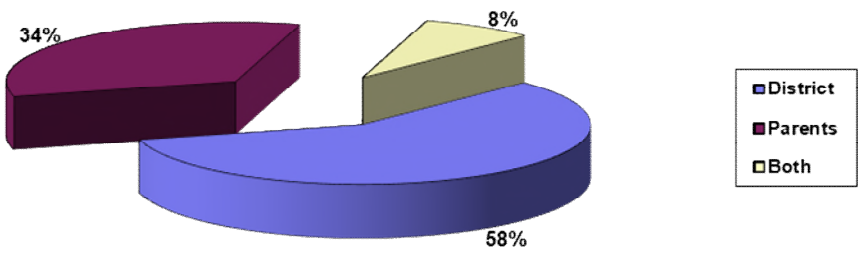
Competent hearing officers are the key to running efficient and effective due process hearings. To accomplish this goal optimally, hearing officers must possess a multitude of skills and talents. Hearing officers must have a strong knowledge of the field of special education as well as federal and state laws regulating the provision of special education. They must also have a sufficient knowledge of the principles of evidence, must have at least the same level of expertise in this area as the attorneys who practice in the area of special education law. Coupled with a sufficient substantive knowledge of special education and the law, hearing officers must have the personal qualities necessary to deal firmly, yet fairly, with the parties to the dispute, especially the attorneys. This last characteristic is essential to establish and maintain control of the hearing process to ensure that all the functions of the hearing are fulfilled, namely a decision on the dispute based upon a good record and a framework for the parties to work together. How hearing officers conduct themselves and the hearing, in terms of establishing and maintaining control, is the crucial factor in determining the effectiveness and efficiency of the due process hearing system.

Throughout the years, a recurring theme has arisen in special education impartial due process hearings: parents concerned that they cannot prevail against deep pocket school districts who have liability

insurance and attorneys representing them. In turn, some school districts assert that they cannot prevail against parents who have the ear of the hearing officer and therefore have opted for alternative dispute resolution. A review of forty-one years of records and hearing officer decisions shows an ebb and flow in terms of who prevails in hearing officer decisions, which is largely dependent upon a wide range of factors including facts of the issue, applicability of law to the remedy requested, saliency of issue, etc. During the 1980s, although Boston Globe NH edition newspaper articles of the time spotlighted concerns that parents could not prevail in NH special education hearings, a review of hearing officer decisions from the period 1980 to 1989 shows an almost even split between parents and school districts prevailing in decisions. During the 1990s, due to a variety of factors such as, among others, changes brought about by court decisions, legislation and staffing in local school districts as well as hearing officer familiarity with the issues, this gradually changed to be more in favor of school districts. Court decisions of this period also largely upheld Hearing Officer Decisions. By 2004, the size and number of cases dramatically decreased. During this time, IDEIA implemented statutory and regulatory changes requiring parents and school districts to agree to opt out of a resolution session prior to the opportunity for a hearing. IDEIA also provided an opportunity for parties to challenge the sufficiency of hearing requests, which could end up in a hearing officer throwing out a case that did not meet certain minimum requirements.

Overall, a review of decisions over forty-one years from 1978 to April 2020 shows 565 decisions in which the school district prevailed in 330 cases (58%); parents prevailed in 190 cases (34%); and, 45 split decisions (8%).

IMPARTIAL DUE PROCESS HEARINGS 1978-2020



Since 1990, in only five cases out of 24, did an appeal to a court of competent jurisdiction prevail against a hearing officer decision leaving a success rate of over 80%. It should be noted that how one defines prevailing party depends upon a number of factors and just because a party did not get what they sought, it does not mean that they ultimately did not win or that their concerns weren't addressed in a way that was productive in the big picture to the child.

Pre 1984

In 1972, after several landmark court cases, Congress introduced legislation establishing in law the right to education for all handicapped children.

On November 19, 1975, Congress enacted Public Law 94-142, also known as The Education for All Handicapped Children Act. The law's intent was that all children with disabilities would "have a right to education, and to establish a process by which State and local educational agencies may be held accountable for providing educational services for all handicapped children."

P.L. 94-142 mandated that states develop an appeals process. Congress found that "*more than half of the handicapped children in the U.S. do not receive appropriate educational services which would enable them to have full equality of opportunity...[and] one million of the handicapped children are excluded entirely from the public school system...*" 20 U.S.C. 1400(b)(3); (b)(4).

In New Hampshire, special education hearings were appealable to the State Board of Education under RSA 193:3 and 186:C. New Hampshire established a two-tier system in which the local level board first heard the case within the federally mandated timeframe, after which the matter went to a hearing officer appointed by the state board. The hearing officer then held a hearing and rendered a decision within 45 days. In 1977, for example, the State Board appointed a consultant from the Bureau of Special Education as hearing officer in a Hampstead School District matter. Between the years 1978-1984, Paul Kilmister, in the Commissioner's Office, as well as contracted Hearing Officers Dr. Newell J. Paire, a former Commissioner of Education, and Otis Cloud acted as Hearing Officers.

In terms of the state process, in a 1984 case, Laurie B. 489, A.2d 567 (N.H. 1984), the court noted:

"New Hampshire law establishes an administrative appeals process in which parents may participate in developing individualized education programs for their educationally handicapped children and may appeal decisions of a school district to the State Board of Education. RSA 186-C:7 (Supp. 1983). Any party aggrieved by a decision of the board of education may appeal the administrative decision to a State trial court or United States District Court. Petition of Darlene W., 124 N.H. 238, 240, 469 A.2d 1307, 1309 (1983); Petition of Milan School District, supra at 232, 459 A.2d at 274. The court may then review the record of the administrative proceedings and hear additional evidence."

From the very beginning, New Hampshire did not meet the statutory timelines. In 1978, one of the state's first hearings went over 45 days while the second hearing went beyond 54 days. Each case took 2 days.

During the period 1978-Summer 1980, an appeal averaged a hearing time of 5-6 hours. From the summer of 1980 until the fall of 1981, hearings jumped and averaged between 2 to 3 working days. During the period of 1978-Fall 1981 the parent was the initiating party in 35 of the 36 appeals. Of these parents prevailed in 14 cases; school districts won in 16 by districts; and a split decision was rendered in five cases.

At a Regional Conference on Mediation, Cooperative Planning, and Procedural Safeguards meeting held on November 20, 1981 in Laconia, Paul Kilmister, the consultant tasked with implementing PL 94-142, made some observations of the hearing situation up to that point:

"There has been a very significant increase in the past 12-18 months; particularly last 6 months in the length of hearings. The time involved, and the real and "hidden" expense, both to the state and school districts. One hearing this summer - 45 hours of tape - 2 attorneys, one employed by the parent - other by the school district - a stenotypist (employed by 1 attorney) - time of witnesses - better than 2 days' work in correspondence, phone calls, - secretarial - perhaps 10 hours' time outside of hearing on part of Hearing Officer in writing decision - direct and indirect costs to all parties involved - 15 to 20 thousand (dollar) range.

"Another cost factor - and time problem - which is a great concern is the review process at the state board level. Up to this time, five of the 36 decisions of the Hearing Officer have been appealed to the State Board, which has conducted "a review." As of now, this review has consisted of reproducing all items submitted

and the typing of a transcript. After a reading of the transcript and reviewing the documents, the State Board schedules a short time for attorneys to make statements and make its decision.

"One problem is that a transcript is costly - and a time-consuming process. The most recent appeal was from the shortest hearing we have had in the past 18 months - 2 1/2 - 90 minute tapes. It cost about $700. One hearing this summer involved more than 30 hours of testimony. We are currently engaged in a similar one - which I feel certain will be appealed by whatever party "loses." If that happens, I am sure we will have exhausted our contract funds and will have the board adopt a different process."

After 1981, the enactment of RSA 186-C:16-b, dissolved the two-tier process and the State Board no longer heard Special Education appeals.

1982-1989

The period 1982-1989 saw a dramatic increase in the number of hearing requests that went to decision after a full hearing. In 1981, 12 cases went on to decision after a full hearing; in 1982, there were 13 cases; in 1983, there were 20. In 1984, the total went down to 14 and in 1985 to nine. However, the number increased in 1986 to 16 cases; in 1987 and 1988 to 20 each year; and in 1989, an all-time high of 33 decisions.

From the very beginning of the hearings mandated by PL 94-142, attorneys for both parents and school districts have been involved. In 1978 there was one attorney hired by the parents. In 1979, out of 12 cases, attorneys for the district represented two, while an attorney for the parents attended one. In 1980, with 11 cases, attorneys for the district represented six, while attorneys for the parents represented six. From 1981-1989, the numbers of attorneys attending hearings increased so that nearly every hearing was attended by attorneys. Additionally, the number of days required for a hearing jumped from 2 days in 1978 and 1979 to 6 days in 1981; 9 days in 1986; and 10 days in 1989.

Beginning in 1984, when 20 cases occupied nearly all of one hearing officer's time, the Department began contracting with two additional hearing officers, Carol Schapira and Alice Vartanian-King, specialists in special education matters, to conduct hearings. There were also numerous complaints (internal and external) that hearing officers did not understand what the law allowed and that they were often writing decisions that would not hold up in court. Already by the mid-1980s, the NH Supreme Court had heard a number of Special Education matters:

Darlene W (1980-1981) regarding a state board decision that a school district was not liable;

Laurie B (1984) determining that the lower court did not follow administrative procedures;

John H (1985) regarding waiver of sovereign immunity by the state;

Todd P (1986) wherein the court addressed legal liability

By that time there had already been several other court cases, which affected the nascent hearings process:

Garrity v. Gallen in 1981 while against DCYF the court mentioned Special Education.

James O (1986) Consent decree brought against NHDOE charging that it had violated EAHCA and subsequent IDEA students placed in state facilities or programs.

Hearing Venue

Originally, hearings were few, small, and easily held in a Department of Education meeting room at Londergan Hall. By 1986, the hearings had become more adversarial and, in some cases, explosive, so moved to the Legislative Office Building when the legislature was not in session. Eventually, in 1987, as hearings increased, the Department worked with the First Congregational Church to utilize its education space to hold hearings when unable to do so at the LOB. By the late 1980s, space freed up in the basement of Londergan Hall so that hearings took place in two hearing rooms (Rm 13 and 19) there. This continued until March 2002 when the Department of Information Technology took over the space. For a period of time hearings occurred at the Franklin Pierce Law Center. By June 2003, the Department contracted for a suite at Regional Drive, which had four hearing rooms and a lobby area. The Department also purchased new recording equipment to ensure quality control. By July 2010, hearings moved again, this time to the DDS hearing room until a more permanent space opened in Room 200 of Walker Building.

Attorneys added as Hearing Officers

Since the legal issues increased by the year, it was determined that it was becoming increasingly important to have hearing officers who were attorneys and therefore would understand the legal ramifications of decisions. Consequently, in 1986, in addition to the then current hearing officers, Attorney Arpiar "Arpie" Saunders, was hired. As the number of cases increased, and the issues grew more cumbersome, in 1987 more hearing officers (State Rep. Betty-Jo Taffe, Maureen Kalfas, Dr. Philip Boucher, Attorney Quentin Blaine, and, Attorney Patricia Quigley) were hired to pick up the extra workload. All the hearing officers either had a background in special education law, or had been in the field of special education for many years.

During this time, two high profile hearing officer decisions were appealed to the US District Court, and affected subsequent hearings:

Karen M. /Henniker (1987) – regarding a dyslexic graduated school valedictorian who the school district was ordered to provide compensatory education;

Timothy W. /Rochester (1987) – Special education entitlement for severely handicapped.

A year later, in 1988, the hearing officer contracts were not renewed and the department instead contracted with a law firm to handle appeals. It was determined that since most of the cases continued to involve attorneys on both sides and legal matters were becoming more important, one law firm could better handle the increasing work load. The law firm hired was the Law Offices of James J. Bianco, Jr. Attorneys assigned by the law firm to hold hearings were Lisa J. Rule, Timothy Bates, Robert Levine, and Eric G. Falkenham. Within a year, however, due to the increasing caseload and the difficulty encountered by one law firm handling all of the cases, it was once again determined to look for new hearing officers who had a good understanding of the law as well as special education matters. It was also at this time that the US District court overturned a hearing officer decision (Casey J. 1988), which made the newspapers. At a due process hearing in 1988, the hearing officer found that a student's suspension violated his due process rights but that the rest of the IEP, including the administration of Ritalin was appropriate. The parents appealed to the US District Court. Judge Loughlin found that the student's "right to a free appropriate education could not be premised on the condition that he be medicated without his parents' consent." Judge Loughlin also found that the school district violated the federal Individuals with Disabilities Education Act by failing to notify the parents about changes in their child's education, including a

month of "isolation" with a teacher in a tiny room. The student had the right to be free from forced administration of psychotropic drugs, like Ritalin, because of their constitutional right to privacy and bodily integrity.

In 1989, the department then contracted with eight independent attorneys – John Dabuliewicz, Gerard Spegman, Gyda DiCosola, Kenneth Nielsen, S. David Siff, Catherine Stern, Richard deSeve, and Katherine Daly.

1989-2002

The number of cases that went to full hearing and decision decreased dramatically after 1989: 1989 (33 cases); 1990 (23 cases); 1991 (20 cases); 1992 (16 cases); 1993 (16 cases); 1994 (14 cases); 1995 (12 cases); 1996 (14 cases); 1997 (10 cases); 1998 (7 cases); 1999 (9 cases); 2000 (13 cases); 2001 (15 cases); and 2002 (1 case). While the number of hearing days remained relatively stable (ranging from 3 to 12 days of testimony in 1990 to a high of 17 days in 1995!), many cases settle and mediation became increasingly popular as a means to settling disputes. In 2000, 4 out of 11 cases had a hearing decision within 45 days while in 2001, 9 out of 15 cases were completed within 61 days with 2 of them falling within 36 days indicating the increased emphasis on timeliness of decisions. What did not decrease, however, were attorneys attending due process hearings. Whereas the number of attorneys representing parents decreased, it was rare for districts to attend hearings without attorneys.

While cases that went to full hearing and decision decreased dramatically after 1989, the same was not true of the number of days involved in hearing. In 1990 one case took up twelve days of hearing

In terms of litigation, several cases affected hearing officer decisions:

Cocores/Portsmouth and a number of other school districts in 1990 – regarding denial of FAPE. The court overturned the Hearing Officer and remanded the decision

Marc A/NHDOE & NHDOC – in 1994 regarding prisoners receiving FAPE while incarcerated

Brandon A/Epsom – in 1999 regarding timeliness of hearings. The court dismissed the matter due to regulation changes meant to tighten the timelines

In six other appeal decisions, the courts upheld hearing officer decisions on a variety of issues such as appeal timeframes, unofficial recording of hearings, placement, 504 accommodation of parent at hearing, and placement issues.

In 1990, the Department added Attorney John LeBrun as a contracted hearing officer and in 1994, Attorney Jeanne Kincaid. Six years later, in 2000, Amy Davidson became a hearing officer.

Among the important cases won by parents at the hearing level and subsequent court appeal during this period was the Hunter P. case about cochlear implants. One other decision from this period that was of Michael M. court upheld HO concerning appropriateness of the IEP. In that case, the school district was not required to devise best IEP, or what parent consider ideal – Parent demanded SAU place student in private school at public expense. The Hearing Officer found against parent as did court. In the subsequent appeal, the Court of Appeals did not address the issue of the IEP. The issue, however, of the lower court stating a parent could not do represent themselves was overturned by the appeals court.

Alternative Dispute Resolution Processes

New Hampshire has a long tradition of mediating disputes. Originally, arrangements for mediations were through the Special Education Bureau at the Department of Education. In 1995, the mediation program moved from the Special Education Bureau to the Commissioner's Office where mediation was further opened up to parties as a way to evaluate their case before hearing. Prior to 1995, there were 40 volunteer mediators. During mediations, two mediators heard cases; after 1996, Hearing Officers acting as mediators handled this role.

In 1994, a second alternative dispute resolution process was enacted – Neutral Conferences. Neutral Conferences are unique to New Hampshire. Parties, prior to the conference submit a four page summary of their case. A conference each are given a half-hour to make their case after which the Neutral gives the parties their decision which, if parties agree, is made into a written, binding agreement.

Another change in the Due Process Hearings program occurred in the summer of 2000. In that year mediation was automatically, unless otherwise requested, scheduled with a requested hearing. This has had the effect of encouraging parties to settle disputes without the need for a formal hearing. The mediation option, as mentioned earlier, proved to be

an invaluable asset in solving disputes. In addition, by May 2001, parties submitted mutually agreeable dates prior to requesting a hearing from the State Department of Education. Failure to provide the dates resulted in the Department unilaterally assigning dates, which might, unintentionally, be inconvenient to the parties, and consequently, result in hearing delays. The intention was that the change would further reduce the number of days from hearing request to the final decision.

In 2013, a third alternative dispute resolution evolved from mediations and neutral conferences – the Third Party Discussion Led by Moderator. In this role, the moderator hears from each side as in a mediation but can also provide insight as to legal stance and how a Hearing Officer might determine it.

Hearing Costs

In terms of hearing costs, during fiscal year 1997 New Hampshire allocated $87,700 for four hearing officers. Of that amount, alternative dispute resolutions took up approximately $25,000. In 1997, the cost for services charged to the Department for a full hearing ranged from $765 to $4,770. A one day hearing cost $942; a three day hearing cost $1,890; a four day hearing cost $765 while another cost $3,870. The reason for such a difference in cost was that the $765 hearing was for half days and the issues less muddied. The cost for a five-day hearing was $4,770. As indicated under the "Historical Overview of Due Process in New Hampshire," the cost for transcription of one hearing in 1981 cost about $700 for a 2½-hour session. The average cost in 1997, with 19 tapes (average 5 per day) came to $3,000. This cost does not include attorney's fees nor the charge for hearing officer services. Through the years, these costs steadily increased.

2003-2020

The year 2003 marked 28 years since the first cases under PL 94-142 began in 1975. In 2003, State Representative and J.D., Gail Morrison became hearing officer followed in 2004 by Attorney Joshua Jones, in 2005 by Attorney Peter Foley and in 2007 by Attorney Joni Reynolds and Attorney Scott Johnson. During the 17-year period from 2003 to 2020, cases have significantly decreased from a high of 113 requests in FY 2004 to 33 cases requested in FY 2014. Since then the average has been around 35 cases per fiscal year. In terms of hearing decisions, this has decreased substantially since passage of IDEIA in 2004, cutting cases from 24 decisions in 2003 and 29 in 2004, to 12 in 2005 and 2006 respectively, 13 in 2007, down to six in 2009 and 3 in 2010 to the average of 2 to 4 cases by

2015 to 2020. The decrease is largely due to the increased emphasis at the state and federal level of utilizing alternative dispute mechanisms to resolve disputes amicably between parties. In 2013, DOE initiated a third alternative dispute resolution process – third party discussion led by moderator. Attorney Briana Coakley-Hyde became hearing officer in 2018.

Timeline

- 1972 — Legislation introduced in Congress after several "landmark court cases establishing in law the right to education for all handicapped children."
- 1975 — P.L. 94-142, the predecessor of IDEA and IDEIA
- 1975-1978 — Two tier system of appeals
  - First tier local school board
  - Second tier State Board appointed hearing officer, then decision by State Board
- 1977 — SPED Bureau consultant Kennedy acts as Hearing Officer
- 1978-1984 — Hearings transferred to/administered by Commissioner's Office starting 1981
  Attorneys hired by/represent parents and attorneys;
  Hearings go beyond statutory 45 days;
- 1980-1981 — **Darlene W. NH Supreme Court writ of certiorari re State Board decision that school district not liable for placement**
- 1981 — **Garrity v. Gallen Laconia State School – case filed against DCYF – NH ordered to devise plan for institutional improvement and community placmeent**
  Two tier system dissolved - state board no longer involved in appeals
- 1982-1989 — Dramatic rise in cases
- 1984 — Two more hearing officers hired due to heavy caseload
  Laurie B. – NH Supreme Court – lower court did not follow administrative appeal procedures
- 1985 — **John H. – NH Supreme Court – waiver of sovereign immunity by state re: appeals**
  Edward B. v. Brunelle – Class action involving SPED for students placed by juvenile courts
- 1986 — **James O. – Consent decree re: case against NHDOE by students placed in state facilities or programs violated EAHCA now known as IDEA**
  Legal complexities in cases necessitate hiring individual with legal knowledge as hearing officer – Attorney Arpiar Saunders becomes 4th hearing officer
  Todd P./Hillsboro-Deering – NH Supreme Court re: determination of legal liability
- 1987 — **Karen M./Henniker - Hearing Officer found in favor of Honor roll Dyslexic student, ordered compensatory education (Vartanian)**; addition of 4 more contracted hearing officers
- 1988 — Contract for hearing officer given to Bianco Law Firm
- 1989 — **Casey J. Ritalin case– hearing officer orders student take Ritalin; overturned in court (Falkenham)**
  Non-renewal of contract with Bianco Law Firm.
  Department contracted with 8 independent attorneys to

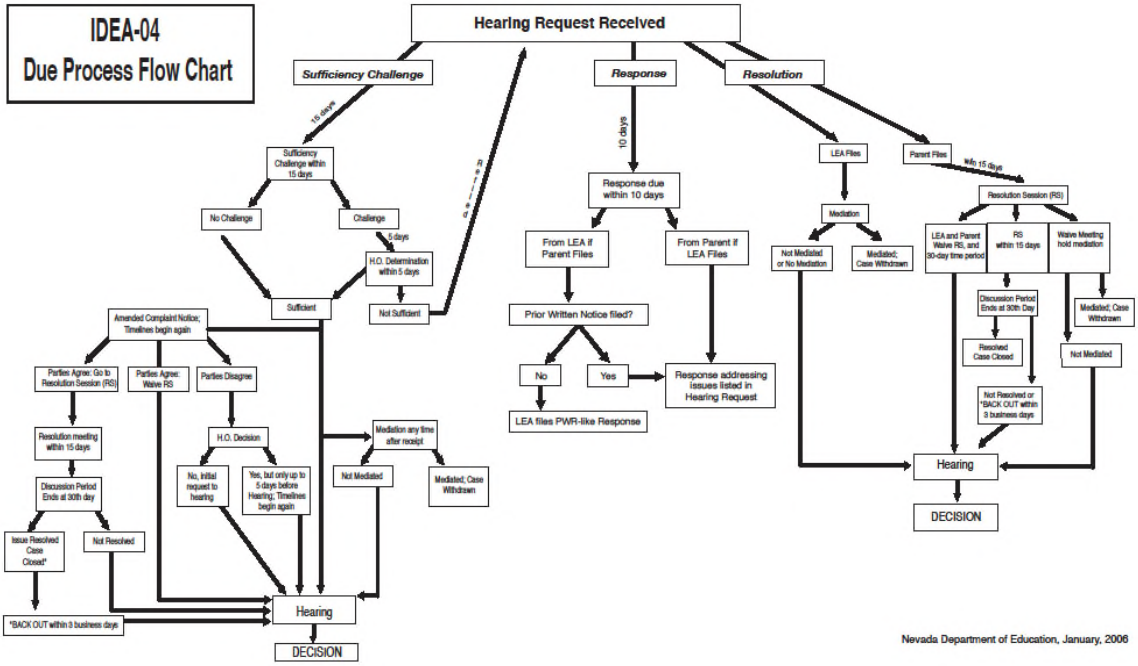
serve as hearing officers
Timothy W./Rochester – Parents appealed an order of the district court which held that under the Education for All Handicapped Children Act, a handicapped child is not eligible for special education if he cannot benefit from that education, and that Timothy W., a severely retarded and multiply handicapped child was not eligible under that standard. The appeal court revised the district court (1987 case – Quentin Blaine).

