



**DEPARTMENT OF THE PUBLIC ADVOCATE**  
**Division of Developmental Disability Advocacy**

**ALLOCATION OF  
THE BURDEN OF PROOF  
IN SPECIAL EDUCATION  
DUE PROCESS HEARINGS**

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# Allocation of the Burden of Proof in Special Education Due Process Hearings

## Introduction

The promise of a quality education for all children is integral to the American value system. Unfortunately, our educational systems have not always fulfilled their obligation to all children - especially those with disabilities. In fact, for the first two hundred years of our country's history, the needs of children with disabilities were virtually ignored. It was not until the mid-1970s that federal legislation was finally enacted guaranteeing educational services for students with disabilities. Since that time, the road to meaningful opportunities in education for children with disabilities has been slow and plagued with obstacles. Regrettably, parents of students with disabilities still frequently face an uphill battle in ensuring that an appropriate education is available for their children. The United States Supreme Court's 2005 decision in Schaffer v. Weast<sup>1</sup> further complicated this problem, creating an additional obstacle for those families in New Jersey who seek to enforce their child's educational rights.

The Individuals with Disabilities Education Act (IDEA) is the major federal law governing special education services for students with disabilities. Under the IDEA, parents of students with disabilities have the right to initiate a due process hearing with their school district if they believe that their child is not receiving an appropriate education.<sup>2</sup> At these hearings, evidence must be presented to demonstrate whether an appropriate educational plan has been provided as mandated by law. Although the IDEA does not specify who should bear the burden of proof in these hearings, the New Jersey Supreme Court ruled, in the 1989 Lascari v. Board of Education of Ramapo Indian Hills School District decision, that the burden of proof should be borne by schools.<sup>3</sup> In November 2005, the United States Supreme Court ruled in Schaffer v. Weast that the burden of proof lies with the party seeking relief.<sup>4</sup> The Court specifically stated, however, that it was not making a determination as to whether a state may override the default burden of proof rule and place the burden on schools through legislation.<sup>5</sup> Accordingly, the Schaffer decision does not bar a state from expressly reallocating the burden of proof to defendant school districts based on considerations of public policy and equity.<sup>6</sup>

After the Schaffer case, there was some confusion as to whether the Lascari decision still applied in New Jersey. However, when this issue was brought before the Third Circuit Court of Appeals, the panel effectively overturned the New Jersey Supreme Court's ruling in Lascari and held that the Schaffer decision is controlling law in states with no contrary legislation.<sup>7</sup> Thus, following this decision, the only way to reallocate the burden of proof to school districts in New Jersey is through legislation.

The shift in burden from school districts to families that has resulted from the Schaffer decision has created an additional obstacle for New Jersey parents seeking to enforce their child's educational rights under the IDEA. In June 2006, several advocacy organizations representing families of children with disabilities approached the Department of the Public Advocate with concerns about this problem. Recognizing the importance of this issue and its potential impact

on thousands of students with disabilities in New Jersey, the Department of the Public Advocate undertook a thorough review of the issue and conducted extensive outreach to a wide range of interested organizations and individuals. This included soliciting comments from and conducting discussions with government offices, professional associations, school administrators, education professionals, special education attorneys, advocates, service providers and families. In addition, a request for public input on this issue was posted on the Department's website. Although a small number of agencies and organizations contacted by the Department were unable to comment because their governing bodies have not adopted a position on the issue, the Department received significant feedback from many interested organizations and individuals.

After careful review and consideration of the positions of these stakeholders and the issues involved, the Public Advocate concludes that the burden of proof should be reallocated to school districts in New Jersey for the following reasons:

- (1) School districts are in a far better position to bear the burden of proof than families.**
- (2) Allowing the burden to remain on parents, who are already disadvantaged in this process, will significantly impede their ability to enforce their child's educational rights under the IDEA.**
- (3) The limited discovery procedures in due process hearings in New Jersey make it difficult for parents to uncover and obtain evidence needed to satisfy the burden of proof. By way of contrast, school districts already possess virtually all of the documentation they need to defend the validity of their proposed educational plan and to prove that it is sufficient to comply with the child's rights as guaranteed by the IDEA.**
- (4) Allocating the burden of proof to school districts will not place an undue burden on school districts or taxpayers, and will not result in an increase in the number of due process proceedings initiated by parents. It will simply mean a return to the status quo as it existed for seventeen years between 1989 and 2006, when school districts carried the burden of proof under Lascari.**

**For these reasons, the Public Advocate concludes that the burden of proof should be reallocated to school districts in New Jersey and urges the New Jersey Legislature to pass legislation to this effect.**

## **Background**

### ***I. Children with Disabilities in New Jersey***

There are approximately a quarter of a million children with disabilities receiving special education services in New Jersey, accounting for about seventeen percent of the total student population in the state.<sup>8</sup> These children have a wide range of disabilities and require varying levels of educational supports and services. For example, almost half of these students have a “specific learning disability” that affects their ability to reason, comprehend, speak, read, write, or do mathematical calculations.<sup>9</sup> Common learning disabilities include dyslexia, central processing disorder, dyspraxia and dysgraphia, among others.<sup>10</sup> In addition, students with multiple disabilities and students who require speech therapy each comprise an additional twelve percent of the special education population.<sup>11</sup> Students with developmental disabilities (such as mental retardation and autism), language impairments, health impairments, emotional disturbance, and students who are “preschool disabled” each represent between five and ten percent of the special education population.<sup>12</sup> The remaining students are those who are deaf or blind or who have hearing impairments, orthopedic impairments, traumatic brain injury, or visual impairments. Each of these disabilities comprise less than one percent of the total population of students receiving special education services in New Jersey.<sup>13</sup> While students with disabilities clearly have a diverse set of challenges, they all essentially require the same thing: an educational program designed to ensure that they are afforded the same opportunities to learn and reach their potential as every other student in New Jersey.

