ALLOCATION OF THE BURDEN OF PROOF IN INDIVIDUALS WITH DISABILITIES EDUCATION ACT DUE PROCESS CHALLENGES

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In disputes between parents and school officials, attempts by parents to seek redress are often, and understandably, difficult. Nowhere, perhaps, is this as true as during disagreements regarding school districts' treatment of children with disabilities. Such quarrels are usually heavily laden with emotion, beset by confusion, and hindered by limited resources. As we discuss below, parents benefit from a complex legal structure that Congress has put in place to ensure their right to participate in school district evaluations of their children, and to contribute to the development of appropriate educational plans. The law expressly charges school districts with involving parents in the creation of educational plans that result in a free appropriate public education for their special needs children.

What happens, however, when any given set of parents and their school district disagree as to whether the district's proposed educational plan actually provides their child with "a free appropriate public education?"[1] When all else fails, the parents mount a challenge to the district's educational plan. The parents are outsiders to the special education process; they are often fearful and frequently lacking in information and resources. The school district clearly has the "bigger guns." Unfortunately, when the parents arrive in some courts, a rude awakening confronts them: although the school district is charged with creating a satisfactory educational plan, it may not even be asked to explain how the plan it actually created is appropriate. Rather, the *parents* might well have to convince the judge that the particular educational plan—the very subject of the *school district's* experience and expertise—is unsatisfactory. If the parents cannot meet that

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1. 20 U.S.C. § 1400(d)(1)(A) (2000); *see* James Schwellenbach, Comment, *Mixed Messages: An Analysis of the Conflicting Standards Used by the United States Circuit Courts of Appeals When Awarding Compensatory Education for a Violation of the Individuals With Disabilities Education Act*, 53 ME. L. REV. 245, 246 (2001) ("It was inevitable that parents would disagree with their local school district, or the state educational agency, as to whether their child was being provided the kind of education that the law requires.").

burden, they find themselves wondering how, first, a statute intended to protect their rights could order the school district to perform a critical, necessary duty, but then, later, a court fails to demand the district demonstrate performance of that very duty. They ask why, under a due-process-challenge system specifically designed to protect *them*, the *school district* scores the default victory.

This scenario exists today in some courts. In an unfortunate David-and-Goliath skew, several Courts of Appeals currently allocate the burden of proof in Individuals With Disabilities Education Act ("IDEA") due process challenges to plaintiff-parents, granting school districts a free pass on their educational plans if the parents fail to demonstrate affirmatively the inadequacy of those plans. Several other courts believe the burden is more properly borne by the school districts charged with affirmative duties under the law.

This circuit split has prompted us to address squarely the question of how courts should optimally allocate the burden of proof when parents bring a due process challenge to their child's treatment by school officials under the IDEA—an issue that will be resolved next Term by the United States Supreme Court in *Schaffer v. Weast*.[2] In this paper, we discuss the dueling approaches of the Third and Fourth Circuits and conclude that the Supreme Court should allocate the burden of proof to defendant school districts. We first discuss the IDEA statutory framework and the underlying principles of allocation of the burden of proof. We then examine the application of burden of proof in IDEA cases by the Courts of Appeals. We follow with an analysis that justifies allocation of the burden of proof to school districts, and conclude with both recommendations to achieve that result and methods for alleviating concerns that may accompany allocating the burden of proof to school districts.

I. THE IDEA FRAMEWORK

The IDEA was specifically designed to ensure that a free public education was made available to all handicapped children.[3] President Gerald Ford signed it into law in 1975 after Congress found "that 'more than half of the children with disabilities in the United States d[id] not receive appropriate educational services.'"[4] Indeed, at the time of

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2. Weast v. Schaffer, 377 F.3d 449 (4th Cir. 2004), *cert. granted*, 125 S. Ct. 1300 (2005).

3. Elizabeth L. Anstaett, Note, *Burden of Proof Under the Education for All Handicapped Children Act*, 51 OHIO ST. L.J. 759, 770 (1990).

4. Oberti v. Bd. of Educ., 995 F.2d 1204, 1213 (3d Cir. 1993) (quoting 20 U.S.C. § 1400(b)(3)); *see also* S. REP. NO. 168, at 8 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1432 ("[T]he

enactment, Congress found "that approximately 1.75 million children with disabilities were totally excluded from school and 2.5 million were in programs that were not appropriate to meet their educational needs."[5]

Commentators have properly described the IDEA's attempt to remedy this discrimination as "a radical departure from the status quo of exclusion and neglect"[6] and "a milestone in the history of the education of handicapped children."[7]

Congress delineated the express purpose of the IDEA in strong and clear language:

> [T]o assure that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of children with disabilities and their parents or guardians are protected, to assist States and localities to provide for the education of all children with disabilities, and to assess and assure the effectiveness of efforts to educate children with disabilities.[8]

The IDEA theoretically accomplishes this intent by providing funding to assist with the cost of providing that special education, and tying extensive requirements to that funding—including "requir[ing] states, through their school districts, to identify children ages three to twenty-one who have disabilities, develop appropriate individualized educational programs for them, and provide these services in the least restrictive environment, preferably in a public school."[9]

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parents of a handicapped child or a handicapped child himself must still too often be told that adequate funds do not exist to assure that child the availability of a free appropriate public education."); Schwellenbach, *supra* note 1, at 248–50 (describing the events leading up to the passage of the IDEA).

5. Mark C. Weber, *Litigation Under the Individuals with Disabilities Education Act After Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 65 OHIO ST. L.J. 357, 368 (2004) (citing H.R. REP. NO. 94–332, at 11 (1975)); s*ee also* Sharon C. Streett, *The Individuals with Disabilities Education Act*, 19 U. ARK. LITTLE ROCK L. REV. 35, 35 (1996) (citing 20 U.S.C. §§ 1400(b)(1), (3), (4), (5) (1994)) (noting that "at the time of enactment eight million children were identified as having disabilities, and of those, nearly half a million were not receiving an appropriate education").

6. Weber, *supra* note 5, at 368 (citing Mark C. Weber, *The Transformation of the Education of the Handicapped Act: A Study in the Interpretation of Radical Statutes*, 24 U.C. DAVIS L. REV. 349, 364–66 (1990)).

7. Schwellenbach, *supra* note 1, at 248 n.17 (citing JAMES J. CREMINS, LEGAL AND POLITICAL ISSUES IN SPECIAL EDUCATION 14 (1983)).

8. 20 U.S.C. § 1400(c) (1994).

