

Burden of Proof: Information & Considerations for Due Process Hearings

OSPI has received multiple inquiries about [SB 5883](#), which shifts the burden of proof in a due process hearing onto the school district. You can read the text of [SB 5883 here](#).

When will this go into effect?

SB 5883 will go into effect on June 6, 2024.

What does the bill do?

The bill requires that in all due process hearings, the district has the burden of proof, including the burden of persuasion and production, whenever the district is a party to a due process hearing regarding the identification, evaluation, reevaluation, classification, educational placement, disciplinary action, or provision of a free appropriate public education for a student with a disability.

The one exception is when a parent is seeking tuition reimbursement for a unilateral parental placement. In such a case, the parent has the burden of proof, including the burden of persuasion and production, on the appropriateness of such placement.

What is the burden of proof?

Burden of proof has two components: burden of persuasion and the burden of production:¹

- Burden of production: Refers to the obligation to present evidence to prove each element of a claim or cause of action.
- Burden of persuasion: Refers to persuading the finder of fact—in due process, the administrative law judge (ALJ)—of the correctness of a party's position. The burden of persuasion does not shift and is only outcome-determinative when the evidence is equally divided. Under the burden of persuasion, the "tie" goes to the party who does not have the burden of persuasion.

How will this impact due process hearings?

The change in burden of proof likely will impact how districts engage in due process hearings. We may see an increase in due process filings.

¹ See, Thomas Mayes, Perry A. Zirkel, & Dixie Snow Huefner, [Allocating the Burden of Proof in Administrative and Judicial Proceedings under the IDEA](#), 108 W. VA. L. REV. 27, 33–36 (2005).



The bill does not create any new requirements related to documentation, record keeping, or evidence of special education services provided. Districts should review existing district policies, procedures, and practices around maintaining documentation, such as service provider logs (e.g., speech and occupational therapy logs) and other student educational records—what documentation do you currently keep in student files and for how long; what should you keep and for how long?

Districts should continue conducting comprehensive evaluations, developing, and implementing high quality IEPs based on student-specific needs, monitoring student progress on IEP goals, and gathering student-specific data to inform IEP development. Districts should think about what staff training is provided on special education obligations, both procedural and substantive.

Districts have always had the burden of proof in due process hearings related to independent educational evaluations (IEEs), wherein the district is defending its evaluation. Past due process hearings related to IEEs could provide an example of the types of documentation, evidence, and expert input needed in a hearing.

OSPI recommends that districts consult with district legal counsel or the risk pool regarding specific recommendations for district practices.

Does this apply to special education community complaints?

SB 5883 specifically changes the burden of proof in due process hearings. In a special education community complaint, there is no burden of proof; rather, the obligation is on OSPI to conduct an independent investigation. SB 5883 has no impact on special education community complaints.

What other states put the burden of proof on districts?

Washington joins six other states that have specifically put the burden of proof on the school district, and these other states include:

- Connecticut²
- New York³
- New Jersey
- Delaware
- New Hampshire
- West Virginia

² Connecticut shared they have had legislative pushes to put the burden of proof on the party filing the due process in 2007 and 2009 (at the time of the research report). Connecticut noted that burden of proof (persuasion) becomes important only in those 50-50 cases, which is rare. LEAs push periodically to shift the burden to parents, but the effort has not been successful, in part, because it really is not having a big impact on decisions. (See Conn. Research; Emails on file with author).

³ Except tuition reimbursement where the burden remains on the parent/person filing. See Zirkel article.

What resources are available?

For more on what the burden of proof is and a survey of the law in the US, see: [Allocating the Burden of Proof in Administrative and Judicial Proceedings under the IDEA](#) (Mayes, Zirkel, Huefner, 2005) and ["Who Has the Burden of Persuasion in Impartial Hearings Under the IDEA"](#) (Zirkel, 2012).

Districts should consider professional development related to engaging families and addressing potential conflict before it gets to a formal complaint or due process. Resources include:

- [The Transformative Power of Engaging Parents as Partners](#): CADRE Webinar with Poway Unified School District, California – “Learn how Poway Unified School District completely transformed their relationships with families, re-established trust, and even more importantly, improved students’ learning experiences. Their intentional efforts to engage parents as partners also helped save the district millions of dollars in attorney fees and settlement costs. Their hope is that by continuing to partner with parents, staff can spend less time and energy embroiled in conflict and more time and energy exploring ways to continuously improve students’ learning experiences.”
- [Deconstructing Our Conflict Story: It Takes Vision and Leadership](#): CADRE Webinar coming up on May 10, 2024, at 10 am. Join Greg Abell and Carlo Rossi, Sound Options Group, LLC; and Greg Mizel and Jodi Payne, Poway Unified School District. “In this webinar, presenters will identify the shift in the Narrative of Special Education, then describe characteristics of the current story, and illustrate the cost of what has become for many, a polarizing conflict story. We will revisit the work of the Poway Unified School District introduced in a 2022 CADRE webinar. At that time, the presenters shared the work they have been doing to change their district’s story and their commitment to building healthy relationships with families by taking a systems approach. In this webinar, we will invite them to reflect on a third factor we believe to be critical to their success: the changes they initiated called for vision and strong leadership. They will identify and describe the challenges they faced and the leadership competencies essential to their success.” [Click Here to Register!](#)
- [Sound Options Group](#), under contract with OSPI, continues to offer resources supporting LEAs and families to effectively engage and navigate conflict prior to a due process hearing. Both Mediation and IEP Facilitation are available to support effective communication and shared decision making in service of children and youth served under the IDEA. In addition, Sound Options Group provides a comprehensive menu of seminars focused on building individual and collective capacity at the local level in support of healthy conflict engagement. These offerings are organized and delivered in the context of a Multi-Tiered System of Support (MTSS).
 - Tier 1 seminars are designed for individuals to develop confidence and competence for dealing with conflict. Examples include:
 - Engaging Challenging Conversations
 - Leading Through Change and Conflict

- Foundations of Effective Teaming
- Tier 2 seminars are designed for individuals who want to build skills for supporting others to engage in conflict and creating local systemic capacity in support of collaboration. Examples include:
 - Operating From the Third Side: Supporting Others to Navigate Conflict
 - Facilitation
 - IEP Facilitation
 - Coaching
 - Teaching Basic Conflict Engagement Skills

For more information, contact Sound Options Group at 206-842-2298 or 800-692-2540 or go to <https://somtgc.com/ospic-professional-development-calendar/> for a calendar of current offerings.