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Follow the Teacher's Advice: Resolving Weast v. Schaffer: Burden Should Shift from School System to Parent to Prove the Inadequacy of Disabled Child's IEP

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FOLLOW THE TEACHER'S ADVICE: RESOLVING *WEAST v. SCHAFFER*: BURDEN SHOULD SHIFT FROM SCHOOL SYSTEM TO PARENT TO PROVE THE INADEQUACY OF DISABLED CHILD'S IEP

I. INTRODUCTION

Under the Individuals with Disabilities Education Act (IDEA),[1] Congress provides federal grants to states that furnish "free appropriate public education" (FAPE) to children with disabilities, whose impairments adversely affect their educational performance.[2] Pursuant to the Act, students with disabilities must receive appropriate special education and related services specifically designed to meet their unique needs.[3] A state is only eligible for federal assistance if the state demonstrates to the satisfaction of its secretary of state that it has implemented policies and procedures that ensure that its disabled students receive FAPE.[4] Congress enacted the IDEA to guarantee an

1. 20 U.S.C. §§ 1400–87 (2000), *amended by* Individuals with Disabilities Education Improvement Act, Pub. L. No. 108-446, 118 Stat. 2647 (2004).

2. *Id*. § 1412(a)(1)(A). According to the IDEA, a "child with disability" is defined as a child

> with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance[,] . . . orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and . . . who, by reason thereof, needs special education and related services.

See id. § 1401(3)(A).

3. Bd. of Educ. v. Rowley, 458 U.S. 176, 181 (1982). The *Rowley* interpretation of the Education for All Handicapped Children Act of 1975 has since been followed by later courts' interpretation of the more modern IDEA. *See* Weast v. Schaffer, 377 F.3d 449, 455 (4th Cir. 2004), *aff'd*, 126 S. Ct. 528 (2005).

4. 20 U.S.C. § 1412(a). As this Article was being completed, in December 2004 Congress passed the Individuals with Disabilities Education Improvement Act to amend the IDEA. Pub. L. No. 108-446, 118 Stat. 2647. As of July 1, 2005, section 1412 of the IDEA now reads:

> A State is eligible for assistance under this part for a fiscal year if the State *submits a plan that provides assurances to the Secretary* that the State has in effect policies and procedures to ensure that the State meets each of the following conditions: . . . A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.

improvement in educational results for disabled children, noting that such development was an "essential element" of the "national policy of ensuring equality of opportunity" for individuals with disabilities.[5] Congress recognized that disability should not diminish the right of individuals to participate in or contribute to society.[6]

Although the IDEA seeks to provide disabled students with opportunities for success, the Act unfortunately leaves unanswered the question of how school officials must enforce its provisions. Consequently, parents, teachers, and courts all may interpret the Act's directive differently. As the First Circuit points out, "[T]he IDEA is not self-executing, and parents, school officials, bureaucrats, and judges alike have struggled to master its intricacies."[7] Still, the IDEA does prescribe some procedural guidance with respect to enforcement of the FAPE obligation, the most notable being the individualized education program (IEP).[8] Under the IEP requirement, the disabled child's parents and educators must create a written statement outlining the student's present level of educational performance, the student's educational goals, and the special education and related services that the school district will provide to the child.[9] The IEP must be "tailored to the unique needs of the handicapped child . . . ."[10] If a party is not satisfied with the proposed IEP, that party is entitled to challenge the IEP's adequacy by initiating a state-prescribed administrative proceeding known as a due process hearing.[11] The losing party

Id. (emphasis added). Like the earlier version of the IDEA, the 2004 amendments still identify limited circumstances whereby some students, ages 3 through 5 and 18 through 21, may be excluded from the provisions of the Act. *Id.*

5. 20 U.S.C. § 1400(c)(1).

6. *Id*. § 1400(c)(1).

7. Me. Sch. Admin. Dist. No. 35 v. Mr. R., 321 F.3d 9, 11 (1st Cir. 2003).

8. *See Rowley*, 458 U.S. at 181 ("The 'free appropriate public education' required by the Act is tailored to the unique needs of the handicapped child by means of an 'individualized educational program . . . .'"); Honig v. Doe, 484 U.S. 305, 311 (1988) (labeling the IEP as the "primary vehicle for implementing . . . congressional goals"); *Weast*, 377 F.3d at 450 (noting that "the IDEA requires every public school system receiving federal funds to develop and implement an [IEP] for each disabled child in its jurisdiction" as a means of enforcing its directive that each disabled child receive free appropriate pubic education); Oberti v. Bd. of Educ., 995 F.2d 1204, 1213 n.16 (3d Cir. 1993) (describing the IEP as the "centerpiece" of the IDEA); LAWRENCE M. SIEGEL, THE COMPLETE IEP GUIDE: HOW TO ADVOCATE FOR YOUR SPECIAL ED CHILD 2/3 (1st ed. 1999) (explaining that under the IDEA, "the program and services [a] child needs (the 'what' and 'where') will be determined through the . . . IEP process"); *see also* Perry A. Zirkel, *Over-Due Process Revisions for the Individuals with Disabilities Education Act*, 55 MONT. L. REV. 403, 403 (1994).

9. 20 U.S.C. § 1414(d)(1)(A)–(B).

10. *Rowley*, 458 U.S. at 181.

11. 20 U.S.C. § 1415(f). At the hearing, the administrative law judge is empowered to issue binding decisions. *Id*. § 1415(i)(1)(A). In the year 2000, of the 11,068 hearings requested, over 3000 were heard. U.S. GENERAL ACCOUNTING OFFICE, SPECIAL EDUCATION: NUMBERS OF

at the hearing can then seek relief in state or federal court by challenging the findings of the administrative law judge (ALJ).[12]

Litigation in the special education sector often centers on the adequacy of a disabled student's special education.[13] Until recently, a major debate split the federal circuits: which party must carry the burden of proving the substantive appropriateness (or inappropriateness) of a disabled child's free public education?[14] The Fifth, Sixth, and Tenth Circuits assigned the burden of proof at the state administrative level to the parents or the challenging party, while the Second, Third, Eighth, and Ninth Circuits (and perhaps the D.C. Circuit)

FORMAL DISPUTES ARE GENERALLY LOW AND STATES ARE USING MEDIATION AND OTHER STRATEGIES TO RESOLVE CONFLICTS 12 (2003), http://www.gao.gov/new.items/d03897.pdf. Attorney Lawrence M. Siegel lists five considerations parents should consider before filing for a due process hearing: the precise nature of their child's problem, the importance of the issue to their child, the strength of their case, the bottom line concerns for the school district, and the cost of going forward. SIEGEL, *supra* note 8, at 12/7–12/8.

12. 20 U.S.C. § 1415(i)(2)(A).

13. SUSAN GORN, THE ANSWER BOOK ON SPECIAL EDUCATION LAW 3:6 (1996).

14. *See Weast*, 377 F.3d at 452 (noting that the circuits are "split—and splintered in reasoning" on the question of how to allocate the burden of proof in state administrative proceedings initiated by parents to challenge an IEP). Specifically, the question presented to the Supreme Court was:

> Under the Individuals with Disabilities Education Act, when parents of a disabled child and a local school district reach an impasse over the child's individualized education program either side has a right to bring the dispute to the administrative hearing officer for resolution. At the hearing, which side has the burden of proof—the parents or the school district?

Petition for Writ of Certiorari, Schaffer v. Weast, 125 S.Ct. 1300 (No. 04-698), 2004 WL 2700081.

In order for courts to resolve substantive inquiries into the adequacy of a child's education, the courts first needed to assign the burden of proof as a matter of law. *See id.* at 452; Brian S. v. Vance, 86 F. Supp. 2d 538, 540 (D. Md. 2000), *vacated*, Schaffer *ex rel.* Schaffer v. Vance, No. 00-1471, 2001 WL 22920, at *1 (4th Cir. Jan. 10, 2001); *see also* Anne E. Johnson, *Evening the Playing Field: Tailoring the Allocation of the Burden of Proof at IDEA Due Process Hearings to Balance Children's Rights and Schools' Needs*, 46 B.C. L. REV. 591, 594 (2005) ("Resolution of [the burden allocation] issue is necessary for the IDEA's continued effectiveness because the due process hearing is among its most fundamental procedural safeguards. At these hearings, the allocation of the burden of proof often determines the outcome . . . .").

placed the burden on the school system.[15] The First Circuit allocated the burden to the party seeking to challenge the status quo.[16]

In 2004, the Fourth Circuit in *Weast v. Schaffer*[17] first confronted the question.[18] The court ruled that there is "no valid reason to depart from the general rule that the party initiating a proceeding has the burden of proof . . . ."[19] In November 2005, the Supreme Court affirmed the Fourth Circuit's decision, holding that "that the burden lies, as it typically does, on the party seeking relief."[20] Hence, parents wishing to prove that their school district violated their child's right to receive FAPE carry the burden of proving that the school district failed to propose and implement an adequate IEP for the child.

This Note will analyze the Fourth Circuit's decision in *Weast*, as well as decisions from the other federal circuits explaining their respective positions on the burden-placement issue. Ultimately, this Note will explain why the Supreme Court should have declared a new burden-shifting approach in IEP challenges: At due process hearings, school districts should carry an initial burden of production, but the party challenging the adequacy of the IEP should shoulder the ultimate burden of persuasion; the party challenging the ALJ's due process determination should then bear the entire burden of proof in federal court.[21] Part II of this Note will open by detailing the history of

15. *Id*. at 452–53; *see* Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1158 (5th Cir. 1986); Doe v. Bd. of Educ., 9 F.3d 455, 458 (6th Cir. 1993); Johnson v. Indep. Sch. Dist. No. 4, 921 F.2d 1022, 1026 (10th Cir. 1990); *see also* Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 128 (2d Cir. 1998); Carlisle Area Sch. v. Scott P., 62 F.3d 520, 533 (3d Cir. 1995); E.S. v. Indep. Sch. Dist. No. 196, 135 F.3d 566, 569 (8th Cir. 1998); Clyde K. v. Puyallup Sch. Dist. No. 3, 35 F.3d 1396, 1398 (9th Cir. 1994); McKenzie v. Smith, 771 F.2d 1527, 1532 (D.C. Cir. 1985) (placing burden on school system where parents challenge IEP as being procedurally deficient).