9. Streett, *supra* note 5, at 35.

A. Free Appropriate Public Education

The key to the entire IDEA framework is the overarching requirement that all the activities of the state be directed toward ensuring that "[a] free appropriate public education is available to all children with disabilities."[10] In *Board of Education v. Rowley*, the Supreme Court held that a "free appropriate public education" consisted of "educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction."[11] In short, the specific hallmarks of a "free appropriate public education" under the IDEA are, as William Myhill describes: (a) "personalized instruction with sufficient support for the child to benefit educationally"; (b) "at the public expense"; (c) "meeting state educational standards"; (d) "approximating the grade levels of the regular educational classrooms"; and (e) "being 'reasonably calculated to enable the child to receive educational benefits'" via sufficient support services.[12]

The main vehicle for provision of a free appropriate public education under the IDEA is the "'individualized education program' or IEP."[13] The IEP is a written plan, created by a multi-disciplinary team, delineating a package of special educational and related services designed to meet the unique needs of a disabled child.[14] The IEP includes summaries of the child's abilities, outlines of educational goals, and specification of educational services to be provided.[15] "[T]he IDEA requires every public school system receiving federal funds to develop and implement an [IEP] for each disabled child in its jurisdiction," and to implement the services specified therein within the least restrictive environment possible.[16]

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10. 20 U.S.C. § 1412(a)(1)(A) (2000). The Department of Education "has promulgated regulations implementing the IDEA and . . . [a]s a condition of the IDEA funding, each state must adopt state procedures that implement the IDEA procedural framework at the state and local levels. When the federal regulations are read in conjunction with the state IDEA regulations, they provide local schools with specific guidelines and directions for carrying out the procedural mandates of the IDEA." Streett, *supra* note 5, at 35–36 (footnotes omitted).

11. Bd. of Educ. v. Rowley, 458 U.S. 176, 188–89 (1982) (quotations omitted).

12. William N. Myhill, *No FAPE for Children with Disabilities in the Milwaukee Parental Choice Program: Time to Redefine a Free Appropriate Public Education*, 89 IOWA L. REV. 1051, 1057 (2004) (citing *Rowley*, 458 U.S. at 188–89, 207).

13. Oberti v. Bd. of Educ., 995 F.2d 1204, 1213 n.16 (3d Cir. 1993) (citations omitted).

14. Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 526 (3d Cir. 1995); Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 173 (3d Cir. 1988) *cert. denied*, 488 U.S. 1030 (1989).

15. Myhill, *supra* note 12, at 1057; *Polk*, 853 F.2d at 173;
see 34 C.F.R. § 300.346 (describing the procedures for "[d]evelopment, review, and revision of IEP").

16. Weast v. Schaffer, 377 F.3d 449, 450 (4th Cir. 2004); Streett, *supra* note 5, at 35–36.

Moreover, it further requires at least an annual review of each child's IEP and authorizes revisions where appropriate.[17]

B. Parental Participation and Procedural Safeguards

Parental participation in development of the IEP is a hallmark of the IDEA; it places great importance on "the ability of the parent to understand their child's evaluation and placement, express their own view of an appropriate placement, and pursue their procedural remedies in the case of disagreement."[18] In keeping with this emphasis, the procedural due process requirements of the IDEA that mandate close involvement of parents are copious. As Steven Marchese aptly summarizes:

> [(a)] Parents must receive written notice before the local school district can evaluate or place a child. [(b)] The notice must clearly and intelligibly explain the procedural safeguards and the actions to be taken by the district. [(c)] Parents have the right to review all records and may obtain an independent evaluation of their child at district expense in the event they disagree with the local district's assessment. [(d)] Parents must be present at a meeting of school officials to design the IEP.[19]

The IDEA also contains specific remedies for parents who disagree with a local school district's handling of their child's special education under the statute.[20] These remedies are designed to "force a local school district to justify [a child's] placement" and educational program.[21] First, parents are able to file a formal complaint "with respect to any matter relating to the . . . evaluation . . . of the child."[22] If the parents are not satisfied with the response to the complaint, the statute provides access to an administrative process before an impartial hearing officer.[23] Finally,

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17. 20 U.S.C. § 1414(d)(4)(A) (2000).

18. Steven Marchese, *Putting Square Pegs into Round Holes: Mediation and the Rights of Children with Disabilities Under the IDEA*, 53 RUTGERS L. REV. 333, 343 (2001); *see also* Weber, *supra* note 5, at 369 ("One of the central innovations of the special education law . . . is that it empowers parents to participate in designing programs for their children and to challenge school district decisions about educational services and placement.").

19. Marchese, *supra* note 18, at 341 (citing 20 U.S.C. §§ 1414(a)(1)(C), 1414(d)(1)(B), 1415(b)(1), 1415(c)-(d)).

20. *See* Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 527 (outlining the procedures for state and federal appeals for aggrieved parents and students).

21. Marchese, *supra* note 18, at 343.

22. 20 U.S.C. § 1415(b)(6) (2000).

23. 20 U.S.C. §§ 1415(f)–(g); *see also* Streett, *supra* note 5, at 40–43 (describing the administrative due process hearing procedure in detail).

"any party aggrieved by the findings and decision [in the administrative process] shall have the right to bring a civil action with respect to the complaint" in a state or federal district court, and the court is to "grant such relief as [it] determines is appropriate."[24]

Nowhere, however, does the IDEA address the issue of the allocation of the burden of proof.[25]

II. BURDEN OF PROOF PRINCIPLES

The party with the obligation of persuading a judge is said to bear the burden of proof.[26] Simply put, the effect on the party with the burden of proof of failing to persuade the judge is that party will lose.[27] It is widely understood that the burden of proof is usually allocated "to the plaintiff who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion."[28] This, however, is not a hard and fast rule—it is merely a presumption. Indeed, no uniform rule exists on how courts allocate the burden of proof: it depends upon the type of case presented. As McCormick describes:

> [T]here is no key principle governing the apportionment of the burdens of proof. Their allocation, either initially or ultimately, will depend upon the weight that is given to any one or more of several factors, including: (1) the natural tendency to place the burdens on the party desiring change,

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24. 20 U.S.C. §§ 1415(i)(2)(A), 1415(i)(2)(B)(iii).

25. Lascari v. Bd. of Educ., 560 A.2d 1180, 1187 (N.J. 1989).

26. In this paper, use of the term "burden of proof" encompasses the trial burdens of production and persuasion. *See, e.g.*, Kathleen Hannon, Comment, *Adjudicating ADEA Disparate Treatment Claims Within the Evidentiary Framework of Title VII: An Order of Proof for Age Discrimination Cases*, 32 CATH. U. L. REV. 865, 867 n.9 (1983) (discussing how "burden of proof" is a somewhat ambiguous term). For example, it encompasses the burden of production, which requires the plaintiff to produce sufficient evidence during his case-in-chief on each element of his claim or otherwise suffer an adverse directed verdict, as well as the burden of persuasion. *Id.* Usually the same party bears both burdens; a party cannot win a favorable verdict unless he carries the burden of persuasion. *Id.*

27. Leo P. Martinez, *Tax Collection and Populist Rhetoric: Shifting the Burden of Proof in Tax Cases*, 39 HASTINGS L.J. 239, 244 (1988).

