

NEW JERSEY SCHOOL BOARDS ASSOCIATION

**413 West State Street
Trenton, NJ 08605-0909**

1-888-886-5722

**SEMIANNUAL DELEGATE ASSEMBLY
December 10, 2016**

**The following resolution was received from the
Marlboro Board of Education (Monmouth):**

- WHEREAS, The goal of the Marlboro Township Board of Education is to provide a high-quality education to all the students of the Marlboro Township School District; and
- WHEREAS, The Board, as a primarily taxpayer-funded entity, understands that it must accomplish this goal while at the same time, taking the needs of the District's taxpayers into account and educating all the District's students in a fiscally conservative manner; and
- WHEREAS, Since 2001, special education expenditures have increased faster than state funding; and
- WHEREAS, The *Schaffer v. Weast*, 2005 U.S. Supreme Court decision decided the burden of proof question; that the plaintiff, which is usually the parents, bear the responsibility of proving that the individualized education plan is not appropriate for their child; and
- WHEREAS, A 2007 New Jersey School Boards Association commissioned study, "Financing Special Education in New Jersey," found that the growth in special education costs could be largely attributed to tuition and transportation for out-of-district students; and
- WHEREAS, On January 13, 2008, a bill was approved, N.J.S.A. 18A:46-1.1, stating "whenever a due process hearing is held pursuant to the provision of the "Individuals with Disabilities Education Act," regarding the identification, evaluation, reevaluation, classification, educational placement, the provision of a free, appropriate public education, or disciplinary action, of a child with a disability, the school district shall have the burden of proof and the burden of production"; and
- WHEREAS, With this legislative change that the burden of proof is on the school district, it thereby implies that any individualized education plan is inappropriate until such time as it is proven appropriate; and

WHEREAS, New Jersey School Boards Association created a Special Education Task Force, made up of a dedicated group of school board members and administrators, that spent over a year researching, collecting data, and consulting with experts; and

WHEREAS, This group deliberated for over one (1) year, beginning in January 2013 and releasing their final report in March 2014; and

WHEREAS, The group focused on strategies that would enable school districts to control costs while still meeting their obligation to provide a free and appropriate public education to all students; and

WHEREAS, One of the recommendations in this report states "The state should amend existing statute and place the burden of proof in disputes over individualized education plan on the party bringing the complaint, rather than on the school district"; and

WHEREAS, The Marlboro Township Board of Education believes this change would reduce their expenses and therefore the impact on property taxes; now, therefore, be it

1 RESOLVED, That the Marlboro Township Board of Education urges other New Jersey
2 school districts to adopt a similar resolution in an effort to convince their
3 State Legislators to introduce or co-sponsor legislation to address the issues
4 raised herein; and, be it further
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6 RESOLVED, That the Marlboro Township Board of Education requests this resolution be
7 presented at the next Delegate Assembly of the New Jersey School
8 Boards Association by District Representatives; and, be it further
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10 RESOLVED, That the Board Secretary shall forward a copy of this Resolution
11 to our State Representatives, the New Jersey School Boards
12 Association, the board secretaries of each school district in the county,
13 the Governor's Office, the County Office of Education and the Office of
14 the Commissioner of Education.

Adopted at a regular meeting
Of the Marlboro Board of
Education on September 13, 2016.

Cindy S. Barr-Rague
Business Administrator/Board Secretary

RESOLUTION NO. 1

SYNOPSIS

Resolution No. from the Marlboro Board of Education (Monmouth County) proposes that NJSBA include **additional** language in its *Manual of Positions and Policies on Education* requiring NJSBA to support changing the burden of proof in special education disputes so that the burden is not always on the district, as required by current law, but is placed on the party bringing the complaint to court.

