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.*,

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.[1]

The Court's decision will affect all of the approximately 6.7 million children with disabilities in public schools,[2] comprising approximately thirteen percent of the student population.[3] 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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[1] 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.

[2] 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 and www.ideadata.org/tables27th/ar_aa9.htm (visited Apr. 16, 2005).

[3] 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),[4] 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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[4] 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 Envtl. 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).

I. PLACING THE BURDEN OF PROOF ON THE SCHOOL DISTRICT WOULD BEST SERVE CONGRESS' AFFIRMATIVE MANDATE THAT ALL CHILDREN WITH DISABILITIES RECEIVE A FREE APPROPRIATE PUBLIC EDUCATION.

Congress enacted the IDEA to "ensure" that "all" children with disabilities were provided a free appropriate public education. 20 U.S.C. § 1400(d)(1) (2005). To fulfill this purpose, Congress created a statutory obligation requiring states to provide a free appropriate education to all children with disabilities in exchange for receiving federal funds. 20 U.S.C. § 1412(a)(1); *Bd. of Educ. v. Rowley*, 458 U.S. 176, 180 (1982).[5]

Significantly, to ensure that the school district provided *all* children with disabilities an appropriate education, Congress did not leave it to parents to apply for services under the IDEA. Instead, Congress imposed a unique affirmative obligation on states and local school districts to identify, locate, and evaluate children, even those in private schools and prisons. 20 U.S.C. § 1412(a)(3); 20 U.S.C. § 1412(a)(10)(A)(ii); *see M.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. 1996) ("a child's entitlement to special education should not depend upon the vigilance of the parents who may not be sufficiently sophisticated to comprehend the problem"); *Weyrick v. New Albany-Floyd County Consol. Sch. Corp.*, No. 4:03-cv-0095, 2004 U.S.

[5] In *Rowley*, this Court traced the extensive background and history of the Act, noting Congress' desire to end discrimination and its dissatisfaction with progress under earlier enactments. *Id.*

Dist. LEXIS 26435 (S.D. Ind. Dec. 23, 2004) ("IDEA does not rely on parents to come forward to ask for help.").[6]

This decision made sense because parents may deny the existence of their children's learning difficulties or lack the sophistication of educational professionals to identify problems in the school context. School districts, however, employ professionals who are trained to recognize learning difficulties and who can act dispassionately in identifying these difficulties.

Congress dictated further that school districts were to provide a free appropriate education, to the maximum extent possible, in the "least restrictive environment," 20 U.S.C. § 1412(a)(5), that it be provided pursuant to an "individualized education program," 20 U.S.C. §§ 1412(a)(4), 1414(d), that it must be in place at the beginning each school year, 20 U.S.C. § 1414(d)(2)(A), and that the school district make available a "continuum of placement options." 34 C.F.R. § 300.551 (2004). Moreover, to ensure that local schools perform their jobs, Congress charged state agencies with ensuring compliance with the Act. 20 U.S.C. § 1412(a)(11). In short, as this Court noted in *Rowley,* "the Act leaves to the States the primary responsibility for developing and executing educational programs for handicapped children, …

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[6] As Judge Luttig's dissent noted, this affirmative obligation on states to provide a free appropriate public education to all disabled children distinguishes IDEA from laws cited by the panel majority that prohibit various types of discrimination. P.A. 18 (Luttig, J., dissenting); *see also Olmstead v. L.C.*, 527 U.S. 581, 623 n.6 (1999) (Thomas, J., dissenting) ("IDEA is not an anti-discrimination law. It is a grant program that affirmatively requires States accepting federal funds to provide disabled children with a 'free appropriate public education.'"). The additional affirmative obligation to seek out children who require services further distinguishes IDEA from those statutes.

[and] imposes significant requirements to be followed in the discharge of that responsibility." 458 U.S. 176, 183 (1982).

These extraordinary requirements reflect Congress' strong judgment that providing children with disabilities an appropriate education would best serve society's interest. 20 U.S.C. § 1400(c)(1) (setting forth Congress' findings for enacting IDEA); *Rowley*, 458 U.S. at 201 n.23 ("providing appropriate educational services now means that many of these individuals will be able to become a contributing part of our society, and they will not have to depend on subsistence payments from public funds") (quoting 121 CONG. REC. 19492 (1975) (remarks of Sen. Williams)). Indeed, "[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. § 1400(c)(1).

