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, and the BOARD OF EDUCATION OF MONTGOMERY COUNTY, MARYLAND,

Respondents.

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

BRIEF FOR RESPONDENTS

JUDITH S. BRESLER
ERIC C. BROUSAIDES
REESE & CARNEY, LLP
Charter Drive 10715
Columbia, MD 21044
(301) 621-5255

JEFFREY A. KREW
4785 Dorsey Hall Drive
Suite 120
Ellicott City, MD 21042
(410) 997-6900

MAREE F. SNEED*
JONATHAN S. FRANKLIN
GREGORY G. GARRE
JESSICA L. ELLSWORTH
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-6416

ZVI GREISMANN
MONTGOMERY COUNTY PUBLIC SCHOOLS
850 Hungerford Drive
Rockville, MD 20850
(301) 279-3549

* Counsel of Record

Counsel for Respondents

QUESTION PRESENTED

Whether the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, incorporates the customary federal rule that the party that initiates the hearing and seeks relief bears the burden of proof in that proceeding.

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BRIEF FOR RESPONDENTS

INTRODUCTION

The question presented in this case is which party bears the burden of proof in due process hearings initiated pursuant to § 1415(f) of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* The court of appeals held that IDEA allocates the burden of proof "to the party initiating the proceeding and seeking relief." Pet. App. 6. In this case, that means the burden lies with the parents, since they initiated the administrative proceeding to challenge the adequacy of the school district's Individualized Education Program (IEP) for their child. But the rule applies both ways. In other situations, the school district may initiate the proceeding, and it likewise bears the burden of proof when it does so. That is the manner in which the burden of proof is overwhelmingly allocated in judicial as well as administrative proceedings, and there is no evidence that Congress intended to depart from that time-honored rule in IDEA. To the contrary, as explained below, the text and

history of IDEA compel the conclusion that Congress intended to incorporate the customary burden of proof.

Invoking notions of "policy and fairness" rather than principles of statutory construction, petitioners ask this Court to adopt an extraordinary rule imposing the burden of proof on school districts in *any* hearing under IDEA, including those initiated by parents. That rule would impose an additional, unstated burden on local schools implementing an underfunded federal mandate—a burden that Congress has not seen fit to impose on its own federal agencies. Moreover, the rule impugns the judgments of state and local educators that retain "primacy" over the field of education under IDEA. *Board of Educ.* v. *Rowley*, 458 U.S. 176, 208 (1982). Petitioners' rule would require schools to affirmatively justify IEP decisions whenever they are challenged, even in generalized terms—subjecting state and local educators to a presumption of invalidity. Furthermore, a rule that IEPs are presumptively invalid will only invite additional litigation. IDEA hearings are expensive, take special education teachers out of the classroom, and foster an adversarial relationship between parents and schools—costs that ultimately divert scarce resources from the education of *all* children.

The facts of this case—which petitioners and their amici would have the Court ignore—illustrate why the traditional burden is appropriate in the IDEA setting. Brian Schaffer was enrolled in a private school when he was diagnosed with a non-severe learning disability. His parents contacted the Montgomery County Public Schools (MCPS), the local public school district, which diligently prepared an IEP for Brian with input from his parents. The parents rejected all of MCPS's efforts to accommodate their requests, objected to the IEP, and then filed a due process complaint against the school, seeking to have MCPS pay for tens of thousands of dollars in private school tuition. In an initial hearing, an administrative law judge (ALJ) applied the customary burden of proof and upheld the IEP. When the burden of proof was

reallocated to the school district, however, the ALJ held the IEP invalid and ordered the school district to pay Brian's private tuition costs. Yet the ALJ consistently found that the facts strongly suggested that the parents had sought all along to "obtain funding from MCPS for a predetermined decision" to send Brian to private school. Pet. App. 113, 146-147 n.6.

This kind of litigiousness and even gamesmanship will only be encouraged if school districts are always required to affirmatively justify every challenged element of an IEP—as they would be required to do under petitioners' rule. The Court should reject that rule and affirm the decision below.

STATEMENT OF THE CASE

1. IDEA establishes a cooperative federalism program designed to ensure that every disabled child in America has access to "a free appropriate public education"—or FAPE—"that emphasizes special education and related services." 20 U.S.C. § 1400(d)(1)(A).[1] The Act reaffirms that States and "local educational agencies," or school districts, "are primarily responsible for providing an education for all children with disabilities," but finds that "it is in the national interest that the Federal Government have a role in assisting States and local efforts to educate children with disabilities." 20 U.S.C. § 1400(c)(6). IDEA authorizes federal financial assistance to States and local school systems to support them in those efforts. 20 U.S.C. § 1411(a)(1). And the Act, in turn, requires school systems that receive such federal assistance to make available FAPE to all children with disabilities in their jurisdiction. 20 U.S.C. § 1412(a)(1).[2]

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[1] Unless otherwise noted, citations to IDEA are to the Act reauthorized in 2004, which has an effective date of July 1, 2005.

[2] FAPE does not mean the most optimal level of services, but rather "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Rowley*, 458 U.S. at 203. That standard leaves ample flexibility

To comply with IDEA, school districts must identify students with disabilities and establish an IEP for them. 20 U.S.C. § 1414(d)(2)(A). An IEP is a written statement that is developed through a collaborative process by a team including teachers, school administrators, and the child's parents. 20 U.S.C. §§ 1401(14), 1414(d)(1)(B). Although parents are entitled to participate in the development of their child's IEP, the "local educational agency"—*i.e.*, the school district—is responsible for producing an IEP at the beginning of the school year for each child and periodically reviewing the IEP and revising it as appropriate. *See* 20 U.S.C. § 1414(d)(1)(A), (d)(4)(A). If parents believe that an IEP is inadequate, they may challenge it by filing a complaint and requesting a "due process hearing." 20 U.S.C. § 1415(f). If parents are unhappy with the outcome of that proceeding, they may bring a civil action. 20 U.S.C. § 1415(i)(2).

As Congress found in 2004, since the statute was originally enacted in 1975 as the Education for All Handicapped Children Act (EHA), IDEA "has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and in improving educational results for children with disabilities." 20 U.S.C. § 1400(c)(3). Today, more than 6.4 million children—13.4 percent of the public school enrollment in America—receive special education services through IDEA. U.S. Dep't of Education, *Digest of Education Statistics 2003*, Table 54 (Dec. 2004). Thousands of teachers, administrators, and health professionals devote their efforts daily to the education of children with disabilities in order to fulfill the requirements of IDEA and, more to the point, their own aim to provide the best education possible to those in their care.[3]

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for the judgment of state and local educators and takes into account the numerous demands on scarce education resources.

[3] The average spending per special education pupil is about $12,600 a year—more than $8000 of which is for special

2. MCPS is the 17th largest school system in the country with 192 schools and an enrollment of 139,337 in 2004-2005. *See* MCPS, *About Us*, *at* http://www.mcps.k12.md.us/about/. MCPS is governed by the Montgomery County Board of Education and the Superintendent of Schools, respondents here. The vast majority of its annual budget—about three quarters—is funded by local taxpayer resources. *Id*. State funding accounts for 17.3 percent and federal funding for about 3.5 percent of the funds received by MCPS. *Id*.

MCPS is a "local educational agency," 20 U.S.C. § 1401(19), responsible for ensuring that each disabled child within its jurisdiction receives a FAPE. In 2003-2004, MCPS provided special education services to more than 17,000 students, about 12 percent of the total student population, in general education schools, special centers, and nonpublic special education schools. MCPS, *The State of Special Education*, *School Year 2004-2005*, at 4-5, *at* http://www.mcps.k12.md.us/departments/specialed/resources/StateCIT.pdf. MCPS's current budget allocates $312 million for special education services, including transportation and special education teachers, and $32 million for the payment of private tuition for some 650 children with disabilities who have received private placements at non-MCPS schools. MCPS has more than 3000 special education positions, including special education teachers, psychologists, and social workers.

MCPS consistently ranks as one of the Nation's most successful school districts. Twenty-nine MCPS schools have

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education services—compared with about $6500 for a regular student. U.S. Dep't of Educ., *Twenty-fourth Annual Report to Congress on the Implementation of the IDEA*, I-22, I-26 (2002). The vast majority of this spending is paid for by state and local governments. In 1999-2000, for example, school districts received only $3.7 billion in federal assistance under IDEA, or about $605 per student. *Id*. at I-32 to I-33. This amounts to only 10.2 percent of the added costs imposed by IDEA. *Id*. at I-33 n.16.

been named National Blue Ribbon Schools by the U.S. Department of Education. All 23 MCPS high schools with twelfth-graders were recently recognized as among the top 800 high schools in the Nation for academics. Barbara Kantrowitz, *The 100 Best High Schools in America*, Newsweek (May 16, 2005). MCPS won the 2004 U.S. Senate Productivity Award for Maryland, the largest school system in the Nation to have won a state productivity award for best exemplifying a management philosophy that focuses on continuous improvement in the pursuit of excellence.

3. Petitioner Brian Schaffer, now a college student, was diagnosed as a child with attention deficit hyperactivity disorder. Pet. App. 75. Brian's parents enrolled him in the Green Acres School from pre-kindergarten through seventh grade. Green Acres is a private school in Maryland with no special education program. *Id*. at 76. In October 1997, at the beginning of the seventh grade, Brian was placed on academic probation, *id.*, and Green Acres informed his parents that Brian "needed a placement for the next school year in a school designed to address his learning difficulties." *Id*. at 77. A month later, Brian's mother contacted a special education teacher at Herbert Hoover Middle School (Hoover), Brian's "home" MCPS school. She asked for an evaluation of Brian's eligibility to receive special education services the following school year, but told the teacher that she was looking to place Brian in another private school. *Id.* at 77-78. In December 1997, Brian's parents applied to have Brian admitted to the McLean School of Maryland, a private school not certified as a special education school. *Id*. at 79.

On February 26, 1998, MCPS convened an initial IEP Team meeting and obtained permission from Brian's parents to assess his eligibility for special education. *Id.* at 80-82. The meeting was attended by Brian's parents, the Hoover principal and assistant principal, an MCPS special education teacher, an MCPS psychologist, an MCPS speech/language pathologist, the head of the middle school at Green Acres,

and attorneys for the parents and MCPS. *Id*. at 80-81. The Team discussed Brian's education history and test results and decided to conduct additional assessments and to reconvene and evaluate Brian's needs in the light of all data it had acquired. *Id*. at 81-82. Less than three weeks later—and while MCPS was still evaluating Brian—Brian's parents accepted a placement for Brian at the McLean School and paid a non-refundable enrollment fee. *Id*. at 82.