BACKGROUND

Under current state law, when parents challenge the “identification, evaluation, reevaluation, classification, educational placement, the provision of a free, appropriate public education, or disciplinary action, of a child with a disability, the school district shall have the burden of proof and the burden of production” in that due process hearing. *N.J.S.A. 18A:46-1.1*. For school districts, this means that they must show the court why their decisions concerning special education students are the correct ones that meet the standard of providing a “free and appropriate education” in the “least restrictive environment” the standard required by the current federal Individuals with Disabilities Education Act (IDEA).

Generally, in most other types of litigation, the persons who initiate a complaint have the burden of proof and production. Not so with special education litigation in New Jersey.

In 1975, the Education for All Handicapped Children’s Act was passed by Congress and assured that “all children with disabilities have available to them...a free appropriate public education which emphasizes special education and related services designed to meet their unique needs.” Additionally, the law assured that the rights of children with disabilities and their parents would be protected. This law was amended several times in the 1980s, creating Individualized Education Plans (IEPs), and expanding the length of time these students would be provided with services beginning at birth and carrying into adulthood with the provision of transitional services. The law included provisions for due process hearings, though it was not clear with whom the burden of proof or burden of production rested.

In 1989, The New Jersey State Supreme Court ruled in *Lascari v. Board of Education of the Ramapo Indian Hills Regional High School District* 116 N.J. 30 (1989) that the burden of proof was the responsibility of school districts. *Lascari* was premised on the Court’s belief that the school district is the party with the better access to relevant information and thus bear the burden of proof. From 1989 to November 2005, school districts were responsible for the burden of proof and production in all special education disputes. The costs associated with due process hearings were high for several reasons. First, the specific aspects of the IEP that were being challenged by the parent did not need to be identified, and could be very broad in nature, which resulted in the school district needing to provide a comprehensive defense, which they then had to present first in the due process hearing. Second, the school district preparation had to be complete, encompassing the entire educational history of the student, including all documents, and all witnesses and testimony relating to the student. Witnesses could be child study team

members, administrators, and teachers who would have to be interviewed prior to the hearing. Last, attorney fees were extraordinary because of the required amount of time spent in preparation and the hearing itself

Districts were required to present their side affirming the placement decision first. In doing so, gave parents the benefit of the board's entire case to develop and reinforce their position. Parents then presented their argument in the matter which could range from disagreement with one simple element in the IEP, to disagreement with every aspect of the IEP. In comparison, school districts were required to be comprehensive and to deal with each and every aspect in which there could be possible disagreement.

In 1990, the federal law was renamed the Individuals with Disabilities Education Act (IDEA). In 1997, a process for voluntary mediation before due process was introduced. This addition to the law mandated that States provide and pay for impartial mediators, and that a resolution reached through mediation would be enforceable under the law. Mediation did not preclude the plaintiff from filing a due process complaint at a later date.

The most recent reauthorization of the IDEA in 2004 introduced several new safeguards for parents and school districts, clarifying much of the due process procedures. One of these additions is a mandatory "resolution session" after a complaint has been filed but prior to the due process hearing (unless the parties to the dispute agree to use the mediation process, which may now occur after a complaint has been filed.) The school district is required to present all relevant facts pertaining to the filed complaint at the resolution session, and this information must be made available to the complainant for review. School districts are required to answer the subject matter of a complaint in writing, and to provide parents with the reasoning behind the disputed action, details about the other options considered and rejected by the IEP team, and a description of all evaluations, reports, and other factors that the school used in coming to its decision. Prior to a hearing, the parties must disclose evaluations and recommendations that they intend to rely upon, including any independent evaluation. Parents have the right to an independent educational evaluation of their child and may use that evaluation as evidence.

Under the 2004 reauthorization of IDEA, parents may recover attorney's fees if they prevail after the due process hearing.