As noted above, while some children with obvious disabilities are identified at the outset of a child's educational journey, many other children are identified only as they progress through school. Indeed, it is not uncommon for a child's teacher, and not the child's parents, to identify problems in the elementary school years, and seek to have the child evaluated. In all of these cases, if the child is determined to have a disability, IDEA requires the school district to provide that child a free appropriate public education. 20 U.S.C. §§ 1412(a)(1), 1412(a)(3)(A) .

To achieve the objective of the statute, as reflected in Congress' broad affirmative command, the Court should place the burden of proof on the school district. If the Court places the burden of proof on the parents, the impact of an erroneous determination resulting from the application of the burden of proof is that a child with a disability will be denied the free appropriate public education that Congress required.

As explained further below, because parents are poorly positioned to bear the burden of proof, the risk of erroneous determinations would be unacceptably high. Accordingly, assigning the burden of proof to parents would undermine, rather than implement, Congress' statutory mandate. Because the burden of proof is a question of substantive law, *Greenwich Collieries*, 512 U.S. at 271, the Court should look, first and foremost, to adopt a burden of proof rule that implements, rather than undermines, the statutory purpose. *Bacto-Unidisk*, 394 U.S. at 799.

II. THE SCHOOL DISTRICT STANDS IN A BETTER POSITION TO BEAR THE BURDEN OF PROOF, AND PLACING THE BURDEN ON PARENTS RISKS DENYING CHILDREN WITH DISABILITIES AN APPROPRIATE EDUCATION.

As this Court has said, courts often assign the burden of proof "to conform with a party's superior access to the proof." *Int'l Bd. of Teamsters v. United States*, 431 U.S. 324, 359 n.45 (1977); *see also United States v. N.Y., N.H. & H.R. Co.*, 355 U.S. 253, 256 n.5 (1957) ("The ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary."); *United States v. Denver & R.G. R.R. Co.*, 191 U.S. 84, 92 (1903) ("[W]hen the opposite party must, from the nature of the case, himself be in possession of full and plenary proof to disprove the negative averment, and the other party is not in possession of such proof, then it is manifestly just and reasonable that the party which is in possession of the proof should be required to adduce it; or, upon his failure to do so, we must presume it does not exist, which of itself establishes a negative.").

In the context of an IDEA administrative hearing, the school district stands in a better position to meet the burden

of proof, and should bear the burden of proof in order to promote the statutory purpose of providing an appropriate education to all children with disabilities.

A. Many Parents Proceed *Pro Se* And Are Unfamiliar With The Implications Of Bearing The Burden Of Proof.

Parents often proceed *pro se*, without legal representation, at IDEA administrative hearings. The school district, however, is virtually always represented by counsel at such hearings. The school district's counsel will be familiar with the procedural and substantive requirements of IDEA, as well as the concepts of "burden of proof" and the mechanisms used for coming forward with evidence to meet that burden. For these reasons alone, the school district is far better situated than the *pro se* parent to bear the burden of proof.

In about one-half of the due process hearings that occurred between 1998 and 2002, in Illinois, for example, the school district was represented by counsel, while the parents had no such representation. Melanie Archer, Ph.D., *Access and Equity in the Due Process System: Attorney Representation and Hearing Outcomes in Illinois, 1997-2002*, *available at* http://www.dueprocessillinois.org/Access.pdf (last visited April 26, 2005). The lack of representation had a striking effect: parents with attorneys succeeded 50% of the time; parents without attorneys were successful merely 16% of the time. In amici's experience, the Illinois illustration is representative of the situation throughout the country. *See also* 150 CONG. REC. S5351 (May 12, 2004) (statement of Sen. Kennedy) (providing state data that shows school districts were much more likely than parents to bring counsel to hearings).

