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# Where to Place the Burden: Individuals with Disabilities Education Act Administrative Due Process Hearings

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## Where To Place the Burden: Individuals with Disabilities Education Act Administrative Due Process Hearings

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### INTRODUCTION

In recent years, some of the biggest education policy debates in Washington have been over special education.<sup>1</sup> Students between the ages of six and seventeen with disabilities comprised 11.5% of student enrollment between prekindergarten and twelfth grade in 2000–2001.<sup>2</sup> The number of students covered by federal special education law rose 28.4% from 1991–92 to 2000–2001.<sup>3</sup> Such students have a wide variety of disabilities ranging from speech or language impairment to

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1. See John O'Neil, *Q&A: A Better IDEA*, N.Y. TIMES, Apr. 14, 2002, § 4A (Education Life), at 17.

2. U.S. DEP'T OF EDUC., TWENTY-FOURTH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT II-19 (2002), available at <http://www.ed.gov/about/reports/annual/osep/2002/index.html>.

3. *Id.*

autism to emotional disturbance.<sup>4</sup> Congress apportioned close to \$9 billion in 2003 to the states for help in educating these children, which represented only about eighteen percent of all average per pupil expenditures.<sup>5</sup> Clearly, Americans today have a stake in special education either directly as parents of one of the one in ten children in school with a disability or as taxpayers picking up the tab for federal special education mandates.

In 1975, Congress passed the Education for All Handicapped Children Act ("EAHCA").<sup>6</sup> This legislation was the forerunner to the modern Individuals with Disabilities Education Act ("IDEA"),<sup>7</sup> which seeks to "ensure that all children with disabilities have available to them a free appropriate public education."<sup>8</sup> A central feature of the statute is the Individualized Education Program ("IEP"), which requires development of an IEP for every disabled child in every public school system receiving federal funds.<sup>9</sup> In what some call the most controversial feature of the statute,<sup>10</sup> Congress provided parents a means to challenge local school systems' decisions concerning the method of their disabled child's education through an administrative due process hearing with the possibility of judicial review.<sup>11</sup> However, the statute is silent on the burden of proof at the administrative level.<sup>12</sup> Nine circuits split over whether the burden should be placed on the school system or whichever party is challenging the IEP, usually the parents.<sup>13</sup> The Supreme Court

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4. *Id.*

5. H.R. REP. NO. 108-77, at 149-50 (2003).

6. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C.A. §§ 1400-1487 (West Supp. 2005)).

7. 20 U.S.C.A. §§ 1400-1487 (West. Supp. 2005). For a more detailed discussion of the history and interpretation of this statute, see *infra* Part I.

8. § 1400(d)(1)(A).

9. *Id.* § 1412(a)(3)-(4). For more detailed information about the development and implementation of IEPs, see *infra* Part II.

10. See Steven S. Goldberg & Peter J. Kuriloff, *Doing Away with Due Process: Seeking Alternative Dispute Resolution in Special Education*, 42 W. EDUC. L. REP. 491, 491 (1988).

11. § 1415. The regulations promulgated by the Department of Education with respect to this statute are codified in 34 C.F.R. pt. 300 (2004).

12. This Comment discusses the burden of proof in the context of the burden of persuasion, as defined by which party will lose if the evidence is equally balanced. See *Schaffer v. Weast*, 126 S. Ct. 528, 533-34 (2005).

13. For a more detailed examination of the circuit split, see *infra* Part III. Seven circuits generally placed the burden on the school system. See *L.T. ex rel. N.B. v. Warwick Sch. Comm.*, 361 F.3d 80, 82 n.1 (1st Cir. 2004); *Beth B. v. Van Clay*, 282 F.3d 493, 496 (7th Cir. 2002); *Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 122 (2d Cir. 1998); *E.S. v. Indep. Sch. Dist. No. 196*, 135 F.3d 566, 569 (8th Cir. 1998); *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 524 (3d Cir. 1995); *Clyde K. v. Puyallup Sch. Dist. No. 3*, 35 F.3d 1396, 1398

recently resolved this issue in *Schaffer v. Weast*,<sup>14</sup> holding that the burden of persuasion lies “on the party seeking relief.”<sup>15</sup>

As illustrated by the sharp divide among circuits, conflicting arguments emerged for placing the IEP due process hearing burden of proof on the challenging party as well as for placing it on the school system. Part I of this Comment discusses the legislative and judicial history of the IDEA. Part II goes into more detail concerning the IDEA’s due process procedure. Part III examines the circuit split and analyzes the various appellate court interpretations as well as the recent Supreme Court decision. Part IV demonstrates that when the disabled child’s parents previously ratified a now-established operative IEP, the burden should be on the party bringing the challenge. In contrast, Part V of this Comment recommends placing the burden of proof on the school system in the case of an initial IEP challenge, where the parents and the school system fail to come to an agreement on an IEP formulation.

#### I. THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT: HISTORY AND INTERPRETATION

Before the adoption of the EAHCA, two district court decisions paved the way for a federal due process requirement for educating children with disabilities in public schools.<sup>16</sup> In the first of these cases, *Pennsylvania Ass’n for Retarded Children v. Pennsylvania (“PARC”)*,<sup>17</sup> parents, on behalf of each of the thirteen disabled children, and the Pennsylvania Association for Retarded Children brought a class action lawsuit against Pennsylvania educational authorities, seeking an injunction against the enforcement of several state statutes that operated to exclude disabled children from the public school system.<sup>18</sup> The plaintiffs argued that the statutes were

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(9th Cir. 1994); *McKenzie v. Smith*, 771 F.2d 1527, 1532 (D.C. Cir. 1985). Four circuits generally placed the burden on the challenging party. See *Weast v. Schaffer*, 377 F.3d 449, 456 (4th Cir. 2004), *aff’d*, 126 S. Ct. 528 (2005); *Johnson v. Indep. Sch. Dist. No. 4*, 921 F.2d 1022, 1026 (10th Cir. 1990); *Cordrey v. Euckert*, 917 F.2d 1460, 1466 (6th Cir. 1990); *Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d 1153, 1158 (5th Cir. 1986).

14. 126 S. Ct. 528 (2005).

15. *Id.* at 531.

16. For a general overview of these two cases, see generally Lauren Zykorie, *Reauthorizing Discipline for the Disabled Student: Will Congress Create a Better Balance in the Individuals with Disabilities Education Act (IDEA)?*, 3 CONN. PUB. INT. L. J. 101, 107–10 (2003); Kelly S. Thompson, Note, *Limits on the Ability to Discipline Disabled School Children: Do the 1997 Amendments to the IDEA Go Far Enough?*, 32 IND. L. REV. 565, 567–68 (1999).

17. 343 F. Supp. 279 (E.D. Pa. 1972).

18. *Id.* at 281–82.

unconstitutional on several grounds, including lack of appropriate due process and denial of equal protection for the disabled.<sup>19</sup> The court never decided the constitutional issues, as the parties settled with a consent decree; however, the decree stated that all disabled children had the right to a free public education appropriate to their capacity for learning,<sup>20</sup> and no disabled child could be either initially assigned or reassigned to regular or special education status without a due process hearing.<sup>21</sup>

The second case, *Mills v. Board of Education*,<sup>22</sup> also involved disabled children excluded from public education without due process.<sup>23</sup> The court held for the plaintiffs (seven children represented by their next friends), stating that, "the defendants' [the District of Columbia Board of Education and other educational officials] conduct here, denying plaintiffs and their class not just an equal publicly supported education but all publicly supported education while providing such education to other children, is violative of the Due Process Clause."<sup>24</sup> The court emphasized the importance of education in its opinion, quoting Chief Justice Warren's language from *Brown v. Board of Education*.<sup>25</sup> The final judgment of the court included requiring procedures similar to those that Congress later mandated in the EAHCA and IDEA.<sup>26</sup> The District of Columbia Board of Education suggested these procedures to the court as a means of implementing a judgment ordering an appropriate education for disabled children. The procedures included such measures as notification of parents before special educational placement; independent, free disability evaluation; and a hearing before the board with the ability to present witnesses.<sup>27</sup>

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19. *See id.* at 283.

20. *See id.* at 287.

21. *See id.* at 284-85.

22. 348 F. Supp. 866 (D.D.C. 1972).

23. *Id.* at 868.

24. *Id.* at 875.

25. *Id.* at 874 ("Today, education is perhaps the most important function of state and local governments." (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954))).

26. *See* Thompson, *supra* note 16, at 567 ("In the end, the court required that the school system follow many of the same guidelines and procedures later adopted by Congress in the IDEA.").

27. *Mills*, 348 F. Supp. at 877-83.

Congress passed the EAHCA in 1975<sup>28</sup> in response to problems facing disabled children in public schools as noted in *PARC* and *Mills*.<sup>29</sup> The stated purpose of the bill was "to assure that all handicapped children have available to them . . . a free appropriate public education."<sup>30</sup> The central feature of the bill with regard to educating disabled children was the requirement that state educational departments implement individualized education programs for handicapped children.<sup>31</sup> The bill defined an "individualized education program" as:

[A] written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and

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28. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C.A. §§ 1400-1487 (West Supp. 2005)). For a broad overview of the provisions of Public Law 94-142, see generally JAMES A. SHRYBMAN, *DUE PROCESS IN SPECIAL EDUCATION* 9-28 (George Matsoukas ed., 1982).

29. See S. REP. NO. 94-168, at 6 (1975), reprinted in 1975 U.S.C.C.A.N. 1425, 1430 (citing the *Mills* and *PARC* cases); see also STEPHEN C. LARSEN & MARY S. POPLIN, *METHODS FOR EDUCATING THE HANDICAPPED: AN INDIVIDUALIZED EDUCATION PROGRAM APPROACH* 6 (1980) ("In essence, PL 94-142 stipulates that school systems and other public agencies are no longer able to exclude handicapped children simply on the basis that they exhibit problems too severe to be handled in the school setting, do not have appropriate programs, or are judged to be uneducable."). The Supreme Court has noted the importance of the *PARC* and *Mills* cases in the enactment of the EAHCA. See *Bd. of Educ. v. Rowley*, 458 U.S. 176, 180 n.2 (1982).

30. § 3(c), 89 Stat. at 775 (codified as amended at 20 U.S.C.A. § 1400(d)(1)(A) (West Supp. 2005)).

