MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON EDUCATION

Seventy-Sixth Session
April 4, 2011

The Committee on Education was called to order by Chair David P. Bobzien at 3:19 p.m. on Monday, April 4, 2011, in Room 3142 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4406 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/76th2011/committees/. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblyman David P. Bobzien, Chair
Assemblywoman Marilyn Dondero Loop, Vice Chair
Assemblyman Paul Aizley
Assemblyman Elliot T. Anderson
Assemblywoman Olivia Diaz
Assemblywoman Lucy Flores
Assemblyman Ira Hansen
Assemblyman Randy Kirner
Assemblywoman April Mastroluca
Assemblyman Richard McArthur
Assemblyman Harvey J. Munford
Assemblywoman Dina Neal
Assemblyman Lynn D. Stewart
Assemblywoman Melissa Woodbury

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

None

STAFF MEMBERS PRESENT:

Mindy Martini, Committee Policy Analyst
Kristin Roberts, Committee Counsel
Taylor Anderson, Committee Manager
Janel Davis, Committee Secretary
Sherwood Howard, Committee Assistant

OTHERS PRESENT:

Gregory D. Ivie, Children's Attorney Projects, Legal Aid Center of Southern Nevada
Jeannie Richard, Private Citizen, Las Vegas, Nevada
Sherida Devine, Private Citizen, Las Vegas, Nevada
Robin Kincaid, Training Services Director, Nevada Parents Encouraging Parents
Jan M. Crandy, Commissioner, Nevada Commission on Autism Spectrum Disorders
David Goldwater, Private Citizen, Las Vegas, Nevada
Nicole Rourke, Executive Director, Government Affairs, Community and Government Relations, Clark County School District
Phoebe V. Redmond, Director, Special Education Due Process Compliance, Office of Compliance and Monitoring, Student Support Services Division, Clark County School District
Randy A. Drake, Chief General Counsel, Office of the General Counsel, Washoe County School District
Sharla Hales, Legislative Co-chair, Nevada Association of School Boards
Ellen Richardson-Adams, Health Program Manager, Nevada Early Intervention Services Southern Region, Health Division, Department of Health and Human Services
Keith Rheault, Ph.D., Superintendent of Public Instruction, Department of Education
Andre Yates, Director, Licensed Personnel, Licensure and Recruitment Services, Human Resources Division, Clark County School District
Dotty Merrill, Executive Director, Nevada Association of School Boards
Mary Pierczynski, representing Nevada Association of School Superintendents
Craig Hulse, Director, Department of Government Affairs, Washoe County School District
Craig Stevens, Director, Education Policy and Research, Nevada State Education Association

Chair Bobzien:
[Roll was called. Rules and protocol were stated.] We will hear two bills today. I would like to open the hearing on Assembly Bill 318.

Assembly Bill 318: Places the burden of proof and the burden of production on a school district in a due process hearing held pursuant to the Individuals with Disabilities Education Act. (BDR 34-1025)

Assemblywoman April Mastroluca, Clark County Assembly District No. 29:
I am tempted to break a rule and say words you are never supposed to say. This is a simple bill that changes one sentence. Assembly Bill 318 deals with the due process hearing for the Individuals with Disabilities Education Act (IDEA). The Act moves the burden of proof for hearings from the parent to the school district. With your permission, Mr. Chair, there are some people in Las Vegas and in Carson City that will go through the bill and give the Committee background information.

Gregory D. Ivie, Children's Attorney Projects, Legal Aid Center of Southern Nevada:
Thank you for allowing me the opportunity to speak about a very important bill proposal. Assembly Bill 318 is important for parents who have children with disabilities. It goes without saying that it is extremely difficult and emotionally draining to be a parent of a child with disabilities. It is a challenge these parents face in trying to determine and obtain an appropriate education for their disabled child. [Continued to read from written testimony (Exhibit C).]

We believe that the school district—not the parent—should bear the burden of proof that the student's educational needs are being met. Good conscience and equity lead us to the passage of A.B. 318. Without this legislation, a disabled child may be denied a free appropriate public education (FAPE) because of obstacles that could be removed with your support of this bill.

Chair Bobzien:
Mrs. Mastroluca, how would you like to proceed?

Assemblywoman Mastroluca:
Thank you. There are parents in Las Vegas who are prepared to testify.

Jeannie Richard, Private Citizen, Las Vegas, Nevada:
I am a parent of a disabled child who is a special education student. My son began having behavioral and emotional problems in elementary school. He was terrified of teachers and never able to gain a rapport with them. He was automatically put in special education classes and has been in a different school

each year. I have tried to work with the school districts as far as what is best for him. [Continued to read from written testimony (Exhibit D).]

This year, he went into sixth grade. It is the first time in his life he is doing wonderfully. He has received an excellent citizenship award. I am glad that he is at a school in Clark County School District (CCSD). I am encouraging you to pass this bill. It would be a good thing for all parents with disabled children.

Sherida Devine, Private Citizen, Las Vegas, Nevada:
I am a parent of a 13-year-old boy who has autism, which stems from a genetic disorder called Klinefelter's syndrome. I am a single parent with five children. My son attends a segregated, special school within CCSD. Originally, I was told that this school—although a school for emotionally challenged students—would be the best for him. [Continued to read from written testimony (Exhibit E).]