28. MCCORMICK ON EVIDENCE § 337, at 949 (Edward W. Cleary ed., 3d ed. 1984); Wilkins v. Am. Exp. Isbrandtsen Lines, Inc., 446 F.2d 480, 484 (2d Cir. 1971), *cert. denied*, 404 U.S. 1018 (1972) ("Inherent in [our adversary] system is the general rule that, as between two parties, he who desires to have judicial action taken in his behalf has the burden of producing the evidence which is a prerequisite to such action."). *See generally* 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5122, at 552–53 (1977) (describing the policy rationales underlying Rule 301's presumption that the risk will generally be borne by the party who initiated the action).

> (2) special policy considerations . . . (3) convenience, (4) fairness, and (5) the judicial estimate of the probabilities.[29]

Subsumed within "convenience and fairness . . . are factors such as who has . . . access to information" or particular knowledge in an area as well as "the natural order of storytelling."[30] Although the treatise writers caution that "access to information should not be overrated" because it can be overridden by fairness considerations,[31] there are precedents for allocating the burden of proof to defendants where the underlying issues involve facts peculiarly within the defendant's knowledge and control.[32]

Wright and Graham make several points of note in agreeing that allocation of the burden of proof to plaintiffs is a mere presumption. First, they observe that the allocation of the burden of proof is, at its core, a "function of the substantive law."[33] As such, assignment of the burden of proof is dependent upon reference to the policies furthered by the underlying substantive law.[34] Second, they recognize that it may not always be fair that a particular plaintiff should be allocated the burden of proof—namely, where the plaintiff is asking the court "to protect him from someone who has the power to affect the out-of-court situation without the aid of the court."[35] Stated differently, it may not be fair to require a powerless plaintiff to bear the burden of proof. Finally, Wright and Graham observe that a presumption in favor of a particular allocation of the burden of proof may arise for a variety of reasons, including "reach[ing] a result deemed socially desirable."[36]

III. APPLICATION TO IDEA CASES

Allocation of the burden of proof can be critical to the outcome of disputes between parents and school districts. First, it can affect fundamental decision-making with regard to the education of the child prior to litigation. For example, as Elizabeth Anstaett describes, the burden of

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29. MCCORMICK ON EVIDENCE, *supra* note 28, § 337, at 952.

30. Candace S. Kovacic-Fleischer, *Proving Discrimination After* Price Waterhouse *and* Wards Cove*: Semantics as Substance*, 39 AM. U. L. REV. 615, 623 (1990).

31. *Id.*

32. Martinez, *supra* note 27, at 253 (citing Browzin v. Catholic Univ. of Am., 527 F.2d 843, 849 (D.C. Cir. 1975) (burden of proof allocated to defendant party with knowledge)); *see also, e.g.*, Gomez v. Toledo, 446 U.S. 635 (1980).

33. WRIGHT & GRAHAM, *supra* note 28, § 5122, at 556.

34. *See id.* (listing the factors for determining the assignment of the burden of proof as policy, probability, and possession of proof).

35. *Id*.

36. *Id*. at 569–70.

proof parents must bear might affect their decision to withdraw their child from public school and enroll the child in private school in the wake of an unsatisfactory IEP.[37] If the parents successfully challenge the IEP, they may be entitled to compensatory costs for that private school education.[38] Should they fail in their due process challenge, however, their chance at reimbursement will be foreclosed.[39] Because the cost of private education may be too high for parents to pay, the likelihood of their success at trial—obviously and necessarily impacted by the allocation of the burden of proof—"may play a major role in their decision whether to place their child in a private school."[40]

Second, the allocation of the burden of proof deeply impacts litigation strategy and cost.[41] If the burden is allocated to the plaintiff-parents, who may have limited financial resources, to disprove the effectiveness of an IEP proposed by a school district, parents will be forced to make difficult decisions regarding gathering resources and developing enough expertise and evidence to affirmatively demonstrate the inadequacy of any particular IEP.[42] Conversely, if the burden is allocated to the defendant school district, and that school district is required to demonstrate that the proposed IEP is appropriate, the school district will be faced with a much greater challenge and may have to marshal additional witnesses and expert testimony.[43]

Several significant schools of thought have developed regarding the proper allocation of the burden of proof when parents bring due process IDEA challenges to court; we discuss each in turn.

A. The Fourth Circuit Position

In *Weast v. Schaffer*, the Fourth Circuit was recently asked to decide whether a district court properly allocated the burden of proof by requiring a school district to show that the IEP proposed by the district provided a free appropriate public education.[44] In *Weast*, the parents of Brian

37. Anstaett, *supra* note 3, at 771.

38. *Id.* at 771–72 (citing Sch. Comm. v. Dep't of Educ., 471 U.S. 359, 369–70 (1985)).

39. *Sch. Comm.*, 471 U.S. at 374.

40. Anstaett, *supra* note 3, at 772.

41. Allan G. Osborne, Jr., *Proving That You Have Provided a FAPE Under IDEA*, 151 ED. LAW. REP. 367, 369 (2001).

42. *See* Anstaett, *supra* note 3, at 771–72 (stating that the school districts "have easier access to experts in the field and other records pertaining to the development of the educational program").

43. *Id.*; *see also infra* Part V.A (noting that school districts will incur additional costs if they must bear the burden of proof in such situations).

44. Weast v. Schaffer, 377 F.3d 449, 450 (4th Cir. 2004); *see* Spielberg v. Henrico County Pub. Schs., 853 F.2d 256, 258 n.2 (4th Cir. 1988) (suggesting that the burden of proof is more properly

Schaffer—a child with multiple disabilities—initiated a due process hearing to challenge the IEP developed for him by Maryland's Montgomery County Public School System; they claimed that the proposed IEP denied Brian a free appropriate public education and sought reimbursement of tuition for an alternative private school.[45]

Faced with conflicting testimony by expert witnesses about the type of special education Brian required, the administrative law judge who conducted the due process hearing ordered briefing on the proper allocation of the burden of proof for claims concerning the adequacy of the IEP.[46] The judge eventually allocated the burden to the parents, thus requiring them to prove that the IEP was inadequate and not "reasonably calculated to enable the child to receive educational benefits."[47] The judge found "the case to be close," but that the parents had failed to meet their assigned burden; he therefore upheld the IEP proposed by the school district.[48]

The parents appealed that decision to federal court where both parties moved for summary judgment on the purely legal question of burden of proof.[49] The district court agreed with the parents' contention that the administrative law judge had incorrectly allocated the burden of proof, and remanded with instructions to re-allocate that burden to the school district.[50] On remand, the administrative law judge held that the school district had failed to prove the adequacy of its proposed IEP and awarded the parents the requested compensation.[51] The district court affirmed the new result.[52] On appeal, the Fourth Circuit reversed, holding that plaintiff-parents must bear the burden of proof when they challenge an IEP.[53] In so holding, the court saw "no reason to depart from the general rule that a party initiating a proceeding bears" the burden of proof.[54]

The court articulated several reasons for its conclusion. First, the court analogized the IDEA to other remedial statutes that are silent on burden of proof but the burden is nonetheless allocated to the plaintiffs, such as the Americans With Disabilities Act and the Age Discrimination in Employment Act.[55] The court reasoned that "[a] 'favored group' . . . is not

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allocated to the party bringing the civil action to challenge the state administrative decision).