31. See LARSEN & POPLIN, *supra* note 29, at 8 ("Developing the IEP is the central feature in effective and efficient education of the handicapped.").

schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.<sup>32</sup>

The current IDEA statute contains an expanded definition of the IEP, including more detailed requirements,<sup>33</sup> but the IEP nonetheless retains its basic meaning from the EAHCA bill. The EAHCA also mandated the due process hearing administrative procedure that is the subject of this Comment.<sup>34</sup>

Before discussing the modern implementation of the EAHCA, known as the IDEA, an understanding of the Supreme Court's decision in *Board of Education v. Rowley*<sup>35</sup> will properly frame the issues. In *Rowley*, the parents of a hearing-impaired child claimed that the "free appropriate public education" mandated by the EAHCA required the child's school to provide a sign-language interpreter in the classroom.<sup>36</sup> The Supreme Court held that the EAHCA did not require such an interpreter.<sup>37</sup>

In deciding *Rowley*, the Court first provided an interpretation of a "free appropriate public education."<sup>38</sup> In light of the statute's definition and statements of purpose, the Court decided that "the face of the statute evinces a congressional intent to bring previously excluded handicapped children into the public education systems of the States and to require the States to adopt *procedures* which would result in individualized consideration of and instruction for each child."<sup>39</sup> The Court went on to note the statute's lack of any required substantive standards of education<sup>40</sup> and ultimately construed the statute as primarily designed to provide the availability of education for disabled children, as opposed to guaranteeing a substantive level of quality of education.<sup>41</sup> In adopting this definition, the Court

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32. § 4(a)(4), 89 Stat. at 776 (codified as amended at 20 U.S.C.A. § 1414(d)(1)(A) (West Supp. 2005)). The modern IDEA definition, found in 20 U.S.C.A. § 1414(d), retains these basic elements.

33. See 20 U.S.C.A. § 1414(d).

34. § 612(5)(A), 89 Stat. at 781 (codified as amended at 20 U.S.C.A. § 1412(a)(6)(A) (West Supp. 2005)).

35. 458 U.S. 176 (1982). For a more detailed overview of the *Rowley* decision, see generally Steven N. Robinson, *Rowley: The Court's First Interpretation of the Education for All Handicapped Children Act of 1975*, 32 CATH. U. L. REV. 941 (1983).

36. *Rowley*, 458 U.S. at 184.

37. *Id.* at 210.

38. See *id.* at 203-04.

39. *Id.* at 189.

40. *Id.*

41. *Id.* at 192; see also *id.* at 203 ("Insofar as a State is required to provide a handicapped child with a 'free appropriate public education,' we hold that it satisfies this

expressly rejected the argument that the statute requires maximizing the educational potential of each disabled child to be equal with the opportunities provided to non-disabled children.<sup>42</sup>

The second major portion of the Court's opinion in *Rowley* discusses the role of the courts in exercising judicial review over administrative due process hearings under the statute.<sup>43</sup> The Court decided reviewing courts should follow a two-part test.<sup>44</sup> The first part is whether the state has complied with the statute's procedural requirements.<sup>45</sup> The second part is whether the IEP is "reasonably calculated to enable the child to receive educational benefits."<sup>46</sup> The Court emphasized that the primary role of the states is selecting educational methodology and cautioned against lower courts attempting to impose their own views of preferable educational methods.<sup>47</sup> Applying this test, the Court held that since the child in question was performing "better than the average child in her class" with personalized instruction and there was no finding that the state violated the statute's procedural protections, the statute did not require a sign-language interpreter to be placed in the classroom.<sup>48</sup> As a whole, the *Rowley* opinion stressed the importance of the

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requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.").

42. *Id.* at 200. Subsequent to *Rowley*, lower courts attempted to expand the decision's minimal definition of an appropriate education. See ALLAN G. OSBORNE, JR. & CHARLES J. RUSSO, SPECIAL EDUCATION AND THE LAW: A GUIDE FOR PRACTITIONERS 22-23 (2003). For example, in 1985 the Fourth Circuit held that "trivial" educational benefits for disabled children would not be enough to fulfill the requirement of an "educational benefit." See *Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 635-36 (4th Cir. 1985); see also *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 184 (3d Cir. 1988) ("[W]e hold that Congress intended to afford children with special needs an education that would confer meaningful benefit.").

43. See *Rowley*, 458 U.S. at 204-09. For a discussion of the mechanics of the IDEA due process hearing, see *infra* notes 86-110 and accompanying text.

44. *Rowley*, 458 U.S. at 206.

45. *Id.*

46. *Id.* at 206-07.

47. *Id.* (using the phrase "due weight" to describe the proper standard of deference for a reviewing court to use to examine the administrative proceeding). There is a debate over the precise meaning of the words "due weight," specifically whether they indicate deference to the administrative proceeding itself or to the local educational officials. This debate is outside the scope of this Comment, which is concerned with the administrative proceeding itself, as opposed to judicial review. For one analysis of this issue, see Thomas F. Guernsey, *When the Teachers and Parents Can't Agree, Who Really Decides? Burdens of Proof and Standards of Review Under the Education for All Handicapped Children Act*, 36 CLEV. ST. L. REV. 67, 77-89 (1988).

48. *Rowley*, 458 U.S. at 209-10.



statute's procedural safeguards.<sup>49</sup> As one commentator stated in discussing *Rowley*, "[i]n effect, IDEA is to be viewed as a law of process, and not one of outcome."<sup>50</sup> *Rowley* continues to prominently influence IDEA interpretation.<sup>51</sup>

In 1990, Congress reauthorized the EAHCA and renamed it the Individuals with Disabilities Education Act.<sup>52</sup> In addition to the renaming, a major substantive change required that "transition services" be included in IEPs for children over sixteen.<sup>53</sup> Transition services were defined by the statute as activities that will aid the disabled individual in moving from the school system to independent life.<sup>54</sup>

Congress reauthorized and modified the IDEA further in 1997.<sup>55</sup> The amendment represented a significant change to the statute,<sup>56</sup> including the concept that disabled children should be educated with

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49. See *id.* at 205 ("When the elaborate and highly specific procedural safeguards embodied in [the EAHCA's due process section] are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid."); see also JAMES N. HOLLIS, CONDUCTING INDIVIDUALIZED EDUCATION PROGRAM MEETINGS THAT WITHSTAND DUE PROCESS: THE INFORMAL EVIDENTIARY PROCEEDING 3 (1998) ("The Supreme Court in *Board of Education v. Rowley* reminds us that IDEA's procedures are seen as the key to its substantive success.").

50. Martin W. Bates, *Free Appropriate Public Education Under the Individuals with Disabilities Education Act: Requirements, Issues and Suggestions*, 1994 BYU EDUC. & L.J. 215, 217.

51. *Id.* at 220 ("*Rowley* remains the only extensive Supreme Court treatment of IDEA."); see also Scott F. Johnson, *Reexamining Rowley: New Focus in Special Education Law*, 2003 BYU EDUC. & L.J. 561, 561 ("*Rowley* is undoubtedly the most important and influential case in special education law.").

52. Education of the Handicapped Amendments of 1990, Pub. L. No. 101-476, sec. 901(a)(1), § 601(a), 104 Stat. 1103, 1141-42 (codified as amended at 20 U.S.C.A. § 1400(a) (West Supp. 2005)).

53. See Zykorie, *supra* note 16, at 114 n.81.

54. Sec. 101(a), § 602(a)(19), 104 Stat. at 1103-04 (codified as amended at 20 U.S.C.A. § 1401(34) (West Supp. 2005)) ("The term 'transition services' means a coordinated set of activities for a student, designed within an outcome-oriented process, which promotes movement from school to post-school activities, including post-secondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation.").

55. Individuals with Disabilities Education Act Amendments for 1997, Pub. L. No. 105-17, 111 Stat. 37 (codified as amended at 20 U.S.C.A. §§ 1400-1482 (West Supp. 2005)).

56. See Zykorie, *supra* note 16, at 115-16 ("The 1997 IDEA also emphasized testing, inclusion, results, funding, assessment, accountability, clearer standards and definitions within the law, parent training, technology development, and paperwork reduction." (citation omitted)). For a more detailed discussion of the modifications Congress made in 1997, see generally EDWARD BURNS, DEVELOPING AND IMPLEMENTING IDEA-IEPS: AN INDIVIDUALIZED EDUCATION PROGRAM (IEP) HANDBOOK FOR MEETING INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA) REQUIREMENTS 22-27 (Charles C. Thomas ed., 2001).

general education children whenever possible.<sup>57</sup> This amendment also added the requirement for school systems to provide a state-funded mediation option when there is a request for a due process hearing.<sup>58</sup>

Recently, Congress once again reauthorized and amended the IDEA in December of 2004.<sup>59</sup> The new amendments became completely effective on July 1, 2005.<sup>60</sup> Primarily, these amendments aim to make the statute less litigious.<sup>61</sup> Although the amendments do not address the burden of proof at the due process level, Congress added features designed to make the complaint process more settlement-oriented, such as a mandatory pre-hearing meeting between parents and the school system.<sup>62</sup> The potential consequences of the new due process features on the appropriate place for the burden of proof are discussed below.<sup>63</sup>

## II. THE INDIVIDUALIZED EDUCATION PROGRAM: THE DUE PROCESS PROCEDURE

As discussed above, a central feature of the IDEA legislation is the IEP, as was the case upon the EAHCA's adoption in 1975.<sup>64</sup> The Department of Education calls the IEP the "cornerstone of special

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57. See SABRINA HOLCOMB ET AL., THE NEW IDEA SURVIVAL GUIDE 10–11 (2000) ("The main principle of IDEA '97: Students with disabilities should be educated within the general education classroom with appropriate aids and services, if necessary . . ."); see also H.R. REP. NO. 105-95, at 100 (1997), reprinted in 1997 U.S.C.C.A.N. 78, 97 ("The majority of children identified as eligible for special education and related services are capable of participating in the general education curriculum to varying degrees with some adaptations and modifications.").

58. Sec. 101, § 615(e), 111 Stat. at 90–91.

59. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (codified at 20 U.S.C.A. §§ 1400–1482 (West Supp. 2005)).

60. *Id.* § 302(a)(1), 118 Stat. at 2803.

61. See *id.* sec. 101, § 601(c)(8), 118 Stat. at 2650 (stating a congressional belief that "[p]arents and schools should be given expanded opportunities to resolve their disagreements in positive and constructive ways"); see also H.R. REP. NO. 108-77, at 85 (2003) ("Litigation under the Act has taken the less productive track of searching for technical violations of the Act by school districts rather than being used to protect the substantive rights of children with disabilities."); President George W. Bush, President's Remarks at the Signing of H.R. 1350 (Dec. 3, 2004), available at <http://www.whitehouse.gov/news/releases/2004/12/20041203-6.html> ("We're making the system less litigious, so it can focus on the children and their parents.").