- 1990 Several lawsuits –
  - **Cocores/Portsmouth/multiple school districts (IDPH-90-61) lawsuit overturns hearing officer dismissal in compensatory decision orders Hearing Officer to determine merits of case. Multiple disabilities claims denial of FAPE (Siff);**
  - Attorney LeBrun becomes hearing officer
  - **G.D. v. Westmoreland (IDPH-90-46) – District and Appeals court upheld HO decision regarding FAPE and placement (LeBrun)**
  - **Caroline T/Hudson (IDPH-90-051)– District court and Appeals court affirm HO decision and found against parent in that issue of school district transcript or recording in sped hearing do not violate parents' rights (Daly).**
  - **Scott H./Manchester (IDPH-90-077) – Appeal timeframe**
- **1991 James O./Marston – Class action case resulted in settlement. Students with disabilities placed in facilities under juvenile laws received FAPE**
  I.D./Westmoreland (IDPH-91-042) court upheld matter in which parent accused NHDOE of not providing parent with enough reasonable accommodations (Daly)
- 1994 Attorney Jeanne Kincaid becomes hearing officer; addition of Neutral Conferences as a second alternative dispute resolution alternative
  Marc A./Manchester (IDPH-94-03)– Court vacated HO order regarding FAPE in prison. Parties ordered to modify IEP in manner consistent with need for safe, secure inmate population. Order further states all qualified inmates are entitled to FAPE while incarcerated (LeBrun).
- 1995 Mediation program moved from Special Education Bureau to Commissioner's Office.
- **1996 Kimberli M./Manchester (IDPH-96-032) – Upheld HO in financial liability (Sending/Receiving district) case between districts**
- **1999 Two lawsuits**
  - **Brandon A. v. NHDOE (IDPH-99-035) – timeliness of hearings – dismissed as NHDOE entering rulemaking to remedy concerns (Kincaid)**
  - **J.W./Con-Val (IDPH-99-043) – IEP/Placement upheld HO decision in favor of district. Parents unilaterally changed child's placement during**

pendency of review proceedings w/o consent of state/local officials. (Kincaid)

- 2000 Attorney Amy Davidson becomes hearing officer; change in mediation - mediations automatically assigned unless otherwise requested, scheduled with a requested hearing.
- 2001 First meeting held with school district and parent attorneys and advocates who appear in front of hearing officers.
  - **Hunter P./Stratham (IDPH-FY-01-011) – SAU brought appeal against HO decision finding district liable for cochlear implant – court upheld HO (LeBrun)**
- 2002 Commissioner Donohue discontinues enforcement of mediated agreements by Hearing Officers
  - Four lawsuits
    - **Michael P./Pemi-Baker (IDPH-FY-02-06-0136) – court upheld HO – appropriateness of IEP.School District not required to devise best IEP, or what parent consider ideal – Parent demanded SAU place student in private school at public expense. HO found against parent as did court. (Siff) This matter was appealed to Court of Appeals due to lower court stating parent could not do so pro-se. Appeals court overturned the district court ruling stating parents could represent themselves.**
    - **Andrew S./Manchester (IDPH-FY-02-07-005) – court upheld HO – parents asserted student at Catholic school had right to IDEA hearing. HO disagreed. (Siff)**
    - **Katie C./Greenland (IDPH-FY-02-11-084) – Overturned HO decision which favored parent right for eligibility and reimbursement (Siff)**
    - **George S./Timberlane (IDPH-FY-02-11-090) – Overturned HO decision in residency decision. Parents claimed residency in district while court asserts they fraudulently did so when they actually reside overseas. (Davidson)**
- 2003 Change in Hearing Officer payment structure – previously paid per hour basis, changed to lump sum and Hearing Officer Evaluation system began
  - Two lawsuits
    - **Galina C./Shaker Reg. (IDPH-FY-03-09-027) Court upheld HO decision regarding non-reimbursement of parental unilateral placement (Davidson)**
    - **Mr. and Mrs. S./Timberlane (IDPH-FY-03-10-043) – Court awarded attorney's fees to parents (Davidson)**
    - Rep. Gail Morrison becomes hearing officer
- 2004 IDEIA changes to Hearings Process – Local Resolution process required to be opted out of by parents and district if parent requested hearing with no such requirement for

	district requested hearing as well as opportunity to throw out case that does not meet sufficiency challenge. **Bryan M./Litchfield (IDPH-FY-04-12-057) – Overturned HO decision – found HO did not apply correct legal standard. Parents awarded IEP and reimbursement (Morrison).** Attorney Joshua Jones becomes hearing officer
• 2005	**Mark and Linda L./Wilton-Lyndeborough (IDPH-FY-05-02-50)– court upheld HO Decision regarding IEP (Siff)** Attorney Peter Foley becomes hearing officer
• **2006**	**Alexandra R./Brookline (IDPH-FY-06-11-026) - Court overturned HO concluding HO dismissed hearing without conducting oral evidentiary hearing even without sufficiency challenge by district (Davidson)** **Elena K./et al. (IDPH-FY-06-03-052; IDPH-FY-06-10-021; IDPH-FY-12-12-020) – Case dismissed. Multiple issues. (Foley; Davidson)** **Mark and Linda L/Wilton-Lyndeborough (IDPH-FY-06-01-044 – court upheld HO Decision regarding IEP/Placement (Foley)**
• 2007	Attorney Joni Reynolds and Scott Johnson become hearing officers
• 2008	**Samantha B./Hampstead (IDPH-FY-08-03-054) – Upheld HO decision regarding denial of reimbursement (Siff)**
• 2011	**Tia Pass/Rollinsford (IDPH-FY-11-10-012)– Upheld HO decision regarding denial of reimbursement for unilateral placement (Johnson)**
• 2012	Two lawsuits o **Leigh R./Hudson (IDPH-FY-12-08-009) – Upheld HO decision re: parent not entitled to reimbursement for unilateral placement (Johnson)** o **Elena K./et al. (IDPH-FY-12-12-020; IDPH-FY-06-10-021; IDPH-FY-12-12-020) see 2006**
• **2013**	Initiation of Third Party Discussion Led by Moderator as a 3rd alternative dispute resolution option
• **2014**	**Elena K./Timberlane (IDPH-FY-14-07-004) – matter dismissed by HO appealed to court. Court ruled appellant has no standing to file and is not proper party as well as statute of limitations for proper party (Johnson)**
• 2015-2020	Between 2 to 4 decisions per year, excluding summary Judgments. Majority of cases mediated, resolved, settled
• 2018	Attorney Briana Coakley-Hyde becomes hearing officer.


IDEA-04
Due Process Flow Chart
Hearing Request Received
Sufficiency Challenge
Response
Resolution
15 days
Sufficiency Challenge within 15 days
No Challenge
Challenge
5 days
H.O. Determination within 5 days
Sufficient
Not Sufficient
10 days
Response due within 10 days
From LEA if Parent Files
From Parent if LEA Files
Prior Written Notice filed?
No
Yes
LEA files PWR-like Response
Response addressing issues listed in Hearing Request
LEA Files
Parent Files
Info 15 days
Mediation
Not Mediated or No Mediation
Mediated; Case Withdrawn
Resolution Session (RS)
LEA and Parent Waive RS, and 30-day time period
RS within 15 days
Waive Meeting hold mediation
Discussion Period Ends at 30th Day
Resolved Case Closed
Not Resolved or *BACK OUT within 3 business days
Mediated; Case Withdrawn
Not Mediated
Hearing
DECISION
Amended Complaint Notice; Timelines begin again
Parties Agree: Go to Resolution Session (RS)
Parties Agree: Waive RS
Parties Disagree
Resolution meeting within 15 days
Discussion Period Ends at 30th day
Issue Resolved Case Closed*
Not Resolved
H.O. Decision
No, initial request to hearing
Yes, but only up to 5 days before Hearing; Timelines begin again
Mediation any time after receipt
Not Mediated
Mediated; Case Withdrawn
*BACK OUT within 3 business days
Hearing
DECISION
Nevada Department of Education, January, 2006

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February 16, 2021

RE: 2021 NH HB 581 (regarding the burden of proof at special education hearings)

To Whom It May Concern:

The New Hampshire Association of Special Education Administrators (NHASEA), which I have volunteered to represent, opposes House Bill 581.

The bill proposes to impose on school districts the burden of proof at special education hearings conducted by the New Hampshire Department of Education.

The term "burden of proof" encompasses two distinct concepts: (1) the burden of production; and (2) the burden of persuasion. The party bearing the *burden of production* must present its evidence first. The party bearing the *burden of persuasion* loses if the evidence is "closely balanced." E.g., *Schaffer v. Weast,* 546 U.S. 49 (2005). In most types of cases, the burden of production falls on the party bearing the burden of persuasion.

HB 581 imposes both burdens on school districts.

The bill is identical to 2020 HB 1232. On October 20, 2020, the House Education Committee voted 17-2 that HB 1232 was "inexpedient to legislate" and sent it to interim study.[1] On October 20, 2020 the interim study committee voted 13-0 to issue the following report: "Not recommended for Future Legislation." [2]

The NHASEA opposes HB 581 for three reasons.

1. The bill is unconstitutional insofar as it shifts the burden of *persuasion*. The New Hampshire Supreme Court has already ruled that a state law shifting the burden of persuasion onto municipalities causes them to lose more cases and thus violates Part 1, Article 28-a. *New Hampshire Municipal Trust Workers' Compensation Fund v. Flynn*, 133 NH 17 (1990).

2. Imposing the burden of *persuasion* on school districts is bad policy, as the U.S. Supreme Court explained in *Schaffer v. Weast*.

3. Imposing the burden of *production* on school districts is bad policy because it will unnecessarily prolong special education hearings.

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The rest of this letter elaborates on those three points.

HOW HB 581 WOULD ALTER CURRENT LAW

HB 581 proposes to amend New Hampshire's special education statute by adding the following as RSA 186-C:16-b, III-a:

> In all hearings the school district shall have the burden of proof, including the burden of persuasion and production, of the appropriateness of the child's program or placement, or of the program or placement proposed by the public agency. This burden shall be met by a preponderance of evidence.

Strangely, the bill includes no fiscal note, although it would have a fiscal impact by causing school districts to lose more cases.

RSA 186-C was designed to implement the federal Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400, et seq. Approximately 29,000 students, 15 percent of all school-age children, qualify for special education in New Hampshire. [3]

The IDEA requires that school districts in participating states offer a "free appropriate public education" (FAPE) to every child with a disability who requires special education. To be "appropriate," a program must be "reasonably calculated to confer a meaningful educational benefit in light of the child's circumstances." *C.D. v. Natick Public School District,* 924 F.3d 621, 629 (1st Cir. 2019). Parents understandably want the "best" programs that will enable their children to reach full potential, but the IDEA does not require this. *Board of Education of Hendrick Hudson School District v. Rowley*, 458 U.S. 176 (1982).

The blueprint for each child's special education program is set forth in an IEP, which is developed by a team that includes school district personnel and the student's parents. 20 U.S.C. § 1401(9)(D). If parents or the school district cannot agree on a student's IEP or placement, either of them may file for a "due process hearing." 20 U.S.C. § 1415(b)(7), (c)(2), (f). These hearings are conducted by administrative law judges appointed by the New Hampshire Department of Education. RSA 186-C:16-a. Hearing officer decisions are appealable to state and federal court. 20 U.S.C. § 1415(i)(2). Parents who prevail at a due process hearing may recover attorney's fees from the school district. 20 U.S.C. § 1415(i)(3)(B).

According to the New Hampshire Department of Education, between 1978 and April 2020, IDEA hearing officer decisions ruled in favor of school districts 58 percent of the time, for parents 34 percent of the time, and reached mixed outcomes 8 percent of the time. N.H.

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The U.S. Department of Education's regulations implementing the IDEA require that a school district obtain written parental consent before implementing a student's *first* IEP or *first* placement. 34 C.F.R. § 300.300(b)(1). For any *subsequent* IEP or placement, federal law allows the school district to implement its proposal unless parents file for a due process hearing and prevail.

The New Hampshire Board of Education's regulations significantly alter that balance of power. They require that a school district obtain parental consent (or permission from a hearing officer) before implementing *any* IEP or placement. N.H. Code Admin. Rules, Ed 1120.04. As a consequence, New Hampshire IEP teams strive to reach consensus and school districts make many compromises to secure parental consent. [4]

Although the special education statutes do not address the burden of proof, the law is nevertheless clear.

- The U.S. Supreme Court has held that the IDEA imposes the burden of *persuasion* on the "moving party." *Schaffer v. Weast,* 546 U.S. 49. This may be the party that filed for the hearing or the party challenging the IEP team's decision. E.g., *D.B. v. Esposito,* 675 F.3d 26, note 3 (1st Cir. 2012).

- The New Hampshire Board of Education's special education rules allocate the burden of *production*. The party filing for a hearing must present its evidence first, unless the hearing officer finds just cause for altering that sequence. Ed 1123.17(a).

HB 581 proposes to overturn those principles. The bill, if enacted, would require that school districts *always* present their evidence first and *always* bear the burden of proof in disputes over special education programs or placements.

Furthermore, by requiring that a school district obtain parental consent for any IEP or placement, New Hampshire has already given parents a powerful right not guaranteed by federal law. Shifting the burden of proof onto school districts is not necessary to even the playing field.

ARGUMENT

I. HB 581, if enacted, will be unconstitutional insofar as it shifts the burden of persuasion onto school districts.

Part 1, Article 28-a of the State Constitution prohibits the legislature from imposing new unfunded mandates on school districts. Article 28-a provides as follows:

[4] COPAA's January 22, 2021 letter to the Committee overlooks that idiosyncrasy of New Hampshire law. COPAA's letter incorrectly assumes that parents must file for due process whenever they disagree with the IEP or placement a school district offers.

> The state shall not mandate or assign any new, expanded or modified program or responsibilities to any political subdivision in such a way as to necessitate additional local expenditures by the political subdivision unless such programs or responsibilities are fully funded by the state….

The electorate ratified Article 28-a in 1984, nine years after Congress enacted what is now called the IDEA and three years after New Hampshire adopted RSA 186-C.

The New Hampshire Supreme Court's very first decision involving Article 28-a, *New Hampshire Municipal Trust Workers' Compensation Fund v. Flynn*, 133 NH 17, struck down a law similar to HB 581. The case involved an amendment to the state's workers' compensation statute. The statutory amendment, enacted after Article 28-a became effective, created a "*prima facie* presumption that cancer disease in a firefighter … is occupationally related."

This amendment essentially shifted the burden onto a town or city to prove that a firefighter's cancer was *not* occupationally related. The court concluded that "the existence of the presumption would in fact increase the number of successful claims," thereby increasing the cost for municipalities to provide workers' compensation insurance for firefighters. By imposing that new costs on municipalities, the statute violated Article 28-a.

HB 581 would likewise increase the number of successful claims against school districts. When the evidence is "closely balanced," school districts prevail under current law, but will lose under HB 581.

It is already difficult for school districts to prevail at special education hearings. Hearing officers, being human, naturally sympathize with students who have disabilities and with those students' parents. Hearing officers sometimes overlook that public resources are finite; when a school district spends more money on one student, it must either raise taxes or cut programs for other children. Furthermore, when parents of students with disabilities prevail at hearings, federal law allows them to recover their attorney's fees from the school district.

Those realities induce school districts to settle most special education disputes through mediation, thus avoiding a hearing.

Shifting the burden of persuasion will not only alter the outcome of hearings, but will also lead to more settlements (and more expensive settlements) in close cases. By "close cases," I mean not only cases where strong evidence supports each party's position, but also cases where the hearing officer is likely to sympathize with the student despite overwhelming evidence favoring the school district's position.

HB 581 will consequently increase local costs while offering no additional state funding to cover those costs. The bill, if enacted, would thus violate the state constitution.

II. Imposing the burden of *persuasion* on school districts is bad policy.

The U.S. Supreme Court's decision in *Schaffer v. Weast* lists several policy reasons for placing the burden of persuasion on the "moving party." These include the following:

- In American jurisprudence, the plaintiff ordinarily bears the burden of persuasion.

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The U.S. Supreme Court recently reiterated that courts and hearing officers lack educational expertise and should consequently defer to the judgment of educators on the IEP team, so long as those educators "offer a cogent and responsive explanation for their decisions." *Endrew F. v. Douglas County School District,* 137 S.Ct. 988, 1001-02 (2017).

Placing the burden of persuasion on the school district would turn that principle upside down.

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[5] Wright, Peter W. D. "Schaffer v. Weast: How Will the Decision Affect YOU?" *Wrightslaw*, 2005, www.wrightslaw.com/law/art/schaffer.impact.pwright.htm.

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March 8, 2021

VIA EMAIL:
HouseEducationCommittee@leg.state.nh.us
Concord, NH 03301

RE: HB581

Dear Mr. Chairman and members of the Education Committee,

Thank you so much for taking the time to listen to my testimony regarding HB581. It was an honor to speak with you and answer your questions. I would like to follow up on a few questions that arose during my testimony.

We discussed that a person who brings a complaint against another will typically bear the burden of proving the basis of the complaint. It should be noted that courts have held, "special policy considerations, convenience and fairness" may justify a deviation from that practice. There is no requirement that the burden of proof be borne by one party.

Rather than looking at general practices, a decision on HB 581 should be based on the purpose of IDEA: the education of our most vulnerable students. The procedure under IDEA is intended to be an efficient administrative proceeding. The parties do not have a right to a jury trial and the proceeding is not held before a judge. The question of burden of proof should be determined by standards of fairness, not by what happens in other situations.

Justice Ginsburg stated, "[p]lacing the burden on the district to show that its plan measures up to the statutorily mandated 'free and appropriate public education' will strengthen school officials' resolve to choose a course genuinely tailored to the child's individual needs." Schaffer v. Weast, 546 US. 49 (2005). Shifting the burden of proof to the school district may encourage schools to invest resources in the education of disabled students rather than investing in litigation expenses.

Thank you again for your service on this and other important educational issues.

Mary Gibbons Stevens, Esq.

Written Testimony

Support of HB 581 Bill

3/2/21

William Caruso
3hemlockdr@gmail.com
603-455-5710

RE: Son 8yrs old non-verbal autistic

First off, I am a proud dad of my son who has this disability. He is the most infectious loving child you could have. Unfortunately, he has a disability and so does his IEP team, student's services director who herself has a long history of ruining children's lives. Special education should not be run by the schools, however a separate state-run program implemented in the schools. The school districts have proven that they are not capable of implementing the programs needed in a non-bias ethical way.

My son has attended school now for 4 years and the school district has repeatedly refused to teach him proper speech using traditional styles of methods. Not due to his disability but due to the progress would not meet the schools needs to fake the data. This leaves my son disable, he has zero speech and zero ways to communicate.

During remote learning my son has made more progress than he would in school face to face due to the lack of injuries he sustains "I have a notebook full of pictures as proof". He has been head butted, finger caught in door, being left to put his hands in a toilet full of feces, and received a severe concussion taking him out of school for months. This is due to the poor and dishonest school district and how they treat my child. If my son makes one thing clear he does not want to be around these people that hurt him at school.

Fake Data explained. The data is only as good as the people that collect it. They constantly change programs an implementation styles to harvest the easy data to show slight progress however when the progress stops the program changes direction. Easy to prove. The commitment starts when the fun stops.

My son has a god given right to an education, he is not a dog, we should not be coaxed into moving to another town or shipping my son across NH like a ups package. He is a human being and will be treated like one but not by the school.

HB581 would be the start of changing the poor special education environment in NH, it needs to be done now. My sons best most important learning years are being wasted by the school district on purpose out of spite because we are parents that are educated and involved. The more pressure we put on the school to do the right thing, the more they ruin my son's education. Using his learning as leverage

to break our hearts. I have spent in upwards of $25,000 on my son's education and my budget does not renew every year like the schools or state. His education is failing on all levels, the team is a disaster the special education student services director is the worst, meanwhile the superintendent turns a blind eye with weak unsupportive misleading emails or no help in which to offer. Our speech pathologist admitted at an IEP meeting after 3 years she has no idea what to do or how to teach him, she somehow does not work there anymore.

There is no possible way for me to get the help for my child that he desperately needs I'm out of money and gaining more heartbreak daily to watch my son struggle at everyday life being held back and permanently disabled by the school system.

Of course, the schools are against HB581, if your winning 98% of the cases why level the playing field to give the parents and special needs students a chance. Just the fact we even argue and meet over this issue means there is a serious issue. Its not the number of wins or loses but the number of cases by parents that is important and want better for their kids than the low-level education provided.

Thank you for your time, please feel free to reach out with any questions.

William Caruso
3hemlockdr@gmail.com
603-455-5710

JENNIFER PIKE
34 DOGWOOD LANE
NEW LONDON, NEW HAMPSHIRE 03257

March 2, 2021

HouseEducationCommittee@leg.state.nh.us
Members of the House Education Committee

Re: HB581 - Amend RSA 186-C:16-b to shift the burden of proof in special education hearings to the school district.

Dear Members of the House Education Committee,

My name is Jennifer Pike and I live in New London, NH. I moved to New Hampshire in 1997 to provide my children with a better quality of life. I am writing to ask that you help provide my youngest son, with multiple disabilities, a chance at a better quality of education by shifting the burden of proof in special education hearings to the school district by supporting HB581 and enacting the following change:

> 1 New Paragraph; Special Education; Due Process Hearing; Burden of Proof. Amend RSA 186-C:16-b by inserting after paragraph III the following new paragraph:
> III-a. In all hearings the school district shall have the burden of proof, including the burden of persuasion and production, of the appropriateness of the child's program or placement, or of the program of placement proposed by the public agency. This burden shall be met by a preponderance of the evidence.
> 2 Effective Date. This act shall take effect 60 days after its passage..

For 13 years I was a stay-at-home mom, addressing the needs of my three older children in addition to the enormous demands of my youngest son who has complex medical needs. Charlie, who is now 16 years old, has Agenesis of the Corpus Callosum, Autism, Epilepsy, Septo Optic Dysplasia, Anxiety, Disruptive

Mood Dysregulation Disorder, Ehlers-Danlos Syndrome, and more. Though he has many on-going struggles, he is a very caring and incredibly determined young man. He requires multiple weekly therapies and frequent appointments with physicians and other health professionals.

About eight years ago, our life changed suddenly when I was informed by the New London Police Department of the illegal and vile activities my ex-husband had been involved in. Since then, I have been trying to unravel and repair the damage that was done. I have gotten divorced and have been in litigation with the bank over my house regarding my homestead right.

I have had to fight daily to maintain a supportive environment for all my kids, but primarily for Charlie. As a result of his disabilities, any change in his daily routine can cause significant behavioral challenges. It is critical that any changes are introduced to Charlie slowly and with numerous supports in place.

Not only do I find myself fighting to maintain my homestead right, but sadly, I find myself constantly running into barriers put before me by the school district on a regular basis. It is difficult to detail the struggles I have had over the past ten years without it sounding implausible, but I assure you my experiences are true.

Early on, recommendations immediately were made from outside professionals that went ignored. Now, I can understand the District trying to provide intervention until it is proven unsuccessful, however, after ten years of no meaningful progress, it is way beyond time for intensive intervention from outside sources.

In addition to denial of intensive intervention for my son, I have been constantly denied a member of my son's IEP team by being denied access to the data that all the other staff members have access to. Upon request after request for data, I might get a piece of data, but for years, more than likely I would never get the data I requested for literally months.

Report cards were also not even given to me for a period of several years – from about the end of 3rd grade through about 6th grade if I recall correctly! Again, when I requested report cards, I was told they would be coming… and then they never would! How can I be considered an equal member of the team when I have

literally no data on my son's academics, yet when we met, I was told he was doing "just fine"!!! Really? Where is the data?

