

# Special Education and the Burdens of Proof: The Legacy of Schaffer ex rel. Schaffer v. Weast

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Mr. Stellman and colleagues from his law firm, together with representatives of the National School Boards Association (NSBA), filed an amicus curiae brief for the NSBA in support of the respondent Montgomery County school division in the Schaffer Supreme Court case.

## Descriptive Context

### Introduction: The Traditional Burden of Proof

Even before the founding of our Republic, the common law tradition which was later adopted by the judicial system of the United States had adhered to the longstanding notion that the burden of proof in litigation falls on the party pressing the action, seeking change, and pursuing relief.<sup>1</sup> An individual filing a civil suit rightfully expects to be responsible for demonstrating to a finder of fact (be it judge or jury) each and every element of his or her case. If a school bus hits a pedestrian, the elements of the pedestrian's case – a duty of care, breach of that duty, causation, and damages – must each be proven by a preponderance of the affirmative evidence, or else the courts are bound to find for the school and/or the driver.<sup>2</sup>

As in litigation before the courts, administrative agencies have incorporated the same reasoning in evaluating evidence. Thus, unless expressly provided by law, the so-called “default” rule governing the burden of proof has been similarly applied in administrative proceedings, requiring the moving party or one asserting the affirmative of an issue to bear the burden of proof.<sup>3</sup> This principle was recently expressed by the Colorado Court of Appeals in *Velasquez v. Department of Higher Education*, “Except as otherwise provided by statute, the proponent of an order shall have the burden of proof in an administrative hearing. . . . The ‘proponent of an order’ is the person who brings forward a matter for litigation or action.”<sup>4</sup>

In the developing area of disability discrimination law, courts never questioned the continuing obligation of parties seeking to change the status quo or to obtain relief to bear the burden of proof.

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<sup>1</sup> 2 J. STRONG, MCCORMICK ON EVIDENCE § 337 oo, 509-511 (5<sup>th</sup> ed. 1999); 9 WIGMORE ON EVIDENCE § 2486 at 288 (CHADBOURN revised edition 1981). The party bearing the “burden of proof” in civil litigation must generally proffer evidence that “preponderates” over that evidence presented by the party that lacks such burden. One court defined “the term ‘preponderance’ in general usage” based upon a dictionary definition. *Campbell v. State*, 125 S.W.3d 1, 11 (Tex. App. 2002) (“See AMERICAN HERITAGE DICTIONARY 978 (2d ed.1991) (defining preponderance as “[s]uperiority in weight, quantity, power, or importance.”)).

In *Nommensen v. American Continental Insurance Company*, 223 Wis. 2d 129, 144, 619 N.W.2d 137, 144 (2000), the Wisconsin Court of Appeals best described both the concept of “burden of proof” and “preponderance of the evidence” as follows: “By preponderance of evidence is meant the evidence which possesses greater weight or convincing power; by burden of proof is meant the duty resting on the party having the affirmative of the issue to satisfy or convince the minds of the jury, by the preponderance of the evidence, of the truth of his contention.”

<sup>2</sup> See, e.g., *Evans v. Bossier Parrish School Board*, 903 So.2d 600, 604 (2005); *Hurd v. Williamsburg County*, 353 S.C. 596, 615, 579 S.E.2d 136, 146 (2003) (“The burden of proof is on the plaintiff to establish the negligence of the defendant.”)

<sup>3</sup> *Office of Workers’ Compensation Programs, Dep’t of Labor v. Greenwich Collieries*, 512 U.S. 267 (1994); 2 AM. JUR. 2D ADMINISTRATIVE LAW § 354 (2004).

<sup>4</sup> 93 P.3d 540, 542 (Colo. Ct. App. 2004).

Thus, persons seeking remedies and relief under the Rehabilitation Act of 1973,<sup>5</sup> which prohibits agencies (including public schools and universities) receiving federal funds from excluding disabled persons “from participation in,” being “denied the benefits of,” or being “subjected to discrimination under any program or activity,” are unquestionably expected to prove such discrimination by a preponderance of the evidence. Even though the statute makes no reference to the burden of proof, courts have presumed that in cases where an accommodation is requested of an educational institution, the burden of proof rests with the disabled plaintiff to show that the requested accommodation would meet the plaintiff’s “special needs.”<sup>6</sup>

Similarly, courts interpreting the Americans With Disabilities Act (“ADA”)<sup>7</sup> – which expanded Section 504’s prohibition against disability discrimination to include the private sector, and to specifically make unlawful, discrimination based upon disability in employment, public accommodations, and access to public services (including the courts,<sup>8</sup> health care,<sup>9</sup> and education<sup>10</sup>) – continued to apply the traditional burden of proof. Thus, in *Jackson v. City of Chicago*,<sup>11</sup> the Court of Appeals for the Seventh Circuit compelled a plaintiff seeking relief under the ADA to show: “(1) that she suffers from a disability as defined in the statutes; (2) that she is qualified to perform the essential functions of the job in question, with or without reasonable accommodation; and (3) that she has suffered an adverse employment action as a result of her disability.”<sup>12</sup>

