No. 04-698

IN THE

Supreme Court of the United States

BRIAN SCHAFFER, a minor; by his parents and next friends, JOCELYN AND MARTIN SCHAFFER,
Petitioners,
v.
JERRY WEAST, Superintendent of Montgomery County Public Schools, *et al.*,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE COUNCIL OF THE GREAT CITY SCHOOLS, AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, NATIONAL EDUCATION ASSOCIATION, PENNSYLVANIA ASSOCIATION OF SCHOOL ADMINISTRATORS, NATIONAL ASSOCIATION OF ELEMENTARY SCHOOL PRINCIPALS, PUBLIC SCHOOL SUPERINTENDENTS' ASSOCIATION OF MARYLAND, AND CONNECTICUT ASSOCIATION OF PUBLIC SCHOOL SUPERINTENDENTS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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This brief is submitted on behalf of the Council of the Great City Schools, American Association of School Administrators, National Education Association, Pennsylvania Association of School Administrators, National Association of Elementary School Principals, Public School Superintendents' Association of Maryland, and Connecticut Association of Public School Superintendents as amici curiae in support of respondent.[1]

INTEREST OF AMICI CURIAE

The Council of the Great City Schools ("Council") is a coalition of 65 of the nation's largest urban public school systems.[2] Founded in 1956 and incorporated in 1961, the

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[1] Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and nobody other than amici, their members, or their counsel contributed monetarily to the brief.

[2] Member school districts include Albuquerque Public Schools, Anchorage School District, Atlanta Public Schools, Austin Independent School District, Baltimore City Public Schools, Birmingham City Schools, Boston Public Schools, Broward County Public Schools, Buffalo City School District, Caddo Parish School District, Charleston County Public Schools, Charlotte-Mecklenburg Schools, Chicago Public Schools, Christina School District, Cincinnati Public Schools, Clark County School District, Cleveland Municipal School District, Columbus Public Schools, Dallas Independent School District, Dayton Public

Council is located in Washington D.C., where it works to promote urban education through legislation, research, media relations, instruction, management, technology, and other special projects. The Council serves as the national voice for urban educators, providing ways to share promising practices and address common concerns.[3] For the past several years, the Council's legislative and legal staffs have participated extensively in congressional consideration of the Individuals with Disabilities Education Act Amendments of 1997 and

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Schools, Denver Public Schools, Des Moines Independent Community School District, Detroit Public Schools, District of Columbia Public Schools, Duval County Public Schools, Fort Worth Independent School District, Fresno Unified School District, Guilford County Schools, Hillsborough County School District, Houston Independent School District, Indianapolis Public Schools, Jackson Public School District, Jefferson County Public Schools, Kansas City School District, Long Beach Unified School District, Los Angeles Unified School District, Memphis City Public Schools, Metropolitan Nashville Public Schools, Miami-Dade County Public Schools, Milwaukee Public Schools, Minneapolis Public Schools, New Orleans Public Schools, New York City Department of Education, Newark Public Schools, Norfolk Public Schools, Oakland Unified School District, Oklahoma City Public Schools, Omaha Public Schools, Orange County Public Schools, Palm Beach County Public Schools, Philadelphia Public Schools, Pittsburgh Public Schools, Portland Public Schools, Providence Public Schools, Richmond Public Schools, Rochester City School District, Sacramento City Unified School District, Salt Lake City School District, San Diego Unified School District, San Francisco Unified School District, Seattle Public Schools, St. Louis Public Schools, St. Paul Public Schools, Toledo Public Schools, and Tucson Unified School District.

[3] The Great City Schools' enrollment represents 15.5% of total national public school enrollment. Nearly two-thirds of our students are eligible for a free-lunch subsidy, compared to just over one-third nationally. In addition, more than three-quarters of Great City Schools' students are from minority backgrounds, primarily African American, Hispanic, or Asian American, compared with the 40.5% national average. Finally, the percentage of our students whose families do not speak English as their first language is double the national average.

the Individuals with the Disabilities Education Improvement Act of 2004.

The American Association of School Administrators (AASA), founded in 1865, is the professional association of over 14,000 local school system leaders across America. AASA's mission is to support and develop effective school administrators who are dedicated to the highest quality education for all children. AASA supports equal educational opportunity as a key factor in providing the highest quality public education for all children.

The National Education Association (NEA) is a nationwide employee organization with more than 2.7 million members, the vast majority of whom are employed by public school districts, colleges and universities. NEA has long supported a free, appropriate public education for all students with disabilities. Because many of its members are special and regular education teachers, and education support professionals who provide education and support services to students with disabilities, NEA has a special interest in this case.

The Pennsylvania Association of School Administrators, (PASA) is a non-profit association composed of school superintendents, Intermediate Unit Executive Directors and other school administrators. Its purposes, among others, are to support the general educational welfare of the Commonwealth of Pennsylvania and to advance educational standards in our schools. Its members are responsible under state law and regulation for the superintendence and supervision of the public schools of the Commonwealth of Pennsylvania, and have under those laws and specific responsibility to administer special education programs in accordance with the Individuals with Disabilities Education Act. In the past, PASA has participated as an amicus in various Pennsylvania appellate cases on important educational issues.

The National Association of Elementary School Principals (NAESP), founded in 1921, represents 30,000 elementary and middle level principals in the United States and abroad. The mission of NAESP is to lead in the advocacy and support for elementary and middle level principals and other education leaders in their commitment to all children.