As I said, my son is 16 years old now. He is currently reading at a 2.3 grade level. When he was in Kindergarten, I was given data that showed he was reading then between a 1.8-2.3 grade level! I have requested intensive reading intervention over and over. He was scheduled to receive 2 hours of intensive reading instruction 1:1 per day, as agreed by the team, until the Associate Director left her position. The Director made a unilateral change to my son's IEP on the 1st day of 9th grade year and decreased the 2 hours of intensive reading instruction 1:1 to 30 minutes of 1:1 intensive reading instruction which ended up being 45 minutes every other day.

First, reading at a 2.3 grade level is not an acceptable reading ability in my opinion, given that he has not even been getting reading services on an everyday basis until about one week ago! My son has a great desire to graduate with a High School Diploma and go to a two-year College, however, I do not know how he will ever be able to make up that much ground in this placement. The whole purpose of IDEA Law is for every child with a disability receive an appropriate education that meets their unique needs, that prepares them for further education, employment, and independent living. Unnecessary barriers presented by the District, preventing parent participation as a team member, should be considered an act of obstruction to FAPE.

The pandemic has also presented inconceivable challenges over the past year. So much so, that Charlie's aggression caused the police to be here on numerous occasions, resulting in me ultimately filing a Voluntary Chins Petition. Now Charlie has the Fast Forward wrap around service working with us, as well as a Juvenile Probation & Parole Officer as we were not getting appropriate supports from school district.

Charlie's coordination of care can be overwhelming; however, the progress he continues to make is a direct result of our hard work. Now that Fast Forward (wrap around team), his JPPO, as well as, Attorney Mary Gibbons Stevens, are all involved, they agree that he requires an out of district placement, however the school district refuses to even discuss it. I am a single mom, with no child support and no income and the District is fully aware of this, hence, they will not agree to anything without requiring me to take this to due process which I cannot afford.

There are also no funding sources to assist with due process either, thus, leaving every single mom and low-income family helpless against the District that has an Attorney Firm (Drummond & Woodsum in my case) on retainer.

I have always been a very independent and self-sufficient person; however, I find myself in an impossible situation. I have many concerns, as you can imagine, however my biggest concern is that Charlie will never receive a sincere chance for FAPE until the School Districts are held accountable. Until this happens, none of our children will have a chance to lead a meaningful and productive life. In addition, the costs will skyrocket for supporting these young adults that have not been educated appropriately or prepared for further education, employment, and independent living. Please remember the effects of your actions on families like mine when you are considering your vote today and support HB581 to amend RSA 186-C:16-b to shift the burden of proof in special education hearings to the school district.

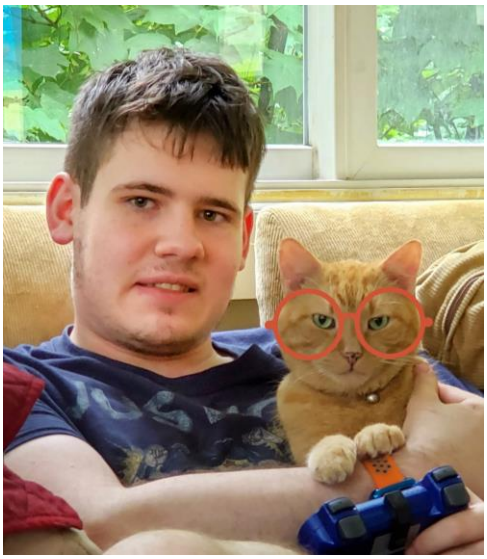
Should you have any questions, please feel free to contact me at 526-2456.

Thank you for your time and service.

Sincerely,

Jennifer L. Pike

Jennifer L. Pike



Charlie Pike, 16yo with Romi

NEW HAMPSHIRE
COUNCIL ON
DEVELOPMENTAL DISABILITIES

March 1, 2021

Dear members of the House Education Committee,

My name is Shawnna Bowman. I am a parent representative on the New Hampshire Council on Developmental Disabilities and Chair of the Policy Committee.

On behalf of the New Hampshire Council on Developmental Disabilities, I am writing in **support** of **HB 581** relative to the burden of proof in special education hearings.

As a parent of students receiving special education services I can speak to the challenges of ensuring that my children are receiving a free and appropriate education as guaranteed under the federal Individuals with Disabilities Education Act. In the event parents and school districts cannot come to a consensus on how to best provide supports for a student receiving special education services, they may resort to mediation or due process.

Due Process is a formal hearing to obtain a ruling on disputes between a school district and parents regarding a child's education. Unfortunately, due process inherently leaves parents at a disadvantage. School districts are represented by attorneys compensated for their wealth of resources and legal experience. Most parents caring for a child with a disability cannot afford representation. Additionally, parents may not be able to gain access to all of the necessary resources for a fair representation of their argument.

School Districts are deemed experts in special education services. Their access to information regarding supports available to them, institutional knowledge and the professional experience of working with other students receiving special education services creates an advantage over parents.

We urge you to **support HB 581** relative to the burden of proof in special education hearings. As the experts, the school district should be required to provide proof of the success of their implemented individualized education plan regardless of who has filed the complaint.

Thank you for your time and consideration.

Best,

Shawnna Bowman
Chair, Policy Committee for the Council on Developmental Disabilities

2½ BEACON STREET, SUITE 10 CONCORD, NEW HAMPSHIRE 03301-4447
603.271.3236 FAX 603.271.1156 TTY/TDD 1.800.735.2964 WWW.NHCDD.ORG

Testimony for HB 581

Chairman Ladd and Education Committee members,

My name is Moira Ryan and I am here to speak with you regarding HB581. This bill would shift the burden of proof from parents to schools in due process hearings. This bill is critically important to students with disabilities who are struggling to access an appropriate education.

As a parent, I have had the misfortune to go through facilitated IEP meetings, state complaints, mediation, and due process. These processes are inherently biased and unfair. Here are some of the reasons why: Facilitated IEP meetings don't involve a facilitator who guides the conversation to move forward. In state complaints, the parent, as the filer, is required to submit everything they sent to the investigator to the school as well but the school is not required to send their information to the parent who is given no opportunity to refute or present additional evidence to address it. In addition, school districts have the use of attorneys whereas parents do not. Last, there is due process. Due process is an unfair, biased, and one-sided system. Why? School districts have access to ALL of the student's records and can observe the student in the school. Parents have been denied the ability to conduct observations with their own evaluators even though they have that right by law. I have a parent who is preparing to file for due process. She requested a complete set of records for her child She received approximately 40 pages for the student's 10+ years in school. There is no way the records are that limited. In my due process, the school turned over no current records and special education record that were 3+ years old. Exhibits are exchanged 5 days prior to due process and if the school has put in an exhibit that the parent wants to challenge with new evidence, it is virtually impossible to get it entered into the record. In my due process, we were not able to get any discovery or use any exhibits and had to rely completely on what the school gave us. They slanted things and misinterpreted them to suit their purposes. I was not permitted to hear all of the testimony, but the school LEA was able to hear all my testimony plus her employee testimony and with the breaks, she was able to tell those employees what she wanted them to say. In addition, the testimony of two school witnesses went missing (the evaluator and the classroom teacher) and were never entered into the record rendering the record inaccurate. I had an expert evaluator who taught at Harvard Medical School and did speciality residencies at Columbia. The school had an evaluator who got an 8 month Masters at Rivier College, had no medical training, and could not understand the statistical relevance of the outcomes of her testing. Yes, because my witness was not granted access to observe my son in school, more weight was placed on the less qualified evaluator. The situation was frustrating to say the least.

There were no pro bono options available to me. As a disabled veteran, I am on a fixed income, but I still had to pay thousands and thousands of dollars which were nothing to the district. Many districts carry Primex liability insurance which covers their due process expenses. And while my costs were equivalent to the price of a small automobile, what the district spent was not even a rounding error in their budget.

Because the school controlled the information, had unlimited funds, and did not have to prove anything, the deck was stacked against me and that was only the beginning of the problems.

My child is high functioning. Because of this, the school feels my child is less deserving of help. The school district, in their brief, stated that they were only required to give a bare minimum benefit. This is the Rowley standard which has been long overturned by Endrew F. Furthermore, the district failed to provide progress reports or provide all the services and altered different aspects of service delivery to minimize the cost and therefore diminishing the effectiveness. Now in grade 11, my child only writes on a 5th grade level, can not advocate, has difficulty navigating remote learning, and has lost almost two years of instruction which will impact both higher education, which is no longer a possibility and limit employment options. As a junior, his counselor should be helping him figure out what he can do after school. BUt school has given up on him and devalues his existence in the world. My child will not be able to attain gainful employment or live independently despite the fact that he has an IQ of 160.

CHildren with IEPs make up roughly 20% of any given graduating class. But they don't have the same access to the curriculum as their non disabled peers. This becomes very clear when you look at the proficiency data for children with IEPs statewide. Only 14% are proficient in math and 17% are proficient in reading. This leaves very little chance for independent living or self sufficiency. If we as a state continue to allow such a large portion of our graduating high school classes to be unemployable, that is unsustainable to keep our state solvent. The state will spend millions supporting kids, who with the proper training and services, could have been independent, tax paying members of society. It is completely unsustainable.

As Justice Ginsberg pointed out in her opinion on the Shaeffer v Weast case, "Understandably, school districts striving to balance their budgets, if '[l]eft to [their] own devices,' will favor educational options that enable them to conserve resources." *Deal v. Hamilton County Bd. of Ed.*, 392 F. 3d 840, 864-865 (CA6 2004). https://www.wrightslaw.com/law/caselaw/04/6th.deal.hamilton.tn.htm
In that case, a school district spent over 42 million in legal fees instead of providing services to an autistic child.

Many times school districts deny a few thousand dollars of services, often making this decision on the basis of staff and funding, and not on what the child needs. In my case, the district was denying $7K of services over 4 years which was less than the amount of funding they received from the federal government to support services for my son.

IDEA encourages collaboration and creative thinking between the parent and the school district to attain solutions that will benefit the child. To try and reach some level of balance, IDEA discourages or disallows schools from bringing an attorney to meetings unless the parent brings one first. But this is not the reality as districts have begun bringing in lawyers before the IEP team meeting has even occurred. Justice Ginsberg noted that ustice Ginsberg explained that if a school district does not have the burden of proof, the district is unlikely to try to reach consensus with a parent about an IEP:

> This case is illustrative. Not until the District Court ruled that the school district had the burden of persuasion did the school design an IEP that met Brian Schaffer's special educational needs. See ante, at 5; Tr. of Oral Arg. 21-22 (Counsel for the Schaffers observed that "Montgomery County ... gave [Brian] the kind of services he had sought from the beginning ... once [the school district was] given the burden of proof."). Had the school district, in the first instance, offered Brian a public or private school placement equivalent to the one the district ultimately provided, this entire litigation and its attendant costs could have been avoided. (Ginsburg dissent, page 4).
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The decision in the Schaeffer v Weast case was attained because the parent's state (Maryland) did not have a state law regarding who should have the burden of proof. The default position was the person bringing the action should have that duty. There were some states which already had that law in place. These states included AK, AL, CT, DC, DE, GA, IL, KY, MN, WV.

Today, this law has expanded to other states including NY, NJ, District of Columbia, Delaware, and Georgia.

What were are asking for here today is that our children become educated and independent. We want them to have gainful employment and the ability to be active participants in society. This law is not new and does not negatively impact the number of due process hearings filed. If anything, these states experienced a decrease in due process filings after this law was passed. With this in mind, I ask that you join the other states who have recognized the need for this law and pass it to help our children and secure their futures.

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KATE SHEA

29 TAMAR DRIVE

GOFFSTOWN, NH 03045

March 2, 2021

Dear NH Education Committee Chair and Members,

I testified today as a NH citizen and mother to four children, three of whom have autism and other special needs. I am also here as an unofficial volunteer – being a voice for other special needs families.

I have heard countless stories of parents simply needing a little support for their children – to no avail due to this burdensome process – such as the power line tree worker, who shared that his autistic 8th grader still could not read, because he had no ability to afford or figure out the unmanage process.

Our families in NH as in many other states have been dealing with many children with legitimately diagnosed medical issues that affect these children academically, behaviorally, developmentally, and emotionally in the school environment. The need for special education continues to grow and has turned into a living nightmare for most families in New Hampshire. I can tell you there is no such thing as a frivolous case in all of my encounters with the almost 2,000 parents from NH Autism Group and several other groups I help manage. These are often for children who are left to "fly under the radar" and belong to families that try to obtain help and quickly learn they cannot navigate the cumbersome and difficult process. These are families and children who are largely from financially disadvantaged situations already. Having a child with special needs is demanding and expensive – and there is not an option to not provide this type of help, so many of us find a way to get the help, sacrificing our health and wellbeing in the process to survive the journey.

I am here today as a mother who has lived this struggle, so much so that it torn our family apart and that struggle began in earnest when our children set foot in schools. This is not to say that we have not been able to gain common ground with the folks who have gotten to know our family over the years (now with kids in 3rd, 4th and 5th grades). After many years of struggling we were able to get some help – some of which is very good, some a work in progress. The path we traveled is all too common – leading to broken, financially strapped families struggling to hang on by their proverbial fingernails. When my now severely ill child with an acquired medical condition and autism was in first grade he cried nightly while I begged for help. He was not able to have anyone to even check in with him, while head of the PTA has a 1:1 para for her son due to anxiety. My child then went through a series of spirialing downward physically due to the massive amount of stress he

encountered over the following years of little to no help. He now has gotten some response, but without my ability to hire an attorney (having just gotten out of a 6-year complex divorce not of my choosing) we are not going to get very far. Can you imagine being a parent going through this with 1 child at once while working full time, dealing with the host of issues that child has to address outside of school and paying privately for things to make up for the lack of support?

What I am here to say however is – for any of us involved, it does not need to be this painful and hard – for anyone, not school administration which are usually teachers and assistant principals stretched thin – way too thin, and the system has an opportunity for us to work better together, not be using the legal system which is based on a system of opposition one party to the other.

As attorney Stevens mentioned earlier, the same evidence is still provided on both sides. A huge difference, however, is that parents might as well not even try to present evidence or spend the money to get help – because they lost before they started. Most of us have been told we cannot even go to mediation unless we have an attorney – this is a common request from educational advocates.

As it stands today, under I.D.E.A., schools already only have to 'consider' medical diagnoses not just accept them – and, coupled with the way this NH law is written now, leaves typically financially stretched and life burdened families with even more hardship. I speak not just for me, but many of the teachers and administrators who cannot say a word, but know things need to change.

Flipping the burden of proof makes sense both from a stretched educational system perspective, and also from a hardship to family's perspective. We need to encourage a more collaborative process. These matters are not frivolous or the same as a law suit in any way – these are generally matters of a child needing a weekly speech or occupational therapy session of 30 minutes, a child needing a little para professional support, and that's generally about all. Our neuro diverse kids need a common set of help – a set of things that is nearly standard for all and none of them should require fighting individually the same battle over and over and over. These supports are very basic and relate to providing a free and appropriate education justified by legitimate medical diagnoses and documentation – often way more than would even be required in a court of law. And because of the burden of proof, it is never enough. How would you feel being denied a wheelchair if you couldn't walk? How would you feel being forced to demonstrate you cannot walk because someone cannot "see it"? There is no difference here. Please help our kids and schools come together in a better way. Please let our families and schools work out a better process. We don't need to invest this kind of time and money to fight over whether a child needs basic supports and services.

Please approve and support this bill.

Sincerely,

Kate Shea

Addendum – added post testimony:

To address several of the School Board Administrator's points – she is correct, these situations do happen and should happen early in a child's education – this makes complete cost/benefit sense. Becky also is right in that this does already stretch school resources in the need to attend overly lengthy proceedings further consuming time and resources – why would we want to keep this the same? And in terms of it damaging a parent/school relationship – again, why would we keep this the same, I can vouch that these relationships have already been damaged. We can do better.

Good afternoon Mr. Chair, Committee members,

My name is Mary Stevens. I am an attorney with Gibbons Stevens Law Office in Kittery, Maine. I have been practicing law for more than thirty years and much of that time has been spent as a child advocate. One part of my advocacy has been in protecting the educational rights of disabled children and their parents under the Individuals with Disabilities Education Act (known as IDEA).

The purpose of IDEA is to ensure that disabled children are provided with a free and appropriate public education (FAPE) so that they can achieve further education, employment and independent living. In the big picture, compliance with IDEA causes states to invest money in the education of disabled children so they become productive members of society and are ultimately taxpayers who contribute to all aspects of our communities. IDEA grants legal rights to children and their parents.

Like many laws, the intent of IDEA is not always carried out in practice. The reality is that parents of disabled children often fight an uphill battle regarding their children's education. In addition to caring for their children, parents have to learn all they can about their child's disability. They become experts not only about their individual children, but about the condition or conditions that impact their development. Then they have to advocate for them to receive an appropriate education. When parents are treated as equal members of the team, the system can work well.

Unfortunately, there are many times that parents are not viewed as experts at the table and are not treated as equal members of the team. When that happens, and parents assert

that the school is not providing their child with FAPE, they can request a due process hearing. The hearing is intended to be an efficient administrative review, not lengthy litigation. The truth is, it is a complicated and difficult legal process. The federal and state laws and regulations are long and dense. The parent-friendly guide to NH special education regulations is 282 pages long. In addition to all of the caregiving and other responsibilities parents have, they have to familiarize themselves with hundreds of pages of detailed legal language in order to assert their child's right to an education. Even when they have some understanding of those rights, they are still at a disadvantage.

This bill is a step toward leveling the playing field. The school is the holder of all the information and evidence regarding the child's education. Parents do not know what happens at school on a day-to-day basis. It is not unusual for teachers or other staff members to give parents information "off the record." It is understandable that the same people are then be unwilling to speak up in a way that would impact their employment. Parents often have to fight with schools to obtain documents and other evidence. Even after several requests, all the information may not be provided. Since the school is the holder of the evidence, the school should bear the burden of proof at hearing.

In order for parents to prove that their children did not receive FAPE from the school district, they usually need the testimony of one or more expert witnesses. While schools have a variety of experts on staff, and calling those experts to testify may not cost the school district any extra money, parents must find and retain experts at their own expense. Shifting the

burden of proof to the school may alleviate some of the expenses incurred by parents in pursuing due process.

Finally, the school should bear the burden of proof at a due process hearing because it is the school that has an obligation to provide FAPE. Parents have their own responsibilities, but when it comes to educating a disabled child, that duty rests squarely upon the school district. The school district has the obligation to educate; the school district should have the burden of proving it has done so when parents raise a challenge.

The interests of justice require the passage of this bill because it protects the rights of the most vulnerable members of our society – disabled children.

The New Hampshire General Court
House of Representatives - Education Committee
107 North Main Street
Concord, NH 03301

RE: Testimony for HB 581

Chairman Ladd and Education Committee Members,

Please **support HB581** relative to the burden of proof in special education hearings.

My name is Tracy Walbridge. I live in Rochester, NH. I am a parent and serve on many boards, including the State Advisory Committee on the Education of Children with Disabilities Advising the NH Department of Education[1].

I am testifying in my personal capacity as a citizen.

Special Education Due Process is one of a parent's rights in the Procedural Safeguards[2]. Due process for parents is usually filed as a last resort, meaning parents have exhausted all other means of the Individualized Education Program (IEP) process including multiple meetings, resolution meetings, and mediation.

NH school districts rarely file for due process hearings, including not filing when they are legally required. A school district can file a due process complaint against a parent for very defined reasons:

- to compel a parent to provide their signature to evaluate
- to give consent to provide Special Education Services
- to defend their evaluations if a parent is requesting an Independent Educational Evaluation (IEE) paid for by the school district. *(The school district would have the burden of proof).*

Having filed for due process after requesting an Independent Educational Evaluation (IEE) for my own child who was struggling to access an appropriate education, I can share that the whole process is emotional, exhausting, and expensive for parents of children who are found eligible for special education.

From my experience and supporting other parents, the Granite State has a climate and culture of "no". What does this mean? This means NH school districts will ignore, postpone shared-decision making and say "no" again and again and again to parent participation in their child's Individualized Education Program (IEP).

[1] New Hampshire Statutes - RSA 186-C: 3-b
[2] New Hampshire Special Education Procedural Safeguards Handbook

When there is a disagreement, the NH school district-proposed IEP goes into effect unless the parent files for a due process hearing. Because if a parent files a due process complaint, the burden of proof is on the filing party. So, NH school districts will keep disregarding and refusing until a parent files.

- In 2019, 1 (one) due process complaint was decided by a hearing officer[3]
- In 2018, 4 (four) due process complaints were decided by a hearing officer
- In 2017, 3 (three) due process complaints were decided by a hearing officer
- In 2016, 3 (three) due process complaints were decided by a hearing officer
- In 2015, 1 (one) due process complaints was decided by a hearing officer

The data shows that parents are not exercising their rights in the Procedural Safeguards.

Historically in NH, when parents exercise any of the alternative dispute resolution actions, the process shows an imbalance of power.

- NH school districts have an attorney and/or contracted attorneys, paid by taxpayers, whose sole purpose is to give advice and legal representation to the school district.
- Paid by liability insurance, Primex, covers:
    - Initial due process ligation
    - Subsequent litigation
    - Payouts/settlements
    - Compensatory Education
        - GEER Funding paid almost all of the district compensatory education costs during COVID 19
- NH school districts expenses are not from an NH school district's general fund or bank account. They are paid by Primex.
- Under IDEA, mediation and due process is a confidential process but some NH school districts attorneys have placed an additional condition on most settlement agreements with a gag order, Non-Disclosure Agreement (NDA), which means that the parent(s) are not allowed to talk about their situation and settlement, if any, and **can not** continue to advocate for their child.

Placing the burden on NH school districts simply requires NH school districts to show that they are providing a student with an appropriate education, consistent with federal and state special education law.

Congress has acknowledged that parents are at a legal disadvantage[4] and has the Supreme Court of the United States, Justice Ginsgurg, dissenting, "the vast majority of parents whose children require the benefits and protections provided in the IDEA" lack "knowledg[e] about the educational resources available to their [child]" and the "sophisticat[ion]" to mount an effective case against a district-proposed IEP[5].

[3] Due Process Hearings by Date | Department of Education
[4] 20 U.S.C. §1400(d)(1)(b)
[5] Cite as: 546 U. S. (2005) 1 GINSBURG, J., dissenting SUPREME COURT OF THE UNITED STATES

It is easier for NH school districts to bear the burden than families, as the districts possess virtually all of the information regarding an educational placement and all their child's educational records. " 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, *"id.,* at 457. Accord *Oberti v. Board of Ed. of Borough of Clementon School Dist.,* 995 F. 2d 1204, 1219 (CA3 1993)[6]

Placing the burden to NH school districts does not unduly burden districts or taxpayers, as it ensures that tax dollars are being spent on effective programs and enhances district accountability.

I ask that you support HB581. Thank you for your time.

Sincerely,
Tracy Walbridge
Rochester, NH

Please provide a copy of this email to all committee members before the hearing, and I request this written testimony form part of the permanent and public record for this bill.

[6] Cite as: 546 U. S. (2005) 1 GINSBURG, J., dissenting SUPREME COURT OF THE UNITED STATES

New Hampshire School Boards Association

Barrett M. Christina, Executive Director
Travis Thompson, President, Exeter Regional Cooperative
Amy Facey, First Vice-President, Souhegan Cooperative
Brenda Willis, Second Vice-President, Derry Cooperative
Shannon Barnes, Past-President, Merrimack

25 Triangle Park Drive, Suite 101
Concord, NH 03301
Phone: (603) 228-2061
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March 1, 2021

Dear Chairman Ladd and members of the House Education Committee,

My name is Becky Wilson, and I serve as the Director of Governmental Relations for the New Hampshire School Boards Association. NHSBA is opposed to HB 581. This bill proposes to impose on New Hampshire school districts, the burden of proof at special education hearings conducted by the New Hampshire Department of Education.