All we are asking for is that A.B. 318 be passed to have the burden of proof rest with the school district.

Robin Kincaid, Training Services Director, Nevada Parents Encouraging Parents:
I am a parent of a student who receives special education services. I am also the Training Services Director at Nevada Parents Encouraging Parents (PEP), where we provide information and training for families on special education and support families to be partners with schools. I appreciate the opportunity to share with you the parent perspective on due process within the special education system.

When families are attempting to resolve an issue with the school district regarding their child's services, many times they are not thinking about hearings, witnesses, or rulings. They simply want their issue and concern to be addressed by school personnel and their child with disabilities to receive appropriate services. Although the law indicates that families are partners with the school in determining an appropriate education, there are disagreements, and families are often encouraged by school personnel to file for due process. If the parent does not agree, he finds no other option for resolution. He becomes frustrated and overwhelmed about facing a complicated, involved, expensive, legal battle where he has to prove the school district is violating IDEA and that his child is not receiving FAPE.

Many parents turn to due process and litigation only as a last resort. At these hearings, the school districts have their built-in expert witnesses and taxpayer-financed lawyers. Parents are not always represented by counsel, and certainly, do not have access to the same amount of resources as the school district. The school districts have their own staff and resources to provide

expert testimony in support of the districts' position. Most families cannot afford to pay for expert witnesses or evaluations. Due to the burden of proof challenge for families, due process has become an ineffective means to resolve issues and has resulted in a lack of partnership for families and children with disabilities. There could be no equal opportunity and access to public education that is both free and appropriate unless all families of children with disabilities—rich, poor, and those in the vast middle—can obtain an education on the same terms. Parents are at a substantial disadvantage. Placing the burden of proof back on the school districts is critical to simply level the playing field.

Jan M. Crandy, Commissioner, Nevada Commission on Autism Spectrum Disorders:
I am here today in support of A.B. 318. I do not think that parents should be in fear of going into debt to get their children a proper education. When a child or parent realizes that things are not going right at school and the Individualized Educational Program (IEP) is not appropriate, parents are told to file for due process. A lot of times, the parent is of a lower income status, and it is obvious that he is unable to file for due process. So, it is almost a threat. In autism cases, we always recommend an expert witness, and if the family cannot afford an expert witness, they should not move forward with the case because they will not win.

I was involved in an early intervention case where the family went forward with an excellent expert witness. I felt that they should have won their case, but the family lost and had to pay all the expenses. If the family had filed appeals, there was a chance of winning at the appeal level, but now they are out of money. Besides getting their child FAPE, this family now has attorney bills. By changing this law, it is at least providing these families with equal access to be able to file and voice their concerns. If the school district is participating in an appropriate program, then having the burden of proof should be easy and not expensive for the school.

Chair Bobzien:
Are there any questions from the Committee? [There were none.]

David Goldwater, Private Citizen, Las Vegas, Nevada:
I am here serving as a lobbyist, but I am also a trained educational Surrogate Parent for foster children. I received my training through the Legal Aid Center of Southern Nevada. We meet and are updated monthly. I have a surrogate daughter, and by court order, I represent her on all matters relating to her education. I can tell you that through all the education and training I have had, it is an incredible burden in the rare instance that you are faced with a due

process hearing to face the burden of proof. I would like to commend Assemblywoman Mastroluca on bringing this matter forward.

Additionally, I would like to recognize that the school district does an excellent job, and it is the exception to the rule that you end up in a due process hearing. When speaking with the representatives from the school district about this, it seemed that the burden of proof issue is a new one—and it is not—which should be emphasized. For 17 years prior to the 2005 U.S. Supreme Court decision, the burden of proof was on the school district. [Referred to (Exhibit F).] As the previous witnesses have said, this bill is making Nevada's voice clear on these matters.

Chair Bobzien:
Are there any questions for Mr. Goldwater? [There were none.] Is there anybody else wishing to speak in favor of the measure? [There was no one.] We will hear from the opposition.

Nicole Rourke, Executive Director, Government Affairs, Community and Government Relations, Clark County School District:
Mrs. Phoebe Redmond in Las Vegas will be testifying on our behalf.

Phoebe V. Redmond, Director, Special Education Due Process Compliance, Office of Compliance and Monitoring, Student Support Services Division, Clark County School District:
I have over 20 years experience representing major urban school districts in all aspects of litigation related to the individuals with IDEA. As part of my job responsibilities, I am also an advocate for children with disabilities.

The decision to proceed to a due process hearing is not taken lightly by parents or school districts. The financial, resource, and emotional costs are high on both parties. I have personally observed the strain of due process hearings on families and school personnel. [Continued to read from written testimony (Exhibit G).]

Assembly Bill 318 will not impact the finding of fact and final decisions of due process hearing officers because the substantive legal standard remains the same. The Supreme Court decision in *Schaffer v. Weast*, 546 U.S. 49 (2005), which holds that the burden of proof and production should fall on the party bringing the action, did not overrule the Supreme Court's prior holding in the *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). [Continued to read from (Exhibit G).]

If A.B. 318 is passed requiring school districts to proceed first at hearings, then school districts will lose all the cost savings and efficiencies made as a result of the *Schaffer* decision. In conclusion, I leave you with the common wisdom of most practitioners in this area of law. Alternative dispute resolution (ADR) should be encouraged to resolve disputes in special education. Litigation should be discouraged. Encouraging communication supports teaching and learning, thereby discouraging litigation. Litigation serves to disrupt the education process, and significantly delays the delivery of appropriate services to our children with disabilities and their families.