### ***II. Individuals with Disabilities Education Act***

Originally passed in 1975, the Individuals with Disabilities Education Act (IDEA) is the major federal law governing special education.<sup>14</sup> The IDEA was the first law requiring states to fully educate all children with disabilities. Prior to its enactment, students with disabilities had very few educational rights and were routinely denied educational services.<sup>15</sup> Amended several times since its enactment, the IDEA now provides a wide variety of protections for students with disabilities and their parents. In addition to entitling students with disabilities to a “free appropriate public education” in the “least restrictive environment,” the IDEA mandates that all students with disabilities receive an “individualized education program” (IEP) designed to meet their unique needs. The IDEA also outlines several procedures that schools must follow with regard to their interaction with parents of children with disabilities. Typically referred to as “procedural safeguards,” these requirements were put in place both to protect the right of parents and students to have input into the educational plan and to provide a mechanism for resolving disputes between families and schools. One such procedural safeguard is the right to present complaints regarding a child’s educational program through administrative due process hearings.<sup>16</sup>

### ***III. Due Process Hearings***

In the special education context, “due process” refers to a formal hearing to resolve a dispute when a family and school district disagree about a student’s special education plan.<sup>17</sup> Although such hearings may involve disputes about a variety of issues such as eligibility, student records, discipline or graduation, more than fifty percent of due process hearings in New Jersey result

from a broader disagreement between the district and the parent about a student's educational program or placement.<sup>18</sup> An additional twenty percent of cases involve a student's evaluation or the provision of related services such as speech or occupational therapy.<sup>19</sup> Thus, disagreements about the core elements of a student's education make up over seventy percent of all special education due process hearings.

In many ways, due process hearings are similar to trials. Evidence is presented, witnesses are called, and parties must proceed in accordance with specific rules. Both school districts and parents have the right to be represented by an attorney at a due process hearing. In some situations, attorneys' fees are recoverable by the prevailing party in an administrative hearing. However, in administrative hearings, the finding of facts and legal decisions are made by an administrative law judge (ALJ) instead of a jury and superior court judge. Also, parties in a due process hearing are not entitled to the same discovery rights that exist in traditional trials.

Although due process hearings can be initiated by either a school district or parent, it is often the parent who initiates these proceedings since the educational plan at issue is developed primarily by the school.<sup>20</sup> Additionally, since school districts in New Jersey have the authority to make unilateral changes to the IEP without parental consent after providing the parent with notice, the only way that parents can stop these unilateral changes is through requesting mediation and/or a due process hearing.

Unfortunately, parents of students with disabilities in New Jersey often face significant challenges in due process proceedings with school districts. For instance, many parents have limited knowledge of the law and cannot afford to hire an attorney to represent them. Due process hearings can also be time-consuming, contentious and very emotional for parents of students with disabilities. Parents are often hesitant to bring a due process claim against a school district because they know their chances of success are slim. Armed with legal representation and greater access to and control of key evidence, school districts are much more likely to prevail, regardless of the circumstances. Despite these disincentives, however, parents continue to utilize due process when needed, as it is their only meaningful recourse when they believe their child's educational needs are not being met.

#### ***IV. Burden of Proof***

The issue of who bears the "burden of proof" is essential in any legal dispute. The term "burden of proof" refers to the duty of affirmatively proving your case.<sup>21</sup> Having the burden of proof in a case essentially means that if both parties present equally compelling cases, the party with the burden loses. In other words, if the burden of proof is placed on the school district in these cases, it will be the school's responsibility to show that the educational program that it provided to the student is appropriate. If, on the other hand, the burden of proof is borne by the parents, they will have to prove that the education plan that the school district proposes for their child is not appropriate. As a practical matter, because this higher standard exists for whoever bears the burden of proof, that party may have to expend more resources such as time, money, and effort in order to prevail. Notably, the allocation of the burden of proof often determines the outcome.<sup>22</sup>

## V. *Legal Precedent*

Both the IDEA and New Jersey's special education regulations are silent as to the issue of which party assumes the burden of proof in special education due process hearings. Prior to 1989, this issue was unresolved in New Jersey, leaving it largely up to the individual administrative law judge to assign the burden to one of the parties in these cases. In 1989, however, the New Jersey Supreme Court settled this issue in the Lascari decision, holding that school districts should bear the burden of proof in special education due process hearings. The Court posited three grounds for its determination: statutory intent, principles of fairness and equity, and the fundamental nature of IDEA disputes.

As a result, for seventeen years following the Lascari decision, the burden of proof in these cases was borne by school districts in New Jersey. During this period, this issue was addressed by numerous other state and circuit courts, resulting in inconsistent opinions throughout the country. Thus, the United States Supreme Court took up this issue in 2005.

In Schaffer v. Weast, the United States Supreme Court held that the plaintiff should bear the burden of proof in these cases. The Court based its decision on the following reasoning: (1) It could not find sufficient evidence that when Congress enacted the IDEA, it intended to abandon the ordinary default rule that places the burden on plaintiffs to prove their claims;<sup>23</sup> and (2) Although school districts have the "natural advantage" in information and expertise in these cases, Congress accounted for this advantage by providing parents with procedural safeguards that allow them to be informed and involved in the IEP process.<sup>24</sup>

Although the Court's holding supports the traditional model of allocating the burden of proof to the plaintiff, the Court specifically declined to decide whether a state legislature could place the burden of proof on the school district under the IDEA.<sup>25</sup> In his dissent, Justice Breyer argued that a procedural issue, such as which party should bear the burden of proof, was meant to be left to the states.<sup>26</sup>

After the Schaffer decision, there was confusion regarding its effect on these matters in New Jersey. In L.E. v. Ramsey Board of Education,<sup>27</sup> a parent plaintiff argued that the Schaffer decision did not overrule the New Jersey Supreme Court's decision in Lascari, and that the burden of proof remains on school districts in New Jersey. The United States Court of Appeals for the Third Circuit rejected that argument and instead ruled that Schaffer is controlling precedent in New Jersey. Notably, however, the Court based its decision on the absence of any New Jersey statute overriding the default burden of proof rule and shifting the burden of proof to school districts:

Because this case is brought solely under the IDEA and arises in a state lacking a statutory or regulatory provision purporting to define the burden of proof in administrative hearings assessing IEPs, Schaffer controls.<sup>28</sup> (emphasis added).