16. Doe v. Brookline Sch. Comm., 722 F.2d 910, 917 (1st Cir. 1983).

17. 377 F.3d 449 (4th Cir. 2004).

18. *Id*. at 452. The Fourth Circuit reiterated its *Weast* holding in *JH* ex rel. *JD v. Henrico County School Board*, 395 F.3d 185, 195 n.7 (4th Cir. 2005).

19. *Weast*, 377 F.3d at 450. For a recent review criticizing the *Weast* decision, see *Disability Law—Individuals with Disabilities Act—Fourth Circuit Holds that Parents Bear the Burden of Proof in Due Process Hearing Against a School District*—Weast v. Schaffer, *377 F.3d 449 (4th Cir. 2004)*, 118 HARV. L. REV. 1078 (2005).

20. Weast v. Schaffer, 126 S. Ct. 528, 531 (2005). This Note was written prior to the Supreme Court's decision. The following analysis does not include reference to the Supreme Court's reasoning, but rather is a response to the Fourth Circuit's holding in *Weast*. This Note offers an approach that differs from the Supreme Court's decision to place the entire burden of proof on the challenging party.

21. For a recent note responding to the Fourth Circuit *Weast* ruling, but advocating for a different burden-shifting analysis, see Johnson, *supra* note 14. Johnson argues that the burden allocation should depend on whether the issue in dispute is procedural or substantive. *Id*. at 621–23.

Congressional regulation in the special education sector. Then, Part II will discuss the substantive and procedural requirements the IDEA imposes upon state public education systems. Next, Part III will elaborate on the meaning of "burden of proof" in administrative proceedings and the consequences of assigning the burden to different parties. Part III will then review the cases that outlined their respective circuit's approach to the issue. Part IV will examine the factual background of *Weast*, the rule and rationale announced by the Fourth Circuit, and the dissent's countervailing arguments. Finally, Part V will analyze both sides of the argument and declare why the Supreme Court should issue this new burden-shifting approach. Part V will also identify how the recent December 2004 amendments to the IDEA have contributed to this Author's reasoning.

II. THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

A. History and Purpose of Congressional Involvement

Prior to the 1960s, state statutes permitted and courts upheld the exclusion of students with disabilities from public schools.[22] Following the 1954 landmark decision in *Brown v. Board of Education*,[23] which held racial segregation of public schools to be unconstitutional,[24] parents of students with disabilities and disability interest groups began demanding equal educational opportunities for disabled students.[25] The first legislative step taken by Congress to address the needs of disabled children occurred in 1966 when Congress amended the Elementary and Secondary Education Act of 1965[26] to "establish a grant program 'for the purpose of assisting the States in the initiation, expansion, and improvement of programs and projects . . . for the

> Whether a new allocation is produced through Supreme Court review or by Congress's amendment of the IDEA, a modified burden-shifting scheme would best mirror the IDEA's delicate balancing of the rights of disabled children and the need to impose a realistic mandate on school districts. Consistent with traditional evidentiary principles, the party challenging the status quo should bear the burden of proof on all substantive issues. On procedural issues, however, the school districts should bear the burden of proof to better respond to the IDEA's remedial purpose and its premium on procedural compliance.

Id. at 622–23.

22. Cory L. Shindel, *One Standard Fits All? Defining Achievement Standards for Students With Cognitive Disabilities Within the No Child Left Behind Act's Standardized Framework*, 12 J.L. & POL'Y 1025, 1033–34 (2004); *see also* Gary L. Monserud, *The Quest for a Meaningful Mandate for the Education of Children with Disabilities*, 18 ST. JOHN'S J. LEGAL COMMENT. 675, 683 (2004).

23. 347 U.S. 483 (1954).

24. *Brown*, 347 U.S. at 495.

25. Shindel, *supra* note 22, at 1034.

26. Pub. L. No. 89-10, 79 Stat. 27 (1965).

education of handicapped children.'"[27] In 1970, Congress passed the Education of the Handicapped Act,[28] effectively replacing the 1966 program.[29] The 1966 and 1970 enactments attempted to stimulate the states to develop educational resources and special teacher training for students with disabilities.[30] In November 1975, Congress passed the predecessor to the IDEA: the Education for All Handicapped Children Act of 1975 (EAHCA).[31] At the time, Congress was concerned that the majority of disabled children in the United States were not receiving appropriate educational services, thus being denied full equality of opportunity.[32] Additionally, Congress feared that many disabled children were prevented from having a successful educational experience because their disabilities were undetected.[33]

Eventually, aiming for stronger and more effective legislation, on June 4, 1997, Congress enacted the IDEA as amendments to the EAHCA.[34] Congress recognized that implementation of the EAHCA had been "successful in ensuring children with disabilities and the families of such children access to a

27. Bd. of Educ. v. Rowley, 458 U.S. 176, 179–80 (1982) (quoting the Elementary and Secondary Education Amendments of 1966, Pub. L. No. 89-750, § 161, 80 Stat. 1204).

28. Pub. L. No. 91-230, 84 Stat. 121 (1970).

29. *Rowley*, 458 U.S. at 180.

30. *Id*.

31. Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400–1491o (2000)).

32. *Id.* § 3.

33. *Id*. When Congress passed the EAHCA, 1.75 million disabled children were out of school and 2.5 million disabled students were receiving education inappropriate for their unique disability. Mark C. Weber, *Litigation Under the Individuals with Disabilities Education Act After* Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources, 65 OHIO ST. L.J. 357, 359–60 (2004). Ultimately, Congress declared:

> State and local educational agencies have a responsibility to provide education for all handicapped children, but present financial resources are inadequate to meet the special educational needs of handicapped children; and . . . it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law. . . . *It is the purpose of this Act to assure that all handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs*, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.

§ 3, 89 Stat. at 775 (emphasis added).

34. Pub. L. No. 105-17, 111 Stat. 37 (1997) (codified as amended at 20 U.S.C. §§ 1400–1491o (2000)). In 1991, earlier amendments to the EAHCA had changed the statute's name to the Individuals with Disabilities Education Act. Pub. L. No. 102-119, 105 Stat. 587; *see* M. LOUISE LANTZY, INDIVIDUALS WITH DISABILITIES EDUCATION ACT: AN ANNOTATED GUIDE TO ITS LITERATURE AND RESOURCES, 1980–1991, at 13–18 (1992) (discussing a brief overview of the statutory evolution of disability law through 1991).

free appropriate public education and in improving educational results for children with disabilities."[35] Congress remained dissatisfied with the low expectations that the EAHCA maintained for disabled students.[36] Congress determined that even after more than twenty years of executing the EAHCA, further advancement in the field of special education remained possible.[37] Indeed, the IDEA articulates the need for "strengthening the role of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home."[38] Congress recognized that students' special education must actually provide a beneficial service, "rather than a place where they are sent."[39]

With the passage of the IDEA, Congress sought to make certain that all disabled students receive FAPE and necessary related services and to "ensure that the rights of the children with disabilities and parents of such children are protected."[40] Congress announced that federal, state, and local officials must all participate in assisting children with special educational needs.[41] The IDEA purports to guarantee that both parents and educators are equipped to help improve the education of disabled children.[42]

As mentioned earlier, Congress created the IEP requirement as the procedural method for such a guarantee.[43] The following Section discusses this obligation.

B. Implementing the FAPE Requirement Through the IEP

The IDEA promises to disabled children 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."[44] These educational services must be provided in the least restrictive

35. 20 U.S.C. § 1400(c)(3).

36. *Id.* § 1400(c)(4) (explaining that "implementation of [the EAHCA] has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities").

37. *Id.* § 1400(c)(5).

38. *Id.* § 1400(c)(5)(B).

39. *Id.* § 1400(c)(5)(C).

40. 20 U.S.C. § 1400(d)(1)(A)–(B). For many students, eligibility for special education means the difference between receiving essential services at public expense or nothing at all. Robert A. Garda, Jr., *Untangling Eligibility Requirements Under the Individuals with Disabilities Education Act*, 69 MO. L. REV. 441, 443 (2004).

41. 20 U.S.C. § 1400(d)(1)(C).

42. *Id.* § 1400(d)(3).

43. *See supra* text accompanying notes 8–10.

44. 20 U.S.C. § 1400(d)(1)(A). For a detailed analysis of the IDEA's directives, see Monserud, *supra* note 22, at 691–700. Professor Monserud classifies the IDEA into six major concepts: (1) FAPE, (2) the IEP, (3) a least restrictive environment, (4) related services, (5) due process, and (6) judicial review. *Id.* at 691.

environment; in other words, to the maximum extent appropriate, disabled students are to be educated alongside non-disabled students.[45] In *Rowley*, the Supreme Court expounded on the meaning of free appropriate public education under the IDEA's predecessor, the EAHCA. According to the Court, FAPE is statutorily defined as special education and related services that "(A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program . . . ."[46] The *Rowley* Court interpreted the FAPE requirement to connote "educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction."[47]

Rowley identified a two-step process courts should undertake in guaranteeing that a student receives FAPE: (1) determine whether the school system procedurally followed the IDEA's directives, and then (2) determine whether the student's IEP is reasonably calculated to ensure substantively appropriate education.[48] To ensure that public schools supply FAPE to their disabled students, the IDEA sets up a process whereby educators and parents together agree on the services to be provided each individual student, i.e., services that constitute the IEP.[49] Courts may analyze the appropriateness of the disabled student's education by reviewing whether the IEP is procedurally or substantively flawed.

The Supreme Court notes that inquiries into whether school districts comply with the procedural obligations placed upon them can evidence the substantive adequacy of an IEP.[50] Procedurally, the Court points out that a

45. 20 U.S.C. § 1412(a)(5)(A) ("[S]pecial classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.").

46. Bd. of Educ. v. Rowley, 458 U.S. 176, 188 (1982) (quoting 20 U.S.C. § 1401(18)).

47. *Id*. at 188–89. The educational instruction must only be sufficient to confer some educational benefit upon the child with disability. *Id*. at 200. In fact, Congress did not intend to require schools to provide instruction that maximizes each disabled child's potential. *Id*. at 199.

48. *Id*. at 206–07.

> [A] court's inquiry in suits brought under [the IDEA] is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

Id.

49. *See supra* note 8 and accompanying text.