If a parent or guardian is unaware that he must proceed first and introduce witnesses or other evidence, he may proceed to a hearing without a prepared case, and be held to have failed to meet his burden before the factfinder ever hears from the school district. This could happen even if the school district's proposal was insufficient, even if the school district would not have been able to establish the appropriateness of its proposal, and even if the parent could have succeeded by simply asking questions of (i.e., cross-examining) the school's witness.

This is not just a hypothetical risk. As described above, in one recent Maryland administrative hearing decision, the administrative law judge found in favor of the Baltimore County Public Schools after the child's guardian – his sister – proceeded *pro se*. The hearing officer granted summary judgment even though Baltimore County produced no witnesses and no evidence, finding:

> 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.[7]

The hearing officer concluded that the child's sister failed to present competent evidence, and ruled against her without hearing *any* evidence from the Baltimore County Public Schools. As this example illustrates, even if a child

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[7] *XXXX XXXX v. Baltimore City Pub. Sch.*, Order, OAH No.: MSDE-CITY-OT-200200192, Md. Office of Admin. Hearings (June 26, 2002), *available at http://www.msde.state.md.us/SpecialEducation/hearing_decisions2002/02-H-CITY-192.pdf* (last visited April 27, 2005).

has a guardian advocating for her educational needs, the guardian's lack of experience with proffering evidence and setting forth a persuasive case is just one of the many examples that should convince this Court that the school district should bear the burden of proof.

Sometimes the child with a disability does not even have a family members to act in his or her interest, but has only a volunteer "surrogate parent" to act on his behalf. Many children in foster care or who are homeless have disabilities and need special education, and, in fact, the newly revised IDEA contains additional provisions focused on ensuring that these children also receive special services.

Placing the burden of proof on the parents, as the Fourth Circuit did, serves only to magnify the need for parents to retain counsel for an administrative hearing. As has been well documented, not all parents and guardians have access to counsel or the resources to hire expert witnesses. [8] In any event, there is neither a statutory basis nor a policy reason to assign the burden of proof in a way that unnecessarily increases the need to inject lawyers into the administrative process.

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[8] *See, e.g.,* Rebecca W. Goldman, *A Free Appropriate Education in the Least Restrictive Environment: Promises Made, Promises Broken by the Individuals with Disabilities Education Act*, 20 U. Dayton L. Rev. 243, 288 (Fall 1994); Kay H. Seven, *In the Matter of Arons: Construction of the IDEA's Lay Advocate Provision Too Narrow?*, 9 Geo. J. on Poverty Law & Pol'y 193, 207 (Winter 2002); Damon Huss, *Balancing Acts: Dispute Resolution in U.S. and English Special Education Law*, 25 Loy. L.A. Int'l & Comp. L. Rev. 347, 361-62 (Spring 2003).

B. Parents Are Not Entitled Under IDEA To Pre-Hearing Discovery That Would Allow Them To Meet The Burden Of Proof.

While a plaintiff in a federal court action sometimes bears the burden of proving matters where the defendant has superior access to information, courts often justify this result on the ground that the plaintiffs can use pre-trial discovery procedures, such as those mechanisms found in the Fedeal Rules of Civil Procedure, to obtain the necessary information. 2 J. STRONG, MCCORMICK ON EVIDENCE § 337 n.11 (5th ed. 1999). The IDEA, however, provides no right to such discovery mechanisms in an administrative hearing.

At most, IDEA guarantees parents access to their own child's written file, and to those select documents the school district intends to use to support its own case. IDEA provides no right for parents to issue document requests, serve requests for admissions, send interrogatories to the school, or depose school system personnel.[9] This presents numerous serious implications for parents attempting to protect their child's statutory right to a free appropriate public education.

1. Parents have no way of learning the school's contentions.

Parents have no way of obtaining complete information about the school district's offer – in particular, information that might contradict or undermine the appropriateness of the school district's offered IEP. The IEP process contemplates that the school district will explain to the parent its rationale

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[9] Formal discovery does occur in some states pursuant to state-devised procedural rules. Even in those states, unrepresented families would have little chance of making effective use of discovery options.

for the IEP it is proposing. These explanations, however, are often cursory, self-serving, and jargon laden. Moreover, IDEA does not require that the school district present to the family information or evaluation data that contradicts its proffered IEP; and a school district, striving to get parental assent to its offer, may not candidly present the pros and cons of its proposals, particularly if it knows it will not bear the burden of proof at a hearing. Without discovery mechanisms, parents cannot be assured of accessing the information they need.[10]