45. *Weast*, 377 F.3d at 450–51.
46. *Id.* at 451.
47. *Id.* (quoting Bd. of Educ. v. Rowley, 458 U.S. 176, 207 (1982)).
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at 451–52.
53. *Id.* at 456.
54. *Id.*
55. *Id.* at 453.

relieved of the burden of proof 'merely because a statute confers substantive rights on [it].'"[56] Second, the court rejected the argument that the district should bear the burden of proof because of its acknowledged advantages in expertise, information, and resources.[57] In doing so, the court concluded that the procedural protections written into the IDEA by Congress provide parents "with substantial information about their child's educational situation and prospects" and, thus, "the school system has no unfair information or resource advantage."[58]

Third, and most fundamentally, the court relied upon the "general rule" that "a party who initiates a proceeding to obtain relief based on a statutory obligation bears the burden of proof."[59] It found no policy supporting a departure from the general rule of allocating the burden to the party who seeks to change the status quo; to the contrary, it reasoned that a policy rationale—"deferring to local school authorities for the development of education plans for disabled children"—justified requiring parents to bear the burden of proof.[60] The court opined that Congress's inclusion of procedural protections and exclusion of a mandate concerning burden of proof occurred because "it no doubt recognized that allocating the burden to school systems is not the kind of help parents really need in challenging IEPs."[61]

B. The Third Circuit Position

The Third Circuit previously reached a contrary conclusion in *Carlisle Area School District v. Scott P.*[62] In that case, the parents of Scott P. brought a due process challenge on the grounds that the school district had not fulfilled its statutory obligations to Scott under the IDEA.[63] The initial hearing officer granted the relief requested by the plaintiffs.[64] On appeal, the state administrative appeals panel allocated the burden of proof to the school district, and allowed the award of damages for compensatory education to stand.[65] The district court affirmed in relevant part.[66]

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56. *Id.* (second alteration in original) (quoting Clyde K. v. Puyallup Sch. Dist., No. 3, 35 F.3d 1396, 1399 (9th Cir. 1994)).

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

58. *Id.* at 454.

59. *Id.* at 455 (citing MCCORMICK ON EVIDENCE, *supra* note 28, at § 337).

60. *Id.* at 455–56.

61. *Id.* at 456.

62. Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 524 (3d Cir. 1995).

63. *Id.* at 523.

64. *Id.*

65. *Id.*

On appeal to the Third Circuit, the parties challenged the allocation of the burden of proof. Writing for the court, Judge Edward Becker squarely declared, "[i]n administrative and judicial proceedings, the school district bears the burden of proving the appropriateness of the IEP it has proposed."[67] In doing so, he relied on the opinion he had previously authored in *Oberti v. Board of Education*, in which he wrote:

> Underlying the [IDEA] is "an abiding concern for the welfare of handicapped children and their parents." Requiring parents to prove at the district court level that the school has failed to comply with the Act would undermine the Act's express purpose "to assure that the rights of children with disabilities and their parents are protected," and would diminish the effect of the provision that enables parents and guardians to obtain judicial enforcement of the Act's substantive and procedural requirements.[68]

The *Oberti* court went further, stressing the "practical" advantages that schools have over parents: "the school has better access to the relevant information, greater control over the potentially more persuasive witnesses[,] . . . and greater overall educational expertise than the parents."[69] Based on "the statutory purpose of IDEA and these practical considerations," the *Oberti* court concluded that "it is appropriate to place the burden of proving compliance with IDEA on the school."[70]

C. Other Circuits

Neither the Fourth Circuit's nor the Third Circuit's approach enjoys a clear majority among the nation's other federal Courts of Appeals. The First, Fifth, Sixth, and Tenth Circuits fall under the Fourth Circuit's column in allotting the burden of proof to parents—or, more precisely, to challengers—in IEP hearings.[71] Among those sibling courts, the Fifth

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66. *Id.*

67. *Id.* at 533.

68. Oberti v. Bd. of Educ., 995 F.2d 1204, 1219 (3d Cir. 1993) (quoting Lascari v. Bd. of Educ., 560 A.2d 1180, 1188 (N.J. 1989), and 20 U.S.C. § 1400(c)) (further citations omitted).

69. *Id.* "[P]lacing [the] burden of proof on [the] school is 'consistent with the proposition that the burdens of persuasion and production should be placed on the party better able to meet those burdens[.]'" *Id.* (quoting *Lascari*, 560 A.2d at 1188).

70. *Id.*

71. *See* Johnson v. Indep. Sch. Dist., No. 4, 921 F.2d 1022, 1026 (10th Cir. 1990), *cert. denied*, 500 U.S. 905 (1991) ("The parties should note that the burden of proof in these matters rests with the party attacking the child's individual education plan."); Doe v. Defendant I, 898 F.2d 1186, 1191 (6th Cir. 1990) (placing the burden of proof on the parents as the party attacking the IEP's sufficiency); Doe

Circuit has taken the lead, providing a mixed statutory and traditional presumption-based burden allocation rationale for forcing parent-challengers to shoulder the burden of proof in administrative hearings.[72] In *Tatro v. State of Texas*, the Fifth Circuit remarked that the IDEA "placed primary responsibility for formulating handicapped children's education in the hands of state and local school agencies in cooperation with each child's parents."[73] Accordingly, because the IDEA creates a presumption in favor of the educational placement established by school officials, the Fifth Circuit held that the burden of proof should rest with the party—namely, the parent-challenger—who wishes to undermine that presumption of correctness.[74] The Sixth and Tenth Circuits subsequently adopted this line of argument and the resulting position in full.[75] The statute itself made little difference to the First Circuit's short burden-of-proof analysis, which hinged exclusively on traditional presumption-based burden-allocation principles in concluding that the party challenging the placement should bear the burden of proving its inadequacy.[76] In these circuits, the reality is that the party challenging the IEP's sufficiency will bear the burden of proof.