Due process hearings, regardless of who carries the burden of proof, are significant investments for districts. Special education law in New Hampshire requires districts to move forward with a due process hearing in certain circumstances, although in many situations, disagreements are resolved or settled through mediation or other dispute resolution options, negating the need for a hearing. In fact, in 2019, only one case in New Hampshire was resolved through due process, in 2018- 4 cases, and in 2017-3 cases. Since 2011, the highest number of cases to be resolved through due process hearings, was 9 cases in 2011. These numbers and decisions can be found on the NHDOE website.

Mediations are often attended by school district leadership representing the district, and perhaps one other district staff member. Parents or guardians also attend and are able to bring an advocate or others to assist them. Mediations often last a full day, but can be highly successful in resolving a disagreement. Should a case not be resolved, school districts must prepare many more staff members for a due process hearing in anticipation of each staff member needing to participate in the trial. This can include extensive pre-trial conferences with legal counsel, interviews, extensive data collection, file preparation, and other required meetings prior to a hearing. These commitments remove staff from the classroom and service provision for large amounts of time; sometimes multiple days, or even weeks.

There is a large increase in legal fees to districts, as well, when a case goes to a due process hearing. In addition, districts at times, are ordered to reimburse parents for legal fees incurred as part of the due process hearing. This is in addition to any

unanticipated costs which may come from the findings of the hearings, such as out of district placements, additional services, etc.

School districts across New Hampshire will soon be setting their operating budgets for 2021-2022. Proposed budgets likely do not include the additional costs to legal fees, the additional staffing which will be needed when due process hearings increase, to cover classroom and special education teachers and providers who are needing to attend hearings, and do not include the potential increased costs of out changed placements or increased services which could come as a result of additional hearings. School districts will be put into a position once again, to shift monies within the operating budget to cover these unanticipated costs, and this will affect other programming and resources available to all students within the district.

School districts work diligently to work collaboratively with families to meet their IDEA obligations, and the additional statutes required by New Hampshire's special education rules and regulations, which already supersede many federal IDEA statutes. HB 581 as proposed, will increase the likelihood that parents will pursue due process hearings as a first step, as opposed to a final attempt to resolve disagreement.

Please do not hesitate to reach out with any further questions or if NHSBA can be of any further assistance.

Respectfully submitted,

Rebecca R. Wilson, NHSBA, Director of Governmental Relations

March 1, 2021

House Education
Room 207, Legislative Office Building
Concord, NH 03301

Re: HB 581, relative to the burden of proof in special education hearings.

Dear Representative Ladd and members of the committee:

My name is Heather Young and I live in Rochester with my husband and two children. I am asking you to support HB581, relative to the burden of proof in special education hearings.

As a parent to a child that receives special education services we are often faced with two things- continue to be beaten down by the school district on things that are a clear violation of state and federal laws or spend endless hours and money preparing for hearings when taking appropriate next steps to continue to advocate for the things our child needs.

My youngest child, Lucas, is ten years old and receives special education services through an individualized education plan (IEP.) My husband and I have spent hundreds of hours over the course of his life learning about rules and laws that support his need for accommodations, modifications and other additional supports in school. While we try to work in partnership with our school district at all times, we have experienced many times that we do not feel like a valued member of our son's IEP team. Despite the rules and laws in place, school districts do not always do what is best for the child and the family's voices are often silenced.

School districts often do not provide appropriate supports and services. Instead of putting money into additional supports and services students need they have unlimited dollars and time to spend on legal representation and technical support to their district leadership staff, at the expense of all of our tax dollars. Our school district brings in representatives from a law firm to intimidate families to a point of exhaustion, to not continue to push for what their child needs. It is not fair to families that do not have the time or money to continue to advocate for what their child needs and often times, what is required by law!

It is time that the school districts are held accountable for their actions and carry the burden, in relation to money and time, and that families do not get beaten down to the point of giving up. If this bill was current law, our son may still be in his local elementary school instead of placed in a private school that could better meet his needs.

Please support HB 581 relative to the burden of proof in special education hearings.

Sincerely,

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February 16, 2021

RE: 2021 NH HB 581 (regarding the burden of proof at special education hearings)

To Whom It May Concern:

The New Hampshire Association of Special Education Administrators (NHASEA), which I have volunteered to represent, opposes House Bill 581.

The bill proposes to impose on school districts the burden of proof at special education hearings conducted by the New Hampshire Department of Education.

The term "burden of proof" encompasses two distinct concepts: (1) the burden of production; and (2) the burden of persuasion. The party bearing the *burden of production* must present its evidence first. The party bearing the *burden of persuasion* loses if the evidence is "closely balanced." E.g., *Schaffer v. Weast,* 546 U.S. 49 (2005). In most types of cases, the burden of production falls on the party bearing the burden of persuasion.

HB 581 imposes both burdens on school districts.

The bill is identical to 2020 HB 1232. On October 20, 2020, the House Education Committee voted 17-2 that HB 1232 was "inexpedient to legislate" and sent it to interim study.[1] On October 20, 2020 the interim study committee voted 13-0 to issue the following report: "Not recommended for Future Legislation." [2]

The NHASEA opposes HB 581 for three reasons.

1. The bill is unconstitutional insofar as it shifts the burden of *persuasion*. The New Hampshire Supreme Court has already ruled that a state law shifting the burden of persuasion onto municipalities causes them to lose more cases and thus violates Part 1, Article 28-a. *New Hampshire Municipal Trust Workers' Compensation Fund v. Flynn*, 133 NH 17 (1990).

2. Imposing the burden of *persuasion* on school districts is bad policy, as the U.S. Supreme Court explained in *Schaffer v. Weast*.

3. Imposing the burden of *production* on school districts is bad policy because it will unnecessarily prolong special education hearings.

[1] http://gencourt.state.nh.us/bill_Status/bill_docket.aspx?lsr=2442&sy=2020&sortoption=billnumber&txtsessionyear=2020&txtbillnumber=hb1232
[2] *Id.*

The rest of this letter elaborates on those three points.

HOW HB 581 WOULD ALTER CURRENT LAW

HB 581 proposes to amend New Hampshire's special education statute by adding the following as RSA 186-C:16-b, III-a:

> In all hearings the school district shall have the burden of proof, including the burden of persuasion and production, of the appropriateness of the child's program or placement, or of the program or placement proposed by the public agency. This burden shall be met by a preponderance of evidence.

Strangely, the bill includes no fiscal note, although it would have a fiscal impact by causing school districts to lose more cases.

RSA 186-C was designed to implement the federal Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400, et seq. Approximately 29,000 students, 15 percent of all school-age children, qualify for special education in New Hampshire. [3]

The IDEA requires that school districts in participating states offer a "free appropriate public education" (FAPE) to every child with a disability who requires special education. To be "appropriate," a program must be "reasonably calculated to confer a meaningful educational benefit in light of the child's circumstances." *C.D. v. Natick Public School District,* 924 F.3d 621, 629 (1st Cir. 2019). Parents understandably want the "best" programs that will enable their children to reach full potential, but the IDEA does not require this. *Board of Education of Hendrick Hudson School District v. Rowley*, 458 U.S. 176 (1982).

The blueprint for each child's special education program is set forth in an IEP, which is developed by a team that includes school district personnel and the student's parents. 20 U.S.C. § 1401(9)(D). If parents or the school district cannot agree on a student's IEP or placement, either of them may file for a "due process hearing." 20 U.S.C. § 1415(b)(7), (c)(2), (f). These hearings are conducted by administrative law judges appointed by the New Hampshire Department of Education. RSA 186-C:16-a. Hearing officer decisions are appealable to state and federal court. 20 U.S.C. § 1415(i)(2). Parents who prevail at a due process hearing may recover attorney's fees from the school district. 20 U.S.C. § 1415(i)(3)(B).

According to the New Hampshire Department of Education, between 1978 and April 2020, IDEA hearing officer decisions ruled in favor of school districts 58 percent of the time, for parents 34 percent of the time, and reached mixed outcomes 8 percent of the time. N.H.

[3] A January 22, 2021 letter submitted to the House Education Committee by COPAA, an out-of-state organization, erroneously asserts that 169,169 New Hampshire children qualify for special education. In fact, that figure approximates New Hampshire's total school age population, not the number of IDEA-eligible students.

Dept. Educ., *Special Education Impartial Due Process Hearings in New Hampshire – A 45 year History, 1975-2020* (May 2020).

The U.S. Department of Education's regulations implementing the IDEA require that a school district obtain written parental consent before implementing a student's *first* IEP or *first* placement. 34 C.F.R. § 300.300(b)(1). For any *subsequent* IEP or placement, federal law allows the school district to implement its proposal unless parents file for a due process hearing and prevail.

The New Hampshire Board of Education's regulations significantly alter that balance of power. They require that a school district obtain parental consent (or permission from a hearing officer) before implementing *any* IEP or placement. N.H. Code Admin. Rules, Ed 1120.04. As a consequence, New Hampshire IEP teams strive to reach consensus and school districts make many compromises to secure parental consent. [4]

Although the special education statutes do not address the burden of proof, the law is nevertheless clear.

- The U.S. Supreme Court has held that the IDEA imposes the burden of *persuasion* on the "moving party." *Schaffer v. Weast,* 546 U.S. 49. This may be the party that filed for the hearing or the party challenging the IEP team's decision. E.g., *D.B. v. Esposito,* 675 F.3d 26, note 3 (1st Cir. 2012).

- The New Hampshire Board of Education's special education rules allocate the burden of *production*. The party filing for a hearing must present its evidence first, unless the hearing officer finds just cause for altering that sequence. Ed 1123.17(a).

HB 581 proposes to overturn those principles. The bill, if enacted, would require that school districts *always* present their evidence first and *always* bear the burden of proof in disputes over special education programs or placements.

Furthermore, by requiring that a school district obtain parental consent for any IEP or placement, New Hampshire has already given parents a powerful right not guaranteed by federal law. Shifting the burden of proof onto school districts is not necessary to even the playing field.

ARGUMENT

I. HB 581, if enacted, will be unconstitutional insofar as it shifts the burden of persuasion onto school districts.

Part 1, Article 28-a of the State Constitution prohibits the legislature from imposing new unfunded mandates on school districts. Article 28-a provides as follows:

[4] COPAA's January 22, 2021 letter to the Committee overlooks that idiosyncrasy of New Hampshire law. COPAA's letter incorrectly assumes that parents must file for due process whenever they disagree with the IEP or placement a school district offers.

> The state shall not mandate or assign any new, expanded or modified program or responsibilities to any political subdivision in such a way as to necessitate additional local expenditures by the political subdivision unless such programs or responsibilities are fully funded by the state….

The electorate ratified Article 28-a in 1984, nine years after Congress enacted what is now called the IDEA and three years after New Hampshire adopted RSA 186-C.

The New Hampshire Supreme Court's very first decision involving Article 28-a, *New Hampshire Municipal Trust Workers' Compensation Fund v. Flynn*, 133 NH 17, struck down a law similar to HB 581. The case involved an amendment to the state's workers' compensation statute. The statutory amendment, enacted after Article 28-a became effective, created a "*prima facie* presumption that cancer disease in a firefighter … is occupationally related."

This amendment essentially shifted the burden onto a town or city to prove that a firefighter's cancer was *not* occupationally related. The court concluded that "the existence of the presumption would in fact increase the number of successful claims," thereby increasing the cost for municipalities to provide workers' compensation insurance for firefighters. By imposing that new costs on municipalities, the statute violated Article 28-a.

HB 581 would likewise increase the number of successful claims against school districts. When the evidence is "closely balanced," school districts prevail under current law, but will lose under HB 581.

It is already difficult for school districts to prevail at special education hearings. Hearing officers, being human, naturally sympathize with students who have disabilities and with those students' parents. Hearing officers sometimes overlook that public resources are finite; when a school district spends more money on one student, it must either raise taxes or cut programs for other children. Furthermore, when parents of students with disabilities prevail at hearings, federal law allows them to recover their attorney's fees from the school district.

Those realities induce school districts to settle most special education disputes through mediation, thus avoiding a hearing.

Shifting the burden of persuasion will not only alter the outcome of hearings, but will also lead to more settlements (and more expensive settlements) in close cases. By "close cases," I mean not only cases where strong evidence supports each party's position, but also cases where the hearing officer is likely to sympathize with the student despite overwhelming evidence favoring the school district's position.

HB 581 will consequently increase local costs while offering no additional state funding to cover those costs. The bill, if enacted, would thus violate the state constitution.

II. Imposing the burden of *persuasion* on school districts is bad policy.

The U.S. Supreme Court's decision in *Schaffer v. Weast* lists several policy reasons for placing the burden of persuasion on the "moving party." These include the following:

- In American jurisprudence, the plaintiff ordinarily bears the burden of persuasion.

- Automatically placing the burden of persuasion on the district "assume[s] every IEP is invalid until the school district demonstrates it is not." The IDEA "does not support this conclusion." The IDEA "relies heavily upon the expertise of school districts to meet its goals."

- The IDEA compels the school district to explain to the student's parents, well in advance of any hearing, all the reasons for its proposals.

The U.S. Supreme Court recently reiterated that courts and hearing officers lack educational expertise and should consequently defer to the judgment of educators on the IEP team, so long as those educators "offer a cogent and responsive explanation for their decisions." *Endrew F. v. Douglas County School District,* 137 S.Ct. 988, 1001-02 (2017).

Placing the burden of persuasion on the school district would turn that principle upside down.

III. Imposing the burden of *production* on school districts is bad policy.

Peter Wright, a nationally recognized attorney who represents *parents* in special education cases, explained why it is unwise to require that school districts always present their case first at special education hearings.

> I always go first. This gives me control over the order of witnesses, and allows me to lay out the case and theme of the case in the manner I prefer.
>
> * * *
>
> I prefer to go first. I had a case in Pennsylvania were the school district had the burden of proof and was expected to go first. Opposing counsel and I agreed that I would go first, even though the school district had the burden of proof. The Hearing Officer refused to go along with our agreement and forced the school district to go first.
>
> What was the result?
>
> The due process hearing, a tuition reimbursement "'Carter" case, could have been completed in two or three days. Instead, the case continued for months. With nearly two weeks of testimony.

> Why?
>
> The school district attorney had to anticipate my case, the testimony of my witnesses, and had to cover every possible issue from A to Z in direct examination of school witnesses. The case that should have been clear, simple and quick became long, drawn out and slow. In the process, the issues in the case became more convoluted. [5]

I suspect that most attorneys who handle New Hampshire special education hearings agree with Mr. Wright, regardless of whether they represent parents or school districts.

Very truly yours,

Gerald M. Zelin

Gerald M. Zelin

[5] Wright, Peter W. D. "Schaffer v. Weast: How Will the Decision Affect YOU?" *Wrightslaw*, 2005, www.wrightslaw.com/law/art/schaffer.impact.pwright.htm.

March 2, 2021 Re: HB 581

Rep. Rick Ladd, Chair
House Education Committee
Legislative Office Building, Room 207
33 North State Street
Concord, NH 03301

Dear Rep. Ladd and Members of the House Education Committee,

I am writing to ask you to please support for **HB 581 – *AN ACT relative to the burden of proof in special education hearings.*** As the parent of an adult son who benefited from the special education services he received in under NH's special education rules, I know that we were fortunate. While our school district and I didn't always agree on everything, we were able to work together using informal means to resolve any disagreements. Sometimes though, parents and school districts find that they need to use more formal dispute resolution options, including filing for a due process hearing.

Due process hearings are not common; in the past 5 years, NH has held an average of 3 due process hearings each year, or about 1 due process hearing for every 10,000 NH students with disabilities. One positive reason for that low number is that NH's special education law and rules include many opportunities for meaningful parent involvement in the special education process, procedures that facilitate reaching agreement, and an array of alternative dispute resolution options that parents and schools can often use to resolve disputes without having to file for a due process hearing.

There is also the harsh reality that there is an inherent imbalance in due process hearings that discourages parents from filing. Of the 16 due process hearings held in the past 5 years (about half filed by parents), parents prevailed in 1 and partially prevailed in a second case.

Due process hearing procedures are complex and overwhelming; parents would almost never choose to file for a due process hearing unless they truly believed that it was their best, or only, way to obtain the special education services or educational placement their child with a disability needed. While parents can go to a due process hearing without legal representation, when they do, they rarely prevail, and the costs of paying for an attorney make the process prohibitive for most parents. Federal and State law provide alternative dispute resolution (ADR) options, including mediation, but those options require the voluntary participation by both parties. So, if a school district refuses, the parent may find that filing for a due process hearing is their only remaining option to resolve the dispute.

School districts almost always have more knowledge of the special education laws than parents, and they have access to more resources, including evaluators, special education experts and attorneys. Since those resources are funded by tax dollars, including those paid by the parent, the parent is put in the unenviable position of paying for both their own (if they can find one) and the school district's attorney! Some of the other points that support a school district bearing the burden of proof in due process hearings are that schools/districts have:

- a legal responsibility under IDEA to ensure that a FAPE is available to each child with a disability;
- a stronger understanding of, and experience with, IDEA and its procedures;
- better access to resources, including teachers, evaluators and related services personnel;
- the resources, experience and legal representation they need to present an effective due process case; and
- control over the potential witnesses who have worked directly with the child and are in the employ of the school.

In most due process cases, the evidence is clearly weighted in favor of either the school district's or the parent's position. Sometimes, though, the evidence presented by the 2 parties is closely balanced. In those cases, the "burden of proof" standard is used. The Federal Individuals with Disabilities Education Act (IDEA), is silent on the issue of burden of proof, but in the 2005 Schaffer v. Weast decision, the Supreme Court determined, even while recognizing that school districts have a "natural advantage" over the parents in a dispute, that unless state law assigns the burden of proof on one party or the other, the burden of proof is placed on the party that requested the due process hearing.

In her dissenting opinion in this case, Justice Ginsburg wrote that while courts typically assign the burden of proof to the party initiating the proceeding, she was "persuaded that, 'policy considerations, convenience, and fairness' call for assigning the burden of proof to the school district in this case". Judge Ginsburg noted that school districts have the responsibility to offer each child with a disability an IEP that meets that child's unique needs, and added "the proponent of the IEP, it seems to me, is properly called upon to demonstrate its adequacy." In developing its proposal, the school district should have already gathered the data and other information to clearly demonstrate to the parents that its proposal was appropriate, so it should not pose a hardship for the district to demonstrate the appropriateness of that same proposal at a due process hearing.

If NH passes HB 581, we will not be the first state to take such a position. Most states had no law placing the burden of proof on one party or the other, but prior to the Schaffer v. Weast decision, there were at least 7 states that assigned the burden of proof to school districts, regardless of whether the hearing was initiated by the parent or the school district. Since then, several other states (including New York and New Jersey) have changed their state statutes to place the burden of proof in special education due process hearings on the school district.

HB 581 is intended to "level the playing field", to insert some balance into the dispute resolution process. Assigning the burden of proof to the school district will not encourage parents to file due process hearings frivolously or for an improper purpose; in such cases, IDEA (sec. 300.517(a)) could require the parents to pay for the school district's attorneys' fees. Additionally, the Council of Parent Attorneys and Advocates, Inc. (COPAA) found that there is no research showing that shifting the burden of proof to the school would increase litigation.

I truly appreciate NH's procedures that value parent participation in the special education process and that provide alternative options for resolving disputes. But, in those cases when a parent believes it is necessary to file for a due process hearing to obtain a free appropriate public education for his/her child, HB 581 will make that process fairer and more equitable.

I encourage you to please support HB 581. Thank you in advance for your consideration of my input.

Sincerely,

Bonnie A. Dunham
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MIKHAIL ZHUKOVSKIY
12 DOGWOOD LANE
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March 16, 2021

HouseEducationCommittee@leg.state.nh.us
Members of the House Education Committee

Re: HB581 - Amend RSA 186-C:16-b to shift the burden of proof in special education hearings to the school district.

Dear Members of the House Education Committee,

My name is Mikhail Zhukovskiy, and I live in New London, NH. I am writing to ask that you help struggling students with disabilities get a chance to obtain a better education by shifting the burden of proof in special education hearings to the school district by supporting HB581 and enacting the following change:

> 1 New Paragraph; Special Education; Due Process Hearing; Burden of Proof. Amend RSA 186-C:16-b by inserting after paragraph III the following new paragraph:
> III-a. In all hearings the school district shall have the burden of proof, including the burden of persuasion and production, of the appropriateness of the child's program or placement, or of the program of placement proposed by the public agency. This burden shall be met by a preponderance of the evidence.
> 2 Effective Date. This act shall take effect 60 days after its passage..

I am a parent of healthy twin girls, currently 18 months old. We do not know what the future holds for our girls, but it is possible that one or both of them may become one of the 7 million public school students with disabilities.

If this happens, we may find that we need to advocate for our daughters before a school district or others in a position of authority. As has happened to other families testifying before this committee, it may come to pass that school

officials may deny us services that we feel would be necessary for our daughters. If that were to happen, and if we were in a legal proceeding against a school district, we would be at a distinct disadvantage. We work hard to make sure that our daughters are well-cared for and live in a comfortable home, free from hunger and other stresses. But we frequently live paycheck to paycheck. We would not have the money to pay expensive legal fees. A school district, on the other hand, would certainly be well-represented legally. If the burden to prove that our children are not receiving appropriate services were placed on us, chances are that we would lose.

This is the flaw with the legal framework governing these hearings, as currently legislated. It places those with the fewest resources and specialized knowledge to argue a legal case in the position of greatest responsibility in a special education hearing. Parents of disabled children are frequently facing severe challenges, are strapped for time and money, and are exhausted physically and emotionally, yet they are made to fight a bureaucratic system designed to defeat them.

Fairness demands that the roles be reversed. It is a school district's duty to ensure that every student receives an appropriate education, and those acting in a child's best interests should have no trouble proving that the level of services a student is receiving is appropriate.

To correct this injustice, I urge you to pass the legislation mentioned above. Should you have any questions, please feel free to contact me at misha354@gmail.com.

Thank you for your time and service.

Sincerely,
Mikhail Zhukovskiy

Dear Education committee members,

I am asking for your support of HB 581, which would transfer the burden of proof in Special Education Due Process Hearings to school districts. I firmly believe that the districts would act with more integrity to begin with if they knew they could reasonably be held accountable in Due Process. School districts would still be able to outman parents and spend exorbitant amounts on attorney fees that would allow them to defend any unreasonable claim of denial of Free and Appropriate Public Education from a parent. Here is a recent slice of my fight with the local school district that provided an excellent education to my non-disabled child.

For a parent in her twelfth year in dealing with the special education in New Hampshire, it could be difficult to find a starting place for my story. In my case, the District agreed to resolve one pending state complaint in February 2018 by promising some much-needed OT services from an outside vendor over that summer. After that meeting, the written agreement came, including a clause that neither my son nor I would make any claims against the district for acts or omissions, known or unknown, to date. I knew that such a clause was probably illegal and unenforceable, but the District knew I could not fight right then, as my mom was entering hospice. I signed, taking the temporary win, never expecting that a Hearing Officer, when presented with this document in 2019 at Due Process, would allow the school district to go back three years and in order to assassinate my character by bringing up their side of an issue that was not part of Due Process and I could not defend. The letter was illegal, as it did not come with required Written Prior Notice, paperwork that allows a parent to accept what is agreed as appropriate while declining services or actions that they disagree with for their child.