The Public School Superintendents' Association of Maryland (PSSAM) provides leadership for quality education in the State of Maryland by addressing educational issues through the unified voice of all of Maryland's public school superintendents. The PSSAM includes the superintendents of all 24 of Maryland's local school districts, and is actively engaged in the legislative process at both the state and federal levels in order to ensure the highest quality education for all of Maryland's public school students.

The Connecticut Association of Public School Superintendents (CAPSS) is a statewide nonprofit educational administration organization whose membership includes all of Connecticut's public school superintendents and whose mission is to lead the continuous improvement of public education for all students by advocating public policy for children, and by developing and supporting executive school leaders. CAPSS is actively involved in monitoring state and federal legislative activity and strives to influence positive laws and regulations affecting the education of Connecticut's public school students.

SUMMARY OF ARGUMENT

I. The Individuals with Disabilities Education Act ("IDEA") provides a roadmap for both parents and schools to ensure that every child with a disability receives a free appropriate public education ("FAPE"). The parties and their amici are united in their sincere desire to achieve this goal. However, amici are concerned that this goal is being undermined as schools are forced to devote more and more resources to *litigating* IDEA compliance, leaving fewer re-

sources to develop and implement proper educational plans for children with disabilities. Placing the burden of proof on schools when such plans are challenged by parents would only exacerbate that problem, increasing both the volume of litigation – contrary to Congress' stated intention – and also the expense of that litigation. As a result, school resources – both direct costs and the time that teachers would otherwise spend in the classroom – would be drained from instruction and other educational services and pumped into the adversarial process. That result benefits no one, least of all the children most in need of special education services.

II. Congress has already taken great care to ensure a level playing field for parents who must navigate the IDEA process. As the Court has recognized, the procedural protections built into the IDEA are intended to keep parents involved, informed and empowered every step of the way. *See School Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 368 (1985). These safeguards nullify any perceived information or resource advantage the schools might otherwise enjoy. Accordingly, it is not necessary to reassign the burden of proof in reliance on vague notions of fairness. In the absence of any indication that Congress intended to alter the traditional default rule, the burden of proof ought to remain with the complaining party.

ARGUMENT

The IDEA is intended to "ensure that all children with disabilities have available to them a free appropriate public education"– one that "emphasizes special education and related services" designed to prepare such children for "further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A).[4] In pursuit of that goal, the IDEA compre-

[4] The statutory sections cited herein refer to the statute as amended in 2004 ("IDEA 2004"), and are effective as of July 1, 2005. These sections are substantially similar to the previous versions except as otherwise noted.

hensively governs every aspect of the education of children with disabilities, starting as early as pre-school and continuing through the transition to adulthood.[5]

Beginning with the initial evaluation and identification of a child with a disability, the IDEA imposes complex substantive and procedural requirements on local educational agencies ("LEAs"). The IDEA specifies the standards by which LEAs evaluate children and determine eligibility for services under the statute. It also imposes strict timelines on the evaluation process and provides for notice and consent procedures. *See* 20 U.S.C. § 1414(a)(1), (b). And under the IDEA, schools must reevaluate a child's abilities and continued eligibility at least once every three years. *Id*. § 1414(a)(2).

Once a child has been thoroughly evaluated and identified as having a disability, the statute mandates a cooperative effort among parents, teachers, school administrators and others to create an Individualized Education Program ("IEP") for the child. *See* 20 U.S.C. § 1414(d). Among other things, the IEP must describe the effects of the child's disability; set short-term and long-term performance goals; explain how such progress will be measured; and describe the regular education, special education and related services, and other accommodations that are necessary to provide that child with a FAPE. *See* 20 U.S.C. § 1414(d)(1)(A)(i). The IEP must also be continuously reviewed and revised, at least annually. *See* 20 U.S.C. § 1414(d)(4).

The IDEA also prescribes if and how schools may discipline students with disabilities, and attaches additional procedural requirements to the disciplinary process that are not applicable to non-disabled students. *See* 20 U.S.C. § 1415(k). For instance, in most circumstances a school may not order a change in placement, such as a school suspen-

[5] Schools are required to provide a FAPE to children between ages 3 and 21. *See* 20 U.S.C. § 1412(a)(1)(A).

sion, that exceeds ten days unless the IEP team determines that the student's misbehavior is not a manifestation of his or her disability. If it is not, then the school may discipline the student pursuant to normal procedures. But if the misbehavior is caused by the child's disability, then the IEP team must complete a functional behavioral assessment ("FBA") and then create a behavioral intervention plan ("BIP") for the student in lieu of standard discipline. *See id.*

Each step of the way, both the parents of a child with a disability and the child's school are entitled to file a complaint, and ultimately proceed to a due process hearing, to address any procedural or substantive compliance issues. *See* 20 U.S.C. § 1415(b)(6)(A) (any party may "present a complaint . . . with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child"); *id.* § 1415(k)(3)(A) (any party who disagrees with a disciplinary action or determination "may request a hearing"). For example, these procedures may be initiated to address the identification, evaluation and reevaluation of a child with disabilities; the provision of educational services; the provision of related and supplementary support services; manifestation determinations; a change of placement for an educational or a disciplinary issue; and behavioral intervention plans.