The IEP Team met again to discuss Brian's needs on April 6, 1998. An attorney for Brian's parents was present. *Id*. at 85. The IEP Team considered reports prepared by special educators within MCPS after their evaluation of Brian as well as private assessments obtained by Brian's parents. The IEP Team identified Brian as a student with a speech-language disability and a learning disability. *Id*. at 86. An MCPS speech/language expert, however, disagreed in part with the private expert hired by Brian's parents who believed Brian had an auditory processing disorder. *Id.* at 84. In accordance with IDEA's "least restrictive environment" mandate (20 U.S.C. § 1412(a)(5)(A)), the Team prepared an IEP that placed Brian at Hoover. Pet. App. 86. The IEP called for Brian to receive 15.3 hours of special education per week through an inclusion model and 45 minutes of speech-language therapy in a small group setting each week, as well as 45 minutes of reading/writing support in a self-contained special education classroom each day. *Id*. Under the inclusion model, a separate, dedicated special education teacher would work exclusively with a small group of 5-6 students within a regular classroom. *Id*. at 87.

At the meeting, Brian's parents expressed concern with the class sizes at Hoover. MCPS then offered to implement the IEP at Robert Frost Middle School (Frost), which was located ten minutes from Brian's home and would permit Brian to be placed in a higher number of small, self-contained special education classes. *Id.* at 89-90. Although the parents left the IEP meeting indicating that they would

contact MCPS after reviewing the IEP and observing the proposed placements at both schools, they visited only one school (Frost). *Id*. at 89. On May 5, 1998, the parents sent a letter to MCPS stating that the proposed IEP placed Brian in classes that were too large and unstructured, and that they had decided to enroll Brian in the private McLean School for the 1998-1999 school year. *Id.* at 90-91.

Three weeks later, Brian's parents, through an attorney, filed a due process complaint against MCPS and request for a hearing under IDEA alleging that the IEP developed for Brian was inadequate. J.A. 10-13. They declined to pursue mediation of their claim before any hearing. J.A. 10. They sought reimbursement of the tuition and other expenses for Brian to attend the private McLean School. Pet. App. 4.

4. Petitioners' due process complaint was referred to an administrative law judge (ALJ) in the Maryland Office of Administrative Hearings, which is responsible for handling IDEA complaints in Maryland. *See* Md. Code Ann. Educ. § 8-413(c). A three-day hearing was held at which both parties were represented by counsel. Pet. App. 121. The ALJ issued a decision in favor of MCPS, holding that Brian "would obtain significant, measurable educational benefit during the 1998-1999 school years" at either of the two schools offered by MCPS in the challenged IEP. *Id*. at 156.

In reaching that result, the ALJ found that MCPS's experts were credible and well-qualified, but "question[ed] the probative value" of the parents' experts—one of whom had not even examined Brian. *Id.* at 149, 150, 153. Despite such deficiencies, the ALJ stated that the diverging expert testimony made the burden of proof "critical." *Id.* at 144. The ALJ held that, "[w]here there has been an IEP formulated with no procedural safeguards violated, the party attacking the IEP should bear the burden of showing why the IEP and the educational setting are not appropriate," *id*. at 145-146, and concluded that petitioners failed to meet that burden. *Id*. at 156. The ALJ further found that Brian's

parents had made only a "mock effort" to participate on the IEP Team and had "never approached their interaction with MPCS as a partnership," and that their conduct "strongly suggest[ed] a design * * * to simply obtain funding from MCPS for their predetermined decision" to enroll Brian in private school. *Id*. at 146-147 n.6.

The parents appealed to the United States District Court for the District of Maryland. The district court held that the ALJ should have placed the burden of proof on the school district, and remanded the case to the ALJ. *Id*. at 68-69.[4] In a second hearing based on the same record, the ALJ found that "the key fact in dispute is whether [Brian] experiences a 'central auditory processing' problem, and if so, the impact of that disability on his ability to learn." *Id*. at 103. The ALJ stated that, "[i]n resolving this dispute of fact, the ALJ must accept one expert's opinion and reject the other." *Id*. at 105. Because "MCPS now bears the burden of proof," the ALJ rejected MCPS's expert testimony and accepted petitioners' expert on that "key" issue, *id*., and this time concluded that MCPS had failed to meet its burden in establishing that the 1998 IEP was adequate. *Id*. at 109-110. The ALJ ordered MCPS to reimburse only one-half of Brian's private school tuition, however, based on his finding that Brian's parents sought to "obtain funding from MCPS for a predetermined decision" to send Brian to private school. *Id*. at 113-114.

The parties filed cross-appeals to the district court. The district court affirmed the ALJ's decision that the IEP was inadequate based on the reallocated burden of proof, *id*. at

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[4] MCPS appealed the district court's decision to the Fourth Circuit. But while the case was pending on appeal, the ALJ issued a subsequent decision. The Fourth Circuit vacated and remanded the district court's decision so that it could address this case in one appeal rather than in a piecemeal fashion. Pet. App. 50-53.

41, but reversed the decision to limit the reimbursement to one-half of the private school tuition. *Id*. at 47.[5]

5. The Fourth Circuit reversed. The court held that "the burden of proof is normally allocated to the party initiating the proceeding and seeking relief," *id*. at 6, and that Congress did not "depart from the normal rule" in IDEA. *Id*. at 8. The court explained that its interpretation of IDEA was consistent with the allocation of the burden of proof under federal civil rights statutes that "are silent about burden of proof," but nonetheless have been consistently interpreted to incorporate the normal rule. *Id*. The court rejected the notion that the "side with the bigger guns" must bear the burden. *Id*. at 9. As the court explained, Congress was sensitive to that policy concern and thus specified numerous "procedural safeguards for parents, but assignment of the burden of proof to school systems was not one of them." *Id*. at 15-16; *see id*. at 9-12. Moreover, placing the burden on the school systems would create a "presumption of inadequacy" at odds with IDEA's

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[5] Brian's parents enrolled Brian in the McLean School for the 1998-1999 and 1999-2000 school years. In August 2000—more than two years after the initial hearing on petitioners' challenge to the 1998 IEP that is the subject of this case—MCPS convened an IEP Team to discuss Brian's educational needs for the 2000-2001 school year. This IEP placed Brian at Walter Johnson High School (Walter Johnson), an MCPS school. J.A. 17. Brian's parents transferred Brian to Walter Johnson, where he performed well academically and in sports. *See* MCPS, Walter Johnson High School 2001 Golf Results, *at* http://www.mcps.k12.md.us/schools/wjhs/athletics/golf/2001.html. Brian graduated from Walter Johnson in 2003. Petitioners assert that if MCPS had offered Walter Johnson in 1998, "this case would not be here." Pet. Br. 3. The ALJ, however, specifically found that Brian's parents were "predetermined" to send Brian to a private school in 1998. Pet. App. 113, 146-147 n.6. Moreover, Walter Johnson is a *high* school, and therefore was not an option for the IEP Team in 1998 that was considering where to place Brian for *middle* school.

"basic policy" of "rely[ing] upon the professional expertise of local educators." *Id*. at 14.[6]

SUMMARY OF ARGUMENT

The court of appeals correctly held that the burden of proof in IDEA § 1415(f) hearings lies with the party that initiates the hearing and seeks relief, *i.e.*, petitioners here.

I. A statutory analysis of the question presented compels the conclusion that IDEA adopts the customary burden of proof—*i.e.*, the party that initiates the hearing and seeks relief bears the burden of proof. That is the default rule that applies in countless judicial as well as administrative proceedings. It is the rule that Congress adopted for administrative hearings before its own federal agencies. *See* 5 U.S.C. § 556(d). It is the rule that applies to federal civil rights laws, including Section 504 of the Rehabilitation Act of 1973, which was enacted two years before IDEA and is grounded on the same fundamental principle as IDEA. And it is the rule that Congress presumptively has in mind when it legislates. The fact that Congress did not express any intention to deviate from the customary burden of proof in IDEA itself establishes that Congress did not intend to do so.

The text of IDEA confirms that Congress adopted the normal burden of proof for IDEA hearings. The statute's reference to "due process" supports that conclusion, because this Court long ago established that it is constitutional to place the burden of proof on the party challenging government action, including the denial of vitally important benefits. *Lavine* v. *Milne*, 424 U.S. 577 (1976). The deliberate and detailed manner in which Congress *explicitly* sought to level the playing field in IDEA hearings likewise supports the conclusion that Congress did not *silently* adopt the extraordinary burden of proof urged by petitioners. That

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[6] Judge Luttig dissented. *Id*. at 16-20. Based on considerations of "policy, convenience and fairness," he would have placed the burden on school districts in all IDEA hearings. *Id*. at 17.

conclusion is reinforced by the fact that in a specific context covered by IDEA involving the removal of a child from the classroom for disciplinary problems, Congress—for a brief period—*did* explicitly place the burden of proof on school districts in a hearing initiated by the parents, underscoring that Congress knows how to place the burden on school districts when it wants to. The fact that IDEA explicitly puts the onus on the complainants to plead their affirmative case also supports the conclusion that Congress adopted the normal burden of proof, because the pleadings are one of the most common guides for allocating the burden of proof.

Furthermore, IDEA may not be interpreted to impose *unstated* burdens on state and local administrators. As this Court has held, because Spending Clause programs—like IDEA—are in the nature of a "contract," the only burdens that Congress may impose on the recipients of federal funds are those that are unambiguously stated. IDEA also must be interpreted in light of the time-honored presumption of administrative regularity. Imposing the burden of proof on school districts in IDEA hearings challenging IEPs would mean that any challenged IEP is presumed *invalid* until proven otherwise by the school district—effectively subjecting the judgments of state and local educators to a presumption of *invalidity*. Finally, imposing the burden of proof on state and local educators in IDEA hearings would contravene our federalism, given that education is a traditional matter of state and local concern. Only the clearest statutory command could sanction that result.

II. To the extent the Court is inclined to take over Congress' role in weighing policy issues, the policies of the IDEA do not support reversing the ordinary burden of proof. Doing so will only foster more costly litigation in contravention of Congress' intent and at the expense of actual education. Requiring school districts to affirmatively justify every aspect of an IEP whenever it is challenged—without parents having to present any evidence—will simply encourage par-

ents (as petitioners were found to have done here) to substitute adversarial hearings for the cooperative IEP process Congress intended. The resulting hearings will not only be more common but also more expensive, as school districts will have to anticipate and rebut in advance every conceivable objection to the IEP. The additional costs are substantial and will fall upon all other students, whose educational dollars will be spent on litigation instead. By contrast, reversing the burden will do little, if anything, for IDEA complainants, who will still have to overcome the school district's evidence regardless of where the burden is placed.

In any event, there are no informational imbalances that would warrant abrogating the customary burden of proof in IDEA cases. Parents have greater access to the most important source of information in all IDEA cases—their own child. And the comprehensive disclosure provisions of the statute ensure that parents will have ready access to all other information they may need. Petitioners' other main "policy" arguments—that school districts have greater resources and that parents are generally unsophisticated—are unrelated to the locus of the burden of proof. Regardless of their relative resources or sophistication, parents will still have to make out their case regardless of where the burden is placed. But just as important, Congress has thoroughly and expressly addressed both of these concerns. It has provided substantial assistance to parents, both by guaranteeing attorneys' fees for meritorious claims and by providing an extraordinary panoply of procedural rights to ensure that parents both understand and can meaningfully vindicate their rights. Finally, reversing the normal burden is not needed to ensure compliance given the formidable array of enforcement mechanisms that exist in both the statute and its regulations.