62. Sec. 101, § 615(f)(1)(B), 118 Stat. at 2720–21 (codified at 20 U.S.C.A. § 1415(f)(1)(B) (West Supp. 2005)).

63. See *infra* Part IV.D.

64. See *supra* notes 31–33 and accompanying text.

education.”<sup>65</sup> Parents and the school system collaborate as partners in the process of designing the IEP document.<sup>66</sup> The IDEA defines an “IEP Team” as a group that includes the disabled child’s parents, teachers, and other personnel who may have expertise regarding the child.<sup>67</sup> The Department of Education’s IEP guide lists ten steps in the overall IEP picture.<sup>68</sup> These steps, in chronological order, consist of: identifying the disabled child; evaluating the child; determining IDEA eligibility; finding IDEA eligibility; scheduling an IEP team meeting; holding the IEP meeting and drafting the IEP; providing the services required for the child by the IEP; measuring the child’s progress and reporting to the parents; periodically reviewing the IEP; and reevaluating the child.<sup>69</sup>

Before the procedural safeguards concerning IEPs become relevant, disabled children must be identified. The IDEA mandates that states identify all children with disabilities who are in need of special education.<sup>70</sup> Either parents or educational agencies may request an evaluation to determine a student’s IDEA eligibility.<sup>71</sup> The statute requires the use of “a variety of assessment tools and strategies”<sup>72</sup> to determine eligibility, administered by “trained and knowledgeable personnel,”<sup>73</sup> along with other substantive evaluation requirements.<sup>74</sup> Even after identification and initial IEP development, IEPs must be reviewed at least annually and revised when appropriate to address the child’s progress and needs.<sup>75</sup>

The IDEA contains extensive procedural safeguards for parents.<sup>76</sup> The statute spells out these safeguards with great

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65. OFFICE OF SPECIAL EDUC. & REHABILITATIVE SERVS., U.S. DEP’T OF EDUC., A GUIDE TO THE INDIVIDUALIZED EDUCATION PROGRAM (Lisa Küpper ed., 2000), available at <http://www.ed.gov/parents/needs/speced/iepguide/index.html> [hereinafter IEP GUIDE].

66. See BURNS, *supra* note 56, at 9 (“Parents are . . . equal partners with school personnel in making IEP decisions.”).

67. 20 U.S.C.A. § 1414(d)(1)(B) (West Supp. 2005).

68. IEP GUIDE, *supra* note 65.

69. *Id.*

70. § 1412(a)(3)(A).

71. *Id.* § 1414(a)(1)(B).

72. *Id.* § 1414(b)(2)(A).

73. *Id.* § 1414(b)(3)(A)(iv).

74. See *id.* § 1414(b).

75. *Id.* § 1414(d)(4)(A).

76. *Id.* § 1415. For an overview of the IDEA’s procedural safeguards in plain English, see generally Dixie Snow Huefner, *A Model for Explaining the Procedural Safeguards of IDEA* ’97, 134 W. EDUC. L. REP. 445 (1998). Note that these safeguards have been modified by the 2004 IDEA Reauthorization, but Huefner still provides a relevant overview.

specificity in contrast to the relatively vague definition of substantive educational standards.<sup>77</sup> The procedural safeguards include, but are not limited to: the rights of parents to examine all records related to the child;<sup>78</sup> written notice to the parents whenever the school system proposes to change or refuses to change the identification, evaluation, or placement of the child;<sup>79</sup> an opportunity for mediation;<sup>80</sup> a due process hearing and appeal;<sup>81</sup> and the right to judicial review.<sup>82</sup>

The IDEA due process hearing has been called the most controversial feature of the statute<sup>83</sup> and has been the subject of analysis and criticism.<sup>84</sup> Nevertheless, the 2004 IDEA legislation retains the essence of the original due process hearing concepts but adds features that aim to make the process less litigious.<sup>85</sup> Before addressing the primary concern of this Comment, the administrative burden of proof, a brief overview of the IDEA due process hearing procedure is warranted.

The due process procedure commences when a disabled child's parent or guardian (or possibly the school system) becomes dissatisfied with an IEP and files a complaint.<sup>86</sup> The 2004 amendments add a new statute of limitations that provides parents with two years to file a complaint from the time they knew or should have known about the action underlying the complaint.<sup>87</sup> The complaint must contain the name and address of the child and the school the child is attending, a description of the problem, and a proposed resolution.<sup>88</sup> The party receiving the complaint has ten days to address the issues raised in the complaint.<sup>89</sup> Complaints may be

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77. See *supra* notes 49–50 and accompanying text.

78. § 1415(b)(1).

79. *Id.* § 1415(b)(3).

80. *Id.* § 1415(b)(5).

81. *Id.* § 1415(f)–(g).

82. *Id.* § 1415(i)(2).

83. See Goldberg & Kuriloff, *supra* note 10, at 492 (noting that “[t]he due process procedures grant parents an unprecedented right to challenge any aspect of a current or proposed special education program”).

84. See generally *id.* (asserting that the due process model may be the least desirable special education dispute resolution device); Howard Margolis, *Avoiding Special Education Due Process Hearings: Lessons from the Field*, 9 J. EDUC. & PSYCHOL. CONSULTATION 233 (1998) (describing eight lessons for IEP teams to follow for the purpose of avoiding due process hearings); Perry A. Zirkel, *Over-Due Process Revisions for the Individuals with Disabilities Education Act*, 55 MONT. L. REV. 403 (1994) (stating that due process hearings are time consuming, overly adversarial, expensive, and unfair).

85. See *supra* note 61 and accompanying text.

86. § 1415(b)(6).

87. *Id.* § 1415(b)(6)(B).

88. *Id.* § 1415(b)(7)(A).

89. *Id.* § 1415(c)(2)(B).

amended if the other party consents and is given opportunity to resolve the complaint or if the hearing officer grants permission not later than five days before the due process hearing.<sup>90</sup> If the local education agency does not satisfy the parents' concerns within thirty days of receipt of the complaint, the due process hearing may occur.<sup>91</sup> The response time limitation, the complaint amendment, and the thirty-day pre-hearing period appeared as new elements of the statute with the 2004 amendments.<sup>92</sup>

Also new with the 2004 amendments is the "resolution session," a meeting convened within fifteen days of receipt of the parents' complaint.<sup>93</sup> The meeting is a forum for the parents to discuss their complaint with the local education agency, while providing the agency with an opportunity to resolve the dispute.<sup>94</sup> The meeting can be avoided if both parties agree in writing or consent to use the statutory mediation device instead of the due process hearing.<sup>95</sup>

The statute includes required qualifications for the person conducting the due process hearing. The hearing officer cannot be an employee of the state educational agency or the disabled child's local educational agency, nor otherwise have a conflict of interest.<sup>96</sup> The hearing officer must understand the IDEA and the regulations promulgated thereunder.<sup>97</sup> The hearing officer must "possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice"<sup>98</sup> and must "possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice."<sup>99</sup>

The parties must confine the subject matter of the hearing to the issues in the complaint unless the other party gives consent to a broader scope.<sup>100</sup> The amount of discretion the hearing officer possesses to find violations depends upon whether the alleged violations are substantive or procedural. The statute gives broad authority to a hearing officer to find substantive violations concerning

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90. *Id.* § 1415(c)(2)(E).

91. *Id.* § 1415(f)(1)(B)(ii).

92. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, sec. 101, § 615, 118 Stat. 2647, 2717-21 (codified at 20 U.S.C.A. § 1415 (West Supp. 2005)).

93. 20 U.S.C.A. § 1415(f)(1)(B)(i)(I).

94. *Id.* § 1415(f)(1)(B)(i)(IV).

95. *Id.* § 1415(f)(1)(B)(i).

96. *Id.* § 1415(f)(3)(A)(i).

97. *Id.* § 1415(f)(3)(A)(ii).

98. *Id.* § 1415(f)(3)(A)(iii).

99. *Id.* § 1415(f)(3)(A)(iv).

100. *Id.* § 1415(f)(3)(B).

a denial of a free appropriate public education.<sup>101</sup> For procedural violations, however, the statute permits the hearing officer to find a violation only if the alleged procedural defect denied the child a free appropriate public education, significantly impeded the parents from participating in the decisionmaking process, or caused a deprivation of educational benefits.<sup>102</sup> The statute provides for an appeal by either party to the state educational agency.<sup>103</sup>

Congress provided a civil right of action in state or federal district court for parties not content with the results of the administrative process.<sup>104</sup> Such action is available only after a party exhausts all available administrative remedies available under the due process section of the statute.<sup>105</sup> The court can look at both the administrative record and any additional evidence at the request of the parties.<sup>106</sup> The judicial standard of decision is a preponderance of the evidence, and the court has broad authority to “grant such relief as the court determines is appropriate.”<sup>107</sup>

In an another controversial section of the statute, the court may award attorney’s fees to prevailing parents for any action under the due process section.<sup>108</sup> There are sections providing for the reduction of these fees for equitable reasons, such as a finding that the parents unreasonably protracted resolution or that the complaint did not contain all appropriate information.<sup>109</sup> In an attempt to further limit frivolous actions, the 2004 amendments to the IDEA provide that a prevailing school system may recover attorney’s fees against the parents’ attorney if the parents filed a frivolous complaint or if the complaint was filed for an improper purpose.<sup>110</sup>

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101. *Id.* § 1415(f)(3)(E)(i).

102. *Id.* § 1415(f)(3)(E)(ii).

103. *Id.* § 1415(g).

104. *Id.* § 1415(i)(2).

105. *Id.* § 1415(i)(2)(A).

106. *Id.* § 1415(i)(2)(C).

107. *Id.*

108. *Id.* § 1415(i)(3)(B)(i)(I). There is an argument that this section, added in 1986, greatly contributes to the litigious nature and expense of special education due process procedures. See Zirkel, *supra* note 84, at 405; see also OSBORNE & RUSSO, *supra* note 42, at 168 (“One of the most often litigated issues under the [IDEA] pertains to the issue of whether parents were actually the prevailing party in the litigation.”).

109. § 1415(i)(3)(F).

110. *Id.* § 1415(i)(3)(B)(i).

### III. THE CIRCUIT SPLIT AND ITS RESOLUTION: IDEA ADMINISTRATIVE BURDEN OF PROOF

Although Congress spelled out a detailed due process hearing procedure for the IDEA,<sup>111</sup> the statute does not speak to the administrative burden of proof for due process hearings.<sup>112</sup> The IDEA's statutory silence concerning the burden of proof permitted an extensive circuit split to develop around the issue. Courts of appeals were sharply divided on the question, and some opinions confused the situation further by not explicitly stating the level of review they addressed.<sup>113</sup> The Supreme Court recently resolved this circuit split by holding that the burden of proof at the administrative due process hearing is on the party seeking relief.<sup>114</sup> Before analyzing the merits of the various positions, it will be helpful to briefly survey the different approaches previously taken by courts around the country.<sup>115</sup>

#### A. Courts that Assigned the Burden to the School System

The D.C. Circuit's decision in *McKenzie v. Smith*<sup>116</sup> provided the starting point for the burden of proof debate. *McKenzie* involved parents objecting to the District of Columbia public school system's proposed placement of their disabled child.<sup>117</sup> It must be noted that *McKenzie* does not directly touch the issue of burden of proof at the administrative level, but it does contain language that forms the basis of one of the major arguments for placing the burden on the school system. The court, in holding that the notice of the proposed placement given to the parents was procedurally deficient, stated that "[t]he underlying assumption of the Act is that to the extent its procedural mechanisms are faithfully employed, handicapped

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111. See *supra* Part II; see also OSBORNE & RUSSO, *supra* note 42, at 167 ("The IDEA contains one of the most comprehensive mechanisms for dispute resolution ever created by Congress.").