My son received and benefitted from the outside OT's evidence-based program, costing my district $2,500 (my insurance deductible), as measured and reported with weekly data sheets that had to be presented to administration for reimbursement. The entire evidence-based program would have cost about $3,000, with free training provided by the manufacturer. The program then would have been available to continue with my son, and also for every child in the District with Autism, ADHD, or CAPD. It requires oversight by a trained party, but daily use can be monitored by a paraprofessional. Despite the success and inclusion (by name) in my son's IEP for the next year, the school won against my challenge in a State complaint by presenting evidence (school OT's opinion at an IEP meeting) that said the program didn't work so they didn't continue with it. The OT had not attended the free training, and was not using the program properly, but she had trained others on its use. A simple adjustment was indicated in the protocol. On the very same day as this meeting where the OT claimed it didn't work, a progress report indicated that my son had made progress in the OT goal attached to the same program. This evidence that they used it and it did work was presented at Due Process in May, 2019. Despite the fact that I my due process complaint clearly indicated that the school was saying two opposite things about the same service, I did not have a lawyer at Due Process, so I lost. The district "won" a state complaint with one explanation and the Due Process with the alternative one, the town of Salem contradicted itself to the state of New Hampshire, and both contradictory statements were taken as evidence that the School District met their obligations.

I did not originally choose Due Process, but was trying with some success to convince a full IEP Team of my son's needs. He needed outside placement, $$$, and the District agreed to pay for an intake evaluation from an Education service recommended verbally by NH Special Medical Services, an agency that purports to be family centered but "can't" go against a NH school they can't persuade. The

evaluation took place, a meeting agenda included “placement discussion” and then the administrator informed me that I needed to sign (without exceptions) a poorly written IEP including placement at the local high school where progress had stopped in order to allow Team to even discuss placement. I signed with exceptions, then got the “Due Process” threat. There was a follow up meeting already scheduled for after February vacation, which everyone knew we were to spend at Disney. On the Friday before vacation, I received, unexpectedly, notice that the Team (without meeting) had changed its mind and issued a WPN and “final offer” IEP, with a 14-day time line (4 days that I would be at home). Sign without exceptions or we take you to due process., it clearly stated. They filed for Due process despite having no legal basis to force my signature on an IEP and NH DOE allowed them to keep this fact hidden. I had already done a cross-file, I had been working hard for4 weeks to gather all the evidence to prove denial of FAPE, however the burden of proof had shifted to me.

The District has multiple responsibilities in Due Process. They must submit mutually agreeable dates that fit the time lines. They submitted dates that did not fit the time lines (due to a lawyer’s vacation) and were therefore given extra time to prepare their case. The district is required to produce a specific list of evidence that I was not to duplicate. Several hundred of their 800 pages were misprinted, so they were permitted to resubmit the entire packet late to the DOE, and just the misprinted pages to me, so I got to collate. This gave me a copy with the same evidence, different page numbers. They had the administrator that was on my witness list assist her lawyer, so she was able to monitor my case and make adjustments as she went. I asked for technical assistance with the subpoena process, and “copies” of subpoenas arrived, with no instruction that it was on me to have them served in 4 separate counties and in Massachusetts. I was later told by a special education attorney that NH DOE serves subpoenas for him whenever he asks. I had 2 witnesses, including myself, and the right to cross the district’s witnesses, but was interrupted with objections any time I tried to show evidence without phrasing in the form of a question, like a Jeopardy nightmare. I was only permitted to present my own testimony at the beginning and end of the process, and there I was stopped and accused of taking up too much time whenever I was nearing an important fact.

Perhaps the most ridiculous part of DP in New Hampshire, contributing to the insurmountable burden of proof, is the Post Hearing submission. Mentioned nowhere in the pro se guideline, and certainly not explained by the hearing officer, this is an extra opportunity for the staff of the district and their team of lawyers to defend their case, in writing. I was able to and did make my submission as well, without instructions, to the school district’s lawyer as well as the hearing officer, by 5 pm on the due date. The school district submitted after 11 pm, and then asked to resubmit the next day – just to clear up some typographical errors, they claimed. I had no reason to suspect this might happen, or opportunity to object, as my work schedule had been arranged to give me time off before the scheduled hearing dates, not after, already using up the balance of my vacation time. I was doomed and knew it.

I currently have an OCR (office of Civil Rights, federal) complaint being investigated against the district for one issue of retaliation, but I hope they will also hear how the district changed the eligibility category for my son during a “stay put” period on the Friday before Due Process. Tutoring that I had paid for in advance but the district agreed to provide in the stay put was never reimbursed, preventing me from having those funds to get a lawyer to appeal. Additional tutoring was added to the next IEP for a different course that the district would not even provide curriculum for, although it had been requested months before. This past week I confirmed my suspicions that the District had not provided an IEP signed August 8, 2020 to any service providers. They claimed that an old IEP was active, and promised to

get back to me soon when I questioned the goals in November. I can't submit this to NH DOE without having OCR drop my complaint, which is probably why they chose to retaliate in this manner.

There are many laws on the books that could support special education students and parents. Each has as a worst-case scenario, the "consequence" to the school that they are forced to adhere to whatever regulation they were ignoring. If a FERPA complaint, they are asked not to violate FERPA any more. Why would a parent bother? If a Due Process is by some miracle lost, they would have to provide compensatory education. If you catch an administrator lying to save the district money, that fits the definition of educator misconduct, where the parent again has the burden of proof. This could perhaps be used in Due process if deadlines aren't past and if your child has not aged out. Both of these avenues allow the school district to delay services, and the student can't really "double up" and receive the necessary services as well as the compensatory at the same time. They win when they lose.

Please support HB 581. My son is, at 18, still in need of transition services as well as academic services in order to fully participate as a productive member of the community. The district is refusing to provide any offer of placement, and remains dishonest or unresponsive in every interaction. I have just postponed an IEP meeting to go over progress, because I learned the wrong IEP is being implemented. The email said "canceled at the request of the parent" making it appear that I don't really care. If I refute this, a lawyer would later point out how nasty I was about a simple mistake, even though I can prove I requested the correct IEP be given to service providers 3 times.

Thank you all for your time and service to the educational process in New Hampshire. I am happy to answer questions or provide testimony in support of HB 581.

Sincerely,

Patricia Eno

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SPECIAL EDUCATION IMPARTIAL DUE PROCESS HEARINGS IN NEW HAMPSHIRE –

A 45 YEAR HISTORY
1975-2020

New Hampshire Department of Education
Concord, NH

May 7, 2020

Governor of New Hampshire

Christopher T. Sununu

The Executive Council

District 1	Michael J. Cryans
District 2	Andru Volinsky
District 3	Russell E. Prescott
District 4	Theodore L. Gatsas
District 5	Debora B. Pignatelli

New Hampshire State Board of Education

		Term Expires
Drew Cline, Chairman	District 4	2021
Kate Cassady	District 1	2020
Anne Lane	District 2	2021
Philip Nazzaro, Phd.	District 3	2022
Helen G. Honorow	District 5	2020
Cindy C. Chagnon	At Large	2020
Celina “Sally” Griffin	At Large	2023

Commissioner of Education

Frank Edelblut

Deputy Commissioner of Education

Christine Brennan

Governance Unit

Diana Fenton, Esquire, Chief

Compiled by Stephen W. F. Berwick

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The Age Discrimination in Employment Act of 1967
The Age Discrimination Act of 1975
Title IX of the Education Amendments of 1972 (Title IX) - sex
Section 504 of the Rehabilitation Act of 1973 (Section 504) - disability
The Americans with Disabilities Act of 1990 (ADA) - disability
NH Law against discrimination (RSA 354-A)

The following individuals have been designated to handle inquiries regarding the non-discrimination policies and laws above

Lisa Hinson-Hatz
State Director, Bureau of Vocational Rehabilitation
21 South Fruit Street, Suite 20
Concord, NH 03301
(603) 271-3471(V/TTY)
1-800-299-1647
Lisa.Hatz@doe.nh.gov

Section 504 Coordinator
Tina Greco
NH Department of Education
NH Vocational Rehabilitation
21 South Fruit Street Suite 20
Concord, NH 03301
(603) 271-3993
Tina.Greco@doe.nh.gov

State Office of Civil Rights (OCR)
Eric Feldborg
State Director of Career & Technical Education
21 South Fruit Street, Suite 20
Concord, NH 03301
(603) 271-3867
Eric.Feldborg@doe.nh.gov

Inquiries regarding Title VI of the Civil Rights Act of 1964, the Age Discrimination Act of 1975, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and/or Title II of the Americans with Disabilities Act of 1990 also, or instead, may be directed to

Boston Office
Office for Civil Rights
US Department of Education
8th Floor
5 Post Office Square
Boston, MA 02109-3921
(617) 289-0111

TTY (877) 521-2172
E-mail: OCR.Boston@ed.gov

Additionally, inquiries may also be directed to the

NH Commission for Human Rights
2 Chenell Drive
Concord, NH 03301-8501
(603) 271-2767

Equal Employment Opportunity Commission (EEOC)
1 Congress Street
Room 100, 10th Floor
Boston, MA 02114
(617) 565-3200

US Department of Education
Office for Civil Rights
Lyndon Baines Johnson Department of Education Bldg
400 Maryland Avenue, SW
Washington, DC 20202-1100
800-421-3481
FAX: 202-453-6012; TDD: 800-877-8339
OCR@ed.gov

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Introduction

In New Hampshire, special education impartial due process hearings are part of the New Hampshire Department of Education's Office of Dispute Resolution and Constituent Complaints under the Governance Unit, which in turn falls under the Office of the Deputy Commissioner. Part of the mission of the New Hampshire Department of Education's Office of Dispute Resolution and Constituent Complaints is to provide timely, impartial administrative processes to constituents that promote free and appropriate public education to all New Hampshire residents.

Under the Individuals with Disabilities Education Improvement Act (IDEIA) Part B, special education impartial due process hearings are the principal vehicle for resolution of disputes between parents of children with disabilities and school districts. The right of parents of children with disabilities to have an impartial binding review of any disagreement over the program offered by the local or regional school district is a central procedural protection in the IDEIA.

The parent obtains a due process hearing by submitting a written request to the school district with a copy to the Office of Dispute Resolution and Constituent Complaints at the New Hampshire Department of Education (hereinafter, the "SDE"). Under some circumstances, school districts may use due process hearings to contest decisions by parents.

New Hampshire operates a single-tier hearing system. That is, the New Hampshire State Department of Education (SDE), rather than the Local Education Agency (LEA), conducts all impartial due process hearings requested by LEAs or by parents or guardians and there is no provision for SDE review of hearing officer decisions. The decision of the hearing officer is final and can only be appealed to either state superior court or to federal district court.

When enacted in 1975, P.L. 94-142, the predecessor of IDEA and IDEIA, special education impartial due process hearing procedures were a way to resolve special education disputes easily and promptly. Over time due process hearings became formalized, legalistic in nature, costly

and at times highly adversarial not only in New Hampshire but in Connecticut, Iowa, Kansas, New York and other states as well. Additionally, due process hearings can be costly in terms of time, money and emotional energy for all parties concerned. From the school district's perspective, no other form of hearing in the school setting is as broad, as well regulated, or as intrusive into the administrative and professional decisions of district staff as the hearing under the IDEA. For parents, the lengthy preparation for a hearing, the need to take time off from work with attendant loss of pay, the anxiety, the win/lose atmosphere, and the wait for a decision, too often increase alienation and sustain antagonism with the school district. All too often, the conflict between parents and school district remains unresolved, or even worsens, regardless of who "won" the hearing.

Hearing Officers

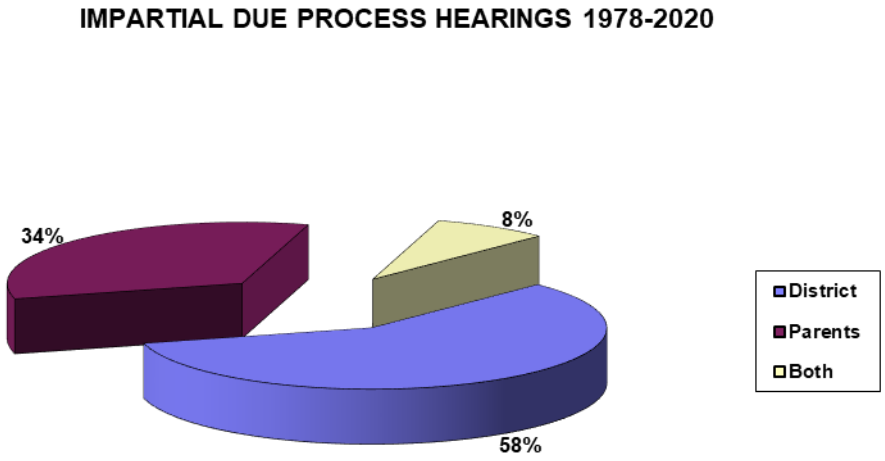
The hearing officer's primary responsibility is to implement state and federal laws and regulations in resolving the dispute in the interest of the student. To this end, the hearing officers must wisely exercise broad authority in their handling of the hearing and the scope of appropriate relief granted, if any.

Competent hearing officers are the key to running efficient and effective due process hearings. To accomplish this goal optimally, hearing officers must possess a multitude of skills and talents. Hearing officers must have a strong knowledge of the field of special education as well as federal and state laws regulating the provision of special education. They must also have a sufficient knowledge of the principles of evidence, must have at least the same level of expertise in this area as the attorneys who practice in the area of special education law. Coupled with a sufficient substantive knowledge of special education and the law, hearing officers must have the personal qualities necessary to deal firmly, yet fairly, with the parties to the dispute, especially the attorneys. This last characteristic is essential to establish and maintain control of the hearing process to ensure that all the functions of the hearing are fulfilled, namely a decision on the dispute based upon a good record and a framework for the parties to work together. How hearing officers conduct themselves and the hearing, in terms of establishing and maintaining control, is the crucial factor in determining the effectiveness and efficiency of the due process hearing system.

Throughout the years, a recurring theme has arisen in special education impartial due process hearings: parents concerned that they cannot prevail against deep pocket school districts who have liability

insurance and attorneys representing them. In turn, some school districts assert that they cannot prevail against parents who have the ear of the hearing officer and therefore have opted for alternative dispute resolution. A review of forty-one years of records and hearing officer decisions shows an ebb and flow in terms of who prevails in hearing officer decisions, which is largely dependent upon a wide range of factors including facts of the issue, applicability of law to the remedy requested, saliency of issue, etc. During the 1980s, although Boston Globe NH edition newspaper articles of the time spotlighted concerns that parents could not prevail in NH special education hearings, a review of hearing officer decisions from the period 1980 to 1989 shows an almost even split between parents and school districts prevailing in decisions. During the 1990s, due to a variety of factors such as, among others, changes brought about by court decisions, legislation and staffing in local school districts as well as hearing officer familiarity with the issues, this gradually changed to be more in favor of school districts. Court decisions of this period also largely upheld Hearing Officer Decisions. By 2004, the size and number of cases dramatically decreased. During this time, IDEIA implemented statutory and regulatory changes requiring parents and school districts to agree to opt out of a resolution session prior to the opportunity for a hearing. IDEIA also provided an opportunity for parties to challenge the sufficiency of hearing requests, which could end up in a hearing officer throwing out a case that did not meet certain minimum requirements.

Overall, a review of decisions over forty-one years from 1978 to April 2020 shows 565 decisions in which the school district prevailed in 330 cases (58%); parents prevailed in 190 cases (34%); and, 45 split decisions (8%).



Since 1990, in only five cases out of 24, did an appeal to a court of competent jurisdiction prevail against a hearing officer decision leaving a success rate of over 80%. It should be noted that how one defines prevailing party depends upon a number of factors and just because a party did not get what they sought, it does not mean that they ultimately did not win or that their concerns weren't addressed in a way that was productive in the big picture to the child.

Pre 1984

In 1972, after several landmark court cases, Congress introduced legislation establishing in law the right to education for all handicapped children.

On November 19, 1975, Congress enacted Public Law 94-142, also known as The Education for All Handicapped Children Act. The law's intent was that all children with disabilities would "have a right to education, and to establish a process by which State and local educational agencies may be held accountable for providing educational services for all handicapped children."

P.L. 94-142 mandated that states develop an appeals process. Congress found that "*more than half of the handicapped children in the U.S. do not receive appropriate educational services which would enable them to have full equality of opportunity...[and] one million of the handicapped children are excluded entirely from the public school system...*" 20 U.S.C. 1400(b)(3); (b)(4).

In New Hampshire, special education hearings were appealable to the State Board of Education under RSA 193:3 and 186:C. New Hampshire established a two-tier system in which the local level board first heard the case within the federally mandated timeframe, after which the matter went to a hearing officer appointed by the state board. The hearing officer then held a hearing and rendered a decision within 45 days. In 1977, for example, the State Board appointed a consultant from the Bureau of Special Education as hearing officer in a Hampstead School District matter. Between the years 1978-1984, Paul Kilmister, in the Commissioner's Office, as well as contracted Hearing Officers Dr. Newell J. Paire, a former Commissioner of Education, and Otis Cloud acted as Hearing Officers.

In terms of the state process, in a 1984 case, Laurie B. 489, A.2d 567 (N.H. 1984), the court noted:

"New Hampshire law establishes an administrative appeals process in which parents may participate in developing individualized education programs for their educationally handicapped children and may appeal decisions of a school district to the State Board of Education. RSA 186-C:7 (Supp. 1983). Any party aggrieved by a decision of the board of education may appeal the administrative decision to a State trial court or United States District Court. Petition of Darlene W., 124 N.H. 238, 240, 469 A.2d 1307, 1309 (1983); Petition of Milan School District, supra at 232, 459 A.2d at 274. The court may then review the record of the administrative proceedings and hear additional evidence."

From the very beginning, New Hampshire did not meet the statutory timelines. In 1978, one of the state's first hearings went over 45 days while the second hearing went beyond 54 days. Each case took 2 days.

During the period 1978-Summer 1980, an appeal averaged a hearing time of 5-6 hours. From the summer of 1980 until the fall of 1981, hearings jumped and averaged between 2 to 3 working days. During the period of 1978-Fall 1981 the parent was the initiating party in 35 of the 36 appeals. Of these parents prevailed in 14 cases; school districts won in 16 by districts; and a split decision was rendered in five cases.

At a Regional Conference on Mediation, Cooperative Planning, and Procedural Safeguards meeting held on November 20, 1981 in Laconia, Paul Kilmister, the consultant tasked with implementing PL 94-142, made some observations of the hearing situation up to that point:

"There has been a very significant increase in the past 12-18 months; particularly last 6 months in the length of hearings. The time involved, and the real and "hidden" expense, both to the state and school districts. One hearing this summer - 45 hours of tape - 2 attorneys, one employed by the parent - other by the school district - a stenotypist (employed by 1 attorney) - time of witnesses - better than 2 days' work in correspondence, phone calls, - secretarial - perhaps 10 hours' time outside of hearing on part of Hearing Officer in writing decision - direct and indirect costs to all parties involved - 15 to 20 thousand (dollar) range.

"Another cost factor - and time problem - which is a great concern is the review process at the state board level. Up to this time, five of the 36 decisions of the Hearing Officer have been appealed to the State Board, which has conducted "a review." As of now, this review has consisted of reproducing all items submitted

and the typing of a transcript. After a reading of the transcript and reviewing the documents, the State Board schedules a short time for attorneys to make statements and make its decision.

"One problem is that a transcript is costly - and a time-consuming process. The most recent appeal was from the shortest hearing we have had in the past 18 months - 2 1/2 - 90 minute tapes. It cost about $700. One hearing this summer involved more than 30 hours of testimony. We are currently engaged in a similar one - which I feel certain will be appealed by whatever party "loses." If that happens, I am sure we will have exhausted our contract funds and will have the board adopt a different process."

After 1981, the enactment of RSA 186-C:16-b, dissolved the two-tier process and the State Board no longer heard Special Education appeals.

1982-1989

The period 1982-1989 saw a dramatic increase in the number of hearing requests that went to decision after a full hearing. In 1981, 12 cases went on to decision after a full hearing; in 1982, there were 13 cases; in 1983, there were 20. In 1984, the total went down to 14 and in 1985 to nine. However, the number increased in 1986 to 16 cases; in 1987 and 1988 to 20 each year; and in 1989, an all-time high of 33 decisions.

From the very beginning of the hearings mandated by PL 94-142, attorneys for both parents and school districts have been involved. In 1978 there was one attorney hired by the parents. In 1979, out of 12 cases, attorneys for the district represented two, while an attorney for the parents attended one. In 1980, with 11 cases, attorneys for the district represented six, while attorneys for the parents represented six. From 1981-1989, the numbers of attorneys attending hearings increased so that nearly every hearing was attended by attorneys. Additionally, the number of days required for a hearing jumped from 2 days in 1978 and 1979 to 6 days in 1981; 9 days in 1986; and 10 days in 1989.

Beginning in 1984, when 20 cases occupied nearly all of one hearing officer's time, the Department began contracting with two additional hearing officers, Carol Schapira and Alice Vartanian-King, specialists in special education matters, to conduct hearings. There were also numerous complaints (internal and external) that hearing officers did not understand what the law allowed and that they were often writing decisions that would not hold up in court. Already by the mid-1980s, the NH Supreme Court had heard a number of Special Education matters:

Darlene W (1980-1981) regarding a state board decision that a school district was not liable;

Laurie B (1984) determining that the lower court did not follow administrative procedures;

John H (1985) regarding waiver of sovereign immunity by the state;

Todd P (1986) wherein the court addressed legal liability

By that time there had already been several other court cases, which affected the nascent hearings process:

Garrity v. Gallen in 1981 while against DCYF the court mentioned Special Education.

James O (1986) Consent decree brought against NHDOE charging that it had violated EAHCA and subsequent IDEA students placed in state facilities or programs.

Hearing Venue

Originally, hearings were few, small, and easily held in a Department of Education meeting room at Londergan Hall. By 1986, the hearings had become more adversarial and, in some cases, explosive, so moved to the Legislative Office Building when the legislature was not in session. Eventually, in 1987, as hearings increased, the Department worked with the First Congregational Church to utilize its education space to hold hearings when unable to do so at the LOB. By the late 1980s, space freed up in the basement of Londergan Hall so that hearings took place in two hearing rooms (Rm 13 and 19) there. This continued until March 2002 when the Department of Information Technology took over the space. For a period of time hearings occurred at the Franklin Pierce Law Center. By June 2003, the Department contracted for a suite at Regional Drive, which had four hearing rooms and a lobby area. The Department also purchased new recording equipment to ensure quality control. By July 2010, hearings moved again, this time to the DDS hearing room until a more permanent space opened in Room 200 of Walker Building.

Attorneys added as Hearing Officers

Since the legal issues increased by the year, it was determined that it was becoming increasingly important to have hearing officers who were attorneys and therefore would understand the legal ramifications of decisions. Consequently, in 1986, in addition to the then current hearing officers, Attorney Arpiar "Arpie" Saunders, was hired. As the number of cases increased, and the issues grew more cumbersome, in 1987 more hearing officers (State Rep. Betty-Jo Taffe, Maureen Kalfas, Dr. Philip Boucher, Attorney Quentin Blaine, and, Attorney Patricia Quigley) were hired to pick up the extra workload. All the hearing officers either had a background in special education law, or had been in the field of special education for many years.

During this time, two high profile hearing officer decisions were appealed to the US District Court, and affected subsequent hearings:

Karen M. /Henniker (1987) – regarding a dyslexic graduated school valedictorian who the school district was ordered to provide compensatory education;

Timothy W. /Rochester (1987) – Special education entitlement for severely handicapped.