III. Like other Spending Clause statutes, IDEA establishes minimum federal requirements that attach to the receipt of federal funds, but permits States to adopt additional requirements that are not inconsistent with the Act.

Accordingly, it may be possible to interpret IDEA as permitting a State to voluntarily assume by statute a different burden of proof for their school districts in IDEA hearings. But that question is not presented by this case. Petitioners rely solely on federal law, and not state law. And, in any event, because Maryland has not enacted any law assigning the burden of proof to school districts in IDEA hearings, the federal rule plainly governs this case.

ARGUMENT

Like this Court's prior IDEA cases, "[t]his case presents a question of statutory interpretation." *Board of Educ.* v. *Rowley*, 458 U.S. 176, 179 (1982); *see also Cedar Rapids Cmty. Sch. Dist.* v. *Garret F. ex rel. Charlene F.*, 526 U.S. 66, 77 (1999). The question is which party—the parents or the school district—bears the burden of proof in an administrative hearing initiated pursuant to IDEA § 1415(f). The burden of proof refers to the "burden of persuasion—the notion that if the evidence is evenly balanced, the party that bears the burden of persuasion must lose." *Director* v. *Greenwich Collieries*, 512 U.S. 267, 272 (1994). The assignment of that burden is "a rule of substantive law." *Id.* at 271; *see Raleigh* v. *Illinois Dep't of Revenue*, 530 U.S. 15, 20-21 (2000). As explained below, although IDEA does not specifically define the burden of proof, the traditional tools of statutory construction compel the conclusion that Congress incorporated the normal rule—*i.e.*, the party that initiates the proceeding and seeks relief bears the burden of proof.

I. IDEA INCORPORATES THE CUSTOMARY RULE THAT THE PARTY INITIATING THE HEARING BEARS THE BURDEN OF PROOF

A. Congress Presumptively Legislates With The Customary Burden Of Proof In Mind

1. The "well-settled presumption" is that "Congress understands the state of existing law when it legislates." *Bowen* v. *Massachusetts*, 487 U.S. 879, 896 (1988); *see also Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-185

(1988). When Congress enacted the EHA in 1975—the predecessor to IDEA—it therefore understood that in civil proceedings "the burden of proof is normally allocated to the party initiating the proceeding and seeking relief." Pet. App. 6 (citing, *e.g.*, 2 John W. Strong, *McCormick on Evidence* § 337 (5th ed. 1999)). While variously articulated, that rule has been a fixture of Anglo-American law for centuries. *See, e.g.*, *Industrial Union Dep't, AFL-CIO* v. *American Petroleum Inst.*, 448 U.S. 607, 653 (1980) (plurality) ("Ordinarily, it is the proponent of a rule who has the burden of proof."); *Bull* v. *United States*, 295 U.S. 247, 260 (1935) ("burden of proof" is "normally on the claimant"); *Arthur* v. *Unkart*, 96 U.S. 118, 122 (1877) ("The burden of proof is upon the party holding the affirmative of the issue.").[7]

Furthermore, when Congress enacted the EHA, it knew that it had adopted the customary burden of proof for federal ad-

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[7] The authorities recognizing this rule are legion. To cite only a few: *Sadeghi* v. *INS*, 40 F.3d 1139, 1143 (10th Cir. 1994) ("general rule [is] that the petitioner bears the burden of proof "); *Rockwell* v. *Commissioner*, 512 F.2d 882, 887 (9th Cir. 1975) ("In most litigation, from time immemorial, the burden of proof * * * is on the plaintiff."); *People* v. *Orth*, 530 N.E.2d 210, 215 (Ill. 1988) ("party requesting judicial relief bears the burden of proof"); *Lublin* v. *Central Islip Psychiatric Ctr.*, 372 N.E.2d 307, 310 (N.Y. 1977) ("burden of proof is normally placed upon the party who is seeking affirmative relief "); 21 Charles A. Wright, *et al.*, Fed. Prac. & Proc. Evid. § 5122 (1997) ("[T]he usual rule is that the burden of proof is on the plaintiff."); 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 63, at 314 (2d ed. 1994) ("the person who seeks court action should justify the request, which means that the plaintiffs bear the burdens on the elements in their claims"); 1 Byrun K. Elliot & William F. Elliot, *A Treatise on the Law of Evidence* § 132 (1904) ("party who seeks to move a court in his favor" normally bears the burden of proof); Thomas Starkie, *Starkie on Evidence* 533 (George Sharswood ed., 8th Am. ed. 1860) ("general rule" is "that the party who alleges the affirmative of any proposition shall prove it").

ministrative proceedings under the Administrative Procedure Act (APA), which was first enacted in 1946. *See* 5 U.S.C. § 556(d) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."); S. Doc. No. 248, at 31 (1946) ("The provision relating to the burden of proof is the standard rule"); *see also* 2 Laura H. Dietz, *et al.*, Am. Jur. 2d *Admin. Law* § 354 (2004). As this Court recognized in *Greenwich Collieries*, 512 U.S. at 281, this means that in any administrative hearing covered by the APA, "when the evidence is evenly balanced, the benefits claimant must lose." Thus, the default rule when Congress enacted IDEA was that a claimant bears the burden of proof in challenging the decisions of federal administrative officials. As explained below, under the principles governing the interpretation of Spending Clause legislation such as IDEA, Congress cannot be presumed to have silently imposed a greater burden on state and local educational agencies under IDEA. *See* Part I.C, *infra*.

In the government context, the customary rule gives effect to the time-honored presumption of administrative regularity, *i.e.*, the assumption that administrators perform their duties properly and in good faith. *See United States Postal Serv.* v. *Gregory*, 534 U.S. 1, 10 (2001) ("[A] presumption of regularity attaches to the actions of Government agencies."); *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) ("courts presume that [public officers] have properly discharged their official duties") (quoting *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926)). Indeed, as this Court has recognized, the traditional presumption of regularity is intertwined with the allocation of the burden of proof in a proceeding challenging administrative action. *See Sunday Lake Iron Co.* v. *Wakefield Twp.*, 247 U.S. 350, 353 (1918) ("The good faith of such [state] officers and the validity of their actions are presumed; when assailed, the burden of proof is upon the complaining party.").

2. The customary rule applies in countless contexts that involve claims of entitlement to government benefits or privileges of vital importance to millions, especially those who seek relief predicated on a claim that they were improperly denied a statutory right or benefit. For example, at the federal level, the complainant bears the burden of proof in challenging the denial of benefits under the Black Lung Benefits Act, *Greenwich Collieries*, 512 U.S. at 270; Federal Employees Health Benefits Act, *Muratore* v. *OPM*, 222 F.3d 918, 920 (11th Cir. 2000); Longshore and Harbor Workers' Compensation Act, *Greenwich Collieries*, 512 U.S. at 270; Public Safety Officers' Benefits Act, *Bice* v. *United States*, 61 Fed. Cl. 420, 436 (2004); Radiation Exposure Compensation Act, *Howell* v. *Reno*, 939 F. Supp. 802, 806 (D. Colo. 1996); and Social Security Act, *Brown* v. *Apfel*, 192 F.3d 492, 499 (5th Cir. 1999). These benefits are at least as important to the claimant as services sought under IDEA, such as the class-size reduction sought by the petitioners here.[8]

Likewise, at the state or local level, the claimant typically bears the burden of proof in challenging the denial or loss of privileges ranging from public employment to vital benefits.[9] So too, individuals bear the burden of proof in challenging tax assessments, *Long* v. *Wayne Twp. Assessor*, 821 N.E.2d

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[8] Petitioners erroneously suggest that the burden of proof is on the agency in a claim for social security benefits. Pet. Br. 43. Although the burden of production may shift in such an action, the burden of *persuasion* remains on the claimant at all times. *See, e.g.*, *Kerner* v. *Flemming*, 283 F.2d 916, 922-923 (2d Cir. 1960).

[9] *See Weibel* v. *Midwest Doors of Kansas*, 2005 WL 331820, at *2 (Kan. Ct. App. Feb. 11, 2005) (workers' compensation); *Velasquez* v. *Department of Higher Educ.*, 93 P.3d 540, 542-544 (Colo. Ct. App. 2004) (employment); *Scott* v. *Iowa Dep't of Transp.*, 604 N.W.2d 617, 620-621 (Iowa 2000) (driver's licenses); *In re Retirement Benefits*, 554 N.W.2d 85, 88 (Minn. Ct. App. 1996) (pension benefits); *Iwanski* v. *Streamwood Police Pension Bd.*, 596 N.E.2d 691, 694 (Ill. App. Ct. 1992) (disability benefits).

466, 468 (Ind. Tax Ct. 2005), the issuance of environmental permits, *Montana Envtl. Info. Ctr.* v. *Montana Dep't of Envtl. Quality*, 2005 WL 896282, at *3 (Mont. Apr. 19, 2005), and the condemnation of their own land, *Owens* v. *Brownlie*, 610 N.W.2d 860, 866 (Iowa 2000). Maryland, the State from which this case arises, has long followed the default rule in its own administrative proceedings. *See Bernstein* v. *Real Estate Comm'n*, 156 A.2d 657, 662 (Md. 1959) ("[T]he burden of proof is generally on the party asserting the affirmative of an issue before an administrative body.").

The customary rule is already a settled feature in the public school context as well. For example, when a student has been expelled from school or suspended, the student or his parents typically bears the burden of proof in an action brought to challenge that expulsion. *See, e.g.*, *Fuller* v. *Decatur Pub. Sch. Bd. of Educ. Sch. Dist. 81*, 78 F. Supp. 2d 812, 821 (C.D. Ill. 2000), *aff'd*, 251 F.3d 662 (7th Cir. 2001); *Cross County Sch. Dist.* v. *Spencer*, 58 S.W.3d 406, 408 (Ark. Ct. App. 2001); *Mayberry* v. *Board of Educ. of Anne Arundel County*, 750 A.2d 677, 686-687 (Md. Ct. Spec. App. 2000); *West* v. *Board of Trs. of Miami Univ. & Miami Normal Sch.*, 181 N.E. 144, 148 (Ohio Ct. App. 1931). A parent's interest in ensuring that their child is not wrongfully *expelled* from the classroom is at least equivalent if not greater than a parent's interest in ensuring that the child receives a different school or particular class size under an IEP.