112. The statute is also silent on the burden of proof at the judicial review level. However, this Comment addresses only the burden at the administrative level unless otherwise noted.

113. See *Weast v. Schaffer*, 240 F. Supp. 2d 396, 403 n.7 (D. Md. 2002) ("It is not always clear from the language of these [IDEA burden of proof] cases whether they are addressing the burden of proof at the administrative level, in the district court, or both."), *rev'd*, 377 F.3d 449 (4th Cir. 2004), *aff'd*, 126 S. Ct. 528 (2005).

114. *Schaffer v. Weast*, 126 S. Ct. 528, 531 (2005).

115. For more discussion concerning the circuit split, see generally Ronald D. Wenkart, *The Burden of Proof in IDEA Due Process Hearings*, 187 W. EDUC. L. REP. 817 (2004).

116. 771 F.2d 1527 (D.C. Cir. 1985).

117. *Id.* at 1530. The hearing officer held for the parents, and the district court affirmed. *Id.* at 1530–31.

children will be afforded an appropriate education.”<sup>118</sup> In so holding, the court drew on the Supreme Court’s IDEA interpretation from *Rowley*, which emphasized the importance of the IDEA’s procedural mechanisms. The D.C. Circuit took this interpretation to mean that the statute requires the school system to establish that it met the elaborate safeguards in the IDEA.<sup>119</sup> This was not a case alleging a substantive deficiency in a child’s IEP, but the case was, nonetheless, significant because the opinion drew an early connection between the IDEA’s extensive procedural safeguards and the allocation to the state of the burden of proof in IDEA due process hearings.

Ten years later, the Third Circuit similarly allocated the burden of proof to the school district in *Carlisle Area School v. Scott P.*<sup>120</sup> The *Carlisle* court held that school systems have the burden to prove the appropriateness of any IEPs that they propose.<sup>121</sup> The court did, however, state that school systems do not have the burden of proving the inappropriateness of any plan the parents propose.<sup>122</sup>

In reaching its decision in *Carlisle*, the Third Circuit cited a previous IDEA decision, *Oberti v. Board of Education*.<sup>123</sup> *Oberti* held that the burden of proof at the judicial level is on the school system.<sup>124</sup> These two decisions based their burden of proof arguments in part on the IDEA’s “least restrictive environment” or “mainstreaming” presumption.<sup>125</sup> The IDEA requires states to place disabled children in the “least restrictive environment”<sup>126</sup>—characterized as “an environment that, given the child’s individual educational needs, provides the fewest restrictions not encountered by the non-disabled student.”<sup>127</sup> In these two cases, the court concluded that the IDEA’s presumption of “mainstreaming,” or placing children in regular classrooms whenever possible, requires the party proposing the more restrictive placement to prove the appropriateness of that placement.<sup>128</sup> The Third Circuit used this presumption in *Oberti* in deciding where to place the burden, since the school system in *Oberti*

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118. *Id.* at 1532.

119. *Id.* (“It was particularly important in this case that [the school system] faithfully comply with the [IDEA]’s requirements.”).

120. 62 F.3d 520 (3d Cir. 1995).

121. *Id.* at 524.

122. *Id.*

123. 995 F.2d 1204 (3d Cir. 1993).

124. *Id.* at 1219–20.

125. See *Carlisle*, 62 F.3d at 533; *Oberti*, 995 F.2d at 1219–20.

126. See 20 U.S.C.A. § 1412(a)(5) (West Supp. 2005).

127. THOMAS F. GUERNSEY & KATHE KLARE, SPECIAL EDUCATION LAW 117 (2d ed. 2001).

128. See *Carlisle*, 62 F.3d at 533; *Oberti*, 995 F.2d at 1219–20.



advocated for a more restrictive environment.<sup>129</sup> Although the parents requested a more restrictive environment in *Carlisle*, the court still placed the burden of proof on the school system, qualifying the holding only to say that the school system did not have to prove the inappropriateness of the parents' proposal.<sup>130</sup> In addition to the mainstreaming presumption, *Oberti* also cited school systems' advantages in access to information, witnesses, and expertise as reasons partially justifying placing the burden with the school system.<sup>131</sup> These are all potential justifications for also placing the burden on the school system at the administrative level.

Finally, several other courts simply assume without analysis that the burden of proof in the administrative proceeding is on the school system. These include the First Circuit,<sup>132</sup> the Second Circuit,<sup>133</sup> the Seventh Circuit,<sup>134</sup> the Eighth Circuit,<sup>135</sup> and the Ninth Circuit.<sup>136</sup> The Ninth Circuit opinion in *Clyde K. v. Puyallup School District No. 3* deserves special mention, because in addition to holding that the school district has the burden of proof at the administrative level, it held (contrary to *Oberti*) that the burden of proof at the judicial level is on the party challenging the administrative decision, not necessarily the school system.<sup>137</sup> The Ninth Circuit's analysis with regard to judicial level foreshadows some of the Fourth Circuit's recent reasoning in holding that the party bringing the challenge at the administrative level has the burden of proof. Both courts stated that there must be clear statutory language to the contrary in order to depart from the general rule that a party bringing an action bears the burden of proof.<sup>138</sup>

Although not part of the circuit split among the courts of appeals, the District Court of Maryland's opinion in *Weast v.*

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129. *Oberti*, 995 F.2d at 1219–20.

130. *Carlisle*, 62 F.3d at 533.

131. *Oberti*, 995 F.2d at 1219.

132. *L.T. ex rel. N.B. v. Warwick Sch. Comm.*, 361 F.3d 80, 82 n.1 (1st Cir. 2004).

133. *See Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 122 (2d Cir. 1998).

134. *Beth B. v. Van Clay*, 282 F.3d 493, 496 (7th Cir. 2002).

135. *See E.S. v. Indep. Sch. Dist. No. 196*, 135 F.3d 566, 569 (8th Cir. 1998).

136. *See Clyde K. v. Puyallup Sch. Dist. No. 3*, 35 F.3d 1396, 1398 (9th Cir. 1994) ("The school clearly had the burden of proving at the administrative hearing that it complied with the IDEA.").

137. *Id.* at 1398–99.

138. *See Weast v. Schaffer*, 377 F.3d 449, 456 (4th Cir. 2004) ("[T]he IDEA does not allocate the burden of proof, and we see no reason to depart from the general rule that a party initiating a proceeding bears that burden."), *aff'd*, 126 S. Ct. 528 (2005); *Clyde K.*, 35 F.3d at 1399 ("Allocation of the burden of proof has long been governed by the rule that the party bringing the lawsuit must persuade the court to grant the requested relief.").

*Schaffer*<sup>139</sup> assigning the administrative burden of proof to the school system is significant. The Fourth Circuit's opinion reversing *Weast* and the Supreme Court's opinion affirming the Fourth Circuit will be discussed in the next two Sections, but the district court's opinion is worth summarizing here as it presents an unusually detailed analysis concerning the burden of proof at the administrative level. Also, *Weast* presents an excellent vehicle for examining burden of proof in IDEA due process hearings, as the administrative law judge (the "ALJ") in the case changed rulings depending upon where the burden of proof stood.<sup>140</sup>

In *Weast*, the school system determined that Brian Schaffer, a seventh grade student diagnosed with attention deficit hyperactivity disorder, was eligible for special education services pursuant to the IDEA.<sup>141</sup> Brian's parents opposed the initial IEP proposed by the school system and requested a due process hearing.<sup>142</sup> In the meantime, Brian enrolled in a private school specializing in learning-disabled students.<sup>143</sup> At the due process hearing, Brian's parents requested relief including reimbursement for the private school placement.<sup>144</sup> In the initial hearing, the ALJ assigned the burden of proof to Brian's parents.<sup>145</sup> Brian's parents and the school system presented conflicting expert testimony by doctors and disability experts.<sup>146</sup> The ALJ, in arriving at a decision for the school system, stressed that in a case in which both sides present experts with excellent credentials, positioning of the burden of proof is critical.<sup>147</sup>

Brian's parents appealed to the District Court of Maryland, which reallocated the burden of proof to the school system and remanded the case to the ALJ.<sup>148</sup> The ALJ did not consider new evidence on remand, but only revisited the existing record.<sup>149</sup> Determining that the evidence "rests in equipoise" but that the school

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139. 240 F. Supp. 2d 396 (D. Md. 2002), *rev'd*, 377 F.3d, 449 (4th Cir. 2004), *aff'd*, 126 S. Ct. 528 (2005).

140. *Id.* at 399–401; *see also id.* at 397 n.2 (stating that the ALJ found the burden of proof "critical" to his decision).

141. *Id.* at 398.

142. *Id.*

143. *Id.*

144. *Id.* at 399.

145. *Id.* at 398.

146. *Id.* at 399.

147. *Id.* ("Because each side's experts have diverging views on the question of what the Child's needs were and which placement would afford the requisite educational benefit for the Child, an assignment of the burden of proof in this case becomes critical.").

148. *Id.* at 398 n.2.

149. *Id.* at 399.

system now had the burden of proof, the ALJ held for the parents in finding the proposed IEP inadequate.<sup>150</sup> However, the ALJ found that the evidence suggested that Brian's parents had no intention of placing Brian in the public school system and they used the proceeding mainly as a device to receive funding for their private school decision.<sup>151</sup> Accordingly, the ALJ limited the award to half of the private school yearly tuition.<sup>152</sup>

The school system and Brian's parents both appealed the second ALJ ruling to the District Court of Maryland; the school system appealed the overall result and the parents appealed the damage award.<sup>153</sup> The court reiterated its earlier analysis concerning the proper placement of the burden of proof on the school system.<sup>154</sup> In doing so, the court first distinguished the initial IEP challenge from the established IEP challenge.<sup>155</sup> The court stated that when a party seeks to change an established IEP, the burden should be on the party seeking the change.<sup>156</sup> This case, however, concerned a challenge to an initial IEP, where "the only sense in which 'change' is involved is that the parents wish to change what the school authorities have unilaterally proposed."<sup>157</sup> In addition, the opinion quoted extensively from a New Jersey case, *Lascari v. Board of Education*.<sup>158</sup> *Lascari* equated the placement of the burden of proof with the IDEA's procedural safeguards and reasoned that placing the burden on the school system fit with the statutory scheme.<sup>159</sup> *Lascari* provided some of the foundation for the Third Circuit's *Oberti* decision concerning burden of proof at the judicial level, in that *Lascari* reasoned that the school system had better access to

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150. *Id.* at 401.