## **Differing Perspectives**

### **The Individuals With Disabilities Act: A Different Burden of Proof?**

The Individuals With Disabilities Education Act (“IDEA”)<sup>13</sup> originated in the mid-1970’s as the Education of the Handicapped Act (“EHA”), and has since been frequently amended by Congress, most recently by the Individuals With Disabilities Education Improvement Act of 2004.<sup>14</sup> It provides for a variety of protections for students with disabilities from early childhood through age 21, including a guarantee that such children will receive a “free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living.”<sup>15</sup> To that end, parents of students with disabilities are afforded the opportunity to participate fully in the development of their children’s “individual educational program,” or “IEP.”<sup>16</sup>

Parents who dispute any aspect of their child’s education under the IDEA have the statutory right to insist upon a hearing conducted by an impartial hearing officer, the result of which is subject to review by the federal courts.<sup>17</sup> It is at these so-called “due process” hearings that parents have an opportunity

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<sup>5</sup> 29 U.S.C. § 794 (LexisNexis 2003).

<sup>6</sup> *Brennan v. Stewart*, 834 F.2d 1248, 1262 (5<sup>th</sup> Cir. 1988) (“On remand, it will be Mr. Brennan’s burden to demonstrate to the court some reasonable accommodation in these requirements which meets his special needs without sacrificing the integrity of the Board’s licensing program.”) See also *McGregor v. Louisiana State University*, 3 F.3d 850, 855 (5<sup>th</sup> Cir. 1993).

<sup>7</sup> 42 U.S.C. § 12101 *et seq.* (LexisNexis 2003).

<sup>8</sup> *Tennessee v. Lane*, 541 U.S. 509, 124 S.Ct. 1978 (2004).

<sup>9</sup> *Olmstead v. L.C. ex rel. Zimring*, 527 US 581, 119 S.Ct. 2176 (1999).

<sup>10</sup> *Constantine v. Rectors and Visitors of George Mason University*, 411 F.3d 474 (4<sup>th</sup> Cir. 2005).  
<sup>11</sup> 414 F.3d 806 (2005).

<sup>12</sup> *Id.* at 810.

<sup>13</sup> 20 U.S.C. §1400 *et seq.* (LexisNexis 2003).

<sup>14</sup> P.L. 108-446, which was signed into law by President Bush on December 3, 2004.

<sup>15</sup> 20 U.S.C. § 1401(d)(1)(A) (LexisNexis 2003).

<sup>16</sup> According to the statute, an “IEP” means “a written statement for each child with a disability that is developed, reviewed, and revised . . . and that includes” a variety of information, including, *inter alia*, the child’s “present levels of educational performance,” “a statement of measurable annual goals, including benchmarks or short-term objectives, related to meeting the child’s needs that result from the child’s disability.” 20 U.S.C. § 1414(d)(1)(A) (LexisNexis 2003).

<sup>17</sup> 20 U.S.C. § 1415 is captioned “Procedural Safeguards,” and contains detailed requirements to insure that disputes over special education services are addressed in a fair and impartial manner.

to challenge the validity of their child's IEP, classroom or program placement, the absence or intensity of related services offered their child,<sup>18</sup> the sufficiency of assistive technology, or a myriad of other issues. Each party to a due process hearing is entitled to present witnesses and evidence, including expert testimony,<sup>19</sup> and to cross-examine witnesses presented by the other side. If parents prevail in such proceedings, IDEA allows them to recover litigation costs, including reasonable attorneys' fees.

Like any other legal proceeding, an initial inquiry in an administrative proceeding brought pursuant to the IDEA is which party bears the burden of proof. The importance of this threshold determination was often overlooked, since due process hearing officers could generally make decisions based upon the overwhelming evidence presented by one side or the other in most hearings. It is only in those extremely close cases, where the evidence presented by both parties is virtually equal in weight,<sup>20</sup> that the burden of proof becomes critical in determining the outcome of the case. Yet it is in precisely this type of case that the Supreme Court was faced, for the first time, with determining what Congress intended in enacting the IDEA when it decided *Schaffer ex rel. Schaffer v. Weast*<sup>21</sup> ("Schaffer") on November 14, 2005.

The IDEA does not contain explicit authority for assigning the burden of proof to one party or another. Because the statute is silent, until the Supreme Court definitively resolved the question in *Schaffer* reviewing courts had resorted to various methods of statutory interpretation to discern Congressional intent on this critical question. Federal appeals courts reached different opinions, prompting the Supreme Court to step in and decide the question. In *Alamo Heights Independent School District v. State Board of Education*<sup>22</sup> one appellate court explained the rationale of those circuits that chose to apply the traditional burden of proof in IDEA cases, which tended to place the burden on parents challenging their children's IEP's or other actions by public school officials:

[The IDEA] "place[s] primary responsibility for formulating handicapped children's education in the hands of local school agencies in cooperation with each child's parent." The deference to the statutory scheme and the reliance it places on the expertise of local school authorities . . . [IDEA] creates a "presumption in favor of the educational placement established by a [student's IEP]," and "the party attacking its terms should bear the burden of showing why the educational setting established by the [IEP] is not appropriate."<sup>23</sup>

Accepting this reasoning were three other federal circuit courts of appeals, each of which concluded that the moving party (usually, but not always,<sup>24</sup> the parents of a special education student) bore the burden of proof to demonstrate that the IEP proposed by the school district was not reasonably

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<sup>18</sup> "Related services" which may be required based upon the needs of the child might include speech and language therapy, physical or occupational therapy, or psychological counseling.