Meanwhile, the Second, Eighth, and Ninth Circuits share the Third Circuit's approach of allotting the burden of proof to the school district that developed a challenged IEP.[77] Whereas Judge Becker took great pains to flesh out precisely why the burden should rest with the school district, Judge Alex Kozinski—writing for the Ninth Circuit panel—took it as a given that parent-challengers should not carry the burden.[78] The Eighth Circuit followed suit by embracing Judge Kozinski's evident certitude.[79]

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v. Brookline Sch. Comm., 722 F.2d 910, 919 (1st Cir. 1983) ("[T]he party seeking a modification of the status quo should bear the burden of proof . . . ."); Tatro v. Texas, 703 F.2d 823, 830 (5th Cir. 1983), *aff'd in part and rev'd in part sub. nom.* Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883 (1984) (providing a mixed rationale for allocating the burden to parents).

72. *See Tatro*, 703 F.2d at 830 (discussing the statutory scheme's reliance on the expertise of local educational authorities).

73. *Id.*

74. *See id.* (relying on fundamental fairness to allocate the burden to parent–challengers).

75. *See Johnson*, 921 F.2d at 1026 (adhering, with little discussion, to the Fifth Circuit's position); *Defendant I*, 898 F.2d at 1191 (same).

76. *See Brookline*, 722 F.2d at 919 (matching a desire for modification with a concomitant requirement to prove a need for that modification).

77. *See* Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 122 (2d Cir. 1998) (accepting summarily that the allocation of the burden of proof to the school district); E.S. v. Indep. Sch. Dist., No. 196, 135 F.3d 566, 569 (8th Cir. 1998) (same); Clyde K. v. Puyallup Sch. Dist., No. 3, 35 F.3d 1396, 1398 (9th Cir. 1994) (same).

78. *See Clyde K.*, 35 F.3d at 1398 ("The school clearly had the burden of proving at the administrative hearing that it complied with the IDEA.").

79. *See E.S.*, 135 F.3d at 569 ("At the administrative level, the District clearly had the burden

The Second Circuit reached the same conclusion with only slightly more fanfare, relying on New York State's general practice in IEP challenges.[80]

Whether allocating the burden of proof at the administrative stage to the parents or to the school district, none of these courts has offered the level of sustained analysis provided by the Fourth and Third Circuits in their dueling treatments.

IV. ANALYSIS

Closer consideration suggests the Fourth Circuit's approach in *Weast* is undesirable. This analysis necessarily begins with the Fourth Circuit's narrow conclusion that the question is governed by "the normal rule of allocating the burden to the party seeking relief."[81] As discussed above, this "usual" result is just a presumption, and certainly not a "rule." Moreover, it is a presumption that may be swayed by a number of factors, including fairness and policy.[82] These factors counsel against the result reached by the Fourth Circuit and in favor of allocating the burden of proof to school districts in the manner held by the Third Circuit.[83]

A. Fairness

1. Information

Fairness can dictate allocation of the burden of proof to the party that possesses superior information or knowledge of the facts.[84] Accordingly, it is important to consider which party here has the information advantage.

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of proving that it had complied with the IDEA.") (citing *Clyde K.*, 35 F.3d at 1398–99).

80. *See Walczak*, 142 F.3d at 122 ("Complaints are resolved through an impartial due process hearing, at which school authorities have the burden of supporting the proposed IEP[.]") (citation omitted) (quotations omitted) (citing Matter of the Application of a Handicapped Child, 22 Educ. Dep't Rep. 487, 489 (1983), which stated that "[i]t is well established that a board of education has the burden of establishing the appropriateness of the placement recommended by [the school board]" (second alteration in original); Application of a Child Suspected of Having a Disability, N.Y. State Educ. Dep't Appeal No. 93-9 (Mar. 29, 1993); *and* Application of a Child with a Handicapping Condition, N.Y. State Educ. Dep't Appeal No. 92-7 (Mar. 5, 1992)).

81. Weast v. Schaffer, 377 F.3d 449, 453 (4th Cir. 2004).

82. *Id.* at 457 (Luttig, J., dissenting).

83. *See* Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 209 (1973) (countenancing burden-shifting according to "policy and fairness based on experience") (quoting 9 J. WIGMORE, EVIDENCE § 2486, at 275 (3d ed. 1940)).

84. *See, e.g.*, NLRB v. Mastro Plastics Corp., 354 F.2d 170, 176 (2d Cir. 1965) (allocating the burden of proof to the party who controls the relevant information needed to decide the dispute), *cert. denied*, 384 U.S. 972 (1966).

The answer is obvious: school districts "possess[] a distinct, inherent advantage over the parents of disabled children in assessing the feasibility and the likely benefit of alternative educational arrangements."[85] Courts have recognized that IDEA cases necessarily implicate "specialized knowledge and experience."[86] As the Third Circuit described in *Oberti*, "the school has better access to the relevant information, greater control over the potentially more persuasive witnesses (those who have been directly involved with the child's education), and greater overall educational expertise than the parents."[87]

The *Weast* majority attempts to circumvent this fact by arguing that the procedural protections written into the IDEA provide parents with "substantial information about their child's educational situation and prospects"; thus, "the school system has no unfair information or resource advantage."[88] But this argument fails for two reasons. First, it ignores the inescapable fact that, despite their experience with their own child, parents lack a "comprehensive understanding" of the "*cumulative*, institutional knowledge gained by representatives of the school district from their experiences with *other*, similarly disabled children."[89] Stated differently, no matter how familiar parents may become with their own child's situation and IEP, they fundamentally lack the institutional frame of reference inherent in the school district's vast special education experiences. Although, as Judge Luttig suggested, "[t]hese procedural protections may invest parents with a basis to understand the characteristics of their child's disability and may even provide some understanding of the relative benefits and drawbacks of the educational plan proposed by the school district,"[90] the school district "*as a matter of course*" possesses a far greater breadth and level of knowledge and expertise.[91] Second, the argument fails because it ignores the fact that, although parents may have access to student records, they may be unsophisticated and lack the ability to properly interpret those records.[92] In other words, the access to information provided by the IDEA

85. *Weast*, 377 F.3d at 458 (Luttig, J., dissenting).

86. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42 (1973), *quoted in* Bd. of Educ. v. Rowley, 458 U.S. 176, 208 (1982); *see also* Oberti v. Bd. of Educ., 995 F.2d 1204, 1219 (3d Cir. 1993) (highlighting the reasons that schools should bear the burden of proof).

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

88. *Weast*, 377 F.3d at 454.

89. *Id.* at 458 (Luttig, J., dissenting) (emphasis added).

90. *Id.* (Luttig, J., dissenting).