The specific question presented in this case is which party should bear the burden of proof at an administrative due process hearing concerning the adequacy of a child's IEP – the complaining party or the school. Amici agree with respondent that when the adequacy of an IEP is at issue, the IDEA provides no basis for departing from the traditional

rule that the complaining party bears the burden of proof.[6] But amici are equally concerned with all of the other issues that may be the subject of administrative hearings under the IDEA. As described above, it is not just the formulation of an IEP that may trigger an administrative hearing under the IDEA, but *any* school action related to the obligation to provide a FAPE. A ruling by this Court adopting petitioners' "fairness" argument could be understood by hearing officers and courts to shift the burden of proof to schools in *all* of those situations – upsetting a complex statutory and regulatory regime and exacting an enormous cost from schools.

Amici do not believe that was the result intended by Congress. As explained below, a presumption that a school has failed to comply with its obligations under the statute devalues the expertise and substantial efforts that lie behind school efforts under the IDEA, increases both the likelihood and the expense of litigation, and drains resources from the schools' primary mission of educating children. None of these negative consequences are necessary; Congress already has taken care to provide parents with ample procedural safeguards in order to ensure fair outcomes. Nothing in the statute suggests that Congress doubted the utility of the procedures it prescribed, and intended also to saddle schools with a ubiquitous burden of proof.

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[6] Accordingly, amici join respondent's argument that all indicia of congressional intent support the conclusion that the traditional default rule – that the complaining party bears the burden of proof – applies to proceedings under the IDEA. In light of the extraordinary burdens that would be imposed on schools by a contrary rule, however, amici believe that a uniform federal rule is both appropriate and consistent with that congressional intent; consequently, states may not voluntarily assume the burden of proof consistent with the IDEA.

I. SHIFTING THE BURDEN OF PROOF TO SCHOOL SYSTEMS WOULD DRAIN SCARCE RESOURCES AND UNDERMINE THE EDUCATIONAL MISSION OF PUBLIC SCHOOLS.

Most public school systems operate under very tight and limited budgets. Implementation of the IDEA has further strained public schools' finances by imposing substantial costs on schools for the education of students with disabilities; in fact, public schools spent over twenty percent of their general operating budgets on special education during the 1999-2000 school year – a total of $78.3 billion. Thomas Parrish et al., Center for Special Education Finance, *State Special Education Finance Systems, 1999-2000: Part II: Special Education Revenues and Expenditures* 22 (2004). While amici embrace the opportunity and responsibility to provide students with disabilities with a free appropriate public education, burdensome administrative requirements and costly litigation procedures undermine this goal by siphoning already scarce resources from the core mission of education. Rather than furthering the IDEA's goal of promoting higher quality education for students with disabilities, these expenditures divert resources from both special and general education services. That effect will only be exacerbated if school districts are forced to bear the burden of proof with regard to the adequacy of IEPs – and magnified still further if the same burden is imposed in the litany of other hearings held under the IDEA regarding the central statutory obligation of providing free appropriate public education.

A. Deeming IEPs Presumptively Invalid Would Be Inconsistent With The Time, Effort, And Expertise Devoted To Their Development.

1. Under the IDEA, school districts invest significant time and money in the initial development of IEPs. That process begins when school districts evaluate and identify

students in need of special education;[7] because the results of the tests used to determine eligibility are also used to develop an appropriate education plan, the evaluation must assess the student's abilities in all areas relevant to the suspected disability. Office of Special Education & Rehabilitation Services, U.S. Department of Education, *A Guide to the Individualized Education Program* 2 (2000) ("IEP Guide"). More specifically, initial evaluations may include psychological, speech, occupational therapy, physical therapy, academic, social, emotional, vision, hearing, or any other appropriate assessments based on the child's needs. Some of those initial evaluations are done twice, the second time by an outside evaluator: if parents disagree with the results of the school's assessment, then they may request that the school pay for an independent educational evaluation ("IEE"), at an average cost of $1500. *IDEA: What's Good for Kids What Works for Schools? Hearing Before the S. Comm. on Health, Education, Labor & Pensions,* 107th Cong. 73 (2002) ("*Hearings*") (statement of Kim Goodrich Ratcliffe, Ed.D., Director of Special Education, Columbia Public Schools, Columbia, MO; Co-founder, Missouri School Boards' Association's Special Education Advocacy Council).

If a student is identified as a child with a disability, then a full IEP team must be assembled immediately. 34 C.F.R. § 300.343(b). At a minimum, each IEP team consists of:

1) the parents of the child;
2) at least one regular education teacher of the child;
3) at least one special education teacher of the child;
4) a representative of the LEA who is "qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities," "is knowledgeable about the general

[7] An LEA may evaluate a child for disability on its own initiative, and must conduct such an evaluation in response to a request from the parents of a child, a State educational agency, or other State agency. *See* 20 U.S.C. § 1414(a)(1)(B).

education curriculum," and "is knowledgeable about the availability of resources" of the LEA;

5) an individual with the capacity to "interpret the instructional implications of evaluation results";
6) "at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate"; and
7) "whenever appropriate, the child with a disability."

20 U.S.C. § 1414(d)(1)(B).

Unless the parents and the LEA agree that a team member's attendance is not necessary, the *entire* IEP team must attend each meeting. *Id*. § 1414(d)(1)(C).

Once the IEP team is assembled, it must meet within thirty days, following the procedures mandated in the regulations. 34 C.F.R. § 300.343(b)(2). In preparation for the first meeting, the "[s]chool staff must contact the participants, including the parents; notify parents early enough to make sure they have an opportunity to attend; schedule the meeting at a time and place agreeable to parents and the school; tell the parents the purpose, time, and location of the meeting; tell the parents who will be attending; and tell the parents that they may invite people to the meeting who have knowledge or special expertise about the child." IEP Guide, *supra*, at 3.

