No. 03-1030

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In the
**UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

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**WEAST**, et al.
Appellants

v.

**SCHAFFER**, et al.
Appellees

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On Appeal from the United States District Court
for the District of Maryland, Southern Division

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# BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION, MARYLAND ASSOCIATION OF BOARDS OF EDUCATION, NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, SOUTH CAROLINA SCHOOL BOARDS ASSOCIATION, and VIRGINIA SCHOOL BOARDS ASSOCIATION

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## INTEREST OF *AMICI*

This brief is filed with the consent of both parties. Letters attesting to their consent have been submitted to this Court.

The Maryland Association of Boards of Education (MABE) is a private, not-for-profit organization that represents all of the state's 24 local boards of education and the State Board of Education. MABE advocates for the concerns of boards of education before state and federal courts and agencies, the Maryland General Assembly, and the United States Congress.

The North Carolina School Boards Association (NCSBA) is a voluntary, non-profit organization representing all 117 local school boards in the state. The mission of the Association is to improve the ability of board members to provide leadership and management for North Carolina's public schools.

The South Carolina School Boards Association (SCSBA), a non-profit organization, serves as a source of information and as a statewide voice for boards governing 85 public school districts in the state. SCSBA seeks to ensure excellence in school board performance through advocacy, training and service as catalysts for positive change in public education.

The Virginia School Boards Association (VSBA) is a private, voluntary non-partisan organization representing every local school board in the state. VSBA's primary mission is the advancement of education through the unique American tradition of local citizen control of, and accountability for, the Commonwealth's public schools.

Each of these state school boards associations seeks participation in this case because the decision reached by the Fourth Circuit will be binding on all the school districts that they represent. The issue of burden of proof in IDEA administrative hearings is one that their districts face on a regular basis.

The National School Boards Association (NSBA) represents the nation's 95,000 school board members, who, in turn, govern nearly 15,000 local school districts that serve more than 46.5 million public school students--approximately 90 percent of the elementary and secondary students in the nation. NSBA has had a long involvement in the proper implementation of special education laws and regulations.

## ISSUE PRESENTED FOR REVIEW

1. Whether the District Court erred in determining that a public school district carries the burden of proving that its initial offer of services is appropriate even though it is the parent who disagrees and is bringing the action under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.* (2000).

## STATEMENT OF THE CASE

*Amici* incorporate by reference the statement of the case contained in Appellants' brief.

## STATEMENT OF FACTS

Brian Schaffer is a disabled child as defined under IDEA. From pre-kindergarten through the 1997-98 school year, Brian attended at his parents' expense a private, non-special education school, where he completed seventh grade. During the 1997-98 school year, his parents requested that the Montgomery County Public Schools ("MCPS") assess Brian to determine whether he would be eligible for special education services. After reviewing outside evaluations and conducting its own assessment, MCPS found that Brian was eligible for special services under IDEA. The initial individualized educational plan ("IEP") offered him placement in a public middle school.

The parents rejected the proposed placement on the ground that the IEP was not reasonably calculated to provide Brian with an appropriate educational benefit. They then requested a due process hearing. An administrative law judge ("ALJ") concluded that the district had offered the student a free appropriate public education and denied the claim for reimbursement of tuition and costs of the student's private school placement. In the ALJ's opinion, determining which party had the burden of proof was crucial to the outcome of this case because the evidence amounted to a battle of experts. The ALJ ruled that where the initial IEP is being challenged, the parents have the burden of proving that the IEP fails to provide a free appropriate public education.

The parents filed suit in federal District Court. They argued that the ALJ erred in assigning the burden of proof to them. Noting that the Fourth Circuit has not yet considered the issue, the District Court held that the school district has the burden of proof where the parents are challenging the initial IEP. In reaching its decision, the District Court pointed to the school district's obligation under the IDEA to provide a free appropriate public education to eligible students. The court's rationale relied heavily on the proposition that an initial IEP to which parents do not agree is a unilateral proposal made by a school district which it should have the burden to justify because it has better access to pertinent information, educational expertise and knowledge of IDEA procedures.