A year later, in 1988, the hearing officer contracts were not renewed and the department instead contracted with a law firm to handle appeals. It was determined that since most of the cases continued to involve attorneys on both sides and legal matters were becoming more important, one law firm could better handle the increasing work load. The law firm hired was the Law Offices of James J. Bianco, Jr. Attorneys assigned by the law firm to hold hearings were Lisa J. Rule, Timothy Bates, Robert Levine, and Eric G. Falkenham. Within a year, however, due to the increasing caseload and the difficulty encountered by one law firm handling all of the cases, it was once again determined to look for new hearing officers who had a good understanding of the law as well as special education matters. It was also at this time that the US District court overturned a hearing officer decision (Casey J. 1988), which made the newspapers. At a due process hearing in 1988, the hearing officer found that a student's suspension violated his due process rights but that the rest of the IEP, including the administration of Ritalin was appropriate. The parents appealed to the US District Court. Judge Loughlin found that the student's "right to a free appropriate education could not be premised on the condition that he be medicated without his parents' consent." Judge Loughlin also found that the school district violated the federal Individuals with Disabilities Education Act by failing to notify the parents about changes in their child's education, including a

month of "isolation" with a teacher in a tiny room. The student had the right to be free from forced administration of psychotropic drugs, like Ritalin, because of their constitutional right to privacy and bodily integrity.

In 1989, the department then contracted with eight independent attorneys – John Dabuliewicz, Gerard Spegman, Gyda DiCosola, Kenneth Nielsen, S. David Siff, Catherine Stern, Richard deSeve, and Katherine Daly.

1989-2002

The number of cases that went to full hearing and decision decreased dramatically after 1989: 1989 (33 cases); 1990 (23 cases); 1991 (20 cases); 1992 (16 cases); 1993 (16 cases); 1994 (14 cases); 1995 (12 cases); 1996 (14 cases); 1997 (10 cases); 1998 (7 cases); 1999 (9 cases); 2000 (13 cases); 2001 (15 cases); and 2002 (1 case). While the number of hearing days remained relatively stable (ranging from 3 to 12 days of testimony in 1990 to a high of 17 days in 1995!), many cases settle and mediation became increasingly popular as a means to settling disputes. In 2000, 4 out of 11 cases had a hearing decision within 45 days while in 2001, 9 out of 15 cases were completed within 61 days with 2 of them falling within 36 days indicating the increased emphasis on timeliness of decisions. What did not decrease, however, were attorneys attending due process hearings. Whereas the number of attorneys representing parents decreased, it was rare for districts to attend hearings without attorneys.

While cases that went to full hearing and decision decreased dramatically after 1989, the same was not true of the number of days involved in hearing. In 1990 one case took up twelve days of hearing

In terms of litigation, several cases affected hearing officer decisions:

Cocores/Portsmouth and a number of other school districts in 1990 – regarding denial of FAPE. The court overturned the Hearing Officer and remanded the decision

Marc A/NHDOE & NHDOC – in 1994 regarding prisoners receiving FAPE while incarcerated

Brandon A/Epsom – in 1999 regarding timeliness of hearings. The court dismissed the matter due to regulation changes meant to tighten the timelines

In six other appeal decisions, the courts upheld hearing officer decisions on a variety of issues such as appeal timeframes, unofficial recording of hearings, placement, 504 accommodation of parent at hearing, and placement issues.

In 1990, the Department added Attorney John LeBrun as a contracted hearing officer and in 1994, Attorney Jeanne Kincaid. Six years later, in 2000, Amy Davidson became a hearing officer.

Among the important cases won by parents at the hearing level and subsequent court appeal during this period was the Hunter P. case about cochlear implants. One other decision from this period that was of Michael M. court upheld HO concerning appropriateness of the IEP. In that case, the school district was not required to devise best IEP, or what parent consider ideal – Parent demanded SAU place student in private school at public expense. The Hearing Officer found against parent as did court. In the subsequent appeal, the Court of Appeals did not address the issue of the IEP. The issue, however, of the lower court stating a parent could not do represent themselves was overturned by the appeals court.

Alternative Dispute Resolution Processes

New Hampshire has a long tradition of mediating disputes. Originally, arrangements for mediations were through the Special Education Bureau at the Department of Education. In 1995, the mediation program moved from the Special Education Bureau to the Commissioner's Office where mediation was further opened up to parties as a way to evaluate their case before hearing. Prior to 1995, there were 40 volunteer mediators. During mediations, two mediators heard cases; after 1996, Hearing Officers acting as mediators handled this role.

In 1994, a second alternative dispute resolution process was enacted – Neutral Conferences. Neutral Conferences are unique to New Hampshire. Parties, prior to the conference submit a four page summary of their case. A conference each are given a half-hour to make their case after which the Neutral gives the parties their decision which, if parties agree, is made into a written, binding agreement.

Another change in the Due Process Hearings program occurred in the summer of 2000. In that year mediation was automatically, unless otherwise requested, scheduled with a requested hearing. This has had the effect of encouraging parties to settle disputes without the need for a formal hearing. The mediation option, as mentioned earlier, proved to be

an invaluable asset in solving disputes. In addition, by May 2001, parties submitted mutually agreeable dates prior to requesting a hearing from the State Department of Education. Failure to provide the dates resulted in the Department unilaterally assigning dates, which might, unintentionally, be inconvenient to the parties, and consequently, result in hearing delays. The intention was that the change would further reduce the number of days from hearing request to the final decision.

In 2013, a third alternative dispute resolution evolved from mediations and neutral conferences – the Third Party Discussion Led by Moderator. In this role, the moderator hears from each side as in a mediation but can also provide insight as to legal stance and how a Hearing Officer might determine it.

Hearing Costs

In terms of hearing costs, during fiscal year 1997 New Hampshire allocated $87,700 for four hearing officers. Of that amount, alternative dispute resolutions took up approximately $25,000. In 1997, the cost for services charged to the Department for a full hearing ranged from $765 to $4,770. A one day hearing cost $942; a three day hearing cost $1,890; a four day hearing cost $765 while another cost $3,870. The reason for such a difference in cost was that the $765 hearing was for half days and the issues less muddied. The cost for a five-day hearing was $4,770. As indicated under the "Historical Overview of Due Process in New Hampshire," the cost for transcription of one hearing in 1981 cost about $700 for a 2½-hour session. The average cost in 1997, with 19 tapes (average 5 per day) came to $3,000. This cost does not include attorney's fees nor the charge for hearing officer services. Through the years, these costs steadily increased.

2003-2020

The year 2003 marked 28 years since the first cases under PL 94-142 began in 1975. In 2003, State Representative and J.D., Gail Morrison became hearing officer followed in 2004 by Attorney Joshua Jones, in 2005 by Attorney Peter Foley and in 2007 by Attorney Joni Reynolds and Attorney Scott Johnson. During the 17-year period from 2003 to 2020, cases have significantly decreased from a high of 113 requests in FY 2004 to 33 cases requested in FY 2014. Since then the average has been around 35 cases per fiscal year. In terms of hearing decisions, this has decreased substantially since passage of IDEIA in 2004, cutting cases from 24 decisions in 2003 and 29 in 2004, to 12 in 2005 and 2006 respectively, 13 in 2007, down to six in 2009 and 3 in 2010 to the average of 2 to 4 cases by

2015 to 2020. The decrease is largely due to the increased emphasis at the state and federal level of utilizing alternative dispute mechanisms to resolve disputes amicably between parties. In 2013, DOE initiated a third alternative dispute resolution process – third party discussion led by moderator. Attorney Briana Coakley-Hyde became hearing officer in 2018.

Timeline

- 1972 — Legislation introduced in Congress after several "landmark court cases establishing in law the right to education for all handicapped children."
- 1975 — P.L. 94-142, the predecessor of IDEA and IDEIA
- 1975-1978 — Two tier system of appeals
  - First tier local school board
  - Second tier State Board appointed hearing officer, then decision by State Board
- 1977 — SPED Bureau consultant Kennedy acts as Hearing Officer
- 1978-1984 — Hearings transferred to/administered by Commissioner's Office starting 1981
  Attorneys hired by/represent parents and attorneys;
  Hearings go beyond statutory 45 days;
- 1980-1981 — **Darlene W. NH Supreme Court writ of certiorari re State Board decision that school district not liable for placement**
- 1981 — **Garrity v. Gallen Laconia State School – case filed against DCYF – NH ordered to devise plan for institutional improvement and community placmeent**
  Two tier system dissolved - state board no longer involved in appeals
- 1982-1989 — Dramatic rise in cases
- 1984 — Two more hearing officers hired due to heavy caseload
  Laurie B. – NH Supreme Court – lower court did not follow administrative appeal procedures
- 1985 — **John H. – NH Supreme Court – waiver of sovereign immunity by state re: appeals**
  Edward B. v. Brunelle – Class action involving SPED for students placed by juvenile courts
- 1986 — **James O. – Consent decree re: case against NHDOE by students placed in state facilities or programs violated EAHCA now known as IDEA**
  Legal complexities in cases necessitate hiring individual with legal knowledge as hearing officer – Attorney Arpiar Saunders becomes 4th hearing officer
  Todd P./Hillsboro-Deering – NH Supreme Court re: determination of legal liability
- 1987 — **Karen M./Henniker - Hearing Officer found in favor of Honor roll Dyslexic student, ordered compensatory education (Vartanian)**; addition of 4 more contracted hearing officers
- 1988 — Contract for hearing officer given to Bianco Law Firm
- 1989 — **Casey J. Ritalin case– hearing officer orders student take Ritalin; overturned in court (Falkenham)**
  Non-renewal of contract with Bianco Law Firm.
  Department contracted with 8 independent attorneys to

serve as hearing officers
Timothy W./Rochester – Parents appealed an order of the district court which held that under the Education for All Handicapped Children Act, a handicapped child is not eligible for special education if he cannot benefit from that education, and that Timothy W., a severely retarded and multiply handicapped child was not eligible under that standard. The appeal court revised the district court (1987 case – Quentin Blaine).

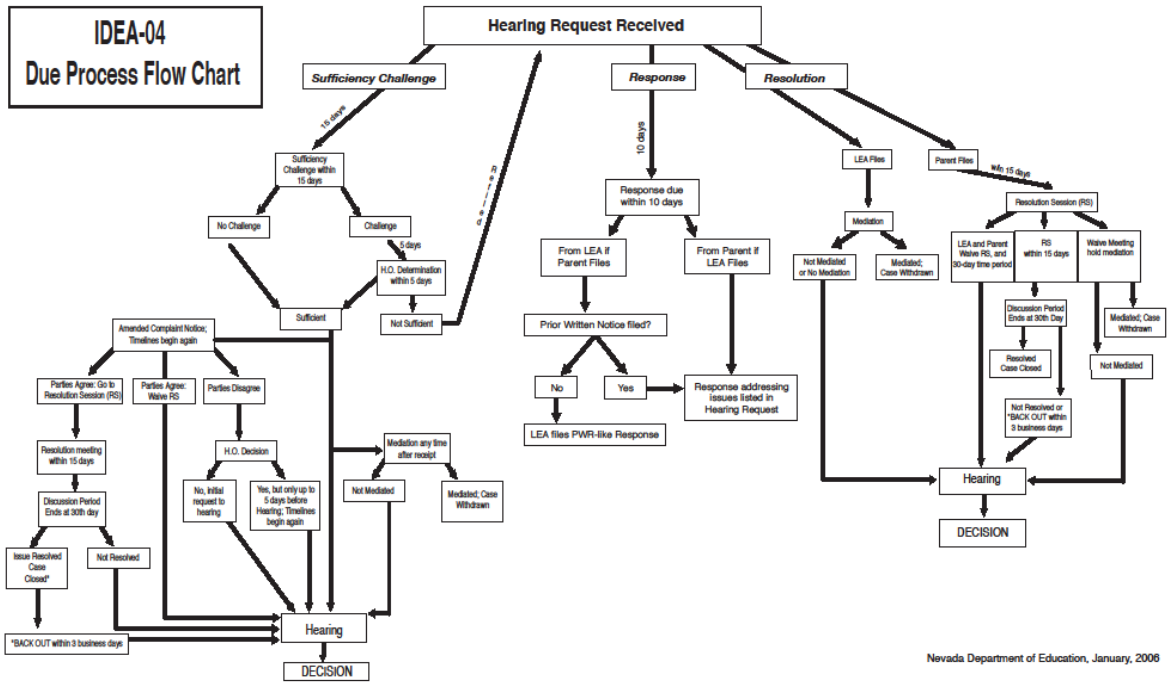
- 1990 Several lawsuits –
  - **Cocores/Portsmouth/multiple school districts (IDPH-90-61) lawsuit overturns hearing officer dismissal in compensatory decision orders Hearing Officer to determine merits of case. Multiple disabilities claims denial of FAPE (Siff);**
  - Attorney LeBrun becomes hearing officer
  - **G.D. v. Westmoreland (IDPH-90-46) – District and Appeals court upheld HO decision regarding FAPE and placement (LeBrun)**
  - **Caroline T/Hudson (IDPH-90-051)– District court and Appeals court affirm HO decision and found against parent in that issue of school district transcript or recording in sped hearing do not violate parents' rights (Daly).**
  - **Scott H./Manchester (IDPH-90-077) – Appeal timeframe**
- **1991 James O./Marston – Class action case resulted in settlement. Students with disabilities placed in facilities under juvenile laws received FAPE**
  I.D./Westmoreland (IDPH-91-042) court upheld matter in which parent accused NHDOE of not providing parent with enough reasonable accommodations (Daly)
- 1994 Attorney Jeanne Kincaid becomes hearing officer; addition of Neutral Conferences as a second alternative dispute resolution alternative
  Marc A./Manchester (IDPH-94-03)– Court vacated HO order regarding FAPE in prison. Parties ordered to modify IEP in manner consistent with need for safe, secure inmate population. Order further states all qualified inmates are entitled to FAPE while incarcerated (LeBrun).
- 1995 Mediation program moved from Special Education Bureau to Commissioner's Office.
- **1996 Kimberli M./Manchester (IDPH-96-032) – Upheld HO in financial liability (Sending/Receiving district) case between districts**
- **1999 Two lawsuits**
  - **Brandon A. v. NHDOE (IDPH-99-035) – timeliness of hearings – dismissed as NHDOE entering rulemaking to remedy concerns (Kincaid)**
  - **J.W./Con-Val (IDPH-99-043) – IEP/Placement upheld HO decision in favor of district. Parents unilaterally changed child's placement during**

pendency of review proceedings w/o consent of state/local officials. (Kincaid)

- 2000 Attorney Amy Davidson becomes hearing officer; change in mediation - mediations automatically assigned unless otherwise requested, scheduled with a requested hearing.
- 2001 First meeting held with school district and parent attorneys and advocates who appear in front of hearing officers.
  - **Hunter P./Stratham (IDPH-FY-01-011) – SAU brought appeal against HO decision finding district liable for cochlear implant – court upheld HO (LeBrun)**
- 2002 Commissioner Donohue discontinues enforcement of mediated agreements by Hearing Officers
  - Four lawsuits
    - **Michael P./Pemi-Baker (IDPH-FY-02-06-0136) – court upheld HO – appropriateness of IEP.School District not required to devise best IEP, or what parent consider ideal – Parent demanded SAU place student in private school at public expense. HO found against parent as did court. (Siff) This matter was appealed to Court of Appeals due to lower court stating parent could not do so pro-se. Appeals court overturned the district court ruling stating parents could represent themselves.**
    - **Andrew S./Manchester (IDPH-FY-02-07-005) – court upheld HO – parents asserted student at Catholic school had right to IDEA hearing. HO disagreed. (Siff)**
    - **Katie C./Greenland (IDPH-FY-02-11-084) – Overturned HO decision which favored parent right for eligibility and reimbursement (Siff)**
    - **George S./Timberlane (IDPH-FY-02-11-090) – Overturned HO decision in residency decision. Parents claimed residency in district while court asserts they fraudulently did so when they actually reside overseas. (Davidson)**
- 2003 Change in Hearing Officer payment structure – previously paid per hour basis, changed to lump sum and Hearing Officer Evaluation system began
  - Two lawsuits
    - **Galina C./Shaker Reg. (IDPH-FY-03-09-027) Court upheld HO decision regarding non-reimbursement of parental unilateral placement (Davidson)**
    - **Mr. and Mrs. S./Timberlane (IDPH-FY-03-10-043) – Court awarded attorney's fees to parents (Davidson)**
    - Rep. Gail Morrison becomes hearing officer
- 2004 IDEIA changes to Hearings Process – Local Resolution process required to be opted out of by parents and district if parent requested hearing with no such requirement for

district requested hearing as well as opportunity to throw out case that does not meet sufficiency challenge.
Bryan M./Litchfield (IDPH-FY-04-12-057) – Overturned HO decision – found HO did not apply correct legal standard. Parents awarded IEP and reimbursement (Morrison).
Attorney Joshua Jones becomes hearing officer

- 2005 — **Mark and Linda L./Wilton-Lyndeborough (IDPH-FY-05-02-50)– court upheld HO Decision regarding IEP (Siff)**
  Attorney Peter Foley becomes hearing officer
- **2006** — **Alexandra R./Brookline (IDPH-FY-06-11-026) - Court overturned HO concluding HO dismissed hearing without conducting oral evidentiary hearing even without sufficiency challenge by district (Davidson)**
  Elena K./et al. (IDPH-FY-06-03-052; IDPH-FY-06-10-021; IDPH-FY-12-12-020) – Case dismissed. Multiple issues. (Foley; Davidson)
  Mark and Linda L/Wilton-Lyndeborough (IDPH-FY-06-01-044 – court upheld HO Decision regarding IEP/Placement (Foley)
- 2007 — Attorney Joni Reynolds and Scott Johnson become hearing officers
- 2008 — **Samantha B./Hampstead (IDPH-FY-08-03-054) – Upheld HO decision regarding denial of reimbursement (Siff)**
- 2011 — **Tia Pass/Rollinsford (IDPH-FY-11-10-012)– Upheld HO decision regarding denial of reimbursement for unilateral placement (Johnson)**
- 2012 — Two lawsuits
  - **Leigh R./Hudson (IDPH-FY-12-08-009) – Upheld HO decision re: parent not entitled to reimbursement for unilateral placement (Johnson)**
  - **Elena K./et al. (IDPH-FY-12-12-020; IDPH-FY-06-10-021; IDPH-FY-12-12-020) see 2006**
- **2013** — Initiation of Third Party Discussion Led by Moderator as a 3rd alternative dispute resolution option
- **2014** — **Elena K./Timberlane (IDPH-FY-14-07-004) – matter dismissed by HO appealed to court. Court ruled appellant has no standing to file and is not proper party as well as statute of limitations for proper party (Johnson)**
- 2015-2020 — Between 2 to 4 decisions per year, excluding summary Judgments. Majority of cases mediated, resolved, settled
- 2018 — Attorney Briana Coakley-Hyde becomes hearing officer.



Nevada Department of Education, January, 2006

March 2, 2021 Re: HB 581

Rep. Rick Ladd, Chair
House Education Committee
Legislative Office Building, Room 207
33 North State Street
Concord, NH 03301

Dear Rep. Ladd and Members of the House Education Committee,

I am writing to ask you to please support for **HB 581 – *AN ACT relative to the burden of proof in special education hearings.*** As the parent of an adult son who benefited from the special education services he received in under NH's special education rules, I know that we were fortunate. While our school district and I didn't always agree on everything, we were able to work together using informal means to resolve any disagreements. Sometimes though, parents and school districts find that they need to use more formal dispute resolution options, including filing for a due process hearing.

Due process hearings are not common; in the past 5 years, NH has held an average of 3 due process hearings each year, or about 1 due process hearing for every 10,000 NH students with disabilities. One positive reason for that low number is that NH's special education law and rules include many opportunities for meaningful parent involvement in the special education process, procedures that facilitate reaching agreement, and an array of alternative dispute resolution options that parents and schools can often use to resolve disputes without having to file for a due process hearing.

There is also the harsh reality that there is an inherent imbalance in due process hearings that discourages parents from filing. Of the 16 due process hearings held in the past 5 years (about half filed by parents), parents prevailed in 1 and partially prevailed in a second case.

Due process hearing procedures are complex and overwhelming; parents would almost never choose to file for a due process hearing unless they truly believed that it was their best, or only, way to obtain the special education services or educational placement their child with a disability needed. While parents can go to a due process hearing without legal representation, when they do, they rarely prevail, and the costs of paying for an attorney make the process prohibitive for most parents. Federal and State law provide alternative dispute resolution (ADR) options, including mediation, but those options require the voluntary participation by both parties. So, if a school district refuses, the parent may find that filing for a due process hearing is their only remaining option to resolve the dispute.

School districts almost always have more knowledge of the special education laws than parents, and they have access to more resources, including evaluators, special education experts and attorneys. Since those resources are funded by tax dollars, including those paid by the parent, the parent is put in the unenviable position of paying for both their own (if they can find one) and the school district's attorney! Some of the other points that support a school district bearing the burden of proof in due process hearings are that schools/districts have:

- a legal responsibility under IDEA to ensure that a FAPE is available to each child with a disability;
- a stronger understanding of, and experience with, IDEA and its procedures;
- better access to resources, including teachers, evaluators and related services personnel;
- the resources, experience and legal representation they need to present an effective due process case; and
- control over the potential witnesses who have worked directly with the child and are in the employ of the school.

In most due process cases, the evidence is clearly weighted in favor of either the school district's or the parent's position. Sometimes, though, the evidence presented by the 2 parties is closely balanced. In those cases, the "burden of proof" standard is used. The Federal Individuals with Disabilities Education Act (IDEA), is silent on the issue of burden of proof, but in the 2005 Schaffer v. Weast decision, the Supreme Court determined, even while recognizing that school districts have a "natural advantage" over the parents in a dispute, that unless state law assigns the burden of proof on one party or the other, the burden of proof is placed on the party that requested the due process hearing.

In her dissenting opinion in this case, Justice Ginsburg wrote that while courts typically assign the burden of proof to the party initiating the proceeding, she was "persuaded that, 'policy considerations, convenience, and fairness' call for assigning the burden of proof to the school district in this case". Judge Ginsburg noted that school districts have the responsibility to offer each child with a disability an IEP that meets that child's unique needs, and added "the proponent of the IEP, it seems to me, is properly called upon to demonstrate its adequacy." In developing its proposal, the school district should have already gathered the data and other information to clearly demonstrate to the parents that its proposal was appropriate, so it should not pose a hardship for the district to demonstrate the appropriateness of that same proposal at a due process hearing.

If NH passes HB 581, we will not be the first state to take such a position. Most states had no law placing the burden of proof on one party or the other, but prior to the Schaffer v. Weast decision, there were at least 7 states that assigned the burden of proof to school districts, regardless of whether the hearing was initiated by the parent or the school district. Since then, several other states (including New York and New Jersey) have changed their state statutes to place the burden of proof in special education due process hearings on the school district.

HB 581 is intended to "level the playing field", to insert some balance into the dispute resolution process. Assigning the burden of proof to the school district will not encourage parents to file due process hearings frivolously or for an improper purpose; in such cases, IDEA (sec. 300.517(a)) could require the parents to pay for the school district's attorneys' fees. Additionally, the Council of Parent Attorneys and Advocates, Inc. (COPAA) found that there is no research showing that shifting the burden of proof to the school would increase litigation.

I truly appreciate NH's procedures that value parent participation in the special education process and that provide alternative options for resolving disputes. But, in those cases when a parent believes it is necessary to file for a due process hearing to obtain a free appropriate public education for his/her child, HB 581 will make that process fairer and more equitable.

I encourage you to please support HB 581. Thank you in advance for your consideration of my input.

Sincerely,

Bonnie A. Dunham
16 Wren Court
Merrimack, NH 03054
Tel. (603) 860-5445
Email Bsdunham12@gmail.com

MIKHAIL ZHUKOVSKIY
12 DOGWOOD LANE
NEW LONDON, NEW HAMPSHIRE 03257

March 16, 2021

HouseEducationCommittee@leg.state.nh.us
Members of the House Education Committee

Re: HB581 - Amend RSA 186-C:16-b to shift the burden of proof in special education hearings to the school district.

