

No. 04-698

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IN THE  
SUPREME COURT OF THE UNITED STATES

BRIAN SCHAFFER, A MINOR, BY HIS PARENTS AND NEXT  
FRIENDS, JOCELYN AND MARTIN SCHAFFER, *et al.*,  
*Petitioner,*

v.

JERRY WEAST, SUPERINTENDENT,  
MONTGOMERY COUNTY PUBLIC SCHOOLS, *et al.*,  
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FOURTH CIRCUIT

**BRIEF OF *AMICI CURIAE***

**COUNCIL OF PARENT ATTORNEYS AND ADVOCATES;  
NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY  
SYSTEMS; AMERICAN ASSOCIATION OF PEOPLE WITH  
DISABILITIES; NATIONAL CHILDREN'S LAW NETWORK;  
EDUCATION LAW CENTER OF NEW JERSEY; EDUCATION  
LAW CENTER OF PENNSYLVANIA; ALEXANDER GRAHAM  
BELL ASSOCIATION FOR THE DEAF AND HARD OF  
HEARING; BAZELON CENTER FOR MENTAL HEALTH LAW;  
CENTER FOR LAW AND EDUCATION; UNIVERSITY OF  
RICHMOND'S SCHOOL OF LAW DISABILITY LAW CLINIC;  
DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, INC.;  
TASH, INC.; WESTERN LAW CENTER FOR DISABILITY  
RIGHTS SUPPORTING PETITIONERS.**

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## INTERESTS OF AMICI

Amici are thirteen organizations of parents of children with disabilities, their families, their attorneys and advocates, their educational consultants, and people with disabilities, listed below.<sup>1</sup>

The Court's decision will affect all of the approximately 6.7 million children with disabilities in public schools,<sup>2</sup> comprising approximately thirteen percent of the student population.<sup>3</sup> The Fourth Circuit's decision to assign the burden of proof to parents in IDEA administrative hearings will have the effect of depriving children with disabilities of the special education services they desperately need and that Congress intended they be provided.

These children live with a broad range of disabilities, including autism, Down Syndrome, hearing loss or deafness, mental retardation, and muscular dystrophy. These obvious disabilities are usually known to the parents and school districts from the outset of the child's experience with the school system. Other children may experience disabilities that are more subtle, and that the school district itself identifies as the child gets older. Examples of difficulties

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<sup>1</sup> Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court pursuant to Supreme Court Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

<sup>2</sup> U.S. Department of Education, Office of Special Education Programs, Data Analysis System (reporting for 2003-04 school year), available at [www.ideadata.org/tables27th/ar\\_aa7.htm](http://www.ideadata.org/tables27th/ar_aa7.htm) and [www.ideadata.org/tables27th/ar\\_aa9.htm](http://www.ideadata.org/tables27th/ar_aa9.htm) (visited Apr. 16, 2005).

<sup>3</sup> Mary Wagner, et al., *The Children We Serve: The Demographic Characteristics Of Elementary And Middle School Students With Disabilities And Their Households (SEELS)* 28 (September 2002).

that may become apparent during the child's school experience include such learning disabilities as dyslexia, and auditory processing disorders. Obvious or subtle, school districts have an affirmative obligation to locate, identify, and evaluate children with disabilities, including those in private schools and prisons, 20 U.S.C. § 1412(a)(3),<sup>4</sup> and provide a free appropriate public education to all children with disabilities. 20 U.S.C. § 1412(a)(1).

As we discuss further below, statistics show that families of children with disabilities have dramatically higher rates of poverty and are less educated than the population as a whole. The population of students with disabilities includes children who are homeless, neglected, or abused. Placing the burden of proof on these families risks denying many of their children the free appropriate public education that Congress mandated.

A recent Maryland administrative case starkly revealed the impact of the burden of proof, in which a boy's guardian proceeded *pro se* and lost because:

It was clear that the Guardian, although well-intentioned, did not know how to go about presenting evidence to support her complaint . . . . As the trier of fact I am prohibited from assisting any party in the presentation of his/her case, or from extending procedural leeway in proving his/her case.

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<sup>4</sup> The 2004 amendments, effective July 1, 2005, impose the further obligation to find homeless children and wards of the state who are disabled.

*XXXX XXXX v. Baltimore City Pub. Sch.*, Order, OAH No.: MSDE-CITY-OT-200200192, Md. Office of Admin. Hearings (June 26, 2002).