91. *See id.* (Luttig, J., dissenting) (emphasis added) ("[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.").

92. Brief for the United States as Amicus Curiae Supporting Appellees at 16, Schaffer v. Vance, 243 F.3d 540 (4th Cir. 2001) (No. 00-1471).

does not necessarily have any correlation to parents' abilities to use that information productively.[93]

2. Practical Concerns

Plaintiff-parents face other practical disadvantages aside from a relative lack of information. The Fourth Circuit ignored the fact that plaintiff-parents are often not sophisticated litigants with specialized knowledge; rather, they are real people hindered by fear, misunderstanding, and disempowerment, involved only by necessity in a process that is naturally biased towards school district insiders. As the Fifth Circuit observed, "in most cases, the handicapped students and their parents lack the wherewithal either to know or to assert their rights."[94] As Professor David Engel describes in a more human context:

> Most parents describe themselves as terrified and inarticulate. Some liken themselves to prisoners awaiting their sentence, and this courtroom imagery emphasizes their perception of the judgmental rather than cooperative quality of the decisionmaking as well as their feelings of vulnerability and disempowerment. In almost all the districts, parents receive little help from the parent representative on the committee, who usually remains silent. Often, but not always, parents feel that their own observations or requests are given little weight and that decisions are based primarily on the recommendations of the professionals. Their own close relationship with the child is viewed as a liability rather than as an asset—a liability that renders their judgments inherently suspect.[95]

Parents that are injected into the formidable IDEA/IEP system thus face numerous hurdles. Many simply "lack the ability to be effective advocates

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93. *See, e.g.*, NLRB v. Mastro Plastics Corp., 354 F.2d 170, 176 (stating that access to evidence alone does not determine the assignment of the burden of proof; the court must also consider which party has the ability to explain the records and interpret any ambiguities they may contain); *see also* Brief for the United States, *supra* note 92, at 16 ("Even if parents do 'not lack ardor in seeking to ensure that handicapped children receive all the benefits to which they are entitled' under the IDEA . . . desire alone is not a substitute for knowledge and expertise.") (citation omitted) (quoting Bd. of Educ. v. Rowley, 458 U.S. 176, 209 (1982)).

94. S-1 v. Turlington, 635 F.2d 342, 349 (5th Cir. 1981), *cert. denied*, 454 U.S. 1030 (1981), *and abrogated on other grounds by* Honig v. Doe, 484 U.S. 305, 317 (1988).

95. David M. Engel, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 DUKE L.J. 166, 188.

for their children."[96] They may not understand technical special education terminology or IEP concepts, and they may lack the ability to articulate educational placements in the "language" of the school district. Moreover, school district personnel may not perceive parents as "'objective.'"[97]

Given these theoretical disadvantages, parents can and do perceive a significant difficulty in negotiating—or fear of—the IDEA system, and so may be daunted or dissuaded from pursuing the redress contemplated by statute.[98] They may also be unable to bear the time and expense necessary either to educate them or to assemble an affirmative case that will meet the burden of proof at a due process hearing.[99] Taken together, these practical considerations support allocating the burden of proof to school districts.

We acknowledge that allocating the burden of proof to the party with the "bigger guns" may not be a desirable *general* policy. When a *specific* party, however, with "bigger guns" has every practical consideration on its own side, allocating the burden to that party as a matter of fairness must surely outweigh a general presumption in favor of allocating the burden of proof away from that party. Moreover, "bigger gun" school districts are plainly already prepared to manage such a burden because doing so "is consistent with the school's existing statutory duties under the IDEA . . . and should not substantially increase the workload for the school."[100] School districts' ongoing responsibilities to ensure that children with disabilities receive a free appropriate public education until they graduate or exit the school system means that the school districts already re-evaluate children and review IEPs on a regular basis. It is not, therefore, unfair to ask the school districts—as part of their ongoing IEP-monitoring duties—to establish to a neutral fact-finder that existing IEPs are appropriate.

In short, the Third Circuit properly recognized that most—if not all—practical considerations attendant to the IDEA process inure to the detriment and difficulty of plaintiff-parents. The Fourth Circuit approach ignores this reality in favor of an imagined world where all parties exist on a "level playing field." Such is clearly not the case.

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96. Marchese, *supra* note 18, at 343–44.

97. *Id.* (quoting Engel, *supra* note 95, at 194).

98. *Id.* at 344 (citing Engel, *supra* note 95, at 188–89).

99. *Id.* (citing David Neal & David L. Kirp, *The Allure of Legalization Reconsidered: The Case of Special Education*, *in* SCHOOL DAYS, RULE DAYS: THE LEGALIZATION AND REGULATION OF EDUCATION 354 (David L. Kirp & Donald N. Jensen eds., 1986)).

100. Brief for the United States, *supra* note 92, at 12.

B. Special Policy Considerations

1. Congressional Intent

The question of which party has the burden of proof under the IDEA must also be determined with reference to the statute's underlying Congressional intent.[101] As described by the First Circuit:

> Our interpretive bearings, then, must be gained from evaluating the goals and purposes of the Act, an inquiry which has the exclusive goal of effectuating congressional intent. In conducting that inquiry, we must look to the language of the statute as a whole and interpret its various provisions harmoniously in order to achieve the congressional aims underlying the Act.[102]

The IDEA has an express and sweeping intent toward which all of its provisions are harmoniously directed "to ensure that all children with disabilities have available to them a free appropriate public education . . . [and] to ensure that the rights of children with disabilities and parents of such children are protected."[103] The IDEA reflects Congress's desire that school districts should take the lead in formulating IEPs and in ensuring that parents are able to have meaningful participation in determining the services that will be provided to their children. Because the IDEA assigns the primary role in formulating the educational plans to the schools,[104] "it is entirely consistent with the statutory scheme to also require that the school be able to prove at the due process administrative hearing that the proposed IEP will provide [a free appropriate public education] to a child with a disability."[105]

Contrary to the Fourth Circuit's conclusion, it is possible—even quite reasonable—to understand the procedural safeguards specified in the IDEA

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101. *See* Steadman v. SEC, 450 U.S. 91, 95–96 & n.10 (1981) (stating that courts must look to congressional intent where Congress has not spoken directly on the precise question at issue including standards of proof).

102. Doe v. Brookline Sch. Comm., 722 F.2d 910, 915 (1st Cir. 1983) (citing Philbrook v. Glodgett, 421 U.S. 707, 713 (1975)).

103. 20 U.S.C. § 1400(d)(1)(A)–(B) (2000).

104. *See* Bd. of Educ. v. Rowley, 458 U.S. 176, 207 (1982) ("The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child.").

