

“Federation Corner” column

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## **Fairness in Education First**

By Jeanne Taylor

During the 2015 legislative session, the Maryland General Assembly will once again have an opportunity to advance civil rights for children with disabilities. Elected officials in Annapolis can correct an injustice for families of special needs students by passing legislation shifting the burden of proof from parents to school districts in special education due process cases, as other states have. Last session, despite hearing testimony from parents, advocates, and students from across the state, the House and Senate ultimately failed to act in the best interest of students with disabilities.

Under the Individuals with Disabilities Education Act (IDEA), children with disabilities are entitled to a free, appropriate public education (FAPE). In order to meet this obligation, school districts provide special education and related services in an Individualized Education Program (IEP) to students with disabilities.

Ideally, the IEP should be developed in a collaborative process involving the school district and the parents. In reality, a new IEP goes into effect every year, *even if the parents disagree with it*. School districts control all aspects of the plans, services, and placements provided to students with disabilities. Moreover, they can change or eliminate services, and/or change a child’s school placement at any time, without parental consent.

If parents disagree with the school district, they have little recourse. They can initiate a legal proceeding called due process in which they have the burden of proving by the weight or preponderance of the evidence that the IEP created by the school district fails to provide FAPE. In these hearings, parents are at a huge disadvantage. They carry the tremendous weight of having to prove a negative against an entire school district. The issues can be complicated and school districts have all the power: knowledge of complex special education law, access to staff attorneys and outside counsel; they employ the teachers, therapists and educational experts who create and implement the IEP; and they have full access to records, instructional materials and placement options – including how other children have fared at them.

In stark contrast, parents have limited resources, limited knowledge of their options, and limited access to witnesses and information. Most cannot afford attorneys, or the experts needed to prove their case. They may be denied access to placements, instructional materials, lesson plans, and other vital information, and are often subjected to aggressive tactics by school district attorneys. They are routinely placed in the untenable position of having to ask teachers to testify against the wishes of their supervisors. Given all of the obstacles they face, it is no surprise that in Maryland, parents lose more than 90% of these disputes. This disparity hits parents who can’t afford attorneys the hardest, those who proceed without representation. In these cases, school districts have won despite putting on little – or no – evidence that the IEP provides FAPE. In the end, when school districts prevail, not on the merits of the case – but because of the parents’ inability to meet the burden of proof - the children lose.

By shifting the burden of proof in special education due process cases from parents to the local school districts, Maryland can better balance the scales of justice in an unfair process. Burden of proof for a local school district is modest – it is merely the requirement to demonstrate that the IEP it created provides a child with disabilities FAPE, which is the basic floor of opportunity. For parents and their children it would mean that due process decisions are based upon the appropriateness of the IEP, instead of the parents' inability to carry the burden of proof.

Shifting the burden is also about school system accountability and encouraging good faith collaboration with parents to avoid disputes. Currently, the lack of accountability is so lopsided that principals and school districts know they will lose only in the most egregious of cases that also involve parents who can afford an attorney. Thus, all too often, there is a take it or leave it attitude in IEP meetings over the services provided to children with disabilities. Low income and middle income students suffer the most in these situations because their parents cannot afford to pay for the attorneys and other resources necessary to shoulder the burden of proof in a due process hearing.

For the past two years, this lack of accountability was a common theme throughout the public hearings held in Annapolis and on-line testimony from across the state. Parents and advocates testified about the enormous challenges they faced getting appropriate IEPs for their children, and then having local schools actually implement them if they did. Numerous parents shared their hardship stories – such as spending their life savings or taking out a second mortgage on their home to secure an appropriate education for their disabled children.

Many families have to hire special education advocates in an attempt to obtain the services that their children are entitled to under the IDEA. They may also need to pay for expensive private evaluations in order to prove that their child qualifies as a student with disabilities. Even then, there is no guarantee that the local school system will agree that the student is eligible to receive special education services under an IEP. Some testified about schools failing to implement IEPs that were already in place. Oftentimes, when faced with the overwhelming prospect of an expensive and lengthy hearing, parents give up and let the school change, or even eliminate, the IEP.

Maryland prides itself on being a progressive state but falls short when it comes to children with disabilities. The Maryland General Assembly must enact this basic civil rights legislation in order to promote justice for our most vulnerable members of society and their families. It is time to shift the burden of proof from the parents to the school districts, where it belongs. It is the only fair thing to do.