50. *Rowley*, 458 U.S. at 206.

child's education can be checked for appropriateness by validating that certain criteria are met: the special instruction and services are paid for by public expenditure, are provided under public supervision, meet the state's educational standards, comport with the grade levels used by the state for regular education, and comport with the child's IEP.[51] "Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a 'free appropriate public education' as defined by the Act."[52]

It is significant to note specifically several of the procedural obligations the IDEA imposes during the creation of an appropriate IEP for a disabled student. For instance, before completing an IEP, school officials must provide notice and either receive informed consent from the student's parents or utilize a due process hearing or mediation.[53] Also, when conducting an evaluation of the child, educators must incorporate several assessment tools and strategies, including information provided by the parent.[54] School officials must ensure that the selected tests are not discriminatory or racially or culturally based.[55] Where feasible, the evaluations must be administered in the child's native language or mode of communication.[56] School evaluators, when giving standardized tests, must guarantee that the tests are administered in accordance with the instructions provided by the tests' producers.[57] With regard to the IEP itself, school officials must provide a written statement of the child's present levels of educational performance and the special services to be provided.[58]

> We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP, as well as the requirements that state and local plans be submitted to the Secretary for approval, demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.

Id.; *see also* McKenzie v. Smith, 771 F.2d 1527, 1532 (D.C. Cir. 1985) ("The underlying assumption of the Act is that to the extent its procedural mechanisms are faithfully employed, handicapped children will be afforded an appropriate education.").

51. *Rowley*, 458 U.S. at 188–89. For an early critique of the IDEA's reliance on procedural benchmarks as a measure of the substantive appropriateness of an IEP, see David M. Engel, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 DUKE L.J. 166.

52. *Rowley*, 458 U.S. at 189.

53. 20 U.S.C. § 1414(b)–(c) (2000), *amended by* Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108–446, § 614, 118 Stat. 2647, 2704–07.

54. *Id.* § 1414(c)(1), *amended by* § 614, 118 Stat. at 2706.

55. *Id.* § 1414(b)(3)(A), *amended by* § 614, 118 Stat. at 2705.

56. *Id.*

57. *Id.*

58. 20 U.S.C. § 1414(d)(1)(A), *amended by* § 614, 118 Stat. at 2707–08. This written statement must include how the child's disability affects her involvement and progress in the

The IEP team, empowered to create a student's IEP, must be comprised of the child's parents, at least one regular education teacher of such child, at least one special education teacher, a representative of the local educational agency, and at the discretion of the parent or the agency, others with knowledge or special expertise regarding the child.[59] Additionally, if appropriate, the disabled child may also participate in the IEP team.[60]

When parents become dissatisfied with a proposed IEP for their child, as a first step the parents could attack the IEP for a procedural flaw. Generally, proving a school district's procedural misstep simply requires showing that the school system failed to perform a requisite task when designing the IEP. However, a school's procedural mistakes do not automatically require a finding that it denied a student FAPE.[61] Still, when the school complies with the IDEA's procedural guidelines—or at least does not violate a student's guaranteed FAPE through enough procedural violations of the IDEA—parents are left to dispute the more difficult issue, the substantive adequacy of their child's IEP. This was the factual scenario in *Weast*, where the parents questioned the appropriateness of their son's public school IEP by attacking the substance of the special education to be provided.[62] The legal issue that arose involved which party carried the burden of proof in the dispute.[63]

III. BURDEN OF PROOF: WHERE DO THE DIFFERENT CIRCUITS PLACE THE BURDEN?

A. Definition of "Burden of Proof"

Before discussing why some circuits place the burden of proof on parents, while others assign it to the school, it is significant to first mention the definition of "burden of proof." According to Black's Law Dictionary, in a civil case, a party's burden of proof involves the "party's duty to prove a

general curriculum, a description of annual goals, and a report of the special education, related services, and supplementary aids to be provided to the child. *Id.*

59. *Id.* § 1414(d)(1)(B), *amended by* § 614, 118 Stat. at 2709–10.

60. *Id.*

61. W.G. v. Bd. of Trustees, 960 F.2d 1479, 1484 (9th Cir. 1992) (noting that clear denial of FAPE does result from procedural inadequacies that create loss of educational opportunity or that seriously infringe the parents' opportunity to participate in the IEP formulation process). In fact, the recent amendments to the IDEA have actually eliminated decisions by hearing officials based solely on procedural errors where the flaws do not adversely affect the implementation of the IEP. *See* NATIONAL SCHOOL BOARDS ASSOCIATION, INDIVIDUALS WITH DISABILITIES EDUCATION IMPROVEMENT ACT OF 2004: EXPANDED AUTHORITY TO LOCAL SCHOOL BOARDS: A QUICK REFERENCE GUIDE FOR LOCAL SCHOOL BOARD MEMBERS (2005), http://www.nsba.org/site/docs/34900/34889.pdf.

62. Weast v. Schaffer, 377 F.3d 449, 451 (4th Cir. 2004), *aff'd*, 126 S. Ct. 528 (2005).

63. *Id.* at 452.

disputed assertion or charge."[64] For example, in *Weast*, determining who carries the burden of proof means determining which party maintains the duty to prove the charge of inadequate (or adequate) special education and related services. The Supreme Court has held that the modern definition of "burden of proof" includes a party's burden of production and burden of persuasion.[65]

The determination of which party carries the burden of proof may play a major role in the outcome of the due process hearing. For instance, the party with the burden of production will lose when that party fails to produce any evidence on the issue.[66] The burden of persuasion becomes a factor when both parties have introduced all of their evidence, meeting their burdens of production.[67] In a trial without a jury—as will be the case in due process hearings before an ALJ— "[i]f. . . the judge is in doubt, the issue must be decided against the party having the burden of persuasion."[68] Thus, the party with the burden of persuasion loses if both parties put forth equal evidence.

It makes sense that in an adversarial setting, a party will want the opponent to bear the ultimate burden of persuasion. After all, carrying the burden means risking loss where the trier of fact is not persuaded by either party's evidence. Nevertheless, the federal circuits did not provide a consensus as to which party should bear the burden of proof in an IEP dispute. Below, this Note analyzes the majority and minority approaches to assigning the burden of proof in such proceedings.

B. Majority: Jurisdictions That Assign Burden to School District

The majority of federal circuits placed the burden of proof at the administrative hearing upon the school district to show that a disabled student's IEP appropriately provided special education and related services to

64. BLACK'S LAW DICTIONARY 209 (8th ed. 2004).

65. Dir., Office of Worker's Comp. Programs v. Greenwich Collieries, 512 U.S. 267, 275–76 (1994).

> The emerging consensus on a definition of burden of proof was reflected in the evidence treatises of the 1930's and 1940's. "The burden of proof is the obligation which rests on one of the parties to an action to persuade the trier of the facts, generally the jury, of the truth of a proposition which he has affirmatively asserted by the pleadings." . . . Accordingly, we conclude that as of 1946 the ordinary meaning of burden of proof was burden of persuasion.

Id. (quoting WILLIAM PAYSON RICHARDSON, THE LAW OF EVIDENCE 143 (6th ed. 1944)); *see* 2 MCCORMICK ON EVIDENCE 425 (John William Strong ed., 4th ed.1992) ("The term encompasses two separate burdens of proof. One burden is that of producing evidence, satisfactory to the judge, of a particular fact in issue. The second is the burden of persuading the trier of fact that the alleged fact is true.").

66. 2 MCCORMICK ON EVIDENCE, *supra* note 65, at 425.

67. *Id.* at 426.

68. *Id.*

the student.[69] Some circuits shifted this burden to the losing party when that party sought relief in federal court.[70] The following Subsections identify the leading cases in the respective circuits that placed the burden on the schools at the due process hearing.

1. Third Circuit

In *Oberti v. Board of Education*,[71] the Third Circuit first stated its position that the school district should maintain the burden of proof in a district court challenge.[72] The dispute in *Oberti* arose when parents of a child with Down's syndrome[73] challenged a school district's decision to exclude their child from a

69. Weast v. Schaffer, 377 F.3d 449, 452 (4th Cir. 2004), *aff'd*, 126 S. Ct. 528 (2005). The Supreme Court of New Jersey has also sided with the majority of federal circuits. Lascari v. Bd. of Educ., 560 A.2d 1180, 1188 (N.J. 1989) ("[W]e believe it is more consistent with the State and federal scheme to place the burden on the school district not only when it seeks to change the IEP, but also when the parents seek the change."). The New Jersey court's reasoning was grounded in the policy that prescribing appropriate education is not enough; the district must also be forced to prove at a due process hearing the appropriateness of the IEP.

> [T]he basic obligation to provide a handicapped child with a free, appropriate education is placed on the local school district. It is the district that must identify handicapped children and then formulate and implement their IEPs. . . . [T]he regulatory scheme vests handicapped children and their parents with numerous procedural safeguards. . . . Like those procedural safeguards, the allocation of the burden of proof protects the rights of handicapped children to an appropriate education.
>
> Our result is also consistent with the proposition that the burdens of persuasion and of production should be placed on the party better able to meet those burdens.

Id.

70. *See, e.g.*, Roland M. v. Concord Sch. Comm., 910 F.2d 983, 991 (1st Cir. 1990) (requiring complaining party to prove state agency's decision to be wrong); Karl v. Bd. of Educ., 736 F.2d 873, 877 (2nd Cir. 1984) (holding that deference should be given to state agency findings); Spielberg v. Henrico County Pub. Sch., 853 F.2d 256, 258 n.2 (4th Cir. 1988) (placing burden on party challenging state administrative decision); Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618, 624 (6th Cir. 1990) (recognizing that due deference should be granted to the state administrative agency because the federal courts lack expertise with regard to children with special needs); Bd. of Educ. v. Ill. State Bd. of Educ., 938 F.2d 712, 716 (7th Cir. 1991) (requiring school board challenging administrative outcome to carry burden of proof); E.S. v. Indep. Sch. Dist. No. 196, 135 F.3d 566, 569 (8th Cir. 1998) (holding that party challenging ruling of state administrative proceeding must shoulder burden of proof); Kerkam v. McKenzie, 862 F.2d 884, 887 (D.C. Cir. 1988) (declaring losing party at administrative proceeding to face burden of proof on appeal).

71. 995 F.2d 1204 (3d Cir. 1993).

72. *Id*. at 1218.