Thus, it is important to note that the courts in both Schaffer and L.E. left the door open to individual states to pass legislation allocating the burden to either party.<sup>29</sup>

## ***VI. Other States***

Currently, nine other states and the District of Columbia have statutes or regulations allocating the burden of proof to school districts.<sup>30</sup> These state laws have not been challenged or struck down since the Schaffer decision. In addition, there is a strong advocacy movement at this time to enact legislation allocating the burden to school districts in several other states.<sup>31</sup> It is also worth noting that nine states submitted an *amicus curiae* (“friend of the court”) brief in the Schaffer case arguing that the burden of proof should be borne by school districts.<sup>32</sup> In her dissenting opinion in the Schaffer case, Justice Ginsberg pointed to this fact and noted that “[i]f allocating the burden to school districts would saddle the school systems with inordinate costs, it is doubtful that these States would have filed in favor of petitioners.”<sup>33</sup>

## ***VII. Public Input***

In addition to the support expressed by many individual family members of students with disabilities, the following organizations contacted the Public Advocate to express support for the reallocation of the burden of proof to school districts in New Jersey in all cases:<sup>34</sup>

- The New Jersey Parent Teacher Association
- The Education Law Center
- The Arc of New Jersey
- The NJ Center for Outreach & Services for the Autism Community (COSAC)
- The New Jersey Coalition for Inclusive Education
- The New Jersey Special Education Practitioners
- The Statewide Parent Advocacy Network (SPAN)
- The Alliance for the Betterment of Citizens with Disabilities (ABCD)

In addition to several of the above organizations, the following organizations signed on to an *amicus curiae* brief prepared by the Education Law Center arguing for the reallocation of the burden of proof to school districts in due process hearings where districts seek to change an IEP over a parent’s objection:

- American Civil Liberties Union of New Jersey (ACLU-NJ)
- Association for Children of New Jersey (ACNJ)
- Cherry Hill Special Education PTA
- Essex County Bar Association
- Excellent Education For Everyone
- New Jersey Protection & Advocacy, Inc.
- The New Jersey Special Education Practitioners
- Special Education Clinic at Rutgers University School of Law-Newark
- Special Education Leadership Council of New Jersey

These families and organizations cite several arguments for reallocation of the burden to school districts. Their comments are reflected throughout the *Analysis* section of this paper.

On the other side, the New Jersey School Boards Association (NJSBA) submitted comments urging the Public Advocate to conclude that adherence to the Schaffer ruling is in the public's best interest. NJSBA argues that the considerations of fairness and unequal access to evidence that the Lascari court cited have been mooted by recent changes to the IDEA. In particular, NJSBA argues that several amendments were made to the IDEA in 2004 that provide parents with better access to evidence and contends that these new requirements demonstrate that the rationale for the Lascari decision is no longer accurate or operative.

The NJSBA further comments that other procedural practices facilitate fair resolution of disputes without shifting the burden of proof. The commenter cites post-Lascari amendments to the IDEA that require the State to provide families with the opportunity to mediate disputes and which also require parties to attend a resolution session prior to any due process hearing. Moreover, the NJSBA notes that due process hearings are designed to be informal and the ALJ has the flexibility to ensure that each side has a fair opportunity to present evidence. The NJSBA also believes that by requiring a party who initiates legal action to bear the burden of proving a violation of IDEA, the State will discourage frivolous matters and provide an incentive for families to work collaboratively with school districts. The NJSBA further notes that, given the extreme funding constraints presented by years of flat, inadequate funding, school districts will be further hampered in serving the needs of the community if they must also bear the expense of protracted legal proceedings in matters that prove to be unreasonable and unnecessary.

The Public Advocate received only one other comment supporting the standards announced in Schaffer. An attorney who regularly represents school boards in special education matters urges the Public Advocate to consider that, not only do parents have access to "any and all information," they are "on equal footing" with school boards because districts are required to share all of their information with families. This practitioner also argues that if school districts have the burden of proof, they are precluded from moving to dismiss a parent's case and must bear the burden of presenting evidence even in weak or meritless cases.

## **Analysis**

The Public Advocate concludes that the burden of proof in special education due process hearings should be borne by school districts in New Jersey for the following reasons:

### **1. School districts are in a far better position to bear the burden of proof than families.**

A large number of organizations and individuals who contacted the Public Advocate regarding this issue strongly object to the Schaffer court's presumption that families and school districts have equal power and resources. The Public Advocate agrees that, without question, schools are in a better position than families to bear the burden of proof in special education disputes. Schools are in the business of educating students and thus have the specialists, information, and

expertise needed to create educational programs. Unlike parents, they have immediate and easy access to the educational expertise of staff including teachers, learning specialists, speech, occupational and physical therapists, social workers and school psychologists. They also possess knowledge about teaching methods and programming options available both in their district and throughout the state.

Under the IDEA, schools receive federal funding to provide students with disabilities with an individualized education program (IEP). Although some parental input into the plan is mandated by the IDEA, the bulk of IEP drafting is done by school personnel. Thus, schools have a greater familiarity with and understanding of the IEP that is in dispute than do parents. The IDEA also requires school districts to educate students with disabilities in the “least restrictive environment.” Because schools have better access to information about which programming options are available, they are in a better position to bear the burden of proving that the program selected is, in fact, the least restrictive setting.