2. Parents do not know, and have no right under IDEA to discover, details about a proposed placement.

Parents similarly have no right to learn the details of a school district's proposed placement, or the details of other placements within the "continuum" of placement options that IDEA requires school districts to offer. *See* 34 C.F.R. § 300.551 (2004) ("Each public agency shall ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services."). Because the school district operates the program, it has complete and unfettered access to information about the program – and the ability to deny the parents access to that information. For example, parents may not even be able to observe the proposed placement, or to observe the child in the current classroom. *See, e.g., Hanson v. Smith,* 212 F. Supp. 2d 474, 487 (D. Md. 2002) (parents do

[10] IDEA requires that the school district provide the reasons why it rejected other options, and the school district must include this explanation in the IEP. These explanations, however, usually contain a few conclusory phrases that are not calculated fully to inform the family of the range of options and reasons for rejections.

not have right to observe a placement). The Department of Education has agreed with this interpretation. It wrote:

> [N]either the statute nor the regulations implementing the IDEA provide a general entitlement for parents of children with disabilities, or their professional representatives, to observe their children in any current classroom or proposed educational placement. The determination of who has access to classrooms may be addressed by State and/or local law.

Letter from Department of Education, Office of Special Education Programs to Ms. Shari Mamas, May 26, 2004, published at 42 Individuals with Disabilities Law Report 10, Vol. 42, Iss. 1 at 48 (2004).

Parents also have no right under IDEA to access information relevant to the appropriateness of a placement. For example, whether a placement is appropriate and whether it represents the "least restrictive environment" for the child, *see* 20 U.S.C. § 1412(a)(5) (2005), depends in part on the characteristics and needs of the other students in a particular program. But only the school district has access to data about the other children, which it can bring forward and use in a hearing if it believes the information is favorable to its position. If the information supports the parents' position, however, the parents have no right under IDEA to discovery mechanisms necessary to obtain it.

School districts also have access to data about the performance of other children in the proposed placement that they can use to support the appropriateness of the placement. Thus, for example, a school district has access to evidence of a particular program's success with other children with a similar profile. In one case, a school district introduced at the administrative hearing evidence of the proposed autism

program's past success with other autistic children. *County Sch. Bd. of Henrico County v. Z.P.*, 399 F.3d 298, 308 (4th Cir. 2005); *cf. Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66 (1999) (ALJ considered evidence about services provided to other students with disabilities). If the data would show the program has *not* been successful for similar children, parents have no right under IDEA to serve discovery requests or conduct depositions to obtain the data.

C. Parents Of Children With Disabilities Are Disproportionately Poorer And Significantly Less Educated.

The challenge for most parents grappling with IDEA is compounded by the fact that families of children with disabilities are poorer than the general population. A recent comprehensive study reported that in the year 2000, twenty-four percent of disabled students lived below the poverty line, compared to sixteen percent in the general population. 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). Because of these financial limitations, many parents are simply unable to afford counsel, and may have difficulty paying to retain expert witnesses. Although the Act provides for attorneys' fee awards to successful parents, many parents are still not represented by counsel, nor can they find representation. 150 CONG. REC. S5351 (daily ed. May 12, 2004) (statement of Sen. Kennedy) (providing statistical data to demonstrate that parents rarely retain representation for hearings). Since assigning the burden of proof to parents increases the risk that the parents will not succeed, it also increases the risk that no fees will be awarded. As a result, it will be even less likely that parents will be represented, at the very same time that representation will become more important.

Parents of children with disabilities are also less well-educated than the population as a whole: only sixteen percent of mothers and twenty percent of fathers of children with disabilities had a college degree, compared to twenty-five percent of mothers and thirty-four percent of fathers in the general population. Wagner, at 23-24. While education levels are not determinative, parents with less education are sometimes less able to understand the requirements necessary to meet the burden of proof and to assemble a compelling affirmative case challenging the appropriateness of an IEP.

D. The School District Developed The Proposal And Should Already Have The Information Needed To Satisfy The Burden Of Proof.