3. Federal civil rights laws also invariably incorporate the traditional rule. For example, the complainant bears the burden of proof in actions under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. *See Kinsella* v. *Rumsfeld*, 320 F.3d 309, 314 (2d Cir. 2003); *Gribcheck* v. *Runyon*, 245 F.3d 547, 550 (6th Cir. 2001). That is significant because the EHA and Section 504—which were enacted only two years apart—"are built around fundamental notions of equal access to state programs" and thus "have been interpreted to be strikingly similar." *Smith* v. *Robinson*,

468 U.S. 992, 1016-17 (1984). The plaintiff also bears the burden of proof under the Americans with Disabilities Act (ADA), *see Tyler* v. *Ispat Inland Inc.*, 245 F.3d 969, 972 (7th Cir. 2001); Age Discrimination in Employment Act, *see Mayer* v. *Nextel West Corp.*, 318 F.3d 803, 807 (8th Cir. 2003); Family Medical Leave Act, *see King* v. *Preferred Technical Group*, 166 F.3d 887, 892 (7th Cir. 1999); and Title VII of the Civil Rights Act, *see St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 507 (1993). As the court of appeals observed, "[l]ike the IDEA, these statutes are silent about the burden of proof, yet we assign it to the plaintiff who seeks the statutory protection or benefit." Pet. App. 8-9.[10]

Petitioners argue that these civil rights statutes "differ from IDEA in that they do not impose affirmative obligations." Pet. Br. 31. That argument is without merit. In virtually every situation discussed above involving statutory benefits or privileges, the government has an affirmative obligation to provide those benefits to eligible individuals. Yet the customary rule is that the claimant bears the burden of proof in challenging the denial of such benefits or privileges. Moreover, as petitioners themselves acknowledge (Br. 32), the ADA imposes an affirmative obligation to make reasonable accommodations for the disabled, *see Tennessee* v. *Lane*, 541 U.S. 509, 516 (2004), as does Section 504 of the Rehabilitation Act, *Henrietta D.* v. *Bloomberg*, 331 F.3d 261, 265, 272 (2d Cir. 2003), *cert. denied*, 541 U.S. 936 (2004). Petitioners' novel "affirmative obligation" rationale accordingly provides no basis for concluding that Congress departed from the normal burden of proof in IDEA.

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[10] These statutes are subject to the "*McDonnell Douglass*" framework—which petitioners have never argued is applicable under IDEA—for shifting the burden of *production* in certain instances. Under that framework, however, the burden of *persuasion* " 'remains at all times with the plaintiff.' " *St. Mary's Honor Ctr.*, 509 U.S. at 507 (quoting *Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 253 (1981)).

Tellingly, petitioners have not identified a single analogous instance in which the party that initiates the proceeding and seeks relief is relieved of the burden of proof. That includes *Keyes* v. *School Dist. No. 1*, 413 U.S. 189 (1973). In *Keyes*, the Court held that where "school authorities have been found to have practiced purposeful segregation in part of a school system"—*i.e.*, *de jure* discrimination in violation of the Fourteenth Amendment—the burden of proof shifts to the school district to show that it has not engaged in such *de jure* discrimination in other segregated schools in the same system. *Id*. at 209. Even in that extraordinary context, however, the customary burden of proof is not inapplicable. Rather, the Court simply held that the burden of proof *shifts* to school authorities if—but only if—there is "a finding of intentionally segregative school board actions in a meaningful portion of a school system." *Id*. at 208. This case, like the typical IDEA action, involves a *claim* that the school district's IEP is inadequate—unaccompanied by any prior judicial finding that the school district has deliberately violated its obligations under IDEA, much less a finding that the district deliberately violated the Fourteenth Amendment. It is absurd to suggest that *Keyes* has any application here.[11]

4. When Congress wants to depart from the customary burden of proof, it knows how to. For example, although the default rule is that a claimant bears the burden of proof in administrative hearings challenging the denial of benefits,

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[11] The reliance (Br. 25) by amici Arc of the United States *et al*., on Section 5 of the Voting Rights Act of 1965 is similarly far-fetched. Section 5 is an extraordinary federal law that requires specified States—found to have discriminated on the basis of race—to obtain pre-clearance from the federal government before adopting new voting practices. 42 U.S.C. § 1973c. "The very effect of § 5 was to shift the burden of proof [for covered states] with respect to racial discrimination in voting." *Georgia* v. *United States*, 411 U.S. 526, 538 n.9 (1973). IDEA by no means is patterned on Section 5 and has no "pre-clearance" requirement.

Congress has specified a different rule for veteran's benefits. *See* 38 U.S.C. § 5107; *see also, e.g.*, 8 U.S.C. § 1186b(c)(3)(D); 25 U.S.C. § 450j-1(*l*)(2). Accordingly, the fact that Congress did not expressly deviate from the customary rule in IDEA is itself a compelling if not decisive reason to conclude that Congress did not intend to do so. *See Industrial Union*, 448 U.S. at 653 (the fact that Congress did not express a different rule "indicates that it intended the Agency to bear the normal burden of establishing the need for the proposed standard"); *see also Raleigh* v. *Illinois Dep't of Revenue*, 530 U.S. at 20-21 (because Bankruptcy Code "makes no provision for altering the [settled burden of proof under state law for tax claims]," "its silence says that no change was intended"); *Bryant Woods Inn, Inc.* v. *Howard County*, 124 F.3d 597, 603-604 (4th Cir. 1997) (because text of the Fair Housing Act "evidences no intent to alter normal burdens," burden of proof is on the plaintiff).[12]

At a minimum, however, given that the default rule against which Congress legislated when it passed IDEA was that a claimant bears the burden of proof, petitioners must point to concrete evidence—not simply abstract conceptions of "policy and fairness"—demonstrating that Congress intended to depart from that rule. Neither petitioners nor their amici have identified any such evidence. To the contrary, as explained next, an examination of the text and history of IDEA only bolsters the conclusion that Congress intended to incorporate the normal burden in IDEA hearings.

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[12] *Alaska Department of Environmental Conservation* v. *EPA*, 540 U.S. 461 (2004), is not to the contrary. In that case, the Court stated that EPA could not avoid the burden of proof that it would bear—under the customary rule—in an "EPA-initiated civil action" by pursuing an alternative "enforcement route" in challenging the same state environmental determination. *Id.* at 493-494. The Court's decision simply closed a loophole in a unique administrative circumstance with no similarity to IDEA.

B. IDEA Itself Confirms That Congress Incorporated The Customary Burden Of Proof

The text of IDEA and recent amendments to the Act—including the Act's reference to "due process hearings"—confirm that Congress intended the customary burden of proof to apply in administrative hearings under § 1415(f).

1. In arguing that Congress intended to depart in IDEA from the customary rule, petitioners rely exclusively on § 1415(f)'s requirement of "an impartial due process hearing." 20 U.S.C. § 1415(f)(1)(A). Petitioners argue that "an analysis of due process principles dictates that the burden be placed on the school district." Pet. Br. 20; *see id*. at 22-28. We agree that Congress' use of the term "due process" evinces an intent to require procedures that comport with due process. The elaborate procedural safeguards established by IDEA, discussed below, guarantee that claimants receive more than adequate process. Indeed, few federal statutes can match the express procedural protections conferred by IDEA. But the statute's reference to "due process" by no means suggests that Congress silently flipped the customary burden onto schools. This Court long ago settled that it is constitutional to place the burden on the party challenging the legality of government action, including when it comes to a claim that an individual has been denied a vitally important government benefit. *Lavine* v. *Milne*, 424 U.S. 577 (1976).

In *Lavine*—which was decided less than two weeks after *Mathews* v. *Eldridge*, 424 U.S. 319 (1976)—the Court unanimously rejected a due process challenge to a state law that placed the burden of proof on individuals claiming that they had been erroneously denied welfare benefits. The Court recognized that "[w]here the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive to the outcome of litigation," but stressed that, "[o]utside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment." *Id*. at 585. In

rejecting the due process challenge in *Lavine*, the Court noted that if an adverse determination is made, the applicant has the right "to receive a full hearing," and that any "wrongful decision that is successfully appealed gains the State no substantive advantage and, indeed, costs the State by way of procedural waste." *Id*. at 586-587. The same is true under IDEA, where claimants may pursue administrative as well as judicial challenges to IEPs. 20 U.S.C. § 1415(f)(1)(A), (i)(2).[13]

Although petitioners do not acknowledge *Lavine*, they argue that the interests at stake in a hearing challenging the adequacy of an IEP mandate the adoption of a different constitutional rule. That argument is refuted by the longstanding tradition of allocating the burden of proof on claimants in administrative hearings governing the denial or revocation of numerous potentially life-altering government benefits or privileges. *See supra* at 17-18. Indeed, petitioners' expansive due process rationale would cast doubt on the constitutionality of thousands of administrative hearings conducted at the federal and state level, not to mention the APA itself. In any event, as discussed in Part II below, the policy considerations in which petitioners couch their due process argument are overstated and unavailing.

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[13] Lower courts have repeatedly relied on *Lavine* in rejecting due process challenges to the allocation of the burden of proof on claimants. *United States* v. *Property, Parcel of Defendant Francisco Aguilar*, 337 F.3d 225, 233 (2d Cir. 2003); *United States* v. *$250,000 in U.S. Currency*, 808 F.2d 895, 900 & n.18 (1st Cir. 1987); *Saavedra* v. *City of Albuquerque*, 917 F. Supp. 760, 765 (D.N.M. 1994), *aff'd*, 73 F.3d 1525 (10th Cir. 1996); *Drogolewicz* v. *Quern*, 393 N.E.2d 1212, 1216 (Ill. App. Ct. 1979); *Sherris* v. *City of Portland*, 599 P.2d 1188, 1193 (Or. Ct. App. 1979). Nothing in *Cooper* v. *Oklahoma*, 517 U.S. 348, 363 (1996), on which petitioners rely (Br. 26), undercuts *Lavine*. *Cooper* arose in the context of a *criminal* trial, where, as *Lavine* itself stressed, the "standard rule [is] that the State *does* bear the burden of proving criminal guilt." *Lavine*, 424 U.S. at 585 n.10.

Because the normal burden of proof comports with due process, IDEA's reference to "due process" is further confirmation that Congress intended to incorporate the customary burden of proof in IDEA administrative hearings.

2. The conclusion that Congress adopted the customary burden of proof is buttressed by other facets of IDEA. The deliberate and detailed manner in which Congress sought to level the playing field in IDEA hearings fatally undermines the notion that Congress silently imposed the extraordinary burden urged by petitioners. As this Court has put it, to address the concern that "school officials would have a natural advantage" over parents, "Congress incorporated 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 Town of Burlington* v. *Department of Educ.*, 471 U.S. 359, 368 (1985); *see also Rowley*, 458 U.S. at 205 (discussing "elaborate and highly specific procedural safeguards embodied in § 1415"). If Congress had intended to add petitioners' proposed burden of proof to the list of those safeguards, it would have done so expressly.

For example, Congress gave the parents of children with disabilities the right to examine and copy educational records relating to their child, and to demand an explanation of such records from school authorities. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.562. It gave parents the right to participate in meetings relating to the "identification, evaluation, and educational placement of the child," and the development of IEPs. 20 U.S.C. § 1415(b)(1), (d). It gave parents the right to obtain an independent evaluation of their child at the school district's expense. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(b)(2)(ii). And it obligated school districts to give parents written notice at key periodic intervals containing "a full explanation of the procedural safeguards" guaranteed to them under the Act. 20 U.S.C. § 1415(d)(2).