Since teachers and other educational experts are already on staff, the schools also have immediate access to expert witnesses on their behalf in a hearing of this nature. Thus, school districts are likely to have the requisite evidence, expertise and skill to present a case with minimal effort and little impact on their operations.

The Public Advocate also finds that schools almost always have access to representation by an attorney, providing them with a clear advantage in any legal proceeding. Commenting on the expense of obtaining representation and expert testimony, several attorneys note that few families can afford such necessary professionals and that fewer attorneys will accept cases on retainer if the burden of proof remains on the family. Another attorney warns, “If the burden of proof remains on the parent, given the obstacles districts are placing on parents who are trying to meet that burden, appropriate special education services will be something only for the wealthy and the very tenacious.”

**2. Allowing the burden to remain on parents, who are already disadvantaged in this process, will significantly impede their ability to enforce their child’s educational rights under the IDEA.**

Unfortunately, despite the IDEA’s requirement that schools solicit parental participation in the IEP process,<sup>35</sup> many parents report that they are not provided with sufficient opportunity to give input and that they do not receive enough information to make informed decisions. The National Council on Disability, after studying and conducting hearings on this issue, reports that “at every hearing, witness after witness testified that the IEP process is extremely frustrating, often intimidating, and hardly ever conducive to making them feel that they were equal partners with professionals.”<sup>36</sup> Indeed, COSAC, an advocacy organization for children with autism in New Jersey, submits to the Public Advocate that:

the landscape in Special Education has not changed since [the Lascari decision in] 1989 and school districts are still incredibly better-equipped than virtually any parent to [bear] the burden of proof in special education cases. [A]lthough IDEA

requires that parents be considered equal and active members of the IEP Team, in reality, parental input is often dismissed by the professionals on the IEP Team and it becomes the school personnel alone who make the critical decisions...

National research also shows that many schools are not forthcoming with information that parents need in order to pursue a due process challenge to an IEP, and instead only provide about twenty-five percent of the evaluations and other reports requested by parents.<sup>37</sup> When reports are provided, most of them are produced without any explanation, leaving the parents to interpret and evaluate information that in actuality requires skilled and expert analysis, making the information virtually useless to parents who wish to present a case.<sup>38</sup> Parents are therefore gravely disadvantaged if they are required to carry the burden of proof because much of the evidence necessary to establish their case is maintained by the school and often is not provided when requested or is incomprehensible when received.

On this point, families and advocates overwhelmingly reported to the Public Advocate that parents often have a very limited understanding of the educational system and inadequate information or expertise about teaching methods and program options. In fact, parents typically must rely upon the school to provide them with a better understanding of education issues. As a result, their knowledge is limited to what the school tells them in most cases.

Further indication of the difficulty parents have in accessing critical information regarding their child's IDEA claim is found in a recent survey conducted by the Statewide Parent Advocacy Network of New Jersey (SPAN). Their survey of approximately 10,000 parents demonstrates that, despite the legal requirement to do so, not all school districts provide parents with documentation and information required by the IDEA. In fact, the survey found that:

- 11% of surveyed parents reported that they did not receive a copy of their child's evaluation report;
- 11% of parents reported that they never received a copy of their child's individual education plan (IEP);
- 37% of surveyed parents reported that, at their child's IEP meeting, the school district did not discuss information about options for placing the child in general education setting with supports.

Significantly, **more than half** of those responding to the SPAN survey said their school district did not engage in the following mandated discussions with parents about their child's educational services:

- Did not discuss the child's need for assistive technology (64%), positive behavior supports (56%), or extended year programs (58%);
- Did not discuss core curriculum standards and how their child would master them (64%);
- Did not consider the full range of support services and accommodations that their child might need to participate in general education classes or field trips and other outside or extracurricular programs (55%);
- Did not provide all the services listed in the child's IEP (64%).

Many attorneys also express concern that even after the 2004 changes to IDEA, districts have exclusive control over much of the relevant evidence. One practitioner comments that “the district controls all the information with regard to what happens during the school day.” Several others note that even when parents hire experts to observe their child, districts often refuse them access to the classroom or place unreasonable restrictions on access to the child’s educational settings. Significantly, one attorney notes that, following the recent shift of the burden of proof to parents in New Jersey, she has not had a single case of a school district “willingly” agreeing to pay for an independent evaluation requested by a parent. By way of contrast, the attorney adds that, prior to Schaffer, she never observed any school district deny a parent’s request for an independent evaluation.

This evidence supports the arguments echoed by many families, professionals and advocates that, compared to school districts, parents are extremely disadvantaged in their ability to become aware of, obtain and produce information about the available special education services, supports and practices that constitute an “appropriate” education for their child in the least restrictive environment as required by IDEA .

Parents are also often unable to afford attorney representation, and thus have to represent themselves *pro se* in these disputes. Commonly, they have no prior experience in due process hearings<sup>39</sup> and a limited knowledge of the law. This creates another obstacle for parents, as they are unlikely to fully understand the rules of evidence and procedural requirements. This lack of representation, coupled with inexperience, can be disastrous for a parent who attempts to bring a case against an experienced and counseled school district, and the odds against the *pro se* parent will be even greater if he or she must bear the burden of digesting the evidence to build a persuasive case.<sup>40</sup>

Additionally, parents of students with disabilities often lack “the economic, social, and educational resources that are necessary to understand the complexities of their child’s individualized education program and to participate in an adversarial administrative proceeding.”<sup>41</sup> Statistically, parents of students with disabilities tend to have less education than other parents. In fact, more than half of parents of students with disabilities have completed only high school or less.<sup>42</sup> The college graduation rate of parents of students with disabilities is two-thirds that of other parents.<sup>43</sup>

Moreover, these parents’ ability to participate effectively in the IEP process is hampered by social and economic circumstances. Almost one quarter of children with disabilities are living in poverty, compared with sixteen percent of students in the general population.<sup>44</sup> Consequently, these families often lack the basic tools needed for effective advocacy, such as transportation and/or telephone service. The New Jersey Special Education Practitioners also note that large numbers of children with disabilities are in foster care placements and have no parent to pursue or finance legal remedies when their special education needs are not met. They assert that adhering to the Schaffer rule will have a “chilling and disparate impact upon children who are in foster care and those children whose parents are indigent and/or have disabilities.”