73. "Down's syndrome" is defined as

> a chromosomal dysgenesis syndrome consisting of a variable constellation of abnormalities caused by triplication or translocation of chromosome 21. The abnormalities include mental retardation, retarded growth, flat hypoplastic face with short nose, prominent epicanthic skin folds, small low-set ears with prominent antihelix, fissured and thickened tongue, laxness of joint ligaments, pelvic dyslpasia, broad hands

regular classroom, i.e., the school refused to mainstream their child.[74] In determining the disabled student's right to be mainstreamed under the Act, the court needed to establish which party had the burden of proving the appropriateness (or inappropriateness) of the removal. The school board carried the burden at the state administrative level and persuaded the ALJ that the IEP's call for removal was appropriate for the disabled student.[75] As a result, the school system argued that the parents should then be forced to bear the burden of persuasion when challenging the ALJ's determination in federal court.[76] The Third Circuit rejected this rationale and declared that the school board has the burden in all proceedings regarding the substantive adequacy of a student's IEP.[77]

The Third Circuit recognized that the IDEA does not prescribe the burden to either party, yet to the court, the Act still sheds light on where the burden should be placed.[78] Since the IDEA was enacted with an underlying concern for the welfare of disabled children, the court explained, "Requiring parents to prove . . . that the school has failed to comply with the Act would undermine the Act's express purpose 'to assure that the rights of children with disabilities and their parents are protected'. . . ."[79] The court held that compelling parents to prove the inadequacy of their child's education would "diminish the effect of the provision that enables parents and guardians to obtain judicial enforcement of the Act's substantive and procedural requirements."[80] Under the IDEA, parents and students are guaranteed that the student will receive appropriate public education.[81] To the court, then, requiring parents to prove that the services provided were not appropriate would undercut the Act's protection. The *Oberti* court also pointed to practical considerations in making its determination: "[T]he 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[,] . . . and greater overall

and feet, stubby fingers, and transverse palmer crease. Lenticular opacities and heart disease are common. The incidence of leukemia is increased and Alzheimer's disease is almost inevitable by age 40.

STEDMAN'S MEDICAL DICTIONARY 1728 (26th ed. 1995).

74. *Oberti*, 995 F.2d at 1206–07.

75. *Id*. at 1218.

76. *Id*.

77. *Id*. at 1219 ("The district court can give due weight to the agency proceedings (i.e., refrain from imposing its own notions of educational policy on the states), while the ultimate burden of proof remains on the school.").

78. *Id*. at 1218. The court also noted that the landmark decision in Bd. of Educ. v. Rowley, 458 U.S. 176 (1982), did not address the burden of proof either. *Id*.

79. *Oberti*, 995 F.2d at 1219 (quoting 20 U.S.C. § 1400(c) (1988)).

80. *Id*. (citation omitted).

81. *See* discussion *supra* Part II.B.

educational expertise than the parents."[82] Thus, the Third Circuit placed upon the school district, as the expert and duty-bound party, the burden of upholding its determination of an appropriate IEP at all proceedings.

2. Second, Eighth, and Ninth Circuits

The Second Circuit never issued an opinion rationalizing why the circuit assigned the burden of proof to the school system.[83] Instead, in *Walczak v. Florida Union Free School District*,[84] the Second Circuit simply recognized that the established law of the circuit held that a board of education shouldered the burden of establishing the appropriateness of a disabled student's IEP.[85]

The Eighth Circuit also assigned to the school district the burden of persuasion at the administrative proceeding. In *E.S. v. Independent School District No. 196*,[86] the court stated without explanation, "At the administrative level, the [school district] clearly had the burden of proving that it had complied with the IDEA."[87] However, the court, again without explanation, took the opposite view of the Third Circuit with respect to the burden of proof during appeals to federal court. The Eighth Circuit allowed the burden to shift to the losing party, stating that "[o]n appeal, the party challenging the outcome of state administrative hearings has the burden of proof."[88]

In a case determining the placement of the burden of proof at the district court level, the Ninth Circuit declared, "The school clearly had the burden of proving at the administrative hearing that it complied with the IDEA."[89] Unfortunately, the opinion left no citation and no reasoning for this rule. But, the Ninth Circuit upheld the general rule that "the party challenging an agency's decision bears the burden of proof" in federal court, specifically rejecting the Third Circuit's decision in *Oberti*.[90]

3. D.C. Circuit

The D.C. Circuit did not assign the burden of proof to a specific party in administrative hearings questioning the substantive adequacy of an IEP.[91]

82. *Oberti*, 995 F.2d at 1219.

83. *See* Weast v. Schaffer, 377 F.3d 449, 452 (4th Cir. 2004), *aff'd*, 126 S. Ct. 528 (2005).

84. 142 F.3d 119 (2d Cir. 1998).

85. *Id.* at 122 (quoting *In re* a Handicapped Child, 22 Educ. Dep't Rep. 487, 489 (1983) ("It is well established that a board of education has the burden of establishing the appropriateness of the placement recommended by [the school board.]").

86. 135 F.3d 566 (8th Cir. 1998).

87. *Id.* at 569. In *E.S.*, the Eighth Circuit reviewed a district court's affirmance of an ALJ's determination regarding the adequacy of a disabled child's IEP. *Id.* at 568.

88. *Id.* at 569.

89. Clyde K. v. Puyallup Sch. Dist. No. 3, 35 F.3d 1396, 1398 (9th Cir. 1994).

90. *Id.* at 1398–99.

91. Weast v. Schaffer, 377 F.3d 449, 452–53 (4th Cir. 2004), *aff'd*, 126 S. Ct. 528 (2005).

However, in *McKenzie v. Smith*,[92] the D.C. Circuit emphasized the responsibility of school districts to uphold the procedural guidelines imposed under the Act.[93] Later courts interpreted *McKenzie* to mean that in the D.C. Circuit the school board carried the burden of proof in hearings where procedural violations of the IDEA were at issue.[94] In stating that "responsibility for compliance with [the IDEA] remains with the public . . . educational agency," the *McKenzie* opinion gave strong language to support this conclusion.[95]

In *McKenzie*, Smith, a learning disabled and emotionally troubled student, attended private school for a number of years.[96] Eventually, this school determined that Smith needed to be placed in a new environment; the private school drafted an IEP proposing that Smith attend another specialized private school.[97] Following a brief psychological interview, the D.C. public educational system recommended that Smith's IEP be changed so that he attended public school.[98] Believing a private environment to be more appropriate, Smith's parents then sought relief through a due process hearing.[99] The ALJ concluded that the public school failed to provide an adequate IEP, and the school appealed to court.[100] After the district court affirmed the hearing officer's conclusions, the D.C. Circuit also affirmed, concluding that the school system failed its procedural obligations.[101] The D.C. Circuit found the procedural violations serious enough to demonstrate a substantive violation of the Act.[102]

A later D.C. Circuit case held that the circuit did not part from the generally accepted principle that challenging parties bear the burden of proof

92. 771 F.2d 1527 (D.C. Cir. 1985).

93. *Id*. at 1532.

94. *See Weast*, 377 F.3d at 452–53.

95. *McKenzie*, 771 F.2d at 1531 (quoting 34 C.F.R. § 300.347).

96. *Id*. at 1529. This private school education, though, had been approved by an IEP drawn up by his local public school, and was thus funded by the public school system. *Id*.

97. *Id*. at 1529–30. The private school's proposed IEP stated that Smith should be placed in a "full-time residential placement designed to teach students whose primary handicap is learning disabilities, but whose emotional overlay problems interfere with academic progress." *Id*. at 1530.

98. *Id*.

99. *Id*.

100. *McKenzie*, 771 F.2d at 1530.

101. *Id.* at 1531, 1535. According to the court, such procedural violations by the public school district included failure to give a detailed rationale for its proposed IEP, failure to describe options considered, and failure to list evaluation procedures, tests, records, or report. *Id*. at 1532–33.

102. *Id.* at 1531 ("[The school district] did not comply with the procedural requirements of the Act. Additionally, and partly as a consequence of this noncompliance, [the district] failed to demonstrate that its proposed placement was reasonably calculated to enable the child to receive educational benefits.") (internal quotations omitted).

in district court. "[W]e think it clear that a party challenging the administrative determination must at least take on the burden of persuading the court that the hearing officer was wrong, and that a court upsetting the officer's decision must at least explain its basis for doing so."[103] Nevertheless, the D.C. Circuit never ruled directly on whether the school district or parent carried the burden of proof in substantive challenges to a student's IEP.

C. Minority: Jurisdictions That Assign Burden to Parents

At the time *Weast v. Schaffer* was decided in the Fourth Circuit, three other federal circuits had been placing the burden on the challenging party to prove the inappropriateness of the child's public education.[104] Below are the leading cases from the Fifth, Sixth, and Tenth Circuits and their rationales.

1. Fifth Circuit

The Fifth Circuit, in deference to the expertise of local school officials, became the first circuit to assign the burden of proof to the party challenging the adequacy of a disabled child's IEP.[105] In *Tatro v. State of Texas*,[106] an eight-year-old girl afflicted with spina bifida[107] suffered from a neurogenic bladder[108] that did not allow her to control her bladder.[109] As a result, she needed to be catheterized several times daily to prevent damage to her health.[110] The child's parents initiated a due process hearing to modify her IEP to include Clean Intermittent Catheterization (CIC) as a "related service"

103. Kerkam v. McKenzie, 862 F.2d 884, 887 (D.C. Cir. 1988). In reaching this conclusion, the D.C. Circuit expressly rejected that *McKenzie v. Smith* always placed the burden of proof on the school district in federal court.

> *McKenzie v. Smith* . . . states that the [school authorities] "totally neglected its obligation . . . to demonstrate that it could provide an appropriate placement for the child." This could be read as placing the burden on the school authorities regardless of the hearing officer's decision. But as the school authorities in *Smith* had lost before the hearing officer, we think the case is more properly read as requiring the loser, as the moving party, to shoulder the burden on appeal to the district court.

Id. (quoting *McKenzie*, 771 F.2d at 1534).

104. 377 F.3d 449, 452 (4th Cir. 2004).

105. Tatro v. Texas, 703 F.2d 823, 830 (5th Cir. 1983), *aff'd in part, rev'd in part*, Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883 (1984); *see also* Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1158 (5th Cir. 1986).