<sup>19</sup> On January 6, 2006, the United States Supreme Court granted review of a case in which it will decide whether prevailing parents in due process proceedings initiated under the IDEA are entitled to recover the cost of expert witnesses in addition to attorneys' fees. *Arlington Central District Board of Education v. Murphy*, 402 F.3d 332 (2d Cir. 2005), cert. granted 126 S.Ct. 978 (2006).

<sup>20</sup> Such a virtual balance in the evidence presented at a legal proceeding has been characterized as "equipoise." *Jenkins v. Missouri*, 216 F.3d 720, 735, n.15 (8<sup>th</sup> Cir. 2000) ("[B]urden of proof is only an issue if the evidence stands in equipoise.") See also *Cates v. Morgan Portable Building Corp.*, 780 F.2d 683, 688 (7<sup>th</sup> Cir. 1985) ("Burden of proof is important when the evidence is in equipoise, or when no evidence is put in on an issue, or the case is tried to a jury, which may attach great significance to who has the burden of proof, not fully realizing (or accepting) that burden of proof should determine the outcome only when decision is balanced on the razor's edge.")

<sup>21</sup> 126 S.Ct. 528, 74 USLW 4009, 203 Ed. Law Rep. 29 (2005).

<sup>22</sup> 790 F.2d 1153, 1158 (5<sup>th</sup> Cir. 1986).

<sup>23</sup> 790 F.2d at 1158, quoting *Tatro v. State of Texas*, 703 F.2d 823 (5<sup>th</sup> Cir. 1983), *aff'd in part, rev'd in part sub nom. Irving Independent School District v. Tatro*, 486 U.S. 883, 104 S.Ct. 1371 (1984).

<sup>24</sup> School districts are not without the ability to initiate due process hearings where, for instance, they seek a determination as to the appropriateness of their designated placement of a student in the face of the unilateral withdrawal of that student by his parents from public school and placement in a private school, with a concomitant demand for tuition reimbursement. See, e.g., *Krista P. v. Manhattan School District*, 255 F.Supp.2d 873 (N.D. Ill. 2003); *Yates v. Charles County Board of Education*, 212 F.Supp.2d 470 (D. Md. 2002).

calculated to enable the disabled child to receive educational benefit.<sup>25</sup> These circuits applied what the Fourth Circuit in *Schaffer* characterized as “the traditional burden of proof that requires the parents challenging an IEP to establish both its procedural and substantive deficiencies.”<sup>26</sup> In other words, the courts in those circuits insisted that the burden of proof be placed upon the parents to demonstrate that the IEP proposed by the school district was not reasonably calculated to enable their child to receive educational benefits.<sup>27</sup>

The reasoning of those circuits that, pre-*Schaffer*, stood in disagreement with this so-called “traditional” or “default” burden of proof<sup>28</sup> was best expressed by the U.S. Court of Appeals for the Third Circuit as follows:

In practical terms, the school has an advantage when a dispute arises under the Act: the school has better access to the relevant information, greater control over the potentially more persuasive witnesses (those who have been directly involved with the child’s education), and greater overall educational expertise than the parents.<sup>29</sup>

## **Court Decision**

### ***Schaffer v. Weast*: The Supreme Court Decides the Issue**

#### **The Facts**

Brian Schaffer was diagnosed with learning disabilities and speech-language impairments from an early age. From pre-kindergarten until middle school he attended private schools. At the urging of private school officials who believed that Brian needed a school better able to accommodate his needs, his parents contacted the Montgomery County Public Schools (“MCPS”) seeking a public school placement for Brian for seventh grade. MCPS evaluated Brian, an IEP team convened, and an initial IEP offering Brian a placement in one of two public middle schools was presented to Brian’s parents. Both proposed placements, as well as the IEP, were rejected, the Schaffers insisting that Brian needed more intensive services.

A due process hearing was conducted before an Administrative Law Judge (“ALJ”), who “deemed the evidence close, held that the parents bore the burden of persuasion, and ruled in favor of the school district.”<sup>30</sup> A federal district judge reversed,<sup>31</sup> ruling that the burden of proof should have been placed

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<sup>25</sup> *Salley v. St. Tammany Parish School Board*, 57 F.3d 458, 467 (5th Cir. 1995); *Tatro*, 703 F.2d at 830 (“[B]ecause the IEP is jointly developed by the school district and the parents, fairness requires that the party attacking its terms should bear the burden of showing why the educational setting established by the IEP is not appropriate.”); *Doe v. Board of Education of Tullahoma City Schools*, 9 F.3d 455, 458 (6<sup>th</sup> Cir. 1993); *Johnson v. Independent School District No. 4*, 921 F.2d 1022 (10<sup>th</sup> Cir. 1990); and *Weast v. Schaffer ex rel. Schaffer*, 377 F.3d 449, 452 (4<sup>th</sup> Cir. 2004), which was affirmed by the Supreme Court, thus deciding the issue definitively.