151. *Id.*

152. *Id.*

153. *Id.* at 398.

154. *Id.* at 402-06.

155. *Id.* at 402. The court described a challenge to an initial IEP as involving an "IEP, proposed by the school authorities the first time it is sought for a child, one which the parents disagree with and as to which they seek a [sic] administrative due process hearing." *Id.* In contrast, a challenge to an established IEP involves an IEP "which at one time was agreed to by everyone, but which either the parents or the school district seeks to change against the wishes of the other, whereupon the matter goes to a due process hearing." *Id.*

156. *Id.* at 406.

157. *Id.* at 405.

158. 560 A.2d 1180 (N.J. 1989).

159. *Id.* at 1188 ("Like those procedural safeguards, the allocation of the burden of proof protects the rights of handicapped children to an appropriate education.").

educational and legal expertise and could more easily bear the burden.<sup>160</sup>

*B. Courts that Assigned the Burden to the Challenging Party*

The courts that assigned the burden to the party challenging an IEP relied heavily on statutory language (or the absence thereof) and traditional statutory construction rules rather than public policy or implied legislative intent arguments.<sup>161</sup> Although these cases tend to be especially unclear as to whether their burden of proof holdings apply to the administrative level, they are often cited for this proposition.<sup>162</sup> Most notable among these cases is the recent Fourth Circuit decision, which made clear its holding applies to the administrative level.<sup>163</sup> In any event, their analysis lends itself just as readily to the administrative due process hearing as to the judicial review level.

A primary example of the reasoning utilized by the cases placing the burden on the challenging party is *Cordrey v. Euckert*<sup>164</sup> from the Sixth Circuit. The parents in *Cordrey* argued that, following the *Lascari* reasoning, the IDEA's extensive procedural requirements support placing the burden of proof on the school district.<sup>165</sup> The court explicitly rejected this approach, stating that "[a]bsent more definitive authorization or compelling justification, we decline to go beyond strict review to reverse the traditional burden of proof."<sup>166</sup> Therefore, unlike the courts that placed the burden on the school system, the Sixth Circuit refused to allow a policy argument to shift the traditional placement of the burden.

The Fifth Circuit also placed the burden on the challenging party.<sup>167</sup> The Fifth Circuit's decision in *Alamo Heights Independent School District v. State Board of Education*<sup>168</sup> reasoned that deference to the intricate processes that create an IEP mandate that the party attacking its terms should bear the burden of proof.<sup>169</sup> The Tenth

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160. *Id.*

161. See Wenkart, *supra* note 115, at 817.

162. See *id.* at 821–22; Recent Case, Weast v. Schaffer, 377 F.3d 449 (4th Cir. 2004), 118 HARV. L. REV. 1078, 1078 n.4 (2005).

163. Weast v. Schaffer, 377 F.3d 449, 452 (4th Cir. 2004), *aff'd*, 126 S. Ct. 528 (2005).

164. 917 F.2d 1460 (6th Cir. 1990).

165. *Id.* at 1466.

166. *Id.*

167. See *Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d 1153, 1158 (5th Cir. 1986).

168. *Id.*

169. *Id.*

Circuit followed the same reasoning, placing the burden on the challenging party.<sup>170</sup>

The Fourth Circuit in *Weast* took a more in-depth analysis of the IDEA due process hearing burden of proof than any circuit court of appeals to date when it reviewed the District Court of Maryland's decision in *Weast v. Schaffer*.<sup>171</sup> After briefly discussing the existing circuit split and concluding that the cases putting the burden on the school system—including the District Court of Maryland's decision—did not provide sufficiently persuasive analysis,<sup>172</sup> the court refuted various arguments for placing the burden on the school system.<sup>173</sup>

The court first reasoned that the school system's statutory obligation to provide a free appropriate public education provided insufficient justification for saddling it with the burden of proof.<sup>174</sup> The court similarly rejected the argument that because school systems often have greater access to legal and educational expertise, they should bear the burden of proof.<sup>175</sup> The court found Congress's creation of multiple procedural safeguards for parents as an adequate attempt to "level the playing field."<sup>176</sup> The court reasoned that since Congress did not explicitly place the burden on the school system as an element of those safeguards, Congress must have meant that the traditional rule of placing the burden on the challenging party should apply.<sup>177</sup>

The parents in *Weast* argued that since the cases that helped inspire the IDEA, *PARC*<sup>178</sup> and *Mills*,<sup>179</sup> placed the burden of proof on the school system, Congress must have intended the same for the IDEA.<sup>180</sup> The Fourth Circuit rejected this argument on the grounds

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170. See *Johnson v. Indep. Sch. Dist. No. 4*, 921 F.2d 1022, 1026 (10th Cir. 1990) ("The parties should note that the burden of proof in these matters rests with the party attacking the child's individual education plan." (citing *Alamo Heights*, 790 F.2d at 1153)).

171. *Weast v. Schaffer*, 377 F.3d 449 (4th Cir. 2004), *aff'd*, 126 S. Ct. 528 (2005). For the procedural history and disposition of this case, see *supra* notes 139–60 and accompanying text. For another overview of the majority and dissenting opinions in *Weast*, see Recent Case, *supra* note 162, at 1080–82.

172. *Weast*, 377 F.3d at 452–53.

173. *Id.* at 453–56.

174. *Id.* at 453.

175. *Id.* ("We do not automatically assign the burden of proof to the side with the bigger guns.").

176. *Id.*

177. *Id.* ("Congress has taken steps, short of allocating the burden of proof to school systems, that level the playing field.").

178. See *supra* notes 17–21 and accompanying text.

179. See *supra* notes 22–27 and accompanying text.

180. *Weast*, 377 F.3d at 454–55.

that if Congress meant to include such a shift from the traditional rule, it would have done so explicitly.<sup>181</sup>

Finally, the court noted that to place the burden of proof on the school system would mean that parents could overturn an established IEP even if no evidence were presented.<sup>182</sup> According to the court, this result would mean that “every challenged IEP is presumptively inadequate.”<sup>183</sup> The court reasoned that such a construction would go against the deference to local education expertise the Supreme Court found inherent in the IDEA in *Rowley*.<sup>184</sup>

### C. The Supreme Court Resolves the Circuit Split

The Supreme Court affirmed the Fourth Circuit’s *Weast* decision in *Schaffer v. Weast*,<sup>185</sup> holding that the burden is on the challenging party.<sup>186</sup> The majority opinion by Justice O’Connor quickly dismissed the argument that the influence of the *Mills* and *PARC* decisions on the IDEA drafters meant that Congress also intended to incorporate their burden of proof scheme, stating that Congress could have done so explicitly.<sup>187</sup> In addressing the argument that the burden should fall on the school system because parents should not have to prove facts that a school system would inherently possess, the Court cited the IDEA’s other procedural requirements such as the right to review records and the right to an independent evaluation as evidence that the IDEA contains other means to establish an equal evidentiary playing field.<sup>188</sup> The Court concluded that the burden should lie “as it typically does, on the party seeking relief.”<sup>189</sup>

Justice Ginsburg wrote a dissent, arguing that practical advantages school systems have with regard to access to information and educational expertise counsel for placing the burden on them.<sup>190</sup> Justice Ginsburg cited the *Oberti* and *Lascari* decisions in support of her argument that policy considerations point toward a departure from the traditional placement of the burden.<sup>191</sup> Justice Ginsburg

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181. *Id.* at 455 (“For the Act here, it borrowed some ideas and specifically ignored others. We cannot conclude from this that Congress intended to adopt the ideas that it failed to write into the text of the statute.”).

182. *Id.*

183. *Id.*

184. *Id.* at 455–56.

185. 126 S. Ct. 528 (2005).

186. *Id.* at 531.

187. *Id.* at 535.

188. *Id.* at 536.

189. *Id.* at 531.

190. *Id.* at 538–39 (Ginsburg, J., dissenting).

191. *Id.* at 538.

concluded that a school system in a due process hearing should be required "to explain persuasively why its proposed IEP satisfies IDEA's standards."<sup>192</sup>

#### IV. THE APPROPRIATE POSITIONING OF THE BURDEN OF PROOF

As evidenced by the number of conflicting appellate opinions,<sup>193</sup> there are a variety of arguments to be made regarding the appropriate place for the burden of proof in IDEA administrative due process hearings. When viewed as a whole, commentators frame these arguments around a certain set of issues, with the debate over exactly which way each issue cuts. Analysis of each issue in detail should focus on practical application when appropriate. The discussion in this Part concerns an ongoing challenge to a complete, implemented IEP. The issue of a dispute arising with an initial IEP, not yet agreed to by the parents, and how this should be handled differently is discussed in Part V.

As a prerequisite to this debate, it must first be reinforced that the statute does not discuss the burden of proof. Therefore, a statutory construction canon such as the plain meaning rule<sup>194</sup> cannot resolve the issue. The case for placing the burden on the parents rests primarily on the rule that the burden of proof normally goes to the party seeking relief.<sup>195</sup> There can be variations on this rule however, since as the Fourth Circuit noted "other factors such as policy considerations, convenience, and fairness may allow for a different allocation of the burden of proof."<sup>196</sup> The discussion that follows analyzes "other factors" such as the IDEA's precursors and history, the comparison of the IDEA to other federal remedial statutes, the IDEA's procedural safeguards, and the recent 2004 IDEA Reauthorization to determine whether there should be an exception to the traditional burden of proof placement.

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192. *Id.* at 540.

193. *See supra* Part III.

194. *See Caminetti v. United States*, 242 U.S. 470, 485 (1917) ("Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion.").

195. *Weast v. Schaffer*, 377 F.3d 449, 452 (4th Cir. 2004), *aff'd*, 126 S.Ct. 528 (2005) ("When a statute is silent, the burden of proof is normally allocated to the party initiating the proceeding and seeking relief." (citation omitted)).

196. *Id.* (citation omitted).