Chair Bobzien:
We have a number of questions.

Assemblyman Stewart:
During the 17 years prior to 2005, the burden of proof was on the individual, or the parent. In the last six years, the burden of proof was on whoever brought the appeal. Now, the burden of proof will be on the school district. As far as the number of cases, could you give us some statistics on what it was like before and after the 2005 ruling?

Phoebe Redmond:
First of all, I conducted the hearings the same way for the last 22 to 23 years. The burden of proof has not changed as far as my representation of school districts. I view the burden of proof as set forth in the *Rowley* decision, which requires school districts to prove that they procedurally and substantively provided FAPE for students. I have not changed my practice at due process hearings.

I have some statistics from 2002 through 2011. On average, the number of requests for due process at CCSD range between 30 and 39 cases per year with a high of 63 cases per year. I understand the *Schaffer* decision, the reauthorization of IDEA, and its implementing regulations came out around 2005. There was an uptake in the request for due process hearings, but, those requests were made to access the resolution process provided in the recent reauthorization of IDEA.

Assemblyman Anderson:
My question centers around the general sense I am getting from your presentation. It makes me feel like the “sky is falling.” I do not think that this encourages litigation; it says if there is litigation, we need the school district to come up with proof that it is not happening. If the school is communicating with the parents and parents are involved in their child’s individual education

plan, you will not have to worry about litigation. Could you comment in general? I do not feel like the sky was falling before this decision.

Phoebe Redmond:
Yes, I would like to specifically address that. As an advocate for parents with children who have disabilities, I have seen parents who are misled to believe that certain changes will give them the results they seek. This particular legislation will not give them that; therefore, it is misleading. In addition, the "sky is falling" if there is a specific mandate as required by this bill.

Recently, I had a high school case where I used the higher standard. The parent made the statement that the IEP was not implemented. I brought in over 20 witnesses. Each teacher and assistant had to testify how she implemented the IEP. This does not seem to be too challenging; it should be easy for the school district, but there is a real visceral impact on schools when requests for due process—with nothing more than an allegation—are brought. The entire high school was placed on hold. Many children lost their teachers for two or three days. The teachers had to be prepped. For an individual school, it means the "sky is falling."

Assemblyman Anderson:
If parents feel like their kids are getting a "raw deal," whether or not the burden of proof is on them or the school district, they are still going to request a due process hearing. We are just changing the hearing. If I had a child, I would not care why there were bad things happening. I would be mad and quickly lose my rationale. I would ask for any and all available options. This bill says once it happens, it should not be happening; it should not be that hard a requirement, right?

Phoebe Redmond:
When you have seven to eight days of hearing to prove a fact, it affects the teaching and learning at the local school level.

Assemblywoman Dondero Loop:
I worked for CCSD for 30 years and sat in many IEP meetings. Did I understand you to say that you have been litigating these hearings in the same method for the past 20 years?

Phoebe Redmond:
Yes.

Assemblywoman Dondero Loop:
With that being said, I will just tell you—and I am not a lawyer, but a teacher—that over the last 20 years, those IEP's have changed dramatically in the way that we deal with students, mainstream students, and the way we include parents. I cannot imagine litigating those pieces in the same manner.

Phoebe Redmond:
I think you misunderstood me. I meant that I use the same burden of proof since I started representing school districts under IDEA. I implemented and relied on the *Rowley* case, not anything substantive.

Assemblywoman Dondero Loop:
It is troubling to me that we are not changing the way we look at the process. As teachers and educators, we are asked to change the way we look at things daily.

Assemblywoman Neal:
Ms. Redmond, you mentioned the *Rowley* case where the burden of proof is the preponderance of evidence. Is that correct?

Phoebe Redmond:
Yes.

Assemblywoman Neal:
You then shifted and discussed how *Schaffer* adjusts the standard to not allow parents to come in with an allegation, but prove what is happening in some sort of statement in order for the school district to have a statement to review before they move forward. Is that correct?

Phoebe Redmond:
That is approximately true. The *Schaffer* decision requires that the parent clearly articulate his issues and support for the remedy that he is seeking.

Assemblywoman Neal:
When you explained it, it seemed that the parents have to establish their claim is real. This gives the school district an advantage. You said when there was an allegation, the parents had to try to gauge what kinds of witnesses they would bring to testify, for and against. With the statement under the *Schaffer* decision, the school district has all the information and can dismiss the allegation without going through any kind of witnesses. Do you think A.B. 318 levels the playing field in terms of proof, or at least, who can have an advantage over the other?

Phoebe Redmond:
In my testimony, I said that the substantive law has not changed. *Schaffer* is addressing when a parent proceeds with the burden of proof, which is consistent with general civil law in America. For the past several years, since the implementation of the *Rowley* decision by the U.S. Supreme Court, the substantive rule has not changed. This means that the school district has to always prove in the affirmative that it provided services procedurally, consistently, and substantively with IDEA. I am saying my level of proof—or the level of proof for school districts—has not changed. Instead of pulling several staff members out of the school, we can better tailor our responses to what the parent is concerned with.