<sup>26</sup> *Schaffer*, 377 F.3d at 452, quoting *Cordrey v. Euckert*, 917 F.2d 1460, 1466 (6<sup>th</sup> Cir. 1990).

<sup>27</sup> This is the traditional test of compliance with the IDEA. *Board of Education of Hendrick Hudson Central District v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982).

<sup>28</sup> Those courts included the First Circuit (*L.T. ex rel. N.B. v. Warwick School Commissioners*, 361 F.3d 80, 82, n.1 (1<sup>st</sup> Cir. 2004)), Second Circuit (*Walczak v. Florida Union Free School District*, 142 F.3d 119, 122 (2d Cir. 1998)), Seventh Circuit (*Beth B. v. Van Clay*, 282 F.3d 493, 496 (7<sup>th</sup> Cir.), cert. denied 537 U.S. 948 (2002)), Eighth Circuit (*Blackmon v. Springfiled R-XII School District*, 198 F.3d 648 (8<sup>th</sup> Cir. 1999)), and Ninth Circuit Court of Appeals (*Clyde K. v. Puyallup School District No. 3*, 35 F.3d 1396, 1398 (9<sup>th</sup> Cir. 1994)). Curiously, the First Circuit’s decision in *L.T.*, which decreed an inflexible assignment of the burden of proof to the school district in all due process hearings, made no reference to its earlier, contrary ruling in *Doe v. Brookline School Committee*, 722 F.2d 910, 919 (1<sup>st</sup> Cir. 1983) (“As with issues of funding interim placement, . . . the party seeking a modification of the status quo should bear the burden of proof.”)

<sup>29</sup> *Oberti v. Board of Education of Clementon, New Jersey*, 995 F.2d 1204, 1219 (3d Cir. 1993).

<sup>30</sup> *Schaffer ex rel. Schaffer v. Weast*, \_\_\_ U.S. \_\_\_, 126 S.Ct. 528, 533 (2005).

<sup>31</sup> *Brian S. v. Vance*, 86 F.Supp.2d 538 (D. Md. 2000).

upon the school district. Meanwhile, MCPS offered Brian placement in a high school with a special learning center, which the Schaffers accepted, but the case continued while they sought tuition reimbursement for the years in which they continued to send Brian to private school while they contested the initial IEP. After applying the shifted burden of proof to the same evidence on remand from the federal district court, the ALJ reversed himself and found for the parents. On appeal a divided Fourth Circuit Court of Appeals reversed. Writing for the majority, Judge Blane Michael concluded that there was no reason to “depart from the normal rule of allocating the burden to the party seeking relief.”<sup>32</sup> The Supreme Court granted *certiorari* to decide the following question: “At an administrative hearing assessing the appropriateness of an IEP, which party bears the burden of persuasion?”<sup>33</sup>

### The Position of the Parties before the Court

On appeal, the Schaffers, joined by numerous “friends of the court” that included disability advocacy groups and a number of State Attorneys General, urged the Supreme Court to reverse the Fourth Circuit’s decision, insisting that “[t]he purposes of the IDEA are best served by placing the burden on the school district.” The Schaffers argued to the Court that in the absence of statutory guidance governing the burden of proof, the remedial purposes of the IDEA should control the issue. Since parents are generally far less knowledgeable, have fewer economic and educational resources, and are less likely to understand their child’s needs to the same degree as educational experts employed by the school system, school officials should be compelled to prove the validity of an IEP or any other educational decision when challenged in a due process hearing.<sup>34</sup>

The Schaffers advanced the further notion that unlike most remedial legislation that merely prohibited discrimination, the IDEA had created affirmative obligations upon public schools to provide students with special education services. The requirements faced by school districts under IDEA, they argued, were tantamount to the racial integration of public schools compelled by *Brown v. Board of Education*,<sup>35</sup> and thus the burden of demonstrating compliance with the law should remain at all times on the districts. Assigning the burden of proof to school districts would further the purposes of IDEA, it was suggested, for it would encourage schools to invest more resources in complying with the law and preparing adequate IEP’s. In effect, this argument would compel the courts to treat every IEP as presumptively *invalid* until proven otherwise.

The most persuasive argument advanced by the Schaffers was that the so-called “default rule” which would assign the burden of proof to parents challenging an IEP, lacked requisite fairness since no litigant should be expected to establish facts which are peculiarly within the knowledge of the other party. As the Schaffers argued in their brief to the Supreme Court:

[E]ven when parents are sophisticated, school districts remain uniquely positioned to collect and evaluate information about how well their programs have worked for students having similar disabilities. If they are developed and presented, such professional program assessments can be very useful to a hearing officer in determining whether a proposed placement or a proposed level of services is appropriate for a particular child. On the other hand, parents rarely have experience with IEP’s outside their own family and, because of privacy concerns, cannot realistically obtain information about whether the school district

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<sup>32</sup> *Weast v. Schaffer ex rel. Schaffer*, 377 F.3d 449, 453 (4<sup>th</sup> Cir. 2004).