Congress granted parents an additional set of safeguards and services for situations in which disagreements do arise. For example, parents may seek voluntary mediation conducted by an impartial mediator at the school district's expense, 20 U.S.C. § 1415(e), or a "due process" hearing before an impartial hearing officer. 20 U.S.C. § 1415(f)(1). Before the hearing, school districts must convene an informal meeting with the parents and members of the IEP Team to discuss the complaint. 20 U.S.C. § 1415(f)(1)(B)(i). In addition, at least five days before the hearing, the parties are required to disclose all evaluations and recommendations that they intend to use at the hearing. 20 U.S.C. § 1415(f)(2)(A). Congress also established specific "safeguards" for the hearing itself, including the right to have counsel present, to call and confront witnesses, to a hearing on the record, and to findings of fact and a decision. 20 U.S.C. § 1415(h). It gave parents who did not prevail in such a hearing the right to file an administrative appeal or civil action. 20 U.S.C. § 1415(i)(1), (2). And it gave prevailing parents the right to reasonable attorney's fees. 20 U.S.C. § 1415(i)(3)(B).

Given the exceptional care that Congress took in detailing the "safeguards" that it deemed appropriate for IDEA, the omission of any provision stating that school districts bear the burden of proof in any hearing initiated by parents is a red flag that Congress did not intend to add that burden to the list of safeguards explicitly conferred by IDEA.[14]

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[14] For similar reasons, petitioners' reliance (Br. 27) on *Pennsylvania Association for Retarded Children* v. *Pennsylvania (PARC)*, 343 F. Supp. 279 (E.D. Pa. 1972), and *Mills* v. *Board of Education*, 348 F. Supp. 866 (D.D.C. 1972), is misplaced. As the court of appeals explained, although "Congress took a number of the procedural safeguards from *PARC* and *Mills* and wrote them directly into [IDEA]," neither case authorizes a court to write *additional* standards into IDEA. Pet. App. 13. That is particularly true with respect to the burden of proof. In both *PARC* and *Mills*, the school defendants had acknowledged that they had failed to

3. Still more evidence is the manner in which Congress addressed the situation in which a disabled child is subject to disciplinary action that necessitates a change in the child's educational placement under IDEA. In that particular context, Congress *did* expressly assign the burden of proof to school districts in certain hearings initiated by parents.

IDEA contains a "stay put" provision that provides that, unless the parents and school district otherwise agree, a child should remain in the "then-current educational placement of the child" during proceedings conducted under the Act. 20 U.S.C. § 1415(j). The Act creates an exception to the stay-put rule, however, in certain situations in which a school district determines that a temporary or longer-term change in a child's educational placement is necessary because the child has violated applicable rules or presents a risk of injury to other students, and the school district has determined that the child's actions were not a manifestation of a disability. *See* 20 U.S.C. § 1415(k)(1). A parent may initiate a due process hearing to challenge a school district's change in the child's placement or manifestation determination.

In the 1997 amendments to IDEA, Congress added a provision stating that, in reviewing a school district's manifestation determination in a hearing initiated by the parents to challenge that determination, "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) (1997) (emphasis

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provide adequate educational services. *See Mills*, 348 F. Supp. at 871; *PARC*, 343 F. Supp. at 301-302. The burden of proof was not at issue in either case. Neither case supports a blanket rule that imposes the burden of proof on school districts where, as here, the school district has not been found to have engaged in unlawful discrimination and placed under a court-approved stipulation or order. More to the point, if Congress had intended to adopt the burden of proof specified in the joint stipulation in *Mills* or the decree in *PARC*, it would have done so expressly.

added); *see also* 20 U.S.C. § 1415(k)(2)(A) (1997). In that situation, Congress *did* depart from the normal rule by specifying that the school district bore the burden of demonstrating that its manifestation determination was correct, even when the parents initiated the hearing. Congress eliminated that express burden in the 2004 amendments to IDEA. *See* 20 U.S.C. § 1415(k)(3) (hearings as to manifestation and alternative-placement determinations). But this history proves that Congress knows how to place the burden of proof on the school district when Congress wants to—and thus bolsters the conclusion that Congress did not *silently* override the customary rule in any administrative hearing in which it did not expressly place the burden on the school district.

4. IDEA's rule that puts the onus on the complainant to plead its affirmative case also comports with the customary burden of proof. Although the administrative hearing at issue in this case was initiated by the parents, IDEA expressly recognizes that *either* "the parents *or* the local educational agency" may initiate a "due process hearing." 20 U.S.C. § 1415(f)(1)(A) (emphasis added); *see also* 20 U.S.C. § 1415(b)(7)(A), (c)(2). Such hearings may be requested, for example, when a disagreement arises over the need for or adequacy of an IEP, change of placement due to an education or disciplinary issue, whether a child's misbehavior or violation of school rules is a manifestation of his disability, or the provision of related support services. There are many reasons why either parents or the school district might initiate a hearing in these varying situations or others.

Before either party may obtain a due process hearing, however, the initiating party must file a "due process complaint notice" 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." 20 U.S.C. § 1415(b)(6)(A). Among other things, the complaint must identify (1) the child and relevant school, (2) "the nature of the problem" and "facts relating to

the problem," and (3) "a proposed resolution of the problem." 20 U.S.C. § 1415(b)(7)(A)(ii)(I), (III), (IV). No party may have a "due process hearing" until it complies with the Act's pleading requirement, 20 U.S.C. § 1415(b)(7)(B), and the hearing is limited to issues raised in the complaint, 20 U.S.C. § 1415(f)(3)(B). The Act also requires the "non-complaining party" to file a written response within 10 days of receiving the complaint addressing the issues raised in the complaint. 20 U.S.C. § 1415(c)(2)(B)(i), (ii).[15]

The Act's pleading requirements are telling. As one leading authority has explained: "In most cases, the party who has the burden of pleading a fact will have the burdens of producing evidence and of persuading the jury of its existence as well. The pleadings therefore provide the common guide for apportioning the burdens of proof." 2 *McCormick on Evidence* § 337 (footnote omitted). *See also* 11 Charles F. Chamberlayne, *A Treatise on the Modern Law of Evidence* § 943 (1911) ("Whichever, of the parties, has the affirmative of the issue as determined by the pleadings, has the burden of proof, to establish his contention by the legally required preponderance of the evidence."). That IDEA places the "burden of pleading" on complainants—including parents—is still further confirmation that Congress intended the complainants to bear the burden of proof under IDEA.

C. IDEA Cannot Be Interpreted To Impose Unstated Burdens On State And Local Administrators

IDEA must be construed in the light of several fundamental background principles that this Court has recognized. Those principles prevent the courts from imposing unstated burdens on state and local school authorities that implement IDEA.

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[15] The response provision was added by the 2004 amendments. Before 2004, the notice-pleading requirement was explicitly placed only on parents who initiated a due process hearing. *See* 20 U.S.C. § 1415(b)(7)(B), (f) (1997).

1. IDEA is Spending Clause legislation that conditions federal financial assistance for special education on compliance with the Act's requirements. *See Rowley*, 458 U.S. at 190 n.11, 204 n.26; *see also Cedar Rapids*, 526 U.S. at 83-84 (Thomas, J., joined by Kennedy, J., dissenting) ("[b]ecause IDEA was enacted pursuant to Congress' spending power, our analysis of the statute in this case is governed by special rules of construction"); H.R. Rep. No. 105-95, at 135 (1997) (IDEA "is within the powers of Congress under the spending clause"). In particular, IDEA conditions the receipt of funding on the requirement that states afford "[c]hildren with disabilities and their parents * * * the procedural safeguards required by section [1415]." 20 U.S.C. § 1412(a)(6)(A).

As this Court has stressed, because Spending Clause programs are in the nature of a "contract," " 'if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.' " *Barnes* v. *Gorman*, 536 U.S. 181, 186 (2002) (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)). There certainly is no "unambiguous" statement in IDEA that one of the strings attached to IDEA funding is that a State's school districts must bear the burden of proof in all hearings in which parents demand additional services. Adopting that exceptional burden—"a rule of substantive law," *Greenwich Collieries*, 512 U.S. at 271—would alter the terms of the contract agreed to by states. Moreover, placing that burden on the states would add to what is an already vastly underfunded mandate, with Congress funding less than 10 percent of the burdens that the statute expressly imposes. *See supra* n.3.[16]

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[16] Each year a State seeking IDEA funding must submit a plan to the Secretary of Education containing assurances that, among other things, the State has adopted "policies and procedures" that ensure that IDEA § 1415's "procedural safeguards" are met. 20 U.S.C. § 1412(a)(6)(A). To our knowledge, the Secretary of Education has never denied eligibility to a State seeking IDEA funding on the ground that it applied the normal burden of proof in

2. IDEA also must be construed in light of the presumption of regularity that attaches to administrative decision-making. *See* Part I.A, *supra*. That presumption is particularly strong with respect to the judgments of state and local educators concerning the appropriate educational services for a child. *See Goss* v. *Lopez*, 419 U.S. 565, 578 (1975) ("By and large, public education in our Nation is committed to the control of state and local authorities.") (quotation omitted); *Mitchell* v. *Helms*, 530 U.S. 793, 863-864 (2000) (O'Connor, J., concurring) ("[I]t is entirely proper to presume that * * * school officials will act in good faith."). Ultimately, the "local educational agency"—*i.e.*, the school district, *see* 20 U.S.C. § 1401(19)—is responsible for producing the IEP and periodically reviewing and revising it as appropriate. *See* 20 U.S.C. § 1414(d)(2), (d)(4)(A). The school district's judgment that an IEP is appropriate for a child is entitled to the same presumption of regularity as other federal or state administrative acts.

Petitioners ask this Court to infer that Congress turned the settled presumption on its head without a word in the statute remotely directing such a drastic step. If school districts bear the burden of proof in hearings brought by parents to challenge an IEP, then whenever the evidence is in equipoise the school district will lose and the IEP will be thrown out. More fundamentally, the moment that a complaint is filed, an IEP is presumptively invalid—regardless of whether the parents present any evidence in support of their complaint—unless the school district can establish to the satisfaction of an ALJ that the plan is valid. In other words, as the court of appeals observed, petitioners' position is that Congress adopted a presumption of administrative *irregularity*. *See* Pet. App. 14 ("We believe that when parents challenge the adequacy of an IEP, they should lose if no evidence is presented. To say that the school system should lose is to say

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administrative hearings initiated by parents. Certainly, Maryland has never been denied federal assistance under IDEA on that basis.

that every challenged IEP is presumptively inadequate."). Nothing in IDEA sanctions that extraordinary result.