106. 703 F.2d 823 (5th Cir. 1983).

107. "Spina bifida" is defined as "embryologic failure of fusion of one or more vertebral arches; subtypes of spina bifida are based upon degree and pattern of deformity associated with neuroectoderm involvement." STEDMAN'S MEDICAL DICTIONARY, *supra* note 73, at 1649.

108. "Neurogenic bladder" is defined as "any defective functioning of bladder due to impaired innervation. . . ." *Id*. at 209.

109. *Tatro*, 703 F.2d at 825.

110. *Id*.

guaranteed under FAPE.[111] After a court order modified the IEP to include CIC, the school district challenged the revision.[112] In reaching its conclusion with regard to the school board's petition, the Fifth Circuit reasoned that a presumption existed in favor of the child's IEP.[113]

As required under the IDEA, an IEP is designed through the collective efforts of informed educators, parents, and occasionally medical personnel familiar with the student.[114] Accordingly, the court in *Tatro* announced, "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."[115] Although the Supreme Court eventually overturned some of the Fifth Circuit's opinion, the High Court did not discuss the issue of burden placement.[116] A few years later, the Fifth Circuit reaffirmed its stance that the party challenging the adequacy of an IEP bears the burden of proof. In *Alamo Heights Independent School District*,[117] the Fifth Circuit cited the rationale provided in *Tatro* for placing the burden of proof on the challenging party.[118]

111. *Id.*

112. *Id.* at 826. For the Supreme Court's summary of the facts, see Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883, 885–88 (1984). Interestingly, in this case, the party attacking the proposed IEP was the school district. *Id.* at 887–88. The procedural posture of the case is necessary to its understanding. Initially, the parents challenged the school board's decision not to offer CIC to their daughter. *Id.* at 886–87. The Fifth Circuit eventually held such catheterization was justified as a "related service" guaranteed under FAPE in limited circumstances. *Id.* at 887. On remand, with this new interpretation of FAPE, the district court modified the girl's IEP to include CIC. *Id.* at 887–88. The school board then sought to change the IEP as modified. *Id.* at 888. Because the school district did not want to cover the expense of catheterization, school officials sought to change the IEP to have the disabled child receive private education where CIC was already available. *Tatro*, 703 F.2d at 829. Hence, the burden was on the school district to prove the need for such a change. *Id.* at 830. The court held that the school district did not meet its burden of production. *Id.* ("Since the school district has not even attempted to do so, its argument must be rejected and we need not reach the thorny issue of what circumstances might call for judicial modification of an IEP.")

113. *Tatro*, 703 F.2d at 830. Note that at this point, the IEP as it stood called for CIC to be administered. *See supra* note 112.

114. *Tatro*, 703 F.2d at 830 (citing 20 U.S.C. § 1401(19) (1976)).

115. *Id.*

116. *See Irving Indep. Sch. Dist.*, 468 U.S. 883.

117. 790 F.2d 1153 (5th Cir. 1986).

118. *See id.* at 1158 (recognizing that the Fifth Circuit, post-*Tatro*, defers to the IDEA and "the reliance it places on the expertise of local education authorities," and places a presumption in favor of the IEP's placement decision by assigning to the party attacking its terms the burden of proving the IEP's inappropriateness).

2. Sixth and Tenth Circuits

Under *Cordrey v. Euckert*[119] and *Doe v. Defendant*,[120] the Sixth Circuit accepted the Fifth Circuit's ruling that the attacking party must carry the burden of proof when challenging an IEP.[121] *Doe* marked the first time the Sixth Circuit followed *Tatro*'s approach to the appropriateness of an IEP.[122] In *Doe*, the Sixth Circuit upheld a district court's affirmation of an ALJ determination that an IEP was adequate stating, "Appellant has the burden of proving by a preponderance of the evidence that the IEP was inadequate. . . . We agree with the ALJ and the District Court that appellant's IEP was calculated to allow him to receive educational benefit from the instruction."[123]

The Tenth Circuit also followed the reasoning of the seminal *Tatro* ruling in *Johnson v. Independent School District No. 4*.[124] "The parties should note that the burden of proof in these matters rests with the party attacking the child's individual education plan."[125] In *Johnson*, the Tenth Circuit trumpeted the deference rationale for placing the burden on the challenger. The Tenth Circuit created a presumption that favored the appropriateness of an IEP in deference to the statutory scheme of the IDEA and "the reliance it places on the expertise of local education authorities."[126]

With the existing legal precedents in place in neighboring circuits, the Fourth Circuit faced the issue of burden-placement in litigation questioning the appropriateness of a child's IEP in *Weast v. Schaffer*.

IV. A REVIEW OF THE *WEAST* APPROACH

A. Weast Factual Background

The parents of Brian Schaffer, a middle-school student with learning disabilities, initiated a due process hearing to challenge the IEP developed for him by Maryland's Montgomery County Public School System (MCPS).[127] Beginning in pre-kindergarten until the seventh grade, Brian attended a private

119. 917 F.2d 1460 (6th Cir. 1990).

120. 898 F.2d 1186 (6th Cir. 1990).

121. *Cordrey*, 917 F.2d at 1469 ("The party challenging the terms of an IEP should bear the burden of proving that the educational placement established by the IEP is not appropriate."); *Doe*, 898 F.2d at 1191 ("Appellant has the burden of proving beyond a preponderance of the evidence that the IEP was inadequate.").

122. *Cordrey*, 917 F.2d at 1469 (explaining that the Sixth Circuit in *Doe* respected the Fifth Circuit's *Tatro* holding).

123. *Doe*, 898 F.2d at 1191.

124. 921 F.2d 1022, 1026 (10th Cir. 1990).

125. *Id.*

126. *Id.* (quoting Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1158 (5th Cir. 1986)).

127. Weast v. Schaffer, 377 F.3d 449, 450 (4th Cir. 2004), *aff'd*, 126 S. Ct. 528 (2005).

school, Green Acres, in Montgomery County.[128] However, Green Acres did not maintain a special education program and Brian struggled academically.[129] In October of Brian's seventh grade year, Green Acres' officials informed Brian's mother that he needed to attend a school that could better accommodate his disabilities.[130] Soon after, Brian's mother requested that his local MCPS school evaluate him to determine his eligibility for special education services for the following academic year.[131] Around this time, Brian's parents also applied to have him admitted to the McLean School of Maryland, another private school.[132]

In February 1998, Brian's parents, their lawyer, and MCPS school officials met with the MCPS's Admission, Review, and Dismissal (ARD) Committee.[133] In March, the McLean School accepted Brian for its upcoming school year and Brian's parents paid the enrollment fee to reserve his place.[134] Then, in April, MCPS declared Brian eligible for special education and offered an IEP for the 1998–1999 school year.[135] Brian's parents informed MCPS that their son would be attending the McLean School because they believed MCPS's proposed IEP was inadequate to serve Brian's needs.[136]

In the meantime, Brian's parents requested a due process hearing to challenge the appropriateness of the MCPS IEP and to recover the private school tuition fees.[137] At the hearing, the ALJ assigned Brian's parents, as the

128. *Id*.

129. *Id*. In the fall of 1997, Brian began the seventh grade on academic probation at Green Acres. *Id*.

130. *Id*.

131. *Id*.

132. *Weast*, 377 F.3d at 450.

133. *Id.*

134. *Id*.

135. *Id*. Under MCPS's proposed IEP, Brian was eligible for 15.3 hours of special education and 45 minutes of speech therapy at either his local public school or, alternatively, at another nearby middle school. *Id*. at 450–51.

136. *Id*. at 451.

137. *Weast*, 377 F.3d at 451; *see* Sch. Comm. v. Dep't. of Educ., 471 U.S. 359, 368 (1985) (holding that school authorities must "reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act."); *see also* GORN, *supra* note 13, at 3:2 (noting that sending a child to private school does not effectively waive that child's right to receive FAPE if the private school enrollment is triggered by the parent's correct assertion that the child has not been offered a public program that provides FAPE); William N. Myhill, Note, *No FAPE for Children with Disabilities in the Milwaukee Parental Choice Program: Time to Redefine a Free Appropriate Public Education*, 89 IOWA L. REV. 1051, 1061 (2004) ("[F]ollowing a unilateral withdrawal, if the parents are able to show that their child was not receiving a FAPE in the public school, courts may order the public school system to bear part of or the entire cost.").

challenging party, the burden of proving the inadequacy of the IEP.[138] The ALJ reasoned that deference should be given to the school district in determining a student's required substantive support.[139] On appeal by Brian's parents, the district court remanded, placing the burden on the school district to substantiate its proposed IEP.[140] In reaching its conclusion, the district court expressed that such burden placement "in no way reflects a lack of deference to the expertise of the school authorities."[141] Nevertheless, the Fourth Circuit ultimately reversed the district court's ruling and confirmed Fourth Circuit precedent "that the party initiating a proceeding has the burden of proof."[142]

B. Rationale in Weast for Placing the Burden on Challenging Party

For the first time, a circuit court devoted its entire opinion to resolving the issue of burden assignment in IEP-related due process hearings. The *Weast* court appeared willing to place the burden with the school district if an appropriate rationale could be shown. But, after a brief discussion of the other circuits' choices for burden placement, the court explained that because "the decisions assigning the burden of proof at the administrative hearing to the school system offer little or no analysis, they do not persuade us to depart from the normal rule of allocating the burden to the party seeking relief."[143]

The court began its analysis by responding to Brian's parents' argument that the school district should bear the burden of proving the adequacy of an IEP since the IDEA is a remedial statute that places many procedural obligations on school systems.[144] To Brian's parents, carrying the burden of proof was simply another of these obligations that the school must shoulder to guarantee that a child receives FAPE.[145] The court rejected this line of reasoning and likened the IDEA to other remedial statutes that impose affirmative obligations on employers, or others, but remain silent with regard to burden of proof.[146] The court noted that courts consistently place the burden

138. *Weast*, 377 F.3d at 451. The due process hearing took place over three days in June and July 1998. Brian S. v. Vance, 86 F. Supp. 2d 538, 540 (D. Md. 2000), *vacated*, Schaffer *ex rel.* Schaffer v. Vance, No. 00-1471, 2001 WL 22920, at *1 (4th Cir. Jan. 10, 2001).

139. *Weast*, 377 F.3d at 451.