<sup>33</sup> The terms “burden of proof” and “burden of persuasion” are used interchangeably by the courts. *O’Neal v. McAninch*, 513 U.S. 432, 446, 115 S.Ct. 992, 999 (1995) (“Because the plaintiff seeks to change the present state of affairs, he ‘naturally should be expected to bear the risk of failure of proof or persuasion.’ 2 J. STRONG, MCCORMICK ON EVIDENCE § 337, p. 428 (4<sup>th</sup> ed. 1992).”)

<sup>34</sup> In oral argument before the Supreme Court, Justice Anthony Kennedy strongly challenged the Schaffers’ contention that school districts have more data and expertise about particular children than those children’s own parents, suggesting that such a position “cuts against” that of the the parents because it would entitle the districts to the presumption of governmental regularity derived from such greater knowledge.

<sup>35</sup> 347 U.S. 483 (1954).

has succeeded with other children to whom similar programs were provided. (*Petitioner's Brief*, filed April 29, 2005, at p. 42.)

In response, MCPS argued that Congress recognized the relative ability of parents and school districts to thoroughly and effectively present their respective cases in due process hearings, but evened out their differences by providing parents with a variety of protections, including access to their children's school records and test results, the right to insist that school officials pay for independent testing, and the right to participate in every step of the development of an IEP. Moreover, MCPS urged, the decisions of school district officials, including the content of IEP's, are entitled to a presumption of correctness based on the expertise and presumed good faith of public servants committed to the successful education of all children.

Perhaps the most persuasive argument presented by MCPS before the Supreme Court, however, was that shifting the burden of proof to school districts would create a presumption that the IEP (or, for that matter, any other school-based decision affecting a disabled child) was invalid, requiring affirmative evidence of its legitimacy. MCPS suggested that parents of special education children could request a due process hearing in the hopes that the school district might miss proving that it complied with the IDEA in each and every respect. In turn, teachers and other school-based professionals would face every due process demand with the prospect that they might somehow fail to satisfy a hearing officer as to the validity of each and every component of an IEP that they helped develop in good faith. It would, therefore, undermine the notion that IEP development is to be a collaborative effort between parents and school officials, making the process more adversarial as school districts are repeatedly challenged to prove their "compliance with the IDEA"<sup>36</sup> – an amorphous and costly task requiring days of formal hearings every time an IEP is challenged.

There are over 11,000 requests for due process hearings every year in the U.S.,<sup>37</sup> resulting in an annual cost to public school systems of over \$146 million for due process hearings, mediation, and litigation arising under the IDEA.<sup>38</sup> If each due process hearing were to trigger an obligation by school districts to defend the validity of every component of an IEP (some of which contain scores of measurable goals and objectives in a variety of disciplines, including in many cases behavior intervention plans), special educators, related service providers, and school administrators would spend countless hours preparing for and attending hearings, it was argued to the Court. And a failure to support even a single aspect of a sophisticated IEP could well result in a costly order to expend public funds on private tuition reimbursement or other unneeded services based upon parents' demands.<sup>39</sup>

### **The Supreme Court's Ruling**

In a 6-2 decision issued on November 14, 2005, the United States Supreme Court affirmed the decision of the Fourth Circuit Court of Appeals, holding that parents of special education students disputing their children's IEP's had the burden of proving why such IEP's were inadequate. Writing for the majority, Justice Sandra Day O'Connor ruled that "[a]bsent some reason to believe that Congress intended otherwise, we will conclude that the burden of persuasion lies where it usually falls, upon the

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<sup>36</sup> This was the burden of proof which at least one Circuit Court of Appeals placed on school districts. *Clyde K. Puyallup School District No. 3*, *supra*, 35 F.3d at 1398.

<sup>37</sup> Source: GAO Report No. GAO-03-897, "Special Education: Numbers of Formal Disputes Are Generally Low and States Are Using Mediation and Other Strategies to Resolve Conflicts" (Sept. 2003). This same report indicated that in the year 2000 approximately 3,000 of those requests resulted in actual due process hearings.

<sup>38</sup> SPECIAL EDUCATION EXPENDITURE PROJECT, AMERICAN INSTITUTE OF RESEARCH, WHAT ARE WE SPENDING ON PROCEDURAL SAFEGUARDS IN SPECIAL EDUCATION, 1999-2000? (May 2003), at 5, found at <http://www.csefair.org/publications/seep/national/AdvRpt1.PDF> (last accessed Jan. 28, 2006).

<sup>39</sup> During oral argument before the Supreme Court, the attorney for the Schaffers suggested that at worst an order requiring a school system to provide services that were not truly necessary would cause little or no harm, in comparison to the long-term harm that a failure to provide adequate educational programs could create for a disabled child. Justice Antonin Scalia immediately repudiated this argument, remarking that such expenditures were not funded with "play money" but, rather, with hard earned tax dollars that could be better spent.

party seeking relief.”<sup>40</sup> Acknowledging that school districts have a natural advantage in information and expertise over parents, nonetheless the Court reasoned that Congress had addressed this problem by requiring school districts to offer parents comprehensive procedural protections, including an obligation to share information with them.