On appeal by MCPS this Court declined to rule on the burden of proof issue and sent the case back so that the ALJ could reconsider the case under the burden of proof standard set by the District Court. Without hearing any new evidence, the ALJ reversed his previous decision and ruled in favor of the parents, primarily based on his determination that the district's witnesses were less credible than those presented by the parents, in direct conflict with his prior decision crediting the testimony of the MCPS experts and questioning the probative value of the parents' experts. The District Court upheld the ALJ's decision that the district's plan was inappropriate and reaffirmed its earlier decision allocating the burden of proof to the school district. Weast v. Schaffer, 240 F.Supp.2d 396 (D. Md. 2002).

MCPS now appeals again to this Court, asking it to determine that the burden of proof should at all times during the administrative process rest with the moving party, in this case, the parents.

## SUMMARY OF ARGUMENT

When a parent challenges the services offered by a school district under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* (2000), the parents should have the burden of proof at the administrative hearing. Thus, the District Court erred in ruling that the school district should carry the burden of proof at the outset.

Although IDEA provides numerous due process protections for parents, the assignment of the burden of proof to the school district is not one of them. Absent statutory authority, administrative law judges should follow the generally accepted rule requiring the party bringing a claim to bear the burden of proof.

The District Court, citing "fairness" and the school district's "experience", required the burden of proof to be shifted from the parents to the school district in parental challenges to initial IEPs. However, those two reasons fail in light of numerous and sufficient protections already provided to parents.

Placing the burden of proof on the school district will not result in a more evenhanded process for deciding disputes under IDEA. Just the opposite is true– it

would unduly burden schools throughout the Fourth Circuit and, if mimicked, potentially throughout the nation.

## ARGUMENT

### I. THE DISTRICT COURT INCORRECTLY ASSIGNED THE BURDEN OF PROOF TO THE SCHOOL DISTRICT.

In administrative proceedings generally, the burden of proof should be on the party bringing the action. See, e.g., International Minerals & Chemical Corp. v. New Mexico Public Service Commission, 466 P.2d 557, 560 (N.M. 1970) (relying on "customary common law rule" in administrative proceedings "that the moving party has the burden of proof"); John W. Strong, McCormick on Evidence, § 357 (4th Ed. 1992). Exceptions to this general rule should be made only when there is a specific provision in law,[1] or there are sound public policy reasons for doing so. Neither is true in this case.

[1]McCormick cites as an example the federal Administrative Procedures Act, 5 U.S.C. § 556(d), which provides, "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof." McCormick then observes, "State courts have reached the same result in connection with state administrative proceedings." McCormick, § 357, citing National Retail Transportation, Inc. v. Pennsylvania Public Utility Comm., 530 A.2d 987 (Pa. Commw. 1987); Crossroads Recreation, Inc. v. Broz, 149 N.E.2d 65 (N.Y. 1958); Pennsylvania Labor Relations Board v. Sansom House Enterprises, Inc., 106 A.2d 404 (Pa. 1954); State *ex rel.* Utilities Comm. v. Carolina Power & Light Co., 109 S.E.2d 253 (N.C. 1959).

### A. IDEA provides no basis for placing the burden of proof on school districts when parents are the moving party.

IDEA is silent as to the burden of proof in special education due process hearings. One can deduce, therefore, that Congress saw no reason to use its legislative power to alter the general rule. Instead, Congress used two offsetting provisions to ensure parity and fairness in the process. First, Congress enacted IDEA with language that gives great deference to local education officials in developing proper IEPs. Board of Education of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206 (1982)(courts should not "substitute their own notions of sound education policy for those of the school authorities that they review"). In Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1158 (5th Cir. 1986) [quoting Tatro v. Texas, 703 F.2d 823, 830 (5th Cir. 1983), *aff'd sub nom.* Irving Independent School Dist. v. Tatro, 486 U.S. 883 (1984)], the court stated:

> In deference to this statutory scheme and the reliance it places on the expertise of local education authorities . . . [IDEA] creates a "presumption in favor of the education 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."

See, also, Johnson v. Independent Sch. Dist. No. 4 of Bixby, Tulsa County, Oklahoma, 921 F.2d 1022, 1026 (10th Cir. 1990), *cert. denied*, 500 U.S. 905 (1991).