Assemblywoman Neal:
How are the parents able to better prepare for this hearing? To me, it seems that the advantage is with the school district. Are you saying that the parents' ability to prepare is predetermined by them getting a good attorney?

Phoebe Redmond:
You have heard the testimony. The Individuals with Disabilities Education Act is one of the most complicated areas of law practice I have had the opportunity to participate in. I strongly recommend parents get an attorney to represent them in this process. That is the only way to level the playing field for parents.

Chair Bobzien:
I have two questions. The first one is for the Committee's understanding. I understand your practice area is primarily special education. For the school district council in other civil matters, are we facing a similar situation where the burden of proof is on the complainant, or are there situations where it is on the school district?

Phoebe Redmond:
I am not aware of any type of civil litigation that school districts handle that puts the responsibility on school districts, other than this proposed bill.

Chair Bobzien:
Knowing that school districts have operated under these two models and what we have heard about the court cases, you had made a statement that there was significant cost savings moving to the system where the burden of proof is on the parents. Could you elaborate on this? The difficulty is not fully understanding the scope of the issue that the school district has to face. Could you give us an idea as to what the cost savings was?

Phoebe Redmond:
Many of the cost savings since 2005 have been attributable to two things: the reauthorization of IDEA, and the inclusion of ADR as a major part of that reauthorization. That has saved the school district litigation costs. The *Schaffer* decision allows school districts to resolve and complete cases in a shorter amount of time. In 2011, it cost approximately $5,000 a day to defend a due process request. On average, in Nevada, a due process hearing lasts anywhere from four to eight days. Any number of days that are reduced from the defense and presentation of a due process hearing reduces the costs for school districts. The *Schaffer* decision allows school districts to target issues the parent raises. Financially, it reduces the cost per day. More significantly, it allows teachers and service providers to remain in the classroom instead of waiting outside a hearing room to testify. By reducing the number of days in a hearing, it allows a reduction in cost for substitute teachers and providers that must be made while the regular teachers are waiting to testify.

Assemblyman Anderson:
I would like to steer away from the lawsuit part of this. I feel like parents who have children with disabilities are probably some of the most engaged parents I have ever met. My mother is a special education teacher and she tells me that the parents who have kids with disabilities are always more engaged. If the districts are making sure to take time with the parents and explain what the school is doing, they should not be close to getting a due process hearing. If the school district and parent get to that point, disabilities law is extremely complicated. How can we ask parents who are already paying a lot of money for their child with a disability to shoulder a burden that is already expensive for the school district?

I thank God that we have agencies like the Legal Aid Center of Southern Nevada that does amazing work throughout Las Vegas and many areas. I feel like we are focusing too much on what is going to happen if we get a lawsuit. I agree with my colleague from District 7 who said CCSD has all the information. If the parent and school district get the due process hearing, the parent is without recourse. How is he supposed to prove something when he has no clue about what is going on?

Phoebe Redmond:
My only response is that the due process hearing is litigation, and litigation has a cost. As far as the district's presentation of its case, the district already has the burden of proof to substantively move forward because it is mandated by *Rowley*.

Chair Bobzien:
Are there any other questions for Ms. Redmond? [There were none.]

Randy A. Drake, Chief General Counsel, Office of the General Counsel, Washoe County School District:
Ms. Redmond is a special education specialist. She has a lot of experience in the intricacies of due process hearings and what leads to the hearings and what happens at the hearings. I do not have this experience. I have been the Chief General Counsel for Washoe County School District (WCSD) for four years, and I specialize in defending the District on civil claims, not special education-related claims. I also advise the WCSD Board of Trustees, the Superintendent, the administration, the principals, and staff. Instead of focusing on the intricacies of due process hearings, I wanted to give you my perspective on what the current law is, and what this statute seeks to do to the current law. I hope to clear up some confusion of what the previous law has been, and what it has become.

At the outset of this hearing, A.B. 318 was introduced as seeking to change the burden of persuasion from parents to the school districts. I do not believe that is accurate. It is seeking to change the burden of persuasion from the party seeking relief to the school district in all cases. While it is true that parents are usually the ones bringing the due process claims, therefore, the party seeking relief, the school district does so as well. As recognized by Justice O'Connor, who wrote the majority opinion in *Schaffer v. Weast*: "School districts may also seek such hearings, as Congress clarified in the 2004 amendments. . . .They may do so, for example, if they wish to change an existing IEP but the parents do not consent, or if parents refuse to allow their child to be evaluated." In those instances, the school district is left with no choice but to file the due process claim under IDEA. Washoe County School District filed a due process claim earlier this school year, and the burden of proof was properly on the school district because it was the party seeking relief.

There has been discussion about 17 years prior to 2005, and prior to the *Schaffer* decision, where the burden was on the school districts. In 2005, the U.S. Supreme Court changed that. The sense I get is that testimony created a belief that that was nationwide. It is not accurate to say that for the 17 years prior to 2005, school districts throughout the country had the burden of persuasion, and in 2005, it changed.

I have provided some information and research on the Supreme Court cases (Exhibit H). The Ninth Circuit Court of Appeals recognized that the school districts had the burden of persuasion. Nevada is in the Ninth Circuit so that law was controlled. There were other circuits that had held that the party

seeking relief had the burden of persuasion, so, it was a split throughout the country as to who had the burden of persuasion. There were at least 17 states prior to 2005 that had always held that the party seeking relief had the burden of persuasion.