Under the IDEA, the IEP team is charged with developing an IEP that meets strict substantive requirements. Every IEP must include, at a minimum:

1) a detailed "statement of the child's present levels of academic achievement and functional performance";
2) "a statement of measurable annual goals, including functional and academic goals";
3) a description of how the child's progress toward the annual goals will be measured and how the child's

parents will be regularly informed of their child's progress;

4) a detailed "statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child";
5) "an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class" and in nonacademic activities;
6) a statement of any individual modifications in the administration of state or districtwide assessments of student achievement that are needed in order for the child to participate in the assessment;
7) "the projected date for the beginning of the services and modifications" described above and the "anticipated frequency, location, and duration of those services and modifications"; and
8) a statement of age appropriate postsecondary goals and transition services.

20 U.S.C. § 1414(d)(A); 34 C.F.R. § 300.347.[8]

2. As should be clear from the description above, the process of creating even one customized IEP is extremely time- and resource-intensive. When those costs are multiplied by the number of IEPs developed each year, they become enormous. One Virginia school district, for example, has spent an average of 83.5 hours and nearly $4,000 in the

[8] The regulations provide more detailed requirements for each of these broader categories. Indeed, several handbooks for school districts have included sections numbering hundreds of pages on how to comply with these guidelines. *See, e.g.*, Barbara D. Bateman & Mary Anne Linden, *Better IEPs: How to Develop Legally Correct and Educationally Useful Programs* (3d ed. 1998); Susan Gorn, *What Do I Do When . . . The Answer Book on Individualized Education Programs* (1997).

process of identifying each student with a disability and developing an initial IEP; multiplied by the number of students with disabilities in the county, the district has spent more than $86,000,000. *Rethinking Special Education: How to Reform the Individuals with Disabilities Education: Hearing Before the Subcomm. on Educ. Reform of the H. Comm. on Educ. and the Workforce*, 107th Cong. 11 (2002) (statement of Gregory Lock, Principal, Oak View Elementary School, Fairfax, Virginia). And nationwide, an estimated $6.7 billion was spent on assessment, evaluation, and development of IEPs during the 1999-2000 school year alone. Jay G. Chambers, et al., American Institutes for Research, *What Are We Spending on Special Education Services in the United States, 1999-2000?* 14 (2004).

Perhaps the most significant cost associated with the initial development of IEPs, however, is the cost in teacher and other professional time. Like general education teachers, special education teachers are responsible for a good deal of standard administrative work: completing lesson plans, grading papers, developing report cards, engaging in written communication with parents, and the like. But unlike their general education counterparts, special education teachers must also devote substantial time to their function as IEP team members, helping to create IEPs, attending IEP meetings, and complying with procedural rules such as parental notice requirements. In one study, special education teachers devoted nearly one hour per day to IEP-related activities. John A. Kirlin et al., *Final Report on Focus Study III: The Burden of Paperwork and Administrative Duties in Special Education* 31 (2004). Active participation by special education teachers and general education teachers in this process is an invaluable piece of the commitment to providing FAPE to students with disabilities. And that investment should not be underestimated: the time committed to the IEP process either

comes on top of what is already a full work day[9] or pulls teachers out of classrooms,[10] depriving students with disabilities of critical time with their instructors.

In addition to general and special education teachers, countless other professionals devote their expertise and their energies towards the development of an appropriate IEP. Psychologists, speech therapists, occupational and physical therapists, school nurses, case managers, LEA representatives (usually principals or assistant principals), and other appropriate professionals regularly participate as members of IEP teams to ensure that IEPs are reasonably calculated to

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[9] These requirements have taken their toll on instructors; many special education teachers feel that excessive IDEA paperwork interferes with their ability to serve students with disabilities and causes them dissatisfaction in their employment. Study of Personnel Needs in Special Education, *Paperwork in Special Education* (2002), *available at* http://ferdig.coe.ufl.edu/spense/Paperwork.pdf. These burdensome requirements have prompted many special education teachers to leave the field, contributing to a chronic shortage of special education instructors. John Boehner, Chairman, H. Educ. & the Workforce Comm., *Bill Summary: Strengthening and Renewing Special Education* (Nov. 17, 2004), http://edworkforce.house.gov/issues/108th/education/idea/1350confsummary.htm. In the 1999-2000 school year, more than 12,000 openings for special education teachers either remained vacant or were filled by substitutes. Study of Personnel Needs in Special Education, *Summary Sheet: Recruiting and Retaining High Quality Teachers* 1 (2002), *available at* http://ferdig.coe.ufl.edu/spense/policymaker5.pdf. "Ninety-eight percent of school districts report special education teacher shortages." President's Commission on Excellence in Special Education, *A New Era: Revitalizing Special Education for Children and Their Families* 52 (2002).

[10] The burdens have become so excessive in some places that school districts have allocated funds specifically for hiring substitute teachers for instruction while special education teachers are completing paperwork. *See Hearings*, *supra*, at 11.

provide educational benefit to students.[11] Not only are all of these people highly trained and educated, but they are also licensed or certified by their states. They may be required to attend several team meetings to develop a single IEP, and each meeting can last several hours. Indeed, "it is not unusual for a student's IEP to take many hours to develop and 20 pages or more to describe." Bridget A. Flanagan, *Individuals with Disabilities Education Act*, San Francisco Att'y, April/May 1999.

