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, *et al*.,

Petitioners,

v.

JERRY WEAST, Superintendent, MONTGOMERY COUNTY PUBLIC SCHOOLS, *et al.*,

Respondents.

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

BRIEF OF VIRGINIA SCHOOL BOARDS ASSOCIATION AND FIVE OTHER SCHOOL BOARD ASSOCIATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

KATHLEEN SHEPHERD MEHFOUD
REED SMITH LLP
901 E. Byrd St.
Suite 1700
Richmond, VA 23219
(804) 344-3421

JOSEPH THOMAS TOKARZ, II
Counsel of Record
P.O. Box 27032
Richmond, VA 23273
(804) 501-4351

Counsel for the Virginia School Boards Association

(Additional Counsel Listed on Signature Page)

QUESTION PRESENTED

Should the Court upset the careful balancing of procedural protections for parents and local school boards in the Individuals with Disabilities Education Act when Congress has not expressed an intent to upset the traditional burden of proof in administrative hearings initiated under the Act?

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

The traditional rule is that the party requesting an administrative hearing has the burden of proof. The amici urge the Court to follow the traditional rule in cases arising under the Individuals with Disabilities Education Act ("IDEA" or the "Act") unless Congress or the State explicitly reverses the customary burden by statute. Such a course would be consistent with IDEA's intentional policy choices and the careful balance of procedural protections for parents and local school boards in the Act.

Both parties have consented to the filing of this brief.

Interest of Virginia School Boards Association

The Virginia School Boards Association ("VSBA") is a private, voluntary non-partisan organization representing every local school board in Virginia (the "Commonwealth"). VSBA's primary mission is the advancement of education through local control of the public schools. VSBA's members are the school divisions that actually teach students.

The VSBA has a particular interest in this case because the Attorney General of Virginia ("Attorney General") prepared and filed an amicus brief,

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[1] This brief was not written in whole or in part by counsel for a party. The preparation of this brief was funded by the Virginia School Boards Association.

purportedly on behalf of the Commonwealth. Brief of the Commonwealth of Virginia and Eight Other States as Amicus Curiae in Support of the Petitioners ("amicus brief"). However, the Attorney General did not consult with local school boards or VSBA before deciding to file the amicus brief.

Furthermore, the amicus brief does not represent the views of the General Assembly of Virginia ("General Assembly"), the State Board of Education ("State Board"), the Superintendent of Public Instruction ("State Superintendent"), or local school boards — even though these are the entities responsible for implementation of IDEA in the Commonwealth. Nor does it represent the position of the Governor of Virginia or Virginia courts.

The amicus brief does not represent the views of the General Assembly. Under the Constitution of Virginia, the General Assembly must provide for public education in the Commonwealth. Va. Const. art VIII, § 1. The General Assembly has not assigned the burden of proof in due process hearings mandated in Va. Code § 22.1-214.

The amicus brief does not represent the views of the State Board or the State Superintendent. These entities have the responsibility for overseeing and administering public education in the Commonwealth. Va. Const. art. VIII, §§ 4-6; Va. Code §§ 22.1-8; 22.1-23. The State Board's special education regulations contain elaborate procedures for due process hearings, but they do not assign the burden of proof to either party. 8 VAC 20-80-76. The

State Superintendent has not assigned the burden of proof by interpretation or administrative guidance.

Moreover, in response to widespread consternation concerning the Attorney General's intention to file the amicus brief, the State Superintendent's Office notified all local school superintendents in writing on April 28, 2005 "that the Attorney General's office did not consult with the Department of Education or the Board of Education in this matter, and we have stated our opposition to the filing of this brief with the Attorney General's Office."

The amicus brief does not represent the views of local school boards. These bodies have the responsibility for supervising and operating the Commonwealth's public schools. Va. Const. art. VIII, § 7; Va. Code § 22.1-28. The Attorney General did not consult with VSBA or local school boards before deciding to file its amicus brief.

In addition, the Governor of Virginia has not taken any public position on the burden of proof. VSBA has notified the Governor's Office of its opposition to the amicus brief, and the Governor has not indicated that he supports its filing.