Because the school district developed the proposal at issue and IDEA assigns primary responsibility for developing the educational program to the school district, the school district should have assembled the requisite evaluations and other relevant data and presented them at the IEP meeting. To the degree the school district prepared such materials for the IEP meeting as it should have done, there should be little additional burden for it to assemble those materials, present its rationale, and persuade an impartial factfinder that it has met IDEA's substantive requirements. To do so, the school district must merely show that the proposal would allow the child to make reasonable educational progress, or, as this Court has put it, "benefit from the instruction"; the school district need not prove that its proposal is the best alternative for the child. *Rowley,* 458 U.S. 176, 188-89 (1982).

E. The School District Employs Professionals Who Can Serve As Witnesses.

School districts employ numerous professionals who can serve as witnesses. This includes the child's teachers, as well as other professionals such as speech and occupational therapists and psychologists. In most cases, these individuals will have had prior experience and contact with the child, often for many years.

While the parent may hire independent experts, the school already has such personnel on its staff, can readily require their attendance at the hearing, and can require them to explain in their professional judgment, based on their experience with the particular child, why the school district believes its particular placement is appropriate.

As discussed above, however, the parents have no right to interview these witnesses, depose them, or otherwise prepare to cross-examine them. Even if school district employees *agree* with the parents, in practice, the parents have no way of learning this fact, unless the employees take the initiative to come forward and tell the parents that they disagree with their employer. These situations are understandably rare.

F. The Procedural Protections The Fourth Circuit Cited Do Not Warrant Placing The Burden Of Proof On Parents.

The Fourth Circuit misperceived the significance of the various procedural protections written into IDEA, which the majority suggested leveled the playing field and justified placing the burden of proof on parents. P.A. 9-12. To the contrary, these procedural mechanisms do not provide enough information to "level the playing field." Moreover, Congress' inclusion of these parent protections signals its

intent to promote parent involvement and protect parents faced with a school district proposal with which they did not agree as members of the IEP team. Congress' creation of *procedural protections* for the parents in fact suggests that the separate *substantive law question* of the burden of proof should similarly be decided in a way that protects parents who disagree with officials from the school district, who "have a natural advantage." *Sch. Comm. of the Town of Burlington v. Dept. of Educ. of Massachusetts*, 471 U.S. 359, 368 (1985).

1. The procedural protections do not alter the fact that the school district stands in a better position to meet the burden of proof.

The protections Congress included recognize the "natural advantage" the school district has, *Burlington*, 471 U.S. at 368, but do not by any stretch put parents in a better position than school districts to meet the burden of proof.

a. For example, although the statute requires the school district to provide the parents with a copy of the child's written file, as the Fourth Circuit noted, P.A. 10, this right is in reality quite limited. The school need not provide other documentation the parent might need to determine whether a proposed placement is appropriate, the historical performance of the proposed program, and the characteristics of children in the proposed program, as discussed above.

b. Similarly, the court below suggested that Congress provided for "discovery" by requiring the parties to exchange witness lists and exhibits 5 days before the administrative hearing. P.A.. 11. As discussed above, however, these pre-hearing disclosures fall well short of "discovery" in the sense of federal procedural discovery rules, which permit parties to ferret out favorable evidence in

the hands of the opposing party. Rather, these pre-hearing disclosure rules simply require the school district to disclose documents it believes support its case. Nothing in the disclosure provision requires the school district to provide documents adverse to its case or allows the parents to require the production of such documents. Thus, the limited pre-hearing disclosures that the IDEA requires fall well short of the type of discovery a parent might need to meet the burden of proof where most relevant evidence is in the school district's possession.

c. The Fourth Circuit majority also cited the fact that Congress authorized money for parent assistance centers. P.A. 10-11. These centers, however, are not mandatory, and a congressional authorization is nothing more than a recognition that the appropriations committees are authorized to appropriate money to fund such centers. In fact, many school districts lack any such center. In any event, in amici's experience, the services of these parent assistance programs that actually exist do not typically extend to assisting parents in preparing their cases for administrative hearings against the school district.

d. The Fourth Circuit misperceived the significance of the parents' inclusion as members of the IEP team. The Fourth Circuit majority failed to recognize the serious impediments to parents' participation in such meetings. The majority also ignored the fact that an administrative hearing takes place only because the school district did not obtain a consensus of the school district and parent members.