3. The presumption of administrative regularity is particularly important when Congress legislates in a sensitive area where state and local administrators have traditionally played a vital role, such as the education of the Nation's youth. *See United States* v. *Lopez*, 514 U.S. 549, 580-581 (1995) ("[I]t is well established that education is a traditional concern of the States."); *Board of Educ.* v. *Dowell*, 498 U.S. 237, 248 (1991); *see also Milliken* v. *Bradley*, 418 U.S. 717, 741-742 (1974) ("[L]ocal autonomy has long been thought essential * * * to quality of the educational process."). Under bedrock principles of federalism, Congress does not silently alter the normal burdens on state and local governments carrying out such traditional state functions. *See Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991); *see also Cedar Rapids*, 526 U.S. at 84 (Thomas, J., joined by Kennedy, J., dissenting) (discussing "federalism concerns" in construing IDEA). In enacting IDEA, Congress gave no indication—much less any clear expression—that it intended to upset the traditional respect accorded to the judgments of state and local officials on education matters by requiring educators to bear the burden of proof in any hearing challenging the adequacy of their judgments in adopting an IDEA.

To the contrary, in addition to the deference traditionally accorded the decisions of teachers and school officials, IDEA reaffirms that state and local educators are responsible for educating children with disabilities—and making the judgments necessary to achieve that objective. *See* 20 U.S.C. § 1400(c)(6); *see* 20 U.S.C. § 1400(d)(1)(C). As this Court observed in *Rowley*, "Congress' intention was not that [IDEA] displace the primacy of the States in the field of education, but that States receive funds to assist them in extending their educational systems to the handicapped." 458 U.S. at 208; *see also id.* at 206 (IDEA does not permit "the courts to substitute their own notions of sound

educational policy for those of the school authorities which they review"); *M.M.* v. *School Dist. of Greenville Cty.*, 303 F.3d 523, 532 (4th Cir. 2002) ("We have always been and we should continue to be reluctant to second-guess professional educators."). To be sure, IDEA imposes requirements on States that choose to accept federal assistance under the Act. But construing IDEA to impose—through silence, no less—a burden on school districts to affirmatively justify any IEP subject to a complaint would upset the traditional balance of federal and state authority in matters of education, not to mention the balance expressly struck by Congress in IDEA.

The federalism concerns are heightened by the manner in which Congress has dealt with federal agencies. As discussed above, Congress has applied the customary burden of proof to federal administrative hearings. *See* 5 U.S.C. § 556(d); *supra* at 16. It would turn federalism on its head to presume that Congress silently intended to place *greater* burdens on States carrying out federal mandates under Spending Clause legislation than Congress placed on its own agencies. Yet that is the necessary conclusion of petitioners' position.

II. THE POLICIES OF IDEA DO NOT SUPPORT PETITIONERS' REQUEST TO ABROGATE THE NORMAL BURDEN OF PROOF

As shown, a statutory analysis of the question presented leads to the conclusion that Congress intended the customary burden of proof to apply in administrative hearings under IDEA. That is as far as the Court need go to decide this case, because vague policy concerns cannot supply a congressional intent that is neither explicitly nor implicitly expressed in the statutory language. Indeed, accepting petitioners' invitation to alter the normal burden based on abstract arguments about which rule might be "fairer" would invite litigation over that question in virtually any statute that does not expressly specify a burden. But even if the Court were inclined to engage in its own weighing of policy issues, the policies of IDEA do not support altering the normal burden of proof.

A. Requiring School Districts To Affirmatively Justify All Aspects Of A Challenged IEP Would Foster Costly Litigation In Violation Of Congress' Intent

It is important to understand that altering the normal burden of proof will have far greater consequences for school districts beyond simply supplying a rule of decision for those cases where the evidence is in equipoise. Reversing the burden would require every school district to affirmatively justify, though expert testimony or other evidence, every aspect of an IEP whenever it is challenged even in the most general terms. It would also encourage parents—as petitioners were found to have done here—to make only "mock effort[s]" to cooperate in the IEP process, Pet. App. 146 n.6, and instead force adversarial litigation.

If the school district bears the affirmative burden of proof whenever a complaint is filed, the school district must—without any prior evidentiary showing by the complainants—formulate and present competent evidence rebutting in advance every conceivable objection that could be raised under the generalized language of the complaint. Thus, a school district would have to prepare evidence covering every conceivable issue (and then some) for if it does not anticipate that a complainant would raise a specific point and therefore does not present evidence on that point, it would lose the case. That can be an extremely difficult endeavor, if not an impossible one in some cases, given the generalized FAPE duty established by IDEA—which is designed to give flexibility to educators, not to make defending their decisions more difficult in court. *See Rowley*, 458 U.S. at 192, 203.

In this case, for example, petitioners' complaint stated that the issue was whether the proposed placement was "appropriate." J.A. 12. The complaint alleges very generally that the Hoover placement "is too large, not structured enough, has insufficient services and does not include required related services," that petitioners were "in disagreement with the Intensity of service proposed," and

that "we do not believe MCPS has identified Brian's complete disability." J.A. 12-13. Although that complaint was filed pursuant to the then-existing IDEA, the amended version requires complainants simply to "descri[be] the nature of the problem of the child * * * including facts relating to such problem" and "a proposed resolution of the problem to the extent known and available to the party at the time." 20 U.S.C. § 1415(b)(7)(A)(ii)(III), (IV). Thus, if it bore the burden of proof, MCPS would have to present expert testimony or other evidence showing that the proposed placement was not "too large," was sufficiently "structured," and provided appropriate "[i]ntensity." MCPS would also have to show that it identified "Brian's complete disability."

Not only does this backwards procedure unnecessarily multiply the costs and burdens on schools—at the expense of actual education—but it also contravenes Congress' goal of resolving IEP disputes without costly litigation. Due process hearings are intended to be a last resort for dissatisfied parties to raise specific challenges only when the collaborative IEP and mediation process has failed to resolve particular disagreements. In particular, the 2004 amendments contain several provisions designed to "[r]estor[e] trust and reduce[e] litigation" under IDEA. H.R. Rep. No. 108-77, at 85 (2003).[17] In making those changes, Congress sought to alleviate the burdens imposed on school districts by "excessive litigation under the Act," and to "align the Act" with other federal statutes such as those authorizing "civil rights claims, Federal tort claims, [and] Social Security." *Id*. at 116.[18]

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[17] *See, e.g.*, 20 U.S.C. § 1415(b)(7)(A) (notice requirements for complaints); 20 U.S.C. § 1415(b)(6)(B) (statute of limitations); 20 U.S.C. § 1415(e) (mediation and nonbinding arbitration); 20 U.S.C. § 1415(i)(3)(B) (attorney's fees for frivolous claims); H.R. Rep. No. 108-77, at 85-86 (discussing new provisions).

[18] *See also id*. at 85 ("litigation breeds an attitude of distrust between the parents and the school personnel rather than working cooperatively to find the best education placement and services for

Interpreting IDEA to impose a burden of proof on school districts in any hearing initiated by a parent would *increase* the incentive for litigation over IEPs and *differentiate* IDEA from other federal civil rights statutes and benefits laws, which, as discussed above, incorporate the customary burden of proof. Flipping the burden creates strong incentives for parents not to cooperate beforehand, knowing that the school will in any event have to come forward in a subsequent hearing and justify each and every aspect of the IEP. With tens of thousands of dollars in private school tuition and hundreds of thousands in attorneys' fees potentially on the line, parents and their attorneys will be encouraged to take more and more matters to hearings because only the school district will bear the affirmative burden if forced to litigate.

The facts of this case amply illustrate the dangers. The ALJ found that Brian's parents, rather than cooperating in the IEP process, sought to use IDEA to compel MCPS to subsidize their "predetermined" decision to have Brian attend an expensive private school. Pet. App. 113, 146-147 n.6. Noting that they had enrolled Brian at McLean before even beginning the IEP process, the ALJ expressly found that the parents' participation in the IEP meeting was only a "mock effort," *Id*. at 146 n.6, and that it was "more likely than not that [Brian] would be attending the McLean School * * * no matter what IEP was developed and public school placement was offered." *Id*. at 113, 147 n.6. As the ALJ noted, the

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the child"); *id.* at 113 ("[M]ediation under the Act has resulted in significant reduction in litigation and helped in restoring trust between parents and school personnel."); S. Rep. No. 108-185, at 6 (2003) (The 2004 amendments seek to discourage "an adversarial, rather than cooperative, atmosphere"). The 2004 amendments build on several reforms initiated by the 1997 amendments to IDEA, including the voluntary mediation provision, which were designed to avoid "formal due process and litigation * * * when possible." H.R. Rep. No. 105-95, at 106; S. Rep. No. 105-17, at 26-27 (1997) (same).

parents "did not approach their interaction with MCPS as a partnership in educating [Brian] as a student with disabilities," which was "inconsistent with the congressional intent behind the statute." *Id*. at 114, 147 n.6.[19]

This kind of gamesmanship only will be encouraged if the normal burden of proof is reversed in all cases. *Cf*. *Rowley*, 458 U.S. at 209 ("parents and guardians will not lack ardor" in taking advantage of IDEA benefits). There is far less incentive for any parents to cooperate in developing an IEP if they know that the school district will always have to justify, in a subsequent hearing, each and every aspect of the plan—without the parents even having to present a shred of evidence first. Abrogating the burden of proof would simply encourage litigious parents to snub the intended IEP process, or turn it into a dry run or fishing expedition for adjudication. Congress did not intend for adversarial hearings to supplant the cooperative IEP and mediation process, yet that is what will happen if the ordinary burden of proof is reversed.

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[19] It is particularly important to respect the ordinary burden of proof when, as in this case, parents initiate the IDEA hearing to demand that a public school to pay tens of thousands of dollars in private school tuition. *See generally* Cindy L. Skaruppa, *et al.*, *Tuition Reimbursement for Parent's Unilateral Placement of Students in Private Institutions: Justified or Not?*, 114 Ed. Law Rep. 353 (1997). The McLean School, where Brian was unilaterally enrolled, charges over $21,000 per year for high school tuition. *See* McLean School, *Admission, Tuition & Fees*, *at* http://www.mcleanschool.org. Far greater amounts are possible. Debra Nussbaum, *Reining in Special Education*, New York Times, Aug. 31, 2003 (private placements in New Jersey range from $20,000 to $100,000); Lisa Gubernick and Michelle Conlin, *The Special Education Scandal*, Forbes, Feb. 10, 1997 (schools forced to pay annual tuition expenses of $80,000 and $193,000).

B. Abrogating The Normal Burden Of Proof Would Multiply The Burdens On School Districts At The Expense Of Education For All Students

Contrary to the image painted by petitioners and their amici, shifting the burden of proof in IDEA hearings will affect more than just the parties to a particular proceeding. The resources of school districts—many of which are relatively small entities—are far from limitless, and every dollar that must be devoted to litigation is a dollar that cannot be spent on actual education. The unnecessary costs that would be imposed on school districts by petitioners' rule, when multiplied across the tens of thousands of IDEA hearings instituted nationwide, would deny educational services to far more children than could ever conceivably benefit from the rule. If such costs are to be borne by all schools, they should be imposed by Congress, not this Court.