Additionally, many low and middle-income families lack health insurance, which impedes their ability to get evaluations they may need in order to effectively challenge a school's proposed education plan.<sup>45</sup> Due to the nature of disability, these families are more likely to be lacking in free time, excess income and energy, and are more likely to be emotionally drained. Taken together, these social, economic, and educational circumstances make it particularly daunting for parents of children with disabilities to bring a challenge to a school's IEP. Allocating the burden of proof to parents in these hearings only adds an additional barrier to families who are already struggling.

Moreover, families advised the Public Advocate that it was extremely difficult to enforce their child's educational rights, even when the burden of proof was allocated to school districts under the Lascari decision, due to the procedural and practical difficulties of navigating a due process hearing. For example, one parent describes litigation she undertook to obtain inclusive educational services and placements for her two sons as "taking over her life." She adds that she could not "imagine ever being able to defend my children if the burden was on the parents. The schools have all the information. Even when I asked for information under the FERPA or OPRA I didn't get it... We had 300 exhibits ...and we still lost and [had to] appeal." Notably, this parent ultimately succeeded on appeal and secured effective inclusive educational services for her sons; one of whom is now thriving in college. Unfortunately, however, many families would not have had the necessary resources to take this issue up on appeal.

Parents in New Jersey are also unfairly disadvantaged because school districts have wide latitude to change an IEP without parental consent. Significantly, the Schaffer decision rests on the Court's conclusion that the burden of proof should be allocated to the party **seeking to change** the *status quo* with regard to an IEP. Specifically, the Court explained:

We hold no more than we must to resolve the case at hand: The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief. In this case, that party is [the] parents. But the rule applies with equal effect to school districts: If they seek to challenge an IEP, they will in turn bear the burden of persuasion before an ALJ.<sup>46</sup> (emphasis added).

Accordingly, the Schaffer decision presumes that the party seeking to change an IEP will be the plaintiff in a legal proceeding.

However, in New Jersey, once a parent has consented to an initial IEP, school districts may implement changes to the IEP, declassify a student, or deny a request for an independent evaluation, all without parental consent. If a parent believes that an IEP change proposed by a school district is inconsistent with the law and contrary to their child's best interest, the parent must initiate a due process hearing to prevent the change. For this reason, applying the default rule in New Jersey is inappropriate because, inconsistent with Schaffer, it would place the burden of proof in many cases on parents seeking to **prevent** a change in their child's educational program rather than on a school district seeking to change the IEP.

- 3. The limited discovery procedures in due process hearings in New Jersey make it difficult for parents to uncover and obtain evidence needed to satisfy the burden of proof. By way of contrast, school districts already possess virtually all of the documentation they need to defend the validity of their proposed educational plan and to prove that it is sufficient to comply with the child's rights as guaranteed by the IDEA.**

In conventional litigation, unlike administrative due process hearings, parties are entitled to extensive pre-trial discovery procedures such as document requests, requests for admissions, interrogatories, and witness depositions. This provides both parties with the ability to “investigate” the issues in dispute. By way of example, in a lawsuit resulting from a car accident, each party has the opportunity to submit a list of questions that must be answered and a list of all documents that must be provided, as well as an opportunity to interview or “depose” any potential witnesses to the accident or experts in the case, such as doctors. This creates an equal playing field for parties, particularly in situations where one party has superior access to information, because the parties must disclose the information requested, regardless of whether it helps or hurts their case.

By way of contrast, the New Jersey regulations do not provide for formal discovery in special education hearings and generally prohibit parents from deposing district witnesses and decision-makers. Schools are only required to disclose items considered a child's “school records,” and do not have to produce evidence of how other children have fared in proposed placements or programs. While both the parent and the school may request information and records from each other prior to the due process hearing, the parties need only disclose documents and summaries of testimony **that they intend to introduce at the hearing.**<sup>47</sup> Thus, a parent's access to information is limited to whatever the school chooses to include in its case.

Clearly, this limits a parent's ability to obtain information, evaluation data, or program options that might contradict the school's proposed IEP. For example, consider a school that has a program specifically designed to meet the needs of students with autism which has a proven history of success. If the district's proposal for the student at issue included placement in that program, the school would likely introduce evidence at the hearing showing the success rates of the program with other students. If, on the other hand, that same program had shown terrible outcomes in the past, the district would be unlikely to introduce that evidence **and the parents would have no other way of accessing that information** to prove their argument that the program was an inappropriate placement for their child. On the other hand, if the burden of proof is on the district to establish that the IEP plan meets the student's needs, the district would need to present a strong case that included proof that the program in question works.

On this point, families and advocates reported to the Public Advocate that school districts frequently only provide the name of a proposed educational placement or a list of possible placements but do not provide information about the services. Against this backdrop, parents bearing the burden of proof may have to prove that one or more placements are inappropriate for their child without access to the facility or information about the outcomes of students who are served there. As noted by the Education Law Center, parents are being asked “to prove the

negative—that an unknown program or placement proposed by the school district . . . would not provide their child with an appropriate education.”<sup>48</sup>

Parents and advocates further argue that it is virtually impossible to prove that a district’s proposed program of special educational services is not appropriate or effective for their child without access to information about resources, methods and practices other than those proposed by and considered by the district. Instead, requiring the district to prove that their proposed IEP is appropriate and offered in the least restrictive environment will ensure compliance with IDEA because districts will be compelled to establish that their educational plan is effective and that they considered supports such as assistive technology, positive behavior supports, in-class supports, and other services required by law.