Finally, the amicus brief does not represent the opinion of Virginia courts. In fact, the only Virginia case deciding the issue is a 1981 ruling by the U.S. District Court for the Eastern District of Virginia that the burden is on parents. *Bales v. Clark*, 523 F. Supp. 1366, 1370 (E.D. Va. 1981).

Interest of Minnesota School Boards Association

The Minnesota School Boards Association ("MSBA") is a voluntary, nonprofit organization which represents members of the school boards of all 344 public school districts in Minnesota. The mission of MSBA is to support, promote, and enhance the work of school boards and school districts throughout Minnesota.

MSBA has a particular interest in this case because the Minnesota legislature enacted Minn. Stat. § 125A.091, subd. 16, in 2003. This statute was enacted, in part, to codify the holding of the Eighth Circuit in *E.S. v. Indep. Sch. Dist. No. 196*, 135 F.3d 566 (8th Cir. 1998), a Minnesota case.

The 2003 statute generally places the burden of proof in special education due process hearings on school districts, regardless of whether the school district is the complaining party.[2] However, the burden is on the parent to show that a private school placement is appropriate if the parent seeks private

[2] Minn. Stat. § 125A.091, subd. 16 states: "The burden of proof at a due process hearing is on the district to demonstrate, by a preponderance of the evidence, that it is complying with the law and offered or provided a free appropriate public education to the child in the least restrictive environment. If the district has not offered or provided a free appropriate public education in the least restrictive environment and the parent wants the district to pay for a private placement, the burden of proof is on the parent to demonstrate, by a preponderance of the evidence, that the private placement is appropriate."

school tuition reimbursement, as in the case before the Court.

MSBA did not support enactment of this legislation and submits that, with the exception of the rule governing private school tuition claims, Minn. Stat. §125A.091, subd. 16 exceeds what should be required of school districts under the IDEA. MSBA would welcome a ruling by the Court that the burden of proof is on the complaining party.

MSBA is equally interested in this case because Minnesota's Attorney General joined the amicus brief of the Attorney General of Virginia without consulting the state's local school boards or MSBA. MSBA submits that the views of the Minnesota Attorney General on this issue do not reflect those of MSBA or of the 344 public school districts in Minnesota.

Interest of Texas Association of School Boards Legal Assistance Fund

Nearly 800 Texas public school districts are members of the Texas Association of School Boards Legal Assistance Fund. The Legal Assistance Fund is governed by three organizations: the Texas Association of School Boards ("TASB"), the Texas Association of School Administrators, and the Texas Council of School Attorneys.

The Texas Association of School Boards is a nonprofit corporation. Approximately 1,045 Texas public school districts, through their elected board of trustees, are TASB members. TASB assists school

boards by providing leadership, educational materials, technical services, and legislative and policy services.

The Texas Association of School Administrators represents the state's school superintendents and other administrators responsible for carrying out the education policies adopted by their local boards of trustees.

The Texas Council of School Attorneys is composed of school attorneys who represent more than 90 percent of the public school districts in Texas.

The Legal Assistance Fund has a particular interest in this case because the well-settled rule in the Fifth Circuit, which reviews cases arising in Texas, is that the party who challenges an IEP has the burden of proof. *Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d 1153, 1158 (5th Cir. 1986). Any change in this long-standing rule would upset the balance of procedural protections in due process hearings in Texas.

Interest of
Connecticut Association of Boards of Education

The Connecticut Association of Boards of Education ("CABE") is a non-profit association representing the vast majority of public school boards and their members in the state of Connecticut. CABE provides education and training for public school board members, delivers legal advice on school law issues, develops and

recommends policies for school boards, and represents boards of education at the state and national level before the legislature and the courts.

CABE has participated as amicus curiae in numerous cases affecting public education in Connecticut. CABE has a particular interest in this case because Connecticut law currently places the burden of proof on parents in due process hearings. Therefore, a decision to place the burden of proof on school boards will reverse current law in Connecticut and would place an unnecessary burden on its school boards.