The boy's sister, acting as his guardian, had sought assistance for her brother, a high school student, because he lacked skills necessary for daily, independent living. The Administrative Law Judge placed the burden of proof on the guardian, and required her to present her case first; the Baltimore County Public Schools presented *no* evidence. The ALJ rejected all of the guardian's proffered exhibits and granted summary judgment for the school district, noting that the guardian had failed to introduce any "competent" evidence.

Thus, when families bear the burden of proof the impact is felt most strongly by those who are least able to bear it. The consequence is that these children will not receive the special education services they need and Congress expected the school district to provide.

\* \* \*

The Council of Parent Attorneys and Advocates is an independent, nonprofit organization of attorneys, advocates, and parents in 43 states and the District of Columbia who are routinely involved in special education due process hearings throughout the country.

The National Association of Protection and Advocacy Systems (NAPAS) provides special education representation to thousands of children and their families each year. NAPAS is the membership organization of the network of protection and advocacy (P&A) agencies. Located in all 50 states, the District of Columbia, Puerto Rico, and the federal territories, P&As are mandated under various federal statutes

to provide legal representation and related advocacy services on behalf of all persons with disabilities in a variety of settings.

The American Association of People with Disabilities (AAPD) is the largest cross-disability membership organization in the United States with more than 110,000 members.

The National Children's Law Network is a partnership consisting of eight children's legal centers. The members, which spread across the country, include Public Counsel (California), Children and Family Justice Center of Northwestern School of Law (Illinois), Children's Law Center of Massachusetts, Children's Law Center of Minnesota, Just Children (Virginia), Oklahoma Lawyers for Children, Rocky Mountain Children's Law Center (Colorado), and Support Center for Child Advocates (Pennsylvania). Among other things, these organizations provide pro bono legal representation and support to the most at risk members of the school population, low-income children with disabilities.

The Education Law Center of New Jersey is a not-for-profit law firm in New Jersey specializing in education law. It serves approximately 600 individual clients each year, primarily in the area of special education law, including in administrative hearings.

The Education Law Center of Pennsylvania, an education advocacy organization supported in large part by Pennsylvania's Protection and Advocacy System, provides free legal assistance to children with disabilities and their families. In selected cases, it represents children and families at special education hearings and in court. Each

year, it interacts with thousands of families and professionals through training and other outreach activities.

TASH, Inc., is an international membership association of people with disabilities, their family members, other advocates, and people who work in the disability field. TASH has chapters throughout the United States and members from thirty-eight countries worldwide.

Alexander Graham Bell Association for the Deaf and Hard of Hearing (AG Bell) serves parents of children who are deaf or hard of hearing, adults who are deaf or hard of hearing, educators of individuals who are deaf or hard of hearing and other interested person in every state, and reaches out to over 54 nations. As part of that advocacy, AG Bell represents parents in test cases throughout the country.

The Disability Law Clinic of the Children's Law Center of the University of Richmond's School of Law represents children and their parents in special education and juvenile court proceedings – hence, its interest in the outcome of this case.

The Center for Law and Education (CLE) of Boston and Washington, D.C. is a national advocacy organization that works with parents, advocates and educators to improve the quality of education for all students, and in particular, students from low-income families and communities. Throughout its history, CLE has been a recognized leader in advancing the rights of students with disabilities.

The Western Law Center for Disability Rights (WLCDR) is a non-profit organization that protects and enforces the civil rights of people with mental and physical disabilities. The WLCDR's Learning Rights Project advocates for special education services for children with learning disabilities who

are from low-income and minority communities through litigation, administrative representation, mediation, and education.

The Bazelon Center for Mental Health Law is a leading national legal-advocacy organization representing people with mental disabilities. Bazelon has a particularly long history of involvement in shaping the delivery of educational services to children with disabilities. The Center was counsel in *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972), one of the two landmark class actions that challenged the exclusion of children with disabilities from school and whose consent decree became the basis for the IDEA's precursor, the Education for All Handicapped Children Act.

The Disability Rights Education and Defense Fund, Inc., (DREDF) is a national disability civil rights law and policy organization dedicated to securing equal citizenship for Americans with disabilities. Since its founding in 1979, DREDF has pursued its mission through education, advocacy and law reform efforts. A significant portion of DREDF's work is directed at securing and advancing the educational entitlements of children with disabilities, and DREDF is nationally recognized for its expertise in the interpretation of the Individuals with Disabilities Education Act.