Considering the fact that schools have the vast majority of the information needed in these types of cases, it would be inequitable to allocate the burden of proof to parents, as they would not be able to access much of the information needed to prove their case.

**4. Allocating the burden of proof to school districts will not place an undue burden on school districts or taxpayers, and will not result in an increase in the number of due process proceedings initiated by parents. It will simply mean a return to the status quo as it existed for seventeen years between 1989 and 2006, when school districts carried the burden of proof under Lascari.**

Nearly all of the organizations and individuals who commented share the belief that placing the burden of proof on school districts will allocate the burden of proof in a manner that supports the statutory purpose of IDEA and related State law. They further maintain that this policy will increase accountability, promote the early implementation of appropriate special education services and lead to efficiencies and cost savings for school districts and the public. They argue that in the seventeen years since the Lascari decision, school districts in New Jersey have borne the burden of proof in all special education cases, yet continue to prevail in most cases, largely due to unequal resources rather than the merits of the cases. The New Jersey Special Education Practitioners argue that leaving this burden on school districts is not oppressive but, rather, requires districts to do “nothing more than demonstrate to an administrative law judge that a child’s program or placement meets minimal special education standards.” The Education Law Center echoes this comment and notes that requiring a school district to meet the burden of proof only asks it to demonstrate “that the changes it proposes are consistent with [IDEA and] . . . to present the evidence that it should already have gathered before it proposed the change.”

The Public Advocate agrees that placing the burden of proof on school districts will not increase costs for the schools or for New Jersey taxpayers. The IDEA expressly requires a school district to provide and maintain a detailed account of IEP development and implementation. Specifically, any time that a school district develops or proposes changes to an IEP or refuses a request to change an IEP, the district must provide the parent with:

- (A) a description of the action proposed or refused by the agency;

- (B) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;
- (C) a statement that the parents of a child with a disability have protection under the procedural safeguards of the law and instructions for obtaining a description of IDEA's procedural safeguards;
- (D) resources parents can contact to obtain assistance in understanding the provisions of the law;
- (E) a description of other options considered by the IEP Team and the reason why those options were rejected; and
- (F) a description of the district's reasons for its disputed IEP decision.<sup>49</sup>

The school district's response to a due process complaint by a parent might be slightly less detailed but requires much of the same information.<sup>50</sup> Since the school district must necessarily maintain such records and documentation, bearing the burden of proof in due process hearings will not create additional financial drain, provided that the school is compliant with the requirements of the IDEA in the first place. A mere presentation of the already documented plan and progress should be sufficient to carry the burden of proof if the challenged IEP is truly adequate.

Additionally, it is unlikely that reallocating the burden of proof to schools will open the floodgates of litigation, as some critics have claimed. It would merely restore the status quo as it existed in New Jersey for seventeen years prior to the ruling in Schaffer and L.E. According to the Office of Administrative Law, there were 512 special education process hearings between January 2001 and April 2006 – an incidence of less than one per district over a five year period.<sup>51</sup> During 2003 and 2004, even though districts in New Jersey bore the burden of proof, they were successful in 82% percent of the cases.<sup>52</sup> There is simply no basis for suggesting that restoring the status quo, and placing the burden of proof back onto school districts, would unfairly impact districts with an increased number of cases or with burdensome outcomes.

Some critics suggest that parents would be more likely to file unworthy claims if the burden of proof rests with the school and that a shift in the burden of proof will require districts to bear the financial and administrative burden of defending meritless cases. This argument fails for several reasons. As discussed earlier, families are already distinctly disadvantaged in the current system due to lack of resources and expertise. They also are often fearful of the potential consequences to their child. Moreover, the IDEA was recently amended to allow school districts to recover attorneys' fees from parents and/or their attorneys if they are found to have brought a frivolous or unreasonable claim, or if they are found to have brought a claim for any improper purpose, such as to harass, cause unnecessary delay or increase litigation costs.<sup>53</sup> Additionally, a recent United States Supreme Court case establishes that expert fees are no longer recoverable by prevailing parties.<sup>54</sup> These changes create a powerful disincentive for parents considering bringing due process claims against school districts, particularly those who might be bringing a case primarily out of anger or emotion. Given the risk of having to pay the school district's legal fees and the need to bear costs of experts even if successful, it is unlikely that parents will bring claims absent valid, good faith reasons to believe that they have to challenge their child's IEP in

order to ensure that their child receives a free and appropriate public education in the least restrictive environment.

It is also important to consider this issue in the larger context of special education funding and compliance with IDEA. Notwithstanding the federal and State mandate that students with disabilities be provided with in-class and inclusive special education services whenever possible, a greater percentage of New Jersey's students with disabilities are sent to segregated, separate school facilities than any other state in the nation. Specifically, according to a recent study citing federal data for the 2002-03 school year, nearly 9% of children eligible for special education services were sent to separate settings while the national average was under 3%. This is more pronounced for children with certain diagnoses. For example, nearly 47% of New Jersey children classified as having autism were sent to segregated facilities, while the national average was only 10.5%. Similarly, over 21% of children classified as having mental retardation were sent to separate, non-inclusive schools, more than four times the national rate of 4.9%.<sup>55</sup> Often, these placements result in school districts spending additional funds on transporting a student out of district and/or paying annual tuition for a segregated placement. Notably, long-term savings for districts and New Jersey taxpayers can be realized if more districts shift resources to in-district and in-class supports. This will also fulfill the legal obligation under IDEA to build capacity for inclusive local services for eligible students. As districts shift resources to in-district and in-class supports and away from settings that impose tuition and transportation costs, greater IDEA compliance may lead to greater budget efficiency and better educational opportunities for all children.