Expressing a preference that federal funds be dedicated to “educational services” rather than “litigation and administrative expenditures,” the Supreme Court majority acknowledged that “[l]itigating a due process complaint is an expensive affair, costing schools approximately \$8,000 - \$12,000 per hearing.”<sup>41</sup> “Petitioners in effect ask this Court to assume that every IEP is invalid until the school district demonstrates that it is not,”<sup>42</sup> Justice O’Connor observed, but the statute was constructed so as to “guarantee[ ] parents and children the procedural protections of the Act . . . protections [that] ensure that the school bears no unique informational advantage.”<sup>43</sup>

In a concurring opinion, Justice John Paul Stevens added an enthusiastic endorsement of what he called the presumption “that public school officials are properly performing their difficult responsibilities under this important statute.”<sup>44</sup> This language explicitly repudiated the notion that decisions made by school personnel, including proposed IEP’s, should be inherently suspect unless proven valid.

Justices Ruth Bader Ginsburg and Stephen Breyer each filed separate dissenting opinions. Expressing a powerful empathy with parents of children with special needs, Justice Ginsburg advanced the notion that “fairness” required placing the burden of proof on school districts in due process hearings. She believed that unlike typical civil rights legislation in which the complaining party must allege and prove discrimination in order to prevail, the IDEA “casts an affirmative, beneficiary-specific obligation on providers of public education;” thus, schools must be “properly called upon to demonstrate [the] adequacy” of a child’s IEP.<sup>45</sup> Expressing a cynical belief that school systems, given a choice, “will favor educational options that enable them to conserve resources,”<sup>46</sup> Justice Ginsburg insisted that “[p]lacing the burden on the district to show that its plan measures up to the statutorily mandated ‘free appropriate public education,’ 20 U.S.C. § 1400(d)(1)(A), will strengthen school officials’ resolve to choose a course genuinely tailored to the child’s individual needs.”<sup>47</sup>

Justice Breyer opened his dissenting opinion by expressing the belief that cases in which, as in *Schaffer*, the evidence in a due process hearing was in “precise equipoise,”<sup>48</sup> were extremely rare. Opting not to adopt the reasoning of either Justices O’Connor or Ginsburg, Justice Breyer proposed that the Court “respect[ ] the States’ right to decide this procedural matter here, where education is at issue, where expertise matters, and where costs are shared.”<sup>49</sup> Thus, in the spirit of “cooperative federalism,”<sup>50</sup> Justice Breyer would have sent the case back to the Maryland administrative judge to apply his interpretation of State law and local rules in assigning the burden of proof. Indeed, as Justice O’Connor characterized Justice Breyer’s view, “the allocation of the burden of proof ought to be left *entirely* up to

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<sup>40</sup> 126 S.Ct. at 535.

<sup>41</sup> 126 S.Ct. at 535, *citing* Department of Education, J. Chambers, J. Harr & A. Dhanani, What Are We Spending on Procedural Safeguards in Special Education 1999-2000, p. 8 (May 2003). (See footnote 38, *supra*, for the website address of the report.)

<sup>42</sup> 126 S.Ct. at 536.

<sup>43</sup> 126 S.Ct. at 537. Justice O’Connor enumerated some of those rights, including “the right to an ‘independent educational evaluation of the[ir] child,’” “the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency,” and thus “access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion. They are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition.” 126 S.Ct. at 536, *citing* 34 CFR § 300.502(b)(1) (2005).

<sup>44</sup> 126 S.Ct. at 557.

<sup>45</sup> 126 S.Ct. at 538.

<sup>46</sup> 126 S.Ct. at 539.

<sup>47</sup> *Id.*

<sup>48</sup> 126 S.Ct. at 541.

<sup>49</sup> 126 S.Ct. at 542.

<sup>50</sup> *Id.*

the States”<sup>51</sup> – an argument the Court majority specifically chose to avoid, since neither party raised it on appeal.

## **The Issue in Practice**

### **Implications of *Schaffer* on the Future of Special Education Litigation**

In the vast majority of due process hearings initiated by parents, the issues tend to be clear and the evidence generally points to one side of the dispute or the other. As Justice Breyer observed in his dissenting opinion in *Schaffer*, “judges rarely hesitate to weigh evidence, even highly technical evidence, and to decide a matter on the merits, even when the case is a close one. Thus, cases in which an administrative law judge (ALJ) finds the evidence in precise equipoise should be few and far between.”<sup>52</sup>

Yet the allocation of the burden of proof in special education due process hearings is a significant procedural determination with real, substantive consequences to both families of disabled children and the school districts obligated to serve those families by the IDEA. Before a Maryland administrative law judge the Schaffers presented expert testimony that was no more or less compelling than that advanced by the school district, leaving the burden of proof as the deciding factor.