After educators and other experts have poured such extensive energy and resources into the development of IEPs, it would make no sense to adopt a rule declaring those IEPs presumptively invalid. An IEP is not some back-of-the-envelope draft, hastily put together and warranting no special deference. It represents the hard work and best efforts of a team of professional experts, and is the end product of an elaborate and inclusive process expressly created by Congress and delegated to the LEA. An IEP should carry a strong presumption of validity – not the presumption of inadequacy that would result were the burden of proof shifted to schools. *See* Pet. App. 14 ("presumption of inadequacy" signaled by putting burden on schools "would go against a basic policy of the IDEA, which is to rely upon the professional expertise of local educators"); *Alamo Heights Indep.*

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[11] *See, e.g.*, *Pace v. Bogalusa City Sch. Bd.*, 325 F.3d 609, 620 (5th Cir. 2003) (IEP meeting participants included nine persons: student's regular and special education teachers; social worker; physical therapist; occupational therapist; adaptive physical education teacher; principal; IEP facilitator; and attorney); *Peter G. v. Chi. Pub. Sch. Dist. No. 299 Bd. of Educ.*, No. 02 C 0687, 2003 U.S. Dist. LEXIS 460, at *8-9 (N.D. Ill. 2003) (IEP meeting participants included twelve persons: the Assistant Director of Citywide Special Education, serving as the case manager; two speech and language pathologists; an early childhood special education facilitator; attorney; occupational therapist; physical therapist; two early childhood special education teachers; general education teacher in physical education; student's parents; and plaintiff's attorney's legal assistant and parent advocate).

Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1158 (5th Cir. 1986) (placing burden of proof on parents in "deference to th[e] statutory scheme and the reliance it places on the expertise of local education authorities"); *Johnson v. Indep. Sch. Dist. No. 4*, 921 F.2d 1022, 1026 (10th Cir. 1990) (same).

B. Shifting the Burden of Proof to Schools Would Increase Both The Amount And The Expense Of Litigation, At The Cost Of Educational Programming For All Children.

Amici believe the time and money invested in the development of IEPs are well spent, and necessary to achieve the goal shared by all parties and articulated by the IDEA – the provision of a free appropriate public education to children with disabilities. However, amici are deeply concerned that the cost of *litigating* IEPs is increasingly undermining the ability of school districts to achieve that goal for all students. More and more, school districts are forced to devote significant portions of both their general and special education budgets to litigation. Andriy Krahmal et al., *"Additional Evidence" Under the Individuals with Disabilities Education Act: The Need for Rigor*, 9 Tex. J. C.L. & C.R. 201, 220 (2004) ("unduly expending resources for protracted proceedings under the IDEA's hearing/review process diverts funding from education to funding for litigation"). Shifting the burden of proof to schools will only make that litigation more common and more expensive – leaving schools with fewer resources to devote to their broader mission of providing quality education to students both with and without disabilities.

1. Contrary to Congress' stated goal of encouraging informal resolution of IDEA disputes, 20 U.S.C. § 1400(c)(8), placing the burden of proof on schools in every instance will increase incentives for parents to litigate while reducing incentives for them to reach mediated solutions or other cooperative outcomes. Under such a system, parents would need

to invest fewer resources to prevail while schools would be forced to invest more, creating greater incentives for parents to pursue litigation. *See* Thomas R. Lee, *Pleading and Proof: The Economics of Legal Burdens*, 1997 B.Y.U.L. Rev. 1, 21. What statistics are available bear out this common-sense proposition. For instance, in the Second Circuit, where the burden is on the school, 58.83 due process complaints were filed for every 10,000 students with disabilities in 2002-2003; by contrast, in the Fifth Circuit, where the burden is on the parents, only 4.6 complaints were filed per 10,000 students with disabilities. *See* Consortium for Appropriate Dispute Resolution in Special Education, *Dispute Resolution National Summary Statistics for School Year 2002-2003: Hearing Events* (Apr. 20, 2005). While filing rates obviously are influenced by any number of variables, these numbers are fully consistent with the incentives created by the placement of the burden.

Indeed, if the burden were shifted, parents would have new incentives to engage in precisely the kind of gamesmanship that appears to have marked this very case, in which the ALJ noted evidence "strongly suggest[ing]" that the Schaffers were engaged in a sham proceeding designed "to simply obtain funding from MCPS for a predetermined decision to have [their son] attend private school." Pet. App. at 113a, 147a n.6. Though private school placements are of course sometimes warranted, it is also true that the facts of this case are not unique, and that parents often enter into the IEP process intent on procuring public funding for private-school placements regardless of the services available to their children in the public schools. *See, e.g.*, *Tucker v. Calloway County Bd. of Educ.*, 136 F.3d 495, 503-04 (6th Cir. 1998); *Sanger v. Montgomery County Bd. of Educ.*, 916 F. Supp. 518, 526 (D. Md. 1996). The cost of such private-school placements – reportedly around $25,000 annually per

child in the nation's three largest school districts[12] – represents an enormous expenditure of funds diverted from both general curricular services and specialized programs of compensatory education or language acquisition for low-income, minority, and limited English proficient children. A rule making it possible for parents to prevail without actually carrying the burden of proof would only invite additional litigation designed to shift the costs of private-school education from parents to public schools.