Second, Congress enacted IDEA with a host of procedural protections for parents. The IDEA, in fact, requires school districts to explain to parents these rights in clear and understandable language. 20 U.S.C. § 1415(d)(2) (2000). Chief among these rights is the right to be included in the decision-making process. 20 U.S.C. § 1413(f) (2000). Parents must be given the opportunity to serve on the IEP team that develops a student's IEP. 20 U.S.C. § 1414(d)(1)(B)(i) (2000). Parents have the right to disagree with school district's evaluations and seek an outside, independent evaluation at the school district's expense. 20 U.S.C. § 1415(b)(1) (2000), 34 C.F.R. § 300.502(b)(2)(ii) (2000). Importantly, IDEA allows parents to use advocates and attorneys in challenges to services offered. 20 U.S.C. § 1415(g)(1) (2000).

Noticeably, placing the burden of proof on the school district in due process hearings is not one of those protections specified in IDEA.

### B. There are no sound public policy reasons for placing the burden of proof in administrative proceedings on school districts when parents are the moving party.

There are no sound public policy reasons for placing the burden of proof on the defending party in IDEA cases. The District Court noted that generally the party seeking the change should have the burden of proof in IDEA cases, but that "experience and fairness" dictate that the school district should have the burden in challenges to initial IEPs. Weast, 240 F. Supp. 2d at 405. Yet, the District Court

fails to satisfactorily justify these public policy reasons, and in fact public policy is not served by shifting this burden to the school district. Absent explicit authority or a compelling policy rationale, this decision unnecessarily alters the careful balance struck by Congress and provides no legal basis for this judicial intervention.

**1. Statutory protections for parents prevent inequities between parents and school districts.**

Congress was well aware of inequity issues as IDEA was developed and enacted. *Id.* at 404, n. 8, citing 20 U.S.C. § 1400(b)(7)-(10) (2000). Congress chose to allow parents to seek attorneys' fees under IDEA as a way of addressing this very issue of inequity. 20 U.S.C. § 1415(i)(3) (2000). If a parent wants to challenge offered services, that parent may seek outside representation, and the school district may have to pay the attorneys' fees, depending on the outcome of the challenge.[2] Federal law also requires school districts to pay for independent evaluations, 20 U.S.C. § 1415(b)(1) (2000), 34 C.F.R. § 300.502(b)(2)(ii) (2000), and for private school tuition if parents place their child there and are later found to be justified in challenging public school judgment about the educational placement

[2]It is true that this is not a complete solution to the inequity issue, since a parent may only recover attorneys' fees when they are the prevailing party. S-1 and S-2 v. State Bd. of Educ. of North Carolina, 21 F.3d 49 (4th Cir. 1994). However, parents can always access low-fee or no-fee legal services, and school districts must inform parents of this option if the parents request the information or if either party initiates a due process hearing. 34 C.F.R. § 300.507(a)(3) (2000).

of their child. 20 U.S.C. § 1412(a)(10)(C). The statute also provides funding for parent training and information centers and community parent resource centers which provide a range of services to parents, including under-served parents, low-income parents, parents of children with limited English proficiency and parents with disabilities themselves. These centers help parents participate effectively in their children's education by offering parents assistance on how to communicate effectively with special education personnel, participate in decisionmaking processes and the development of their children's IEPs, and obtain information about the range of options, programs, services and resources available. 20 U.S.C. §§ 1482, 1483 (2000). Many centers also provide parent advocates who often accompany parents to meetings with the school, help parents understand their legal rights under federal and state laws and promote the parents' interests. The statute also requires school districts to provide notice to the parents of their rights and of proposed evaluations or changes in their child's educational plan. 20 U.S.C. §§ 1414(a)(1)–(4), 1415(b)(3), (d) (2000). These statutory protections already address the concern of "fairness" raised by the District Court. There is no need for judicial creation of further protections.

The District Court stated that it would not be "fair" to require parents who may not be able to afford counsel to meet any sort of burden of proof to challenge the services offered by the school district in an initial IEP. 240 F. Supp. 2d at 404,

n. 8. This factor clearly fails as a reason to change the traditional rule of law since it would be true at any stage in the IDEA process. But as the District Court noted, under settled law in this circuit, in cases where a change is being sought to an already approved IEP, the initiating party bears the burden of proof. *Id.* at 402-03. Whether that party has the financial means to obtain legal services does not cause the burden to shift under such circumstances. The District Court offers no explanation on why "fairness" should dictate such a shift at the initial IEP stage but not at other times.