140. *Id.*; *see Brian S.*, at 545 ("[W]ith regard to an initial IEP, experience and fairness dictate that the school district should have the burden of proof at any administrative due process hearing that might follow."). The district court reached its conclusion after citing authority from the circuits that placed the burden of proof on the school district at all times. *Id.* at 542–43.

141. *Brian S.*, at 544.

142. *Weast*, 377 F.3d at 450.

143. *Id.* at 453

144. *Id.*

145. *See id.*

146. *Id.* (citing Title VII of the Civil Rights Act of 1964, 20 U.S.C. §§ 2000a–2000h-6 (2000), Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (2000), and Age

on the party seeking the protection of Title VII of the Civil Rights Act of 1964 (Title VII), the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA), not the party under orders.[147] "Like the IDEA, these statutes are silent about burden of proof, yet we assign it to the plaintiff who seeks the statutory protection or benefit; the burden is not assigned to the party with the statutory obligation."[148] The Fourth Circuit noted that the IDEA compels public school systems to initiate appropriate special education for their disabled students, but this does mean that the disabled students are "relieved of the burden of proof."[149]

The court further reasoned that giving the challenger such an advantage would undermine the purpose of the IDEA. Since the burden of proof encompasses the burden of production, if a party with the burden of proof fails to put forth any evidence in its favor, it will automatically lose.[150] The Fourth Circuit believed that policy dictated putting this burden on the parents: where no evidence is presented, if the burden is on the school district, then the district will lose. "To say that the school system should lose is to say that every challenged IEP is presumptively inadequate. A presumption of inadequacy would go against a basic policy of the IDEA, which is to rely upon the professional expertise of local educators."[151]

The Fourth Circuit also expressly rejected the argument put forth in *Oberti*, which stated that school officials, by reason of their greater expertise and resources, should be charged with the burden of proving the appropriateness of an IEP.[152] "We do not automatically assign the burden of proof to the side with the bigger guns."[153] In fact, often the party with fewer resources must plead and prove a matter even where the adversary has superior access to proof.[154] The court discounted the argument that schools have a "natural advantage" in litigation, identifying that the IDEA legally involves parents in the IEP formulation.[155] Parents are members of their child's IEP team, have

Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (2000), as examples of such legislation).

147. *Weast*, 377 F.3d at 453.

148. *Id*.

149. *Id.* The court rejected the notion that a "favored group" avoids bearing the burden "merely because a statute confers substantive rights on [it]." *Id*. (quoting Clyde K. v. Puyallup Sch. Dist. No. 3, 35 F.3d 1396, 1399 (9th Cir. 1994)) (alteration in original).

150. *Id*. at 455. *See* discussion *supra* Part III.A.

151. *Weast*, 377 F.3d at 455–56 (citation omitted).

152. *Id*. at 453.

153. *Id*.

154. *Id*.

155. *Id*. at 453–54.

> The IDEA and its implementing regulations require an open process that makes relevant information and special services, such as the independent evaluation, available to parents. By the time the IEP is finally developed, parents have been provided with substantial

the right to examine records and other relevant information the school system uses to develop the IEP, and have the right to participate at meetings relating to the IEP.[156] The court rebuffed the financial burden placed on parents since they may request an independent evaluation of their child at the school's expense.[157] In addition, parents receive written notice of their rights throughout the IEP process and may receive public training with regard to their rights in protecting their child's special education.[158] The court interpreted these protections as mechanisms that "level the playing field."[159] Hence, parents do not need the added protection of having the burden of proof on the schools.

Brian's parents advanced another argument to prove that the IDEA implicitly places the burden of proof on the school district. According to his parents, Congress's enactment of the EAHCA codified all of the procedural blueprints laid out in two early special education cases, *Mills v. Board of Education*[160] and *Pennsylvania Ass'n for Retarded Children v. Commonwealth* (PARC).[161, 162] Brian's parents argued that when Congress responded to the needs of disabled students by establishing the EAHCA, Congress intentionally codified all of the principles of *Mills* and *PARC*, including their determination that the burden of proof in litigation lies with the school district.[163] The Fourth Circuit rejected this logic.[164] The court held that Congress's enactment of the

> information about their child's educational situation and prospects. They have continuing access to information and anticipated evidence once a hearing is requested. In sum, Congress has taken into account the natural advantage a school system might have in the IEP process, including the administrative hearing, by providing the explicit protections we have outlined. As a result, the school system has no unfair information or resource advantage that compels us to reassign the burden of proof to the school system when the parents initiate the proceeding.

Id. at 454.

156. *Weast*, 377 F.3d at 454 (citing 20 U.S.C. §§ 1414–15 (2000)).

157. *Id*. (citing 20 U.S.C. § 1415(b)).

158. *Id*. (citing 20 U.S.C. §§ 1415(d)(1), 1482).

159. *Id*. at 453.

160. 348 F. Supp. 866 (D.D.C. 1972) (outlining numerous procedural requirements a school district must follow when providing special education).

161. 343 F. Supp. 279 (E.D. Pa. 1972) (approving consent decree in which defendants agreed to provide free public education to mentally retarded children).

162. *Weast*, 377 F.3d at 454–55.

163. *Id.* at 455. *Mills* and *PARC* were decided at a time before special education services were congressionally guaranteed, and they served to lay the framework for necessary pronouncements from Congress. *Id.*; *see* Bd. of Educ. v. Rowley, 458 U.S. 176, 192–194 (1982). According to Brian's parents' brief to the Fourth Circuit, "It stands to reason that Congress intended for the IDEA to echo the[ir] assignments of burden of proof." *Weast*, 377 F.3d at 455 (quoting Brief of Appellees at 15, Weast v. Schaffer, 377 F.3d 449 (4th Cir. 2004) (No. 00-1471)).

164. *Weast*, 377 F.3d at 455.

EAHCA (now the IDEA) specifically incorporated some of the procedural guidelines necessary to protect disabled children, but also chose to disregard others.[165] According to the court, if Congress wanted to preserve the burden placement used in *Mills* and *PARC*, Congress could have easily incorporated it into the Act.[166]

In sum, the Fourth Circuit refused to read into the IDEA an implicit burden of proof requirement for school systems.

C. Fourth Circuit's Dissent

Judge Luttig, in his dissenting opinion, contended that the school board should always shoulder the burden of proof in IEP challenges.[167] The dissent asserted that the public school system, which is statutorily obligated to provide free appropriate education to disabled students, is in the best position to ensure that such appropriate education is granted.[168] To Luttig, "comparatively uninformed parents" do not have enough expertise in a dispute against the school.[169] Based on "policy, convenience and fairness," the dissent found it reasonable for school systems to bear the burden of proving the appropriateness of an IEP.[170] The dissent did concede that such an assignment of burden should only be a rebuttable presumption.[171]

In challenging the majority's argument that the IDEA mirrors Title VII, the ADA, and the ADEA, the dissent asserted that the affirmative obligation of those statutes is significantly different than the obligation imposed on schools under the IDEA. Luttig contended that these statutes impress an obligation to remedy discrimination, whereas the IDEA affirmatively imposes the duty to provide a beneficial and appropriate service upon school systems.[172] It is this

165. *Id.*

> Congress took a number of the procedural safeguards from *PARC* and *Mills* and wrote them directly into the Act. Congress thus knows how to borrow ideas and incorporate them into legislation. For the Act here, it borrowed some ideas and specifically ignored others. We cannot conclude from this that Congress intended to adopt the ideas that it failed to write into the text of the statute. For whatever reason Congress did not assign the burden of proof, and Congress has not signaled by its silence that we should depart from the general rule.

Id.

166. *Id.*

167. *Id.* at 457 (Luttig, J., dissenting) ("I would hold that the school district—and not the comparatively uninformed parents of the disabled child—must bear the burden of proving that the disabled child has been provided with the statutorily-required appropriate educational resources.").

168. *Id.*

169. *Weast*, 377 F.3d at 457.

170. *Id.*

171. *Id.*

172. *Id.* at 457–58.

responsibility—providing disabled students "with an enhanced level of attention and services"—that dictates a policy toward obliging the schools to bear the burden.[173]

The dissent took exception to the majority's argument that the IDEA places parents in the same position as schools when it comes to identifying appropriate education for a child.[174] Luttig acknowledged that the IDEA places resources in the hands of parents, but argued that these parents lack the requisite expertise necessary to allow them to assess the likely benefits of available alternatives: "Parents simply do not have, and cannot easily acquire, the cumulative, institutional knowledge gained by representatives of the school district from their experiences with other, similarly-disabled children."[175] The resources made available under the IDEA, while providing some understanding for parents, do not "level[] the playing field," the dissent claimed.[176]

Under this approach, school officials, thanks to their educational and continual experiences, have higher levels of expertise in IEP matters and should be held accountable for their decisions in such matters.

V. ANALYSIS: PLACE THE BURDEN ON THE CHALLENGING PARTY

The rationales presented in *Oberti*, *Lascari*, and Judge Luttig's dissent in *Weast* reflect the majority philosophy that places the burden of proof on the

173. *Id*. at 458.

174. *Weast*, 377 F.3d at 458 ("While individual parents may have insight into the educational development of their own children, they lack the comprehensive understanding of the educational alternatives available to disabled children in the school district that officials of the school system possess.").

175. *Id*. at 458. The dissent concluded that the majority overstated the average knowledge and expertise of most parents when challenging their child's education. The dissent worried that the majority's overvaluation may be clouded because Brian's parents "have proven to be knowledgeable about the educational resources available to their son and sophisticated (if yet unsuccessful) in their pursuit of these resources." *Id.* Because most parents are not as knowledgeable as Brian's parents, policy considerations suggested assigning the burden of proof to the party with greater access to resources and an elevated level of expertise. *Id.*

176. *Id*.; *see* Engel, *supra* note 51, at 189, 193–94 (noting that parental input tends to be misinformed and that parental knowledge and recommendations carry less weight than professional knowledge and recommendations during the IEP process). Engel further asserts why school officials curry greater expertise:

> The parents hold tenuously to the due process protections of the [IDEA], although they generally have neither the understanding nor the inclination to invoke them. The school district personnel are more confident, usually wielding superior political power—the capacity to define the problem, to dictate the language used to discuss the child, to intimidate, to retaliate, or to ignore.