Through IDEA 2004, Congress clearly expressed its intent to promote collaboration between parents and school districts and to reduce litigation. 20 U.S.C. § 1400(c)(8) ("Parents and schools should be given expanded opportunities to resolve their disagreements in positive and constructive ways."). Requiring school districts to bear the burden of proof would promote litigation and directly undermine these goals.

2. The risk of increased litigation is deeply troubling in light of the onerous costs – both direct and indirect – already being incurred to resolve these disputes. During the 1999-2000 school year alone, school districts spent approximately $90.2 million on mediation and administrative hearings and $56.3 million on litigation. Jay G. Chambers, et al., American Institutes for Research, *What Are We Spending on Procedural Safeguards in Special Education, 1999-2000?* 5 (2003) ("*Procedural Safeguards*"). Each litigation case that was pending during that year cost an average of $94,600. *Id*. at 8. As for administrative hearings, on average, each involves one to two weeks of testimony, *Hearing*, *supra*, at 73, and may span several different sessions and result in thousands of pages of transcript and hundreds of pages of exhibits, Perry A. Zirkel, *Transaction Costs and the IDEA*, Education Week, May 21, 2003. An estimated $8,160 to $12,200 was spent on the average mediation or due process case in

[12] Data on file with the Council of the Great City Schools.

1999-2000. *Procedural Safeguards*, *supra*, at 8, 22. Even a single administrative hearing may cost as much as $25,000-$30,000; in some cases, the cost of one hearing can be so high that it exceeds a small school district's yearly instructional budget. *Hearings*, *supra*, at 73.[13]

A particularly egregious example of the extent of litigation costs is found in *Deal v. Hamilton County Board of Education*, 392 F.3d 840 (6th Cir. 2005), a Tennessee case involving a challenge to the adequacy of an IEP that has been ongoing for five years. The due process hearing alone included twenty-seven days of testimony from twenty witnesses and tens of thousands of pages of exhibits. *Id.* at 847. The expense only mounted as the case went to litigation: costs to the Hamilton County School District have already reached $2.3 million, including almost $48,000 for one expert witness and $18,000 for a doctor. John Madewell, *U.S. Court Of Appeals Rules In Favor Of Parents With Autistic Child* (Apr. 5, 2005), http://www.newschannel9.com/engine.pl?station=wtvc&id=880&template=breakout_story1.shtml&dateformat=%M+%e (last visited June 23, 2005).

Deal is only one of many examples in which final decisions have been issued years after the initial placement, and only after extensive administrative hearing time and litigation. *See* Zirkel, *supra*. The costs to schools in such cases are enormous. There are of course the direct costs of attorney and expert fees. And the indirect costs, though harder to quantify, are just as severe: the costs of having relevant teachers and school administrators taken away from their classrooms and offices to participate in hearings and litigation. To compensate for time lost in classrooms, schools

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[13] Other estimates are even higher. *See* David Gruber, *Communication and Conflict Resolution Skills Can Lead to Lasting Relationships and Positive Results for Children*, http://www.cenmi.org/focus/dispute/article_05-02.asp (last visited 6/23/2005) ("Reaching a decision through a due process hearing can take up to five months and cost up to $40,000. Litigation can take up to two years and cost even more.").

must pay to hire substitutes – another expense associated with litigation over IEPs. And substitutes are less likely to be knowledgeable about students' individualized needs and thus less able to provide high quality instruction. The end result is that students are deprived of the educational services they need to succeed.

But the drain on educational resources encompasses more than just the actual hours spent in hearings and in court. School districts know that even if they have developed adequate IEPs, failure to prepare for litigation can result in an adverse holding. Indeed, in response to one such case, an article published in the Education Law Reporter warned that substantive legal compliance may not be enough to ensure victory in judicial proceedings, and that school districts also must invest considerable time and resources specifically in preparation for litigation. Allan G. Osbourne, Jr., *Proving That You Have Provided a FAPE Under IDEA*, 151 Educ. L. Rep. 367 (2001).[14] Petitioners are simply wrong when they assume that the costs of litigation are not significant so long as adequate IEPs are developed in the first place. *See* Pet. Br. at 44.

According to some commentators, the increasing costs of administration and litigation under the IDEA are already draining resources from core education programs. *See* Marie Gryphon & David Salisbury, *Escaping IDEA: Freeing Parents, Teachers, and Students Through Deregulation and Choice* 1 (Cato Inst. Policy Analysis no. 444) (2002); Krahmal, *supra*, at 220. Thus, even now, students are feeling the pinch of school budgets strained by litigation costs.

3. Shifting the burden of proof to schools would increase not only the frequency of litigation over IEPs, but also the costs associated with that litigation. In order to carry the burden of proof in some increased number of IEP cases,

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[14] One special education teacher has reported spending 75 hours preparing for a single due process hearing. Kirlin, *supra*, at 73.

schools would be compelled to incur heftier lawyer and expert fees, and to absorb even more teacher and administrator time away from regular duties.