In November 2005, the U.S. Supreme Court determined in *Schaffer v Weast*, 546 U.S. 49 (2005) that the burden of proof rests with the party bringing the action, which in most cases the parents or guardians of special education students. The Court rejected the argument that the school district has better access to relevant information than the parents. They noted that Congress had already addressed that concern through numerous provisions in IDEA that obligate schools to safeguard the procedural rights of parents and to share information with them. As the burden of proof in all other types of cases rests with the complainant, the Supreme Court determined that these types of cases were no different. The *Schaffer* decision was silent as to the burden of production; however, most courts place the burden of production on the same party that bears the burden of proof. The Supreme Court declined to decide the question of whether a State could pass a law moving the burdens of proof and production to the school district.

In March 2007, a bill, A-4076, was introduced in the New Jersey State Legislature to place the burden of proof and the burden on production on school districts in special education disputes. The bill was approved by both houses of the legislature in December 2007 and signed by the Governor in January 2008. P.L. 2007, c.331 was codified at N.J.S.A. 18A:46-1.1 and remains in effect today. NJSBA opposed the bill throughout the legislative process.

RELEVANT NJSBA POLICY

File Code 1430 State Role in Education

A. The NJSBA believes the authority for management of public schools should rest with local boards of education and State authority over school districts should not exceed the scope necessary to fulfill the constitutional mandate for a thorough and efficient system of free public education [Authority: DA 10/78-CR Graduation Requirements, DA 6/80-A, DA 6/93-SR, DA 6/95-SR]

File Code 3220: State Funds

- A. **The NJSBA believes** that New Jersey's system of financing public schools should enable all local school districts to provide an equal educational opportunity for all children in New Jersey to receive a thorough and efficient education.
- B. **The NJSBA believes** that New Jersey's school finance system should:
1. Define the elements of and the resources necessary to provide a thorough and efficient education;
 2. Provide funds to support and guarantee a thorough and efficient level of education to all public school children;
 3. Provide that all constituents of the state—individuals, businesses and communities—be required to pay a fair share, but that no one would be required to pay more than a fair share;
 4. Retain the principle that local school boards have the primary responsibility, with the assistance of the state, for ensuring that each child in the district obtains a thorough and efficient education, and permit a limited degree of local spending to fund a locally defined thorough and efficient education, with the state paying a share on an equalized basis;
 5. Recognize the diversity, unique circumstances and community composition of each local school district;
 6. Provide for equalized aid for capital expenditures and debt service, based on individual districts' ability to pay as defined by the School Funding Reform Act or its successor;
 7. Provide state aid based on predictable statutory formulas which is predictable, transparent and capable of being re-calculated at the local district level;
 8. Provide current-year funding of all state aid;
 9. Provide state aid for the full excess cost of all mandated special education programs and services;
 10. Provide state funding for the full cost of all state mandates;

11. Include a system of evaluation to ensure accountability in the allocation of state aid;
12. Promote efficiency in the use of tax dollars; and recognize that the geographically adjusted average of expenditures by school district that have demonstrated an ability to provide a thorough and efficient education based on agreed-upon outcomes is an appropriate benchmark for the funds needed by every district to provide a thorough and efficient education;
13. Be modified, as needed, through a comprehensive approach with input from NJSBA members;
14. Provide all public school students in New Jersey districts with fiscal equity.
15. Reward districts and schools that meet ambitious learning goals, prioritize resources, model fairness, transparency, predictability and equity, decrease achievement gaps and provide the opportunity for the development of local educators to manage resources effectively as needed.
16. Be sensitive to legitimate variations in school districts' capabilities to meet student needs, including, but not limited to, proficiency levels, demographics, socioeconomic status, geographical location and physical abilities.
17. Provide full funding for state-initiated programs designed to promote innovation and that the level of participation in such programs should be determined by the local school district.

File Code 6171.4 Special Education

A. The NJSBA believes that New Jersey's system of financing public education should enable all local school districts to provide appropriate public educational opportunities for all of New Jersey's educationally disabled students without unduly burdening local taxpayers.

DISCUSSION

The placement of the burden of proof and production on local school districts by the State of New Jersey has had a negative impact on local budgets. In this era of the 2% cap, the more dollars that must be utilized by districts for the defense of legal cases are dollars that are not being spent on student achievement. When districts must not only prepare a defense in litigation but must also bear the burden of proof and production, it pulls even more dollars out of the classroom.