Although the disabled advocacy community generally expressed disappointment with the outcome of the case,<sup>53</sup> some parent attorney-advocates have taken the position that the case will have little effect on real world special education disputes. For instance, Chicago-based special education attorney Charles Fox writes in his November 21, 2005 Weblog entitled “The Sky is Not Falling:”

Rarely, if ever, is a case so close in the evidence that it is decided implicitly or explicitly on the basis of burden of proof. Recently, I had occasion to research the issue of burden of proof at due process, and I found that the extent it is even noted, it was never applied. . . .

The decision in *Schaffer* does not disturb state law. In Illinois, the School Code still places the burden of proof for all that matters on the school district.<sup>54</sup> The simple reality is that only a foolhardy parents’ lawyer would ever approach a case and factor in burden of proof in strategic decision-making. . . .

In fact, as a result of *Schaffer*, I have successfully advocated for the position that parents need fuller access to evidence so they can be equally armed to fight the school; a position that grows directly out of that decision. *Schaffer* also reiterated the primacy of the procedural safeguards embodied in the statute that all too often hearing officers are willing to ignore.<sup>55</sup>

It remains to be seen whether, over time, *Schaffer* will truly impact the outcome of due process hearings, or whether it might even have a chilling effect on parent initiation of such proceedings – a statistic that is difficult, if not impossible, to measure.

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<sup>51</sup> 126 S.Ct. at 537 (emphasis original).

<sup>52</sup> 126 S.Ct. at 541.

<sup>53</sup> See, e.g., <http://www.autism-society.org/site> (last accessed Jan. 29, 2006), containing the reaction of the Autism Society of America to the *Schaffer* decision. See also “Supreme Court Ruling May Make It Harder for Children to Get Extra Help at School,” ADDITUDE MAGAZINE – FOR PEOPLE WHO HAVE AD/HD, located at <http://www.additudemag.com/additude.asp?DEPT> (last accessed Jan. 29, 2006).

<sup>54</sup> Such legislation exists in at least five other states, which are identified by Justice Breyer in his dissenting opinion. See 126 S.Ct. at 541.

<sup>55</sup> C. Fox, SPECIAL EDUCATION LAW BLOG, located at <http://specialedlaw.blogs.com/home/> (Nov. 21, 2005) (last accessed Jan. 29, 2006).

In at least one state, however, *Schaffer* has already upset a longstanding rule of law that resulted from a State Supreme Court ruling. In *Lascari v. Board of Education of Ramapo Hills Regional High School District*,<sup>56</sup> the New Jersey Supreme Court had concluded that, in practical terms, the school district always holds an advantage over parents when a dispute arises under the IDEA, since the school has better access to the relevant information, greater control over potentially more persuasive witnesses (those who have been directly involved with the child's education), and greater overall educational expertise than the parents.<sup>57</sup>

In *L.E. v. Ramsey v. Board of Education*,<sup>58</sup> decided January 23, 2006, the U.S. Court of Appeals for the Third Circuit reversed its previous decision in *Oberti* and acknowledged that the Supreme Court "in *Schaffer* saw no reason to depart from 'the ordinary rule that plaintiffs bear the risk of failing to prove their claims, leaving for another day whether a state can overcome that rule by statute.'"<sup>59</sup> In the absence of a specific New Jersey law or regulation governing the burden of proof, the Court held that *Lascari* no longer controlled. Indeed, the Court applied *Schaffer* to "the appropriateness of the [challenged] IEP as a whole" – not just the "FAPE<sup>60</sup> aspect of the analysis," as the parents urged.<sup>61</sup> Reacting to this result, a very active Statewide Parents Advocacy Network has urged the New Jersey Department of Education to "continue to protect New Jersey families on this issue, [by] adopt[ing] a regulation specifying that the school district bears the burdens of production and proof in all disputes under New Jersey's special education laws and under federal laws within the State of New Jersey."<sup>62</sup>

Where, contrary to the circumstances in *L.E.*, a pre-*Schaffer* State law or regulation already specifically assigned the burden of proof to the school district at the time of the due process hearing, at least one post-*Schaffer* decision declined to apply the contrary burden-of-proof scheme compelled by *Schaffer*. Thus, in *Escambia County Board of Education v. Benton*,<sup>63</sup> a pre-*Schaffer* Alabama regulation that specifically imposed the burden of proof on school districts when parents called into question the propriety of an IEP was applied, and supported a federal judge's decision to uphold a due process ruling that the school system failed to provide FAPE to an autistic student.

With the Supreme Court leaving open the question of the ability of the states to legislate the burden of proof, it can be expected that school districts and disabled advocacy groups will be scrambling

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<sup>56</sup> 116 N.J. 30, 45-46, 560 A.2d 1180, 1188-1189 (1989). *Lascari* was heavily relied upon by both Justice Ginsburg in her dissent in *Schaffer*, 126 S.Ct. at 538, and by Judge Michael Luttig of the Fourth Circuit Court of Appeals in his dissent in the lower appellate court. 377 F.3d at 457.