Perhaps most troubling, under revisions made to IDEA in 2004, the special education and related services provided in an IEP must be "based on peer-reviewed research to the extent practicable." 20 U.S.C. § 1414(d)(1)(A)(i)(IV). As a practical matter, experts continue to debate the effectiveness of many treatments for specific disabilities. An especially contentious debate, for instance, has grown up around therapies for autistic children. Because there is little established scientific information on the underlying causes of autism, experts have continued to disagree about the most effective therapy, and new and unproven therapies are emerging all the time. *See* Nancy Reid, *Unproven Therapies for Autism*, (Aug. 10, 2004), http://health.yahoo.com/ency/healthwise/ue4928 (last visited June 23, 2005). But while many experts have remained skeptical, many parents of children with disabilities have remained hopeful, and have clung to nontraditional forms of therapy such as gymnastics, yoga, dolphin therapy, and horseback riding therapy. Stephanie Horvath, *Horses, Dolphins, Yoga, Tumbling Nudge Kids Along*, Palm Beach Post, May 1, 2005, at 1F.[15]

In cases like these, IDEA's new emphasis on peer-reviewed research means that expert testimony will increasingly take center stage, much as it did in this case. Requiring school districts to carry the burden of proof threatens to turn these hearings into battles of the experts, akin to full-blown *Daubert* contests. School districts will not only have to present expert testimony demonstrating the adequacy of their proposed therapies based on peer-reviewed research, but as a

[15] The Director of Florida Atlantic University's Center for Autism and Related Disabilities, Jack Scott, observed that parents have often opted for untested and expensive alternative therapies in lieu of traditional behavioral therapy: "It hurts when we see families who rush to every new therapy but bypass the most basic teaching out there." *Id.*

practical matter, they may often be forced to hire additional experts who are qualified to question the appropriateness of the therapies proposed by parents' experts. Because so many different types and degrees of disabilities are found in the student population, and new and untested therapies are constantly emerging, schools will be forced to rely on a myriad of experts in different fields of therapy. The costs associated with hiring and preparing those experts so that they can carry the burden of proof for schools would be enormous.[16]

Carrying the burden of proof would be particularly onerous for schools for procedural reasons, as well. In practice, parents may provide very little information to schools at the start of the hearing process, making it difficult or impossible for schools to engage in cost-effective preparation. Although parents are required to disclose their objections and proposed remedies when they file a complaint under the IDEA, they need not provide substantial detail or specificity. *See* S. Rep. No. 108-185, at 34 (2003) ("The committee does not intend for a notice of a due process complaint to reach the level of specificity and detail of a pleading or complaint filed in a court of law."). Indeed, parents have even been allowed to proceed with due process hearings after filing complaints that stated only that "Child was denied FAPE." *Id*. Forced to guess at the specific issues in dispute and wary of the costs that may result from an adverse determination, school districts often have no choice but to "overprepare" for the litigation – thus wasting significant public resources.[17]

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[16] Similar issues may arise in other contexts as well. In the 2004 Amendments, Congress permitted greater flexibility in the methods of evaluation used to identify children with "specific learning disabilities." *See* 20 U.S.C.§ 1414(b)(6). As a result, administrative hearing officers and courts could face a *Daubert*-like battle on this front as well, with parents and schools relying on competing evaluative methods to determine whether a child is eligible for services under the IDEA.

[17] A recent Missouri case exemplifies the position of many school districts facing litigation. The school district requested disclosure of the parents' complaints in order to mediate an agreeable solution. The par-

Those costs are severe enough when parents are charged with carrying the burden of proof; they only become more substantial, and less justifiable, if the burden is shifted to schools.

II. IDEA'S PROCEDURAL SAFEGUARDS ENSURE A LEVEL PLAYING FIELD.

It is not the case, as petitioners contend, that parents will be unfairly disadvantaged under the standard rule placing the burden of proof on the complaining party. The IDEA establishes a fair procedural framework for resolving disputes in which both parents and school systems are equally capable of advancing their respective visions of what is appropriate for the child. Indeed, to combat any perceived natural advantage school officials might have, Congress "incorporated [into the IDEA] an elaborate set of what it labeled 'procedural safeguards' to insure the full participation of the parents and proper resolution of substantive disagreements." *School Comm. of Burlington*, 471 U.S. at 368. *See also Bd. of Educ. v. Rowley*, 458 U.S. 176, 205 (1982) (noting "elaborate and highly specific procedural safeguards" and commenting that Congress emphasized "procedures giving parents and guardians a large measure of participation at every stage of the administrative process"). These procedural safeguards mitigate any inherent information or resource advantages enjoyed by schools by keeping the parents involved, informed, and empowered throughout the entire process of planning their children's educations. As a result, school systems have no unfair advantage that would require a shifting of the burden of proof to the school system in parent-initiated administrative hearings.

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ents refused the request at this early stage and continued to do so even as they initiated an administrative hearing. On the first day of the hearing, the parents articulated specific complaints and continued to express additional concerns throughout the proceeding, asserting that it was the hearing panel's responsibility to identify issues for the parent. *Hearings*, *supra*, at 72-73.

The IDEA's procedural safeguards strongly encourage parents to involve themselves in the initial development of their child's IEP. Under the Act, parents have the right to be members of their child's IEP team. 20 U.S.C. § 1414(d). They have the right to fully participate in meetings concerning the IEP. *Id.* § 1415(b)(1). They have the right to examine all records used by the school system to develop the IEP. *Id.* They have the right to request an independent evaluation of their child at the public's expense. *Id.*; 34 C.F.R. § 300.502(b). They also have the right to receive a written notice from the LEA explaining in detail the basis for any proposed or refused action. 20 U.S.C. § 1415(c).[18] In short, the IDEA's procedural safeguards ensure that parents are active participants in the process. By encouraging such parental involvement, the IDEA seeks to resolve disputes before they arise.