As noted, disrupting the normal burden of proof would require schools to affirmatively justify, through expert testimony or other competent evidence, every conceivable aspect of an IEP that a complainant could challenge, lest the schools run the risk of having failed to carry their burden. As Congress recognized when it encouraged informal mediation, IDEA hearings are already costly affairs even in ordinary circumstances. The first hearing in this case, for example, lasted for three days, and MCPS presented six witnesses just to respond to the parents' evidence. *See* Pet. App. 123.

Nationwide, the costs of IDEA compliance, including litigation, are enormous. The Nation's schools spent $78 billion to educate special education students in 1999-2000—comprising 21.4 percent of total spending for elementary and secondary education—and the costs of educating those students are nearly double those of other students. *See* U.S. Dep't of Educ., *Twenty-fourth Annual Report to Congress*, *supra*, I-20 to I-23, *What Are We Spending on Special Education Services* (June 2004). The costs of reimbursing parents for private school placements, such as petitioners

seek here, are even larger, averaging more than $26,000 per student—more than four times the cost of public placements. *Id*. at I-30 to I-31. Administration and support services comprise 10 percent of special education spending, *id*. at I-29, and expenditures on assessment, evaluation, and IEP related services amount to $6.8 billion. *Id*. at I-32.

Then there are litigation expenses. In 2000, there were more than 3250 hearings over IEPs. Project FORUM, National Ass'n of State Directors of Special Educ., *Due Process Hearings: 2001 Update*, at 6-7 (Apr. 2002). On average, schools spend $8160-$12,200 for *each* due process hearing or mediation. *See* Jay G. Chambers, *et al.*, *What Are We Spending on Procedural Safeguards in Special Education, 1999-2000*, at 8 (May 2003). Given that the average per pupil expenditure for special education services is about $8000, a due process hearing or mediation effectively doubles a school district's cost to educate a single disabled child. *See id*. at 3; *supra* n.3. Moreover, in addition to direct legal and administrative costs, hearings impose substantial opportunity costs for both school districts and students, for educators must be out of the classrooms while attending and even preparing for hearings.[20]

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[20] Data on the benefits of mediation underscore the expenses associated with due process hearings. Texas, for example, estimates saving about $50 million in attorneys' fees and related hearing expenses in the last decade by promoting mediation. *See Special Education—Numbers of Formal Disputes are Generally Low and States are Using Mediation and Other Strategies to Resolve Conflicts*, GAO Rep. No. 03-897, at 18 (2003). A hearing officer alone costs an average of $9000—compared to $1000 for a mediator. *Id*. California likewise reports significant savings from use of mediation—the average cost to the State for a due process hearing ($18,600) is ten times as much as for a mediation session ($1800). *Id*. Overall, 96.3 percent of school districts report that mediation is more cost-effective than formal hearings. *Id*. at 19.

Reversing the burden of proof will increase all these costs. As noted, it will encourage more hearings, with all the costs they entail. And the hearings themselves will be more costly. If schools must anticipate and rebut in advance every conceivable objection—including arguments that a complainant may never have raised in the first place—the costs imposed on them in every case will multiply, even before a hearing commences. These additional costs are necessarily borne by other students, who can ill-afford them. Dollars spent on litigation are dollars that cannot be spent on teaching children in the classroom. Public schools are not profit-making enterprises, and any additional costs must necessarily come out of a district's taxpayer-funded budget at the expense of actual education for both special needs and other children. By contrast, requiring complaining parents to bear the normal burden of proof imposes *no* additional costs on them, because they will have to overcome the schools' evidence regardless of the locus of the burden.

Under the best of circumstances from their perspective, petitioners' rule would result in a extremely small number of additional victories for parents, in cases where the evidence is deemed to be in equipoise. Yet even in those evenly-balanced cases, the parent's evidence would, by definition, be insufficient to overcome the school's. The outcome of all other cases would be unaffected, because either the school districts would carry their affirmative burden or the parents would successfully rebut the school districts' evidence. The additional costs of that rule, however, would be imposed in *every* one of the tens of thousands of IDEA cases brought or threatened nationwide, not just those where the evidence is in equipoise. *See* CADRE, *National Dispute Resolution Use and Effectiveness Study* 18 (Summer 2004) (estimating that there were 27,283 IDEA disputes in 2001). Thus, the few students who might achieve a windfall from petitioners' rule—whose evidence does not overcome that of the school district's but merely equals it—are far outweighed by the millions whose educational benefits will necessarily be

curtailed by the additional costs of rebutting hypothetical arguments not yet made and evidence not yet presented.

Local school districts must, and do, comply with their IDEA obligations. But they must also educate *all* their students. Requiring IDEA complainants to bear the normal burden of proof imposes no additional costs on them, whereas shifting the burden ultimately will burden all other children.

C. There Is No Unequal Access To Information

Petitioners contend that the burden of proof should be reversed because school districts allegedly have greater access to relevant evidence. *See* Pet. Br. 39-44. But petitioners' premise is incorrect. Parents in IDEA cases have at least equal—and most likely superior—access to the most important evidence in these cases as the school districts, and much better access to information than virtually any other complainant challenging administrative action.

The ultimate question in every IDEA case is whether an IEP affords a particular child an appropriate education. As the "I" in IEP denotes, this is an individualized inquiry focusing on a particular child's needs. *See Rowley*, 458 U.S. at 181 (FAPE "is tailored to the unique needs of the handicapped child."). Thus, the single most important source of relevant information in every IDEA case—and the only source in many cases—is the child himself or herself. Clearly, parents have at least equal and, in most cases, superior access to that source of information. Parents have lived with their child since birth; they have seen how the child learns; and they are familiar with his or her educational progress over many years. *See Amanda J. ex rel. Annette J.* v. *Clark County Sch. Dist.*, 267 F.3d 877, 891 (9th Cir. 2001) ("because they observe their children in a multitude of different situations, [parents] have a unique perspective of their child's special needs"). If a case requires an evaluation of the child's facilities and skills, the parents can have those evaluations performed without requiring *any* information from the school. Thus, petitioners themselves argue that

their own complaint was supported by "those experts *most* familiar" with Brian. Pet. Br. 10 (emphasis added).

To the extent a parent desires further information about a child's current educational progress, all that information is likewise readily available. All parents are able to speak freely and regularly with teachers and administrators at parent-teacher conferences and informally throughout the school year. Congress has also specifically mandated that parents be provided an opportunity "to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child * * * and to obtain an independent educational evaluation of the child." 20 U.S.C. § 1415(b)(1). Parents also are full participants in the entire IEP process and are therefore able, early on, to know exactly what the school district is proposing and why. And before taking any IEP action, the school district must provide, in writing, an "explanation of why [it] proposes or refuses to take the action"; a "description of each evaluation procedure, assessment, record, or report [it] used as a basis for the proposed or refused action"; a "description of other options considered by the IEP Team and the reason why those options were rejected"; and "a description of the factors that are relevant to the [school district's] proposal or refusal." 20 U.S.C. § 1415(c)(1)(B), (E), (F). Finally, another federal law, the Family Educational Rights and Privacy Act, provides parents with further rights to information about their children. *See* 20 U.S.C. § 1232g.

Once a complaint is filed, parents are afforded additional rights to information. The school district's response must include, *inter alia*, yet another "description of each evaluation procedure, assessment, record, or report" used for the IEP action, 20 U.S.C. § 1415(c)(2)(B)(i)(I)(cc), and prior to the hearing the school must also disclose "all evaluations completed by that date, and recommendations based on [its] evaluations, that [it] intends to use at the hearing." *Id.* at § 1415(f)(2)(A). Mediation affords another opportunity for

the parents to receive relevant data, if they choose to pursue it. 20 U.S.C. § 1415(e). And before the hearing commences, the school district must convene yet another meeting to discuss the IEP. 20 U.S.C. § 1415(f)(1)(B)(i).

Petitioners and their amici complain that IDEA hearings, like many state administrative adjudications, do not carry full discovery rights such as exist in federal court. But as noted, IDEA provides parents with extensive rights to information—including pre-hearing disclosure of all evidence to be used—and petitioners fail to identify any category of critical information, not already provided, that is uniquely in the hands of school districts.[21] Moreover, while parents have a right to examine "all records relating to [their] child," 20 U.S.C. § 1415(b)(1), the school district is entitled to disclosure of only those evaluations that the parents "intend[ ] to use at the hearing." 20 U.S.C. § 1415(f)(2)(A). Thus, for example, MCPS had no right to receive any of Brian's private school records or any private assessments obtained by his parents that they did not plan to use at the hearing (and that therefore might support MCPS's decision).

This case amply illustrates that there is no structural concern about unequal access to relevant evidence. Brian attended private school through seventh grade. Thus, he had *never* attended MCPS before his IDEA request, and MCPS therefore had *no* prior information about him. The critical issue upon which the ALJ found the entire case turned was whether Brian had a "central auditory processing" problem or instead a "mild speech-language disability." Pet. App. 25-31, 103-108. Brian's parents clearly had superior access regarding what was happening in Brian's own body than did a school system that never met him. Moreover, the ALJ

[21] State law may provide additional pre-hearing rights to information. Maryland law, for example, affords discovery rights in administrative hearings, including those conducted pursuant to IDEA. *See* Md. Regs. Code tit. 28, § 02.01.10.

found that Brian's prior private-school experience—also unknown to MCPS—supported his case. *Id*. at 109. Nor is this informational balance in any way unusual; even when children have been in public school before, their parents will almost always know more about them.

In short, due to the nature of the IDEA process and the rights conferred by Congress, parents in IDEA hearings have far greater access to relevant information than do virtually all other complainants in administrative proceedings.

D. Petitioners' Other Policy Issues Are Unrelated To The Burden Of Proof And Have Been Directly Addressed By Congress In Any Event

Petitioners and their amici raise two other policy concerns that they contend require flipping the burden of proof: that schools allegedly have greater resources (and therefore better access to attorneys and expert consultants) and that parents of special education students are often unsophisticated. *See*, *e.g.*, Pet. Br. 10-13; Br. of Council of Parent Attorneys and Advocates at 14-16; Br. of the Arc of the United States at 10-13. Neither of these concerns, however, is related to the locus of the burden of proof or would be affected by altering it. And in any event, Congress has already thoroughly and extensively addressed both concerns in the statute itself.

1. The relative resources of the parties to a proceeding has nothing to do with the burden of proof—as the court of appeals put it, "[w]e do not automatically assign the burden of proof to the side with the bigger guns." Pet. App. 9. For example, the federal government is the wealthiest entity on the planet and has thousands of attorneys at its disposal, but parties challenging its actions bear the ordinary burden of proof. *See* 5 U.S.C. § 556(d). Not only does the law treat all parties equally regardless of financial condition, but reversing the burden of proof will do nothing to counter any perceived resource imbalance. If one party is better able to hire lawyers or consultants, that purported advantage will be

unaffected by the locus of the burden, because the other party will still have to counter the evidence in order to prevail.[22]

As the court of appeals correctly explained (Pet. App. 15), Congress "no doubt" recognized that

> allocating the burden to school systems is not the kind of help parents really need in challenging IEPs. For regardless of which side has the burden of proof in an administrative hearing, parents will have to offer expert testimony to show that the proposed IEP is inadequate. Shifting the burden of proof, in other words, will not enable parents by themselves to mount a serious, substantive challenge to an IEP * * *.