Id. at 203.

school district at due process hearings.[177] These influential opinions declared that a school, with its administrative expertise, must be held responsible to parents by obliging it to prove the adequacy of an IEP.[178] As *McKenzie* identified, the many procedural obligations imposed upon school districts under the IDEA evidence congressional intent to protect disabled students.[179] These opinions all placed the burden of proof on the party with the "bigger guns."[180] They justified such burden-placement on fairness principles, burdening the public school district because of its greater access to resources and its obligation under the IDEA to provide all of its students with free appropriate education.[181]

Nevertheless, the decisions of *Tatro* and *Weast* exercised sound arguments that favored assigning the burden of proof to the parents, or at the very least, to the challenging party.[182] These decisions held that charging the school district with the burden of proof effectively presumes all IEPs to be inadequate.[183] However, to these courts, this conclusion was wholly at odds with the IDEA's deference to professional expertise and parental involvement.[184] Moreover, this view saw no reason to depart from the generally accepted principle that the party initiating a proceeding, or challenging a ruling, should suffer the burden of persuasion.[185] According to the Fourth Circuit, had Congress wanted to depart from this procedural standard, it would have explicitly done so when it drafted the IDEA.[186] Significantly, the *Weast* opinion made clear that the Fourth Circuit disagreed with the majority belief that parents are disadvantaged when challenging an IEP.[187]

Determining which party should carry the burden of proof in a dispute over the adequacy of an IEP requires reconciling several competing policy considerations. For instance, should deference toward the expertise of the school system point toward the presumption of an appropriate IEP? Or, conversely, should this very same deference lead toward charging the school district with the burden of affirming its expertise? Do the procedural safeguards provided to parents under the IDEA imply that Congress sought to

177. *See* discussion *supra* Parts III.B, IV.C. For a brief summary of the *Lascari* opinion, see *supra* note 69.

178. *See* discussion *supra* Parts III.B, IV.C.

179. *See* discussion *supra* Parts III.B.3.

180. *Weast*, 377 F.3d at 453 (majority); *See* discussion *supra* Parts III.B, IV.C.

181. *See* discussion *supra* Parts III.B, IV.C.

182. *See* discussion *supra* Parts III.C, IV.B.

183. *See* discussion *supra* Parts III.C, IV.B.

184. *See* discussion *supra* Parts III.C, IV.B.

185. *See* discussion *supra* Parts III.C, IV.B.

186. *See* Weast v. Schaffer, 377 F.3d 449, 455 (4th Cir. 2004), *aff'd*, 126 S. Ct. 528 (2005).

187. *Id*. at 454 ("[T]he school system has no information or resource advantage that compels us to reassign the burden of proof to the school system when the parents initiate [a due process hearing.]").

protect parents by ensuring that the burden of proof not be placed with them? Or, on the other hand, did Congress intentionally not place the burden of proof on parents when it chose how to protect disabled students and their parents? Finally, does fairness require placing the burden of proof on school districts because they have better access to resources and finances when litigating? Or, has the IDEA sufficiently leveled the playing field, giving parents adequate access to information and expertise? Resolution of such questions is necessary before allocating the burden of proof to either party at the state administrative proceedings, as well as at the district court level.

The following Sections explore the three major overriding questions that must be answered when choosing which party should carry the burden of proof: (1) What are the implications on burden of proof when giving deference to school administrative expertise? (2) How should Congress's omission of a burden placement be interpreted? (3) Do school districts possess greater weapons than parents when litigating the appropriateness of an IEP? To fairly resolve the underlying issues, a burden-shifting analysis should be established: At due process hearings, school districts should bear a burden of production, but the challenging party should maintain the ultimate burden of persuasion. Then, the party challenging the ALJ's determination should be forced to carry the entire burden of proof at federal court.

A. School Administrative Expertise

A necessary question that must be answered when deciding which party should bear the burden of proof involves the deference owed to the expertise of school officials. Should a child's education be presumptively adequate because school experts made the primary determination of services to be administered? As noted above, proponents of placing the burden on the school district argue that deference to school officials' expertise should not translate into a presumption of appropriateness regarding an IEP.[188] Rather, the experts' work should not go unchecked. For example, the district court in *Weast*, when assigning the burden to the school district, held that "it would seem entirely reasonable to assign the burden to the school authority to affirmatively establish the propriety of its plan."[189] The court asserted that such accountability does not show a lack of deference toward the expertise of school officials.[190] Instead, the court found it entirely consistent to acknowledge the expertise of school officials and still require the school to demonstrate to an impartial ALJ that the proposed IEP addresses the individual student's

188. *See supra* Parts III.B, IV.C.

189. Brian S. v. Vance, 86 F. Supp. 2d 538, 544 (D. Md. 2000), *vacated*, Schaffer *ex rel.* Schaffer v. Vance, No. 00-1471, 2001 WL 22920, at *1 (4th Cir. Jan. 10, 2001).

190. *Id.*

needs.[191] Similarly, Judge Luttig, in his dissent in *Weast*, opined that the IDEA "imposes an *affirmative obligation* on the nation's school systems to provide disabled students with an enhanced level of attention and services."[192] To Luttig, this affirmative obligation included the school board's duty to demonstrate the adequacy of the IEP at the due process challenge.[193] These opinions stressed Congress's objective of ensuring appropriate, special, individual education to disabled students; presuming the adequacy of an IEP undercuts such a goal.

On the other side, those siding with the schools argue that the expertise school personnel possess should lead to deference toward the IEP they design.[194] As the Fourth Circuit declared, "Congress enacted the IDEA with the clear intention of deferring to local school authorities for the development of educational plans for disabled children."[195] This view not only presumes an IEP to be appropriate because it was drafted by special education experts, but also because the child's parents were included as part of the IEP team.[196] Because special education teachers as well as the child's parents and other assistants all collaborate in drawing the IEP, "it is reasonable to require parents attacking the terms of an IEP to bear the burden of showing why it is deficient."[197]

A burden-shifting approach at the due process hearing would address the policy considerations framed by both points of view above. Both sides agree that deference should be accorded to the expertise of school officials. Assigning an initial burden of production to the school district would solve the concern that an IEP is presumptively adequate without evidence supporting it. However, giving the school authorities the due deference they deserve, the school should only need to meet this initial burden of producing evidence supporting its plan.[198] Once the school offers some support for the

191. *Id*.

192. *Weast*, 377 F.3d at 458.

193. *Id*.

194. *See supra* Parts III.C, IV.B.

195. *Weast*, 377 F.3d at 456 (majority).

196. *Id*. at 456 (noting that Congress entrusts a disabled child's special education to public schools under the IDEA, but it also provides for parental involvement and assistance in the formulation of a child's IEP).

197. *Id*.

198. In practice, this initial burden of production should almost always be met without issue by the district. The IDEA requires, as part of the IEP, that the IEP team turn over its documented methods of examination and determinations to the child's parents. 20 U.S.C. § 1414(b)(4)(B) (2000), *amended by* Pub. L. No. 108-446, § 614, 118 Stat. 2647, 2705 (2004). Thus, the school's evidence must be produced anyway and should be readily available.

For a Seventh Circuit case that instructs ALJs to give due deference to a school's finding of appropriateness, without declaring which party bears the burden of proof before the ALJ, see Sch. Dist. v. Z.S., 295 F.3d 671, 676–77 (7th Cir. 2002).

appropriateness of the IEP, the burden of persuasion should then shift to the challenger. The burden of persuasion only becomes a factor where both sides have produced evidence and the fact-finder is not persuaded by either side.[199] Thus, the ultimate burden of persuasion will only come into play if the school district's proof and the parents' proof are equal. In accordance with the general rule that the challenger should bear the burden, and out of respect for the IEP drawn mutually by parents and teachers, the final burden of proof should rest with the parents (if they initiated the proceeding). It is also entirely reasonable to hold the losing party at the administrative proceeding responsible for contesting the ALJ's determination. If the school loses at the state level, the school should then be forced to bear the burden of persuasion in federal court. After all, deference should also be given to the ALJ's finding.[200]

B. Congress's Omission of Burden of Proof in the IDEA

The Supreme Court in *Rowley* noted that the IDEA purports to give a child with disability appropriate education that is "reasonably calculated to enable the child" to receive educational benefits.[201] The Supreme Court also recognized that the IDEA sets up several procedural benchmarks that help to ensure such educational benefits are received.[202] Yet, Congress did not assign the procedural issue of burden of proof to a specific party in special education litigation.[203] An important query, then, is whether Congress intended the procedural guidelines to suggest that the heavy burden placed on school districts means the districts must also carry an implied burden of proof in due process hearings and federal court challenges. Or, as the Fourth Circuit held, are the procedural requirements the only obligations for school districts with respect to an IEP? In other words, does Congress's omission of a burden assignment on the school district imply that Congress did not want such an assignment to occur?[204]

> Administrative law judges in Wisconsin who hear IDEA cases are, we grant, specialists, and are not required to accept supinely whatever school officials testify to. But they have to give that testimony due weight. . . . A particular Individualized Education Program, to survive administrative review . . . need only be "*reasonably* calculated to enable the child to receive educational benefits."

Id. (quoting Bd. of Educ. v. Rowley, 458 U.S. 176, 206–07 (1952)) (internal citations omitted).

199. *See supra* text accompanying notes 67–68.

200. *See supra* note 70 and accompanying text.

201. *Rowley*, 458 U.S. at 204.