If a dispute should arise, these same procedural safeguards also prepare parents to effectively challenge the school system. As the Fourth Circuit found, "[b]y the time the IEP is finally developed, parents have been provided with substantial information about their child's educational situation and prospects." Pet. App. at 11. Armed with this information, parents are in an excellent position to appreciate

[18] This notice must contain: "(A) a description of the action proposed or refused by the agency; (B) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; (C) a statement that the parents of a child with a disability have protection under the procedural safeguards of this part, and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; (D) sources for parents to contact to obtain assistance in understanding the provisions of this part; (E) a description of other options considered by the IEP Team and the reason why those options were rejected; and (F) a description of the factors that are relevant to the agency's proposal or refusal." 20 U.S.C. § 1415(c)(1).

the issues at stake, vocalize their concerns, and advocate for changes to the IEP.

When a dispute escalates to the point of requiring a formal resolution, the IDEA attempts to forestall full-blown adversarial administrative hearings – a more formal setting in which parents may perceive themselves to be at a disadvantage – by providing parents with a voluntary mediation option that is funded by the state. *See* 20 U.S.C. § 1415(e)(1). In addition, the IDEA establishes a separate state complaint process to remedy school district violations of IDEA requirements. *See* 34 C.F.R. § 300.660. Under these procedures, parents may opt to submit a formal complaint to the state, and the state is legally required to investigate and resolve the issue within sixty days. *Id*. § 300.661. Parents have frequently used both of these procedures with success. In addition to the 6,763 due process cases initiated during the 1998-1999 school year, 6,360 state complaints were filed and 4,266 cases were submitted for mediation. *Procedural Safeguards*, *supra*, 7 & A-1.

As of July 2005, the IDEA will require resolution sessions as yet another means of reducing the number of formal due process hearings. *See* 20 U.S.C. § 1415(f)(1)(B). Designed to be non-adversarial meetings between parents and school systems, these resolution sessions will provide parents with the opportunity to discuss their concerns and seek out agreeable settlements. Under the Act, resolution sessions will be required before the start of any formal due process hearing unless both the parents and the school system agree to either waive the session or use the mediation process. *Id.* § 1415(f)(1)(B)(i)(IV). The non-adversarial nature of these resolution sessions will be reinforced by a provision of the IDEA prohibiting the school system from bringing an attorney to the meeting unless the parents opt for an attorney first. *Id.* § 1415(f)(1)(B)(i)(III). If the meetings are successful and the parents and the school system reach a settlement, then a legally binding written agreement must be executed. *Id.* §

1415(f)(1)(B)(iii). Both parties, however, have three business days to void any such agreement. *Id.* § 1415(f)(1)(B)(iv). If the school system cannot resolve the parents' complaint within thirty days, then the parents may still proceed to a due process hearing. *Id.* § 1415(f)(1)(B)(ii).

In the event that a full-blown due process hearing cannot be avoided, the IDEA affords parents still more procedural safeguards. It requires the school system to provide a response to the parents' due process complaint within ten days of receiving it. *Id*. § 1415(c)(2)(B). If the complaint raises new issues that were not addressed in the LEA's prior written notices (*see supra*, n.18), then the LEA must prepare a similarly detailed response to the complaint. *Id*. § 1415(c)(2)(B)(i)(I). If no new issues are raised, the LEA must provide a response that "specifically addresses the issues raised in the complaint." *Id*. § 1415(c)(2)(B)(ii). The IDEA further requires the school system and the parents to give each other five days advance notice of the evidence that will be presented at the hearing. 34 C.F.R. § 300.509(a)(3). It also compels the school system to notify the parents "of any free or low-cost legal . . . services available in the area." *Id*. § 300.507(a)(3). If the parents prevail at the hearing, it requires that they be awarded reasonable legal fees. 20 U.S.C. § 1415(i)(3)(B). By providing these special discovery rules and assurances of financial recovery, the IDEA empowers parents to effectively challenge a school system in an administrative hearing.

The IDEA not only establishes these procedural safeguards, but also promotes their use. Under the Act, school systems are required to provide parents with written notice about their rights at key moments, such as when the child is initially referred for evaluation or the parents first file a complaint. *Id*. § 1415(d)(1)(A). These written notices must contain "a full explanation of the procedural safeguards, written in a native language of the parents . . . [and] in an

easily understandable manner." *Id.* § 1415(d)(2). The Act also authorizes the establishment of parent training and information centers, which are centers designed, at least in part, to "assist parents to understand the availability of, and how to effectively use, [the IDEA's] procedural safeguards . . . ." *Id.* § 1471(b)(8). In short, the IDEA goes well beyond simply granting parents rights. Rather, by repeatedly informing parents of the existing procedural safeguards, the IDEA affirmatively encourages parents to invoke those rights.

With all of these procedural safeguards in place – safeguards that involve, inform, and empower parents from the very beginning of the process –"the school system has no unfair information or resource advantage" in due process hearings. Pet. App. at 11-12. As the Fourth Circuit recognized, "Congress has taken steps . . . that level the playing field" between schools and parents in IDEA disputes. *Id.* at 9. Consequently, it is unnecessary to assign the burden of proof to the school system in the name of fairness.

* * *

Given the magnitude of the educational costs associated with petitioners' reading of the statute, and the degree to which it would be inconsistent with Congress' intent to reduce litigation and protect educational outcomes for all children, the Court should adopt that reading only if compelled to do so by unambiguous statutory text. In this case, however, there is no such legislative directive; the statute simply does not address the burden of proof. Sound educational policy and all indicia of congressional intent, on the other hand, point clearly to the traditional default rule: the burden of proof should remain with the complaining party.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

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