Dear Members of the House Education Committee,

My name is Mikhail Zhukovskiy, and I live in New London, NH. I am writing to ask that you help struggling students with disabilities get a chance to obtain a better education by shifting the burden of proof in special education hearings to the school district by supporting HB581 and enacting the following change:

> 1 New Paragraph; Special Education; Due Process Hearing; Burden of Proof. Amend RSA 186-C:16-b by inserting after paragraph III the following new paragraph:
> III-a. In all hearings the school district shall have the burden of proof, including the burden of persuasion and production, of the appropriateness of the child's program or placement, or of the program of placement proposed by the public agency. This burden shall be met by a preponderance of the evidence.
> 2 Effective Date. This act shall take effect 60 days after its passage..

I am a parent of healthy twin girls, currently 18 months old. We do not know what the future holds for our girls, but it is possible that one or both of them may become one of the 7 million public school students with disabilities.

If this happens, we may find that we need to advocate for our daughters before a school district or others in a position of authority. As has happened to other families testifying before this committee, it may come to pass that school

officials may deny us services that we feel would be necessary for our daughters. If that were to happen, and if we were in a legal proceeding against a school district, we would be at a distinct disadvantage. We work hard to make sure that our daughters are well-cared for and live in a comfortable home, free from hunger and other stresses. But we frequently live paycheck to paycheck. We would not have the money to pay expensive legal fees. A school district, on the other hand, would certainly be well-represented legally. If the burden to prove that our children are not receiving appropriate services were placed on us, chances are that we would lose.

This is the flaw with the legal framework governing these hearings, as currently legislated. It places those with the fewest resources and specialized knowledge to argue a legal case in the position of greatest responsibility in a special education hearing. Parents of disabled children are frequently facing severe challenges, are strapped for time and money, and are exhausted physically and emotionally, yet they are made to fight a bureaucratic system designed to defeat them.

Fairness demands that the roles be reversed. It is a school district's duty to ensure that every student receives an appropriate education, and those acting in a child's best interests should have no trouble proving that the level of services a student is receiving is appropriate.

To correct this injustice, I urge you to pass the legislation mentioned above. Should you have any questions, please feel free to contact me at misha354@gmail.com.

Thank you for your time and service.

Sincerely,
Mikhail Zhukovskiy

Dear Education committee members,

I am asking for your support of HB 581, which would transfer the burden of proof in Special Education Due Process Hearings to school districts. I firmly believe that the districts would act with more integrity to begin with if they knew they could reasonably be held accountable in Due Process. School districts would still be able to outman parents and spend exorbitant amounts on attorney fees that would allow them to defend any unreasonable claim of denial of Free and Appropriate Public Education from a parent. Here is a recent slice of my fight with the local school district that provided an excellent education to my non-disabled child.

For a parent in her twelfth year in dealing with the special education in New Hampshire, it could be difficult to find a starting place for my story. In my case, the District agreed to resolve one pending state complaint in February 2018 by promising some much-needed OT services from an outside vendor over that summer. After that meeting, the written agreement came, including a clause that neither my son nor I would make any claims against the district for acts or omissions, known or unknown, to date. I knew that such a clause was probably illegal and unenforceable, but the District knew I could not fight right then, as my mom was entering hospice. I signed, taking the temporary win, never expecting that a Hearing Officer, when presented with this document in 2019 at Due Process, would allow the school district to go back three years and in order to assassinate my character by bringing up their side of an issue that was not part of Due Process and I could not defend. The letter was illegal, as it did not come with required Written Prior Notice, paperwork that allows a parent to accept what is agreed as appropriate while declining services or actions that they disagree with for their child.

My son received and benefitted from the outside OT's evidence-based program, costing my district $2,500 (my insurance deductible), as measured and reported with weekly data sheets that had to be presented to administration for reimbursement. The entire evidence-based program would have cost about $3,000, with free training provided by the manufacturer. The program then would have been available to continue with my son, and also for every child in the District with Autism, ADHD, or CAPD. It requires oversight by a trained party, but daily use can be monitored by a paraprofessional. Despite the success and inclusion (by name) in my son's IEP for the next year, the school won against my challenge in a State complaint by presenting evidence (school OT's opinion at an IEP meeting) that said the program didn't work so they didn't continue with it. The OT had not attended the free training, and was not using the program properly, but she had trained others on its use. A simple adjustment was indicated in the protocol. On the very same day as this meeting where the OT claimed it didn't work, a progress report indicated that my son had made progress in the OT goal attached to the same program. This evidence that they used it and it did work was presented at Due Process in May, 2019. Despite the fact that I my due process complaint clearly indicated that the school was saying two opposite things about the same service, I did not have a lawyer at Due Process, so I lost. The district "won" a state complaint with one explanation and the Due Process with the alternative one, the town of Salem contradicted itself to the state of New Hampshire, and both contradictory statements were taken as evidence that the School District met their obligations.

I did not originally choose Due Process, but was trying with some success to convince a full IEP Team of my son's needs. He needed outside placement, $$$, and the District agreed to pay for an intake evaluation from an Education service recommended verbally by NH Special Medical Services, an agency that purports to be family centered but "can't" go against a NH school they can't persuade. The

evaluation took place, a meeting agenda included “placement discussion” and then the administrator informed me that I needed to sign (without exceptions) a poorly written IEP including placement at the local high school where progress had stopped in order to allow Team to even discuss placement. I signed with exceptions, then got the “Due Process” threat. There was a follow up meeting already scheduled for after February vacation, which everyone knew we were to spend at Disney. On the Friday before vacation, I received, unexpectedly, notice that the Team (without meeting) had changed its mind and issued a WPN and “final offer” IEP, with a 14-day time line (4 days that I would be at home). Sign without exceptions or we take you to due process., it clearly stated. They filed for Due process despite having no legal basis to force my signature on an IEP and NH DOE allowed them to keep this fact hidden. I had already done a cross-file, I had been working hard for4 weeks to gather all the evidence to prove denial of FAPE, however the burden of proof had shifted to me.

The District has multiple responsibilities in Due Process. They must submit mutually agreeable dates that fit the time lines. They submitted dates that did not fit the time lines (due to a lawyer’s vacation) and were therefore given extra time to prepare their case. The district is required to produce a specific list of evidence that I was not to duplicate. Several hundred of their 800 pages were misprinted, so they were permitted to resubmit the entire packet late to the DOE, and just the misprinted pages to me, so I got to collate. This gave me a copy with the same evidence, different page numbers. They had the administrator that was on my witness list assist her lawyer, so she was able to monitor my case and make adjustments as she went. I asked for technical assistance with the subpoena process, and “copies” of subpoenas arrived, with no instruction that it was on me to have them served in 4 separate counties and in Massachusetts. I was later told by a special education attorney that NH DOE serves subpoenas for him whenever he asks. I had 2 witnesses, including myself, and the right to cross the district’s witnesses, but was interrupted with objections any time I tried to show evidence without phrasing in the form of a question, like a Jeopardy nightmare. I was only permitted to present my own testimony at the beginning and end of the process, and there I was stopped and accused of taking up too much time whenever I was nearing an important fact.

Perhaps the most ridiculous part of DP in New Hampshire, contributing to the insurmountable burden of proof, is the Post Hearing submission. Mentioned nowhere in the pro se guideline, and certainly not explained by the hearing officer, this is an extra opportunity for the staff of the district and their team of lawyers to defend their case, in writing. I was able to and did make my submission as well, without instructions, to the school district’s lawyer as well as the hearing officer, by 5 pm on the due date. The school district submitted after 11 pm, and then asked to resubmit the next day – just to clear up some typographical errors, they claimed. I had no reason to suspect this might happen, or opportunity to object, as my work schedule had been arranged to give me time off before the scheduled hearing dates, not after, already using up the balance of my vacation time. I was doomed and knew it.

I currently have an OCR (office of Civil Rights, federal) complaint being investigated against the district for one issue of retaliation, but I hope they will also hear how the district changed the eligibility category for my son during a “stay put” period on the Friday before Due Process. Tutoring that I had paid for in advance but the district agreed to provide in the stay put was never reimbursed, preventing me from having those funds to get a lawyer to appeal. Additional tutoring was added to the next IEP for a different course that the district would not even provide curriculum for, although it had been requested months before. This past week I confirmed my suspicions that the District had not provided an IEP signed August 8, 2020 to any service providers. They claimed that an old IEP was active, and promised to

get back to me soon when I questioned the goals in November. I can't submit this to NH DOE without having OCR drop my complaint, which is probably why they chose to retaliate in this manner.

There are many laws on the books that could support special education students and parents. Each has as a worst-case scenario, the "consequence" to the school that they are forced to adhere to whatever regulation they were ignoring. If a FERPA complaint, they are asked not to violate FERPA any more. Why would a parent bother? If a Due Process is by some miracle lost, they would have to provide compensatory education. If you catch an administrator lying to save the district money, that fits the definition of educator misconduct, where the parent again has the burden of proof. This could perhaps be used in Due process if deadlines aren't past and if your child has not aged out. Both of these avenues allow the school district to delay services, and the student can't really "double up" and receive the necessary services as well as the compensatory at the same time. They win when they lose.

Please support HB 581. My son is, at 18, still in need of transition services as well as academic services in order to fully participate as a productive member of the community. The district is refusing to provide any offer of placement, and remains dishonest or unresponsive in every interaction. I have just postponed an IEP meeting to go over progress, because I learned the wrong IEP is being implemented. The email said "canceled at the request of the parent" making it appear that I don't really care. If I refute this, a lawyer would later point out how nasty I was about a simple mistake, even though I can prove I requested the correct IEP be given to service providers 3 times.

Thank you all for your time and service to the educational process in New Hampshire. I am happy to answer questions or provide testimony in support of HB 581.

Sincerely,

Patricia Eno

90 Shadow Lake Road,

Salem, NH 03079

(603) 898-5045

marktrisheno@yahoo.com

SPECIAL EDUCATION IMPARTIAL DUE PROCESS HEARINGS IN NEW HAMPSHIRE –

A 45 YEAR HISTORY
1975-2020

New Hampshire Department of Education
Concord, NH

May 7, 2020

Governor of New Hampshire

Christopher T. Sununu

The Executive Council

District 1	Michael J. Cryans
District 2	Andru Volinsky
District 3	Russell E. Prescott
District 4	Theodore L. Gatsas
District 5	Debora B. Pignatelli

New Hampshire State Board of Education

		Term Expires
Drew Cline, Chairman	District 4	2021
Kate Cassady	District 1	2020
Anne Lane	District 2	2021
Philip Nazzaro, Phd.	District 3	2022
Helen G. Honorow	District 5	2020
Cindy C. Chagnon	At Large	2020
Celina “Sally” Griffin	At Large	2023

Commissioner of Education

Frank Edelblut

Deputy Commissioner of Education

Christine Brennan

Governance Unit

Diana Fenton, Esquire, Chief

Compiled by Stephen W. F. Berwick

AN EQUAL OPPORTUNITY EMPLOYER

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Title IV, VI, and VII of the Civil Rights Act of 1964 – race color, national origin
The Age Discrimination in Employment Act of 1967
The Age Discrimination Act of 1975
Title IX of the Education Amendments of 1972 (Title IX) - sex
Section 504 of the Rehabilitation Act of 1973 (Section 504) - disability
The Americans with Disabilities Act of 1990 (ADA) - disability
NH Law against discrimination (RSA 354-A)

The following individuals have been designated to handle inquiries regarding the non-discrimination policies and laws above

Lisa Hinson-Hatz
State Director, Bureau of Vocational Rehabilitation
21 South Fruit Street, Suite 20
Concord, NH 03301
(603) 271-3471(V/TTY)
1-800-299-1647
Lisa.Hatz@doe.nh.gov

Section 504 Coordinator
Tina Greco
NH Department of Education
NH Vocational Rehabilitation
21 South Fruit Street Suite 20
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(603) 271-3993
Tina.Greco@doe.nh.gov

State Office of Civil Rights (OCR)
Eric Feldborg
State Director of Career & Technical Education
21 South Fruit Street, Suite 20
Concord, NH 03301
(603) 271-3867
Eric.Feldborg@doe.nh.gov

Inquiries regarding Title VI of the Civil Rights Act of 1964, the Age Discrimination Act of 1975, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and/or Title II of the Americans with Disabilities Act of 1990 also, or instead, may be directed to

Boston Office
Office for Civil Rights
US Department of Education
8th Floor
5 Post Office Square
Boston, MA 02109-3921
(617) 289-0111

TTY (877) 521-2172
E-mail: OCR.Boston@ed.gov

Additionally, inquiries may also be directed to the

NH Commission for Human Rights
2 Chenell Drive
Concord, NH 03301-8501
(603) 271-2767

Equal Employment Opportunity Commission (EEOC)
1 Congress Street
Room 100, 10th Floor
Boston, MA 02114
(617) 565-3200

US Department of Education
Office for Civil Rights
Lyndon Baines Johnson Department of Education Bldg
400 Maryland Avenue, SW
Washington, DC 20202-1100
800-421-3481
FAX: 202-453-6012; TDD: 800-877-8339
OCR@ed.gov

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Introduction

In New Hampshire, special education impartial due process hearings are part of the New Hampshire Department of Education's Office of Dispute Resolution and Constituent Complaints under the Governance Unit, which in turn falls under the Office of the Deputy Commissioner. Part of the mission of the New Hampshire Department of Education's Office of Dispute Resolution and Constituent Complaints is to provide timely, impartial administrative processes to constituents that promote free and appropriate public education to all New Hampshire residents.

Under the Individuals with Disabilities Education Improvement Act (IDEIA) Part B, special education impartial due process hearings are the principal vehicle for resolution of disputes between parents of children with disabilities and school districts. The right of parents of children with disabilities to have an impartial binding review of any disagreement over the program offered by the local or regional school district is a central procedural protection in the IDEIA.

The parent obtains a due process hearing by submitting a written request to the school district with a copy to the Office of Dispute Resolution and Constituent Complaints at the New Hampshire Department of Education (hereinafter, the "SDE"). Under some circumstances, school districts may use due process hearings to contest decisions by parents.

New Hampshire operates a single-tier hearing system. That is, the New Hampshire State Department of Education (SDE), rather than the Local Education Agency (LEA), conducts all impartial due process hearings requested by LEAs or by parents or guardians and there is no provision for SDE review of hearing officer decisions. The decision of the hearing officer is final and can only be appealed to either state superior court or to federal district court.

When enacted in 1975, P.L. 94-142, the predecessor of IDEA and IDEIA, special education impartial due process hearing procedures were a way to resolve special education disputes easily and promptly. Over time due process hearings became formalized, legalistic in nature, costly

and at times highly adversarial not only in New Hampshire but in Connecticut, Iowa, Kansas, New York and other states as well. Additionally, due process hearings can be costly in terms of time, money and emotional energy for all parties concerned. From the school district's perspective, no other form of hearing in the school setting is as broad, as well regulated, or as intrusive into the administrative and professional decisions of district staff as the hearing under the IDEA. For parents, the lengthy preparation for a hearing, the need to take time off from work with attendant loss of pay, the anxiety, the win/lose atmosphere, and the wait for a decision, too often increase alienation and sustain antagonism with the school district. All too often, the conflict between parents and school district remains unresolved, or even worsens, regardless of who "won" the hearing.

Hearing Officers

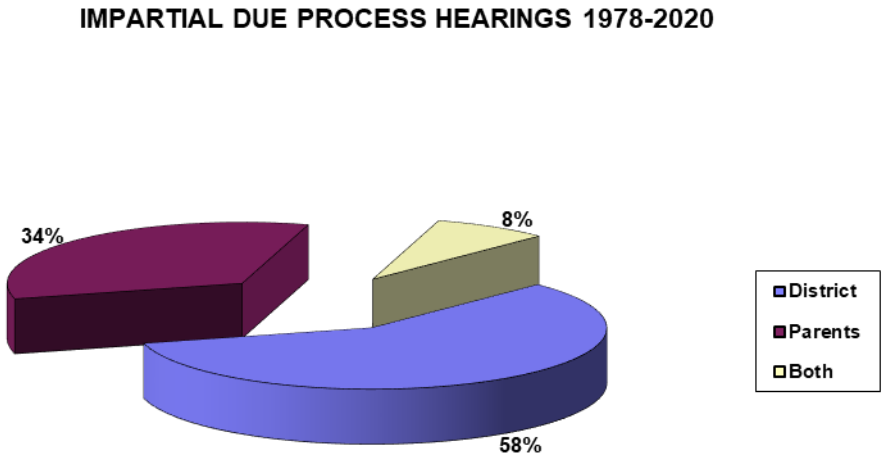
The hearing officer's primary responsibility is to implement state and federal laws and regulations in resolving the dispute in the interest of the student. To this end, the hearing officers must wisely exercise broad authority in their handling of the hearing and the scope of appropriate relief granted, if any.

Competent hearing officers are the key to running efficient and effective due process hearings. To accomplish this goal optimally, hearing officers must possess a multitude of skills and talents. Hearing officers must have a strong knowledge of the field of special education as well as federal and state laws regulating the provision of special education. They must also have a sufficient knowledge of the principles of evidence, must have at least the same level of expertise in this area as the attorneys who practice in the area of special education law. Coupled with a sufficient substantive knowledge of special education and the law, hearing officers must have the personal qualities necessary to deal firmly, yet fairly, with the parties to the dispute, especially the attorneys. This last characteristic is essential to establish and maintain control of the hearing process to ensure that all the functions of the hearing are fulfilled, namely a decision on the dispute based upon a good record and a framework for the parties to work together. How hearing officers conduct themselves and the hearing, in terms of establishing and maintaining control, is the crucial factor in determining the effectiveness and efficiency of the due process hearing system.

Throughout the years, a recurring theme has arisen in special education impartial due process hearings: parents concerned that they cannot prevail against deep pocket school districts who have liability

insurance and attorneys representing them. In turn, some school districts assert that they cannot prevail against parents who have the ear of the hearing officer and therefore have opted for alternative dispute resolution. A review of forty-one years of records and hearing officer decisions shows an ebb and flow in terms of who prevails in hearing officer decisions, which is largely dependent upon a wide range of factors including facts of the issue, applicability of law to the remedy requested, saliency of issue, etc. During the 1980s, although Boston Globe NH edition newspaper articles of the time spotlighted concerns that parents could not prevail in NH special education hearings, a review of hearing officer decisions from the period 1980 to 1989 shows an almost even split between parents and school districts prevailing in decisions. During the 1990s, due to a variety of factors such as, among others, changes brought about by court decisions, legislation and staffing in local school districts as well as hearing officer familiarity with the issues, this gradually changed to be more in favor of school districts. Court decisions of this period also largely upheld Hearing Officer Decisions. By 2004, the size and number of cases dramatically decreased. During this time, IDEIA implemented statutory and regulatory changes requiring parents and school districts to agree to opt out of a resolution session prior to the opportunity for a hearing. IDEIA also provided an opportunity for parties to challenge the sufficiency of hearing requests, which could end up in a hearing officer throwing out a case that did not meet certain minimum requirements.

Overall, a review of decisions over forty-one years from 1978 to April 2020 shows 565 decisions in which the school district prevailed in 330 cases (58%); parents prevailed in 190 cases (34%); and, 45 split decisions (8%).



Since 1990, in only five cases out of 24, did an appeal to a court of competent jurisdiction prevail against a hearing officer decision leaving a success rate of over 80%. It should be noted that how one defines prevailing party depends upon a number of factors and just because a party did not get what they sought, it does not mean that they ultimately did not win or that their concerns weren't addressed in a way that was productive in the big picture to the child.

Pre 1984

In 1972, after several landmark court cases, Congress introduced legislation establishing in law the right to education for all handicapped children.

On November 19, 1975, Congress enacted Public Law 94-142, also known as The Education for All Handicapped Children Act. The law's intent was that all children with disabilities would "have a right to education, and to establish a process by which State and local educational agencies may be held accountable for providing educational services for all handicapped children."

P.L. 94-142 mandated that states develop an appeals process. Congress found that "*more than half of the handicapped children in the U.S. do not receive appropriate educational services which would enable them to have full equality of opportunity...[and] one million of the handicapped children are excluded entirely from the public school system...*" 20 U.S.C. 1400(b)(3); (b)(4).

In New Hampshire, special education hearings were appealable to the State Board of Education under RSA 193:3 and 186:C. New Hampshire established a two-tier system in which the local level board first heard the case within the federally mandated timeframe, after which the matter went to a hearing officer appointed by the state board. The hearing officer then held a hearing and rendered a decision within 45 days. In 1977, for example, the State Board appointed a consultant from the Bureau of Special Education as hearing officer in a Hampstead School District matter. Between the years 1978-1984, Paul Kilmister, in the Commissioner's Office, as well as contracted Hearing Officers Dr. Newell J. Paire, a former Commissioner of Education, and Otis Cloud acted as Hearing Officers.

In terms of the state process, in a 1984 case, Laurie B. 489, A.2d 567 (N.H. 1984), the court noted:

"New Hampshire law establishes an administrative appeals process in which parents may participate in developing individualized education programs for their educationally handicapped children and may appeal decisions of a school district to the State Board of Education. RSA 186-C:7 (Supp. 1983). Any party aggrieved by a decision of the board of education may appeal the administrative decision to a State trial court or United States District Court. Petition of Darlene W., 124 N.H. 238, 240, 469 A.2d 1307, 1309 (1983); Petition of Milan School District, supra at 232, 459 A.2d at 274. The court may then review the record of the administrative proceedings and hear additional evidence."

From the very beginning, New Hampshire did not meet the statutory timelines. In 1978, one of the state's first hearings went over 45 days while the second hearing went beyond 54 days. Each case took 2 days.

During the period 1978-Summer 1980, an appeal averaged a hearing time of 5-6 hours. From the summer of 1980 until the fall of 1981, hearings jumped and averaged between 2 to 3 working days. During the period of 1978-Fall 1981 the parent was the initiating party in 35 of the 36 appeals. Of these parents prevailed in 14 cases; school districts won in 16 by districts; and a split decision was rendered in five cases.

At a Regional Conference on Mediation, Cooperative Planning, and Procedural Safeguards meeting held on November 20, 1981 in Laconia, Paul Kilmister, the consultant tasked with implementing PL 94-142, made some observations of the hearing situation up to that point:

"There has been a very significant increase in the past 12-18 months; particularly last 6 months in the length of hearings. The time involved, and the real and "hidden" expense, both to the state and school districts. One hearing this summer - 45 hours of tape - 2 attorneys, one employed by the parent - other by the school district - a stenotypist (employed by 1 attorney) - time of witnesses - better than 2 days' work in correspondence, phone calls, - secretarial - perhaps 10 hours' time outside of hearing on part of Hearing Officer in writing decision - direct and indirect costs to all parties involved - 15 to 20 thousand (dollar) range.

"Another cost factor - and time problem - which is a great concern is the review process at the state board level. Up to this time, five of the 36 decisions of the Hearing Officer have been appealed to the State Board, which has conducted "a review." As of now, this review has consisted of reproducing all items submitted

and the typing of a transcript. After a reading of the transcript and reviewing the documents, the State Board schedules a short time for attorneys to make statements and make its decision.

"One problem is that a transcript is costly - and a time-consuming process. The most recent appeal was from the shortest hearing we have had in the past 18 months - 2 1/2 - 90 minute tapes. It cost about $700. One hearing this summer involved more than 30 hours of testimony. We are currently engaged in a similar one - which I feel certain will be appealed by whatever party "loses." If that happens, I am sure we will have exhausted our contract funds and will have the board adopt a different process."

After 1981, the enactment of RSA 186-C:16-b, dissolved the two-tier process and the State Board no longer heard Special Education appeals.