Mr. Ivie previously stated that the Supreme Court left the door open as to whether or not a statute can change the 2005 holding in *Schaffer*. I respectfully disagree with that opinion, and here is why: the Supreme Court specifically declined to address that issue. Justice O'Connor, in the majority opinion stated, "We therefore decline to address it." [Read from (Exhibit H).] Assembly Bill 318 is seeking to insert statutory language in the *Nevada Revised Statutes* that, according to Justice O'Connor and *Schaffer*, would be contrary to the congressional intent when IDEA was enacted.

There has been a lot of discussion about advantages the school districts have in these proceedings. I am not going to sit here and say that resources are not placed within the school districts. However, I believe that Congress has attempted to deal with this, and Justice O'Connor has recognized that. I want to read more from Justice O'Connor regarding these procedural safeguards. [Continued to read from (Exhibit H).]

In conclusion, this law seeks to change the burden of persuasion from the party seeking relief to the school district. Justice O'Connor found that doing so would essentially seek changing the law to assume that every IEP is invalid unless the school demonstrates otherwise. For example, if an IEP is instituted and a due process hearing comes about, the burden of persuasion is on the school district. If that is the case, then every IEP is assumed invalid. That is why the burden of persuasion typically lies with the party seeking relief because you are not seeking to prove a negative.

Assemblywoman Dondero Loop:
There are other states that are following this model. Do we have any information on how it is working for other states?

Randy Drake:
Following which model? And following what this statute seeks to do?

Assemblywoman Dondero Loop:
Yes. And the model that is being followed now.

Randy Drake:
The states that have statutes similar in structure to what A.B. 318 seeks to do are Alabama, Alaska, Connecticut, Washington D.C., Delaware, Georgia, Illinois,

Kentucky, Minnesota, and West Virginia. I do not have information about how it is working compared to how it used to work.

Assemblyman Stewart:
In your opinion, is this bill in contradiction to what Justice O'Connor intended in her decision?

Randy Drake:
The statute is contrary to what Justice O'Connor stated was Congress's intent when it enacted IDEA.

Assemblyman Stewart:
I think that is what I said. Was there a change in the litigation from 2005 to the present?

Randy Drake:
I have been at the School District since 2007. I do not think I can accurately respond to that.

Assemblywoman Flores:
In listening to all of this testimony, it comes down to the question of whether there is an imbalance of advantage. In a criminal case, the state has to prove its case and satisfy each element because the burden of proof is on the state. The defendant has access to a public defender or counsel in one way or another. In a civil case, there is an argument to be made about requirements that pleadings should be more substantive. Even in a civil case, the burden of proof is still on the person defending his case. In this situation, it comes down to whether or not the person seeking relief has access to legal counsel and has access to someone who can satisfy that burden of proof.

Oftentimes, you are dealing with families who have kids with disabilities, and the last thing they are thinking about is obtaining counsel. There is a lack of attorneys doing pro bono work in this area. Once the burden of proof is satisfied, it goes to the other party to prove the substantive claim. It comes down to the issue of imbalance of advantage.

Assemblywoman Diaz:
Prior to the United States Supreme Court ruling you are referencing, was the burden of proof on the district in the State of Nevada?

Randy Drake:
Yes. Prior to the *Schaffer* decision in 2005, Nevada was following Ninth Circuit law, which was putting the burden of persuasion on the school districts.

Assemblywoman Diaz:
If the burden of persuasion was previously placed on our school districts, why would it be difficult to go back to that same position? I see both sides of the issue. I see the school districts' perspective, as well as the parents' perspective, especially working at an at-risk, lower socioeconomic threshold school. It is difficult for the parent to seek representation and ensure that his child is getting the best. I know the school districts are doing what is best for children, so, why would it be difficult to prove that for a parent, especially since there is mediation and conversation?

Randy Drake:
That could be a long conversion. I do not have a lengthy history handling due process cases at the school district level. In general, I can tell you this is an increasingly busy area of law with an increasing amount of resources being expended on both sides.

Assemblyman Hansen:
Are there any other cases involved in the school district where the burden of proof is on the district? Normally, the burden of proof is always on the challenger. Is that right?

Randy Drake:
In some cases, the school district is the plaintiff—not often—but sometimes. And when the district is the plaintiff, it has the burden of proof.

Assemblyman Hansen:
When WCSD is the defendant, is there ever a case where it has the burden of proof?

Randy Drake:
No.

[Chair Bobzien left the room. Assemblywoman Dondero Loop assumed the Chair.]

Vice Chair Dondero Loop:
Are there any other questions from the Committee?

Assemblywoman Neal:
In the *Schaffer* case, the court said the party seeking relief has the burden of proof substantively. Procedurally, the court felt that the state organized its hearings to give parents sufficient time to review the IEP or teacher recommendations, and then they would rebut.

Within the state of Nevada, how are the hearings organized? Are they set up in the same manner as all the factors recited in *Schaffer* under the procedural rule afforded to the parents?