Interest of
Kansas Association of School Boards

The Kansas Association of School Boards ("KASB") is a voluntary, nonprofit organization that represents members of the school boards of 298 of the 301 public school districts in Kansas. KASB provides education and training for public school board members, delivers legal advice on school law issues, develops and recommends policies for school boards, and represents boards of education at the state and national level before the legislature and the courts.

KASB has a particular interest in this case because Kansas due process hearing officers and the courts in Kansas have generally followed the Tenth Circuit's holding in *Johnson v. Indep. Sch. Dist. No. 4*, 921 F.2d 1022 (10th Cir. 1990), which places the burden of proof on the party challenging the action, generally the parents.

KASB is also interested in this case because the Kansas Attorney General joined the amicus brief of the Attorney General of Virginia without consulting the state's local school boards or KASB. KASB submits that the views of the Kansas Attorney General on this issue do not reflect those of KASB or of the 301 public school districts in Kansas.

Interest of Illinois Association of School Boards

The Illinois Association of School Boards ("IASB") is a voluntary nonprofit organization of local school boards organized under § 23-1 of the Illinois School Code, 105 ILCS 5/23-1 et seq. Over 95 percent of the state's 893 public school districts are active members of IASB. IASB is governed by a Board of Directors composed of school board members across Illinois, and is dedicated to strengthening and improving Illinois' public schools.

Specifically, IASB assists member school districts in developing and implementing school board policies and meeting federal and state student achievement standards. IASB also advocates the adoption of policies that promote efficient and effective operation of school districts that are consistent with statutory and constitutional guidelines.

The mission of the IASB is excellence in local school governance and support of public education.

SUMMARY OF ARGUMENT

VSBA urges the Court to follow the traditional rule because Congress and most States have not assigned the burden of proof to school boards when parents initiate the hearing. Their decisions not to do so recognize that IDEA contains an extensive set of procedural protections that are carefully balanced to protect the rights of parents and school boards.

Congress has reauthorized 20 U.S.C. § 1400 *et seq.* four times since its initial enactment as the Education of All Handicapped Children's Act in 1975. In the 1997 reauthorization, it expressly imposed the burden of proof on local school boards in cases involving misconduct by disabled students, but it has not chosen to do so in any other situation.

Furthermore, Congress deliberately rescinded its allocation of the burden in misconduct cases in the 2004 reauthorization. Given IDEA's legislative history, the Court should reject the invitation of the amicus brief to "continue this [IDEA's] transformation of education for disabled children" by adopting a burden of proof requirement that Congress has not chosen to impose.

There is no need to depart from the traditional rule allocating the burden of proof to the party initiating the hearing because Congress and the States have the power to act otherwise if they deem it appropriate. Furthermore, there are valid policy reasons for not overturning the traditional rule.

ARGUMENT

THE COURT SHOULD ALLOW CONGRESS AND THE STATES TO DETERMINE IF THEY WISH TO CHANGE THE TRADITIONAL ALLOCATION OF THE BURDEN OF PROOF.

It is axiomatic that Congress may explicitly choose to allocate the burden of proof in due process hearings by amending the Act.

Significantly, a Congressional decision to allocate the burden of proof by statute involves constitutional considerations. Because IDEA is legislation enacted pursuant to the Spending Clause of the U. S. Constitution, "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 204 n 26 (1982) (citing *Pennhurst State Sch. v. Halderman*, 451 U.S. 1, 17 (1981)). Because Congress has not unambiguously assigned the burden of proof in IDEA, judicial action altering the traditional rule would change the requirements of the contract States entered into under the Act.

Similarly, States may choose to provide procedural protections consistent with, and even beyond, those provided by IDEA. *Fowler v. Unified Sch. Dist. No. 259*, 128 F.3d 1431, 1438 (10th Cir. 1997)(citation omitted).

Because Congress and the States have the power to act, the Court should leave any change of the traditional rule to them.

(1) The Court Should Not Substitute Its Judgment For That Of Congress And The States.

The Attorney General asks the Court to substitute its judgment for that of Congress and the States which have chosen not to alter the traditional allocation of the burden of proof in most due process hearings. VSBA respectfully submits that this step would unwisely override intentional policy choices made by Congress and the States.