But regardless, Congress has already addressed the issue directly. Most importantly, Congress authorized payment of attorneys' fees to prevailing parties, 20 U.S.C. § 1415(i)(3), to effectuate its intent "that due process procedures, including the right to litigation if necessary, be available to all parents." S. Rep. No. 99-112, at 2 (1985). Such a fee-shifting provision—which is unusual in administrative litigation—provides powerful incentives for the vindication of legitimate claims and strong deterrence against school districts' non-compliance.[23] In part because of this provision,

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[22] In any event, petitioners' assertions about the resources of school districts are vastly overstated. Most school districts are small—nearly half nationwide have total enrollments of less than 1000, and 12.4 percent serve less than 150 students. *See* National Center for Educ. Statistics, *Overview of Public Elementary and Secondary Schools and Districts: School Year 2000-01*, Table 7, *at* http://www.nces. ed.gov/pubs2002/overview/index.asp.

[23] *See Buckhannon Bd. & Care Home, Inc.* v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 639 (2001) (when attorneys' fees make noncompliance expensive, parties seek to conform to legal requirements before litigation is threatened) (citing Keith N. Hylton, *Fee Shifting and Incentives to Comply with the Law*, 46 Vand. L. Rev. 1069, 1121 (1993)); *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54, 63 (1980) (availability of attorneys' fees

there is a substantial network of attorneys and public interest groups that specialize in representing parents. *See, e.g.*, Br. of *Amici Curiae* Council of Parent Attorneys and Advocates at 3-6. Congress has also decreed that States must bear the costs of mediation, *see* 20 U.S.C. § 1415(e)(2)(D), and the States or local districts foot the bill for the hearings themselves, *see* 20 U.S.C. § 1415(f)(1). Finally, although the availability of expert-witness fees has divided the lower courts, *see* Pet. Br. 47-48 (noting circuit split), Congress is free to authorize such fees as well as any other costs if it believes they are appropriate.

Recently, however, Congress has expressed concern the other way: that parents may be bringing *too many* unjustified suits and may be utilizing lawyers *too much*. *See* 20 U.S.C. § 1415(i)(3)(B)(i)(II), (III) (authorizing fee awards against parents and their attorneys) (added in 2004); 20 U.S.C. § 1415(i)(3)(D)(ii) (barring attorneys' fees for attendance at IEP meetings or mediations) (added in 1997). In any event, Congress' careful attention to these issues underscores that it—not this Court—is the proper forum to address any concerns regarding resources for litigation.

2. The same is true with petitioners' assertions regarding parents' lack of sophistication. There is clearly no such lack in this case, where at least one of Brian's parents is a lawyer and they were represented by counsel.[24] But in any event, this issue as well is unrelated to the burden of proof. Even if the school bears the affirmative burden, parents will have to

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facilitates the bringing of complaints); Pet. App. 15 ("Congress recognized that parents need professional assistance, and the IDEA therefore allows parents who prevail in due process hearings to recover their fees for hiring lawyers.").

[24] Mr. Schaffer is an attorney with a private law firm, and Mrs. Schaffer, who also has a law degree, served as an assistant to the head of Green Acres, the private school that Brian previously attended. *See* 3 July 2, 1998 ALJ Hrg. 551.

present their own case regardless of their sophistication and will not prevail unless their evidence outweighs the school's.

Congress, however, has addressed this issue as well, and has done so directly. As discussed in Part I.B, IDEA imposes painstakingly detailed mandatory obligations on schools to notify and educate parents about their legal rights and to shepherd them through the process, and Congress has also funded centers to specifically train and assist parents in exercising their rights. As this Court has held, to the extent schools have any "natural advantage" when disputes arise Congress "incorporated an elaborate set of * * * 'procedural safeguards' to insure the full participation of the parents and proper resolution of substantive disagreements." *Burlington*, 471 U.S. at 368. If other safeguards are needed, they should be created by Congress after careful study, not by this Court.

As the court of appeals noted, Congress was "keenly aware that school systems have professional expertise and that parents do not" and "[i]t was for this very reason that Congress imposes statutory safeguards to assist parents in becoming substantively informed." Pet. App. 15. Among other requirements, schools districts or state agencies must:

- provide every parent at key intervals with "[a] copy of the procedural safeguards available" to them, which must contain a "full explanation" of fifteen specific issues, 20 U.S.C. § 1415(d)(1)(A), (2);
- provide written notice of all IEP actions, in the parents' native language if feasible, 20 U.S.C. § 1415(b)(3), (4);
- develop a "model form" for due process complaints, 20 U.S.C. § 1415(b)(8);
- notify parents before taking any IEP action that they "have protection under the procedural safeguards of [IDEA]" and listing "sources for parents to contact to obtain assistance in understanding the provisions of [IDEA]," 20 U.S.C. § 1415(c)(1)(C), (D); and

- appoint a surrogate for the child where the parents cannot be located, 20 U.S.C. § 1415(b)(2)(A).

Congress has also appropriated substantial sums for "parent training and information centers" to, *inter alia*, "assist parents to understand the availability of, and how to effectively use, procedural safeguards under [IDEA]." 20 U.S.C. § 1471(b), (b)(8).

In sum, IDEA provides more direct assistance to parents in vindicating their legal rights against government—including procedural rights, informational guarantees, and attorneys' fees—than exists in perhaps any other federal statute. Congress has deemed these "elaborate" safeguards sufficient. *Burlington*, 471 U.S. at 368. As the court of appeals noted, "[i]f experience shows that parents do not have sufficient access to substantive expertise under the current statutory scheme, Congress should be called upon to take further remedial steps." Pet. App. 15. But abrogating the normal burden of proof by judicial decision will just increase costs on schools without affecting the resource and sophistication imbalances of which petitioners complain.

E. IDEA Makes Schools Directly Accountable For Fulfilling Their Statutory Obligations

Nor is there any reason for this Court to abrogate the normal burden of proof in order to ensure that schools follow their obligations under IDEA. Congress has already expressly provided a robust array of enforcement mechanisms. Just as federal agencies are held fully accountable under the APA, which adopts the ordinary burden of proof, so too are school districts held accountable in IDEA due process hearings conducted under the same rule. Petitioners and their amici complain that school districts sometimes do not follow the mandatory IDEA procedures. In this case, the ALJ specifically found that "[t]here has been no demonstration of any violation of a procedural safeguard," and that "[t]here has been a properly formulated IEP." *Id*. at 145. IDEA provides a direct remedy for procedural noncom-

pliance in any event. If a school district has failed to follow IDEA's detailed procedures, a hearing officer may find that such failure amounts to a denial of a free and appropriate public education. *See* 20 U.S.C. § 1415(f)(3)(E)(ii).

But these private rights are far from the only enforcement mechanisms. To receive federal funding, each State must demonstrate annually to the Secretary of Education that it is complying with IDEA, and Congress has directed the Secretary to withhold funds from any State that fails to substantially comply. 20 U.S.C. §§ 1412, 1416. Each local school district must furthermore demonstrate to its state education agency that it is complying with IDEA or risk losing state funding. 20 U.S.C. § 1413(a). Nor are due process hearings the only mechanism for resolving complaints: the Secretary requires that each State agency have a process for resolving individual complaints that local school districts have violated the statute. *See* 34 C.F.R. §§ 300.660 to 300.662.

In light of this extraordinary panoply of existing enforcement mechanisms, there is no reason for this Court to create additional burdens that will simply multiply costs and encourage litigation while doing little, if anything, to further compliance. In fact, as next shown, if any State believes it would be appropriate as a policy matter to abrogate the normal burden of proof with respect to its own schools, IDEA's cooperative federalism structure likely would not prevent that State from legislating its own rule in that regard.

III. STATES MAY VOLUNTARILY ASSUME ADDITIONAL OBLIGATIONS FOR THEIR SCHOOLS NOT INCONSISTENT WITH IDEA

Petitioners argue that federal law—that is, IDEA—imposes the burden of proof on school districts in *all* administrative hearings initiated pursuant to IDEA, regardless of which party initiates the hearing. For the reasons discussed above, the court of appeals correctly rejected that argument. But although IDEA does not impose a standing federal burden of proof on school districts in every case, States are not

prevented from voluntarily assuming additional obligations through legislation that is not inconsistent with IDEA.

As explained above, like other Spending Clause statutes, IDEA establishes minimum federal requirements that attach as conditions to the receipt of federal financial assistance. States that accept such funding must comply with those federal standards, but they remain free to expand on IDEA's requirements and grant additional benefits to their residents. *See, e.g.*, *Gill* v. *Columbia 93 Sch. Dist.*, 217 F.3d 1027, 1035 (8th Cir. 2000); *Johnson* v. *Independent Sch. Dist. No. 4*, 921 F.2d 1022, 1029 (10th Cir. 1990); *Lagares* v. *Camdenton R-III Sch. Dist.*, 68 S.W.3d 518, 524 (Mo. Ct. App. 2002). Indeed, IDEA expressly recognizes that States may impose their own special education standards for their school systems. 20 U.S.C. § 1401(9)(B). In addition, IDEA directs States receiving federal assistance to "establish and maintain procedures" that give effect to the Act's requirements. 20 U.S.C. § 1415(a). Accordingly, it may be possible to interpret IDEA as authorizing States to voluntarily assume through their own statutory law a different burden of proof for their school districts in IDEA hearings, and at least a few States have passed such laws. *See* Pet. Opp. 19-20.

But that issue is not presented by this case. Petitioners do not and cannot argue that *state* law imposes the burden of proof on Maryland school districts such as MCPS in IDEA hearings; instead, as discussed, their position is that federal law imposes that burden. In any event, because Maryland has not enacted any statute assigning the burden of proof to its school systems in IDEA hearings, the federal burden of proof clearly governs this case—the party that initiates the IDEA hearing and seeks relief bears the burden of proof.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

JUDITH S. BRESLER
ERIC C. BROUSAIDES
REESE & CARNEY, LLP
10715 Charter Drive
Columbia, MD 21044
(301) 621-5255

JEFFREY A. KREW
4785 Dorsey Hall Drive
Suite 120
Ellicott City, MD 21042
(410) 997-6900

MAREE F. SNEED*
JONATHAN S. FRANKLIN
GREGORY G. GARRE
JESSICA L. ELLSWORTH
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-6416

ZVI GREISMANN
MONTGOMERY COUNTY
PUBLIC SCHOOLS
850 Hungerford Drive
Rockville, MD 20850
(301) 279-3549

* Counsel of Record

Counsel for Respondents