IEP meetings are inherently intimidating for parents worried about their children and faced by government officials, and the power balance during such meetings inherently favors the school district. As the Department of Education has recognized, "[i]n many situations, an IEP meeting can be a very intimidating experience for many

parents, even if the [Local Education Agency] encourages their active participation." Assistance to States for the Education of Children with Disabilities and the Early Intervention Program for Infants and Toddlers with Disabilities, 64 Fed. Reg. 12,582 (March 12, 1999). Therefore, "[a]lthough IDEA treats parents as equal participants on the IEP team, this parity position for parents is often illusory." Rebecca W. Goldman, *A Free Appropriate Education in the Least Restrictive Environment: Promises Made, Promises Broken by the Individuals with Disabilities Education Act*, 20 U. Dayton L. Rev. 243, 280 (Fall 1994). In this context, placing the burden on the parents when the school district proceeds with a proposal the parents have not agreed to undermines Congress' goal of expanding parent participation – a goal that draws on parents' deep knowledge of their children's needs to ensure they are provided an appropriate education.

Thus, at these IEP meetings, the parents typically are vastly outnumbered by school district personnel. The school system is represented by the child's regular education teacher (if the child is in a regular classroom), the child's special education teacher, various personnel employed by the school district who have worked with or evaluated the child (e.g., speech therapists, psychologists, social workers, occupational therapists, and others), a school system administrator who is "knowledgeable about the availability of resources of the local educational agency," 20 U.S.C. § 1414(d)(1)(B), and potentially others. The school district employee runs the meeting and completes the various components of the IEP as the meeting progresses. School district professionals may present the results of specialized evaluations, using statistical information and educational jargon with which the parent is not necessarily familiar. Parents are usually alone. They are rarely accompanied by lawyers, which IDEA discourages at IEP meetings, 20

U.S.C. § 1415(i)(3)(d)(ii) (stating that "[a]ttorneys' fees may not be awarded relating to any meeting of the IEP Team"), and they do not have a similar coterie of experts.

One article for educators provided the following example, which describes the atmosphere of intimidation that a parent may feel upon entering the IEP meeting room:

> [The parent] noticed that the professional team members had already arrived at the room. They seated themselves along one of the long sides as well as at both short ends of the rectangular table. [The parent] took the lone seat in the middle of the remaining side.

Diane M. Dabkowski, *Encouraging Active Parent Participation in IEP Team Meetings*, 36 Teaching Exceptional Children 34, 35 (Jan/Feb 2004). This feeling – that parents are outnumbered and alone – is common among parents attending IEP meetings. *See, e.g.*, Pamela P. Garriott, et al., *Teachers as Parents, Parents as Children: What's Wrong with this Picture?*, Preventing School Failure, Fall 2000, at 41 (quoting parent saying, "[f]or many years I was grieving over my daughter's disability and overwhelmed by the number of people they had versus one lonely, sad, guilty, mom.").

Amici's experience, and published cases, reflect the many impediments to meaningful parent participation. For example, school districts often present parents with draft IEPs, and then sit and watch while the parents read and sign them. In one case, a school district scheduled a meeting at a time when the parent could not attend due to work or other

obligations, and then proceed without the parents.[11] In some instances, school districts have simply refused to discuss a placement the parent suggested;[12] or have refused to review professional evaluations submitted by the parents.[13] Frequently, school district personnel assert – incorrectly – in IEP meetings that IDEA prohibits what the parents are requesting.[14] The problems and challenges are numerous, and the school district must make a conscious effort to involve parents and seek consensus. The parents' presence at IEP meetings falls well short of "leveling the playing field."

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[11] *Shapiro v. Paradise Valley Unified Sch. Dist.*, 317 F.3d 1072 (9th Cir. 2003).

[12] *Briere v. Fair Haven Grade Sch. Dist.*, 948 F. Supp. 1242 (D. Vt. 1996) (school district team members "told [the parent] that Maplewood school would not be discussed.").