105. Brief for the United States, *supra* note 92, at 12.

to be representative, and not exhaustive, of Congressional intent to protect the rights of parents vis à vis school districts. Where the Fourth Circuit would consider the lack of a burden of proof written into the text of the statute as an indicator that a presumption of a "normal" allocation should trump, such a view stubbornly ignores the overarching intent of the IDEA. Indeed, allocating the burden to plaintiff-parents would diminish the effect of the IDEA's protective provisions that enable parents and guardians to obtain judicial enforcement of their valued rights. This is so because allocating the burden of proof to parents would pre-ordain the due process challenge against them, and essentially place them in the same position they would be in if there were no law at all.[106]

As the United States has described in an amicus curiae brief, allocating the burden to parents

> would unhinge [the] statutory framework. It would, in effect, allow the school—through the IEP team, consisting of mostly school representatives—to propose an IEP and, if the parents disagree with the draft IEP, abstain from the school's statutory responsibilities to provide [free appropriate public education] and to take the lead in developing the IEP by forcing the parents . . . [to demonstrate] . . . that the IEP does not provide [free appropriate public education]. . . .
>
> . . . .
>
> The school's argument for presuming the correctness of the IEP is inconsistent with . . . the rights and obligations under the statute.[107]

In other words, the affirmative provisions of the IDEA "serve two complementary goals: to ensure the proper use of discretion and to protect parental rights."[108] Allocating the burden of proof to parents is inconsistent with the latter-stated statutory purpose of "ensur[ing] that the rights of children with disabilities and parents of such children are protected."[109]

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106. *See id.* at 11 ("To presume an IEP proposed by the school is correct would render meaningless the role of the parents and neutral ALJ in the statutory scheme.").

107. *Id.* at 5, 10.

108. Anstaett, *supra* note 3, at 771 (citing Sheila K. Hyatt, *Litigating the Rights of Handicapped Children to an Appropriate Education: Procedures and Remedies*, 29 UCLA L. REV. 1, 11 (1981)).

109. 20 U.S.C. § 1400(d)(1)(B) (2000).

2. Affirmative Purpose

As Judge Luttig stressed in dissent, Congress intended the IDEA to "impose[] an affirmative obligation on the nation's school systems to provide disabled students with an enhanced level of attention and services."[110] Accordingly, the purpose of the IDEA is not simply to remedy discrimination against special needs students; rather, it is also to require that school districts bear the affirmative responsibility for ensuring that a free appropriate public education is available to each special needs child. As the IDEA's legislative history suggests, "'[a]s much as any other action of the Congress in the two hundred years of the Republic, the . . . Act represents a gallant and determined effort to terminate the two-tiered invisibility once *and for all* with respect to exceptional children in the Nation's school systems.'"[111] For this reason, the Fourth Circuit's analogy of the IDEA to the Americans with Disabilities Act, the Age Discrimination in Employment Act, and Title VII of the Civil Rights Act is misplaced. Those statutes "merely seek to remedy discrimination," but the IDEA goes further.[112]

A better analogy suggested by one commentator is to the law arising from *Brown v. Board of Education* (*Brown II*).[113] That decision imposed affirmative, ongoing obligations on states with segregated schools to desegregate them.[114] When the courts considered the question of burden of proof in the context of students challenging the sufficiency of desegregation efforts, they allocated it to the school districts that bore the affirmative responsibility under the law.[115] That allocation reflected a "determination

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110. Weast v. Schaffer, 377 F.3d 449, 458 (4th Cir. 2004) (Luttig, J., dissenting) (emphasis omitted) (citing Bd of Educ. v. Rowley, 458 U.S. 176, 189 (1982)).

111. Weber, *supra* note 5, at 368 (emphasis added) (omission in original) (quoting Robert T. Stafford, *Education for the Handicapped: A Senator's Perspective*, 3 VT. L. REV. 71, 72 (1978) (discussing the legislative history of the Education for All Handicapped Children Act while celebrating its passage)).

112. *Weast*, 377 F.3d at 457–58 (Luttig, J., dissenting) (emphasis omitted).

113. Brown v. Bd. of Educ., 349 U.S. 294, 298 (1955). This apt analogy was made by the author of Note, *Recent Case—Weast v. Shaffer*, 118 HARV. L. REV. 1078, 1084 (2005) [hereinafter *Recent Case*].

114. *Brown*, 349 U.S. at 300.

115. *Recent Case*, *supra* note 113, at 1083. "*Brown* and its progeny . . . established that the burden of proof falls on the *State*, and not the aggrieved plaintiffs, to establish that it has dismantled its prior de jure segregated system." *Id.* at 1083 n.45 (emphasis in original) (omission in original) (quoting United States v. Fordice, 505 U.S. 717, 739 (1992)); *see, e.g.*, Coalition to Save Our Children v. State Bd. of Educ., 901 F. Supp. 784, 785 (D. Del. 1995) (granting defendant education boards' motion for a declaration of unitary status where the boards "carried their burden of proof" of showing that their school districts had desegregated); *see also* United States v. City of Yonkers, 181 F.3d 301, 310 (2d Cir. 1999) ("In policy terms, a party that has been found to have implemented de jure segregation should ordinarily bear the burden of demonstrating that the vestiges of its prior wrong have been eradicated.")

to err on the side of overprotecting rather than underprotecting the rights of the victims of state-sanctioned school segregation."[116]

We face an analogous situation here.[117] Indeed, the IDEA is based on the same root principles as *Brown I*: "[I]t is doubtful that any child may be reasonably expected to succeed in life if he is denied the opportunity of an education. Such an opportunity . . . must be made available to all on equal terms."[118] As we have already discussed, Congress intended the IDEA to operate as "a radical departure from the status quo of exclusion and neglect" that disabled children had faced in public school systems.[119] That is to say, the statute expressly presumes that many special needs students would not receive the type of appropriate education that they require absent the affirmative creation of a specially tailored IEP. School districts are not only required to remedy persistent and infamous discrimination against special needs students in the public schools, but districts also bear an affirmative responsibility to perform ongoing duties that ensure a free appropriate public education throughout students' time in the school system.

School districts are therefore charged by the IDEA with ensuring that students' IEPs are always appropriate. When parents challenge the sufficiency of school districts' performance of their affirmative duties in the form of due process challenges to particular IEPs, the school districts are essentially being asked if they are fulfilling their affirmative responsibilities. Phrased differently, "[s]ince the procedural rights of the [IDEA] were designed to remedy a problem, it is logical that the agency seeking a remedy show that it has indeed complied."[120] It is therefore consistent, as a matter of policy and Congressional intent, with the underlying purpose of the IDEA that the school districts be required to *demonstrate* exactly that during a due process challenge.[121]

(italics omitted).

116. Note, *Allocating the Burden of Proof After a Finding of Unitariness in School Desegregation Litigation*, 100 HARV. L. REV. 653, 657 (1987).