Randy Drake:
As previously indicated by other testimony, due process hearings are a culmination of many meetings, hours, attempts at resolution, and alternative dispute resolution (ADR). Within that lengthy process involving hours of work by staff, parents, and advocates, information is exchanged from the outset and discussed endlessly prior to the due process hearing. There is no new information at the due process hearing. The length of the process and how much work goes into the resolution process between both parties ensures procedural safeguards. There has to be information exchanged and provided by the school district to the other party. It is required under the Individuals with Disabilities Education Act (IDEA). If that is not done, then the school district will lose the due process hearing, and will have to pay for it. That is an incentive to provide all the procedural safeguards you are talking about.

Assemblywoman Neal:
This is what I understand. For example, say there is a special education teacher who has her student's IEP. The student is not necessarily following it; she is not doing her 50 minutes of reading or her 30 minutes of math. When it comes time for the due process hearing, the parent is supposed to come in, reevaluate time, and figure out if there are any changes. All of sudden he starts scrabbling trying to get information and paperwork together. At that time, nobody knows that the IEP was not followed. When it comes down to the issue of the parent accusing the teacher about the IEP, there is a question about growth.

This process is not helping a parent solve the problem because the district is going to defend the school. The teacher is going to defend herself. What about the parent? How does he prove he failed to do the IEP? I know what is in the law, but that does not mean the teacher did her job or what she is required to do. Usually, that evokes the due process hearing in some cases.

Randy Drake:
The only way I can respond to that is the ADR processes and the IEP meetings are designed to address and fix those issues before a due process hearing occurs. Again, I am not here to testify about the intricacies of a due process hearing. I do not want to go down a road that I may not know enough about.

Vice Chair Dondero Loop:
Are there additional questions from the Committee?

Assemblyman Stewart:
I have a comment. The IEP might say if the teacher does "X," then the student will do "Y." There is still responsibility on the part of the student and the parent to actually do it. Oftentimes, this does not happen.

Assemblyman Hansen:
If the burden of proof shifted to the school district, would the parents in a due process hearing have to hire an attorney and go through the normal process of accruing witnesses? Does this bill relieve them of any kind of expense?

Randy Drake:
The parents would have to go through the process of seeking representation to assist them at the due process hearing.

Vice Chair Dondero Loop:
Are there any additional questions? [There were none.] Is there anyone in opposition?

Sharla Hales, Legislative Co-chair, Nevada Association of School Boards:
I would like to comment on some of things that have already been stated. One of you asked if the school district is doing what is best for children; why is it difficult for districts to have this change? Here is how I understand it: with this change, the district has to come in and prove that they have done everything right for this particular student. They must prove that all of the educational programs for this student have been absolutely correct in all regards. When the parent retains the burden of proof, the parent comes in and says, "This is what you are doing wrong." The school district can respond to that narrow issue. Keeping the law as is under *Schaffer* narrows the issues and makes the whole process more efficient.

There have been a lot of side issues about whether or not the parent needs to engage an attorney with or without the change in law. What this law means is that the school district does not have to come in and present every aspect of the student's educational program. It can solely respond to those things that the parent feels have not been done correctly in order to offer free and appropriate public education (FAPE).

In the State of Nevada, school board members understand their moral and legal obligation to provide FAPE to students who are protected by IDEA. They affirm their commitment to do this. Whether or not this bill passes, school districts will continue their efforts to provide every student with FAPE covered by IDEA. In due process hearings, school districts will still put on a case in every regard to show that this objective has been achieved. School board members and

educators have an interest in making due process hearings efficient. By spending less money on the hearing itself, by narrowing the issues, and by having a focused dispute, that money can be used to educate students and not wasted on litigating unfocused issues. That is why *Schaffer* says the ordinary rule is the person bringing the complaint has to explain what he is complaining about. The defense comes in and defends on narrow issues.

In emphasizing the efficiencies that come with this ordinary rule of placing the burden of proof on the complainant, the U.S. Supreme Court noted that Congress has repeatedly amended the Act in order to enhance such efficiencies. The Court quoted IDEA and said, "Teachers, schools, local education agencies, and States should be relieved of irrelevant and unnecessary paperwork burdens that do not lead to improved educational outcomes." Placing the burden of proof on schools would create just such irrelevant and unnecessary paperwork because the schools would have to present all parts of the student's educational program, not just the parts that deal with the parents' complaints.

I agree with Mr. Drake that the Court did not hold that states may make their own designation on the burden of proof in due process cases. It specifically said, "We do not make that decision." It is, at best, uncertain whether state law, contrary to *Schaffer*, such as that proposed in A.B. 318 would actually be upheld if that decision came before the Court again. With those comments, I urge you not to pass this bill. It would not help parents in the way the bill says it will. Changing the law is not going to address the issues discussed by the parents who testified today. It is going to make due process hearings lengthier and cover a lot of irrelevancies.

Assemblywoman Flores:
If it were that simple in that all you have to say is, "Hey, these things are not being done," and go through the process, then I could see how that matters, but clearly, that is not how it works. The other thing you said is the school district has to prove everything has been done correctly. I do not have any kids, but I would imagine if I had children, or even a special needs child, I would want the school district to prove to me that everything is done correctly. I do not think that is an unreasonable request.

There were statements made about congressional intent in U.S. Supreme Court holdings. What about the other states that are already doing this? Are you saying that they are now in conflict, and the only reason they are not in conflict is because there has not been litigation?

Sharla Hales:
I am saying that if that question came before the Supreme Court, it is not at all clear if the school districts have the burden of proof. Justice O'Connor clearly says, "We do not decide that." They do not say it is up to the individual states.