## **Conclusion**

After thorough review of this issue, the Public Advocate believes that New Jersey should pass legislation that restores the burden of proof to school districts in special education due process hearings. It is critical that the civil rights of children with disabilities are protected and that they are afforded every opportunity to develop the skills and knowledge needed to live full and independent lives in their communities. New Jersey must make every effort to ensure that, consistent with Congressional intent, students with disabilities receive an appropriate educational program "designed to meet [the child's] unique needs and prepare [him or her] for further education, employment, and independent living."<sup>56</sup> In the end, if a fair balance is not struck, we risk making decisions about the education of children with disabilities on incomplete records. It is simply unacceptable that a child might be denied a free and appropriate public education because a judge's decision about the child's individual education plan is impeded by procedural rules that prevent the full and fair consideration of critical facts. The Public Advocate urges the Legislature to act without delay to see that such injustice is prevented.

## ENDNOTES

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<sup>1</sup> Schaffer v. Weast, 126 S. Ct. 528 (2005).

<sup>2</sup> 20 U.S.C. § 1400, et seq. (2006).

<sup>3</sup> Lascari v. Board of Education of Ramapo Indian Hills School District, 116 N.J. 30 (1989).

<sup>4</sup> Schaffer, 126 S. Ct. at 535.

<sup>5</sup> Id. at 537.

<sup>6</sup> The Schaffer Court did not address the burden of production in special education cases, and did not alter current law regarding which party must come forward with evidence. Id. at 534. Accordingly, the portion of the New Jersey ruling in Lascari v. Board of Education of Ramapo Indian Hills School District, 116 N.J. 30 (1989), that school districts have the burden of production, was unchanged by the Schaffer decision. However, the Public Advocate has received anecdotal reports of several instances where Administrative Law Judges have ruled that Schaffer also requires parents to bear the burden of production. Given reports of a misunderstanding of this issue, the Public Advocate believes that legislation on the conduct of public hearings in special education cases should also clarify that the burden of production remains on the school district as the party with greater access to information critical to ensuring compliance with IDEA.

<sup>7</sup> See L.E. v. Ramsey Bd. of Educ., 435 F.3d 384, 391 (3d. Cir. 2006).

<sup>8</sup> According to the NJ Department of Education's most recent data, there were 232,894 students in special education in 2005, accounting for 16.8% of the entire student population. See Office of Special Education Programs, NJ Department of Education, Statewide Numbers and Percents, Ages 3-21 (2006).

<sup>9</sup> Id.; see also The Learning Disability Association of America, Learning Disabilities: Signs, Symptoms and Strategies, [http://www.lidaamerica.org/aboutld/parents/ld\\_basics/ld.asp](http://www.lidaamerica.org/aboutld/parents/ld_basics/ld.asp).

<sup>10</sup> See The Learning Disability Association of America, Learning Disabilities: Signs, Symptoms and Strategies, [http://www.lidaamerica.org/aboutld/parents/ld\\_basics/ld.asp](http://www.lidaamerica.org/aboutld/parents/ld_basics/ld.asp).

<sup>11</sup> Id.

<sup>12</sup> Id.

<sup>13</sup> Id.

<sup>14</sup> 20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.

<sup>15</sup> See 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, 596 (May 2005). In discussing two of the seminal cases brought in the 1970s to remedy this problem, the author states: "Before these decisions brought the needs of disabled children to Congress's attention, the U.S. public education system systematically underserved and excluded such students."

<sup>16</sup> Specifically, a parent can bring a complaint in a due process hearing regarding a student's identification, evaluation, classification, educational placement or the appropriateness of the educational plan. 20 U.S.C. § 1415 (b)(6); N.J.A.C. 6A:14-2.7(a).

<sup>17</sup> Generally, the term "due process" refers to a longstanding protection embedded in the First, Fifth, Sixth and Fourteenth amendments to the United States Constitution that essentially protects a person from being deprived of certain rights without receiving "due process of law."

<sup>18</sup> Brief for the Educational Law Center as Amicus Curiae Supporting Plaintiffs at Exhibit B, A.R. v. Freehold Reg'l High Sch. Bd. of Educ., No. 06-cv-03849 (D.N.J., filed October 20, 2006).

<sup>19</sup> Id.

<sup>20</sup> A review of NJ Department of Education data of all special education due process hearings in New Jersey from 2001 through 2006 revealed that parents are the moving party in approximately 75% of the cases.

<sup>21</sup> Burden of proof is defined as the "duty of affirmatively proving a fact or facts in dispute on an issue raised between parties." Black's Law Dictionary 209 (8<sup>th</sup> ed. 2004). The term "burden of proof" technically encompasses two distinct concepts: (1) the "burden of persuasion" and (2) the "burden of production." Put simply, the burden of persuasion refers to a party's obligation to prove all of the elements of the case. Id. The burden of production, a burden that traditionally shifts from one party to the other during the course of a case, essentially refers to the obligation of a party to produce sufficient evidence to avoid a ruling against him. Id. For the purposes of this report, the term "burden of proof" will refer primarily to the burden of persuasion.

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<sup>22</sup> See Johnson, *supra* Note 15, at 594.

<sup>23</sup> Schaffer, 126 S. Ct. at 534.

<sup>24</sup> *Id.* at 536.

<sup>25</sup> *Id.* at 537.