To hold that "fairness" justifies placing the burden of proof on the school district fails to recognize the existing statutory procedures that both protect parents and often give them advantages that the school district does not have. After all, IDEA is structured as an affirmative statute that confers specific rights upon parents and children and specific obligations on school districts. It is unnecessary to upset this statutory balance by placing another procedural burden upon school districts and yet another arrow in the quiver of the already well-armed and well-protected parents. Many parents are zealous and sophisticated advocates for their children with disabilities and are well aware of how to use these arrows to obtain the educational placement they deem best. In addition, they often seek the assistance of competent and experienced special education attorneys to lead their efforts.

If the burden of proof in the administrative process were to be placed on the school district, parents may in fact find it to their advantage not to cooperate with the school district and instead force the school district to defend the entire IEP in the due process hearing.[3] School districts burdened in an administrative hearing with the obligation to prove the appropriateness of all services are easily subject to attacks by parents who may actually target just one aspect of the proposed IEP in response. In addition, parents who are looking for any excuse to disagree with offered services or those who are wedded to a particular placement, such as those seeking private school tuition, would be at an advantage as they force the school district to defend all aspects of an offered IEP. Thus, it would be fair and proper to require that the parents have the burden of proof as to the inappropriateness of the offered services as an additional incentive for their good faith participation and open-minded consideration of initial proposals by the school district.

School districts, on the other hand, need no additional incentives to create a proper IEP aimed at meeting the individual goals of the student, because they are already required by law to do so. 20 U.S.C. § 1414(d)(2)(A) (2000). Under IDEA, there are clear penalties for school districts that violate the mandates of the statute.

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[3]Parents can completely refuse to participate or consent to the IEP process, and in those cases the school district is still obligated to attempt to ensure parental involvement. For example, if parents refuse to consent to a necessary evaluation, the school district must seek to take the parents to mediation or a due process hearing. 20 U.S.C. § 1414(a)(1)(C)(ii) (2000).

20 U.S.C. § 1416(a) (2000). Districts cannot simply ignore IDEA and fail to follow the procedures of the IEP process. Where the school district has complied with its statutory obligations to identify, evaluate, and propose an individualized educational program for a child with disabilities, through a team approach that encourages parental participation, its educational judgment is entitled to a presumption of appropriateness that parents should have the burden of disproving.

**2. The "experience" of the school district may be equaled by that of the parents, providing no justification for placing the burden of proof on the schools.**

The District Court invokes the presumed inability of parents to match the educational expertise of a school district as one of its justifications for shifting the burden of proof. The District Court cites language from Lascari v. Board of Educ. of Ramapo Indian Hills Regional High Sch. Dist., 560 A.2d 1180 (N.J. 1989), which stated that it would be easier for the school district to defend its offered services than it would be for parents to prove such services are inappropriate. 240 F. Supp. 2d at 404. However, the District Court failed to recognize that parents, as full participants in the development of the IEP, are allowed to have access to all the records, materials, assessments, and other information the school district uses to develop IEPs. 20 U.S.C. § 1415(b)(1) (2000). In fact, parents likely know more about the student than the school district does, especially in constructing the initial IEP. Often, as here, students have never attended school in the district prior to the

development of an initial IEP. Although in theory parents may lack the educational expertise to formulate an appropriate instructional plan for their child, parents do have intimate knowledge of the child's developmental history and response to different learning environments and techniques. In addition, parents have access to all of the same information and educational records that the school district is obliged to share with them. This complete knowledge enables parents to have an equal opportunity to determine what is appropriate for their child. Certainly, parents who challenge an initial IEP believe they know better than the district how to serve their child's educational needs. In their own view, they have "better access to relevant information," including their own personal knowledge of their child along with information they may have received from outside educational experts, including the school district. It is precisely because parents perceive that the school's expertise is lacking that they find it necessary to challenge the district's proposed educational plan.