[13] *Dibuo v. Bd. of Educ.*, 309 F.3d 184 (4th Cir. 2002) ("the School District members of Mark's IEP Team refused to consider the evaluations.")

[14] There is extensive literature discussing the barriers to parent participation:

> The studies indicate that educators tend to focus on a child's weaknesses and faults as a way of coercing parental compliance with the school personnel's recommendation. Others observe that school personnel do not allow parents to give constructive input on their child's needs or simply do not incorporate parents' input into an IEP recommendation. Parents report that school officials tend to blame them for their child's problems, particularly when the nature of the child's disability is undetermined. Several studies note the extensive use of educational and medical terminology that accompany IEP meetings, which often has the effect of excluding parents from the dialogue.

Stephen C. Shannon, *The Individuals with Disabilities Education Act: Determining "Appropriate Relief" in a Post-Gwinnett Era*, 85 Va. L. Rev. 853, 879 (August 1999).

2. Assigning the burden of proof to the school district implements Congress' objective in enacting procedural protections and promotes parent participation.

In recognizing the power differential between parents and the school district, Congress structured IDEA to contain some protections for parents that would represent a start to minimizing this disparity. Congress' failure to speak directly to the substantive law question of the burden of proof in an administrative hearing does not indicate, as the Fourth Circuit majority apparently felt, that the parents should bear the burden of proof. To the contrary, the statute's concern for parental involvement and protection, along with its mandate for a free appropriate education, require precisely the opposite result. This is because the Court should decide the substantive law question of the burden of proof in a manner that "produces a substantive effect that is compatible with the rest of the law." *United Sav. Assoc. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988).

The statute's inclusion of various procedural protections for parents reflects Congress' recognition that parents would be at a disadvantage in a dispute with the school district, *see Burlington*, 471 U.S. at 368, as well as Congress' belief that parents offer important insight into their child's needs and should therefore be members of the IEP team.

Assigning the burden of proof to the school district in those situations in which the district does not obtain a consensus of the school district and parent members of the IEP team[15] would align the substantive burden of proof

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[15] The Department of Education has explained that school districts are responsible for the IEP process, and for promoting the required services, (continued...)

standard with the Act's procedural protections, with Congress's expressed desire to promote parental involvement, and with Congress' desire to ensure that children with disabilities receive an appropriate education.

If the school district is not required to justify its proposals at a hearing when it fails to achieve a consensus at the IEP meeting, it will have little incentive to treat the parents as equal participants in the IEP meeting. In fact, if the burden of proof is on the parents, the school district would have the opposite incentive: the less objective information the school district discloses at the IEP meeting and the less open it is in its discussion with the parents, the better its position if the matter ends up at a hearing. School districts would be encouraged to be *less* forthcoming at the IEP stage, since they would suffer little consequence from having failed to achieve consensus, and could simply wait to see if the parents are able to prepare their case. The ultimate impact is that the parent-school district partnership that Congress sought to ensure with the IEP process will be substantially undermined.

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but that "parents are considered equal partners with school personnel in making . . . decisions." This means that:

> [T]he IEP team *should work toward consensus*, but the public agency has ultimate responsibility to ensure that the IEP includes the services that the child needs in order to receive FAPE. It is not appropriate to make IEP decisions based on a majority 'vote.' If the team cannot reach consensus, the public agency must provide the parents with prior written notice of the agency's proposals or refusals, or both, regarding the child's educational program, and the parents have the right to seek resolution of any disagreements by initiating an impartial due process hearing.

64 Fed. Reg. 12,473-74 (March 12, 1999).

At the same time, there is no harm to school districts from requiring them to bear the burden at the administrative hearing since the school district is expected to be able support and justify the proposals it makes in meetings with parents, who are equal members of the IEP team. If the school district has followed the dictates of the IDEA and followed IDEA's requirement to hold an IEP meeting at which parents are equal participants, the school district should *already* be prepared to present that very same information to and persuade a neutral fact-finder.

CONCLUSION

For the foregoing reasons, amici request that this Court reverse the decision of the Court of Appeals for the Fourth Circuit and remand this case for further proceedings below.

Respectfully submitted,

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