A. *IDEA Precursors, IDEA Reauthorization, and Burden of Proof*

This Section considers whether congressional concern for the rights of disabled children, evident in the statute's precursors and legislative history, translates into intent to place the burden of proof on the school system. As noted above in the discussions of the Fourth Circuit's *Weast* decision,<sup>197</sup> the Supreme Court's *Schaffer* decision,<sup>198</sup> and the IDEA's history,<sup>199</sup> Congress was especially motivated by *PARC* and *Mills* to pass the statute that would become the IDEA. The statute, therefore, borrows a number of procedural safeguards suggested in these cases.<sup>200</sup> While *Mills* affirmatively placed the burden of proof on the school system,<sup>201</sup> the result in *PARC* was not so clear. The *PARC* court placed the initial burden of production<sup>202</sup> on the school system to present the required report recommending a change in educational status, but then the court shifted the burden of production to the parents to introduce evidence supporting their contention regarding such change.<sup>203</sup> The parents could call any school official with evidence on the proposed action as a witness as well as present expert testimony of their own.<sup>204</sup> The required report mentioned by the Pennsylvania court bears great similarity to the notice requirements under the IDEA,<sup>205</sup> so in that sense, school

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197. See *supra* notes 180–81 and accompanying text.

198. See *supra* note 187 and accompanying text.

199. See *supra* note 29 and accompanying text.

200. For example, the parents and school system in *PARC* agreed to a stipulation that included the following provisions: notice to the parents of a proposed change in educational status, the due process hearing itself, the right of access for the parents to the school system's records, and the right of the parents to present evidence. *Penn. Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279, 303–05 (E.D. Pa. 1972). The order in *Mills* included the following provisions: notice, hearing, the right to records, and the right to present evidence. *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 880–82 (D.D.C. 1972).

201. See *Mills*, 348 F. Supp. at 882 (“[The school system] shall bear the burden of proof as to all facts and as to the appropriateness of any disposition and of the alternative educational opportunity to be provided during any suspension.”).

202. The burden of production refers to which party must come forward with evidence, which is a different concept than the burden of persuasion. See *supra* note 12.

203. See *PARC*, 343 F. Supp. at 305 (“Introduction by the school district or intermediate unit of the official report recommending a change . . . shall discharge its burden of going forward with the evidence, thereby requiring the parent to introduce evidence . . . in support of his contention.”).

204. *Id.*

205. Compare *PARC*, 343 F. Supp. at 304 (“The notice shall describe the proposed action in detail, including specification of the statute or regulation under which such action is proposed and a clear and full statement of the reasons therefor, including specification of any tests or reports upon which such action is proposed.”), with 20 U.S.C.A. § 1415(c)(1)(B) (West Supp. 2005) (requiring in the due process notice “an explanation of why the agency proposes or refuses to take the action and a description of each evaluation



districts do have an initial burden of production, even under the Supreme Court's recent decision. Indeed, to the extent that the modern IEP is a much more thorough document than the report required by the court in *PARC*,<sup>206</sup> the IDEA requires the school system to meet a burden exceeding that mandated by *PARC* before a party may bring a due process challenge.

Thus, the evidence from the decisions foreshadowing the IDEA is mixed. However, when Congress reauthorized the IDEA in December 2004, months after the Fourth Circuit's decision and years after the other major decisions in the circuit split, it did modify the due process section of the statute,<sup>207</sup> but did not touch the burden of proof. Legislative silence does not necessarily mean acceptance of a judicial interpretation of a statute,<sup>208</sup> but a valid argument exists in this instance in particular that Congress had an opportunity to conclusively rectify this circuit split and did not take it. A large number of interest groups have a stake in the IDEA, and between the special education lobby<sup>209</sup> and the school administrators lobby,<sup>210</sup> plenty of evidence exists that Congress recognized this issue when reformulating the IDEA. The parent-oriented IDEA reauthorization lobbying efforts primarily concerned themselves with disciplinary

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procedure, assessment, record, or report the agency used as a basis for the proposed or refused action").

206. See *supra* notes 64–69 and accompanying text; see also IEP GUIDE, *supra* note 65 (sample IEP form).

207. See *supra* notes 59–62 and accompanying text.

208. See *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) (stating that generally, arguments based on congressional inaction "deserve little weight in the interpretative process"); see also *Johnson v. Transp. Agency*, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting) (noting that it is "impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice").

209. See, e.g., League of Special Education Voters, <http://www.spedvoters2.org> (last visited Feb. 22, 2006) (detailing the views of parent-oriented lobbying group organized to influence the IDEA); National Center for Learning Disabilities, <http://www.ld.org/advocacy/IDEAwatch.cfm> (last visited Feb. 22, 2006) (listing parent-oriented advocacy IDEA advocacy links); Position Paper on the Reauthorization of the Individuals with Disabilities Education Act (IDEA) (2004), <http://p078.ezboard.com/fourchildrenleftbehindfrm28.showMessage?topicID=95.topic> [hereinafter Position Paper] (protesting certain provisions of the 2004 IDEA reauthorization, listing 195 ratifying organizations).

210. See, e.g., AASA Letters of Support Urging Final Passage of IDEA Reauthorization: House Letter (2004), <http://www.aasa.org/policy/content.cfm?ItemNumber=2004&snItemNumber=1984> [hereinafter AASA Letters] (listing eight changes in the IDEA reauthorization of which school administrators particularly approve); American Association of School Administrators, <http://www.aasa.org> (last visited Feb. 22, 2006) (organization representing public school administrators).

proceedings, IEP content requirements, and the new attorney's fees provisions.<sup>211</sup> In addition, the school district-oriented IDEA lobbying efforts appear similarly unconcerned with the burden of proof.<sup>212</sup> As the Fourth Circuit in *Weast* noted, "If 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."<sup>213</sup> Congress had ample opportunity and incentive to take such further remedial steps in the months directly following the *Weast* decision and chose not to act on this subject. Unlike most of the decisions in the circuit split, *Weast* dealt exclusively with the burden of proof. The immediacy and directness of the *Weast* decision, so close to the enactment of the 2004 reauthorization, suggests congressional acceptance of its result. However, the fact that more circuits continued to place the burden on the school system indicates otherwise. Since it is difficult to draw a conclusion concerning congressional intent on the burden of proof from the passage of the 2004 statute, we must look to other sources for principles to guide us toward the correct positioning of the burden.

#### B. IDEA and the Comparison to Other Remedial Statutes

The majority and dissenting opinions from the Fourth Circuit's *Weast* decision as well as academic commentary all debate the merits of comparing the IDEA to other federal remedial statutes, such as the Civil Rights Act of 1964, which have more settled burden of proof schemes.<sup>214</sup> For example, the familiar *McDonnell Douglas* burden-shifting scheme operates as follows: the plaintiff must first establish a *prima facie* case of racial discrimination.<sup>215</sup> If the plaintiff can do so,

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211. See Position Paper, *supra* note 209.

212. See AASA Letters, *supra* note 210. After noting that, "[t]he reauthorization also missed opportunities to clarify certain issues," the letter goes on to discuss Medicaid reimbursement. *Id.* The only part of the letter directly concerned with due process states that the reauthorization makes gains toward "[m]aking the complaint process much clearer for parents and school officials." *Id.*

213. *Weast v. Schaffer*, 377 F.3d 449, 456 (4th Cir. 2004), *aff'd*, 126 S. Ct. 528 (2005).

214. For the *Weast* majority view on this point, see *Weast*, 377 F.3d at 453. For the dissent, see *Weast*, 377 F.3d at 457-58 (Luttig, J., dissenting). See also Anne E. Johnson, Note, *Evening the Playing Field: Tailoring the Allocation of the Burden of Proof at IDEA Due Process Hearings To Balance Children's Rights and Schools' Needs*, 46 B.C. L. REV. 591, 610-11 (2005); Recent Case, *supra* note 162, at 1082-84.

215. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (stating that a *prima facie* case requires showing membership in a racial minority, qualification for a job for which the employer was seeking applicants, rejection despite qualification, and the employer's continued seeking of applicants with the plaintiff's qualifications).

the burden then shifts to the employer to put forth a legitimate nondiscriminatory reason for its alleged discriminatory action.<sup>216</sup> Finally, the plaintiff must show that the proffered legitimate reason is a pretext for discrimination.<sup>217</sup> The *Weast* majority stated that this comparison warrants a conclusion that the challenging party should have the burden of proof in remedial statutes.<sup>218</sup> In contrast, the dissent argued that there is a crucial difference between the IDEA and other remedial statutes in that the IDEA provides for an "affirmative obligation" on school systems and not simply a remedy.<sup>219</sup>

In essence, both of these positions are correct. Judge Luttig's dissent is correct that the IDEA imposes a greater affirmative, prophylactic obligation on IDEA defendants (school systems) than Title VII does on discrimination defendants (employers, for example). This obligation's consequence, however, should not be the shifting of the burden of proof to the schools but rather the IEP product itself. As the parent-oriented lobbying efforts stated, the IEP is the major practical focus of the IDEA.<sup>220</sup> The IEP is the subject of some very specific statutory language<sup>221</sup> requiring school districts to expend significant resources accommodating the needs of disabled students.<sup>222</sup> The correct analogy to *McDonnell Douglas* is that the preliminary cost incurred under the IDEA by the school systems in effect fulfills the second part of the burden-shifting framework: the defendant's required legitimate reason. This leaves the plaintiffs (parents) with the initial burden of presenting a *prima facie* case and rebuttal burden of proving that the defendant's proffered legitimate reason (IEP) is inadequate. If Congress wished to make Title VII resemble the modern IDEA, it would have to describe detailed procedures for how employers must work with individual employees

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216. *Id.*

217. *See id.* at 802–04.

218. *See Weast*, 377 F.3d at 453 ("Like the IDEA, these statutes are silent about burden of proof, yet we assign it to the plaintiff who seeks the statutory protection or benefit . . .").

219. *See id.* at 457–58 (Luttig, J., dissenting) ("Unlike the civil rights statutes referenced by the majority, the IDEA does not merely seek to *remedy* discrimination against disabled students, it imposes an *affirmative obligation* on the nation's school systems to provide disabled students with an enhanced level of attention and services.").

220. *See* Position Paper, *supra* note 209 ("[T]here is no justification . . . to weaken the Individualized Education Program (IEP), a parent's strongest tool for holding schools accountable for their child's learning to high standards.").

221. *See* 20 U.S.C.A. § 1414(d) (West Supp. 2005).

222. For example, if a parent disagrees with a disability evaluation performed by the school system, the parent has a right to an independent evaluation paid for by the school system. 34 C.F.R. § 300.502(b)(1) (2004).

to create plans assuring them of nondiscriminatory treatment and the procedures employers must follow when deviating from these plans. Instead, the current Title VII system allows employers to argue this assurance as the middle step of a burden-shifting scheme in litigation. In contrast, the IDEA places the burden on school systems to create the assurance before a dispute arises.