<sup>57</sup> 116 N.J. at 44, 560 A.2d at 1188 (placing burden of proof on the school district is "consistent with the proposition that the burdens of persuasion and production should be placed on the party better able to meet those burdens.") In reaching this sweeping decision, the New Jersey Supreme Court rationalized that "[t]he school board, with its recourse to the child-study team and other experts, has ready access to the expertise needed to formulate an IEP. Through the child-study team, the board generally has extensive records pertaining to a handicapped child. The board is also conversant with the federal and State laws dictating what the district must provide to handicapped children in order to comply with the [IDEA]." 116 N.J. at 45, 560 A.2d at 1188. Accordingly, the *Lascari* court concluded, "we believe the obligation of parents at the due-process hearing should be merely to place in issue the appropriateness of the IEP. The school board should then bear the burden of proving that the IEP was appropriate." *Id.*

The U.S. Court of Appeals for the Third Circuit was persuaded to join those appellate courts that assigned the burden of proof to school districts largely on the basis of the *Lascari* decision. *Oberti*, *supra*, 995 F.2d at 1219. The *Oberti* court also relied on David M. Engel, *Law, Culture, and Children with Disabilities*, 1991 DUKE L.J. at 187-94 (arguing that parents are generally at a disadvantage vis-a-vis the school when disputes arise under IDEA because parents generally lack specialized training and because their views are often treated as "inherently suspect" due to the attachment to their child).

<sup>58</sup> \_\_\_ F.3d \_\_\_, 2006 WL 156827 (3d Cir. 2006).

<sup>59</sup> 2006 WL 156827 at \*5.

<sup>60</sup> "FAPE" is an acronym for disabled children's right to a "free appropriate public education," which is the principal goal of IDEA. 20 U.S.C. § 1401(d) (LexisNexis 2003).

<sup>61</sup> 2006 WL 156827 at \*5.

<sup>62</sup> See <http://www.spannj.org/StateCodeActionAlert-January18thHearing.doc> (last accessed Jan. 29, 2006), summarizing the legislative position of this organization of special education parent advocacy groups.

<sup>63</sup> \_\_\_ F.Supp.2d \_\_\_, 2005 WL 3560555 (S.D. Ala. 2005), at \*8-9.

in many state capitals to obtain favorable legislation. The New York Association of Boards of Education, for instance, recently forewarned that in light of *Schaffer* – which resulted in a reversal of New York’s practice of assigning the burden of proof to school districts – Assemblyman Steven Sanders (D-Manhattan) has said he will introduce a bill intended to restore the pre-*Schaffer* burden of proof in due process hearings.<sup>64</sup> In Maryland, where *Schaffer* began, legislation (Senate Bill 107) was introduced January 16, 2006. While this bill would not specifically assign the burden of proof in due process hearings, it would require that every due process decision “be made on substantive grounds based on the determination of whether the child received a free appropriate public education.” Such proposed legislation is plainly intended to encourage administrative law judges to make substantive decisions based on the evidence presented in due process hearings rather than relying on resolving the purely procedural dilemma posed in *Schaffer*.

While public school special educators were both relieved and vindicated by the Supreme Court’s ruling which effectively maintained the presumptive validity of what Justice Stevens called the “proper performance of their difficult responsibilities,”<sup>65</sup> legislative and regulatory changes are already being urged in every state where the burden of proof remains unresolved by specific legislation. Even so, what the Supreme Court left unanswered is whether its interpretation of the IDEA, which is, after all, a **federal** statute, will preempt contrary state legislation. While Justice Breyer would leave the assignment of the burden of proof entirely up to the states, only future Supreme Court guidance can clarify this critical question. Until then, school districts in states without such legislation, such as Maryland, have an easier and far less costly task, for they need no longer fear that every due process hearing request will obligate them to prove each and every element of a challenged IEP.

In those states where existing legislation or regulations contravene the so-called “default” burden of proof assigned by *Schaffer* to the party that challenges the contents of an IEP or otherwise initiates a due process hearing, absent Supreme Court guidance there is a possibility that a future ruling of that Court will conclude that *Schaffer* represented an interpretation of federal law which preempts competing local legislation. Faced with competing priorities and limited budgets, this is the best of all results that public education officials and special educators can expect.

In the meantime, the most positive outcome of *Schaffer* is to reinforce the collaborative (rather than adversarial) nature of special education decision-making. Parents should continue to be embraced as full partners in the development of IEP’s and the determination of placement, related services, and other decisions affecting children with special needs. While *Schaffer* may have lightened the load for special educators insofar as the preparation and presentation of testimony in due process hearings, the IDEA lives on and must be fully and effectively followed, with the object of meeting the educational needs of even the most profoundly disabled children.

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<sup>64</sup> New York State School Board Association, ON-BOARD ONLINE, v. 6, no. 20 (Dec. 5, 2005), found at [http://www.nyssba.org/scriptcontent/VA\\_Custom/News/newspage.cfm](http://www.nyssba.org/scriptcontent/VA_Custom/News/newspage.cfm) (last accessed Jan. 29, 2006).

<sup>65</sup> 126 S.Ct. at 557.