202. See discussion *supra* Part II.B.

203. Weast v. Schaffer, 377 F.3d 449, 450 (4th Cir. 2004), *aff'd*, 126 S. Ct. 528 (2005).

204. *Compare* Brief for the United States as Amicus Curiae Supporting Appellees Urging Affirmance at 12, Schaffer *ex rel.* Schaffer v. Vance, 2 Fed. App'x. 232 (4th Cir. 2001) (No. 00-1471), 2000 WL 33991818 [hereinafter Brief for United States] ("Having to carry the burden of proof regarding the adequacy of its proposed IEP is consistent with the school's existing statutory duties under the IDEA to provide FAPE and should not substantially increase the workload for

Judge Luttig's dissent to *Weast* and the New Jersey state court decision of *Lascari* interpret the IDEA's many procedural obligations as evidence of Congress's intent that the burden of proof should fall on the school district.[205] "[T]he policies behind the IDEA indisputably argue in favor of placing the burden of proof with the school district."[206] Under such an approach, the many procedural requirements that school officials must follow in order to provide appropriate education suggest the inference that schools should also shoulder other procedural safeguards not necessarily outlined in the IDEA. In fact, the argument was even asserted that all of the procedural principles of *PARC* and *Mills* have impliedly been incorporated into the IDEA.[207]

But as the *Weast* court notes, the omission regarding burden of proof is consistent with other pieces of major legislation.[208] The Supreme Court has interpreted those statutes to place the burden on the party seeking the protection of the law.[209] In special education cases, the parents and student are seeking appropriate special education guaranteed them under the IDEA. According to *Weast*, Congressional silence with respect to burden of proof indicates that courts should not depart from the general rule that "a party who initiates a proceeding to obtain relief based on a statutory obligation bears the burden of proof."[210]

Assigning the burden of production to the school and the burden of persuasion to the parents reasonably reconciles the opposing interpretations of the IDEA. Requiring the school district to put forth some evidence in support of the IEP, at the very least, adds another procedural directive under the IDEA. However, parents should be forced to carry the burden of persuasion because they are seeking the protection of the IDEA. If Congress intended to depart from the general practice of putting the burden on the party seeking protection

the school."), *with* Brief of Amici Curiae Maryland Ass'n of Boards of Education & National School Boards Ass'n at 5, Schaffer *ex rel.* Schaffer v. Vance, 2 Fed. App'x. 232 (4th Cir. 2001) (No. 00-1471), 2000 WL 33991819 ("Although IDEA provides numerous due process protections for parents, the assignment of the burden of proof to the school system 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.").

205. *See* discussion *supra* Part IV.C, note 69.

206. *Weast*, 377 F.3d at 457 (Luttig, J., dissenting); *see supra* text accompanying notes 172–73; Brian S. v. Vance, 86 F. Supp. 2d 538, 543 (D. Md. 2000), *vacated*, Schaffer *ex rel.* Schaffer v. Vance, No. 00-1471, 2001 WL 22920, at *1 (4th Cir. Jan. 10, 2001) ("Like [the] procedural safeguards, the allocation of the burden of proof protects the rights of handicapped children to an appropriate education.").

207. *See supra* text accompanying notes 160–63.

208. *Weast*, 377 F.3d at 453.

209. *Id.*

210. *Id.* at 455.

of the Act, Congress should have included the provision.[211] Thus, giving the school a small burden increases its procedural requirements; but the parents still must satisfy the ultimate burden at the administrative proceeding. Again, no valid reasoning under this Section justifies requiring any party but the losing party to carry the burden in federal court.[212]

C. Level Playing Field

A fairness exception exists to the general rule that the party initiating a proceeding or seeking the protection of a statute maintains the burden of proof. As the Fourth Circuit conceded in *Weast*, "[F]actors such as policy considerations, convenience, and fairness may allow for a different allocation of the burden of proof."[213] It is thus necessary to determine whether school districts possess resources that parents cannot access when litigating an IEP dispute. If so, the goal of fairness would dictate that the burden of proof should be properly be on the school.

The majority of circuits have held that the burden of proof should be placed on the school district in order to fairly mitigate the advantages school districts possess in IEP battles with parents.[214] In an amicus brief, filed in support of parents, on behalf of the United States, the U.S. General Counsel argued that schools are in a better position to shoulder the burden because they possess "superior knowledge of the facts" and control "the relevant information needed to decide the dispute."[215] The Third Circuit, in *Oberti*, recognized this apparent imbalance of resources when it placed the burden on the parents,[216] and Judge Luttig in his *Weast* dissent asserted that "[p]arents simply do not have, and cannot easily acquire, the cumulative, institutional knowledge gained by representatives of the school district from their experiences with other, similarly-disabled children."[217]

On the other hand, proponents of placing the burden with the parents argue that the IDEA has effectively leveled the playing field. These decisions recognized that under the IDEA, parents are fully informed about their child's educational plight and are granted access to all resources available to the schools. Parents are permitted and encouraged to participate in the IEP formulation and are entitled to an independent evaluation of their child at the

211. As the Fourth Circuit pointed out, Congress "knows how to borrow ideas and incorporate them into legislation. For [the IDEA], it borrowed some ideas and specifically ignored others. . . . For whatever reason Congress did not assign the burden of proof . . . ." *Id.*

212. *See supra* note 70 and accompanying text.

213. *Weast*, 377 F.3d at 452.

214. *See* discussion *supra* Parts III.B, IV.C.

215. Brief for United States, *supra* note 204, at 13.

216. *See* discussion *supra* Part III.B.1.

217. *Weast*, 377 F.3d at 458.

district's expense.[218] The majority in *Weast* noticed that Congress has taken into account the natural advantage a school system might have over a parent in the IEP and has provided the parents with explicit protections.[219] "As a result," the court declared, "the school system has no unfair information or resource advantage . . . ."[220]

The Fourth Circuit position that Congress has effectively closed the resource disparity between parents and schools is well grounded. While parents may not have the same overall experience and knowledge as schools, the IDEA grants to parents substantial opportunity to actively participate in the IEP process. Under the IDEA, parents are guaranteed the ability to "examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child . . . ."[221] Parents are not to be excluded from their child's IEP team and are to receive notice of all evaluations.[222] Importantly, the IEP team must take into consideration existing evaluation data on the child, including evaluations and information provided by the parents of the child.[223] What is more, parents maintain the right to obtain, at the expense of the district, an independent educational evaluation of their child and a preliminary impartial mediation even before the due process hearing.[224]

Conceding that not all parents will become experts with respect to the educational resources available to them, the better position is still to place the ultimate burden of persuasion on them. By the time the parents' challenge reaches an ALJ, the parents have been granted a funded independent evaluation of their child and have presented their case before an impartial mediator. It makes more sense to burden the parents, as the challenger, with the ultimate responsibility of proof by the time the issue reaches an ALJ. Nevertheless, schools still should be forced to present some evidence in their favor before an IEP presumably becomes appropriate.

218. *See supra* text accompanying notes 154–159.

219. *See supra* text accompanying notes 154–159.

220. *Weast*, 377 F.3d at 454.

221. 20 U.S.C. § 1415(b)(1) (2000), *amended by* Pub. L. No. 108-446, § 615, 118 Stat. 2647, 2716 (2004).

222. *Id.* §§ 1414(b)(1), (d)(1)(B), *amended by* § 614, 118 Stat. at 2704, 2709. Parents of disabled students should be motivated to take advantage of the many resources available to them. *See* Phyllis Coulter, *Expert: Be Your Child's Advocate: Experienced Parent Gives Special Ed Advice*, PANTAGRAPH, Jan. 29, 2005, at A3 (reporting the advice of a mother of a 21-year-old disabled student and now a regional training coordinator for Family Matters Parent Training and Information Center: "Parents are vital to the individualized education plan, and they have to be knowledgeable about the system and prepared to make the decisions about what is best for their children").

223. 20 U.S.C. § 1414(b)(2), *amended by* § 614, 118 Stat. at 2704–05.

224. *See id.*§ 1415(b)(6), (e)(1), *amended by* § 615, 118 Stat. at 2716, 2719.

Because both parties essentially carry the same guns to the ALJ, the ALJ's determination should be granted deference. The losing party should then be assigned the burden of proving a defect in the ALJ's determination.[225]

D. December 2004 Changes to the IDEA

It must be acknowledged that as this Note was drafted, Congress enacted changes to the IDEA. However, this recent development in the special education law supports the conclusion that the challenging party should bear the final burden of persuasion. In December 2004, Congress passed into law the Individuals with Disabilities Education Improvement Act (Improvement Act)[226] to amend the IDEA. The Improvement Act again did not address the assignment of the burden of proof in IEP challenges. Still, the amendments tend to confirm that the challenger should be responsible for proving the inappropriateness of an IEP.

The Improvement Act obliges a party challenging an IEP to give notice of all issues prior to the due process hearing or risk not having the issue addressed.[227] This requirement affirms Congress's intent that the party seeking the protection of the IDEA carries responsibilities. Also, the new amendments call for a meeting fifteen days before the administrative proceeding, list options for state-funded mediation with a qualified and impartial mediator, and give an option to parents to meet with a disinterested party to encourage the use of such mediation.[228] Furthermore, the Improvement Act imposes liability on attorneys for the costs of frivolous lawsuits.[229] It appears that Congress intends due process hearings to be administered only when necessary. Thus, the party choosing to still attack an IEP after a preliminary meeting and mediation should be forced to prove its case.

VI. CONCLUSION

The decision of the Fourth Circuit in *Weast v. Schaffer*, and the subsequent affirmance by the Supreme Court, properly assign to the challenging party the burden of persuasion at IDEA-related due process hearings. However, a more fair and reasonable solution would be to create a burden-shifting approach that

225. *See supra* note 70 and accompanying text.

226. Pub. L. No. 108-446, 118 Stat. 2647 (2004).

227. *Id.* § 615, 118 Stat. at 2722; *see* NATIONAL SCHOOL BOARDS ASSOCIATION, *supra* note 61.

228. *See* Individuals with Disabilities Education Improvement Act § 615, 118 Stat. at 2719–21; NATIONAL SCHOOL BOARDS ASSOCIATION, *supra* note 61.

229. Individuals with Disabilities Education Improvement Act § 615, 118 Stat. at 2724; *see* NATIONAL SCHOOL BOARDS ASSOCIATION, *supra* note 61; HOUSE EDUCATION & THE WORKFORCE COMMITTEE, FACT SHEET: SPECIAL EDUCATION REFORM: SUPPORTING TEACHERS & SCHOOLS, PROVIDING NEW CHOICES FOR PARENTS & STUDENTS (2004), http://edworkforce.house.gov/issues/108th/education/idea/1350factsheet.htm.

places the initial burden of production at the hearing on the school district. In deference to the school officials' expertise, once the school has produced sufficient evidence supporting its plan, the IEP should then be presumed adequate. The challenging party (whether it is the school or parents) should then be dealt the decisive burden of persuasion. The losing party should be forced to prove its disagreement with the ALJ's determination in federal court. This approach defeats the presumption of an appropriate IEP without more, but sticks to the general principle that a party initiating a proceeding, and seeking the protection of a statute, bears the burden of persuasion.

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