On the federal level, Congress has made a purposeful decision not to alter the traditional burden of proof in most hearings. Only in cases of misconduct by disabled students has Congress chosen to do so. In fact, not only did Congress impose the burden of proof in such cases in the 1997 reauthorization of IDEA, it chose to rescind its action in the 2004 reauthorization. Taken collectively, these actions show Congress making deliberate policy choices on the burden of proof issue.

To illustrate, Congress provided in the 1997 reauthorization that when parents challenge a school board's manifestation determination in cases of student misconduct, "the hearing officer shall determine whether the public agency has

demonstrated that the child's behavior was not a manifestation of such child's disability." 20 U.S.C. § 1415(k)(6)(B)(i). In addition, the 1997 version of IDEA mandated that when a hearing officer reviews a decision to place a child in an interim alternative educational setting because of the student's behavior, the hearing officer must determine "that the public agency has demonstrated by substantial evidence that maintaining the current placement of such child is substantially likely to result in injury to the child or to others." 20 U.S.C. § 1415(k)(2)(A).

However, effective July 1, 2005, Congress changed these provisions. Under the 2004 reauthorization, IDEA does not impose any proof requirements on school districts in misconduct cases initiated by parents. Instead, it simply grants authority for the hearing officer to order a change in placement "if the hearing officer determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others." P.L. 108-446 § 615(k)(3)(B)(ii)(II). This common-sense change recognizes the difficulties for teachers and other students inherent in cases of misconduct by disabled students in the public school setting.

While it has chosen not to impose the burden of proof on school boards when parents initiate an administrative hearing, Congress has provided an "elaborate set" of protections to parents in IDEA to offset the "natural advantage" of school officials. *Sch. Committee of Town of Burlington v. Bd. of Educ.*, 471 U.S. 359, 368 (1985).

For example, parents have the right to independent educational evaluations, 20 U.S.C. § 1415(b)(1), and private school tuition, 20 U.S.C. § 1412(a)(10)(C), at public expense if school boards do not fulfill their statutory duties. Parents have detailed rights to file administrative and judicial challenges to school board actions. 20 U.S.C. § 1415. The Act's procedural safeguards also include an entitlement to attorneys' fees for parents, but not school boards, who prevail in administrative and judicial proceedings. 20 U.S.C. § 1415(i)(3).

Because Congress has made a deliberate decision not to alter the traditional burden of proof in most administrative hearings, the Court should not override Congressional intent.

Similarly, States are fully able to consider local circumstances that may justify a change from the traditional allocation of the burden of proof in a particular State. The Attorney General correctly notes that Minnesota did so by statute in 2003. Minnesota Statute, § 125A.091, subd. 16.

However, although the Attorney General claims that "many" states "would be willing" to allocate the burden of proof to local school districts by statute, it is telling that the Attorney General can only point to Minnesota as actually having done so. Amicus Brief, 3 n 6.

The collective policy judgment by most States not to deviate from the traditional rule for allocating the burden of proof is additional justification for the Court's deference to Congress and the States.

(2) Congress And The States Have Valid Policy Reasons For Not Allocating The Burden Of Proof To Local School Boards.

The Attorney General argues that a local school board should have the burden of proving that its proposed individualized education program complies with IDEA when parents request a due process hearing to contest it. However, this contention undercuts key premises of federal special education law.

The Court has long recognized that state and local education officials have the "primary responsibility" for public education. *Rowley,* 458 U.S. at 230 n 30. Thus, courts have given great deference to the professional judgment of local educators.

Furthermore, the Court has also stated that "[i]t is clear that Congress was aware of the States' traditional role in the formulation and execution of education policy." *Id.* at 208. Therefore, the Court recognized that while Congress included extensive procedural requirements in P.L. 94-142, "it seems highly unlikely that Congress intended courts to overturn a State's choice of appropriate educational theories in a proceeding conducted pursuant to 1415(e)(2)." *Id.* at 207-08.

The Attorney General's position ignores this judicial and statutory context. Moreover, it contradicts the presumption of regularity normally accorded to governmental actions.