### **SUMMARY OF ARGUMENT**

When the school district is unable to obtain a consensus of the parent and school members of an IEP team on the appropriate program to serve a child with a disability, the school district should bear the burden of establishing the appropriateness of its proposal at a due process administrative hearing.

1. Placing the burden of proof on the school district in IDEA's administrative hearing would implement Congress' broad affirmative mandates that school districts locate, identify, evaluate, and provide an appropriate education to all children with disabilities.

In passing IDEA, Congress imposed a broad, affirmative mandate on school districts to provide a free appropriate public education to *all* children with disabilities. In so doing, Congress required that schools (1) on their own initiative, search out, identify, and evaluate all children with disabilities, including children in private schools; and (2) provide all children with disabilities with a free appropriate public education designed to meet their unique needs. Congress did not structure the program as a benefit that children or their families must apply for, and it went beyond a mere prohibition of discrimination in the provision of educational services to children with disabilities.

2. Placing the burden on the school district recognizes that in the unique circumstance of an IDEA administrative hearing, the school district stands in a better position to meet the burden than the parents.

During the IEP and administrative hearing processes, only the school district is fully aware of the rationale behind its proposal, and only the school district has full, unfettered access to all relevant information about a proposed placement. The school district typically employs the professional witnesses or other experts who have worked with or evaluated the child. The parents often proceed *pro se* and do not appreciate the import of the burden of proof or have any experience in the mechanisms for presenting evidence. These considerations take on added importance in IDEA administrative hearings, because there is usually no right to discovery by which the parents can obtain documents

(other than the child's own file) or to depose school district employees.

For these reasons, placing the burden of proof on the parents risks denying a child with a disability the appropriate education IDEA requires. Placing the burden of proof on the school district creates no such risk; it simply promotes the Congressional goals of providing an education to all children with disabilities.

IDEA's procedural protections for parents do not "level the playing field," as the Fourth Circuit asserted, because they do not fundamentally alter the school district's superior position and resources. Moreover, IDEA's procedural protections and parent participation rights demonstrate Congress' concern for parents' roles. Placing the burden of proof on the school district would be consistent with this Congressional intent, while imposing little additional burden on a school district. Placing the burden on the parents, on the other hand, would risk inviting school districts to ignore or undermine parents' rights, while imposing significant costs on them and creating a substantial risk of denying children with disabilities an appropriate education.

## **ARGUMENT**

In assigning the burden of proof in IDEA administrative hearings, the Fourth Circuit incorrectly applied a so-called "normal rule of allocating the burden to the party seeking relief," Petitioner's Appendix ("P.A.") 6, and declined to deviate from this supposed default rule. But the Fourth Circuit's heavy reliance on an arbitrary default rule has little legal support. As this Court has previously held, "[t]here are no hard-and-fast standards governing the allocation of the burden of proof in every situation. The issue, rather, 'is

merely a question of policy and fairness based on experience in the different situations.” *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973) (quoting 9 J. WIGMORE, EVIDENCE § 2486 (3d ed. 1940)). The Court has acknowledged that “looking for the burden of pleading is not a foolproof guide to the allocation of the burdens of proof. The latter burdens do not invariably follow the pleadings.” *Alaska Dept. of Env’tl. Conservation v. EPA*, 540 U.S. 461, 494 n.1 (2004) (quoting 2 J. STRONG, MCCORMICK ON EVIDENCE § 337 (5th ed. 1999)). In addition, “[n]o ‘single principle or rule . . . solve[s] all cases and afford[s] a general test for ascertaining the incidence’ of proof burdens.” *Id.* (quoting 9 J. WIGMORE, EVIDENCE § 2486 (J. Chadbourn rev. ed. 1981)). “Among other considerations, allocations of burdens of production and persuasion may depend on which party . . . ‘presumably has peculiar means of knowledge.’” *Id.* (citations omitted).

Moreover, because the “assignment of the burden of proof is a rule of *substantive law*,” *Dir. v. Greenwich Collieries*, 512 U.S. 267, 271 (1994) (citation omitted) (emphasis added), ordinary principles of statutory interpretation require that the Court allocate the burden of proof in a manner that *supports*, rather than undermines, the statutory purpose. See *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 431-32 (1984); *United States v. Bacto-Unidisk*, 394 U.S. 784, 799 (1969) (when interpreting an imprecise statute, courts should look to the statutory purpose).