Assemblywoman Flores:
They have not explicitly said that we cannot also?

Sharla Hales:
That is correct. It is unclear.

Vice Chair Dondero Loop:
Are there any other questions? [There were none.] Is there anyone else in opposition? [There was no one.] Is there anyone neutral?

Ellen Richardson-Adams, Health Program Manager, Nevada Early Intervention Services Southern Region, Health Division, Department of Health and Human Services:
This bill may have some unintended consequences for the Early Intervention Programs operated by the Nevada State Health Division. Nevada's Part C, IDEA Office, under the Aging and Disability Services Division, had adopted Part B due process procedures for Early Intervention Programs serving eligible Part C IDEA children. [Continued to read from written testimony (Exhibit I).]

Vice Chair Dondero Loop:
Are there any questions from the Committee? [There were none.] Mrs. Mastroluca, would you like to follow up?

Assemblywoman Mastroluca:
I wanted to summarize and give the Committee a few statistics. This bill is in the best interests of a child. That is what it comes down to; what is the best interest of every student within the State of Nevada and his ability to get a fair education? The Individuals with Disabilities Education Act is a main federal statute that governs the education of students with disabilities. When a dispute arises between the parent of a student with disabilities and a school district, there is an administrative hearing process provided for in IDEA. For 17 years, the burden of proof and due process hearings were on the public agency for the state of Nevada.

As Mr. Ivie stated, in 2005, the U.S. Supreme Court decision held that the party challenging the educational decision made on behalf of the child with disabilities bears the burden of proof in an administrative hearing. This is almost always the parent. There are six states that currently have statutes placing the burden

of proof on the school district. I have examples from two states: New Jersey and New York. In New Jersey, there were 77 due process cases. When the burden of proof was shifted, the number went down to 63 cases. In 2010, there were 29 cases. In New York in 2005, there were 1,054 cases. The burden of proof was shifted in 2008, and it went down to 550. In 2009-2010, the cases went down to 452. In Nevada, before 2005, we averaged about five cases per year. It is interesting to look at who won those cases. In 2002, the school districts won four; the parents won one. In 2003, it was six for the district and one for the parent. In 2004, the school districts won four, and the parents won two. Since 2006, not one parent has won a due process case in Nevada.

There are two large school districts in Nevada; both employ and contract the majority of experts and trained personnel in special education areas. This puts parents who have children with disabilities at an extreme disadvantage in finding equally qualified local experts willing to testify against school districts, and, accordingly, at a disadvantage in getting their children the services they need.

Many of the families with children with disabilities are low-income families who lack the resources to obtain legal representation. Because of that, there are few legal resources available to help parents file due process claims. I ask for your support in this bill so we can ensure that all children receive a fair education in Nevada.

[Assemblyman Bobzien returned and reassumed the Chair.]

Chair Bobzien:
Thank you. I will now close the hearing on A.B. 318. I would like to open the hearing on Assembly Bill 395. I would like to welcome to the table our Vice Chair Dondero Loop to the table.

Assembly Bill 395: Creates a separate category of licensure to teach special education. (BDR 34-808)

Assemblywoman Marilyn Dondero Loop, Clark County Assembly District No. 5:
I am here to present Assembly Bill 395. The purpose of this measure is to create a separate category of licensure to teach special education. I would like to open my testimony by providing members of the Committee with background information explaining how A.B. 395 has come about. [Continued to read from written testimony (Exhibit J).]

Section 1 of the bill simply creates a distinct category for licensure to teach special education in Nevada. Although the work of the Commission on Professional Standards in Education in identifying best practices in other states is ongoing, it is clear that this is a necessary and useful step in the reform of the licensure process. I would like to ask if Dr. Keith Rheault can come forward, as he has an amendment that is important to this bill.

Chair Bobzien:
Welcome, Dr. Rheault.

Keith Rheault, Ph.D., Superintendent of Public Instruction, Department of Education:
We support A.B. 395. I think a lot of individuals might think we have a special education license. On page 2 of the bill, under subsection 5, we have a special license that includes everything from counselors, school nurses, and psychologists to driver's education and technology. We give a special license with 14 different endorsements. Currently, that is how we license special education teachers. After reading the bill and getting questions on what the intent of the bill was, the intent is to primarily recognize that we have a special education license—not a special license—that we could easily match with other states. The real intent is to be able to reciprocally license special education teachers brought in from out of state. To me, the in-state education is not a problem because we accredit all the teacher education programs in the state. Anyone who finishes the program automatically qualifies for a special education license. We are looking at accommodating the 65 percent of teachers we bring from out of state to license them as efficiently as possible.

My amendment (Exhibit K) is fairly simple. In NRS 391.032, under subsection 1 (b), it directs the Commission to "Adopt regulations which provide for the reciprocal licensure of educational personnel . . . ." I added this section to ensure that the Commission went back and reviewed the reciprocal licensure to make sure they address the new license for special education teachers. I think it can be cleaned up. For example, when you look at the licensure across the 50 states, it is night and day. The state of Montana has one license for special education, no matter what is being taught. In other states, similar to Nevada, there are 14 specific endorsements ranging from autism to hearing to visual. With this bill passing, we would be somewhere in between, providing a little flexibility for special education licensure while still making sure there are qualified teachers for special education students, who are harder to teach, but not limiting us from being able to license teachers coming in from out of state.