There is a more attractive comparison between the IDEA and the Americans with Disabilities Act ("ADA"), but it does not justify placing the burden of proof on school systems.<sup>223</sup> The ADA places an obligation on employers to take "affirmative steps . . . to accommodate the disabled."<sup>224</sup> This active accommodation requirement makes the ADA more similar to the IDEA than Title VII. The burden-shifting scheme under the ADA's reasonable accommodations provision requires first that the plaintiff make a *prima facie* case that he has a qualifying disability and was terminated for that reason.<sup>225</sup> The employer then has the burden of presenting evidence explaining the inability to accommodate the disability, and finally, the burden shifts back to the plaintiff to rebut this evidence.<sup>226</sup> Courts make clear, however, that with the ADA as in Title VII, "[t]he plaintiff at all times bears the ultimate burden of persuading the trier of fact that he has been the victim of illegal discrimination based on his disability."<sup>227</sup> The ADA also lacks a parallel to the IDEA's IEP, in that it does not require the pre-litigation preparation of a thorough document detailing the ways the parties will behave. The logic of an ADA burden-shifting scheme is attractive, and it is in fact consistent with that logic to put the burden on the parents as opposed to the school system in IDEA administrative due process hearings.

### C. *The IDEA's Procedural Safeguards and the Burden of Proof*

The IDEA provides extensive procedural safeguards for parents.<sup>228</sup> Both sides of the debate recognize these safeguards, and both sides recognize that school systems have a natural advantage in IDEA due process hearings because of easier access to witnesses,

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223. *Contra* Recent Case, *supra* note 162, at 1082–85 (arguing that the ADA comparison is appropriate and suggesting a shift of the burden of proof to the school district once the parents have made a *prima facie* case).

224. *Id.* at 1083.

225. See *White v. York Int'l Corp.*, 45 F.3d 357, 360–61 (10th Cir. 1995).

226. See *id.* Note the similarity to the *McDonnell Douglas* scheme above. See *id.* at 361 n.6 ("We developed an analysis . . . much like the *McDonnell Douglas* test applicable in Title VII discrimination cases . . . ." (citation omitted)).

227. *Id.* at 361 (citations omitted).

228. See *supra* notes 76–82 and accompanying text.

expertise, and resources.<sup>229</sup> The question then becomes whether the IDEA's procedural safeguards adequately "level the playing field" so as to lend support to the argument that the burden of proof should be on the challenger,<sup>230</sup> or whether the safeguards simply show Congress's awareness of the school systems' advantage. Under that theory, placing the burden on the school systems furthers the goal of providing needed help to parents.<sup>231</sup>

Regardless of how one analyzes the effectiveness of the IDEA safeguards, Congress did consider the natural advantages of school systems by enacting the safeguards, and has very recently reaffirmed their importance in the 2004 Reauthorization.<sup>232</sup> The Supreme Court noted in *Rowley* that the IDEA contains "elaborate and highly specific procedural safeguards."<sup>233</sup> Keeping in mind the cautions that should accompany interpreting legislative silence,<sup>234</sup> if Congress had wanted to add the safeguard of always placing the burden of proof on the school system in the due process hearing it would have done so.

Some may argue, however, that even if Congress enacted the procedural safeguards as an attempt to "level the playing field," they do not go far enough, necessitating a shift in the burden of proof.<sup>235</sup> To the contrary, the IDEA's procedural safeguards provide extensive protection so that such a shift is not required.<sup>236</sup> First, the notice required by the statute to be given to parents has a large number of statutory<sup>237</sup> and regulatory<sup>238</sup> content requirements. Second, the statute requires the person conducting the hearing be impartial (i.e.,

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229. See *Weast v. Schaffer*, 377 F.3d 449, 453 (4th Cir. 2004), *aff'd*, 126 S. Ct. 528 (2005).

230. See *Schaffer v. Weast*, 126 S. Ct. 528, 536–37 (2005) (noting the procedural safeguards the IDEA grants parents and stating that the "protections ensure that the school bears no unique informational advantage"); see also *Weast*, 377 F.3d at 456 ("[Congress] was keenly aware that school systems have professional expertise and that parents do not. It was for this very reason that Congress imposed statutory safeguards to assist parents in becoming substantively informed.").

231. *Weast*, 377 F.3d at 458 (Luttig, J., dissenting) ("[E]ven in the rosiest of scenarios, the provision of such remedial protections and services would not begin to impart to the average parent the level of expertise or knowledge that the school district possesses as a matter of course.").

232. See H.R. REP. NO. 108-77, at 112 (2003) ("The procedural safeguards in the Act have historically provided the foundation for ensuring access to a free appropriate public education for children with disabilities.").

233. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 205 (1982) (noting that "the importance Congress attached to these procedural safeguards cannot be gainsaid").

234. See *supra* note 208.

235. See Recent Case, *supra* note 162, at 1085.

236. See *OSBORNE & RUSSO*, *supra* note 42, at 167.

237. See 20 U.S.C.A. § 1415(c)(1) (West Supp. 2005).

238. See 34 C.F.R. § 300.504 (2004).

not an employee of a state educational agency or having a personal conflict of interest) and qualified (i.e., understands the statute and is able to conduct a legal hearing).<sup>239</sup> Third, the statute gives the complaining party the right to be accompanied by counsel.<sup>240</sup> Fourth, the statute grants “the right to present evidence and confront, cross-examine, and compel the attendance of witnesses.”<sup>241</sup> Finally, the statute requires the school system to allow the parents to examine all records related to the child.<sup>242</sup> These rights are an excellent balance against the school system’s superior position, as they assure the parents access to all the information the school system has on the child<sup>243</sup> as well as a trial-like process in front of a neutral administrative judge. While critics may argue that “the limited discovery available in many IDEA due process hearings”<sup>244</sup> stems from difficulty parents may have in securing the appearance of witnesses, this argument is without merit as a matter of statutory construction. Any such difficulty would spring from a state’s lack of compliance with regulations and not from the statutory scheme itself.<sup>245</sup>

Furthermore, the IDEA’s procedural protections are crucial in understanding the IDEA’s proper place as a remedial statute. As discussed above, the IDEA is most fairly compared with other federal statutes, such as the ADA, when the school system is seen as preemptively fulfilling the defendant’s position in the burden-shifting scheme during the IEP creation process.<sup>246</sup> Therefore, in expending the time and resources necessary to create a procedurally adequate IEP, the school system discharges its burden of producing a legitimate

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239. U.S.C.A. § 1415(f)(3)(A).

240. *Id.* § 1415(h)(1).

241. *Id.* § 1415(h)(2).

242. *Id.* § 1415(b)(1).

243. See GUERNSEY & KLARE, *supra* note 127, at 165 (“IDEA’s extensive procedural protections, including the right to have access to records, however, provide considerable means for the parents to acquire information.”).

244. Recent Case, *supra* note 162, at 1085 (citing Sharon C. Streett, *The Individuals with Disabilities Education Act*, 19 U. ARK. LITTLE ROCK L. REV. 35, 41 (1996)).

245. See Streett, *supra* note 244, at 41 n.57 (stating that the IDEA and regulations state that both parties have the right to compel witnesses to attend due process hearings, but that Arkansas is not in compliance); see also Goldberg & Kuriloff, *supra* note 10, at 493 (noting that the IDEA due process hearing meets all of Judge Friendly’s ten elements for a fair hearing) (citing Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1279–93 (1975)). The argument that formal due process hearings are not appropriate in an education context at all, see *supra* note 84 and accompanying text, is separate from the point here, namely that to the extent we currently have a due process hearing model, the IDEA’s provisions are very fair to the parents.

246. See *supra* Part IV.B.

rationale for its actions.<sup>247</sup> The IDEA's procedural safeguards play a crucial role in legitimizing the school system's efforts in this regard, ensuring that the school system will put in the necessary work toward fulfilling its substantive obligations.<sup>248</sup> Therefore, it is appropriate to put the administrative burden of proof on parents challenging the byproduct of this effort. In his book on IEP team meetings, James Hollis argues that complaints and due process hearings related to IEPs are so prevalent, IEP team meetings should be structured in anticipation of them.<sup>249</sup> With so much of the IDEA focused on procedure, it seems only fair that the party attacking the product of the procedure should bear the burden of proof in a due process hearing.

Some argue that the burden of proof should be split, whereby the school system would bear the burden on procedural issues and the challenging party would bear the burden on substantive issues.<sup>250</sup> This argument is especially attractive when considering the importance of the IDEA's procedural protections in legitimizing the IEP. However, it faces several practical hurdles. First, the act of dividing substance and procedure is a notoriously difficult task.<sup>251</sup> Introducing this division in IDEA due process hearings would add a layer of complexity to an already intricate proceeding, to the advantage of neither the child nor the parents. Assuming, however, that this division is clear, putting the procedural burden on the school system is not the kind of help parents truly require. Courts and commentators usually refer to the uneven playing field between parents and schools in substantive terms.<sup>252</sup> School systems do not

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247. In response to the argument that the burden should be on the school system, the Supreme Court has implicitly recognized the deference a court should accord an established IEP. See *Schaffer v. Weast*, 126 S. Ct. 528, 536 (2005) ("Petitioners in effect ask this Court to assume that every IEP is invalid until the school district demonstrates that it is not. The Act does not support this conclusion.").

248. See HOLLIS, *supra* note 49, at 3 ("[I]f the IEP team uses correct procedures, then more often than not the IEP team will make the best decision in the interests of the child.").

249. *Id.* ("[I]n today's litigious world of special education, teachers, administrators, assessment personnel, and parents could benefit from approaching IEP team meetings . . . with one eye focused on making a record for appeal, in order to get the most from IDEA's procedural safeguards.").

250. See Johnson, *supra* note 214, at 612-23.

251. See Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 193 (2004) (stating that, in the context of federal law, "[m]ore than sixty years of *Erie* jurisprudence has yet to result in any clear consensus on the distinction between substance and procedure").

252. See *Weast v. Schaffer*, 377 F.3d 449, 459 (4th Cir. 2004) (Luttig, J., dissenting) ("[T]he school district will have better information about the resources available to it, as

have a similar advantage concerning potentially contested procedural matters, such as notice content and timelines, IEP team meeting participation, the opportunity for a resolution session, and related procedural issues. In the burden-splitting proposal, school systems would have the burden on such issues, which the parents could contest relatively easily, while the parents would still have the burden on issues where the school system has a substantive advantage in educational expertise. Finally, although such a proposal might help ensure school systems follow the IDEA procedures to the letter, one must consider whether the potential gain is worth the cost to the school system, especially given the questionable practical effect of the burden splitting in terms of help for parents.<sup>253</sup> School systems bear a large procedural burden in creating an IEP, and the party attacking its terms should be prepared to overcome a presumption of validity that these procedures bestow.