1982-1989

The period 1982-1989 saw a dramatic increase in the number of hearing requests that went to decision after a full hearing. In 1981, 12 cases went on to decision after a full hearing; in 1982, there were 13 cases; in 1983, there were 20. In 1984, the total went down to 14 and in 1985 to nine. However, the number increased in 1986 to 16 cases; in 1987 and 1988 to 20 each year; and in 1989, an all-time high of 33 decisions.

From the very beginning of the hearings mandated by PL 94-142, attorneys for both parents and school districts have been involved. In 1978 there was one attorney hired by the parents. In 1979, out of 12 cases, attorneys for the district represented two, while an attorney for the parents attended one. In 1980, with 11 cases, attorneys for the district represented six, while attorneys for the parents represented six. From 1981-1989, the numbers of attorneys attending hearings increased so that nearly every hearing was attended by attorneys. Additionally, the number of days required for a hearing jumped from 2 days in 1978 and 1979 to 6 days in 1981; 9 days in 1986; and 10 days in 1989.

Beginning in 1984, when 20 cases occupied nearly all of one hearing officer's time, the Department began contracting with two additional hearing officers, Carol Schapira and Alice Vartanian-King, specialists in special education matters, to conduct hearings. There were also numerous complaints (internal and external) that hearing officers did not understand what the law allowed and that they were often writing decisions that would not hold up in court. Already by the mid-1980s, the NH Supreme Court had heard a number of Special Education matters:

Darlene W (1980-1981) regarding a state board decision that a school district was not liable;

Laurie B (1984) determining that the lower court did not follow administrative procedures;

John H (1985) regarding waiver of sovereign immunity by the state;

Todd P (1986) wherein the court addressed legal liability

By that time there had already been several other court cases, which affected the nascent hearings process:

Garrity v. Gallen in 1981 while against DCYF the court mentioned Special Education.

James O (1986) Consent decree brought against NHDOE charging that it had violated EAHCA and subsequent IDEA students placed in state facilities or programs.

Hearing Venue

Originally, hearings were few, small, and easily held in a Department of Education meeting room at Londergan Hall. By 1986, the hearings had become more adversarial and, in some cases, explosive, so moved to the Legislative Office Building when the legislature was not in session. Eventually, in 1987, as hearings increased, the Department worked with the First Congregational Church to utilize its education space to hold hearings when unable to do so at the LOB. By the late 1980s, space freed up in the basement of Londergan Hall so that hearings took place in two hearing rooms (Rm 13 and 19) there. This continued until March 2002 when the Department of Information Technology took over the space. For a period of time hearings occurred at the Franklin Pierce Law Center. By June 2003, the Department contracted for a suite at Regional Drive, which had four hearing rooms and a lobby area. The Department also purchased new recording equipment to ensure quality control. By July 2010, hearings moved again, this time to the DDS hearing room until a more permanent space opened in Room 200 of Walker Building.

Attorneys added as Hearing Officers

Since the legal issues increased by the year, it was determined that it was becoming increasingly important to have hearing officers who were attorneys and therefore would understand the legal ramifications of decisions. Consequently, in 1986, in addition to the then current hearing officers, Attorney Arpiar "Arpie" Saunders, was hired. As the number of cases increased, and the issues grew more cumbersome, in 1987 more hearing officers (State Rep. Betty-Jo Taffe, Maureen Kalfas, Dr. Philip Boucher, Attorney Quentin Blaine, and, Attorney Patricia Quigley) were hired to pick up the extra workload. All the hearing officers either had a background in special education law, or had been in the field of special education for many years.

During this time, two high profile hearing officer decisions were appealed to the US District Court, and affected subsequent hearings:

Karen M. /Henniker (1987) – regarding a dyslexic graduated school valedictorian who the school district was ordered to provide compensatory education;

Timothy W. /Rochester (1987) – Special education entitlement for severely handicapped.

A year later, in 1988, the hearing officer contracts were not renewed and the department instead contracted with a law firm to handle appeals. It was determined that since most of the cases continued to involve attorneys on both sides and legal matters were becoming more important, one law firm could better handle the increasing work load. The law firm hired was the Law Offices of James J. Bianco, Jr. Attorneys assigned by the law firm to hold hearings were Lisa J. Rule, Timothy Bates, Robert Levine, and Eric G. Falkenham. Within a year, however, due to the increasing caseload and the difficulty encountered by one law firm handling all of the cases, it was once again determined to look for new hearing officers who had a good understanding of the law as well as special education matters. It was also at this time that the US District court overturned a hearing officer decision (Casey J. 1988), which made the newspapers. At a due process hearing in 1988, the hearing officer found that a student's suspension violated his due process rights but that the rest of the IEP, including the administration of Ritalin was appropriate. The parents appealed to the US District Court. Judge Loughlin found that the student's "right to a free appropriate education could not be premised on the condition that he be medicated without his parents' consent." Judge Loughlin also found that the school district violated the federal Individuals with Disabilities Education Act by failing to notify the parents about changes in their child's education, including a

month of "isolation" with a teacher in a tiny room. The student had the right to be free from forced administration of psychotropic drugs, like Ritalin, because of their constitutional right to privacy and bodily integrity.

In 1989, the department then contracted with eight independent attorneys – John Dabuliewicz, Gerard Spegman, Gyda DiCosola, Kenneth Nielsen, S. David Siff, Catherine Stern, Richard deSeve, and Katherine Daly.

1989-2002

The number of cases that went to full hearing and decision decreased dramatically after 1989: 1989 (33 cases); 1990 (23 cases); 1991 (20 cases); 1992 (16 cases); 1993 (16 cases); 1994 (14 cases); 1995 (12 cases); 1996 (14 cases); 1997 (10 cases); 1998 (7 cases); 1999 (9 cases); 2000 (13 cases); 2001 (15 cases); and 2002 (1 case). While the number of hearing days remained relatively stable (ranging from 3 to 12 days of testimony in 1990 to a high of 17 days in 1995!), many cases settle and mediation became increasingly popular as a means to settling disputes. In 2000, 4 out of 11 cases had a hearing decision within 45 days while in 2001, 9 out of 15 cases were completed within 61 days with 2 of them falling within 36 days indicating the increased emphasis on timeliness of decisions. What did not decrease, however, were attorneys attending due process hearings. Whereas the number of attorneys representing parents decreased, it was rare for districts to attend hearings without attorneys.

While cases that went to full hearing and decision decreased dramatically after 1989, the same was not true of the number of days involved in hearing. In 1990 one case took up twelve days of hearing

In terms of litigation, several cases affected hearing officer decisions:

Cocores/Portsmouth and a number of other school districts in 1990 – regarding denial of FAPE. The court overturned the Hearing Officer and remanded the decision

Marc A/NHDOE & NHDOC – in 1994 regarding prisoners receiving FAPE while incarcerated

Brandon A/Epsom – in 1999 regarding timeliness of hearings. The court dismissed the matter due to regulation changes meant to tighten the timelines

In six other appeal decisions, the courts upheld hearing officer decisions on a variety of issues such as appeal timeframes, unofficial recording of hearings, placement, 504 accommodation of parent at hearing, and placement issues.

In 1990, the Department added Attorney John LeBrun as a contracted hearing officer and in 1994, Attorney Jeanne Kincaid. Six years later, in 2000, Amy Davidson became a hearing officer.

Among the important cases won by parents at the hearing level and subsequent court appeal during this period was the Hunter P. case about cochlear implants. One other decision from this period that was of Michael M. court upheld HO concerning appropriateness of the IEP. In that case, the school district was not required to devise best IEP, or what parent consider ideal – Parent demanded SAU place student in private school at public expense. The Hearing Officer found against parent as did court. In the subsequent appeal, the Court of Appeals did not address the issue of the IEP. The issue, however, of the lower court stating a parent could not do represent themselves was overturned by the appeals court.

Alternative Dispute Resolution Processes

New Hampshire has a long tradition of mediating disputes. Originally, arrangements for mediations were through the Special Education Bureau at the Department of Education. In 1995, the mediation program moved from the Special Education Bureau to the Commissioner's Office where mediation was further opened up to parties as a way to evaluate their case before hearing. Prior to 1995, there were 40 volunteer mediators. During mediations, two mediators heard cases; after 1996, Hearing Officers acting as mediators handled this role.

In 1994, a second alternative dispute resolution process was enacted – Neutral Conferences. Neutral Conferences are unique to New Hampshire. Parties, prior to the conference submit a four page summary of their case. A conference each are given a half-hour to make their case after which the Neutral gives the parties their decision which, if parties agree, is made into a written, binding agreement.

Another change in the Due Process Hearings program occurred in the summer of 2000. In that year mediation was automatically, unless otherwise requested, scheduled with a requested hearing. This has had the effect of encouraging parties to settle disputes without the need for a formal hearing. The mediation option, as mentioned earlier, proved to be

an invaluable asset in solving disputes. In addition, by May 2001, parties submitted mutually agreeable dates prior to requesting a hearing from the State Department of Education. Failure to provide the dates resulted in the Department unilaterally assigning dates, which might, unintentionally, be inconvenient to the parties, and consequently, result in hearing delays. The intention was that the change would further reduce the number of days from hearing request to the final decision.

In 2013, a third alternative dispute resolution evolved from mediations and neutral conferences – the Third Party Discussion Led by Moderator. In this role, the moderator hears from each side as in a mediation but can also provide insight as to legal stance and how a Hearing Officer might determine it.

Hearing Costs

In terms of hearing costs, during fiscal year 1997 New Hampshire allocated $87,700 for four hearing officers. Of that amount, alternative dispute resolutions took up approximately $25,000. In 1997, the cost for services charged to the Department for a full hearing ranged from $765 to $4,770. A one day hearing cost $942; a three day hearing cost $1,890; a four day hearing cost $765 while another cost $3,870. The reason for such a difference in cost was that the $765 hearing was for half days and the issues less muddied. The cost for a five-day hearing was $4,770. As indicated under the "Historical Overview of Due Process in New Hampshire," the cost for transcription of one hearing in 1981 cost about $700 for a 2½-hour session. The average cost in 1997, with 19 tapes (average 5 per day) came to $3,000. This cost does not include attorney's fees nor the charge for hearing officer services. Through the years, these costs steadily increased.

2003-2020

The year 2003 marked 28 years since the first cases under PL 94-142 began in 1975. In 2003, State Representative and J.D., Gail Morrison became hearing officer followed in 2004 by Attorney Joshua Jones, in 2005 by Attorney Peter Foley and in 2007 by Attorney Joni Reynolds and Attorney Scott Johnson. During the 17-year period from 2003 to 2020, cases have significantly decreased from a high of 113 requests in FY 2004 to 33 cases requested in FY 2014. Since then the average has been around 35 cases per fiscal year. In terms of hearing decisions, this has decreased substantially since passage of IDEIA in 2004, cutting cases from 24 decisions in 2003 and 29 in 2004, to 12 in 2005 and 2006 respectively, 13 in 2007, down to six in 2009 and 3 in 2010 to the average of 2 to 4 cases by

2015 to 2020. The decrease is largely due to the increased emphasis at the state and federal level of utilizing alternative dispute mechanisms to resolve disputes amicably between parties. In 2013, DOE initiated a third alternative dispute resolution process – third party discussion led by moderator. Attorney Briana Coakley-Hyde became hearing officer in 2018.

Timeline

- 1972 — Legislation introduced in Congress after several "landmark court cases establishing in law the right to education for all handicapped children."
- 1975 — P.L. 94-142, the predecessor of IDEA and IDEIA
- 1975-1978 — Two tier system of appeals
  - First tier local school board
  - Second tier State Board appointed hearing officer, then decision by State Board
- 1977 — SPED Bureau consultant Kennedy acts as Hearing Officer
- 1978-1984 — Hearings transferred to/administered by Commissioner's Office starting 1981
  Attorneys hired by/represent parents and attorneys;
  Hearings go beyond statutory 45 days;
- 1980-1981 — **Darlene W. NH Supreme Court writ of certiorari re State Board decision that school district not liable for placement**
- 1981 — **Garrity v. Gallen Laconia State School – case filed against DCYF – NH ordered to devise plan for institutional improvement and community placmeent**
  Two tier system dissolved - state board no longer involved in appeals
- 1982-1989 — Dramatic rise in cases
- 1984 — Two more hearing officers hired due to heavy caseload
  Laurie B. – NH Supreme Court – lower court did not follow administrative appeal procedures
- 1985 — **John H. – NH Supreme Court – waiver of sovereign immunity by state re: appeals**
  Edward B. v. Brunelle – Class action involving SPED for students placed by juvenile courts
- 1986 — **James O. – Consent decree re: case against NHDOE by students placed in state facilities or programs violated EAHCA now known as IDEA**
  Legal complexities in cases necessitate hiring individual with legal knowledge as hearing officer – Attorney Arpiar Saunders becomes 4th hearing officer
  Todd P./Hillsboro-Deering – NH Supreme Court re: determination of legal liability
- 1987 — **Karen M./Henniker - Hearing Officer found in favor of Honor roll Dyslexic student, ordered compensatory education (Vartanian)**; addition of 4 more contracted hearing officers
- 1988 — Contract for hearing officer given to Bianco Law Firm
- 1989 — **Casey J. Ritalin case– hearing officer orders student take Ritalin; overturned in court (Falkenham)**
  Non-renewal of contract with Bianco Law Firm.
  Department contracted with 8 independent attorneys to

serve as hearing officers
Timothy W./Rochester – Parents appealed an order of the district court which held that under the Education for All Handicapped Children Act, a handicapped child is not eligible for special education if he cannot benefit from that education, and that Timothy W., a severely retarded and multiply handicapped child was not eligible under that standard. The appeal court revised the district court (1987 case – Quentin Blaine).

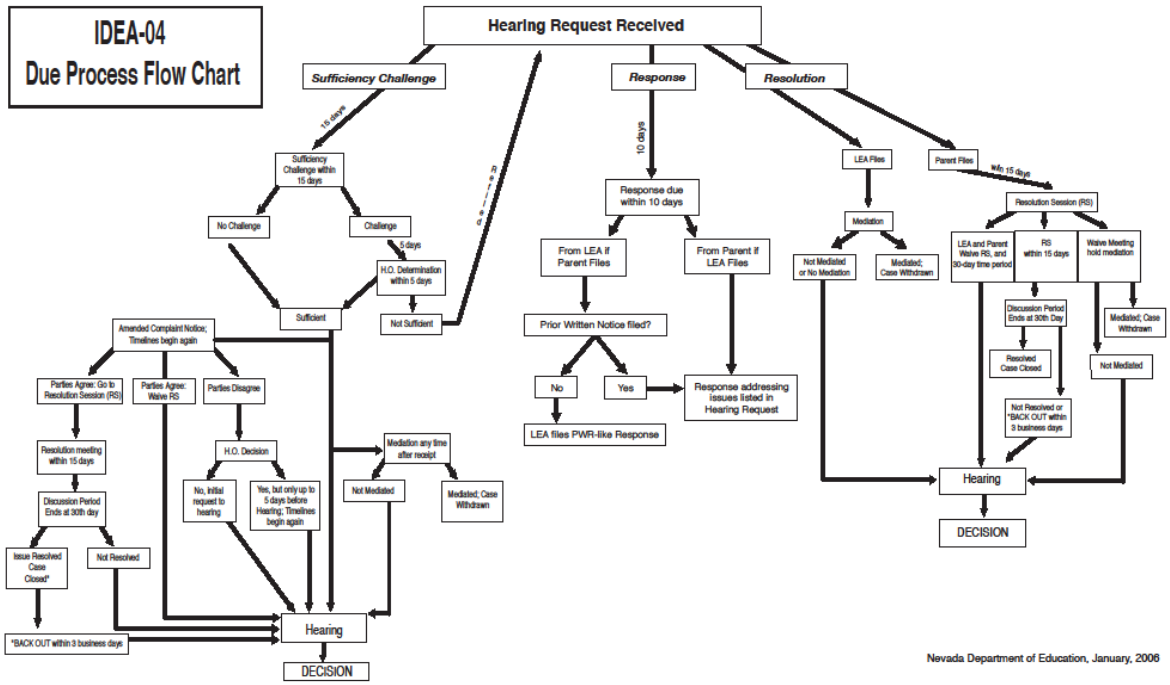
- 1990 Several lawsuits –
  - **Cocores/Portsmouth/multiple school districts (IDPH-90-61) lawsuit overturns hearing officer dismissal in compensatory decision orders Hearing Officer to determine merits of case. Multiple disabilities claims denial of FAPE (Siff);**
  - Attorney LeBrun becomes hearing officer
  - **G.D. v. Westmoreland (IDPH-90-46) – District and Appeals court upheld HO decision regarding FAPE and placement (LeBrun)**
  - **Caroline T/Hudson (IDPH-90-051)– District court and Appeals court affirm HO decision and found against parent in that issue of school district transcript or recording in sped hearing do not violate parents' rights (Daly).**
  - **Scott H./Manchester (IDPH-90-077) – Appeal timeframe**
- **1991 James O./Marston – Class action case resulted in settlement. Students with disabilities placed in facilities under juvenile laws received FAPE**
  I.D./Westmoreland (IDPH-91-042) court upheld matter in which parent accused NHDOE of not providing parent with enough reasonable accommodations (Daly)
- 1994 Attorney Jeanne Kincaid becomes hearing officer; addition of Neutral Conferences as a second alternative dispute resolution alternative
  Marc A./Manchester (IDPH-94-03)– Court vacated HO order regarding FAPE in prison. Parties ordered to modify IEP in manner consistent with need for safe, secure inmate population. Order further states all qualified inmates are entitled to FAPE while incarcerated (LeBrun).
- 1995 Mediation program moved from Special Education Bureau to Commissioner's Office.
- **1996 Kimberli M./Manchester (IDPH-96-032) – Upheld HO in financial liability (Sending/Receiving district) case between districts**
- **1999 Two lawsuits**
  - **Brandon A. v. NHDOE (IDPH-99-035) – timeliness of hearings – dismissed as NHDOE entering rulemaking to remedy concerns (Kincaid)**
  - **J.W./Con-Val (IDPH-99-043) – IEP/Placement upheld HO decision in favor of district. Parents unilaterally changed child's placement during**

pendency of review proceedings w/o consent of state/local officials. (Kincaid)

- 2000 Attorney Amy Davidson becomes hearing officer; change in mediation - mediations automatically assigned unless otherwise requested, scheduled with a requested hearing.
- 2001 First meeting held with school district and parent attorneys and advocates who appear in front of hearing officers.
  - **Hunter P./Stratham (IDPH-FY-01-011) – SAU brought appeal against HO decision finding district liable for cochlear implant – court upheld HO (LeBrun)**
- 2002 Commissioner Donohue discontinues enforcement of mediated agreements by Hearing Officers
  - Four lawsuits
    - **Michael P./Pemi-Baker (IDPH-FY-02-06-0136) – court upheld HO – appropriateness of IEP.School District not required to devise best IEP, or what parent consider ideal – Parent demanded SAU place student in private school at public expense. HO found against parent as did court. (Siff) This matter was appealed to Court of Appeals due to lower court stating parent could not do so pro-se. Appeals court overturned the district court ruling stating parents could represent themselves.**
    - **Andrew S./Manchester (IDPH-FY-02-07-005) – court upheld HO – parents asserted student at Catholic school had right to IDEA hearing. HO disagreed. (Siff)**
    - **Katie C./Greenland (IDPH-FY-02-11-084) – Overturned HO decision which favored parent right for eligibility and reimbursement (Siff)**
    - **George S./Timberlane (IDPH-FY-02-11-090) – Overturned HO decision in residency decision. Parents claimed residency in district while court asserts they fraudulently did so when they actually reside overseas. (Davidson)**
- 2003 Change in Hearing Officer payment structure – previously paid per hour basis, changed to lump sum and Hearing Officer Evaluation system began
  - Two lawsuits
    - **Galina C./Shaker Reg. (IDPH-FY-03-09-027) Court upheld HO decision regarding non-reimbursement of parental unilateral placement (Davidson)**
    - **Mr. and Mrs. S./Timberlane (IDPH-FY-03-10-043) – Court awarded attorney's fees to parents (Davidson)**
    - Rep. Gail Morrison becomes hearing officer
- 2004 IDEIA changes to Hearings Process – Local Resolution process required to be opted out of by parents and district if parent requested hearing with no such requirement for

district requested hearing as well as opportunity to throw out case that does not meet sufficiency challenge.
Bryan M./Litchfield (IDPH-FY-04-12-057) – Overturned HO decision – found HO did not apply correct legal standard. Parents awarded IEP and reimbursement (Morrison).
Attorney Joshua Jones becomes hearing officer

- 2005 — **Mark and Linda L./Wilton-Lyndeborough (IDPH-FY-05-02-50)– court upheld HO Decision regarding IEP (Siff)**
  Attorney Peter Foley becomes hearing officer
- **2006** — **Alexandra R./Brookline (IDPH-FY-06-11-026) - Court overturned HO concluding HO dismissed hearing without conducting oral evidentiary hearing even without sufficiency challenge by district (Davidson)**
  Elena K./et al. (IDPH-FY-06-03-052; IDPH-FY-06-10-021; IDPH-FY-12-12-020) – Case dismissed. Multiple issues. (Foley; Davidson)
  Mark and Linda L/Wilton-Lyndeborough (IDPH-FY-06-01-044 – court upheld HO Decision regarding IEP/Placement (Foley)
- 2007 — Attorney Joni Reynolds and Scott Johnson become hearing officers
- 2008 — **Samantha B./Hampstead (IDPH-FY-08-03-054) – Upheld HO decision regarding denial of reimbursement (Siff)**
- 2011 — **Tia Pass/Rollinsford (IDPH-FY-11-10-012)– Upheld HO decision regarding denial of reimbursement for unilateral placement (Johnson)**
- 2012 — Two lawsuits
  - **Leigh R./Hudson (IDPH-FY-12-08-009) – Upheld HO decision re: parent not entitled to reimbursement for unilateral placement (Johnson)**
  - **Elena K./et al. (IDPH-FY-12-12-020; IDPH-FY-06-10-021; IDPH-FY-12-12-020) see 2006**
- **2013** — Initiation of Third Party Discussion Led by Moderator as a 3rd alternative dispute resolution option
- **2014** — **Elena K./Timberlane (IDPH-FY-14-07-004) – matter dismissed by HO appealed to court. Court ruled appellant has no standing to file and is not proper party as well as statute of limitations for proper party (Johnson)**
- 2015-2020 — Between 2 to 4 decisions per year, excluding summary Judgments. Majority of cases mediated, resolved, settled
- 2018 — Attorney Briana Coakley-Hyde becomes hearing officer.



Nevada Department of Education, January, 2006

Bill as Introduced

HB 581 - AS INTRODUCED

2021 SESSION

21-0702
06/05

HOUSE BILL ***581***

AN ACT relative to the burden of proof in special education hearings.

SPONSORS: Rep. Cordelli, Carr. 4; Rep. Verville, Rock. 2; Rep. Thomas, Rock. 5; Rep. Spillane, Rock. 2; Rep. McLean, Hills. 44; Rep. Rouillard, Hills. 6; Sen. Reagan, Dist 17

COMMITTEE: Education

ANALYSIS

This bill provides that the burden of proving the appropriateness of a child's special education placement or program is on the school district or other public agency.

- -

Explanation: Matter added to current law appears in ***bold italics.***
Matter removed from current law appears [~~in brackets and struckthrough.~~]
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

HB 581 - AS INTRODUCED

21-0702
06/05

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Twenty One

AN ACT relative to the burden of proof in special education hearings.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 New Paragraph; Special Education; Due Process Hearing; Burden of Proof. Amend RSA 186-C:16-b by inserting after paragraph III the following new paragraph:

III-a. In all hearings the school district shall have the burden of proof, including the burden of persuasion and production, of the appropriateness of the child's program or placement, or of the program or placement proposed by the public agency. This burden shall be met by a preponderance of the evidence.

2 Effective Date. This act shall take effect 60 days after its passage..