<sup>26</sup> *Id.* at 541-42 (Breyer, J., dissenting). The IDEA expressly delegates the establishment of procedures to the states and does not require a uniform federal policy for every aspect of implementing and enforcing the Act. *Id.* As such, Justice Breyer posits that it is within the powers of a state to legislate on matters about which the federal statute is silent, i.e., the burden of proof in IDEA cases. The IDEA has been described by Congress as a model of “cooperative federalism.” *Id.* at 531 (quoting *Little Rock Sch. Dist. v. Mauney*, 183 F.3d 816, 830 (8th Cir. 1999)). Justice Breyer used this to support the proposition that, in regards to a procedural matter where the state legislature has more expertise, such as education, the state should be given the leeway to make the best decision for the state. *Id.* at 542.

<sup>27</sup> *L.E. v Ramsey Bd. Of Educ.*, 435 F.3d 384 (3d Cir. 2006).

<sup>28</sup> *Id.* at 391.

<sup>29</sup> Although neither court specifically stated that individual state legislation on this issue would not be overruled, both decisions were explicit in their direction that they were not currently ruling on that issue. *L.E.*, 435 F.3d at 391; Schaffer, 126 S. Ct. at 537.

<sup>30</sup> These include: Alabama, (Ala. Admin. Code r. 290-8-9.08(8)(c)(6)), Alaska (Alaska Admin. Code tit. 4, § 52.550(e)(9)), Connecticut (Conn. Agencies Regs. § 10-76h-14); Delaware (Del. Code Ann., tit. 14 § 3140); Washington D.C. (District of Columbia Mun. Regs. tit. 5, § 3030.3); Georgia (Ga. Comp. R. & Regs. 160-4-7.18(1)(g)(8)); Illinois (105 Ill. Comp. Stat. Ann. § 5/14-8.02); Kentucky (Ky. Rev. Stat. Ann. § 13B.090(7)); Minnesota (Minn. Stat. § 125A.091, subd. 16 (2004)); and West Virginia (W.Va. Code R. § 126-16-8.1.1 (c) (2006)).

<sup>31</sup> The states that currently do not have legislation on this issue include: Arizona, Arkansas, California, Florida, Hawaii, Idaho, Illinois, Iowa, Maine, Massachusetts, Missouri, Montana, Nebraska, Nevada, New Hampshire, New York, North Dakota, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Dakota, Vermont, Washington, and Wisconsin. Of these, advocates report that there are parent movements building to pass legislation in Arizona, California, Illinois, Massachusetts, Oregon, Pennsylvania, Vermont and Washington. Additionally, the New York Legislature recently passed legislation to reallocate the burden to school districts. Although the NY legislation was subsequently vetoed by Governor Pataki, advocates are confident that the veto will be overridden later this fall. There is also a bill pending in the Legislature in Hawaii (HI, S.B. 2733, 23<sup>rd</sup> Legislature 2006) that allocates the burden of proof in IDEA hearings to school districts.

<sup>32</sup> These include Virginia, Connecticut, Illinois, Kansas, Minnesota, Nevada, Rhode Island, Washington and Wisconsin. *Id.*

<sup>33</sup> Schaffer, 126 S. Ct. at 539.

<sup>34</sup> All organizations listed here directly contacted the Department of the Public Advocate to express support for the reallocation of the burden of proof to school districts except: the Essex County Bar Association, Excellent Education For Everyone, New Jersey Protection & Advocacy, Inc., and the Special Education Clinic at Rutgers University School of Law-Newark. These groups signed on to an *amicus curiae* brief prepared for a recent case by the New Jersey Special Education Practitioners, *et al.*, arguing, at a minimum, for the reallocation of the burden of proof to school districts in due process hearings where districts seek to change an IEP over a parent’s objection. Although this matter was recently settled by the parties and did not lead to a court ruling on the issue of burden of proof, the Education Law Center submitted the brief to the Public Advocate as part of its’ comments.

<sup>35</sup> 20 USC § 1415(b)(1).

<sup>36</sup> National Council on Disability, *Improving the Implementation of the Individuals with Disabilities Education Act: Making Schools Work for All of America’s Children* 57 (1995).

<sup>37</sup> Brief for the Arc of the United States as Amicus Curiae Supporting Petitioners at 15, *Schaffer v. Weast*, 126 S. Ct. 528 (2005) (No. 04-698).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 16-17.

<sup>40</sup> *Id.* at 17.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 11.

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- <sup>43</sup> Id.
- <sup>44</sup> Id.
- <sup>45</sup> Id. at 11-12
- <sup>46</sup> Schaffer, 126 S. Ct. at 533.
- <sup>47</sup> 20 U.S.C. § 1415(f)(2)(A); N.J.A.C. 1:6A-10.1(b).
- <sup>48</sup> Brief for the Educational Law Center as Amicus Curiae Supporting Plaintiffs at 8, A.R. v. Freehold Reg'l High Sch. Bd. of Educ., No. 06-cv-03849 (D.N.J., filed October 20, 2006).
- <sup>49</sup> 20 U.S.C. § 1415(c)(1).
- <sup>50</sup> See generally 20 U.S.C. § 1415(b) – (c).
- <sup>51</sup> Brief for the Educational Law Center as Amicus Curiae Supporting Plaintiffs at Exhibit B, A.R. v. Freehold Reg'l High Sch. Bd. of Educ., No. 06-cv-03849 (D.N.J., filed October 20, 2006).
- <sup>52</sup> Id.
- <sup>53</sup> 20 U.S.C. § 1415(i)(3)(B)(i).
- <sup>54</sup> Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 126 S. Ct. 2455 (2006).
- <sup>55</sup> New Jersey Council on Developmental Disabilities, *Still Separate and Unequal: The Education of Children with Disabilities in New Jersey, 2004*, available at <http://www.njddc.org/sep-uneq.htm> (last visited January 24, 2007).
- <sup>56</sup> 20 U.S.C. § 1400(d)(1)(A).