117. One commentator suggests that the IDEA was the next step in "[t]wo decades of judicial and legislative efforts to expand public educational opportunities for all children," a trend whose beginning can be traced to *Brown*. Schwellenbach, *supra* note 1, at 248.

118. *Id.* at 248–49 (alteration in original) (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).

119. Weber, *supra* note 5, at 368 (citing Mark C. Weber, *The Transformation of the Education of the Handicapped Act: A Study in the Interpretation of Radical Statutes*, 24 U.C. DAVIS L. REV. 349, 364–66 (1990)).

120. 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, 76 (1988).

121. *See id.* (arguing "that the policy establishing [the IDEA] argues strongly" that the school districts should bear the burden of proof).

V. CONCLUSION AND RECOMMENDATIONS

The IDEA's procedural safeguards alone do not necessarily protect all of the interests of disabled children. The procedural due process procedures are, deliberately, a critical part of the IDEA system because they allow parents to appeal challenges to IEPs to a neutral judge. However, simply because parents are statutorily able to bring due process challenges does not in any way correlate to those parents' relative ability to succeed—vis à vis empowered school districts that possess greater knowledge, information, resources, and expertise at all things related to special education—by sustaining the burden of proof.

There are several evident problems with the approach of the Fourth Circuit. First, it ignores compelling policy reasons for allocating the burden of proof to parents, including both Congressional intent and the statute's affirmative nature. Second, it ignores fundamental issues of fairness and essentially leaves unsophisticated parent-plaintiffs to fend for themselves in the litigation landscape—exactly what the IDEA, in its own way, was intended to prevent. The underlying policy of the IDEA weighs heavily in favor of allocating the burden of proof to the school districts. The "normal" burden of proof presumption must yield to the IDEA's powerful expression of Congressional intent.[122]

A. The Supreme Court

The Supreme Court should recognize the wisdom of the Third Circuit's approach and reverse *Weast*. The Third Circuit's rationale balances legal and practical factors to arrive at a fair result that most closely reflects Congressional intent. In contrast, the Fourth Circuit's approach is plagued with unrealistic assumptions about parents' sophistication and ignores practical factors that affect parents' ability to exploit the IDEA to secure a free appropriate public education for their disabled children.

Allocation of the burden of proof to school districts is in line with the approach taken by the Court in the wake of *Brown II* and is consistent with the emphatic recitation of the IDEA's statutory purpose in *Rowley*. As discussed herein, it is well within the Supreme Court's discretion to deviate from the presumption that the burden should rest with the party requesting change. Congress—by evincing in the IDEA a clear intent to protect the rights of parents and to obligate school districts to affirmative acts—has signaled which party should bear the burden.

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122. *See* United Scenic Artists, Local 829 v. NLRB, 762 F.2d 1027, 1034 (D.C. Cir. 1985) (noting that a presumption is only valid if it comports with legislative intent).

No doubt, placing the burden of proof exclusively on school districts would necessarily translate into a modest increase in costs incurred by the districts that must then defend the sufficiency of challenged IEPs. In a climate in which costs associated with mandated IDEA adherence are already high,[123] and in which Congress's funding assistance to school districts has lagged behind what the IDEA's framers hoped it would be;[124] some members of the Court might understandably harbor fears about placing any additional costs on school districts' already burgeoning tabs.

But the fact remains that Congress has placed an affirmative duty on school districts to develop IEPs for those special needs students who require them. If a school district has properly tailored an IEP for a given special needs student, and if that IEP is subsequently challenged, the costs of proving the IEP's adequacy should be minimal relative to the costs of creating the IEP in the first place. Moreover, if the Supreme Court were to adopt the Third Circuit's reasoning, the decision might provide a wake-up call to Congress to increase funding for legislation that has drained the coffers of local governments, albeit for a righteous cause.

Accordingly, there is no valid reason why *Weast* should not be reversed.

B. Legislative Reform

If, however, the Supreme Court affirms *Weast* and allocates the burden of proof to plaintiff-parents, Congress should act decisively and amend the IDEA to specifically and permanently allocate the burden of proof to school districts. Such a provision would be in line with the stated intent of the IDEA and would track numerous other procedural protections already granted by the IDEA to plaintiff-parents.[125]

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123. *See, e.g.*, Peggy Goetz, *District Alarmed at Increasing Special-Ed Expenses*, ORANGE COUNTY REG., Oct. 28, 2004 ("The cost of the district's special education programs has risen about 20 percent from $24.6 million in 2001–2002 to $29.5 million this year. Over that time revenue from the state and federal government to support mandated special education programs has held steady at about $18 to $20 million with the rest coming from the district's general fund.").

124. Although Congress in 1975 set a goal of spending up to 40 percent of the average per pupil expenditure for each special education student, Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 611, 89 Stat. 773, 776-77 (codified as 20 U.S.C. § 1411(a) (2000)), Congress has repeatedly fallen short of that aspirational target. *See* Karen Adler, *Special Education Law at Crossroads*, SAN ANTONIO EXPRESS-NEWS, Sep. 12, 2004, at 3B ("Congress made a commitment to pay 40 percent of the cost, but federal funding has never come close to that. Funding has increased over the years, but is now around 18 percent, which means the state and local school districts must shoulder the rest.").

125. *See, e.g.*, Weber, *supra* note 5, at 408–10 (discussing legislative reform as a direct solution to cases that undermine the goals of the IDEA); Anstaett, *supra* note 3, at 772 (recommending legislative action to permanently resolve this issue).

C. Splitting the Difference

One commentator has advocated taking a middle path between the Third and Fourth Circuit approaches: the implementation of a modified burden-shifting system based on the Americans with Disabilities Act's reasonable accommodation provision.[126] The author posits that a burden-shifting system (where, once the plaintiff shows "that he has a qualifying impairment and that a reasonable accommodation is possible," the burden shifts to the defendant to show that compliance would constitute an undue hardship) would work for IDEA due process challenges "because plaintiffs possess greater knowledge about whether their disability falls within the enumerated categories."[127]

However, given the information and comprehension gap that can exist between parents and school personnel, parents simply may not understand what their child's disability is or how it fits into the IDEA/IEP system. In addition, they may not have the experience or technical knowledge to effectively articulate such information. Any conclusion that amateur parent advocates have greater knowledge about *any* technical aspect of the IDEA/IEP process (including, for example, "qualifying impairments") remains nothing more than an unsupported assumption. There is no reason to believe that parents are able to show that a "reasonable accommodation is possible" any more than they could bear the burden of proof at trial. This proposed approach also ignores the overarching policy reasons, discussed previously, for placing the burden on school districts.

126. *Recent Case*, *supra* note 113, at 1082–84.
127. *Id.* at 1084.