Chair Bobzien:
Are there any questions from the Committee?

Assemblyman Stewart:
If a special education teacher had the proper endorsements, would he qualify for the new special education license?

Keith Rheault:
If this bill passes, all of the current special education teachers that hold an endorsement would probably be converted automatically to a special education license instead of a special license. We would do that internally.

Assemblyman Stewart:
Do teachers who work with the Gifted and Talented Education program (GATE) have to have endorsements?

Keith Rheault:
Yes, they do. It is a special license with a gifted and talented endorsement.

Assemblyman Stewart:
So, this would carry over as well then?

Keith Rheault:
Right now, the GATE endorsement is under the special license. By including it in the change over, it would be included under a special education license.

Assemblywoman Diaz:
As it is right now, if a teacher has a regular license and he receives the coursework for GATE to teach in that area, then he adds the endorsement. I do not understand the change over. How will it change to a special education license? Could you explain that to me?

Keith Rheault:
I may need to follow up with you. Currently, for example, you can hold an elementary license, which is one category, and a secondary license with an endorsement. Even though you would have one piece of paper, that is your teaching license; we would have both of them listed on the license issued. It would read special education license and elementary education license.

Assemblywoman Diaz:
It will say special education, whether it is gifted and talented or special education, is that correct?

Keith Rheault:
By this change over, it would have to say special education license. If you held some other license, technically, it would be an elementary or secondary license.

All of that would be worded on the license. I do not know at this point. The teacher would qualify for both licenses if eligible to receive them.

Chair Bobzien:
Are there any additional questions? [There were none.]

Nicole Rourke, Executive Director, Government Affairs, Community and Government Relations, Clark County School District:
Mr. Yates will give the Clark County School District's (CCSD) testimony in support.

Andre Yates, Director, Licensed Personnel, Licensure and Recruitment Services, Human Resources Division, Clark County School District:
I am here to speak on behalf of CCSD in support of A.B. 395. I believe it would improve our recruitment efforts in terms of reciprocity. It is important to note the distinction between the special license and the special education license. Currently, they are all lumped together. This bill would eliminate confusion. We worked at the commission level on special education licensure in trying to consolidate and eliminate endorsements and take down some barriers in terms of requirements in reference to autism, et cetera.

Chair Bobzien:
Are there any questions from the Committee?

Assemblyman Stewart:
Would you agree that the GATE program needs to be included in this bill?

Andre Yates:
Yes. I would support that. The GATE program would fall under the purview of the special education section.

Assemblyman Stewart:
To me, it causes confusion.

Dotty Merrill, Executive Director, Nevada Association of School Boards:
On behalf of the Nevada Association of School Boards (NASB), we appreciate the efforts of Assemblywoman Dondero Loop and are in support of A.B. 395 and appreciate the efforts of. The NASB believes this bill will assist with the reciprocity for special education teachers coming to Nevada from out-of-state. Although we cannot speak to the very specific questions that have been asked by some members of the Committee, we think that, conceptually, this is an advantage that will benefit all 17 school districts.

Mary Pierczynski, representing Nevada Association of School Superintendents:
We would like to thank Assemblywoman Dondero Loop for bringing this bill forward. The Nevada Association of School Superintendents believes that this bill will help us in our recruitment efforts in the special education area. Special education is one of the toughest areas to recruit teachers. We find it especially difficult to recruit teachers in Nevada's rural areas. This bill will make it easier to access people coming in from out of state.

Craig Hulse, Director, Department of Government Affairs, Washoe County School District:
We support the bill for the exact same reasons already stated, and appreciate Assemblywoman Dondero Loop bringing it forward.

Craig Stevens, Director, Education Policy and Research, Nevada State Education Association:
We are in support of the bill. Anytime we can bring in more special education educators into the state, we certainly have to take advantage.

Chair Bobzien:
Are there any other questions? [There were none.] Madam Vice Chair, would you like to give closing remarks?

Assemblywoman Dondero Loop:
I would like to clarify that when you are a teacher in the GATE program, you are funded with special education funds. It may not seem that it is special education, but it is special education of those gifted and talented children. The primary reason for this bill is to make sure that we have qualified and certificated teachers in classrooms where currently there are substitutes.

Chair Bobzien:
I will close the hearing on A.B. 395. Is there any public comment? [There was none.]

The meeting is adjourned [at 5:12 p.m.].

RESPECTFULLY SUBMITTED:

_____
Janel Davis
Committee Secretary

APPROVED BY:

_____
Assemblyman David P. Bobzien, Chair

DATE: _____

EXHIBITS

Committee Name: Committee on Education

Date: April 4, 2011 **Time of Meeting: 3:19 p.m.**

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
A.B. 318	C	Gregory D. Ivie	Written Testimony
A.B. 318	D	Jeannie Richard	Written Testimony
A.B. 318	E	Sherida Devine	Written Testimony
A.B. 318	F	David Goldwater	Summary
A.B. 318	G	Phoebe V. Redmond	Written Testimony
A.B. 318	H	Randy Drake	Research
A.B. 318	I	Ellen Richardson-Adams	Written Testimony
A.B. 395	J	Marilyn Dondero Loop	Written Testimony
A.B. 395	K	Keith Rheault	Amendment