*D. The Impact of the 2004 IDEA Reauthorization on the Burden of Proof*

The 2004 IDEA Reauthorization made several changes to the existing IDEA but focused on bringing more possibilities for alternative dispute resolution to special education law.<sup>254</sup> The new statute requires states to develop procedures to allow for mediation of disputes at any time, even before the filing of a complaint.<sup>255</sup> The statute also requires a resolution session between parents, the school system, and relevant IEP team members with the possibility of a binding settlement if the parties reach an agreement.<sup>256</sup> Now, even before the formal hearing process begins, parents have avenues open to them to communicate with their school district and achieve a mutually favorable result. To the extent that the argument for placing the burden on the school district is based on the perception of an uneven playing field created by the technical, legalistic hearing

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well as the benefit of its experience with other disabled children.”), *aff’d*, 126 S. Ct. 528 (2005); *Lascari v. Bd. of Educ.*, 560 A.2d 1180, 1188 (N.J. 1989) (arguing that since the school system has greater access to the information, it should bear the burden of proof); Recent Case, *supra* note 162, at 1085 (citing “institutional knowledge and resources” as reasons for shifting the burden to school districts).

253. See Johnson, *supra* note 214, at 621 (“[S]chool districts already have a strong financial incentive to meet their statutory obligations, both procedural and substantive.”).

254. See H.R. REP. NO. 108-77, at 85–86 (2003) (“The bill encourages the use of mediation and voluntary binding arbitration to speed the resolution time so that children with disabilities obtain the needed services and education in a timely manner.”).

255. 20 U.S.C.A. § 1415(e)(1) (West Supp. 2005).

256. *Id.* § 1415(f)(1)(B).



process,<sup>257</sup> these changes undercut that argument by providing parents with multiple informal dispute resolution possibilities before any formal hearing. The changes, therefore, provide further support for the argument that when an IEP is challenged, the burden should be on the attacking party.

There is significant debate about the appropriateness of mediation in the IDEA context.<sup>258</sup> Supporters and critics agree, however, that mediation, at least in certain situations, can lead to positive outcomes that circumvent the delay, expense, and adversarial nature of a due process proceeding.<sup>259</sup> It remains to be seen how the new dispute resolution section in the IDEA Reauthorization will impact the process, as it only became effective in July 2005.<sup>260</sup> At a minimum, the new procedure provides a forum for parents to advocate for their child without attorneys present, as the statute only allows the school system to have an attorney if the parents are accompanied by one as well.<sup>261</sup> Since one of the main critiques of the IDEA mediation procedure is a perceived power imbalance between parents and school systems,<sup>262</sup> this provision helps level the field. However, the crucial component of effective alternate dispute resolution in special education—the ability of the parents’ advocacy—would seem to be even more pivotal in a resolution session where there are no formal hearing rules concerning witnesses, evidence, or other trial-like matters.<sup>263</sup>

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257. See Johnson, *supra* note 214, at 602; see also *supra* notes 159–60 and accompanying text.

258. See generally Steven Marchese, *Putting Square Pegs into Round Holes: Mediation and the Rights of Children with Disabilities Under the IDEA*, 53 RUTGERS L. REV. 333 (2001) (analyzing mediation in special education and concluding that “parents and school districts must carefully evaluate whether mediation is appropriate in a given context”).

259. See HOLLIS, *supra* note 49, at 3–4 (“Those who have litigated special education due process hearings, prepared for hearing, or struggled through hearing as a witness know this: mediation or settlement, based on a mutually agreed-upon resolution, usually produces a more satisfactory outcome for the child than going to trial.”); Marchese, *supra* note 258, at 365 (“[I]f a school district sincerely values parental input, mediation may be an additional opportunity for the district to explain its position and obtain a compromise that benefits all parties.”).

260. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, § 302(a)(1), 118 Stat. 2647, 2803.

261. 20 U.S.C.A. § 1415(f)(1)(B)(i)(III).

262. See Marchese, *supra* note 258, at 362 (“Particularly where parents lack the ability to advocate effectively on their own behalf, the presence of an outside advocate, in particular, a lawyer, could potentially mitigate any possible power imbalances.”).

263. *Id.* at 365 (noting that mediation is most attractive, “where a parent is capable of advocating effectively on behalf of her child, understands the issues involved, and has a realistic sense of what the best possible resolution could be in litigation”).

Regardless of whether these alternate procedures are effective on their own in producing satisfactory outcomes, their presence lends support to a presumption of the IEP's validity, as well as to the argument for placing the burden of proof on the challenging party. With more procedures now available for parents to challenge an IEP before a due process hearing begins, an IEP should be entitled to an even greater presumption of validity when such a hearing commences.<sup>264</sup> Now, both unsuccessful mediation and an informal resolution session concerning the IEP may precede a formal hearing. It thus seems counterintuitive to have an IEP emerge unscathed through two processes and then be treated as presumptively invalid in a due process hearing by placing the burden on the school district to rebut an attack against it. The effectiveness of these procedures in any particular case will depend on the circumstances of that case, but Congress attempted to provide parents with several opportunities to discuss an IEP on neutral terms with the school system. Thus, when an IEP survives these preliminary challenges and the burdensome full due process hearing is about to begin, the IEP deserves a presumption of validity that the attacking party must overcome.

#### V. THE BURDEN OF PROOF AND AN INITIAL IEP

The above discussion concludes that the burden of proof in an IDEA due process hearing involving a complete, established IEP should be placed on the challenging parents. The analysis changes when the IEP rests in the proposal stage with its provisions lacking parental approval. In that case, the factors discussed above are either not relevant or point toward placing the burden on the school system.

First, as noted above, the legislative history of the IDEA does not forcefully speak to putting the burden on one particular party, and Congress chose not to address the issue in the 2004 Reauthorization.<sup>265</sup> This is just as unhelpful in the situation with a challenge to an initial IEP as with a challenge to an established one. However, the logical comparison of the IDEA to other federal remedial statutes is more informative. The IDEA is best viewed as similar to other remedial federal statutes, such as Title VII or the ADA, as utilizing the standard *McDonnell Douglas* burden-shifting framework, but with the school system having carried its burden with the creation of the IEP itself.<sup>266</sup> Prior to the complete implementation

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264. See *supra* note 248.

265. See *supra* Part IV.A.

266. See *supra* Part IV.B.

of an IEP, the school system retains the initial duties that are central to the operation of the IDEA. The IDEA requires informed consent from parents before school systems can begin providing special education services to their children.<sup>267</sup> Before this consent, the IEP cannot be implemented and the school system's duty to work with the parents remains. In such a situation, the school system's burden is unmet, and the framework suggested by statutes such as the ADA should control where the parents make an initial showing that their child is disabled (i.e., qualified under the IDEA). The burden then shifts to the school system to justify its proposed IEP.<sup>268</sup>

Shifting the burden to the school system when parents challenge an initial IEP also ensures the proper role of the IDEA's procedural safeguards. As noted above, the IDEA's extensive safeguards and procedures aim to ensure a correct substantive educational outcome.<sup>269</sup> By definition, these safeguards have not yet produced a satisfactory outcome in the case of an initial IEP. Parental consent to an IEP means that the parties agreed at one time that the school system discharged its duty in following its procedures to create, in partnership with the parents, a plan for the education of the disabled child. Lacking this initial consent, the school system should not be entitled to the assumption that it followed adequate procedures and discharged this duty. The very fact that parents challenge an initial IEP evinces a problem somewhere in the attempt to create the IEP. In contrast, implicit in an established IEP is that the IDEA's procedures worked to produce a plan that both the school system and the parents agreed upon. In essence, a school system can point toward an established IEP and say, "We worked with the parents and followed the rules, the rules are the heart of the statute,"<sup>270</sup> therefore we must be accorded deference." The school system cannot make this assertion when the parents did not consent to anything. Therefore, the deference owed to the procedures when parents challenge an established IEP should be minimal when the dispute surrounds an initial, unapproved IEP.

The new dispute resolution procedures in the 2004 Reauthorization also favor shifting the burden of proof to the school system when an initial IEP is challenged. The availability of these new procedures aids in ensuring that an established IEP is worthy of

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267. 20 U.S.C.A. § 1414(a)(1)(D)(i)(II), (ii)(II) (West Supp. 2005).

268. For a description of how such a scheme could work, see Recent Case, *supra* note 162, at 1084.

269. See *supra* notes 49–50 and accompanying text.

270. See *supra* notes 47–51 and accompanying text.

deference, but when an IEP is yet to be agreed upon by the parents, this is not a relevant consideration. The legislative history of the 2004 Reauthorization makes clear that the new procedural devices are not meant to supplant traditional due process hearings in any way.<sup>271</sup> When a parent disagrees with the local school system about the direction of an initial IEP, the revised statute, while giving more options for dispute resolution, does not diminish the possibility of a due process challenge or make it appropriate for the burden to be on the parents.

While the reasoning and logic pertaining to a due process challenge of an established IEP point toward placing the burden on the challenging parents, the same reasoning and logic point in the opposite direction when an initial IEP is challenged. This is the direction the district court took in the *Weast* case.<sup>272</sup> In contrast, the Supreme Court's holding placing the burden on the parents does not distinguish between challenging an initial or established IEP.<sup>273</sup> Placing the burden on the school system after the parents make a *prima facie* showing of their child's qualifying disability is the correct outcome for a challenge to an initial IEP. Otherwise, the burden is on the parents to prevent a school system's unilateral imposition of its concept of special education services. Such an outcome conflicts with the basic premise that the IDEA should encourage heavy collaboration between parents and school systems to determine what is best for educating disabled children.

### CONCLUSION

The IDEA mandates a "free appropriate public education" for all children with disabilities.<sup>274</sup> The statute involves extensive procedures, both in the formation of an IEP and in providing parents of disabled children ways to advocate on their behalf. The administrative due process hearing is the last resort for parents challenging an IEP. The statute is silent on the burden of proof in such a hearing, and a circuit split developed regarding its proper placement. The comparison with other federal remedial statutes, the

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271. See H.R. REP. NO. 108-77, at 113 (2003) ("[A] choice to mediate does not foreclose any procedural avenues . . ."); *id.* at 114 ("Importantly, this [voluntary binding arbitration] system is truly voluntary for both the parent and the local education agency to choose . . . . The resolution session is not intended to delay the ability of a parent to access a due process hearing.").

272. See *supra* notes 155-57 and accompanying text.

273. See *Schaffer v. Weast*, 126 S. Ct. 528, 537 (2005).

274. 20 U.S.C.A. § 1400(d)(1)(A) (West Supp. 2005).

IDEA's procedural safeguards, and the recent 2004 amendments to the statute all point toward placing the burden on parents challenging an IEP, at least when the IEP has previously been established and put into operation. When an initial IEP is being challenged, these same factors lead to the conclusion that after an initial qualification showing by the parents, the burden should be on the school system. Congress can facilitate this with an amendment to the IDEA, but this is unlikely to occur in the near future since Congress has only very recently amended and reauthorized the statute. The Supreme Court's decision in *Schaffer v. Weast* may provide impetus for Congress to act, but until it does, the burden of proof in administrative due process hearings will be governed by the Court's most important special education case since *Rowley*.

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