When the legislature in 2007 determined that a law was needed to place the burden of proof and production on school districts, NJSBA was able to advocate on behalf of school districts using a variety of policies that were already in its *Manual of Policies and Positions*. However, there was no one particular policy that addressed the burden of proof and the burden of production in special education matters.

That same year, NJSBA commissioned a study on the cost of providing special education services in New Jersey. The study used an empirical approach to examine trends affecting the cost and delivery of special education programs and services. It found that local, state and federal special education expenditures in New Jersey totaled \$3.3 billion. The main cost-drivers were out-of-district placements, programs for students with autism, transportation, related services, and resource programs. New Jersey has tried to combat

the rising costs of special education over the years. For instance, the legislature expanded the role of the Executive County Superintendent (ECS) to include serving as a liaison to facilitate shared special education services within the county including, but not limited to, in-district and out-of-district program data base management, placement options, regional planning, budgetary planning, inclusive education, adult life transition, direct services, personnel development, and technical assistance. In regulation, the ECS is to promote and facilitate the sharing of special education services within the county. The regulation contains a variety of processes to accomplish that goal, including notification to the ECS when an out of district placement is contemplated, with identification by the ECS, if an in-district program is available. The ECS shall also conduct regional planning, identify special education class programs in the county, maintain a list of appropriately licensed and certified professionals and investigate the possibility of school districts sharing special education staff members. *See N.J.S.A. 18A:7-8 and N.J.A.C. 6A:23-2.7*

Notwithstanding these legislative and regulatory efforts, the cost of special education continues to rise.

In 2013, NJSBA conducted another study of special education in New Jersey. The 2013 study reaffirmed the need for a fair, adequate and equitable funding formula. The study also identified other cost-drivers, including high classification rates, exclusionary placements, and impediments to shared services. Expenditures identified as special education increased approximately 8% from 2008-09 to 2011-12. The increase was twice as large as the rate of growth in expenditures for general education during that same period. It was also double the rate of growth in the number of students receiving special education services. In 2011-2012, statewide expenditures to cover the additional costs of serving special education students accounted for over one-fifth of the total expenditures for K-12 education. From 2008-09 to 2011-12, the number of classified students in regular operating (or non-Abbott) districts grew by 4%, while total enrollment in those districts remained flat.

As part of NJSBA's 2013 study, a survey was conducted. Through an open-ended question, the survey asked superintendents and special education directors to identify changes in law and regulation that would enable them to manage costs. More than one-third of the school officials participating in the 2013 Special Education Task Force survey identified the adjudication process for special education program challenges, especially due-process and burden of proof, as an area in need of change. Over 21% of all responses to the question identified placement of the burden of proof on school districts, rather than on the party bringing the challenge, as a problem.

The burden of proof and production in special education disputes continues to be placed on local school districts by the state. To enhance its advocacy efforts on this vital issue, NJSBA should have a specific policy on the burden of proof and production in special education disputes.

STATEMENT OF REASONS

1. Current state law places the burden of proof and burden of production in special education disputes on local school districts, regardless of whether or not the districts have initiated the disputes.

2. Placing the burdens of proof and production on local districts needlessly drives up the costs of providing special education, costing local districts and taxpayers. Placing the burden of proof of production on the party who is bringing the litigation will reduce costs and keep dollars in the classroom.
3. NJSBA does not have policy specifically addressing this critical issue; a specific policy will enhance NJSBA's advocacy efforts to keep local school districts direct limited resources in the classroom.

1 **RECOMMENDATION**

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3 The Resolutions Subcommittee recommends approval of this resolution with the
4 following substitute policy language which would create **new** policy language in
5 NJSBA's *Manual of Positions and Policies on Education*:

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The NJSBA believes that the burden of proof and the burden of production in special education disputes should be placed on the party initiating the litigation.