The Attorney General justifies its position on the ground of "fairness." However, given the numerous procedural protections afforded to parents in IDEA, Congress and the States could, and have, reasonably determined that the Act's statutory scheme is "fair" in light of competing policy considerations. The Court should not substitute its judgment for this legislative weighing of competing policies affecting "fairness."

For example, local school boards bear the responsibility and financial burdens of the Act, but Congress has fallen far short of allocating sufficient funds to meet IDEA's requirements. This shortfall necessitates difficult local decisions in determining how to allocate limited public resources between disabled students and the diverse educational needs of the general student population. Local school boards are painfully aware that every dollar spent in adversarial meetings and litigation is a dollar diverted from instruction of other students in gifted, vocational, regular, and special education.

Congress is also aware that often there may be little disparity in resources and sophistication of parents and school boards in special education cases. In the Commonwealth, for example, school boards range in size from 164,767 students in Fairfax County in northern Virginia to 298 students in Highland County in western Virginia.

Given parents' rights to attorneys' fees and independent educational evaluations at public expense, many parents are fully prepared to vigorously represent themselves and their children.

Indeed, this case, as well as thousands of others in the 20-plus years since *Rowley*, vindicates the Court's observation that "parents and guardians will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled by the Act." *Rowley*, 458 U.S. at 209 (footnote omitted).

In addition, some state agencies represent parents for little or no cost in due process hearings. For example, the Virginia Office of Advocacy and Protection performs this task for some disabled students in the Commonwealth.

Moreover, Congress understands that going beyond the procedural protections already afforded by the Act will inevitably result in increased confrontation at every step of the special education process. The resulting costs of this increased confrontation would be highly detrimental to all public school students because of the diversion of time, energy and resources from instruction.

Congress has carefully calibrated IDEA to balance these competing interests. The Act has led to great strides in the education of disabled students. Disabled pupils and their parents are no longer on the outside looking in. However, against a backdrop of limited public funds, any shift in the balance of public obligations to disabled children will have potentially serious effects on other equally deserving students.

While the concept of "fairness" is one to which everyone can subscribe, there are many policy dimensions to the concept of "fairness." Congress, with its power to appropriate federal assistance to the States, is best equipped to consider all such dimensions on a national level. Congress did so with great care when establishing the detailed procedural protections in IDEA. And States, if they disagree with the legislative judgment of Congress, are fully able to add further protections in their educational statutes.

CONCLUSION

For the reasons stated above and in the other briefs supporting Jerry Weast and the Montgomery County School Board, the judgment of the Fourth Circuit Court of Appeals should be AFFIRMED.

Respectfully submitted,

Joseph Thomas Tokarz, II
P. O. Box 27032
Richmond, VA 23273
(804) 501-4351
(804) 501-4140 (fax)

Kathleen Shepherd Mehfoud
Reed Smith LLP
901 E. Byrd St.
Suite 1700
Richmond, VA 23219
(804) 344-3421 (phone)
(804) 344-3410 (fax)

Counsel for the Virginia School Boards Association

Additional counsel:

Patrice A. McCarthy
Deputy Director and
General Counsel
Kelly Balser Moyher
Senior Staff Attorney
Connecticut Association of
Boards of Education
81 Wolcott Hill Road
Wethersfield, CT 06109
(860) 571-7446 (phone)
(860) 571-7452 (fax)

Kathleen Wells
General Counsel
Legal Assistance Fund
Texas Association of School Boards
P.O. Box 400
Austin TX 78767-0400
(800) 580-5345 (phone)
(512) 467-3610 (phone)
(512) 467-3522 (fax)

Thomas S. Deans
General Counsel, Minnesota
School Boards Association
Knutson, Flynn & Deans, P.A.
1155 Centre Pointe Drive, Suite 10
Mendota Heights, MN 55120
(651) 222-2811 (phone)
(651) 225-0600 (fax)

Cynthia Lutz Kelly
Kansas Association of School Boards
1420 SW Arrowhead
Topeka, KS 66604
(785)273-3600 (phone)
(785) 273-7580 (fax)

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