Under these circumstances, assigning the burden of proof to parents is de minimus. It would simply mean that they must offer sufficient evidence to show by a preponderance that particular aspects of the school district's proposal are educationally inappropriate for their child. It remains the school district's obligation under the law to provide a free appropriate public education. 20 U.S.C. § 1412(a)(1) (2000). Placing the burden of proof on the parents, where it belongs,

does not require parents to offer a substitute plan that would require special educational expertise.

Additionally, parents may have records or other information (including outside evaluations) that they have never provided to the school district. IDEA mandates that the school district share all relevant materials with the parents, 20 U.S.C. § 1415(b)(1) (2000). However, nothing in IDEA requires parents to reveal all their relevant information to the school district. Indeed, diligent parents could acquire their own assessments and would have no obligation to share these findings with the district.[4] Requiring the school district to have the burden of proof in cases where the parents may not have disclosed all relevant information or may not have been cooperative in the development of an initial IEP will not ensure that a student who is in need of special education services actually receives an appropriate program.

Therefore, both "experience" and "fairness" fail as public policy reasons to place the burden of proof on anyone but the party challenging an IEP. Parents

[4]IDEA is silent as to whether parents must share privately obtained evaluation results with the school district, but federal regulations nevertheless provide that the results of these evaluations may be presented as evidence at a due process hearing regarding the child. 34 C.F.R. § 300.502(c)(2) (2000). Compare that section with 34 C.F.R. § 300.501(a)(1)(i) (2000), which states that parents must be afforded an opportunity to inspect all records with respect to the identification, evaluation, and placement of their child.

should have the burden of proof when they challenge an IEP, whether it is an initial IEP or an existing IEP.

### 3. Placing the burden of proof on school districts will not ensure better results for students.

IDEA requires that all public school students with disabilities under the Act be provided with an individualized education plan developed specifically to address their individual needs and updated annually. 20 U.S.C. § 1412(a)(4) (2000), 20 U.S.C. § 1414(d)(4)(A)(i) (2000). Nationally, school districts have developed and implemented millions of IEPs.[5] IDEA provides a process for challenging services offered in IEPs, and under these provisions school districts face numerous individual challenges each year. While many of those challenges have merit, many others do not. Procedurally, it makes more sense to place the burden of proof on the individual parents bringing a challenge than it would to require the school district to prove the appropriateness of all services offered.

Certainly, such a rule would aid due process hearing judges in deciding these cases. If the party bringing the challenge always has the burden of proof, then the trier of fact would be able to establish a consistent and fair process for hearing and deciding these challenges. This is especially important where rulings in other

[5]In the 1998-99 school year, Maryland alone had more than 111,000 public school students receiving special education services under IDEA. Maryland State Department of Education, The Fact Book 1998-99, 27 (1999).

circuits about which party bears the burden of proof in IDEA administrative hearings provide no clear rule of law to follow. Federal appeals courts in the First, Fifth, Sixth and Tenth Circuits have held that the burden of proof should be borne by the party seeking the change. *See, e.g.*, Doe v. Brookline Sch. Comm., 722 F.2d 910 (1st Cir. 1983); Alamo Heights, 790 F.2d 1153 (5th Cir. 1986); Doe v. Board of Educ., 9 F.3d 455 (6th Cir. 1993); Johnson v. Independent Sch. Dist. No. 4, 921 F.2d 1022 (10th Cir. 1990). But the Second, Third, Eighth, and Ninth Circuits have placed that burden on the school district. *See, e.g.*, Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119 (2d Cir. 1998); Carlisle Area Sch. v. Scott P., 62 F.3d 520 (3d Cir. 1995); E.S. v. Independent Sch. Dist. No. 196, 135 F.3d 566 (8th Cir. 1994); Clyde K. v. Puyallup Sch. Dist. No. 3, 35 F.3d 1396 (9th Cir. 1994). The split in the circuits on this issue is further complicated by the lack of clarity and absence of rationale in many of these decisions. Thus, it is important that this Court establish a clear ruling that is consistent with traditional rules of law and with its own decisions on burden of proof issues in IDEA court proceedings.

Thus, the parents should have the burden of proof when challenging the services offered by a school district through a properly developed IEP.

## CONCLUSION

For the foregoing reasons, the decision of the District Court should be reversed and the burden of proof placed on parents who challenge an initial IEP.

Respectfully submitted,


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